

grapefruit must meet the requirements as specified in the U.S. Standards for Grades of Florida Grapefruit (7 CFR 51.760 through 51.784) issued under the Agricultural Marketing Act of 1946 (7 U.S.C. 1621 through 1627).

The Committee's meetings were widely publicized throughout the Florida citrus industry and all interested persons were invited to attend the meetings and participate in Committee deliberations on all issues. Like all Committee meetings, the May 22, and August 29, 2001, meetings were public meetings and all entities, both large and small, were able to express views on this issue.

The two interim final rules concerning these actions were published in the **Federal Register**, one on September 26, 2001 (66 FR 39459) and one on January 8, 2002 (67 FR 801). Copies of the rules were mailed or sent via facsimile to all Committee members and citrus handlers. Finally, both rules were made available through the Internet by the Office of the Federal Register and USDA. The rule published on September 26, 2001, provided a 20-day comment period that ended October 9, 2001. The rule published on January 8, 2002, provided a 15-day comment period that ended January 23, 2002. 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 rules, without change, as published in the **Federal Register** (66 FR 39459, September 26, 2001) and (67 FR 801, January 8, 2002) will tend to effectuate the declared policy of the Act.

#### List of Subjects in 7 CFR Part 905

Grapefruit, Marketing agreements, Oranges, Reporting and recordkeeping requirements, Tangelos, Tangerines.

#### PART 905—ORANGES, GRAPEFRUIT, TANGERINES, AND TANGELOS GROWN IN FLORIDA

Accordingly, the interim final rules amending 7 CFR part 905 which were published at 66 FR 49088 on September 26, 2001 and at 67 FR 801 on January 8, 2002, are adopted as final rules without change.

Dated: June 10, 2002.

A.J. Yates,

*Administrator, Agricultural Marketing Service.*

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## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

#### 7 CFR Part 948

[Docket No. FV02-948-1 FR]

#### Irish Potatoes Grown in Colorado; Increase in the Minimum Size Requirement for Area No. 2

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

**ACTION:** Final rule.

**SUMMARY:** This rule increases the minimum size requirement for all varieties of potatoes produced in Area No. 2 of Colorado, except for the round varieties and the Russet Burbank, Russet Norkotah, and Silverton Russet varieties. This rule raises the minimum size requirement from 1 $\frac{7}{8}$  inches to 2 inches in diameter or 4 ounces in weight. This size change is based on a recommendation of the Colorado Potato Administrative Committee (Committee), the agency responsible for local administration of the marketing order for potatoes grown in Colorado. This change is intended to improve the marketing of Colorado potatoes and increase returns to producers.

**EFFECTIVE DATE:** This final rule becomes effective July 15, 2002.

#### FOR FURTHER INFORMATION CONTACT:

Robert J. Curry, Northwest Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1220 SW., Third Avenue, suite 385, Portland, Oregon 97204-2807; telephone: (503) 326-2724, Fax: (503) 326-7440; or George Kelhart, Technical Advisor, 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.

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 final rule is issued under Marketing Agreement No. 97 and Order No. 948, both as amended (7 CFR part 948), regulating the handling of Irish potatoes grown in Colorado, 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."

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

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. This 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. Such 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.

This rule increases the minimum size requirement for all varieties of potatoes produced in Area No. 2 of Colorado, except for the round varieties and the Russet Burbank, Russet Norkotah, and Silverton Russet varieties. This rule raises the minimum size requirement from 1 $\frac{7}{8}$  inches in diameter to 2 inches in diameter or 4 ounces in weight. This action is based on a recommendation the Committee made on August 16, 2001.

Section 948.4 of the order defines the counties included in Area No. 2, which is commonly known as the San Luis Valley. Section 948.22 of the order authorizes the issuance of regulations for grade, size, quality, maturity, and pack for any variety or varieties of potatoes grown in different portions of the production area during any period. Section 948.23 authorizes the issuance of regulations that modify, suspend, or

terminate requirements issued under § 948.22. Section 948.386 contains handling regulations authorized in § 948.22 for potatoes grown in Area No. 2. The regulations in effect prior to this final rule prescribed minimum size requirements of 2 inches in diameter for round varieties and 1 $\frac{7}{8}$  inches in diameter for long varieties.

As stated above, this rule raises the minimum size requirement from 1 $\frac{7}{8}$  inches in diameter to 2 inches in diameter or 4 ounces in weight for all varieties of potatoes produced in Area No. 2 of Colorado, except for the round varieties and the Russet Burbank, Russet Norkotah, and Silverton Russet varieties. This means that the potato varieties subject to the minimum size requirements under this rule will meet the size requirements if they are at least 2 inches in diameter or 4 ounces in weight. For example, long, thin potatoes smaller than 2 inches in diameter, but weighing 4 ounces or more will meet these size requirements. Similarly, potatoes weighing less than 4 ounces, but at least 2 inches in diameter will also meet the minimum size requirements effective in this rule.

According to the Committee, quality assurance is very important to the Colorado potato industry. Providing the public with acceptable quality produce that is appealing to the consumer on a consistent basis is necessary to maintain buyer confidence in the marketplace. The Committee reports that potato size is important to buyers and that providing the sizes desired is necessary to maintain buyer confidence in the marketplace.

When the Committee made its recommendation, nine members voted in favor of the motion, two members voted in opposition to the motion and one member abstained from voting. The Committee made the recommendation to provide buyers with the sizes they prefer and to maintain buyer confidence. The Committee also believes that this rule will help improve the marketing of the potato varieties affected by the change and that it will help improve producer returns.

For the purpose of obtaining additional information on the need for the change, the Committee conducted a producer survey prior to making the recommendation to the USDA. The survey indicated that 58 percent of the producers supported an increase in the minimum size to 2 inches in diameter or 4 ounces in weight for all varieties of potatoes, except for the round varieties and the Russet Burbank, Russet Norkotah, and Silverton Russet varieties.

The Committee did not recommend a change in the minimum size requirement for all round varieties because it believes that the minimum size requirement of 2 inches in diameter for these varieties of potatoes continues to be appropriate. The Russet Burbank, Russet Norkotah, and Silverton Russet are long, thin potato varieties that have a tendency to fall through the sizing screens on the potato grading equipment, even when the potatoes are of adequate size and weight (i.e., 4 ounces or larger). This is particularly a problem when the sizing screens are tooled for larger sized potatoes such as 2 or 2 $\frac{1}{4}$  inch minimum diameter. Because of this problem, the Committee believes that the minimum size requirement for these three Russet varieties of 1 $\frac{7}{8}$  inches in diameter is appropriate. Although one Committee member opposed the recommendation because he believed all Area No. 2 potato varieties should have a minimum size requirement of 2 inches in diameter or 4 ounces in weight, the Committee believes that handlers might lose a high percentage of acceptable potatoes of the long, thin varieties during the sizing and grading of the potatoes if the minimum size requirement on such potatoes was increased to 2 inches in diameter or 4 ounces in weight. Another Committee member opposing the motion did not believe that the results of the producer survey were a sufficient reason for the Committee to recommend an increase in the minimum size requirements. While the survey provided background information that assisted the Committee in making its recommendation, the primary purposes for the change are to better meet the needs of buyers and consumers, improve the image of Colorado potatoes, and improve sales and prices.

#### Final Regulatory Flexibility Analysis

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA), the Agricultural Marketing Service (AMS) has considered the economic impact of this rule on small entities. Accordingly, AMS has prepared this final regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf. Thus, both statutes have small entity orientation and compatibility.

There are approximately 230 producers of Colorado Area No. 2 potatoes and approximately 80 handlers subject to regulation under the marketing order. Small agricultural producers are defined by the Small Business Administration (13 CFR 121.201) as those having annual receipts of less than \$750,000, and small agricultural service firms are defined as those whose annual receipts are less than \$5,000,000.

Information provided by the National Agricultural Statistics Service (NASS) was considered in determining the number of large and small producers by acreage, production, and producer prices. According to the information provided, the recent average yield per acre was 335 hundredweight, the average farm size was 306 acres of potatoes, and the recent season average producer price was \$4.20 per hundredweight. This equates to average gross annual producer receipts of approximately \$430,542 each. In addition, based upon information provided by the Committee, all handlers of Area No. 2 potatoes have shipped under \$5,000,000 worth of potatoes during the most recent season for which statistics are available. Based on the foregoing, it can be concluded that a majority of producers and handlers of Area No. 2 potatoes may be classified as small entities.

The NASS estimated planted acreage for the 2001–02 crop in Area No. 2 at 68,100 acres, a decrease of 7,500 acres when compared with the 75,600 acres harvested in 2000–01. Approximately 90 percent of the potatoes harvested in 2001–02 entered the fresh market (including potatoes produced for seed).

Russet varieties accounted for 81.4 percent of the acres planted for the 2001–02 crop year. Russet Norkotah, the most popular variety, was planted on 53.8 percent of the total potato acreage. Other Russet varieties, including Russet Burbank and Silverton Russet varieties, accounted for 27.6 percent of the total acres planted, with various other non-Russet varieties making up the remaining 18.6 percent. While exact acreage is not known, plantings of Russet Burbank and Silverton Russet varieties of potatoes are estimated to make up only a small percentage of the total potato acreage.

This rule increases the minimum size requirement for all varieties of potatoes produced in Area No. 2 of Colorado, except for the round varieties and the Russet Burbank, Russet Norkotah, and Silverton Russet varieties. This rule raises the minimum size requirement from 1 $\frac{7}{8}$  inches in diameter to 2 inches in diameter or 4 ounces in weight. Only

a small portion of the crop (i.e., that portion smaller than 2 inches in diameter or 4 ounces in weight but larger than 1 $\frac{7}{8}$  inches in diameter) is expected to be affected by the size increase. The Committee believes that the expected benefits of improved quality, increased purchases and sales volume, and increased returns received by producers will greatly outweigh the costs related to the regulation.

Alternatives considered by the Committee included increasing the minimum size requirement for all Russet varieties or not making any changes. The Committee does not believe it is desirable to increase the minimum size requirement for the Russet Burbank, Russet Norkotah, and Silverton Russet varieties because these long and thin varieties have a tendency, especially when sitting on end, to fall through the sizing screens on the potato grading equipment even when the potatoes are of good size. This is particularly a problem when the sizing screens are set at larger size settings such as 2 or 2 $\frac{1}{4}$  inches. Because of this problem, the Committee decided that the minimum size requirement of 1 $\frac{7}{8}$  inches in diameter for these three Russet varieties is appropriate. The Committee believes that handlers would have lost a high percentage of acceptable potatoes through the sizing screens if the minimum size requirement on such potatoes had been increased to 2 inches in diameter or 4 ounces in weight. Finally, the Committee determined that the alternative of not taking action would not have addressed the industry's marketing problems.

This rule changes the size requirements prescribed under the handling regulations of the order. Accordingly, this action 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.

Furthermore, as noted in the initial regulatory flexibility analysis, USDA has not identified any relevant Federal rules that duplicate, overlap or conflict with this proposed rule.

In addition, the Committee's meeting was widely publicized throughout the Colorado Area No. 2 potato industry and all interested persons were invited to attend the meeting and participate in Committee deliberations on all issues. Like all Committee meetings, the Committee meeting on August 16, 2001, was a public meeting and all entities, both large and small, were able to

express views on this issue. Finally, interested persons were invited to submit information on the regulatory and informational impacts of this action on small businesses.

A proposed rule concerning this action was published in the **Federal Register** on March 1, 2002 (67 FR 9418). A copy of the rule was provided to the Committee's staff, who in turn notified Committee members, potato producers, and handlers, and other interested persons. In addition, the Office of the Federal Register and USDA also made a copy available through the Internet. Finally, a 60-day comment period, which ended on April 30, 2002, was provided to allow interested persons the opportunity to respond to the proposal.

Four comments were received during the comment period in response to the proposal. Each of the comments contained several questions and opinions regarding the proposed size change. We have separated the questions and opinions into the following four categories: (1) USDA's role in implementing the proposal; (2) the level of support potato producers in Colorado Area No. 2 have for the proposal; (3) the purpose of the proposed size change; and (4) the impact of the proposed size change on consumers. Since most of the individual commenter's opinions and questions were similar, their questions are addressed below within the context of these four categories.

#### **USDA's Role in Implementing the Proposal**

Marketing orders are designed to help stabilize market conditions for fruit, vegetable, and specialty crops. The programs assist producers in allowing them to collectively work to solve marketing problems. Industries voluntarily enter into these programs and choose to have federal oversight of certain aspects of their operations. The Marketing Order Administration Branch of the Fruit and Vegetable Programs oversees the programs to make sure the orders operate in the public interest and in accordance with the authorizing Act, the order, and the regulations. The Colorado potato order is one of 36 active orders which collect assessment fees from handlers to cover the operational and administrative costs of the programs.

Marketing orders contain regulations authorized by the U.S. Congress through the Agricultural Marketing Agreement Act of 1937. Local administrative committees made up of producers and handlers from their particular growing areas administer programs for fruits, vegetables, and specialty crops. Some of

the committees have members that represent the public. The Colorado Potato Administrative Committee for Area No. 2 works with USDA in providing potato buyers with the size and quality their customers desire. Additional information on these programs, including the Colorado potato order, may be found at <http://www.usda.gov/fv/moab.html>.

#### **The Level of Support Potato Producers in Colorado Area No. 2 Have for the Proposal**

Committee members are nominated by their peers and selected by USDA. Committee members make decisions and vote for regulations that are supported by their constituents—the producers or handlers that nominated them. When a decision is made by a committee to recommend the establishment of, or change in, a regulation, considerable effort and debate is expended to ensure that the proposal would be effective.

In addition to relying on each of its members expertise in the production, handling, and marketing of the regulated crop, a committee compiles such other information as is available to help it make decisions. In that regard, as previously stated, the Colorado Area No. 2 Committee conducted a producer survey to help it determine what type of changes in the size regulations it should pursue. The survey established that 58 percent of the respondents supported the increase in minimum size from 1 $\frac{7}{8}$  inches to 2 inches. Although the Committee made its decision based on many factors including the desire to meet the needs of buyers, the survey was a useful tool in providing the Committee with feedback.

One of the commenters questioned whether producers in Area No. 2 would be disadvantaged relative to producers in Areas No. 1 and 3. Area No. 1 is not currently regulated and the handling of potatoes in Area No. 3 is regulated under different handling provisions than those in Area No. 2. The order was established with different administrative committees, production areas, and handling regulations in recognition of the distinct geographical and marketing differences between them. Although the two regulated areas meet once a year as a combined committee, marketing and regulatory decisions are made independently of each other by the respective area committees in recognition that their decisions do not directly impact the other area. It is important to note that this final rule only affects the handling of certain potatoes produced in Area No. 2 of the State of Colorado.

### The Purpose of the Proposed Size Change

Most of the individuals submitting comments questioned the reasoning behind a rule that mandates and changes the minimum allowable size of potatoes for the fresh market. As previously stated, this regulation only regulates the minimum size of certain varieties of Colorado Area No. 2 potatoes that are handled for subsequent sale into the fresh market. This regulation does not regulate potato production. Only those potatoes of the varieties affected by this regulation that are sold into the fresh market must meet the revised minimum size of at least 2 inches minimum diameter or 4 ounces in weight. Potatoes of these varieties that do not meet this size may be sold into alternative markets, including processing (e.g., frozen and dehydrated).

As explained in the proposed rule, the change in size from 1 $\frac{7}{8}$  inches minimum diameter to 2 inches minimum diameter for the affected potato varieties was recommended by the Committee for the purpose of improving the marketing of certain Colorado Area No. 2 potatoes and for improving the income producers receives from the sale of such potatoes. The Committee believes that the marketing of Area No. 2 potatoes is improved when the demand for such potatoes improves. Based on the experience of its members and input from buyers, the Committee determined that demand for the varieties affected by this rule would be better if such potatoes were consistently sized and larger. In this regard, the Committee determined that an increase in the minimum size of the affected varieties by an eighth of an inch was the optimal size increase to best improve demand. The establishment of a larger minimum diameter, 2 $\frac{1}{2}$  inches for example, would not have met with the Committee's, nor the Colorado Area No. 2 potato industry's, objective of satisfying the buyers of their potatoes and thereby increasing the marketing of the affected potato varieties. In addition, a larger minimum size would have required producers and handlers to divert a larger quantity of potatoes to lower return processing outlets.

With regard to questions by some of the commenters pertaining to why the regulation affects only certain varieties, the Committee determined that a marketing problem does not exist for round varieties or potatoes of the Russet Burbank, Russet Norkotah, and Silverton Burbank varieties. Round potatoes, including various white, red, and yellow varieties, generally have a

different fresh market niche than do Russet potato varieties, and as such, the Committee continues to believe that the minimum diameter of 2 inches is appropriate for that market. Moreover, the long, thin shape of the Russet Burbank, Russet Norkotah, and Silverton Russet varieties cause a significant quantity of these potatoes to fall through the sizing screens in the grading equipment, even when the potatoes are of adequate size and weight. When potatoes are being graded, sized, and otherwise prepared for market, they are run on conveyer belts that include sections with screens that allow potatoes of different sizes to fall through adjustable openings to other conveyer belts. This is the method generally used by the industry to ensure that specific sized potatoes are segregated and thus packaged with similar sized potatoes. If too many potatoes of a desired size and weight for the fresh market fall through the sizing screens to belts conveying the potatoes to bins destined for a processor, for example, the industry loses money on the potential high-value sales of those potatoes into the fresh market.

### The Impact of the Proposed Size Change on Consumers

Finally, most of the comments reflected concern as to how consumers would be affected by this rule and why they would want to support it. Consumers purchasing Colorado Area No. 2 potatoes will benefit from this rule by continuing to have available a stable supply that is of consistent quality and of good marketable size. Although prices to consumers for the slightly larger potatoes may be higher, prices at retail are affected by many variables. The economic impact of this rule, which affects only a small portion of the total number of potatoes available in the fresh market, would likely be insignificant to the consumer, while significantly beneficial to the producers of such potatoes.

Based on the comments received, no changes will be made to the rule as proposed.

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 matter presented, including the information and recommendation submitted by the Committee and other available information, it is hereby found

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

### List of Subjects in 7 CFR Part 948

Marketing Agreements, Potatoes, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, 7 CFR part 948 is amended as follows:

### PART 948—IRISH POTATOES GROWN IN COLORADO

1. The authority citation for 7 CFR part 948 continues to read as follows:

**Authority:** 7 U.S.C. 601–674.

2. Section 948.386 is amended by revising the introductory text and paragraph (a) to read as follows:

#### § 948.386 Handling regulation.

No person shall handle any lot of potatoes grown in Area No. 2 unless such potatoes meet the requirements of paragraphs (a), (b), and (c) of this section, or unless such potatoes are handled in accordance with paragraphs (d) and (e), or (f) of this section.

(a) *Minimum grade and size requirements.* (1) *Round varieties*, U.S. No. 2, or better grade, 2 inches minimum diameter.

(2) *All other varieties*. U.S. No. 2, or better grade, 2 inches minimum diameter or 4 ounces minimum weight: *Provided*, That the Russet Burbank, Russet Norkotah, and Silverton Russet varieties shall be 1 $\frac{7}{8}$  inches minimum diameter.

(3) *All varieties*. Size B, if U.S. No. 1 grade.

(4) *All varieties*. 1-inch minimum diameter to 1 $\frac{3}{4}$  inches maximum diameter, if at least U.S. No. 1 grade.

(5) None of the above categories of potatoes identified in paragraphs (a)(1) through (a)(4) of this section may be commingled in the same bag or other container.

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Dated: June 10, 2002.

**A.J. Yates,**

*Administrator, Agricultural Marketing Service.*

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