



DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 948

[Doc. No. AMS-FV-13-0001; FV13-948-1 IR]

**Irish Potatoes Grown in Colorado; Modification of the
General Cull and Handling Regulation for Area No. 2**

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Interim rule with request for comments.

SUMMARY: This interim rule modifies the size requirements for potatoes handled under the Colorado potato marketing order, Area No. 2 (order). The order regulates the handling of Irish potatoes grown in Colorado and is administered locally by the Colorado Potato Administrative Committee, Area No. 2 (Committee). This action revises the 1-inch minimum to 1¼-inch maximum diameter size allowance for U.S. Commercial and better grade potatoes contained in the order's handling regulation for Area 2 to ¾-inch minimum to 1½-inch maximum diameter. In addition, this action revises the minimum size requirement under the order's general cull regulation to ¾-inch diameter. As required under section 8e of the Agricultural Marketing Agreement Act of 1937, this action also revises the size requirements for imported round type potatoes, other than red-skinned varieties. This change is expected to

facilitate the handling and marketing of the Area No. 2 potato crop, provide producers and handlers with increased returns, and offer consumers increased potato purchasing options.

DATES: Effective June 15, 2013; comments received by [INSERT DATE 60 DAYS AFTER THE DATE OF PUBLICATION IN THE FEDERAL REGISTER] will be considered prior to issuance of a final rule.

ADDRESSES: Interested persons are invited to submit written comments concerning this interim rule. Comments should be sent to the Docket Clerk, Marketing Order and Agreement Division, Fruit and Vegetable Program, AMS, USDA, 1400 Independence Avenue SW, STOP 0237, Washington, DC 20250-0237; Fax: (202) 720-8938; or Internet:

<http://www.regulations.gov>. All comments should reference the document number and the date and page number of this issue of the **Federal Register** and will be made available for public inspection in the office of the Docket Clerk during regular business hours, or can be viewed at:

<http://www.regulations.gov>. All comments submitted in response to this interim rule will be included in the record and will be made available to the public. Please be advised that the identity of the individuals or entities

submitting the comments will be made public on the Internet at the address provided above.

FOR FURTHER INFORMATION CONTACT: Barry Broadbent, Marketing Specialist, or Gary Olson, Regional Director, Northwest Marketing Field Office, Marketing Order and Agreement Division, Fruit and Vegetable Program, AMS, USDA; Telephone: (503) 326-2724, Fax: (503) 326-7440, or E-mail: Barry.Broadbent@ams.usda.gov or GaryD.Olson@ams.usda.gov.

Small businesses may request information on complying with this regulation by contacting Jeffrey Smutny, Marketing Order and Agreement Division, Fruit and Vegetable Program, AMS, USDA, 1400 Independence Avenue SW, STOP 0237, Washington, DC 20250-0237; Telephone: (202) 720-2491, Fax: (202) 720-8938, or E-mail: Jeffrey.Smutny@ams.usda.gov.

SUPPLEMENTARY INFORMATION: This interim rule is issued under Marketing Agreement No. 97 and Marketing 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."

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

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

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

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with USDA a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. A handler is afforded the opportunity for a hearing on the petition. After the hearing USDA would rule on the petition. The Act provides that the district court

of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA's ruling on the petition, provided an action is filed not later than 20 days after the date of the entry of the ruling.

There are no administrative procedures which must be exhausted prior to any judicial challenge to the provisions of import regulation issued under section 8e of the Act.

This action modifies the size requirements for potatoes handled under the order's general cull regulation and handling regulation for Area 2. This interim rule relaxes the 1-inch minimum to $1\frac{3}{4}$ -inch maximum size allowance for U.S. Commercial or better grade potatoes handled under the order to $\frac{3}{4}$ -inch minimum to $1\frac{5}{8}$ -inch maximum diameter (Creamer size, as designated in the U.S. Standards for Grades of Potatoes). This action also relaxes the minimum size requirement of the general cull regulation to $\frac{3}{4}$ -inch diameter.

Prior to this change, the smallest potatoes that could be shipped outside the State of Colorado under the order were 1-inch to $1\frac{3}{4}$ -inch diameter potatoes that met or exceeded the requirements of the U.S. Commercial grade. Potatoes measuring less than 1-inch were not allowed to be

shipped outside the State, regardless of grade. This action is a relaxation of the order's regulations and will allow shipments of Creamer size potatoes ($\frac{3}{4}$ -inch to $1\frac{5}{8}$ -inch diameter), if such potatoes otherwise meet or exceed the requirements of the U.S. Commercial grade. None of the other size requirements contained in the handling regulation are impacted by this action. This change was unanimously recommended by the Committee at a meeting held on December 20, 2012.

Section 948.22 authorizes the issuance of grade, size, quality, maturity, pack, and container regulations for potatoes grown in the order's production area. Section 948.21 authorizes the modification, suspension, or termination of regulations issued pursuant to § 948.22. Section 948.20 establishes the requirements of the general cull regulation. The Secretary may suspend or modify the general cull regulation provisions contained in § 948.20 upon the recommendation of the Committee, or on other available information.

Under the Colorado potato marketing order, the State of Colorado is divided into three areas of regulation for marketing order purposes. These include: Area 1, commonly known as the Western Slope; Area 2, commonly known as San

Luis Valley; and, Area 3, which consists of the remaining producing areas within the State of Colorado not included in the definition of Area 1 or Area 2. Currently, the order only regulates the handling of potatoes produced in Area 2 and Area 3. Regulation for Area 1 has been suspended.

The grade, size, and maturity requirements specific to the handling of potatoes grown in Area 2 are contained in § 948.386 of the order. Additionally, the minimum grade and size requirements established under the order's general cull regulation are contained in § 948.126. The handling regulation requires that all potatoes handled under the order meet the minimum requirements of the U.S. No. 2 grade, and be 2 inches or greater in diameter. Smaller size potatoes may be handled, if such potatoes otherwise meet the requirements of certain higher grade standards. For all varieties, size B potatoes (1½-inch minimum to 2¼-inch maximum diameter as designated in the U.S. Standards for Grade of Potatoes) may be handled under the order, if such potatoes meet or exceed the requirements of the U.S. Commercial grade. In addition, prior to this interim rule, 1-inch to 1¾-inch diameter potatoes that met or exceeded

the requirements of the U.S. Commercial grade were also allowed to be handled under the order.

At the December 20, 2012, Committee meeting, industry participants indicated to the Committee that there is an emerging market for smaller size U.S. Commercial grade potatoes sold in consumer packs and included in certain value added potato products. They further stated that the order's current size requirements (1-inch diameter being the smallest potato allowed to be handled) precludes them from supplying this growing and profitable market. Relaxing the size requirements to allow shipments of such higher grade, smaller size potatoes will allow area handlers to compete with other domestic potato producing regions for this developing market segment. This change effectively lowers the allowable minimum diameter for U.S. Commercial and better grade potatoes to $\frac{3}{4}$ -inch, which is in line with the minimum size requirements contained in the handling regulations of the other domestic potato marketing orders.

Relaxing the size requirements to allow shipments of smaller size potatoes will make more small potatoes available to consumers and will allow Area 2 handlers to move more of the area's potato production into the fresh

market. This change is expected to benefit producers, handlers, and consumers of potatoes.

Section 8e of the Act provides that when certain domestically produced commodities, including potatoes, are regulated under a Federal marketing order, imports of that commodity must meet the same or comparable grade, size, quality, and maturity requirements as the domestically produced product. Minimum grade, size, quality, and maturity requirements for potatoes imported into the United States are currently in effect under the import regulations contained in § 980.1 (7 CFR 980.1). The import regulations distinguish between each of the three major types of potatoes handled domestically: red-skinned, round types; long types; and all other round types.

Section 980.1(a)(2)(ii) specifies that imports of round type potatoes, other than red-skinned varieties, are in most direct competition with potatoes of the same type produced in Area 2, Colorado (San Luis Valley) and covered by Marketing Order No. 948. Further, section 980.1(b)(2) stipulates that, through the entire year, the grade, size, quality, and maturity requirements of Marketing Order No. 948 applicable to potatoes of the round type, other than red-skinned varieties, shall be the respective grade, size,

quality, and maturity requirements for imports of that type potatoes. As such, the relaxation of the size requirements effectuated by this interim rule for domestic potatoes covered by the order likewise relaxes the size requirements for U.S. Commercial and better grade round type potatoes, other than red-skinned varieties, that are imported into the U.S. No change to the regulatory text is necessary to accomplish this action.

Prior to this action, 1-inch minimum diameter to 1 $\frac{3}{4}$ -inch maximum diameter was the smallest size range of potatoes allowed to be imported. As a result of the change in the order's handling regulation, and pursuant to section 8e of the Act, importers may now ship Creamer size ($\frac{3}{4}$ -inch minimum to 1 $\frac{5}{8}$ -inch maximum diameter) U.S. Commercial and better grade round type potatoes, other than red-skinned varieties, into the U.S. market.

This action allows potato handlers and importers to better respond to the changing demands of the U.S. potato market. The consumers' increasing preference for small size potatoes applies to imported potatoes as well as domestic potatoes. Thus, domestic handlers and importers should benefit by increasing sales to this emerging domestic market segment.

Initial Regulatory Flexibility Analysis

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA) (5 U.S.C. 601-612), the Agricultural Marketing Service (AMS) has considered the economic impact of this action on small entities. Accordingly, AMS has prepared this initial regulatory flexibility analysis.

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

There are approximately 80 handlers of Colorado Area No. 2 potatoes subject to regulation under the order and approximately 180 producers in the regulated production area. Small agricultural service firms are defined by the Small Business Administration as those having annual receipts of less than \$7,000,000, and small agricultural producers are defined as those having annual receipts of less than \$750,000. (13 CFR 121.201)

During the 2011-2012 marketing year, the most recent full marketing year for which statistics are available,

15,072,963 hundredweight of Colorado Area No. 2 potatoes were inspected under the order and sold into the fresh market. Based on an estimated average f.o.b. price of \$12.60 per hundredweight, the Committee estimates that 66 Area No. 2 handlers, or about 83 percent, had annual receipts of less than \$7,000,000. In view of the foregoing, the majority of Colorado Area No. 2 potato handlers may be classified as small entities.

In addition, based on information provided by the National Agricultural Statistics Service, the average producer price for the 2011 Colorado fall potato crop was \$10.70 per hundredweight. Multiplying \$10.70 by the shipment quantity of 15,072,963 hundredweight yields an annual crop revenue estimate of \$161,280,704. The average annual fresh potato revenue for each of the 180 Colorado Area No. 2 potato producers is therefore calculated to be approximately \$896,000 (\$161,280,704 divided by 180), which is greater than the SBA threshold of \$750,000. Consequently, on average, many of the Area No. 2 Colorado potato producers may not be classified as small entities.

This interim rule relaxes the size allowance for U.S. Commercial and better grade potatoes in the order's handling regulation and modifies the size requirement in

the order's general cull regulation. Prior to this action, the smallest size range allowed to be handled under the order was 1-inch minimum diameter to 1 $\frac{3}{4}$ -inch maximum diameter if the potatoes were otherwise U.S. Commercial or better grade. As a result of this interim rule, Creamer size ($\frac{3}{4}$ -inch to 1 $\frac{5}{8}$ -inch diameter) U.S. Commercial and better grade potatoes are now allowed be handled under the order. All other size requirements in the order's handling regulation remain unchanged. Authority for this action is contained in §§ 948.20, 948.21, and 948.22.

This relaxation is expected to benefit the producers, handlers, and consumers of Colorado Area 2 potatoes by allowing a greater quantity of fresh potatoes from the production area to enter the market. This anticipated increase in volume is expected to translate into greater returns for handlers and producers, and more purchasing options for consumers.

After discussing possible alternatives to this interim rule, the Committee determined that a relaxation in the size requirement for U.S. Commercial and better grade potatoes will meet the industry's current needs while maintaining the potato quality objectives of the order. During its deliberations, the Committee considered making

no changes to the handling regulation, as well as relaxing the size requirement for all U.S. No. 2 and better grade potatoes. The Committee believes that a relaxation in the handling regulation for small potatoes is necessary to allow handlers to pursue new markets, but lowering the size requirements for all potatoes that are U.S. No. 2 and better grade could erode the quality reputation of the area's production. Therefore, the Committee found that there were no other viable alternatives to the relaxation of the size requirements as recommended.

AMS is committed to complying with the E-Government Act, to promote the use of the Internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

In accordance with the Paperwork Reduction Act of 1995, (44 U.S.C. Chapter 35), the order's information collection requirements have been previously approved by the Office of Management and Budget (OMB) and assigned OMB No. 0581-0178 (Generic Vegetable and Specialty Crops). No changes in those requirements as a result of this action are necessary. Should any changes become necessary, they would be submitted to OMB for approval.

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

Further, the Committee's meeting was widely publicized throughout the Colorado potato industry and all interested persons were invited to attend the meeting and participate in Committee deliberations. Like all Committee meetings, the December 20, 2012, meeting was a public meeting and all entities, both large and small, were able to express their views on this issue. Finally, interested persons are invited to submit comments on this interim rule, including the regulatory and informational impacts of this action on small businesses.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at:
www.ams.usda.gov/MarketingOrdersSmallBusinessGuide. Any

questions about the compliance guide should be sent to Jeffrey Smutny at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

This interim rule invites comments on a modification of the size requirements prescribed under the Colorado potato marketing order. Any comments received will be considered prior to the finalization of this interim rule.

After consideration of all relevant material presented, including the Committee's recommendation, and other information, it is hereby found that this interim rule, as hereinafter set forth, will tend to effectuate the declared policy of the Act.

In accordance with section 8e of the Act, the United States Trade Representative has concurred with the issuance of this interim rule.

Pursuant to 5 U.S.C. 553, it is also found and determined upon good cause that it is impracticable, unnecessary, and contrary to the public interest to give preliminary notice prior to putting this interim rule into effect and that good cause exists for not postponing the effective date of this interim rule until 30 days after publication in the **Federal Register** because: (1) This action is a relaxation of the current handling regulations;

(2) handlers are already shipping potatoes from the 2012-2013 crop and may want to take advantage of this relaxation as soon as possible; (3) handlers are aware of this interim rule, which was initiated by the industry and unanimously recommended by the Committee at a public meeting during which interested parties had an opportunity to provide input; and (4) this interim rule provides a 60-day comment period and any comments received will be considered prior to finalization of this interim rule.

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. In § 948.126, paragraph (a) is revised to read as follows:

§ 948.126 General cull regulation.

(a) No handler shall handle potatoes grown in the State of Colorado which do not meet the requirements of

U.S. No. 2 or better grade, or are less than $\frac{3}{4}$ -inch in diameter.

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3. In § 948.386, the heading of paragraph (a)(4) is revised to read as follows:

§ 948.386 Handling regulation.

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(a) * * *

(4) $\frac{3}{4}$ -inch minimum diameter to $1\frac{5}{8}$ -inch maximum diameter (Creamer). * * *

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Dated: June 11, 2013

Rex A. Barnes
Associate Administrator
Agricultural Marketing Service

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