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DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Parts 948 and 980

[Doc. No. AMS-FV-13-0073; FV13-948-3 FR]

Irish Potatoes Grown in Colorado and Imported Irish Potatoes; Relaxation of the Handling Regulation for Area No. 2 and Import Regulations

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This rule revises the minimum quantity exception 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 increases the quantity of potatoes that may be handled under the order without regard to the order's handling regulation requirements from 1,000 to 2,000 pounds. The change in the import regulation is required under section 8e of the Agricultural Marketing Agreement Act of 1937. This action allows for the importation which, in the aggregate, does not exceed 2,000 pounds for all other round type potatoes,

except red skinned, round type or long type potatoes that continue to remain at a 500 pound limit, to be imported without regard to the import regulations. This action is expected to benefit producers, handlers, and importers.

DATES: Effective date: [INSERT DATE 3 DAYS AFTER THE DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Sue Coleman, Marketing Specialist, or Gary D. 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: Sue.Coleman@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 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."

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

The Department of Agriculture (USDA) is issuing this rule in conformance with Executive Orders 12866, 13563, and 13175.

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. This 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 regulations issued under section 8e of the Act.

This final rule revises the minimum quantity exception currently prescribed in the handling regulation for potatoes handled under Marketing Order No. 948. This rule increases the quantity of potatoes that may be handled without regard to the order's handling regulation from 1,000 to 2,000 pounds. Relaxing the minimum quantity exception is expected to benefit producers, handlers, and importers. The rule was unanimously recommended by the Committee at a meeting on July 18, 2013.

Section 948.4 of the order divides the State of Colorado into three areas of regulation for marketing order purposes. These areas include: Area No. 1, commonly known as the Western Slope; Area No. 2, commonly known as San Luis Valley; and, Area No. 3, which consists of the remaining producing areas within the State of Colorado not included in the definition of Area No. 1 or Area No. 2. Currently, the order only regulates the handling of potatoes produced in Area No. 2 and Area No. 3. Regulation for Area No. 1 has been suspended.

Section 948.50 of the order establishes committees as administrative agencies for each of the areas set forth under § 948.4. Section 948.22(a) of the order authorizes the issuance of grade, size, quality, maturity, pack, and container regulations for potatoes grown in the order's production area. Further, § 948.22(b)(2) of the order provides authority for each area committee to recommend modification of regulations to provide for minimum quantities that should be relieved of regulatory or administrative obligations.

Section 948.386 of the order's administrative rules prescribes grade, size, maturity, and inspection

requirements for Colorado Area No. 2 potatoes. Paragraph (f) of that section prescribes the minimum quantity of potatoes that are exempt from regulation. Currently, each person may handle up to 1,000 pounds of potatoes without regard to the order's grade, size, maturity, and inspection requirements.

At its meeting on July 18, 2013, the Committee unanimously recommended increasing the order's minimum quantity exception from 1,000 to 2,000 pounds. The recommendation was made at the request of producers and handlers who wanted greater flexibility in distributing smaller quantities of potatoes. In its deliberations, the Committee commented that 2,000 pounds is consistent with the current weight of a pallet of potatoes. One pallet is typically the smallest lot of potatoes distributed, since most delivery vehicles are now capable of transporting at least 2,000 pounds.

Handlers also feel that the value of one pallet of potatoes does not warrant the cost of complying with the order's regulations. Based on an estimated average f.o.b. price of \$12.60, the value of one pallet of potatoes is approximately \$252.00. Increasing the minimum quantity

exception from 1,000 to 2,000 pounds of potatoes allows a handler to ship one pallet of potatoes without regard to the order's grade, size, maturity, and inspection requirements. Relaxing the minimum quantity is expected to benefit producers, handlers, and importers.

Section 8e of the Act provides that when certain domestically produced commodities, including Irish potatoes, are regulated under a Federal marketing order, imports of that commodity must meet the same or comparable grade, size, quality, and maturity requirements. Whenever two or more marketing orders regulating the same commodity produced in different areas of the United States are concurrently in effect, the importation into the United States of any such commodity shall be prohibited unless it complies with the grade, size, quality and maturity provisions of the order which, as determined by the Secretary of Agriculture, regulates the commodity produced in the area with which the imported commodity is in most direct competition (7 U.S.C. 608e-1(a)). Section 980.1(a)(2)(ii) of the Vegetable Import Regulations specifies that imported round-type potatoes, except red-skinned, round type potatoes, are in most direct

competition with potatoes of the same type produced in the area covered by Marketing Order 948. Since this action increases the minimum quantity exemption under the domestic handling regulations, a corresponding change to the import regulations must also be considered.

Minimum grade, size, quality, and maturity requirements for Irish potatoes imported into the United States are currently in effect under § 980.1 (7 CFR 980.1). The minimum quantity exemption is specified in § 980.1(c). The exemption for red skinned, round type or long type potatoes will remain at a 500 pound limit as provided in Marketing Orders 946 and 945, respectively. This rule increases the quantity for all other round type potatoes that may be imported without regard to the import regulation requirements from 1,000 to 2,000 pounds. The metric equivalent for 1,000 pounds is 453.592 kilograms and 2,000 pounds is 907.185 kilograms. The increase in the minimum quantity exemption for imports of potatoes will have a beneficial impact on importers. This rule will provide flexibility in the importation and distribution of smaller quantities of potatoes.

Final 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 final regulatory flexibility analysis.

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

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. There are approximately 240 importers of potatoes. Small agricultural service firms (handlers and importers) are defined by the Small Business Administration (SBA) 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 fiscal period, the most recent 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 Colorado Area No. 2 potato producers may not be classified as small entities.

Information from the Foreign Agricultural Service, USDA, indicates that the dollar value of imports of the type of potatoes affected by this rule ranged from approximately \$55.8 million in 2009 to \$ 56.5 million in 2013. Using these values, the majority of importers of the type of potatoes affected by this rule would have annual receipts of less than \$7,000,000 and may be classified as small entities.

Canada is the major potato-producing country exporting potatoes to the United States. In 2013, affected shipments of potatoes imported into the United States totaled around 3,479,468 hundredweight. Of that amount, 3,479,383 hundredweight were imported from Canada, 59 hundredweight were imported from Ecuador, and 26 hundredweight were imported from Peru.

This final rule revises the quantity of potatoes that may be handled without regard to the requirements of § 948.386(a), (b), and (c) of the order from 1,000 to 2,000 pounds and makes a corresponding change to the potato import regulation. At the July 18, 2013 meeting, the

Committee unanimously recommended increasing the minimum quantity exception to be consistent with the approximate weight of one pallet of potatoes. Authority for the establishment and modification of a minimum quantity exception is provided in § 948.22(b)(2) of the order. This final rule amends the provisions in §§ 948.386(f) and 980.1(c). The change in the import regulation is required under section 8e of the Act.

This action is not expected to increase the costs associated with the order's requirements or the potato import regulation. Rather, it is anticipated that this change will have a beneficial impact. The Committee believes it will provide greater flexibility in the distribution of small quantities of potatoes. Currently, the distribution of potatoes between 1,000 and 2,000 pounds requires an inspection and certification that the product conforms to the grade, size, and maturity requirements of the order. This translates into a cost for handlers and importers of both time and inspection fees, which is high in relation to the small value (approximately \$252.00 per pallet) of these transactions. This action will allow shipments up to 2,000 pounds of potatoes without regard to

the order's grade, size, maturity, and inspection requirements and the related costs. The benefits for this final rule are expected to be equally available to all fresh potato producers, handlers, and importers, regardless of their size.

As an alternative to the proposal, the Committee discussed leaving the handling regulation unchanged. The Committee rejected this idea because a pallet of potatoes weighs approximately 2,000 pounds and the 1,000 pound minimum quantity exception did not accommodate this size shipment. No other alternatives were discussed.

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 final rule relaxes the minimum quantity exception under the order from 1,000 to 2,000 pounds. Accordingly, this action will not impose any additional reporting or

recordkeeping requirements on either small or large Colorado Area No. 2 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.

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

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

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 July 18, 2013, meeting was a public meeting and all entities, both large and small, were able to express views on this issue.

A proposed rule concerning this action was published in the **Federal Register** on October 6, 2014 (79 FR 60117). Copies of the rule were made available to all interested Colorado potato producers and handlers. Finally, the rule was made available through the Internet by USDA and the Office of the Federal Register. A 60-day comment period ending December 5, 2014, was provided to allow interested persons to respond to the proposal. 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/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.

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

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.

It is further found that good cause exists for not postponing the effective date of this rule until 30 days after publication in the **Federal Register** (5 U.S.C. 553) because handlers are already shipping potatoes from the 2014-2015 crop and handlers want to take advantage of the relaxation as soon as possible. Further, handlers are aware of this rule, which was recommended at a public meeting. Also, a 60-day comment period was provided for in the proposed rule and no comments were received.

List of Subjects

7 CFR Part 948

Marketing agreements, Potatoes, Reporting and recordkeeping requirements.

7 CFR Part 980

Food grades and standards, Imports, Marketing agreements, Onions, Potatoes, Tomatoes.

For the reasons set forth above, 7 CFR parts 948 and 980 are 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. Amend §948.386(f) to read as follows:

§ 948.386 Handling regulation.

* * * * *

(f) Minimum quantity. For purposes of regulation under this part, each person may handle up to but not to exceed 2,000 pounds of potatoes without regard to the requirements of paragraphs (a), (b), and (c) of this section, but this exception shall not apply to any shipment which exceeds 2,000 pounds of potatoes.

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PART 980 - VEGETABLES; IMPORT REGULATIONS

3. The authority citation for 7 CFR part 980 continues to read as follows:

Authority: 7 U.S.C. 601-674.

4. In §980.1, paragraph (c) is revised to read as follows:

§980.1 Import regulations; Irish potatoes.

* * * * *

(c) Minimum quantities. Any importation which, in the aggregate, does not exceed 500 pounds of red skinned, round type or long type potatoes, or 2,000 pounds for all other round type potatoes, may be imported without regard to the provisions of this section.

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Dated: April 16, 2015.

Rex A. Barnes,
Associate Administrator,
Agricultural Marketing Service.

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