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DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 948

[Doc. No. AMS-SC-18-0067; SC18-948-2 FR]

Irish Potatoes Grown in Colorado; Modification of the Handling Regulations for Area No. 2

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This final rule revises the size requirements currently prescribed under the federal marketing order for Irish potatoes grown in Colorado. This action revises the minimum size requirement for U.S. No. 2 or better grade round potatoes to align with the current size requirements for all other types of U.S. No. 2 or better grade potatoes. In addition, this rule revises the size requirements for smaller size profile U.S. Commercial grade or better potatoes.

DATES: Effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Barry Broadbent, Senior Marketing Specialist, or Gary D. Olson, Regional Director, Northwest Marketing Field Office, Marketing Order and Agreement Division, Specialty Crops Program, AMS, USDA;

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Small businesses may request information on complying with this regulation by contacting Richard Lower, Marketing Order and Agreement Division, Specialty Crops Program, AMS, USDA, 1400 Independence Avenue SW, STOP 0237, Washington, DC 20250-0237; Telephone: (202) 720-2491, Fax: (202) 720-8938, or Email: Richard.Lower@usda.gov.

SUPPLEMENTARY INFORMATION: This action, pursuant to 5 U.S.C. 553, amends regulations issued to carry out a marketing order as defined in 7 CFR 900.2(j). This rule is issued under Marketing Agreement No. 97 and Order No. 948, as amended (7 CFR part 948), regulating the handling of Irish potatoes grown in Colorado. Part 948, (referred to as 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 Colorado Potato Administrative Committee, Area 2 (Committee) locally administers the Order and is comprised of potato producers and handlers operating within the area of production.

This rule is also issued pursuant to section 8e of the Act (7 U.S.C. 608e-1), which provides that whenever certain

specified commodities, including 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 final rule in conformance with Executive Orders 13563 and 13175. This action falls within a category of regulatory actions that the Office of Management and Budget (OMB) exempted from Executive Order 12866 review. Additionally, because this final rule does not meet the definition of a significant regulatory action, it does not trigger the requirements contained in Executive Order 13771. See OMB's Memorandum titled "Interim Guidance Implementing Section 2 of the Executive Order of January 30, 2017, titled 'Reducing Regulation and Controlling Regulatory Costs'" (February 2, 2017).

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. 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.

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 size requirements prescribed for potatoes regulated under the Order. This action modifies the minimum size requirement for U.S. No. 2 or better grade round potatoes from 2 inches minimum

diameter to 2 inches minimum diameter or 4 ounces minimum weight. The change in the handling regulations is effectuated by merging the size requirements for U.S. No. 2 or better grade potatoes (previously differentiated with separate requirements for round varieties and all other varieties) into one minimum size requirement that covers all U.S. No. 2 or better grade potatoes.

In addition, this rule revises the size requirements for U.S. Commercial grade or better potatoes to allow handling of $\frac{3}{4}$ -inch minimum to $1\frac{1}{8}$ -inch maximum diameter potatoes. The new size requirement is a change from the $\frac{3}{4}$ -inch minimum to $1\frac{5}{8}$ -inch maximum diameter size range ("Creamer" size as defined in the U.S. Standards for Grades of Potatoes (7 CFR 51.1545) (Standards)) allowed prior to implementation of this rule. The handling regulations will no longer refer to the "Creamer" size in the size requirements, because the specified size range will no longer conform to the Creamer requirements in the Standards. The changes to the handling regulations were unanimously recommended by the Committee at a meeting held on July 12, 2018.

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.

Under the 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 definitions 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. Prior to this action, the Order's handling regulations required round varieties of potatoes to be U.S. No. 2 or better grade, and 2 inches minimum diameter. All other non-round varieties of potatoes were required to be U.S. No. 2 or better grade, and either 2 inches minimum diameter or 4 ounces minimum weight.

Additionally, potatoes that are U.S. Commercial grade or better were allowed to be Size B (1½-inch minimum to 2¼-inch maximum diameter) or Creamer size (¾-inch minimum to 1⅓-inch maximum diameter).

At the July 12, 2018, Committee meeting, industry participants, including the Colorado Department of Agriculture Inspection Division, indicated to the Committee that standardizing the size requirement for all varieties of U.S. No. 2 or better grade potatoes to 2 inches minimum diameter or 4 ounces minimum weight would simplify the handling of potatoes from the production area. The industry believes that merging the two current size requirements for U.S. No. 2 or better grade potatoes into one minimum size requirement covering all varieties of U.S. No. 2 or better potatoes will ease the implementation of the handling regulations for handlers and for the fresh produce inspectors. Further, industry stakeholders stated that there is a market for U.S. Commercial grade or better potatoes of a slightly larger size profile than currently allowed under the Creamer size, and increasing the maximum size in the profile to 1⅓-inch maximum diameter would facilitate sales.

Revising the size requirements for round U.S. No. 2 or better grade potatoes and U.S. Commercial grade or better potatoes will allow area handlers to better compete with other domestic potato producing regions. The changes will effectively increase the quantity of potatoes that can enter the fresh market from the production area and will allow handlers to supply potato buyers with the grade and size profiles that they prefer. This change is expected to benefit producers, handlers, and consumers 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 are unique in that they are brought about through group action of essentially small entities acting on their own behalf. Import regulations issued,

pursuant to the Act are based on the requirements established in Federal marketing orders.

There are approximately 60 handlers of Colorado Area No. 2 potatoes subject to the Order and approximately 160 producers in the regulated production area. In addition, there are approximately 255 importers of all types of potatoes, many of which import long types, who are also subject to the Order. Small agricultural service firms, which include potato handlers and importers, are defined by the Small Business Administration (SBA) as those having annual receipts of less than \$7,500,000, and small agricultural producers are defined as those having annual receipts of less than \$750,000 (13 CFR 121.201).

During the 2016-2017 marketing year, the most recent full marketing year for which statistics are available, approximately 19,828,000 hundredweight of Colorado Area No. 2 potatoes were inspected as required by the Order and sold into the fresh market. Based on information reported by USDA's Market News Service, the average f.o.b. shipping point price for the 2016-2017 Colorado potato crop was \$11.79 per hundredweight. Multiplying \$11.79 by the shipment quantity of 19,828,000 hundredweight yields an

annual crop revenue estimate of \$233,772,120. The average annual fresh potato revenue for each of the 60 handlers is therefore calculated to be \$3,896,202 (\$233,772,120 divided by 60), which is less than the SBA threshold of \$7,500,000. Consequently, on average most of the 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 2016 Colorado fall potato crop was \$9.60 per hundredweight. Multiplying \$9.60 by the shipment quantity of 19,828,000 hundredweight yields an annual crop revenue estimate of \$190,348,800. The average annual fresh potato revenue for each of the 160 Colorado Area No. 2 potato producers is therefore calculated to be approximately \$1,189,680 (\$190,348,800 divided by 160), which is greater than the SBA threshold of \$750,000. Therefore, on average, most of the Area No. 2 Colorado potato producers may not be classified as small entities.

Further, based on information from USDA's Foreign Agricultural Service (FAS), potato importers imported 17,254,160 hundredweight of potatoes into the U.S. in 2017. FAS also reported the total value of potato imports for

2017 to be \$235,685,000. The average 2017 annual revenue of the estimated 255 potato importers is therefore calculated to be \$924,255 (\$235,685,000 divided by 255), which is significantly less than the SBA threshold of \$7,500,000. Consequently, on average, most of the entities importing potatoes into the U.S. may be classified as small entities.

This rule revises the minimum size requirement for round U.S. No. 2 grade or better potatoes from 2 inches minimum diameter to 2 inches minimum diameter or 4 ounces minimum weight. In addition, this final rule revises the size requirements for U.S. Commercial grade or better potatoes to allow handling of $\frac{3}{4}$ -inch minimum to $1\frac{1}{8}$ -inch maximum diameter size range potatoes. Revising the size requirements will allow Colorado Area 2 handlers to market more of their potatoes and enable them to better compete with the other domestic potato producing regions. All other requirements in the Order's handling regulations remain unchanged. Authority for this action is contained in §§ 948.20, 948.21, and 948.22 of the Order.

This final rule is expected to benefit the producers, handlers, and consumers of Colorado Area 2 potatoes by

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

At its July 12, 2018, meeting, the Committee discussed possible alternatives to this action. The Committee determined that a change in the size requirements for U.S. No. 2 or better grade round potatoes, and U.S. Commercial grade or better potatoes, will meet the industry's current marketing needs while maintaining the integrity of the Order's quality objectives. During its deliberations, the Committee considered making no changes to the handling regulations, as well as further changing the size requirements for all potatoes. The Committee believed that a revision to the Order's size requirements is necessary to allow handlers to pursue all available markets, but further revising the size requirements for all other types and varieties of potatoes could erode the quality reputation of the area's production. Therefore, the Committee found that there were no other viable alternatives to this action.

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 OMB and assigned OMB No. 0581-0178, Vegetable and Specialty Crops. No changes are necessary in those requirements as a result of this action. Should any changes become necessary, they would be submitted to OMB for approval.

This rule revises the size requirements established under the Order. Accordingly, this action does 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. 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.

A proposed rule concerning this action was published in the *Federal Register* on January 31, 2019 (84 FR 572). Copies of the proposed rule were also mailed or sent via facsimile to all Colorado potato handlers. The proposal was made available through the internet by USDA and the Office of the Federal Register. A 60-day comment period ending April 1, 2019, was provided for interested persons to respond to the proposal. One comment was received during the comment period. The comment was supportive of the proposal. Accordingly, 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/rules-regulations/moa/small-businesses>. Any questions about the compliance guide should be sent to Richard Lower at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

After consideration of all relevant material presented, including the information and recommendation submitted by the Committee and other available information, it is hereby found that this rule, 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 part 948 continues to read as follows:

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

2. In § 948.386, remove paragraph (a) (1), redesignate paragraphs (a) (2) through (5) as paragraphs (a) (1) through (4), and revise new paragraphs (a) (1) and (3).

The revisions read as follows:

§ 948.386 Handling regulation.

* * * * *

(a) * * *

(1) All varieties. U.S. No. 2 or better grade, 2 inches minimum diameter or 4 ounces minimum weight.

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(3) $\frac{3}{4}$ -inch minimum to $1\frac{1}{8}$ -inch maximum diameter. U.S. Commercial grade or better.

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Dated: May 16, 2019

Bruce Summers,

Administrator,

Agricultural Marketing Service.

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