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DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 948

[Docket No. FV01-948-1 FR]

Irish Potatoes Grown in Colorado; Modification of Area No. 3 Handling Regulation

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This rule increases exemptions to the handling regulation prescribed under the marketing order (order) for Colorado Area No. 3 potatoes. The order regulates the handling of Colorado potatoes and is administered locally by the Colorado Potato Administrative Committee for Area No. 3 (Committee). This rule exempts potatoes shipped for the purpose of experimentation and the manufacture or conversion into specified products from the grade, size, maturity, inspection, and assessment requirements of the order. Relaxing handling requirements provides handlers with greater marketing flexibility, producers with increased returns, and consumers with more choices in buying fresh potatoes. This rule also clarifies the regulatory text by specifying that potatoes shipped for livestock feed, charity, and certified seed are exempt from assessment requirements.

EFFECTIVE DATE: This final rule becomes effective October 1, 2001.

FOR FURTHER INFORMATION CONTACT: Dennis L. West, Northwest Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1220 SW Third Avenue, suite 385, Portland, Oregon 97204; telephone: (503) 326-2724, Fax: (503) 326-7440; or George J. 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) 720-8938.

Small businesses may request information on complying with this regulation by contacting Jay Guerber, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, room 2525-S, P.O. Box 96456, Washington, DC 20090-6456; telephone: (202) 720-2491, Fax: (202) 720-8938, or E-mail: Jay.Guerber@usda.gov.

SUPPLEMENTARY INFORMATION: This final rule is issued under Marketing Agreement No. 97 and Marketing Order No. 948 (7 CFR part 948), both as amended, regulating the handling of Irish potatoes grown in Colorado, hereinafter referred to as the "order." The order is authorized by 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 (Department) 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 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.

This final rule increases exemptions to the handling regulation prescribed under the order. This rule exempts potatoes shipped for the purpose of experimentation and the manufacture or conversion into specified products from the grade, size, maturity, inspection and assessment requirements of the order. These exemptions were unanimously recommended by the Committee. This rule also clarifies the regulatory text by specifying that potatoes shipped for livestock feed, charity, and certified seed are exempt from assessment requirements.

Section 948.22 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 or to facilitate the handling of potatoes for special purposes. Section 948.24 requires adequate safeguards be prescribed to ensure that potatoes handled pursuant to § 948.23 enter authorized trade channels. Safeguard procedures for special purpose shipments are specified in §§ 948.120 through 948.125. Section 948.387 of the order's handling regulations establishes the grade, size, maturity, and inspection requirements for Area No. 3. The Committee's assessment rate is established under § 948.215.

At its meeting on December 14, 2000, the Committee unanimously recommended that potatoes shipped for the purpose of experimentation and the manufacture or conversion into specified products be exempt from the grade, size, maturity, and inspection requirements provided under the order's regulations for Area No. 3. The Committee recommended that experimentation and the manufacture or conversion into specified products be added under 948.387(d) as special purpose shipments.

To apply for the exemption, handlers will obtain a Certificate of Privilege for handling such potatoes and furnish the Committee such information as it may require to track shipments, determine whether applicable requirements have been met, and verify whether proper disposition has occurred.

At a subsequent meeting on March 8, 2001, the Committee reconfirmed its

earlier action and, in addition, unanimously recommended that shipments for livestock feed, charity, certified seed, and for the purpose of experimentation and the manufacture or conversion into specified products be exempt from assessment requirements. Shipments of potatoes for livestock feed, charity, and certified seed are specified as special purpose shipments and are exempt from grade, size, maturity, and inspection requirements.

Some producers and handlers within the production area are interested in developing new uses for fresh potatoes using experimental varieties and packs. The Committee also anticipates that some handlers may want to ship traditional varieties, or experimental varieties, for use in the manufacture or conversion into special products, or perform the manufacture or conversion themselves prior to shipment. Handlers are, for example, attempting to develop new special products such as fresh cut potatoes shipped in vacuum-sealed bags. Handlers have also expressed a desire to experiment with the shipment of potatoes of different varieties in the same container. Prior to this rule, this was not possible because the potatoes did not meet the minimum grade requirement that a particular lot of potatoes must have "similar" varietal characteristics.

The Committee strongly encourages innovation that could result in the development of new varieties, markets, or opportunities for the expanded use of fresh forms of potato products, such as fresh cut potatoes in vacuum-sealed bags, thus benefiting the Colorado potato industry. Some of the new varieties have irregular shapes or are small in size, and did not meet minimum order requirements. This prevented them from being shipped except under the minimum quantity exemption of 1,000 pounds specified in paragraph (f) of § 948.387. Thus, handlers were prevented from shipping larger quantities.

For the purpose of this rule, the term "manufacture or conversion into specified products" means the preparation of potatoes for market into products by peeling, slicing, dicing, applying material to prevent oxidation, or other means approved by the Committee, but not including other processing. Under the prior regulation, potatoes for manufacture or conversion into specified products were required to be inspected and certified as meeting the specified quality requirements prior to preparation for market.

Prior to this final rule, the handling regulations required that all potatoes shipped to fresh market, with the

exception of those meeting minimum quantity and special purpose exemptions, be inspected and assessed. These regulations did not provide adequate relief for commercially viable shipments of non-traditional varieties, potatoes for experimentation, or the shipment of potatoes for the manufacture or conversion into products. This rule exempts such shipments and relieves handlers of this regulatory burden.

This relaxation of the Area No. 3 handling regulation is expected to encourage new product development that could lead to market expansion, benefiting producers, handlers, buyers, and consumers. By relaxing the handling requirements on traditional and experimental varieties and on new and innovative fresh potato products, additional opportunities should be available to increase the fresh utilization of Colorado potatoes.

The Committee also unanimously recommended that shipments of potatoes for livestock feed, charity, and certified seed potatoes be exempt from assessment requirements. This Committee recommendation was made with the intent of treating all special purpose shipments in the same manner. As explained previously, shipments to these fresh outlets are exempt from the grade, size, maturity, and inspection requirements. The order only regulates, however, the shipment of potatoes outside the State of Colorado. It is very uncommon for Area No. 3 potatoes to be shipped for livestock feed, charity, or certified seed outside of the State of Colorado. It is not expected that exempting such shipments from assessments will have the effect of increasing shipments. Thus, this rule is expected to have little impact on handlers or the Committee's assessment income. And finally, this rule clarifies the handling regulation to indicate that special purpose shipments for canning, freezing, and "other processing" are exempt from assessments. Such shipments are exempt from regulation under federal marketing orders in conformity with an amendment to the Act (Public Law No. 92-233, Feb. 15, 1972).

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 action on small entities. Accordingly, the 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 13 handlers of Colorado Area No. 3 potatoes who are subject to regulation under the marketing order and approximately 31 producers of Colorado potatoes in the regulated area. Small agricultural service firms are defined by the Small Business Administration (13 CFR 121.201) as those having annual receipts of less than \$5,000,000, and small agricultural producers are defined as those whose annual receipts are less than \$750,000.

Based upon information provided by the Committee, all handlers of Area No. 3 potatoes have shipped under \$5,000,000 worth of potatoes during the most recent season for which numbers are available. In addition, information reported by the National Agricultural Statistics Service was considered in determining the number of large and small producers by acreage, production, and producer prices. According to the information provided, the average yield per acre was 340 hundredweight, the average farm size was 53 acres, and the season average producer price was \$5.95 per hundredweight for 1999 crop. This equates to average gross receipts to producers of approximately \$107,200. Based on the foregoing, it can be concluded that all handlers and the majority of producers of Area 3 potatoes may be classified as small entities, excluding receipts from other sources.

This final rule exempts special purpose shipments of potatoes from the grade, size, maturity, inspection and assessment requirements prescribed under the order's handling regulations for Colorado Area No. 3 potatoes. Based on authority in §§ 948.22, 948.23, and 948.24 of the order, the Committee at its meeting on December 14, 2000, unanimously recommended that potatoes shipped for the purpose of experimentation and the manufacture or conversion into specified products be exempt from the grade, size, maturity, and inspection requirements of the order. The Committee at its meeting on March 8, 2001, recommended that potatoes for experimentation and the manufacture or conversion into specified products be exempt from assessment requirements. It also recommended that the regulatory text of the applicable provisions be clarified by specifying that potatoes shipped for

livestock feed, charity, and certified seed are exempt from assessment requirements.

Producers and handlers within the production area are interested in developing innovative uses for fresh potatoes. The Committee anticipates that some handlers may want to ship traditional or experimental varieties for the manufacture or conversion of potatoes into fresh forms such as fresh cut french fries using experimental packaging and preservation methods. The Committee strongly encourages innovation that could result in the development of new varieties and market opportunities for the expanded use of fresh forms of potato products, such as those packaged in vacuum-sealed bags. The relaxation of Area No. 3's handling and assessment requirements is expected to encourage new product development, which benefits producers, handlers, buyers, and consumers by increasing the fresh utilization of Colorado potatoes. The changes are expected to have a positive economic impact on the Colorado potato industry.

As with all special purpose shipments, handlers are required to apply and obtain a Certificate of Privilege for handling such potatoes and furnish the Committee such information as they may require to track shipments, determine whether applicable requirements have been met, and verify whether proper disposition has occurred. The intent of the Committee is to keep reporting requirements to a minimum level necessary to monitor compliance while determining the viability and extent of any changes in the marketing of the area potatoes. There is no available information detailing how many potatoes this relaxation will allow to be marketed. During the previous growing season, one producer planted less than 20 acres of the non-traditional, experimental type varieties on a trial basis. No viable alternatives to this action were identified to ensure innovations in marketing and product development. Furthermore, the goals expressed by the Committee could not be solved absent this action.

The Committee estimates that two or three handlers may apply for and obtain a Certificate of Privilege for the handling of potatoes for experimentation or for the manufacture or conversion into specified products. It is estimated that the time taken by the handlers who apply will total less than ten hours and this time is currently approved under OMB No. 0581-0178 by the Office of Management and Budget (OMB) in accordance with the Paperwork

Reduction Act of 1995 (44 U.S.C. Chapter 35).

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, the Department has not identified any relevant Federal rules that duplicate, overlap or conflict with this final rule.

In addition, the Committee's meetings were widely publicized throughout the Colorado potato industry and all interested persons were invited to attend the meetings and participate in Committee deliberations on all issues. Like all Committee meetings, those held on December 14, 2000, and March 8, 2001, were public meetings and all entities, both large and small, were able to express their views on this issue.

A proposed rule concerning this action was published in the **Federal Register** on August 2, 2001 (66 FR 40155). Copies of the rule were mailed or sent via facsimile to all Committee members and potato handlers. Finally, the rule was made available through the Internet by the Office of the Federal Register and the Department. A 20-day comment period ending August 22, 2001, was provided to allow interested persons to respond to the proposal. No comments were received. Accordingly, no changes are 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.

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 2000-01 crop and handlers want to take advantage of the relaxed requirements as soon as possible. Further, handlers are aware of this rule, which was recommended at two public meetings. Also, a 20-day comment period was provided for in the proposed rule, and no comments were received.

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 § 948.387, paragraph (d)(1) introductory text is revised, a new paragraph (d)(1)(v) is added, and in paragraph (g) a new sentence is added before the last sentence to read as follows:

§ 948.387 Handling regulation.

* * * * *

(d) * * *

(1) The grade, size, maturity and inspection requirements of paragraphs (a), (b), and (c) of this section and the assessment requirements of this part shall not be applicable to shipments of potatoes for:

* * * * *

(v) Experimentation and the manufacture or conversion into specified products.

* * * * *

(g) *Definitions.* * * * The term *manufacture or conversion into specified products* means the preparation of potatoes for market into products by peeling, slicing, dicing, applying material to prevent oxidation, or other means approved by the committee, but not including other processing. * * *

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Dated: September 21, 2001.

Kenneth C. Clayton,

Acting Administrator, Agricultural Marketing Service.

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