

# Rules and Regulations

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## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

#### 7 CFR Part 946

[Docket No. FV00-946-1 IFR]

#### Irish Potatoes Grown in Washington; Exemption From Handling and Assessment Regulations for Potatoes Shipped for Experimental Purposes

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

**ACTION:** Interim final rule with request for comments.

**SUMMARY:** This rule exempts potatoes shipped for experimental purposes from the handling and assessment regulations of the Washington State potato marketing order. The marketing order regulates the handling of potatoes grown in Washington, and is administered locally by the State of Washington Potato Committee (Committee). Experimental shipments of potatoes by handlers utilizing new and innovative packaging, including the commingling of different varieties of potatoes in the same package, or shipments of non-traditional experimental varieties of potatoes will be exempt from the grade, size, maturity, pack, inspection, and assessment requirements of the marketing order. By relaxing the requirements on shipments of such potatoes, this rule provides the industry with greater marketing flexibility and with the ability to investigate new methods for increasing producer returns. It also is expected to provide consumers with more choices in buying fresh potatoes.

**DATES:** Effective November 27, 2000; comments received by January 23, 2001 will be considered prior to issuance of a final rule.

**ADDRESSES:** Interested persons are invited to submit written comments concerning this rule. Comments must be

sent to the Docket Clerk, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, room 2525-S, P.O. Box 96456, Washington, DC 20090-6456; Fax: (202) 720-5698, or E-mail: moab.docketclerk@usda.gov. All comments should reference the docket 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.ams.usda.gov/fv/moab.html>.

**FOR FURTHER INFORMATION CONTACT:**

Teresa L. Hutchinson, 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, room 2525-S, P.O. Box 96456, Washington, DC 20090-6456; telephone: (202) 720-2491, Fax: (202) 720-5698.

Small businesses may request information on complying with this regulation by contacting Jay Guerber, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, P.O. Box 96456, room 2525-S, Washington, DC 20090-6456; telephone: (202) 720-2491, Fax: (202) 720-5698, or E-mail: [Jay.Guerber@usda.gov](mailto:Jay.Guerber@usda.gov).

**SUPPLEMENTARY INFORMATION:** This rule is issued under Marketing Agreement No. 113 and Marketing Order No. 946, both as amended (7 CFR part 946), regulating the handling of Irish potatoes grown in Washington, 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 (Department) is issuing this rule in conformance with Executive Order 12866.

This 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 rule exempts shipments of potatoes for experimentation from the grade, size, maturity, pack, inspection, and assessment requirements of the marketing order. By relaxing the requirements on new and innovative packaging and on non-traditional varieties of fresh potatoes, this rule provides the industry with greater marketing flexibility and the ability to investigate new methods for increasing producer returns, and provides consumers with more choices in buying fresh potatoes. The Committee unanimously recommended the exemption for experimental packs and varieties at its meeting held on June 8, 2000.

Section 946.51 of the order provides authority for the Committee to recommend the implementation, modification, suspension or termination of regulations. Section 946.52 provides the necessary authority for the Department to issue regulations, and to modify, suspend, or terminate such regulations. Furthermore, § 946.54 provides authority for the modification, suspension, or termination of handling regulations for the purpose of facilitating the handling of potatoes for special purposes, while § 946.55 provides for adequate safeguards to prevent such special purpose shipments from entering unauthorized outlets. The order's handling regulations, § 946.336, establish the grade, size, maturity, pack, and inspection requirements for potatoes grown in Washington. The

assessment rate for Washington potatoes is established in § 946.248, pursuant to § 946.41.

Handlers have expressed a desire to experiment with shipping potatoes of different varieties in the same container. This has been a problem, however, since the order requires that all potato varieties, as a minimum, meet U.S. No. 2 grade as defined in the U.S. Standards for Grades of Potatoes. These standards specify that a particular lot of potatoes has "similar" varietal characteristics.

Although the order's handling regulations do allow the mixing of any size and variety in a 3-pound or smaller container, handlers have been unable to ship a large enough quantity of the experimental packs to determine market feasibility. With this action, however, marketers will have the ability to experiment with various packs, including containers with a mixture of different potato varieties and sizes.

Prior to this action, the order's regulations required that all potatoes shipped to the fresh market, with the exception of those meeting the minimum quantity and special purpose exemptions, be inspected and assessed. The handling regulations did not provide adequate relief for commercially viable shipments of non-traditional or experimental potato varieties that could not meet minimum inspection requirements. Several producers and handlers within the production area are attempting to develop and market new varieties of potatoes. Some of the new varieties have irregular shapes or are small in size and will not meet minimum order requirements. In order to market these unique potatoes, handlers were required to utilize the order's minimum quantity exemption, which allows shipments up to, but not in excess of, 500 pounds of potatoes daily without regard to assessment and inspection requirements. This has prevented handlers from shipping larger quantities of these potatoes and from adequately determining their marketability and consumer acceptance. By allowing handlers to ship the quantities of new varieties they believe are necessary to determine marketability, this rule adequately addresses this issue.

As is currently required for all special purpose shipments, handlers shipping experimental potato packs or experimental potato varieties will need to apply for and obtain a Special Purpose Certificate from the Committee. To help ensure compliance with the revised provisions and to statistically track the shipments of experimental potato packs and varieties, the Committee will require that shipments

made pursuant to this action be reported on the Special Purpose Shipment Report, as modified to include potatoes shipped for experimental purposes. Such reports will help the Committee in determining whether applicable requirements have been met and whether proper disposition has occurred, and will be furnished to the Committee for each shipment made pursuant to the applicable Special Purpose Certificate. The Committee's intent is to keep reporting requirements at the minimum level necessary to monitor compliance while determining the viability and extent of any changes in the packaging and marketing of Washington potatoes.

The Committee contends that the purpose of the order is to provide quality assurance and minimum grade standards for Washington potatoes and not to inhibit innovation. This rule thus provides the Washington potato industry with the ability to seek new and innovative ways to market its fresh potato crop without the costs and constraints of regulation that otherwise provide a necessary service to the industry. This rule provides the industry with the flexibility to explore new markets while enhancing product development, and helps in identifying niche markets which may benefit producers, handlers, buyers, and consumers of Washington State potatoes. Should a particular experimental pack or variety become commercially significant and some form of quality control or assessment reinstatement be needed, the Committee will consider further changes in the exemptions.

As referenced earlier, the Committee currently utilizes two forms for special purpose shipments. These are the Shippers Application for Special Purpose Certificate and the Special Purpose Shipment Report. To conform to this terminology, this rule also replaces the term "Certificate of Privilege" with the term "Special Purpose Certificate" wherever it appears in the Rules and Regulations and Handling Regulations established under the order.

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, 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. Thus, both statutes have small entity orientation and compatibility.

There are approximately 40 handlers of Washington potatoes who are subject to regulation under the marketing order and approximately 340 Washington potato producers 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 having annual receipts of less than \$500,000. A majority of these handlers and producers may be classified as small entities, excluding receipts from other sources.

This rule exempts shipments of potatoes shipped for experimentation from the grade, size, maturity, pack, inspection, and assessment requirements prescribed under the regulations of the marketing order regulating the handling of potatoes grown in Washington. Pursuant to authority in §§ 946.51, 946.52, and 946.54, at its meeting on June 8, 2000, the Committee unanimously recommended that this exemption for experimental potato packs and varieties be added under § 946.336(d), *Special purpose shipments*. By relaxing the regulations, this rule provides the Washington potato industry with the enhanced ability to seek new and innovative methods of marketing its fresh potato crop. This rule provides the industry with the flexibility to explore new markets while enhancing product development, and helps to identify niche markets which may benefit producers, handlers, buyers, and consumers of Washington State potatoes.

The Committee believes that this rule will have a positive economic impact on the Washington potato industry. Producers and handlers will be able to concentrate on developing innovative new packaging and marketable new potato varieties without the costs associated with inspection and administrative assessments, as well as most of the costs associated with grading. Although not having specific information regarding the volume of potatoes that will be marketed through this exemption, the Committee estimates that the initial volume being shipped will be low and thus will have little negative impact on Committee assessment income. However, since one of the objectives of this action is to increase the utilization of fresh potatoes

produced in Washington, the Committee will consider changing the handling regulation and assessment requirements in the future, if needed, to help ensure quality control and adequate Committee income if the experimental shipments become commercially viable.

The current assessment rate is \$0.002 per hundredweight of potatoes handled. Also, the cost of inspection under the marketing order is \$0.06 per hundred weight of potatoes inspected. Handlers, both small and large, shipping potatoes under the experimental shipment exemption will not incur these costs. Any savings accrued will be proportional to the quantities of potatoes shipped under the experimentation exemption.

With regard to alternatives, we believe that this action best reflects the marketing and product development goals of the Washington potato industry.

The Committee estimates that initially four or five handlers may each apply for and obtain a Special Purpose Certificate for the purpose of making shipments of experimental packs or varieties. In addition, such handlers will be required to furnish to the Committee a Special Purpose Shipment Report for each shipment made under the experimental purposes exemption. The Committee estimates that the additional paperwork burden on handlers for this action will total less than ten hours. Such time is currently approved under OMB No. 0581-0178 by the Office of Management and Budget 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. In addition, the Department has not identified any relevant Federal rules that duplicate, overlap or conflict with this rule.

Further, the Committee's meeting was widely publicized throughout the Washington potato industry and all interested persons were invited to attend the meeting and participate in Committee deliberations. Like all Committee meetings, the June 8, 2000, 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 information on 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: <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.

This rule invites comments on a change to the regulations prescribed for the production area under the Washington potato marketing order. Any comments received will be considered prior to finalization of this rule.

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

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 rule into effect and that good cause exists for not postponing the effective date of this rule until 30 days after publication in the **Federal Register** because: (1) This rule relaxes requirements on Washington potato handlers and provides additional marketing opportunities; (2) early September was the beginning of the 2000-2001 shipping season and this rule should be in place as promptly as possible so that handlers can take advantage of the benefits resulting from this relaxation; (3) this recommendation was unanimously approved by the Committee at a public meeting and interested parties had an opportunity to provide input; and (4) this rule provides a 60-day comment period and any comments received will be considered prior to finalization of this rule.

#### List of Subjects in 7 CFR Part 946

Marketing agreements, Potatoes, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, 7 CFR part 946 is amended as follows:

#### PART 946—IRISH POTATOES GROWN IN WASHINGTON

1. The authority citation for 7 CFR part 946 continues to read as follows:

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

2. Amend Part 946 as follows:

(a) Revise the undesignated center heading following § 946.104;

(b) Revise paragraphs (a)(3) and (4) in § 946.120; and

(c) Add a new paragraph (a)(5) to § 946.120 to read as follows:

#### Special Purpose Certificates

##### § 946.120 Application.

(a) \* \* \*

(3) Prepeeling outside the district where grown;

(4) Grading or storing at any specified location in Morrow or Umatilla

Counties in the State of Oregon; and

(5) Experimentation.

\* \* \* \* \*

3. In § 946.336, paragraphs (e)(3)(i), (iii), and (iv) are amended by removing the words "Certificate of Privilege" and adding the words "Special Purpose Certificate" in their place, the undesignated paragraph following paragraph (d)(7) is removed, paragraph (d) is revised, and a new paragraph (e)(6) is added to read as follows:

\* \* \* \* \*

##### § 946.336 Handling regulation.

\* \* \* \* \*

(d) *Special purpose shipments.* (1) The minimum grade, size, cleanness, maturity, and pack requirements set forth in paragraphs (a), (b), and (c) of this section shall not apply to shipments of potatoes for any of the following purposes:

(i) Livestock feed;

(ii) Charity;

(iii) Seed;

(iv) Prepeeling;

(v) Canning, freezing, and "other processing" as hereinafter defined;

(vi) Grading or storing at any specified location in Morrow or Umatilla Counties in the State of Oregon, in District 5, or in Spokane County in District 1;

(vii) Export, except to Alaska and Hawaii and except as provided in paragraph (c)(2) of this section; or

(viii) Experimentation.

(2) Shipments of potatoes for the purposes specified in paragraphs (d)(1)(i) through (viii) of this section shall be exempt from inspection requirements specified in paragraph (g) of this section except shipments pursuant to paragraph (d)(6) of this section shall comply with inspection requirements of paragraph (e)(2) of this section. Shipments specified in paragraphs (d)(1)(i), (ii), (iii), (v) and (viii) of this section shall be exempt from assessment requirements as specified in § 946.248 and established pursuant to § 946.41.

\* \* \* \* \*

(a) \* \* \*

(6) Each handler desiring to make shipments of potatoes for experimentation shall:

(i) First apply to the committee for and obtain a Special Purpose Certificate to make shipments for experimentation;

(ii) Upon request by the committee, furnish reports of each shipment pursuant to the applicable Special Purpose Certificate.

\* \* \* \* \*

Dated: November 15, 2000.

**Ronald L. Cioffi,**

*Acting Deputy Administrator, Fruit and Vegetable Programs.*

[FR Doc. 00-29944 Filed 11-22-00; 8:45 am]

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## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

#### 7 CFR Part 1011

[DA-01-01]

#### Milk in the Tennessee Valley Marketing Area; Termination of the Order

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

**ACTION:** Final rule; termination order.

**SUMMARY:** This document terminates the remaining administrative provisions of the Tennessee Valley Federal milk marketing order (Order 1011). All of the monthly operating provisions of the order were terminated as of October 1, 1997.

**EFFECTIVE DATE:** November 27, 2000.

**FOR FURTHER INFORMATION CONTACT:**

Nicholas Memoli, Marketing Specialist, USDA/AMS/Dairy Programs, Order Formulation Branch, Room 2971, South Building, P.O. Box 96456, Washington, DC 20090-6456, (202) 690-1932, [Nicholas.Memoli@usda.gov](mailto:Nicholas.Memoli@usda.gov).

**SUPPLEMENTARY INFORMATION:** The 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 a 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 Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), 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 request modification or exemption from such order by filing 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 the law. A handler is afforded the opportunity for

a hearing on the petition. After a 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 its principal place of business, has jurisdiction in equity to review the Secretary's ruling on the petition, provided a bill in equity is filed not later than 20 days after the date of the entry of the ruling.

#### Small Business Consideration

In accordance with the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), the Agricultural Marketing Service has considered the economic impact of this action on small entities and has certified that this final rule will not have a significant economic impact on a substantial number of small entities because the Tennessee Valley milk order ceased operating as of October 1, 1997, and there are no handlers or dairy farmers that will be affected by the termination of its one remaining administrative provision.

#### Preliminary Statement

This order of termination is issued pursuant to the provisions of the Agricultural Marketing Agreement Act, as amended (7 U.S.C. 601-674), and of the order regulating the handling of milk in the Tennessee Valley marketing area.

Notice of proposed rulemaking was published in the **Federal Register** on July 3, 1997 (62 FR 36022), concerning a proposed termination of the order. Interested persons were afforded opportunity to file written data, views and arguments thereon.

In total, 11 comments were received, 3 supporting the termination, 3 opposed to it, and 5 taking no position on the termination but offering comments on questions raised by the Department in the notice of proposed termination.

After consideration of all relevant material, including the proposal in the notice, the comments received, and other available information, the Administrator of the Agricultural Marketing Service found and determined that the order regulating the handling of milk in the Tennessee Valley marketing area (7 CFR 1011) did not tend to effectuate the declared policy of the Act and terminated all of the operating provisions of the order on September 5, 1997, effective October 1, 1997 (62 FR 47923).

#### Statement of Consideration

This rule terminates the last remaining provision of the Tennessee Valley Federal milk marketing order

effective one day after publication of this final rule in the **Federal Register**.

On May 12, 1997, the Department issued a partial final decision on proposed amendments to the Carolina, Southeast, Tennessee Valley, and Louisville-Lexington-Evansville milk orders (i.e., Orders 5, 7, 11, and 46) which was published on May 20, 1997 (62 FR 27525). The final decision document contained proposed amended orders for the 4 southeast marketing areas, including the Tennessee Valley order, and directed the respective market administrators of the 4 orders to ascertain whether producers approved the issuance of the amended orders. The final decision concluded that amended orders were needed to effectuate the declared policy of the Act.

Less than two-thirds of the producers whose milk is pooled in the Tennessee Valley marketing area approved the issuance of the proposed amended order. The Act requires approval by at least two-thirds of the producers before an amended order may be issued.

Pursuant to the provisions of the Agricultural Marketing Agreement Act and of the order regulating the handling of milk in the Tennessee Valley marketing area, the operating provisions of the Tennessee Valley Federal milk order were terminated effective October 1, 1997. Notice of the termination was published in the **Federal Register** on September 12, 1997 (62 FR 47923). Certain administrative provisions were left intact at that time so that the market administrator, in his capacity as the order's liquidating agent, could disburse all of the money remaining in the administrative, producer-settlement, and marketing service funds established under the order. These tasks having been completed, the remaining provisions of the order are unnecessary and may be removed immediately. Therefore, it is determined that the remaining provisions of Part 1011 no longer tend to effectuate the declared policy of the Act and are hereby terminated pursuant to provisions of 7 U.S.C. 608(c)(16)(A).

For the same reasons, it is hereby found and determined, upon good cause, that it is impracticable, unnecessary, and contrary to the public interest to give preliminary notice or engage in further rulemaking prior to putting this rule into effect and that good cause exists for not postponing the effective date of this rule until 30 days after publication in the **Federal Register**.

#### List of Subjects in 7 CFR Part 1011

Milk marketing orders.