



DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 966

[Doc. No. AMS-SC-18-0075; SC19-966-1 PR]

Tomatoes Grown in Florida; Modification of Handling Regulations

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule.

SUMMARY: This proposed rule would implement a recommendation from the Florida Tomato Committee (Committee) to change the handling regulations under the Marketing Order regulating the handling of tomatoes grown in Florida. This action would remove the standard weight requirements for tomato containers under the handling regulations.

DATES: Comments must be received by [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

ADDRESSES: Interested persons are invited to submit written comments concerning this proposal. Comments must be sent to the Docket Clerk, Marketing Order and Agreement Division, Specialty Crops 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 proposal 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: Steven W. Kauffman, Marketing Specialist, or Christian D. Nissen, Regional Director, Southeast Marketing Field Office, Marketing Order and Agreement Division, Specialty Crops Program, AMS, USDA; Telephone: (863)324-3375, Fax: (863) 291-8614, or Email: Steven.Kauffman@usda.gov or Christian.Nissen@usda.gov.

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 E-mail: Richard.Lower@ams.usda.gov.

SUPPLEMENTARY INFORMATION: This action, pursuant to 5 U.S.C. 553, proposes an amendment to regulations issued to carry out a marketing order as defined in 7 CFR 900.2(j). This proposed rule is issued under Marketing Agreement No. 125 and Order No. 966, as amended (7 CFR part 966), regulating the handling of tomatoes grown in Florida. Part 966 (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 Committee locally administers the Order and is comprised of producers operating within the production area.

The Department of Agriculture (USDA) is issuing this proposed 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 proposed 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 proposed rule has been reviewed under Executive Order 12988, Civil Justice Reform. This proposed 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.

This proposed rule invites comments on eliminating the standard weight certification requirement established under the Order for the 2019-20 and subsequent fiscal periods. This action would reduce time and costs associated with tomato inspection at handling facilities. The Committee unanimously approved this recommendation at public meetings held on August 24, 2018, and on September 6, 2018.

Section 966.52 of the Order provides authority to the Committee to establish pack and container requirements for tomatoes grown within the regulated area. This includes fixing the size, weight, capacity, dimensions, markings, or pack of the container which may be used in the packaging, transportation, sale, shipment, or other handling of tomatoes.

Section 966.323 sets forth the handling regulations for Florida tomatoes. Section 966.323(a)(3)(i) designates the container requirements for weight and that Section 51.1863 of the U.S. Tomato Standards (7 CFR §51.1863), which specifies the standard weight requirement, shall apply to all containers.

Section 966.60 requires Florida tomatoes to be inspected and certified by authorized representatives of

the Federal or Federal-State Inspection Service (FSIS), or such other inspection service as the Secretary shall designate. The Florida Department of Agriculture and Consumer Services is an agency employing state workers who collaborate with the USDA to provide inspection services to areas not serviced by federal employees. FSIS currently certifies to standard weight as part of the inspection process.

The Committee met on August 24, 2018, and on September 6, 2018, to discuss current standard weight procedures and compliance with the standard weight certification requirements. Representatives from USDA's Specialty Crop Inspection Division (SCI) and from FSIS were present to participate in the discussion. These representatives informed Committee members that some handling facilities were not maintaining compliance with the standard weight certification requirements.

The current inspection sampling rate for standard weight certification is 36 containers sampled based on a lot size of 1600 containers. FSIS currently samples eight tomato containers from each lot for grade and size inspection, and these containers are also weighed as part

of the sampling for standard weight. In order to comply with standard weight certification procedures, an additional 28 containers need to be weighed. To lower the inspection time and cost, many tomato handlers provide an employee to sample and weigh the additional 28 containers to reach the total 36 samples required for the standard weight certification of each lot.

The containers weighed must meet the prescribed inspection requirements in § 51.1863 for certification of the lot. Section 51.1863 specifies that when packages are marked to a net weight of 15 pounds or more, the net weight of the contents shall not be less than the designated net weight and shall not exceed the designated weight by more than 2 pounds. In order to allow for variations incident to proper sizing, not more than 15 percent, by count, of the packages in any lot may fail to meet the requirements for standard weight. Most of the tomatoes produced in the production area are packed in 25-pound containers.

In their discussion, Committee members stated the current sampling rate requires costly labor and is a time-consuming process that is difficult to maintain due to the handling volume in many operations. One industry member

stated that the volume of lots inspected at some handling operations can total around 50 lots in a single 24-hour period. If 50 lots were inspected in one day this would equal a total of 1800 samples selected for recording the weight. The handler's employee would be responsible for pulling and weighing 1400 of these 25-pound samples to meet the standard weight requirement. Thus, high volume handlers may have to employ multiple people to perform the weight inspections.

The labor provided by the handler expedites the certification process and is lower than the cost of having FSIS inspectors weigh the additional cartons. However, standard weight certification is still expensive to maintain. One member stated that providing the necessary employees at their handling facility to properly administer the certification program cost an extra \$80,000 a year above the fees charged by FSIS inspection.

The Committee asked if it might be possible to lower the sampling rate while maintaining the certification process as the container sampling size for standard weight is several times greater than the number of containers sampled by FSIS when certifying for grade and size. SCI

stated that certification at a rate lower than 36 samples would require a study that could statistically support a new sampling rate. SCI indicated a study would possibly take a year to develop, implement, and to analyze the results. Committee members expressed concern over the time and cost of carrying out such a study, and that the best course of action may be to remove the requirement for standard weight inspection.

In discussing the value of the weight certification program, Committee members stated that receivers of Florida tomato shipments still perform weight inspections regardless of the required weight certification. Even with the standard weight certification, there are occasions when weight is an issue and the shipper often rectifies any discrepancies by making an adjustment to the shipment for the receiver. At both meetings, Committee members expressed that handling operations are spending thousands of dollars annually to meet the certification requirement without realizing a significant benefit from the program. Committee members stated that the expense of labor and inspection time for certification is difficult to justify

since the handler already makes an adjustment for the receiver regardless of the certification.

Committee members also stated that tomato handlers outside the regulated area are not required to maintain standard weight certification. One member indicated that eliminating the standard weight requirement on Florida tomato handlers would allow the industry's inspection procedures to be more comparable to handlers outside the regulated area. Another commenter stated that most handlers are now using in-line scales to weigh each container and did not see the benefit of requiring standard weight certification.

Removing the standard weight requirement would allow handlers to avoid the time and labor costs associated with the certification process. The Committee believes there is no longer enough benefit to justify maintaining the standard weight certification, and unanimously recommended eliminating the standard weight requirements for the 2019-20 and subsequent fiscal periods.

Committee members agreed that maintaining the individual net weight requirements for containers is still a valuable component of the Order. The current net weight

requirements state all tomatoes packed by a registered handler shall be packed in containers of 10, 20, and 25 pounds designated net weights. The net weight of the contents shall not be less than the designated net weight and shall not exceed the designated net weight by more than two pounds. This action would not modify that requirement.

With this action, FSIS would still sample the required containers to perform size and grade inspection along with recording the weights from each sample. FSIS could provide a record of the weights from the eight samples inspected for size and grade upon request. The Committee noted that the eight samples weighed by FSIS would provide an independent record to reference in addition to the in-line automated weighing systems used by many handlers. The Committee believes the eight samples weighed by FSIS in conjunction with the automated weighing systems would provide ample information regarding the container weights for each lot. Further, eliminating the standard weight requirement would not preclude the handler from requesting a standard weight inspection.

Section 8e of the Act (7 U.S.C. 608e-1) provides that when certain domestically produced commodities, including

tomatoes, are regulated under a Federal marketing order, imports of that commodity must meet the same or comparable grade, size, quality, and maturity requirements. No corresponding change to the import regulations is required as this is a proposal to change the container requirements.

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 proposed rule 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 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 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 75 producers of Florida tomatoes in the production area and 37 handlers subject to regulation under the Order. Small agricultural producers are defined by the Small Business Administration (SBA) as

those having annual receipts less than \$750,000, and small agricultural service firms are defined as those whose annual receipts are less than \$7,500,000 (13 CFR 121.201).

According to industry and Committee data, the average annual price for fresh Florida tomatoes during the 2017-18 season was approximately \$12.56 per 25-pound container, and total fresh shipments were 25.9 million containers. Using the average price and shipment information, the number of handlers, and assuming a normal distribution, the majority of handlers have average annual receipts of more than \$7,500,000, ($\$12.56 \times 25.9 \text{ million containers} = \$325,304,000$ divided by 37 handlers equals \$8,792,000 per handler).

In addition, based on production data, an estimated producer price of \$6.00 per 25-pound container, the number of Florida tomato producers, and assuming a normal distribution, the average annual producer revenue is above \$750,000 ($\$6.00 \times 25.9 \text{ million containers} = \$155,400,000$ divided by 75 producers equals \$2,072,000 per producer). Thus, the majority of handlers and producers of Florida tomatoes may be classified as large entities.

This proposed rule would eliminate the standard weight certification requirement under the Order. The Committee determined there is no longer sufficient benefit to justify the cost and time required for the standard weight certification. This proposed action would enable handlers to reduce inspection time and labor costs associated with the standard weight program. This rule would revise § 966.323. Authority for these changes is provided in § 966.52.

It is not anticipated that this action would impose additional costs on handlers or growers, regardless of size. The proposed changes are intended to reduce expenses incurred for labor and inspection time associated with the certification process for standard weight.

The current inspection sampling rate for standard weight certification based on a lot size of 1600 containers is 36 containers. FSIS currently samples eight tomato containers from each lot for grade and size inspection, and these containers are also weighed as part of the sampling for standard weight. In order to comply with standard weight certification procedures, an additional 28 containers need to be weighed. To lower the inspection

time and cost, many tomato handlers provide an employee to sample and weigh the additional 28 containers to reach the total 36 samples required for the standard weight certification of each lot.

Total fresh shipments of Florida tomatoes for the 2017-18 season were 25.9 million 25-pound containers. This volume represents approximately 16,188 normal lots of tomatoes requiring inspection for standard weight. Using 2017-18 volume, this change would eliminate the requirement that inspection personnel or handler employees lift, weigh, and record approximately 453,265 25-pound containers during a similar season. This analysis illustrates the laborious nature involved in the standard weight inspection and certification process.

Avoiding the time and labor costs associated with standard weight certification would reduce expenses for the Florida tomato industry. This proposed action would reduce the labor required for the inspection process by thousands of hours every year, reducing the cost for handlers. The expense of labor for inspection can vary widely between handler employees and the FSIS. However, one Committee member stated that this action would save his handling

operation \$80,000 every year. This proposed action is expected to lower handler cost associated with the inspection process. The benefits of this rule are expected to be equally available to all Florida fresh tomato handlers, regardless of size.

The Committee considered an alternative to this proposed action. Prior to this recommendation, the Committee discussed lowering the sampling size for the standard weight certification program with the SCI. However, after further discussion on the inspection process and the time it could possibly take to review, the Committee determined the standard weight program no longer provided sufficient benefit to justify the cost and time required for certification. Therefore, the alternative was rejected.

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 proposed action. Should any changes become necessary, they would be submitted to OMB for approval.

This proposed rule would not impose any additional reporting or recordkeeping requirements on either small or large Florida tomato 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.

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.

USDA has not identified any relevant Federal rules that duplicate, overlap or conflict with this proposed rule.

The Committee's meetings were widely publicized throughout the Florida tomato industry, and all interested persons were invited to attend the meeting and participate in Committee deliberations on all issues. Like all Committee meetings, the August 24 and September 6, 2018, meetings were public meetings, and all entities, both large and small, were able to express their views on this issue. Interested persons are invited to submit comments on this

proposed rule, including the regulatory and information collection impacts of this proposed 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/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.

A 30-day comment period is provided to allow interested persons to respond to this proposal. All written comments timely received will be considered before a final determination is made on this matter.

List of Subjects in 7 CFR Part 966

Marketing agreements, Reporting and recordkeeping requirements, Tomatoes.

For the reasons set forth in the preamble, 7 CFR part 966 is proposed to be amended as follows:

PART 966 - TOMATOES GROWN IN FLORIDA

1. The authority citation for 7 CFR part 966 continues to read as follows:

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

2. Amend § 966.323 by revising paragraphs (a) (3) (i) and the last two sentences of paragraph (g) to read as follows:

§ 966.323 Handling Regulations.

* * * * *

(a) * * *

(3) * * *

(i) All tomatoes packed by a registered handler shall be packed in containers of 10, 20, and 25 pounds designated net weights. The net weight of the contents shall not be less than the designated net weight and shall not exceed the designated net weight by more than two pounds.

* * * * *

(g) * * * U.S. tomato standards means the revised United States Standards for Fresh Tomatoes (§§51.1855 through 51.1877) effective October 1, 1991, as amended, or variations thereof specified in this section, Provided that 51.1863 shall not apply to tomatoes covered by this part. Other terms in this section shall have the same meaning as

when used in Marketing Agreement No. 125, as amended, and this part, and the U.S. tomato standards.

Dated: April 11, 2019

Bruce Summers,

Administrator,

Agricultural Marketing Service.

BILLING CODE 3410-02 P

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