



DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 966

[Doc. No.: **AMS-SC-19-0068; SC19-966-3**]

Tomatoes Grown in Florida; Amendments to the Marketing Order No. 966

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This final rule amends Marketing Order No. 966, which regulates the handling of Florida Tomatoes. The amendments will change the Florida Tomato Committee's (Committee) size, length of the terms of office, and quorum requirements.

DATES: This rule is effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Geronimo Quinones, Marketing Specialist, Rulemaking Services Branch, 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: Geronimo.Quinones@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 Email: Richard.Lower@usda.gov.

SUPPLEMENTARY INFORMATION: This action, pursuant to 5 U.S.C. 553, finalizes amendments to regulations issued to carry out a marketing order as defined in 7 CFR 900.2(j). This rule is issued under Marketing 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 tomato producers operating within the area of production. The applicable rules of practice and procedure governing the formulation of Marketing Agreements and Orders (7 CFR part 900) authorize amendment of the Order through this informal rulemaking action.

The Department of Agriculture (USDA) is issuing this 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 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 rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is not intended to have retroactive effect. This rule shall not be deemed to preclude, preempt, or supersede any State program covering tomatoes grown in Florida.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 8c(15)(A) of the Act (7 U.S.C. 608 (15)(A)), 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 no later than 20 days after the date of entry of the ruling.

Section 1504 of the Food, Conservation, and Energy Act of 2008 (2008 Farm Bill) (Pub. L. 110-246) amended section 8c(17) of the Act, which in turn required the addition of supplemental rules of practice to 7 CFR part 900 (73 FR 49307; August 21, 2008). The amendment of section 8c(17) of the Act and the supplemental rules of practice authorize the use of informal rulemaking (5 U.S.C. 553) to amend Federal fruit, vegetable, and nut marketing agreements and orders. USDA may use informal rulemaking to amend marketing orders depending upon the nature and complexity of the proposed amendments, the potential regulatory and economic impacts on affected entities, and any other relevant matters.

The Agricultural Marketing Service (USDA-AMS) considered the nature and complexity of the proposed amendments, the potential regulatory and economic impacts on affected entities, and other relevant matters, and determined that amending the Order as proposed by the Committee could appropriately be accomplished through informal rulemaking.

The Committee unanimously recommended the amendments following deliberations at two public meetings held on November 1, 2018, and February 27, 2019. This final rule will amend the Order by changing the Committee's size, the length of term of office, and quorum requirements. A proposed rule and referendum order was issued on February 14, 2020, and published in the Federal Register on February 21, 2020 (85 FR 10096). That document also directed that a referendum among Florida tomato growers be conducted May 11, 2020, through June 1, 2020, to determine whether they favored the proposals. To become effective, the amendments had to be approved by either two-thirds of the growers voting in the referendum or by those representing at least two-thirds of the volume of tomatoes produced by those voting in the referendum.

The results of the referendum show that 78 percent of the eligible producers who voted and 91 percent of the volume voted favored amendment number 1. Also, 89 percent of the eligible producers who voted and 98 percent of the volume voted favored amendments number 2 and 3. The producer vote met the requirement of being favored by two-thirds of the producers voting, or by two-thirds of the volume voted in the referendum for all three amendments. Consequently, all three amendments passed and will change

the Committee's size, the length of term of office, and quorum requirements.

Final Regulatory Flexibility Analysis

Pursuant to the requirements set forth in the Regulatory Flexibility Act (RFA) (5 U.S.C. 601-612), 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 so 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.

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 \$1,000,000, and small agricultural service firms are defined as those whose annual receipts are less than \$30,000,000 (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 less than \$30,000,000 (\$12.56 times 25.9 million containers equals \$325,304,000 divided by 37 handlers equals \$8,792,000 per handler).

With 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 \$1,000,000 (\$6.00 times 25.9 million containers equals \$155,400,000 divided by 75 producers equals \$2,072,000 per producer). Thus, the majority of producers of Florida tomatoes may be classified as large entities.

The Committee unanimously recommended the proposed amendments at public meetings on November 1, 2018, and February 27, 2019.

Since 1995, the number of producers and handlers operating in the industry has decreased, which makes it difficult to find enough members to fill positions on the Committee. Decreasing the Committee's size will make it more reflective of today's industry. No economic impact is

expected from these amendments because they will not establish any new regulatory requirements on handlers, nor will they have any assessment or funding implications. There will be no change in financial costs, reporting, or recordkeeping requirements because of this action.

Alternatives to this proposal, including making no changes at this time, were considered by the Committee. Due to changes in the industry, AMS believes the proposals are justified and necessary to ensure the Committee's ability to locally administer the program. Reducing the size of the Committee will enable it to satisfy membership and quorum requirements fully, thereby ensuring a more efficient and orderly flow of business.

Paperwork Reduction Act

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 in those requirements are necessary because of this action. Should any changes become necessary, they would be submitted to OMB for approval.

This action will 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 action.

The Committee's meetings were widely publicized throughout the Florida tomato production area. All interested persons were invited to attend the meetings and encouraged to participate in Committee deliberations on all issues. Like all Committee meetings, the November 1, 2018, and February 27, 2019, meetings were public, and all entities, both large and small, were encouraged to express their views on the proposals.

A proposed rule concerning this action was published in the Federal Register on October 1, 2019 (84 FR 52042). Copies of the rule were mailed or sent via facsimile to all Committee members and Florida tomato handlers. The proposed rule was made available through the Internet by USDA and the Office of the Federal Register. A 60-day

comment period ending December 2, 2019, was provided to allow interested persons to respond to the proposal. No comments were received, so no changes were made to the proposed amendments.

A proposed rule and referendum order was then issued on February 14, 2020, and published in the Federal Register on February 21, 2020 (85 FR 10096). That document directed that a referendum among Florida tomato growers be conducted during the period of May 11, 2020, through June 1, 2020, to determine whether they favored the proposed amendments to the Order. To become effective, the amendments had to be approved by at least two-thirds of the growers voting, or two-thirds of the volume of Florida tomatoes represented by voters in the referendum. The results show that 78 percent of the eligible producers who voted and 91 percent of the volume voted favored amendment number 1. Also, 89 percent of the eligible producers who voted and 98 percent of the volume voted favored amendments number 2 and 3.

The producer vote met the requirement of being favored by two-thirds of the producers voting, or by two-thirds of the volume voted in the referendum for all three amendments. All three amendments passed.

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.

**Order Amending the Order Regulating the Handling of
Tomatoes Grown in Florida¹
Findings and Determinations**

(a) Findings and Determinations Upon the Basis of the Rulemaking Record.

The findings hereinafter set forth are supplementary to the findings and determinations which were previously made in connection with the issuance of the Order; and all said previous findings and determinations are hereby ratified and affirmed, except insofar as such findings and determinations may be in conflict with the findings and determinations set forth herein.

1. The Order, as amended, and as hereby further amended, and all the terms and conditions thereof, will tend to effectuate the declared policy of the Act;

¹ This order shall not become effective unless and until the requirements of § 900.14 of the rules of practice and procedure governing proceedings to formulate marketing agreements and marketing orders have been met.

2. The Order, as amended, and as hereby further amended, regulates the handling of tomatoes grown in Florida in the same manner as, and is applicable only to, persons in the respective classes of commercial and industrial activity specified in the Order;

3. The Order, as amended, and as hereby further amended, is limited in application to the smallest regional production area which is practicable, consistent with carrying out the declared policy of the Act, and the issuance of several orders applicable to subdivisions of the production area would not effectively carry out the declared policy of the Act;

4. The Order, as amended, and as hereby further amended, prescribes, insofar as practicable, such different terms applicable to different parts of the production area as are necessary to give due recognition to the differences in the production and marketing of onions produced in the production area; and

5. All handling of tomatoes produced or packed in the production area as defined in the Order is in the current of interstate or foreign commerce or directly burdens, obstructs, or affects such commerce.

(b) *Determinations.*

It is hereby determined that:

1. The issuance of this amendatory Order, amending the aforesaid Order, is favored or approved by producers representing at least two-thirds of the volume of tomatoes produced by those voting in a referendum on the question of approval and who, during the period of October 1, 2018, through September 31, 2019, have been engaged within the production area in the production of such tomatoes.

2. The issuance of this amendatory Order advances the interests of growers of tomatoes in the production area pursuant to the declared policy of the Act.

Order Relative to Handling

It is therefore ordered, that on and after the effective date hereof, all handling of tomatoes grown in Florida shall be in conformity to, and in compliance with, the terms and conditions of the said Order as hereby proposed to be amended as follows:

The provisions amending the Order contained in the proposed rule issued by the Administrator on September 23, 2019, and published in the *Federal Register* (84 FR 52042) on October 1, 2019, will be and are the terms and provisions of this order amending the Order and are set forth in full herein.

List of Subjects in 7 CFR Part 966

Tomatoes, Marketing agreements, Reporting and recordkeeping requirements.

Bruce Summers,
Administrator,
Agricultural Marketing Service.

For the reasons set forth in the preamble, 7 CFR part 966 is 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. Revise § 966.22(a) to read as follows:

§ 966.22 Establishment and membership.

(a) The Florida Tomato Committee, consisting of 10 producer members, is hereby established. For each member of the committee there shall be an alternate who shall have the same qualifications as the member.

* * * * *

3. Revise § 966.23(a) to read as follows:

§ 966.23 Term of office.

(a) The term of office of committee members, and their respective alternates, shall be for 2 years and shall begin as of August 1 and end as of July 31.

* * * * *

4. Revise § 966.32(a) to read as follows:

§ 966.32 Procedure.

(a) Six members of the committee shall be necessary to constitute a quorum and the same number of concurring votes shall be required to pass any motion or approve any committee action.

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