

having annual receipts less than \$750,000, and small agricultural service firms are defined as those whose annual receipts are less than \$6,500,000 (13 CFR 121.201).

Based on industry and Committee data, the average annual price for fresh Florida tomatoes during the 2004–05 season was approximately \$12.50 per 25-pound container, and fresh shipments totaled 53,025,915 25-pound cartons of tomatoes. Committee data indicates approximately 27 percent of the handlers handle 95 percent of the total volume shipped outside the regulated area. Based on the average price, about 75 percent of handlers could be considered small businesses under SBA's definition. In addition, based on production, grower prices as reported by the National Agricultural Statistics Service, and the total number of Florida tomato growers, the average annual grower revenue is below \$750,000. Thus, the majority of handlers and producers of Florida tomatoes may be classified as small entities.

This rule would provide a partial exemption to the minimum grade requirements for tomatoes grown in Florida. Under the order, Florida tomatoes must meet at least a U.S. No. 2 grade before they can be shipped and sold outside the regulated area. This rule would exempt UglyRipe tomatoes from the shape requirements specified under the Standards for a U.S. No. 2 grade. This change would increase the volume of UglyRipe tomatoes that would meet the order requirements, and would help increase shipments and availability of these tomatoes for consumers. This rule would amend the provisions of § 966.323. Authority for this action is provided in § 966.52 of the order.

This change would represent a small increase in costs for producers and handlers of UglyRipe tomatoes, primarily from costs associated with developing and maintaining the IP program. However, the majority of facilities associated with UglyRipe tomatoes were involved with the IP program prior to this proposed rule and have already received a successful audit. Therefore, the additional costs associated with this action would be those costs related to maintaining and complying with the IP program. It is anticipated that these costs would be minimal.

In addition, this rule would make additional volumes of UglyRipe tomatoes available for shipment. This should result in increased sales of UglyRipe tomatoes. Consequently, the benefits of this action should more than offset the associated costs.

One alternative to this action that was considered was to not provide an exemption from shape requirements for UglyRipe tomatoes. However, providing the exemption would increase the volume of UglyRipe tomatoes that would meet the order requirements, and would help increase shipments and availability of these tomatoes. Therefore, this alternative was rejected.

This rule would not impose any additional reporting or recordkeeping requirements beyond the IP program on either small or large 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 compliance with the Government Paperwork Elimination Act (GPEA), which requires Government agencies in general to provide the public the option of submitting information or transacting business electronically to the maximum extent possible.

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

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 proposed partial exemption to the minimum grade requirements prescribed under the order. A 60-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 adding a new paragraph (d)(5) to read as follows:

#### § 966.323 Handling regulation.

\* \* \* \* \*

(d) \* \* \*

(5) *For UglyRipe™ tomatoes.* UglyRipe™ tomatoes must meet all the requirements of this section: *Provided*, That UglyRipe™ tomatoes shall be graded and at least meet the requirements specified for U.S. No. 2 under the U.S. Standards for Grades of Fresh Tomatoes, except they are exempt from the requirements that they be reasonably well formed and not more than slightly rough, and *Provided*, Further that the UglyRipe™ tomatoes meet the requirements of the Identity Preservation program, Fresh Products Branch, Fruit and Vegetable Programs, AMS, USDA.

\* \* \* \* \*

Dated: June 26, 2006.

**Lloyd C. Day,**

*Administrator, Agricultural Marketing Service.*

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## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

#### 7 CFR Part 980

[Docket No. FV06–980–1 PR]

#### **Vegetables, Import Regulations; Partial Exemption to the Minimum Grade Requirements for Fresh Tomatoes**

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

**ACTION:** Proposed rule.

**SUMMARY:** This rule invites comments on a proposed partial exemption to the minimum grade requirements under the tomato import regulation. The import regulation is authorized under section 8e of the Agricultural Marketing Agreement Act of 1937 (Act). Section 8e requires imported tomatoes to meet the same or comparable grade and size requirements as those in effect under Federal Marketing Order No. 966 (order). The order regulates the handling of tomatoes grown in Florida. A separate proposed rule to amend the rules and regulations under the order to exempt UglyRipe (UglyRipe) tomatoes from the shape requirements associated with the U.S. No. 2 grade is being issued by Department of Agriculture (USDA). This rule would provide the same partial exemption under the import regulation so it would conform to the regulations for Florida tomatoes under the order.

**DATES:** Comments must be received by August 28, 2006.

**ADDRESSES:** Interested persons are invited to submit written comments concerning this proposal. Comments must be sent to the Docket Clerk, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., STOP 0237, Washington, DC 20250-0237; Fax: (202) 720-8938; E-mail: [moab.docketclerk@usda.gov](mailto:moab.docketclerk@usda.gov); or Internet: <http://www.regulations.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:** William Pimental or Christian Nissen, Southeast Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA; telephone: (863) 324-3375, Fax: (863) 325-8793; e-mail: [william.pimental@usda.gov](mailto:william.pimental@usda.gov) or [christian.nissen@usda.gov](mailto:christian.nissen@usda.gov).

Small businesses may request information on complying with this regulation by contacting Jay Guerber, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., STOP 0237, Washington, DC 20250-0237; telephone: (202) 720-2491, Fax: (202) 720-8938, or E-mail: [Jay.Guerber@usda.gov](mailto:Jay.Guerber@usda.gov).

**SUPPLEMENTARY INFORMATION:** This proposed rule is issued under section 8e of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), hereinafter referred to as the "Act," which provides that whenever certain specified commodities, including tomatoes, 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 commodity.

USDA 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.

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 proposed rule would provide a partial exemption to the minimum grade requirements for UglyRipe tomatoes imported into the United States. The import requirements for tomatoes specify that tomatoes must meet at least a U.S. No. 2 grade. A proposed rule to amend the rules and regulations under the order to exempt UglyRipe tomatoes from the shape requirements associated with the U.S. No. 2 grade is being issued separately by USDA. This rule would provide the same partial exemption under the import regulation so it would conform to the regulations for Florida tomatoes under the order.

The order provides the authority for the establishment of grade requirements for Florida tomatoes. Section 966.323 of the order specifies, in part, the minimum grade requirements for tomatoes grown in Florida. The current minimum grade requirement for Florida tomatoes is a U.S. No. 2. The specifics of this grade requirement are listed under the U.S. Standards for Grades of Fresh Tomatoes (7 CFR 51.1855-51.1877).

The U.S. Standards for Grades of Fresh Tomatoes (Standards) specify the criteria tomatoes must meet to grade a U.S. No. 2, including that they must be reasonably well formed, and not more than slightly rough. These two factors relate specifically to the shape of the tomato. The definitions section of the Standards defines reasonably well formed as not decidedly kidney shaped, lopsided, elongated, angular, or otherwise decidedly deformed. The term slightly rough means that the tomato is not decidedly ridged or grooved.

UglyRipe tomatoes are a trademarked tomato variety bred to look and taste like an heirloom-type tomato. One of the characteristics of this variety is its appearance. UglyRipe tomatoes are often shaped differently from other round tomatoes. Depending on the time of year and the weather, UglyRipe tomatoes are concave on the stem end with deep, ridged shoulders. They can also appear kidney shaped and lopsided. Because of this variance in shape and appearance, UglyRipe tomatoes can have difficulty meeting the shape requirements of the U.S. No. 2 grade.

This rule would provide UglyRipe tomatoes with a partial exemption from the grade requirements under the import regulation. UglyRipe tomatoes would only be exempt from the shape

requirements of the grade and would still be required to meet all other aspects of the U.S. No. 2 grade. The UglyRipe tomato also continues to be required to meet all other requirements under the import regulation, such as size and inspection.

Prior to the 1998-99 season, the Florida Tomato Committee (Committee), which locally administers the order, recommended that the minimum grade be increased from a U.S. No. 3 to a U.S. No. 2. A conforming change was also made to the import regulation. Some Committee members have stated that a large part of the volume of the standard commercial varieties of tomatoes which fail to make the grade are rejected because of their shape and appearance. Consequently, there was some industry concern that providing an exemption for the UglyRipe tomato could result in the shipment of U.S. No. 3 grade tomatoes of other varieties, contrary to the objectives of the exemption and the order.

To address this concern, the producers of UglyRipe tomatoes pursued entry into USDA's Identity Preservation (IP) program. This program was developed by the Agricultural Marketing Service to assist companies in marketing products having unique traits. The program provides independent, third-party verification of the segregation of a company's unique product at every stage, from seed, production and processing, to distribution. The UglyRipe tomato was granted positive program status in early 2006.

This partial exemption would only extend to UglyRipe tomatoes covered under the IP program. As such, this should help ensure that only UglyRipe tomatoes would be shipped under the proposed exemption. In addition, this exemption would be contingent upon imported UglyRipe tomatoes continuing to meet the specific requirements related to imports established under the IP program.

This proposed rule would exempt imported UglyRipe tomatoes from the shape requirements associated with the U.S. No. 2 grade. This change would increase the volume of UglyRipe tomatoes that would meet order requirements, and would help increase shipments and availability of these tomatoes.

This rule would bring the tomatoes import regulation into conformity with the proposed changes to the domestic order making the import requirements correspond to the domestic requirements under the order by amending 7 CFR 980.212 of the import requirements.

### Initial 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, 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 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. Import regulations issued under the Act are based on those established under Federal marketing orders.

There are approximately 225 importers of tomatoes subject to the regulation. Small agricultural service firms, which include tomato importers, are defined by the Small Business Administration (SBA) as those having annual receipts of less than \$6,500,000 (13 CFR 121.201). Based on information from the Foreign Agricultural Service, USDA, the dollar value of imported tomatoes ranged from around \$1.05 billion in 2003 to \$1.08 billion in 2005. Using these numbers, the majority of tomatoes importers may be classified as small entities.

Mexico, Canada, and the Netherlands are the major tomato producing countries exporting tomatoes to the United States. In 2005, shipments of tomatoes imported into the United States totaled 951,787 metric tons. Mexico accounted for 801,408 metric tons, 141,642 metric tons were imported from Canada, and 6,249 metric tons arrived from the Netherlands.

This proposed rule would provide a partial exemption to the minimum grade requirements for UglyRipe tomatoes imported into the United States. The import requirements for tomatoes specify that tomatoes must meet at least a U.S. No. 2 grade before they can be shipped and sold into the fresh market. A proposed rule which would amend the rules and regulations under the order to exempt UglyRipe tomatoes from the shape requirements associated with the U.S. No. 2 grade is being issued by USDA. Accordingly, under section 8e of the Act, imports of tomatoes would have to meet the same or comparable grade, size, quality, and maturity requirements as the domestic product. This rule would provide the same partial exemption for UglyRipe tomatoes under

the import regulation so it would conform to the domestic regulation.

This change would represent a small increase in costs for importers of UglyRipe tomatoes, primarily from costs associated with developing and maintaining an IP program. However, the majority of importers associated with UglyRipe tomatoes were involved with the IP program prior to this proposed rule and have already received a successful audit. Therefore, the additional costs associated with this action would be those costs related to maintaining and complying with the IP program. It is anticipated that these costs would be minimal.

In addition, this rule would make additional volumes of UglyRipe tomatoes available for shipment. This should result in increased sales of UglyRipe tomatoes. Consequently, the benefits of this action should more than offset the associated costs.

Section 8e of the Act 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. Since a proposed rule is being initiated that would provide a partial exemption to the minimum grade requirements under the domestic handling regulations, a corresponding change to the import regulations would also need to be accomplished.

This rule would impose no additional reporting or recordkeeping requirements beyond the IP program on either small or large tomato importers. Reports and forms required under the import regulations for tomatoes are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies.

AMS is committed to compliance with the Government Paperwork Elimination Act, which requires Government agencies in general to provide the public the option of submitting information or transacting business electronically to the maximum extent possible.

Additionally, except for applicable domestic regulations, USDA has not identified any relevant Federal rules that duplicate, overlap, or conflict with this rule. Finally, all 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.

In accordance with section 8e of the Act, the United States Trade Representative has concurred with the issuance of this proposed rule.

This rule invites comments on a proposed partial exemption to the minimum grade requirements for imported tomatoes. A 60-day comment period is provided to allow interested persons to respond to this rule. All comments received will be considered prior to finalization of this rule.

### List of Subjects in 7 CFR Part 980

Food grades and standards, Imports, Marketing agreements, Onions, Potatoes, Tomatoes.

For the reasons set forth in the preamble, 7 CFR part 980 is proposed to be amended as follows:

### PART 980—VEGETABLES; IMPORT REGULATIONS

1. The authority citation for 7 CFR part 980 continues to read as follows:

**Authority:** 7 U.S.C. 601–674.

2. Amend § 980.212, by adding a sentence at the end of paragraph (b)(1) to read as follows:

#### § 980.212 Import regulation; tomatoes.

\* \* \* \* \*

(b) \* \* \*

(1) \* \* \* *Provided*, That UglyRipe™ tomatoes shall be graded and at least meet the requirements specified for U.S. No. 2 under the U.S. Standards for Grades of Fresh Tomatoes, except they are exempt from the requirements that they be reasonably well formed and not more than slightly rough, and *Provided*, Further that the UglyRipe™ tomatoes meet the requirements of the Identity Preservation program, Fresh Products Branch, Fruit and Vegetable Programs, AMS, USDA.

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Dated: June 26, 2006.

**Lloyd C. Day,**

*Administrator, Agricultural Marketing Service.*

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