

(c) In order to provide funds to carry out the functions of the commodity committee prior to commencement of shipments in any season, shippers may make advance payments of assessments, which advance payments shall be credited to such shippers and the assessments of such shippers shall be adjusted so that such assessments are based upon the quantity of fruit shipped by such shippers during such season. Any shipper who ships fruit for the account of a grower may deduct, from the account of sale covering such shipment or shipments, the amount of assessments levied on said fruit shipped for the account of such grower. The Control Committee may also borrow money for such purposes for peaches.

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## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

#### 7 CFR Parts 945

[Docket No. FV06-945-1 PR]

#### Irish Potatoes Grown in Certain Designated Counties in Idaho, and Malheur County, Oregon; Proposed Modification of Handling Regulation

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

**ACTION:** Proposed rule.

**SUMMARY:** This proposed rule invites comments on removing the exception for yellow fleshed Finnish-type potatoes from the minimum quantity exemption paragraph of the handling regulations issued under the Idaho-Eastern Oregon potato marketing order. The marketing order regulates the handling of Irish potatoes grown in certain designated counties in Idaho, and Malheur County, Oregon, and is administered locally by the Idaho-Eastern Oregon Potato Committee (Committee). A minimum quantity shipment exemption of up to 200 hundredweight is provided for yellow fleshed Finnish-type potatoes. Because yellow fleshed Finnish-type potatoes are no longer produced in the production area covered under the marketing order, the exemption is no longer necessary.

**DATES:** Comments must be received by April 24, 2006.

**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, 1400

Independence Avenue SW., STOP 0237, Washington, DC 20250-0237; Fax: (202) 720-8938; E-mail:

*moab.docketclerk@usda.gov*; or Internet: <http://www.regulations.gov>. Comments should reference the docket number and the date and page number of this issue of the **Federal Register** and will be 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:**

Barry Broadbent, Marketing Specialist, Northwest Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1220 SW. Third Avenue, Suite 385, Portland, OR 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, 1400 Independence Avenue SW., STOP 0237, Washington, DC 20250-0237; 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, 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*.

**SUPPLEMENTARY INFORMATION:** This proposed rule is issued under Marketing Agreement No. 98 and Marketing Order No. 945, both as amended (7 CFR part 945), regulating the handling of Irish potatoes grown in certain designated counties in Idaho, and Malheur County, Oregon, 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 (USDA) is issuing this rule in conformance with Executive Order 12866.

This proposed rule has been reviewed under Executive Order 12988, Civil Justice Reform. This action is not intended to have retroactive effect. This proposed rule would 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 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 removing the exception for yellow fleshed Finnish-type potatoes from the minimum quantity exemption paragraph of the handling regulations issued under the order. The minimum quantity exemption in the regulation allows handlers to ship up to five hundredweight of potatoes without regard to the inspection and assessment requirements of the order. Included in the minimum quantity exemption is an exception for yellow fleshed Finnish-type potatoes which allows up to 200 hundredweight to be shipped without regard to inspection or assessment requirements. The Committee unanimously recommended the removal of the exception at its meeting on November 2, 2005.

Section 945.42 of the order provides the authority to assess first handlers of potatoes to provide funds to cover the expenses of the Committee. Sections 945.51 and 945.52 provide the authority for the establishment and modification of regulations applicable to the handling of potatoes, including required inspections. Section 945.54 provides the authority to establish exemptions from the regulations based on shipment size.

Section 945.341 establishes minimum quality, maturity, pack, and inspection requirements for potatoes handled subject to the order. Paragraphs (e), (f), and (g) of § 945.341 delineate the circumstances in which the shipment of potatoes subject to the order may be granted an exemption from the regulation. Paragraph (g) of that section specifies that shipments of potatoes, except yellow fleshed Finnish-type, weighing five hundredweight or less may be shipped without regard to the inspection or assessment requirements of the order. An exception included in that paragraph increases the minimum quantity exemption threshold to 200 hundredweight for yellow fleshed Finnish-type potatoes.

At its meeting on November 2, 2005, the Committee unanimously recommended the removal of the special

exception for yellow fleshed Finnish-type from the handling regulations. In its deliberations, the Committee commented that yellow fleshed Finnish-type potatoes are no longer produced within the production area and that the exception is no longer needed.

The exception to the minimum quantity exemption for yellow fleshed Finnish-type potatoes was added to the regulation in 1987, specifically to promote the production and marketing of this new type potato by relieving shipments of less than 200 hundredweight from inspection and assessment requirements. Nonetheless, the production of yellow fleshed Finnish-type potatoes declined over time and is currently nonexistent. The Committee noted, however, that the production of other colorful varieties (some with yellow flesh but not Finnish-type) has increased and that the exception, if retained, may cause confusion to industry participants. Since the niche market for which the exception was intended no longer exists, and there is the potential for misunderstanding within the industry, the Committee believes the exception should be removed from the regulation.

#### Initial Regulatory Flexibility Analysis

Pursuant to the 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.

There are approximately 48 handlers of Idaho-Eastern Oregon potatoes who are subject to regulation under the order and about 1,000 potato producers in the regulated area. Small agricultural service firms, which include potato handlers, are defined by the Small Business Administration (SBA) (13 CFR 121.201) as those having annual receipts of less than \$6,000,000, and small agricultural producers are defined as those whose annual receipts are less than \$750,000.

Based on a three-year average fresh potato production of 33,623,000 hundredweight as calculated from Committee records, a three-year average

of producer prices of \$4.64 per hundredweight reported by the National Agricultural Statistics Service, and 1,000 Idaho-Eastern Oregon potato producers, the average annual producer revenue is approximately \$156,000. It can be concluded, therefore, that a majority of these producers would be classified as small entities.

In addition, based on Committee records and 2004–05 f.o.b. shipping point prices ranging from about \$4.00 to \$28.00 per hundredweight reported by USDA's Market News Service, most of the Idaho-Eastern Oregon potato handlers do not ship over \$6,000,000 worth of potatoes. In view of the foregoing, it can be concluded that a majority of the handlers would be classified as small entities as defined by the SBA.

This rule would remove the exception for yellow fleshed Finnish-type potatoes from the minimum quantity exemption in the order. The exception was added to the regulation in 1987 to allow less restrictive requirements for yellow fleshed Finnish-type potatoes. The intent was to facilitate the production and marketing of this new experimental type potato. In the years that have followed, though, the production and marketing of that type potato has shifted to other potato producing regions. Consequently, yellow fleshed Finnish-type potatoes are currently not produced within the production area covered by the order and the exception to the minimum quantity exemption in handling regulations is no longer warranted. Authority for the establishment and modification of a minimum quantity exemption is provided in § 945.54 of the order.

At the November 2, 2005, meeting, the Committee discussed the impact of this change on producers and handlers. Since there currently is not any production of the type of potato covered by the exception, producers and handlers should not be adversely impacted. In addition, there should be no increased costs associated with this modification of the handling regulations.

As an alternative to the proposal, the Committee discussed leaving the handling regulation as currently issued. The Committee rejected this idea because it would have left outdated language in the rules and regulations. They also felt that the exception, if unchanged, could be misinterpreted by the industry. No other alternatives were discussed.

This rule would not impose any additional reporting or recordkeeping requirements on either small or large potato handlers or importers. As with

all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sectors. The USDA has not identified any relevant Federal rules that duplicate, overlap, or conflict with this proposed rule.

Further, the Committee's meeting was widely publicized throughout the potato industry, and all interested persons were invited to attend the meeting and participate in Committee deliberations. Like all Committee meetings, the November 2, 2005, 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 the following Web site: <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.

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 945

Marketing agreements, Potatoes, Reporting and recordkeeping requirements.

For the reasons set forth above, 7 CFR part 945 is proposed to be amended as follows:

#### **PART 945—IRISH POTATOES GROWN IN CERTAIN DESIGNATED COUNTIES IN IDAHO, AND MALHEUR COUNTY, OREGON**

1. The authority citation for 7 CFR part 945 continues to read as follows:

**Authority:** 7 U.S.C. 601–674.

2. In § 945.341, paragraph (g) is revised to read as follows:

#### **§ 945.341 Handling regulation.**

\* \* \* \* \*

(g) *Minimum quantity exemption.* Each handler may ship up to, but not to exceed, five hundredweight of potatoes any day without regard to the inspection and assessment requirements of this part, but this exception shall not apply to any shipment that exceeds five hundredweight of potatoes.

\* \* \* \* \*

Dated: February 15, 2006.

Lloyd C. Day,

Administrator, Agricultural Marketing Service.

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## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

#### 7 CFR Part 1030

[Docket No. AO-361-A39; DA-04-03B]

#### Milk in the Upper Midwest Marketing Area; Recommended Decision and Opportunity To File Written Exceptions on Proposed Amendments to Tentative Marketing Agreement and Order

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

**ACTION:** Proposed rule; Recommended Decision.

**SUMMARY:** This decision recommends adoption of proposals that would amend certain features of the Upper Midwest (UMW) Federal milk marketing order. Specifically, this decision recommends adoption of proposals that would deter the de-pooling of milk and increase the order's maximum administrative assessment rate.

**DATES:** Comments must be submitted on or before April 24, 2006.

**ADDRESSES:** Comments (six copies) should be filed with the Hearing Clerk, United States Department of Agriculture, STOP 9200—Room 1031, 1400 Independence Avenue, SW., Washington, DC 20250-9200. Comments may also be submitted at the Federal e-Rulemaking portal: <http://www.regulations.gov> or by e-mail: [amsdairycomments@usda.gov](mailto:amsdairycomments@usda.gov).

Reference should be made to the title of action and docket number.

**FOR FURTHER INFORMATION CONTACT:**

Gino Tosi, Associate Deputy Administrator, Order Formulation and Enforcement Branch, USDA/AMS/Dairy Programs, STOP 0231—Room 2968, 1400 Independence Avenue, SW., Washington, DC 20250-0231, (202) 690-1366, e-mail [gino.tosi@usda.gov](mailto:gino.tosi@usda.gov).

**SUPPLEMENTARY INFORMATION:** This decision recommends adoption of amendments that would: (1) Establish a limit on the volume of milk a handler may pool during the months of April through February to 125 percent of the volume of milk pooled in the prior month; (2) Establish a limit on the volume of milk a handler may pool during the month of March to 135 percent of the volume of milk pooled in

the prior month; and (3) Allow the market administrator to increase the maximum administrative assessment rate up to 8 cents per hundredweight on all pooled milk if necessary to maintain the required fund reserves.

This administrative action is governed by the provisions of sections 556 and 557 of Title 5 of the United States Code and, therefore, is excluded from the requirements of Executive Order 12866.

The amendments to the rules proposed herein have been reviewed under Executive Order 12988, Civil Justice Reform. They are not intended to have a retroactive effect. If adopted, the proposed amendments would 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 Department 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 Department 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 Department 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.

#### Regulatory Flexibility Act and Paperwork Reduction Act

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 proposed rule will not have a significant economic impact on a substantial number of small entities.

For the purpose of the Regulatory Flexibility Act, a dairy farm is considered a "small business" if it has an annual gross revenue of less than \$750,000, and a dairy products manufacturer is a "small business" if it has fewer than 500 employees. For the purposes of determining which dairy farms are "small businesses," the \$750,000 per year criterion was used to establish a production guideline of

500,000 pounds per month. Although this guideline does not factor in additional monies that may be received by dairy producers, it should be an inclusive standard for most "small" dairy farmers. For purposes of determining a handler's size, if the plant is part of a larger company operating multiple plants that collectively exceed the 500-employee limit, the plant will be considered a large business even if the local plant has fewer than 500 employees.

During August 2004, the month during which the hearing occurred, there were 15,802 dairy producers pooled on and 60 handlers regulated by the UMW order. Approximately 15,608 producers, or 97 percent, were considered small businesses based on the above criteria. Of the 60 handlers regulated by the UMW during August 2004, 49 handlers, or 82 percent, were considered small businesses.

The recommended amendments for adoption of the pooling standards serve to revise established criteria that determine those producers, producer milk, and plants that have a reasonable association with and consistently serve the fluid needs of the UMW marketing area. Criteria for pooling milk are established on the basis of performance standards that are considered adequate to meet the Class I fluid needs of the market and, by doing so, determine those producers who are eligible to share in the revenue that arises from the classified pricing of milk.

Criteria for pooling are established without regard to the size of any dairy industry organization or entity. Administrative assessments are similarly charged without regard to the size of any dairy industry organization or entity. Therefore, the proposed amendments will not have a significant economic impact on a substantial number of small entities.

A review of reporting requirements was completed under the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35). It was determined that these proposed amendments would have no impact on reporting, recordkeeping, or other compliance requirements because they would remain identical to the current requirements. No new forms are proposed and no additional reporting requirements would be necessary.

This recommended decision does not require additional information collection that requires clearance by the Office of Management and Budget (OMB) beyond currently approved information collection. The primary sources of data used to complete the approved forms are routinely used in