

Research Subcommittee, and Education and Promotion Subcommittee.

Alternative expenditure levels were discussed by these groups, based upon the relative value of various research projects to the tomato industry. The assessment rate of \$0.035 per 25-pound container of assessable tomatoes was determined by examining the anticipated expenses and expected shipments and considering available reserves. The assessment rate should generate \$1,750,000 in income. Considering income from interest and other sources of \$190,000, with assessments, total income should be approximately \$253,700 below the anticipated expenses, which the Committee determined to be acceptable.

A review of historical information and preliminary information pertaining to the upcoming season indicates that the grower price for the 2006–07 season could range between \$8.27 and \$12.95 per 25-pound container or equivalent of tomatoes. Therefore, the estimated assessment revenue for the 2006–07 fiscal period as a percentage of total grower revenue could range between 0.3 and 0.4 percent.

This action increases the assessment obligation imposed on handlers. While assessments impose some additional costs on handlers, the costs are minimal and uniform on all handlers. Some of the additional costs may be passed on to producers. However, these costs are offset by the benefits derived by the operation of the marketing order. In addition, the Committee's meeting was 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 22, 2006, meeting was a public meeting and all entities, both large and small, were able to express views on this issue.

This rule imposes no 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.

The 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 rule.

A proposed rule concerning this action was published in the **Federal Register** on November 16, 2006 (71 FR 66702). Copies of the proposed rule were also mailed or sent via facsimile to all Florida tomato handlers. Finally, the proposal was made available through the Internet by USDA and the Office of the Federal Register. A 15-day comment period ending December 1, 2006, was provided for interested persons to respond to the proposal. No comments were received.

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.

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

Pursuant to 5 U.S.C. 553, it also found and determined that good cause exists for not postponing the effective date of this rule until 30 days after publication in the **Federal Register** because: (1) The 2006–07 fiscal period began on August 1, 2006, and the marketing order requires that the rate of assessment for each fiscal period apply to all assessable Florida tomatoes handled during such fiscal period; (2) the Committee needs to have sufficient funds to pay its expenses which are incurred on a continuous basis; and (3) handlers are aware of this action which was unanimously recommended by the Committee at a public meeting and is similar to other assessment rate actions issued in past fiscal periods. Also, a 15-day comment period was provided for in the proposed rule.

#### 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 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. Section 966.234 is revised to read as follows:

#### **§ 966.234 Assessment rate.**

On and after August 1, 2006, an assessment rate of \$0.035 per 25-pound container or equivalent is established for Florida tomatoes.

Dated: January 11, 2007.

**Lloyd C. Day,**

*Administrator, Agricultural Marketing Service.*

[FR Doc. 07–149 Filed 1–11–07; 4:45 pm]

**BILLING CODE 3410–02–P**

## **DEPARTMENT OF AGRICULTURE**

### **Agricultural Marketing Service**

#### **7 CFR Part 966**

[Docket No. FVO6–966–1 FR]

#### **Tomatoes Grown in Florida; Partial Exemption to the Minimum Grade Requirements**

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

**ACTION:** Final rule.

**SUMMARY:** This rule provides a partial exemption to the minimum grade requirements under the marketing order for tomatoes grown in Florida (order). The Florida Tomato Committee (Committee) locally administers the order. 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 exempts UglyRipe™ (UglyRipe) tomatoes from the shape requirements associated with the U.S. No. 2 grade. This change increases the volume of UglyRipe tomatoes that will meet the order requirements, and will help increase shipments and availability of these tomatoes for consumers.

**EFFECTIVE DATE:** This final rule becomes effective January 18, 2007.

**FOR FURTHER INFORMATION CONTACT:** William Pimental, Marketing Specialist, or Christian Nissen, Regional Manager, Southeast Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA; Telephone: (863) 324–3375, Fax: (863) 325–8793, or 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 final rule is issued under Marketing Agreement No. 125 and Marketing Order No. 966, both as amended (7 CFR part 966), regulating the handling of tomatoes grown in certain designated counties in Florida, hereinafter referred to as the "order." The marketing agreement and order are 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 final 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 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 final rule provides a partial exemption to the minimum grade requirements prescribed under the order. The order's rules and regulations specify that 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 exempts UglyRipe tomatoes from the shape requirements associated with the U.S. No. 2 grade. This change increases the volume of UglyRipe tomatoes that will meet the order requirements, and will help increase shipments and availability of these tomatoes for consumers. In addition, it is anticipated that this change will help promote continued innovation within the industry.

Section 966.52 of the order provides the authority for the establishment of grade and size requirements for Florida tomatoes. Form and shape represent

part of the elements of grade. Section 966.323 of the order's rules and regulations specifies, in part, the minimum grade requirements for Florida tomatoes. 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 elements 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. This rule amends § 966.323 to exempt UglyRipe tomatoes from these shape requirements as specified under the grade for a U.S. No. 2.

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 provides UglyRipe tomatoes with a partial exemption from the grade requirements under the order. UglyRipe tomatoes are only exempt from the shape requirements of the grade and are still required to meet all other aspects of the U.S. No. 2 grade. UglyRipe tomatoes also continue to be required to meet all other requirements under the marketing order, such as size, pack and container, and inspection.

Prior to the 1998–99 season, the Committee recommended that the minimum grade be increased from a U.S. No. 3 to a U.S. No. 2. Committee members agree that increasing the grade requirement has been very beneficial to the industry and in the marketing of Florida tomatoes. Further, 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 UglyRipe tomatoes 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. UglyRipe tomatoes were granted positive program status in early 2006.

This partial exemption only extends to UglyRipe tomatoes covered under the IP program. As such, this should help ensure that only UglyRipe tomatoes are shipped under the exemption. In addition, this exemption is contingent upon UglyRipe tomatoes continuing to meet the requirements of the IP program.

This rule exempts UglyRipe tomatoes from the shape requirements associated with the U.S. No. 2 grade. This change increases the volume of UglyRipe tomatoes that will meet order requirements, and will help increase shipments and availability of these tomatoes. In addition, it is hoped that this change will help promote continued innovation within the industry.

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 this rule provides a partial exemption to the minimum grade requirements under the domestic handling regulations, a corresponding change to the import regulations is also needed. A final rule providing the same partial exemption to the minimum grade requirements under the import regulations will be issued as a separate action.

#### **Final 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 final 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 100 producers of tomatoes in the production area and approximately 70 handlers subject to regulation under the marketing 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 \$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 final rule provides 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 final rule exempts UglyRipe tomatoes from the shape requirements specified under the Standards for a U.S. No. 2 grade. This change increases the volume of UglyRipe tomatoes that will meet the order requirements, and will help increase shipments and availability of these tomatoes for consumers. This final rule amends the provisions of § 966.323. Authority for this action is provided in § 966.52 of the order.

This change represents 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 rule and have already received a successful audit. Therefore, the additional costs associated with this action are those costs related to maintaining and complying with the IP program. It is anticipated that these costs will be minimal and will be offset by the increased sales of UglyRipe tomatoes.

Finally, UglyRipe tomatoes are still required to meet the majority of the requirements for a U.S. No. 2 grade, and are usually priced higher than U.S. No. 2 graded standard commercial variety tomatoes. Therefore, this action should not have a price depressing effect on standard varieties, and because of the difference in price, this exemption should not have a significant impact on the market share for standard commercial varieties of Florida tomatoes.

One alternative to this action that was considered was to not provide an exemption from shape requirements for UglyRipe tomatoes. This option would not have allowed for an increase in the volume of UglyRipe tomatoes that would meet the order requirements, and would not help increase shipment and availability of these tomatoes. Therefore, this alternative was rejected.

This final rule provides a partial exemption to the minimum grade requirements under the Florida tomato marketing order. Accordingly, this rule will not impose any additional reporting or recordkeeping requirements 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.

The 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.

As noted in the initial regulatory flexibility analysis, USDA has not identified any relevant Federal rules that duplicate, overlap or conflict with this final rule.

A proposed rule concerning this action was published in the **Federal Register** on June 29, 2006 (71 FR 37014). Copies of the rule were mailed or sent via facsimile to all Committee members and tomato handlers. Finally, the rule was made available through the Internet by USDA and the Office of the Federal Register. A 60-day comment period ending August 28, 2006, was provided to allow interested persons to respond to the proposal.

Eighty-eight comments were received during the comment period in response to the proposal. Of the comments received, 79 were in support of the regulation and 9 were in opposition. One comment was received after the close of the comment period.

The comments in support of the proposal expressed appreciation for the taste of UglyRipe tomatoes, and supported a greater market availability for UglyRipe tomatoes. Several commenters stated that UglyRipe tomatoes compared favorably with homegrown tomatoes. Other commenters compared the taste as being equal to local tomatoes, even in winter when local tomatoes were not available. Several of the comments stated that good taste was of greater importance than appearance. Commenters also expressed that they have had difficulty in finding UglyRipe tomatoes available for purchase and supported this rule and its efforts to increase availability.

Nine comments were received in opposition to the proposed rule. Of these comments, five expressed concerns regarding this proposal's impact on orderly marketing. Four commenters stated that the current marketing order requirements provide stability to the industry. One commenter stated that the standards established under the order are key to the establishment of an orderly market for Florida growers and that this rule will weaken the industry's ability to maintain an orderly market. Another commenter stated that the proposed rule does not establish, maintain, or support orderly marketing conditions, but does the exact opposite.

One of the main goals of marketing orders is to establish orderly marketing conditions for those commodities covered under marketing orders. As previously noted, this partial exemption only extends to UglyRipe tomatoes. Further, this rule only provides UglyRipe tomatoes with a partial exemption from the shape requirements of the U.S. No. 2 grade. UglyRipe tomatoes are still subject to the requirements for maturity, ripeness, softness, development, decay, and damage as specified under the Standards for a U.S. No. 2 grade. Even with this partial exemption, the requirements for UglyRipe tomatoes are still significantly higher than those for U.S. No. 3 grade tomatoes.

Because this partial exemption is narrowly defined, the vast majority of the tomatoes shipped from Florida will still meet the requirements for a U.S. No. 2 grade. Therefore, this change will not diminish the overall benefits of the established grade standard.

Consequently, this change should not have an adverse impact on the orderly market for Florida tomatoes.

Five commenters stated that this change would allow UglyRipe tomatoes to circumvent the requirements of the order. Two comments declared that this rule would allow all UglyRipe tomatoes produced to be sold outside of the regulated area. Another comment stated that this rule would allow UglyRipe tomatoes to escape the standards applicable to all other tomatoes.

This partial exemption will not allow UglyRipe tomatoes to circumvent the requirements of the order, or allow all UglyRipe tomatoes produced in Florida to be shipped outside the regulated area. As stated above, UglyRipe tomatoes will still have to meet the majority of the requirements for U.S. No. 2 grade tomatoes, and will have to be inspected to ensure these requirements are met. UglyRipe tomatoes also continue to be required to meet all other requirements under the marketing order, such as size, pack and container, and assessment provisions. In addition, UglyRipe tomatoes must meet the requirements of the IP program.

Five commenters expressed concern that providing this exemption for the UglyRipe tomato will create a loophole, which will result in the shipment of U.S. No. 3 grade tomatoes of other varieties by other producers. One of the commenters stated that with this change, every farmer in Florida will be selling his off shaped fruit. Another commenter wrote that this action presents too many opportunities for domestic growers and importers to sell tomatoes of inferior quality. Another commenter stated that they had no doubt that efforts will be made to market U.S. No. 3 grade tomatoes that resemble UglyRipe tomatoes.

We disagree with these comments. There are safeguards in place to address these issues. In addition to the existing inspection requirements, and compliance efforts, this partial exemption only extends to UglyRipe tomatoes covered under the IP program. This program was developed by AMS and provides independent, third-party verification of the segregation of a company's product at every stage, from seed, production and processing, to distribution. This will help ensure that only UglyRipe tomatoes are shipped using this partial exemption, as only handlers covered under the IP program will be allowed to pack under the exemption. Further, USDA plans to closely monitor compliance with this exemption.

Three commenters stated that this rule will have a negative economic

impact on the tomato industry. One commenter stated that this rule will cause a market share loss and loss of sales. Another comment states that this will increase supply, which will negatively affect price.

We disagree because this partial exemption is so narrowly defined, and only applies to UglyRipe tomatoes, it should not result in a significant increase in the overall supply of tomatoes. Also, this action should not have a significant impact on price. Prior to the 1998–99 season, the Committee recommended that the minimum grade be increased from a U.S. No. 3 to a U.S. No. 2. The reason for this action was that U.S. No. 3 grade tomatoes were having a price depressing effect on the market. This is because U.S. No. 3 grade tomatoes of standard commercial varieties sell at prices below those for U.S. No. 2 grade tomatoes. However, in the case of UglyRipe tomatoes, they are still required to meet the majority of the requirements for a U.S. No. 2 grade, and are usually priced higher than U.S. No. 2 graded standard commercial variety tomatoes. Therefore this action should not have a price depressing effect on standard varieties, and because of the difference in price this exemption should not have a significant impact on the market share for standard commercial varieties of Florida tomatoes.

Two commenters also stated that this regulation would have a negative impact on small growers. The commenters stated that when USDA did its initial regulatory flexibility analysis USDA only considered the impact on producers and handlers of UglyRipe tomatoes. The commenters stated that this rule would have a negative impact on small producers and handlers of standard commercial varieties.

In its initial regulatory flexibility analysis, USDA found that this change represents a small increase in costs for producers and handlers of UglyRipe tomatoes, primarily from costs associated with developing and maintaining the IP program. As discussed above, this rule should not significantly impact demand or price for standard commercial varieties. Consequently, we do not agree that this action will negatively impact growers and handlers of standard commercial varieties.

Accordingly, no changes will be made to the rule as proposed, based on comments received.

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.

After consideration of all relevant matter presented, including the information and recommendation submitted by the Committee and other available information, it is hereby found that this rule, as hereinafter set forth, will tend to effectuate the declared policy of the Act.

It is further found that good cause exists for not postponing the effective date of this rule until 30 days after publication in the **Federal Register** (5 U.S.C. 553) because the regulatory period will begin October 10, 2006. Also, a 60-day comment period was provided for in the proposed rule.

#### 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 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: January 12, 2007.

**Lloyd C. Day,**

*Administrator, Agricultural Marketing Service.*

[FR Doc. 07–162 Filed 1–12–07; 11:58 am]

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