

# Rules and Regulations

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## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

#### 7 CFR Part 966

[Docket No. FV96-966-2 IFR]

#### Tomatoes Grown in Florida; Partial Exemption From the Handling Regulation for Single Layer and Two Layer Place Packed Tomatoes

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

**ACTION:** Interim final rule with request for comments.

**SUMMARY:** This interim final rule provides an exemption to the pack and container requirements currently prescribed under the Florida tomato marketing order. The marketing order regulates the handling of tomatoes grown in Florida and is administered locally by the Florida Tomato Committee (Committee). This rule exempts shipments of single layer and two layer place packed tomatoes from the container net weight requirements under the marketing order. This rule will facilitate the movement of single layer and two layer place packed tomatoes and should improve returns to producers of Florida tomatoes.

**DATES:** Effective October 30, 1996; comments received by November 29, 1996 will be considered prior to issuance of a final rule.

**ADDRESSES:** Interested persons are invited to submit written comments concerning this rule. Comments must be sent in triplicate to the Docket Clerk, Fruit and Vegetable Division, AMS, USDA, room 2525-S, P.O. Box 96456, Washington, DC 20090-6456, Fax # (202) 720-5698. 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.

#### FOR FURTHER INFORMATION CONTACT:

Aleck Jonas, Marketing Specialist, Southeast Marketing Field Office, Fruit and Vegetable Division, AMS, USDA, P.O. Box 2276, Winter Haven, Florida 33883-2276; telephone: (941) 299-4770, or FAX: (941) 299-5169; or Mark Slupek, Marketing Order Administration Branch, F&V, AMS, USDA, room 2525-S, P.O. Box 96456, Washington, DC 20090-6456; telephone: (202) 205-2830, or FAX: (202) 720-5698. Small businesses may request information on compliance with this regulation by contacting: Jay Guerber, Marketing Order Administration Branch, Fruit and Vegetable Division, AMS, USDA, P.O. Box 96456, room 2525-S, Washington, DC 20090-6456; telephone (202) 720-2491; Fax # (202) 720-5698.

**SUPPLEMENTARY INFORMATION:** This rule is issued under Marketing Agreement No. 125 and Order No. 966 (7 CFR Part 966), both as amended, regulating the handling of tomatoes grown in Florida, 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 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.

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 the Secretary 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 the Secretary 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 the Secretary's ruling on the petition, provided an action is filed not

later than 20 days after date of the entry of the ruling.

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.

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 75 handlers of tomatoes who are subject to regulation under the order and approximately 90 producers of tomatoes in the regulated area. Small agricultural service firms, which include handlers, are defined by the Small Business Administration (13 CFR 121.601) as those having annual receipts of less than \$5,000,000, and small agricultural producers are defined as those whose annual receipts are less than \$500,000. The majority of handlers and producers of Florida tomatoes may be classified as small entities.

This rule exempts shipments of single layer and two layer place packed tomatoes from container net weight requirements currently specified under the order. Place packing requires a certain number of tomatoes to fill a container, making it difficult to meet established weight requirements. Tomatoes are packed in one or two layers, which some industry members believe is superior to the bulk container pack. Place packing is labor intensive, with most of the packing being done by hand, but it allows handlers to ship higher colored, more mature tomatoes. Place packed tomatoes, which are shipped from many domestic and foreign growing areas, currently maintain a strong market share.

This exemption is the same as granted for specialty packed red ripe tomatoes and yellow meated tomatoes. This exemption appears to be the most viable alternative to present requirements because it facilitates the use of place

packing in Florida, and provides handlers an additional shipping option. Also, while we lack sufficient information necessary to quantify these benefits at this time, we believe that this exemption will be beneficial to the industry. After the industry operates under the relaxed requirements for a time, additional information will be available. Because the exemption and the packing techniques required affect both small and large handlers equally, both will benefit proportionally from the exemption. Therefore, the AMS has determined that this action will not have a significant economic impact on a substantial number of small entities. Interested persons are invited to submit information on the regulatory and informational impacts of this action on small businesses.

Under the Florida tomato marketing order, tomatoes produced in the production area and shipped to fresh market channels are required to meet certain handling requirements. These requirements include minimum grade, size, and pack and container specifications.

This interim final rule revises § 966.323 paragraph (d) of the rules and regulations to make single layer and two layer place packed tomatoes exempt from the current net weight requirements. This exemption is the same as granted for specialty packed red ripe tomatoes and yellow meated tomatoes. The exemption is from net weight only. The tomatoes are still subject to all other provisions of the handling regulation, including established grade, size, pack, and inspection requirements. The Committee met September 5, 1996, and unanimously recommended this change.

Section 966.52 of the Florida tomato marketing order provides authority for the modification, suspension, and termination of regulations. Section 966.323(a)(3)(i) of the order's rules and regulations defines the net weight container requirements. These requirements specify that all tomatoes be packed in containers of 10, 20, and 25 pound designated net weights. The net weight cannot be less than the designated weight or exceed the designated weight by more than two pounds.

Most tomatoes from Florida are shipped at the mature green stage, and are packed in volume fill containers. When volume fill containers are packed, the tomatoes are placed by hand or machine into the container until the required net weight is reached. This procedure, by design, works well when packing to meet a specified weight.

In contrast, it is very difficult to pack to a specified weight when place packing in a single layer or two layer pack. Place packing a container requires a fixed number of tomatoes to fill the container. In place packing, the tomatoes are packed in layers, with the fill determined by the size of the tomato, dimensions of the container, and the way the tomatoes are positioned in the box. To facilitate this type of pack, most handlers use plastic cells, cardboard partitions, or trays to position the tomatoes. The majority of place packed tomatoes are sold by count per container rather than by weight.

Throughout the harvesting season, the weight of equal size tomatoes may vary dramatically. When tomatoes are place packed into a container, the handler cannot add extra tomatoes if the container's net weight is light. Because the tomatoes are packed in layers, when a layer is complete there are no spaces for adding additional tomatoes. Similarly, when the tomatoes are heavy, the handler cannot remove a tomato to meet a maximum weight requirement. Buyers expect a full pack with no spaces, and a missing tomato could result in a loose pack which could allow shifting or bruising during transport.

The Committee made this recommendation to overcome this problem and allow the industry to develop this market. This change allows the industry to place pack single layer and two layer packs exempt from the current net weight requirements. However, all other packs must continue to meet the requirements.

Single layer and two layer place packed tomatoes are common in today's markets. Many tomato growing areas within the United States utilize them, as do most shippers of Mexican tomatoes. Buyer demand for this type of container is well established. Tomatoes packed in single layer and two layer containers have a strong market share. Some Committee members stated that this pack provides a superior presentation of the tomatoes when compared to the bulk net weight container. Committee members believe that Florida tomato shippers can compete well in this market.

Another advantage of the place pack is that a more mature tomato can be shipped if desired. The Committee expressed interest in beginning to ship a higher colored, more mature tomato. Volume packing such a tomato could cause bruising or other damage. Place packing in single layer or two layer packs would prevent damage and help a mature tomato arrive at market in good condition.

The Committee is focusing on ways to continue to be competitive, develop new markets, and increase grower returns. The Committee believes this change will provide the industry with more flexibility and additional marketing opportunities.

Section 8(e) of the Act requires that whenever grade, size, quality, or maturity requirements are in effect for certain commodities under a domestic marketing order, including tomatoes, imports of that commodity must meet the same or comparable requirements. Since the Act does not authorize the imposition of pack or container requirements on imports, even when such requirements are in effect under a domestic marketing order, no change is necessary in the tomato import regulations as a result of this action.

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

This rule invites comments on an exemption to the pack and container requirements currently prescribed under the Florida tomato marketing order. Any comments received will be considered prior to finalization of this rule.

Pursuant to 5 U.S.C. 553, it is also found and determined upon good cause that it is impracticable, unnecessary, and contrary to the public interest to give preliminary notice prior to putting this rule into effect and that good cause exists for not postponing the effective date of this rule until 30 days after publication in the Federal Register because: (1) This action provides an exemption to container requirements currently in effect for tomatoes grown in Florida; (2) Florida tomato handlers are aware of this action that was unanimously recommended by the Committee at a public meeting, and they will need no additional time to comply with the exemption requirements; (3) Florida tomato shipments begin October 10; and (4) this rule provides a 30-day comment period and any comments received will be considered prior to finalization of this 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 966.323 is amended by revising paragraph (d)(1) to read as follows:

**§ 966.323 Handling regulations**

(d) *Exemption.* (1) *For types.* The following types of tomatoes are exempt from the regulations in this part: Elongated types commonly referred to as pear shaped or paste tomatoes and including but not limited to San Marzano, Red Top, and Roma varieties; cerasiform type tomatoes commonly referred to as cherry tomatoes; hydroponic tomatoes; and greenhouse tomatoes. Specialty packed red ripe tomatoes, yellow meated tomatoes, and single layer and two layer place packed tomatoes are exempt from the container net weight requirements specified in paragraph (a)(3)(i) of this section, but must meet the other requirements of this section.

Dated: October 22, 1996.

Sharon Bomer Lauritsen,  
*Acting Director, Fruit and Vegetable Division.*  
[FR Doc. 96–27724 Filed 10–28–96; 8:45 am]  
BILLING CODE 3410–02–P

**7 CFR Part 1079**

[DA–96–11]

**Milk in the Iowa Marketing Area; Revision of Pool Supply Plant Shipping Percentage**

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

**ACTION:** Final rule.

**SUMMARY:** This document reinstates certain provisions of the Iowa Federal milk order indefinitely for the months of September through November, beginning with October 1996 milk deliveries, and revises other provisions for the months of December 1996 through March 1997. This action increases the percentage of a supply plant's receipts that must be delivered to fluid milk plants to qualify a supply plant for pooling under the Iowa Federal milk order. The applicable percentage will be increased by 5 percentage points, from 30 percent to 35 percent, for the months of September through November; and by 10 percentage points, from 20 percent to 30 percent, for the months of December 1996 through March 1997. The revision is being made

in response to a request by a distributing plant that is regulated under the order. This action is necessary to assure an adequate supply of milk for fluid use.

**EFFECTIVE DATES:**

1. Amendment number 1 is effective October 1, 1996.

2. Amendment number 2 is effective October 1, 1996, and applies October 1, 1996, through November 30, 1996, and for the September through November period thereafter.

3. Amendment number 3 is effective December 1, 1996, through March 31, 1997.

4. Amendment number 4 is effective April 1, 1997.

**FOR FURTHER INFORMATION CONTACT:**

Constance M. Brenner, Marketing Specialist, USDA/AMS/Division, Order Formulation Branch, Room 2968, South Building, P.O. Box 96456, Washington, DC 20090–6456, (202) 720–2357.

**SUPPLEMENTARY INFORMATION:** Prior document in this proceeding:

Notice of Proposed Revision of Rule: Issued August 26, 1996; published September 4, 1996 (61 FR 46571).

The Department is issuing this final 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 a 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 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 file with the Secretary a petition stating that the order, any provisions of the order, or any obligation imposed in connection with the order is not in accordance with the law and request a modification of an order or an exemption from the order. A handler is afforded the opportunity for a hearing on the petition. After a hearing, the Secretary 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 Secretary's 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.

This document reinstates the pool supply plant shipping percentage of 35 percent under the Iowa order for the

period October 1 through November 30, 1996, and the September through November period thereafter. A reduction from 35 to 30 percent was issued in 1990 (55 FR 41504, published October 12, 1990) effective October 12, 1990, for an indefinite period. This action increases the percentage by reinstating the original percentage of 35, thus eliminating the prior 1990 action. The proposed rule for this action (61 FR 46571, published September 4, 1996) incorrectly stated that the current percentage for the months of September through November was 35 and would have been increased to 45.

The current issue of the Code of Federal Regulations (CFR) shows the percentage requirements to be 35 percent for September through November and 20 percent for December through August because a temporary change (e.g., 35 percent to 30 percent) is not printed in the CFR.

**Small Business Consideration**

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 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 \$500,000, 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 \$500,000 per year criterion was used to establish a production guideline of 326,000 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 farms. 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.

The supply plant shipping percentage provisions are being increased in the order to assure an adequate supply of milk for the fluid market. It is expected that producers and their handlers who share in the benefits of the higher-valued fluid uses of the market through their participation in a marketwide pool should be required to help supply milk to fluid milk distributing plants when additional supplies are needed. As a result of this expectation, order