



[BILLING CODE 3410-KD-U]

## **DEPARTMENT OF AGRICULTURE**

### **Grain Inspection, Packers and Stockyards Administration**

#### **7 CFR Part 810**

#### **United States Standards for Barley**

**AGENCY:** Grain Inspection, Packers and Stockyards Administration, USDA.

**ACTION:** Proposed rule.

**SUMMARY:** The Grain Inspection, Packers and Stockyards Administration (GIPSA) is proposing to revise the U.S. Standards for Barley (barley standards) under the U.S. Grain Standards Act (USGSA) by revising the Definitions of Other Terms to remove Blue Malting barley and the reference to kernels with white aleurone layers. Further GIPSA will revise the standards to add the factors injured-by-mold and mold-damaged kernels. The proposal also recommends revisions to the grade and grade requirements for Two-rowed Malting Barley, Six-rowed Malting barley, and Six-rowed Blue Malting barley. These proposed changes will help to facilitate the marketing of barley.

**DATES:** Comments must be received on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

**ADDRESSES:** You may submit written or electronic comments on this proposed rule to:

- Mail: Irene Omade, GIPSA, USDA, STOP 3642, 1400 Independence Avenue, SW, Room 2530-B, Washington, DC 20250-3604.
- Fax: (202) 690-2173

- Internet: Go to <http://www.regulations.gov> and follow the on-line instruction for submitting comments.

All comments will become a matter of public record and should be identified as “U.S. barley standards proposed rule comments,” making reference to the date and page number of this issue of the *Federal Register*. All comments received become the property of the Federal government, are a part of the public record, and will generally be posted to [www.regulations.gov](http://www.regulations.gov) without change. If you send an e-mail comment directly to GIPSA without going through [www.regulations.gov](http://www.regulations.gov), or you submit a comment to GIPSA via fax, the originating e-mail address or telephone number will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. Also, all personal identifying information (for example, name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not submit confidential business information or otherwise sensitive or protected information.

Electronic submissions should avoid the use of special characters, avoid any form of encryption, and be free of any defects or viruses, since these may prevent GIPSA from being able to read and understand, and thus consider your comment.

GIPSA will post a transcript or report summarizing each substantive oral comment that we receive about this proposed rule. This would include comments about this rule made at any public meetings hosted by GIPSA during the comment period, unless GIPSA publically announces otherwise.

All comments will also be available for public inspection at the above address during regular business hours (7 CFR 1.27(b)). Please call the GIPSA Management and Budget Services support staff (202) 720-8479 for an appointment to view the comments.

FOR FURTHER INFORMATION CONTACT: Patrick McCluskey at GIPSA, USDA, 10383 N. Ambassador Drive, Kansas City, MO, 64153; Telephone (816) 659-8403; Fax Number (816) 872-1258; e-mail [Patrick.J.McCluskey@usda.gov](mailto:Patrick.J.McCluskey@usda.gov).

## **SUPPLEMENTARY INFORMATION:**

### **Background**

Barley is defined in the U.S. Standards for Barley as grain that, before the removal of dockage, consists of 50 percent or more of whole kernels of cultivated barley (*Hordeum vulgare* L.) and not more than 25 percent of other grains for which standards have been established under the USGSA. The term “barley” as used in these standards does not include hull-less barley or black barley.

In 2012, U.S. barley producers harvested 3.2 million acres of barley producing 220.3 million bushels of the grain. Of all the barley planted, more than 60 percent were malting barley types. Beer production in the United States (U.S.) accounts for approximately 55 percent of total domestic use (2008-2012 average), feed and industrial uses account for about 40 percent of domestic use (2008-2012 average), while whiskey, food and seed account for about 6 percent of domestic use (2008-2012 average). Barley is exported for feed and malting purposes, typically accounting for less than five percent of total barley usage.

Under the USGSA (7 U.S.C. 76), GIPSA is authorized to establish and maintain the standards for barley and other grains regarding kind, class, quality, and condition.

The barley standards facilitate the marketing of barley, define U.S. barley quality, and define commonly used industry terms in the domestic and global marketplace. Also, the barley standards contain basic principles such as the basis of determination used for a particular quality factor analysis, as well as specifying grades, grade requirements, special grades, and special grade requirements. The barley standards, which were established on August 24, 1926, were last revised in 1997, and appear in the USGSA regulations at 7 CFR 810.201 through 810.207.

### **Discussion of Comments and Proposed Action**

On October 4, 2011, GIPSA published an Advance Notice of Proposed Rulemaking (ANPR) in the **Federal Register** (76 FR 61287) requesting public comment on what revisions, if any, are needed to the current barley standards. GIPSA received four comments from two barley producer associations, one malting industry association, and one beer brewing company. The malting industry association provided a comment stating that two-rowed and six-rowed malting barley are used interchangeably by the malting industry, thus the grades and grade standards should be harmonized for most factors, excluding test weight and thin barley. The comment from a beer brewing company stated that malting quality specifications which are currently applicable only to two-rowed malting barley should be extended to six-rowed malting barley, because the brewing industry uses both types. Additionally, the brewing company stated that they fully supported the comments of the malting barley industry association. Comments from two North Dakota barley producers groups mirrored the comments of the malting barley industry association with regard to harmonizing the standards, and addressed other issues which will be discussed herein.

The malting barley industry association stated that distinctions between two- and six-rowed varieties are not generally warranted, but that distinctions for test weight and percent thin barley are warranted. Two-rowed and six-rowed malting barley have different test weight patterns that are under genetic control and influenced by environment.

All commenters recommended that grade limits for two-rowed and six-rowed malting barley be identical for all grade determining factors except test weight and thin barley, which should remain unchanged. U.S. malting barley manufacturers and users do not distinguish between two-rowed and six-rowed malting barley based on the current barley standards, but view both two-rowed and six-rowed malting barley as functionally equivalent.

All commenters stated that Wild Oats should be included as a grade determining factor for Six-rowed Malting barley. Likewise all commenters stated that Damaged kernels, as well as Other grains, should be included as a grade determining factor for Two-rowed Malting barley. All commenters stated that the grade factors Suitable malting type, Sound barley, and Skinned and broken kernels should all be harmonized for Two-rowed and Six-rowed Malting barley. Further, all commenters agreed that these specific changes are needed in the barley standards.

GIPSA believes that stakeholders in the malting barley industry are well-informed with respect to production, functionality, and quality issues related to malting barley. GIPSA believes the recommended revisions will facilitate the marketing of barley and accordingly, will propose amendments to the malting barley standards to make the recommended revisions. To harmonize two-rowed and six-rowed malting barley grade

factors and grade limits, GIPSA recognizes the definitions of Six-rowed Malting barley and Two-rowed Malting barley must be also be consistent. Accordingly, GIPSA will propose revising the definition of Six-rowed Malting barley to mirror the definition of Two-rowed Malting barley, with the exception of test weight and percent thins.

All commenters recommended removing Six-rowed Blue Malting barley as a subclass of malting barley because 1) blue aleurone barley is no longer used by the malting and brewing industry in the U.S. and 2) no blue aleurone malting varieties are being grown for export, and 3) U.S. production of blue aleurone malting barley is minimal. GIPSA agrees and will propose revising the malting barley standards to remove Six-rowed Blue Malting barley as a subclass of malting barley.

GIPSA received identical comments from two North Dakota barley producer groups. Both producer groups questioned why the definitions of Frost-damaged kernels, Heat-damaged kernels, and Mold-damaged kernels included the words “other grains, and wild oats” in their definitions, while the definitions of Injured-by-frost, Injured-by-heat, and Injured-by-mold do not include other grains and wild oats. Both commenters stated that the terminology utilized in malting factors is quasi-redundant and can initiate misunderstanding. They recommended removing other grains and wild oats from all damage definitions, so as to focus attention on heat, frost, or mold damage to barley kernels rather than damage to components other than barley (i.e., other grains and wild oats). Barley is unique in that it is the only grain which has a definition for frost-damaged kernels and mold-damaged kernels in the standard. (In other grains, these damages are determined based on Visual Reference Images.)

The inclusion of “other grains” in the definition of heat-damaged kernels in barley is consistent with the definition of heat-damaged kernels in oats, rye, sorghum, triticale, and wheat. The purpose of including of “other grains” in the damage definition of certain grain standards is to hinder blending of inferior quality grains into the primary grain being presented for inspection. Some grains were more likely to have “other grains” blended into them, which explains why not all grains for which standards exist include “other grains” in the damage definition. The standards should promote increasing quality. Accordingly, GIPSA will not propose any revisions to the barley standards based on the two comments.

GIPSA received comments from the two producer groups recommending that consideration should be given to establishing specific grades for hull-less barley. Hull-less barley is a specialized plant wherein the hull does not adhere to the grain. In the regulations at 810.201, the definition of barley states, “The term “barley” as used in these standards does not include hull-less barley or black barley.” Hull-less barley is considered Not Standardized Grain, counted as “other grain” when encountered in barley, and counted against “sound barley”.

In a comment unrelated to hull-less barley, the malting industry association pointed out that the production of malt for brewing requires barley that is sound, and with an intact hull. The malting and brewing industries are the largest users of U.S. barley. The hull of the barley kernel plays a critical role in the malting process. The malt manufacturing industry would encounter processing problems if hull-less barley was counted as barley, even if only a small percentage of hull-less barley kernels were

comingled with malting types. This commenter also addressed “malting factors” that are not part of this rulemaking.

GIPSA’s Program Directive 9180.65 provides inspection and certification procedures for hull-less barley, so applicants for service can receive certified results on factors of interest. Given these facts, and absent a market signal from end-users, GIPSA will not propose revisions to the barley standards establishing grades for hull-less barley.

All commenters stated that certain revisions were needed in the inspection instructions in the Barley chapter of Grain Inspection Handbook 2. While inspection instructions are not included in the regulations, GIPSA will review the inspection instructions in Handbook 2, in consideration of the comments, separately from this rulemaking.

GIPSA is issuing this proposed rule to invite comments from all interested persons on how GIPSA can further enhance the barley standards to better facilitate the marketing of barley.

GIPSA proposes to revise Section 810.202 Definition of other terms (c) (1) by amending (i) Six-rowed Malting barley to remove the reference to kernels with white aleurone layers and adding maximum percentages for injured-by-mold and mold-damage kernels, removing (ii) Six-rowed Blue Malting barley, and renumbering (iii) Two-rowed Malting barley to become (ii).

GIPSA proposes to revise Section 810.204 Grade and Grade Requirements for Six-rowed Malting barley and Six-rowed Blue Malting barley by removing references to Six-rowed Blue malting barley, adding Wild Oats as a grade determining factor,



increasing the minimum percent of suitable malting type at grades 1 and 2, and increasing the minimum percent of sound barley at all grades.

GIPSA proposes to revise Section 810.205 Grade and Grade Requirements for Two-rowed Malting barley by adding Damaged kernels as a grade determining factor, adding Other grains as a grade determining factor, and reducing the maximum percent of Skinned and broken kernels at grades 1, 2, and 3.

Pursuant to section 4(b)(1) of the USGSA, as amended (7 U.S.C. 76(b)(1)), no standards established, or amendments or revocations of the standards, are to become effective less than 1 calendar year after promulgation unless, in the judgment of the Secretary of Agriculture, the public health, interest, or safety require that they become effective sooner.

#### **Executive Order 12866, 13563, and Regulatory Flexibility Act**

This rule has been determined to be exempt for the purposes of Executive Orders 12866 and 13563, and therefore has not been reviewed by the Office of Management and Budget (OMB).

Pursuant to the requirements set forth in the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 - 612), GIPSA 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 businesses subject to such actions in order that small businesses will not be unduly or disproportionately burdened.

The Small Business Administration (SBA) defines small businesses by their North American Industry Classification System Codes (NAICS).<sup>1</sup> This proposed rule affects customers of GIPSA's official inspection and weighing services in the domestic

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<sup>1</sup>See: [http://www.sba.gov/idc/groups/public/documents/sba\\_homepage/serv\\_sstd\\_tablepdf.pdf](http://www.sba.gov/idc/groups/public/documents/sba_homepage/serv_sstd_tablepdf.pdf)

and export grain markets such as grain elevators/merchants (NAICS 424510), those in the malt manufacturing industry (NAICS 311213), and official grain inspection agencies.

GIPSA is proposing to revise the barley standards in the Definitions of Other Terms by removing Six-rowed Blue Malting barley and the reference to kernels with white aleurone layers. In addition, the proposed change will add injured-by-mold and mold-damaged kernels to the definition of Six-rowed Malting barley. The definition change also revises the grade and grade requirements for Two-rowed Malting barley. Further, the grade and grade requirements for Six-rowed Malting barley and Six-rowed Blue Malting barley will be revised.

Under the provisions of the USGSA, grain exported from the U.S. must be officially inspected and weighed. Mandatory inspection and weighing services are provided by GIPSA at 40 export facilities, by delegated States at 11 facilities, and seven facilities for U.S. grain transshipped through Canadian ports. All of these facilities are owned by multi-national corporations, large cooperatives, or public entities that do not meet the requirements for small entities established by the SBA. Further, the regulations are applied equally to all entities. The USGSA (7 U.S.C. 87f-1) requires the registration of all persons engaged in the business of buying grain for sale in foreign commerce. In addition, those persons who handle, weigh, or transport grain for sale in foreign commerce must also register. Section 800.30 of the USGSA regulations (7 CFR 800.30) define a foreign commerce grain business as persons who regularly engage in buying for sale, handling, weighing, or transporting grain totaling 15,000 metric tons or more during the preceding or current calendar year. At present, there are 129 registrants registered to export grain. All are considered to be large businesses.

GIPSA also provides domestic and miscellaneous inspection and weighing services at other than export locations. Such services are provided by 53 official state and private agencies. Approximately 217 different applicants receive domestic inspection services each year and approximately 150 different locations receive track scale tests as a miscellaneous service each year.

Most users of the official inspection and weighing services do not meet the requirements for small entities nor are the agencies that provide such services. Further, GIPSA is required by statute to make services available and to recover, as nearly as practicable, the costs of providing such services. There would be no additional reporting, record keeping, or other compliance requirements imposed upon small entities as a result of this proposed rule. Further, GIPSA has not identified any other Federal rules which may duplicate, overlap or conflict with this proposed rule. GIPSA has determined that this proposed rule will not have a significant economic impact on a substantial number of small entities as defined in the RFA.

#### **Executive Order 12988**

This proposed rule has been reviewed under Executive Order 12988, Civil Justice Reform. This action is not intended to have retroactive effect. The USGSA provides in section 87g that no subdivision may require or impose any requirements or restrictions concerning the inspection, weighing, or description of grain under the USGSA. Otherwise, this rule would not preempt any State or local laws, or 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 this rule.

## **Executive Order 13175**

This proposed rule has been reviewed with the requirements of Executive Order 13175, Consultation and Coordination with Indian Tribal Governments. GIPSA has received no requests for official services for barley from any Tribal Government. Therefore, GIPSA believes that this rule would not have substantial and direct effects on Tribal governments and would not have significant Tribal implications.

## **Paperwork Reduction Act**

In compliance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the information collection and record keeping requirements included in this proposed rule previously has been approved by the OMB under control number 0580-0013.

GIPSA is committed to complying 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 maximum extent possible.

## **E-Government Compliance**

GIPSA 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.

## **List of Subjects in 7 CFR Part 810**

Export, Grain.

For reasons set out in the preamble, GIPSA proposes to amend 7 CFR part 810 as follows:

**PART 810 - OFFICIAL UNITED STATES STANDARDS FOR GRAIN**

1. The authority citation for part 810 continues to read as follows:

Authority: 7 U.S.C. 71–87k.

2. In § 810.202, revise paragraph (c)(1) to read as follows:

§ 810.202 Definition of other terms.

\* \* \* \* \*

(c) *Classes*. There are two classes of barley: Malting barley and Barley.

(1) *Malting barley*. Barley of a six-rowed or two-rowed malting type. The class Malting barley is divided into the following two subclasses:

(i) *Six-rowed Malting barley*. Barley that has a minimum of 95.0 percent of a six-rowed suitable malting type that contains not more than 1.9 percent injured-by-frost kernels, 0.4 percent frost-damaged kernels, 0.2 percent injured-by-heat kernels, and 0.1 percent heat-damaged kernels, 1.9 percent injured-by-mold kernels, and 0.4 percent mold-damaged kernels. Six-rowed Malting barley shall not be infested, blighted, ergoty, garlicky, or smutty as defined in § 810.107(b) and § 810.206.

(ii) *Two-rowed Malting barley*. Barley that has a minimum of 95.0 percent of a two-rowed suitable malting type that contains not more than 1.9 percent injured-by-frost kernels, 0.4 percent frost-damaged kernels, 0.2 percent injured-by-heat kernels, 0.1 percent heat-damaged kernels, 1.9 percent injured-by-mold kernels, and 0.4 percent mold-damaged kernels. Two-rowed Malting barley shall not be infested, blighted, ergoty, garlicky, or smutty as defined in § 810.107(b) and § 810.206.

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**§ 810.204 [Amended]**

3. Section 810.204 is revised to read as follows:

**§ 810.204 Grades and grade requirements for Six-rowed Malting barley.**

Grade	Minimum limits of--				Maximum limits of--				
	Test weight per bushel (pounds)	Suitable malting types (percent)	Sound barley <sup>1/</sup> (percent)	Damaged kernels <sup>1/</sup> (percent)	Wild Oats (percent)	Foreign material (percent)	Other Grains (percent)	Skinned and broken kernels (percent)	Thin barley (percent)
U.S. No. 1	47.0	97.0	98.0	2.0	1.0	0.5	2.0	4.0	7.0
U.S. No. 2	45.0	97.0	98.0	3.0	1.0	1.0	3.0	6.0	10.0
U.S. No. 3	43.0	95.0	96.0	4.0	2.0	2.0	5.0	8.0	15.0
U.S. No. 4	43.0	95.0	93.0	5.0	3.0	3.0	5.0	10.0	15.0

<sup>1/</sup> Injured-by-frost kernels and injured-by-mold kernels are not considered damaged kernels or considered against sound barley.

NOTE: Malting barley shall not be infested in accordance with § 810.107(b) and shall not contain any special grades as defined in § 810.206. Six-rowed Malting barley varieties not meeting the requirements of this section shall be graded in accordance with standards established for the class Barley.

**§ 810.205 [Amended]**

4. Section 810.205 is revised to read as follows:

**§ 810.205 Grades and grade requirements for Two-rowed Malting barley.**

Grade	Minimum limits of--			Damaged kernels <sup>1/</sup> (percent)	Maximum limits of--				
	Test weight per bushel (pounds)	Suitable malting types (percent)	Sound barley <sup>1/</sup> (percent)		Wild Oats (percent)	Foreign material (percent)	Other Grains (percent)	Skinned and broken kernels (percent)	Thin barley (percent)
U.S. No. 1	50.0	97.0	98.0	2.0	1.0	0.5	2.0	4.0	5.0
U.S. No. 2	48.0	97.0	98.0	3.0	1.0	1.0	3.0	6.0	7.0
U.S. No. 3	48.0	95.0	96.0	4.0	2.0	2.0	5.0	8.0	10.0
U.S. No. 4	48.0	95.0	93.0	5.0	3.0	3.0	5.0	10.0	10.0

<sup>1/</sup> Injured-by-frost kernels and injured-by-mold kernels are not considered damaged kernels or considered against sound barley.

NOTE: Malting barley shall not be infested in accordance with § 810.107(b) and shall not contain any special grades as defined in § 810.206. Two-rowed Malting barley varieties not meeting the requirements of this section shall be graded in accordance with standards established for the class Barley.

Larry Mitchell,  
Administrator,  
Grain Inspection, Packers and Stockyards Administration.

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