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DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 922

[Docket No. AMS-FV-12-0028; FV12-922-2 IR]

Apricots Grown in Designated Counties in Washington;

Temporary Suspension of Handling Regulations

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Interim rule with request for comments.

SUMMARY: This rule suspends the minimum grade, size, quality, maturity, and inspection requirements prescribed under the Washington apricot marketing order for the 2012-13 fiscal period. The marketing order regulates the handling of apricots grown in designated Counties in Washington and is administered locally by the Washington Apricot Marketing Committee (Committee). In order for the Committee to continue collecting assessments and administer the marketing order, the Washington State Department of Agriculture will provide apricot handling data to the Committee during the suspension of the handling regulations. This rule is expected to reduce overall industry expenses and increase net returns to producers and handlers.

DATES: Effective [INSERT DATE 1 DAY AFTER THE DATE OF PUBLICATION IN THE FEDERAL REGISTER] through March 31,

2013; comments received by [INSERT DATE 60 DAYS AFTER THE DATE OF PUBLICATION IN THE FEDERAL REGISTER] will be considered prior to the issuance of a final rule.

ADDRESSES: Interested persons are invited to submit written comments concerning this rule. Comments must be sent to the Docket Clerk, Marketing Order and Agreement Division, Fruit and Vegetable Program, AMS, USDA, 1400 Independence Avenue SW, STOP 0237, Washington, DC 20250-0237; Fax: (202) 720-8938; or Internet: www.regulations.gov. All comments should reference the document number and the date and page number of this issue of the **Federal Register** and will be made available for public inspection in the Office of the Docket Clerk during regular business hours, or can be viewed at: www.regulations.gov. All comments submitted in response to this rule will be included in the record and will be made available to the public. Please be advised that the identity of the individuals or entities submitting the comments will be made public on the Internet at the address provided above.

FOR FURTHER INFORMATION CONTACT: Manuel Michel, Marketing Specialist, or Gary Olson, Regional Manager, Northwest Marketing Field Office, Marketing Order and Agreement Division, Fruit and Vegetable Program, AMS, USDA;

Telephone: (503) 326-2724; Fax: (503) 326-7440; or Email: Manuel.Michel@ams.usda.gov or GaryD.Olson@ams.usda.gov.

Small businesses may request information on complying with this regulation by contacting Laurel May, Marketing Order and Agreement Division, Fruit and Vegetable Program, AMS, USDA, 1400 Independence SW, STOP 0237, Washington, DC 20250-0237; Telephone: (202) 720-2491, Fax: (202) 720-8938, or E-mail: Laurel.May@ams.usda.gov.

SUPPLEMENTARY INFORMATION: This rule is issued under Marketing Agreement and Order No. 922, as amended (7 CFR 922), regulating the handling of apricots grown in designated counties in Washington, 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 rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is not intended to have retroactive effect.

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 then 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 date of the entry of the ruling.

This rule suspends the handling regulations prescribed under the order for the 2012-13 fiscal period. Specifically, this rule suspends the minimum grade, size, quality, maturity, and inspection requirements under the order. Notwithstanding the suspension of the order's handling regulations, apricots handled in Washington must still meet the state minimum grade requirement of Washington No. 2.

As a direct result of the suspension of the order's handling regulations, information from the Inspection Service will no longer be available for the Committee to

compile industry statistics and to assess handlers.

However, collaboration with the Washington State Department of Agriculture will provide the Committee access to apricot handling data, similar to the handler information that has been previously collected and provided by the Inspection Service.

Section 922.52 of the order authorizes the issuance of regulations for grade, size, quality, maturity, and pack for apricots grown in the production area. Section 922.53 authorizes the modification, suspension, or termination of regulations issued under § 922.52, whenever the Secretary finds that a regulation no longer effectuates the declared policy of the act.

Section 922.55 provides that whenever the handling of any variety of apricots is regulated pursuant to § 922.52 or § 922.53, such apricots must be inspected by the Inspection Service, and certified as meeting the applicable requirements. The cost of this inspection and certification is borne by handlers.

Section 922.60 authorizes the Committee, with the approval of USDA, to require reports and other information from handlers that are necessary for the Committee to perform its duties.

Minimum grade, size, quality, maturity, and inspection requirements for apricots regulated under the order are specified in § 922.321 (the section being suspended by this rule). When effective, § 922.321, with exemptions for certain varieties and types of shipments, provides that all apricots shall grade not less than Washington No. 1, and are at least reasonably uniform in color; provided, that such apricots of the Moorpark variety in open containers shall be generally well matured. The regulation also includes a minimum quantity exemption, as well as specific tolerances for apricots that fail to meet color, minimum diameter, and quality requirements.

The Committee meets regularly to review and consider recommendations for the regulatory requirements of Washington apricots. Committee meetings are open to the public and interested persons may express their views at these meetings. The USDA reviews Committee recommendations, information submitted by the Committee, and other available information, and determines whether modification, suspension, or termination of the regulatory requirements would tend to effectuate the declared policy of the Act.

At its May 24, 2012, meeting, the Committee unanimously recommended suspending the order's handling regulations for the 2012 season. The Committee requested that this rule be effective immediately for the 2012-13 fiscal period, which began on April 1, 2012.

The objective of the handling regulation has been to ensure that only acceptable quality apricots enter fresh market channels, thereby ensuring consumer satisfaction, increasing sales, and improving returns to producers.

The apricot industry recognizes the continued importance of quality as a significant factor in maintaining sales. Some Committee members expressed concern that the elimination of current handling and inspection requirements could potentially result in lower quality apricots being shipped to fresh markets, thereby affecting consumer demand. There is also concern that if overall quality declines, the Washington apricot industry could lose sales to other apricot producing regions.

However, due to the evolving nature of fresh fruit marketing, many wholesale and retail apricot buyers now require their own specific criteria for product quality from all handlers. Therefore, the Committee believes the cost of inspection and certification, which is mandated

when the handling regulations are in effect, may exceed the benefits derived.

After much consideration, the Committee recommended the suspension of the handling regulations prescribed under the order for the 2012-13 fiscal period. This action will allow the Committee to evaluate the impact that suspended regulations will have on the quality of Washington apricots. Should the market situation so dictate, the Committee may take appropriate action to continue the suspension of the handling regulations or recommend termination of the order.

This rule enables Washington apricot handlers to ship apricots without regard to the order's minimum grade, size, quality, maturity, and inspection requirements. This suspension action will also allow handlers to decrease their total costs by eliminating the expenses associated with mandatory inspection. However, this rule does not impede handlers from seeking product inspection on a voluntary basis if they find inspection desirable. Prior to the end of the fiscal period, the Committee will evaluate the effect that the suspension of the handling regulations has on the 2012 market conditions and on

producer returns, and if necessary, make recommendations to USDA for changes.

The suspension of the handling regulations will also result in the elimination of the inspection certificates being generated and forwarded to the Committee office by the Inspection Service. The Committee has used these certificates as the basis for the collection of handler assessments and for compiling apricot industry statistics. As a result of not having the information provided by the inspection certificates, the Committee will enter into a memorandum of understanding with the Washington State Department of Agriculture in order to obtain the information necessary to collect assessments and generate statistical information.

Authorization to assess handlers enables the Committee to incur expenses that are reasonable and necessary to administer the program.

Consistent with the suspension of § 922.321, this rule also suspends § 922.111 of the rules and regulations in effect under the order. Section 922.111 contains provisions for handlers to apply for waivers from mandatory inspection when such inspection is not readily available

from the Inspection Service. With the suspension of regulation, such waivers are no longer necessary.

Initial Regulatory Flexibility Analysis

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA) (5 U.S.C. 601-612), 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 the rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf.

There are approximately 20 handlers of Washington apricots who are subject to regulation under the marketing order and approximately 94 apricot producers in the regulated area. Small agricultural service firms are defined by the Small Business Administration (SBA) (13 CFR 121.201) as those having annual receipts of less than \$7,000,000, and small agricultural producers are defined as those having annual receipts of less than \$750,000.

Apricot production has been approximately 4,200 to 8,900 tons per year for the past several years. The National Agricultural Statistics Service (NASS) reports that all Washington apricot handlers combined ship approximately \$7,132,000 worth of apricots during the 2011 season. In addition, based on acreage, production, and producer prices reported by NASS, and the total number of Washington apricot producers, average annual producer receipts are approximately \$76,000, which is considerably less than the \$750,000 threshold. In view of the foregoing, it can be concluded that a majority of the handlers and producers of Washington apricots may be classified as small entities.

At its May 24, 2012, meeting, the Committee unanimously recommended suspending the handling regulations for the 2012-13 fiscal period.

This rule suspends the handling regulations specified in §§ 922.111 and 922.321. The suspension of these handling regulations will allow the Washington apricot industry to market apricots without regard to minimum grade, size, quality, maturity, and inspection requirements prescribed under the federal marketing order. Authority for this action is provided in § 922.53.

The handling regulations help ensure that only acceptable quality apricots enter fresh market channels, thereby ensuring consumer satisfaction, increasing sales, and improving returns to producers. While the industry continues to believe that quality is an important factor in maintaining sales, the Committee believes the cost of inspection and certification may exceed the benefits derived. The Committee also believes that the demands of wholesale buyers and consumers will drive handlers and producers to maintain a high level of product quality without the necessity of minimum quality standards and mandatory inspections. The Committee will review the outcome of the handling regulation suspension prior to the end of the 2012-13 fiscal period and determine if continued suspension, or alternatively, termination of the marketing order is warranted. The handling regulations will be automatically reinstated on April 1, 2013.

Apricot prices have fluctuated considerably in recent years, and at times some producers have faced difficulty covering their total costs. In response to the adverse economic conditions experienced by the industry, the Committee discussed the possibility of reducing expenses through the elimination of mandatory inspection. The

Committee considered the potential consequences of suspending the handling and inspection requirements, and how this could result in lower quality apricots being shipped to fresh markets. Also, if fruit quality were to decline, there is some concern among Committee members that the Washington apricot industry could lose sales to other apricot producing regions.

While acknowledging these concerns, the Committee also believes that the current marketing conditions make the program unnecessary, because the costs of regulation may be greater than the benefits gained. Therefore, the Committee recommended the suspension of the handling regulations for the 2012-13 fiscal period. The Committee will review the impacts of the suspension prior to the end of the fiscal period and consider appropriate actions for ensuing seasons.

This rule enables handlers to ship apricots without regard to the order's minimum grade, size, quality, maturity, and inspection requirements during the 2012-13 fiscal period. This rule allows handlers to decrease their overall costs by eliminating the costs associated with mandatory inspection. This rule, however, does not impede

handlers from seeking inspection on a voluntary basis if they find inspection desirable.

The suspension of the handling regulations will result in the elimination of mandatory inspections and, in turn, the inspection certificates generated by the Inspection Service and provided to the Committee. The Committee has used such certificates for assessment billing purposes and for compiling industry statistics. As a result of needing the information that was previously provided by the inspection certificates, the Committee will enter into a memorandum of understanding with the Washington State Department of Agriculture in order to obtain information on which to collect assessments and generate statistical information.

The Committee anticipates that this rule will not negatively impact small handlers and producers because it suspends minimum grade, size, quality, maturity, and inspection requirements prescribed under the order. The total cost of inspection and certification for fresh shipments of Washington apricots during the 2011 marketing season is estimated by the Committee to have been \$0.23 per hundredweight, or approximately \$12,700 total. This represents approximately \$635 per handler. Since handlers

may continue to have their apricots voluntarily inspected, the Committee expects that some handlers will continue to have at least a portion of their fresh apricots inspected and certified by the Inspection Service.

Alternatives to the suspension of the handling regulations considered by the Committee included maintaining the status quo, suspending regulations indefinitely, and terminating the marketing order in its entirety. The Committee believes that the continuation of regulation would be an unnecessary burden on the industry, given the evolving marketing conditions and future outlook. Thus, continuing to regulate in the same manner was not a viable option to the Committee. The Committee also discussed suspending regulation indefinitely, but rejected this alternative at this time. The Committee believes that suspending the handling regulations for one season will provide sufficient information to evaluate the impact this has on the quality of Washington apricots. Last of all, the Committee considered terminating the order in its entirety, but similarly declined the option. The Committee will review the impacts of the suspension prior to the end of the fiscal period and consider appropriate actions for ensuing seasons.

In accordance with the Paperwork Reduction Act of 1995, (44 U.S.C. Chapter 35), the order's information collection requirements have been previously approved by the Office of Management and Budget (OMB) and assigned OMB No. 0581-0189. No changes in those requirements as a result of this action are necessary. Should any changes become necessary, they would be submitted to OMB for approval.

This rule will not impose any additional reporting or recordkeeping requirements on either small or large apricot handlers. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies.

AMS is committed to 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.

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

Further, the Committee's meeting was widely publicized throughout the Washington apricot industry and all interested persons were invited to attend the meeting and participate in Committee deliberations. Like all Committee meetings, the May 24, 2012, 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 comments on this interim rule, including 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:
www.ams.usda.gov/MarketingOrdersSmallBusinessGuide. Any questions about the compliance guide should be sent to Laurel May at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

This rule invites comments on the suspension of the handling regulations prescribed under the Washington apricot marketing order. Any comments timely received will be considered prior to finalization of this rule.

After consideration of all relevant material presented, including the Committee's recommendation, and

other information, it is found that the regulatory requirements no longer tend to effectuate the declared policy of the Act, and are therefore being suspended.

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 interim rule is a relaxation in the apricot handling regulations and should be in place as soon as possible for the 2012-13 fiscal period; (2) handlers need to know as soon as possible that they are free to market their apricots without regard to the order's handling regulations; (3) this issue has been widely discussed at various industry and association meetings and the Committee has kept the industry well informed; (4) handlers are aware of this rule, which was recommended at a public meeting; and (5) this rule provides a 60-day comment period and any comments received will be considered prior to finalization of this rule.

List of Subjects in 7 CFR Part 922

Apricots, Marketing agreements, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, 7 CFR part 922 is amended as follows:

PART 922 - APRICOTS GROWN IN DESIGNATED COUNTIES IN WASHINGTON

1. The authority citation for 7 CFR part 922 continues to read as follows:

Authority: 7 U.S.C. 601-674.

§§ 922.111 and 922.321 [Suspended]

2. In Part 922, §§ 922.111 and 922.321 are suspended in their entirety from [INSERT DATE 1 DAY AFTER THE DATE OF PUBLICATION IN THE FEDERAL REGISTER] through March 31, 2013.

Dated: January 2, 2013

David R. Shipman
Administrator
Agricultural Marketing Service

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