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Dated: June 5, 1998.

**James R. Baker,**  
*Administrator.*

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## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

#### 7 CFR Part 922

[Docket No. FV98-922-1 IFR]

#### **Apricots Grown in Designated Counties in Washington; Revision in Container Regulations**

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

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

**SUMMARY:** This rule revises the container requirements currently prescribed under the Washington apricot marketing order. 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). This rule removes the requirement to use a top pad when apricots are packed loose in closed containers that weigh not less than 24 pounds. This revision will allow handlers greater flexibility in determining the need for a top pad depending on apricot variety or container dimensions. This change is expected to increase returns to producers and to improve the quality of apricots available to consumers.

**DATES:** Effective June 17, 1998. Comments received by August 17, 1998 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 to the Docket Clerk, Fruit and Vegetable Programs, AMS, USDA, Room 2525-S, P.O. Box 96456, Washington, DC 20090-6456; Fax: (202) 205-6632. 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:** Teresa L. Hutchinson, Northwest Marketing Field Office, Marketing Order Administration Branch, F&V, AMS, USDA, 1220 SW Third Avenue, Room 369, Portland, Oregon 97204; telephone:

(503) 326-2724, Fax: (503) 326-7440; or George Kelhart, Technical Advisor, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, Room 2525-S, P.O. Box 96456, Washington, DC 20090-6456; telephone: (202) 720-2491, Fax: (202) 205-6632. Small businesses may request information on compliance with this regulation by contacting Jay Guerber, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, Room 2525-S, P.O. Box 96456, Washington, DC 20090-6456; telephone: (202) 720-2491, Fax: (202) 205-6632.

**SUPPLEMENTARY INFORMATION:** This rule is issued under Marketing Agreement No. 132 and Marketing Order No. 922 (7 CFR part 922), regulating the handling of apricots grown in designated counties in Washington, 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 (Department) 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.

This rule revises the order's container regulations by removing the requirement to use a top pad when apricots are packed loose in closed containers that weigh not less than 24 pounds. A top pad is a pad made of

various materials, typically paper, which is placed on top of fruit packed in a closed container. This change will allow handlers greater flexibility in determining the need for a top pad depending on apricot variety or container dimensions. This change is expected to increase returns to producers and handlers, and to improve the quality of apricots available to consumers.

Section 922.52 of the order provides authority for container regulations and section 922.53 allows the modification, suspension, or termination of the container regulations. The container regulations are prescribed in section 922.306. Paragraph (a)(4) of that section currently requires handlers to use a top pad when apricots are packed loose in closed containers that weigh not less than 24 pounds.

At its May 14, 1998, meeting the Committee unanimously recommended removing the requirement requiring mandatory use of a top pad in apricots packed loose in closed containers weighing not less than 24 pounds. This requirement for a top pad was intended to protect apricots from bouncing and bruising during transportation to market. However, some varieties of apricots, typically the newer and larger varieties, are often damaged from rubbing against a top pad. The Committee believed that some varieties of apricots, typically the older and smaller varieties, still derive benefit from the use of a top pad. Therefore, the Committee believed that handlers should have the flexibility to determine whether or not to use a top pad in these closed containers depending on apricot variety or container dimensions. Currently, the container regulations require the use of a top pad regardless of the apricot variety or the dimensions of the closed container. This rule provides handlers greater flexibility to use different packaging techniques for different varieties, and to develop new packaging techniques that do not require a top pad. This rule also provides handlers greater flexibility to use containers with different dimensions because some containers may not have sufficient space for a top pad. This change is expected to increase returns to producers and handlers because of the elimination of the cost of a top pad (ranging in cost from 4 cents per pad for paper to 25 cents per pad for foam) and to improve the quality of apricots available to consumers because of decreased fruit damage during transit. The removal of the requirement requiring mandatory use of a top pad for apricots packed loose in closed containers weighing not less than 24

pounds will save producers and handlers the cost of a top pad when the pad is not needed.

An editorial change which removes, for clarity, reference in section 922.306(a)(4) to containers being row-faced or tray-packed does not eliminate the current requirement in section 922.306(a)(2) which applies to all containers with a net weight of apricots greater than 14 pounds.

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 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. Thus, both statutes have small entity orientation and compatibility.

There are approximately 75 handlers of Washington apricots who are subject to regulation under the order and approximately 400 apricot producers in the regulated area. Small agricultural service firms have been 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 having annual receipts of less than \$500,000. The majority of Washington apricot handlers and producers may be classified as small entities.

At its May 14, 1998, meeting the Committee unanimously recommended removing the requirement requiring mandatory use of a top pad in apricots packed loose in closed containers weighing not less than 24 pounds. The requirement for a top pad was intended to protect apricots from bouncing and bruising during transportation to market. However, some varieties of apricots, typically the newer and larger varieties, are often damaged from rubbing against a top pad. The Committee believed that some varieties of apricots, typically the older and smaller varieties, still derive benefit from the use of a top pad. Therefore, the Committee believed that handlers should have the flexibility to determine whether or not to use a top pad in these closed containers depending on apricot variety or container dimensions. Currently, the container regulations require the use of a top pad regardless of the apricot variety or the dimensions

of the closed container. This rule provides handlers greater flexibility to use different packaging techniques for different varieties, and to develop new packaging techniques that do not require a top pad. This rule also provides handlers greater flexibility to use containers with different dimensions because some containers may not have sufficient space for a top pad. This change is expected to increase returns to producers and handlers because of the elimination of the cost of a top pad (ranging in cost from 4 cents per pad for paper to 25 cents per pad for foam) and to improve the quality of apricots available to consumers because of decreased fruit damage during transit.

The removal of the mandatory use of a top pad for apricots packed loose in closed containers weighing not less than 24 pounds will save producers and handlers the cost of a top pad when the pad is not needed.

The only alternative would be to continue the mandatory use of a top pad to the detriment of the quality of certain varieties of apricots.

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 sectors. In addition, the Department 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 14, 1998, meeting was a public meeting and all entities, both large and small, were able to express their views on this issue. The Committee itself is composed of 12 members, of which four are handlers and eight are growers, the majority of whom are small entities. Finally, interested persons are invited to submit information on the regulatory and informational impacts of this action on small businesses.

After consideration of all relevant material presented, including the Committee's recommendation, and other 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 a revision to the container regulations currently prescribed under the Washington apricot 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 rule removes a requirement to use a top pad in Washington apricots packed loose in closed containers weighing not less than 24 pounds; (2) this rule was unanimously recommended by the Committee at an open public meeting and all interested parties had an opportunity to express their views and provide input; (3) Washington apricot handlers are aware of this rule and need no additional time to comply with the relaxed requirements; (4) June 15, 1998, is the date 1998 season shipments of the Washington apricot crop are expected to begin; 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.

2. In § 922.306, paragraph (a)(4) is revised to read as follows:

#### **§ 922.306 Apricot Regulation 6.**

(a) \* \* \*

(4) In closed containers containing not less than 24 pounds, net weight, of apricots when packed loose in such containers; or

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Dated: June 12, 1998.

**Robert C. Keeney,**

*Deputy Administrator, Fruit and Vegetable Programs.*

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