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DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 928

[Docket No. FV01-928-1 FIR]

Papayas Grown in Hawaii; Suspension of Grade, Inspection, and Related Reporting Requirements

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: The Department of Agriculture (Department) is adopting, as a final rule, without change, an interim final rule suspending the grade, inspection, inspection waiver procedures, and related exempt shipment reporting requirements under the marketing order regulating papayas grown in Hawaii, due to current overproduction and unprecedented low prices for fresh papayas. This rule continues in effect the suspension of those provisions. These modifications result from a unanimous recommendation of the Papaya Administrative Committee (committee or PAC) at an emergency meeting on December 28, 2000. This action is expected to permit the industry to utilize funds earmarked for inspection for enhanced marketing efforts, thus improving producer returns by increasing consumer demand.

EFFECTIVE DATE: October 22, 2001.

FOR FURTHER INFORMATION CONTACT: Terry Vawter, Marketing Specialist, California Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 2202 Monterey Street, suite 102B, Fresno, California 93721; telephone: (559) 487-5901, Fax: (559) 487-5906; 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) 720-8938.

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) 720-8938, or E-mail: Jay.Guerber@usda.gov.

SUPPLEMENTARY INFORMATION: This rule is issued under Marketing Agreement No. 155 and Marketing Order No. 928, both as amended (7 CFR part 928), regulating the handling of papayas grown in Hawaii, 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 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 the date of the entry of the ruling.

This rule continues in effect the suspension of three sections of the order's rules and regulations regarding

minimum grade requirements (§ 928.313), maturity exemptions (§ 928.152), and inspection waiver procedures (§ 928.150). It also continues in effect the amendment of § 928.160 of the order's rules and regulations. The amendment to § 928.160 continues in effect the removal of references to mandatory regulations and relieves handlers from the requirement to add the inspection certificate number on PAC Form 1, Papaya Utilization.

This rule results from a unanimous recommendation of the committee at an emergency meeting on December 28, 2000. At that meeting, the committee recommended postponing, until July 1, 2001, the effective date of a final rule published by the Department on November 22, 2000, which reinstated grade, inspection, and related reporting requirements, effective January 2, 2001. The committee held a subsequent committee meeting on January 11, 2001, at which further public discussion was held. After considering the committee's recommendation and other relevant information, the Department is continuing in effect the suspension of the requirements that were reinstated on January 2, 2001, for an indefinite period.

Section 928.52 of the papaya marketing order authorizes the establishment of grade, size, quality, maturity, and pack and container regulations for shipments of papayas. Section 928.53 allows for the modification, suspension, or termination of such regulations when warranted. Section 928.55 provides that whenever papayas are regulated pursuant to §§ 928.52 or 928.53, such papayas must be inspected by the inspection service and certified as meeting the applicable requirements. The cost of inspection and certification is borne by handlers. Section 928.54 authorizes regulation exemptions when shipping papayas for commercial processing, relief agencies, or charitable institutions. In addition, the Secretary may relieve from any or all requirements under or established pursuant to §§ 928.41, 928.52, 928.53, and 928.55, the handling of papayas in such minimum quantities, in such types of shipments, or for such specified purposes (including shipments to facilitate the conduct of marketing research and development projects established pursuant to "928.45) as the committee, with the approval of the

Secretary, may prescribe. Section 928.60 of the papaya marketing order authorizes handler reporting requirements.

This rule continues in effect the suspension of § 928.313 of the order's rules and regulations regarding minimum grade requirements. That section states that no handler shall ship papayas to any destination unless such papayas meet the minimum grade of Hawaii No. 1.

This rule also continues in effect the removal of the requirement that handlers obtain inspection through the Federal or Federal-State Inspection Service (inspection service) prior to shipment of fresh papayas. Suspension of the inspection waiver procedures in § 928.150 of the order's rules and regulations results in the elimination of the authority of the inspection service to grant inspection waivers. Inspection waivers allow handlers to ship papayas without inspection under certain conditions when it is not practicable for the inspection service to provide such inspection. In the absence of mandatory inspection, handlers do not need inspection waivers issued by the inspection service.

This rule also continues in effect the suspension of the maturity exemption and related reporting requirements in § 928.152 of the order's rules and regulations to remove the requirement that handlers interested in becoming handlers of immature papayas apply to the committee for approval, and report handling of immature papayas. Immature papayas are used in a popular dish called green papaya salad and as a vegetable substitute in recipes. Suspension of the maturity exemption and related reporting requirements also relieves handlers from filing PAC Forms 7 and 7(c) with the committee.

In addition, this rule continues in effect the amendment of § 928.160 to remove the references to mandatory regulations and the requirement that handlers include the number of the inspection certificate issued by the inspection service on each PAC Form 1 filed with the committee.

Grade, inspection, and reporting requirements under the order were suspended in 1994. As previously mentioned, in a final rule published on November 22, 2000, and effective January 2, 2001, the Department reinstated those requirements under §§ 928.150, 928.152, 928.313, and 928.160 of the order's rules and regulations.

The committee met on December 28, 2000, and voted unanimously to postpone the effective date until July 1, 2001. During that meeting, and a

subsequent meeting on January 11, 2001, the committee noted that producer prices ranged from 6 to 12 cents per pound, compared to 25 to 45 cents per pound reported by the committee for the same period the previous year. Such prices, coupled with overproduction, have had a negative effect on the entire industry, especially for the new Rainbow variety of papayas. The Rainbow variety has been developed to tolerate the effects of the Papaya Ringspot Virus, which has decimated papaya trees in Hawaii for several years. The Rainbow variety, however, has not yet been approved for exportation to significant markets, especially Japan or Canada, and is only marketed in the United States.

Given the current marketing limitations and overproduction of papayas, the committee recommended that funds earmarked for inspection costs be redirected to marketing and promotion in an effort to increase demand and improve returns to producers. Currently, with low prices to producers, there is little money available for inspection. What funds are available, the committee believes, would best be utilized in increasing demand by enhanced marketing and promotion activities at this time. The committee proposed to review the condition of the industry in late spring or early summer to determine if overproduction eased or demand improved. Historically, the summer months result in lower production, due to the reduced availability of rainwater. This has been true for most varieties of papayas, and may also be true for the Rainbow variety. This information would place the committee in a better position to evaluate what further recommendations to make in the interests of the industry.

While the committee recommended a postponement of the effective date for implementing mandatory grade, inspection, and related reporting requirements until July 1, 2001, the Department believes that a suspension of the requirements is preferable. First, the emergency recommendation was made five days prior to the effective date of the regulations, January 2, 2001. Since that time inspections of papayas have not occurred. Second, the committee does not yet have a timetable for entry of the new Rainbow variety of papayas into the export markets to which the traditional variety, Kapoho, currently has entry. The committee believes increased demand would help absorb the current overproduction of the prolific Rainbow variety, and have a positive affect on producer returns. Third, the committee also believes that

enhanced marketing and promotion may also improve demand for all fresh papayas. The committee believes that funds earmarked for inspection costs would be better utilized on promotional efforts. Thus, there would be no funds available later in the fiscal year for implementing mandatory inspection. There is no evidence that the conditions that currently exist in the industry would be greatly improved in the next several months.

For these reasons, the suspension of mandatory grade, inspection, and reporting requirements effective January 2, 2001, are continued in effect until such time as the conditions in the industry improve and the committee can demonstrate a long-term commitment to a quality control program.

Final Regulatory Flexibility Analysis

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA), 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 60 handlers of papayas in the production area and approximately 400 producers subject to regulation under the marketing order. Small agricultural producers are defined by the Small Business Administration (13 CFR 121.201) as those having annual receipts less than \$750,000, and small agricultural service firms are defined as those whose annual receipts are less than \$5,000,000.

Based on a reported current average f.o.b. price of \$.65 per pound of papayas, a handler would have to ship in excess of 7.69 million pounds of papayas to have annual receipts of \$5,000,000. Last year, only one handler shipped more than 7.69 million pounds of papayas, and, therefore, could be considered a large business. The remaining handlers could be considered small businesses, excluding receipts from other sources.

Based on a reported current average grower price of \$0.09 per pound and annual industry shipments of 40 million pounds, total grower revenues would be \$3.6 million. Average annual grower

revenue would, thus, be \$9,000. Based on the foregoing, the majority of handlers and producers of papayas may be classified as small entities, excluding receipts from other sources.

This rule continues in effect the suspension of the grade, inspection, and related reporting requirements under the order's rules and regulations. As a result, the suspension of §§ 928.150, 928.152, and 928.313 in their entirety is continued, and the amendment of § 928.160 is continued to remove the reference to mandatory regulations and the requirement that the inspection certificate number be added to the utilization reports filed by handlers.

At the meeting, the committee discussed the impact of these changes on handlers and producers in terms of cost. Since mandatory inspection and certification costs are borne by handlers, the cost savings to each handler are estimated to be a total \$24.24 per hour for on-site inspections. In addition, the inspection service charges mileage costs of \$.37 per mile round trip from the inspection service office to the handler's premises or processing plant. According to the inspection service, for a trip taking 10 or more minutes, or covering 7 or more miles, the travel time cost is based on the \$24.24 hourly rate. Some handlers could pass the inspection costs onto producers, thus, further decreasing overall producer returns. These costs do not apply in the absence of minimum quality requirements and associated mandatory inspection.

During its deliberations, the committee discussed possible alternatives to this action. They deliberated the impacts of the final rule taking effect on January 2, 2001. However, because economic conditions in the papaya industry are currently at a historically low level, the committee rejected that alternative.

The committee also debated the value of suspending, rather than postponing, the regulations in their entirety. That alternative, however, was also rejected, as the committee felt suspension of the regulations was too drastic an action to take at the time. Instead, the committee proposed postponing the effective date of the requirements until July 1, 2001, and further reviewing the conditions within the industry at that time. The requirements were originally suspended beginning on July 1, 1994.

However, as noted earlier, the Department has determined that the suspension of the requirements is preferable and continues in effect, given the current industry conditions and likelihood that there will be no substantial improvement in the next several months. If industry conditions

improve, implementation of the quality control program could again be recommended by the committee. Accordingly, this action will have a favorable effect on both large and small entities.

This rule continues in effect the relaxation of reporting requirements under the order, since PAC Form 1 will no longer require the addition of the inspection certificate number on it. In addition, PAC Forms 7 and 7(c) will not be required from handlers wishing to be approved handlers of immature papayas. In the absence of mandatory inspection, no handlers will be required to apply for approval to handle immature papayas using PAC Form 7 nor report shipments of immature papayas to the committee using PAC Form 7(c). This rule will decrease the burden by 9.25 hours.

The Department has not identified any relevant Federal rules that duplicate, overlap, or conflict with this rule.

In addition, the committee's meetings were widely publicized throughout the papaya industry and all interested persons were encouraged to attend the meetings and participate in committee deliberations on all issues. Like all committee meetings, the December 28, 2000, and the subsequent January 11, 2001, meetings were public meetings and all entities, both large and small, were encouraged to express views on this issue. The committee itself is comprised of 13 members, consisting of nine producer members and three handlers members. The committee also includes a public member who does not represent an agricultural interest nor have a financial interest in papayas.

An interim final rule concerning this action was published in the **Federal Register** on May 30, 2001. Copies of the rule were mailed by the committee's staff to all committee members and papaya handlers. In addition, the rule was made available through the Internet by the Office of the Federal Register. That rule provided for a 60-day comment period which ended July 30, 2001. No comments were received.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at the following website: <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 matters presented, including the information and recommendation submitted by the committee and other

available information, it is found that finalizing the interim final rule, without change, as published in the **Federal Register** (66 FR 29216, May 30, 2001) will tend to effectuate the declared policy of the Act.

List of Subjects in 7 CFR Part 928

Marketing agreements, Papayas, Reporting and recordkeeping requirements.

PART 928—PAPAYAS GROWN IN HAWAII

Accordingly, the interim final rule amending 7 CFR part 928, which was published at 66 FR 29216 on May 30, 2001, is adopted as a final rule without change.

Dated: September 17, 2001.

Kenneth C. Clayton,

Acting Administrator, Agricultural Marketing Service.

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DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 966

[Docket No. FV01-966-1 FR]

Tomatoes Grown in Florida; Changes to the Handling Regulation for Producer Field-Packed Tomatoes

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This rule changes the requirements currently prescribed for producer field-packed tomatoes under the Florida tomato marketing order (order). The order regulates the handling of tomatoes grown in Florida, and is administered locally by the Florida Tomato Committee (Committee). This rule removes the net weight and weight labeling exemptions for producer field-packed tomatoes. Producer field-packed tomatoes compete directly with packinghouse tomatoes that must meet the net weight requirement. This change requires all tomatoes, regardless of where they are packed, to meet the same net weight requirements so that these requirements are the same for producer field-packed tomatoes and packinghouse tomatoes.

EFFECTIVE DATE: This final rule becomes effective September 24, 2001.

FOR FURTHER INFORMATION CONTACT: Doris Jamieson, Southeast Marketing Field Office, Marketing Order Administration Branch, Fruit and