

**7 CFR Part 920**

[Docket No. FV95-920-1PR]

**Kiwifruit Grown in California;  
Proposed Relaxation of Pack  
Requirements****AGENCY:** Agricultural Marketing Service, USDA.**ACTION:** Proposed rule.

**SUMMARY:** This proposed rule would relax the pack requirements for kiwifruit packed in Size 45 containers under the Federal marketing order (order) for kiwifruit grown in California. This relaxation would increase the size variation tolerance for all Size 45 containers of kiwifruit from 5 percent, by count, to 10 percent, by count. This rule would reduce grower and handler costs and enable more fruit to be packed and sold. Several editorial changes are also being proposed to clarify the current kiwifruit handling requirements.

**DATES:** Comments must be received by May 24, 1995.

**ADDRESSES:** Interested persons are invited to submit written comments concerning this rule. Comments must be submitted in triplicate to the Docket Clerk, Fruit and Vegetable Division, AMS, USDA, P.O. Box 96456, Room 2523-S, Washington, DC 20090-6456, or by facsimile at (202) 720-5698. Comments should reference this 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:** Rose Aguayo, California Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Division, AMS, USDA, 2202 Monterey Street, Suite 102B, Fresno, California 93721; telephone (209) 487-5901; or Charles Rush, Marketing Order Administration Branch, Fruit and Vegetable Division, AMS, USDA, P.O. Box 96456, Room 2526-S, Washington, DC 20090-6456, telephone (202) 690-3670.

**SUPPLEMENTARY INFORMATION:** This proposed rule is issued under Marketing Order No. 920 (7 CFR part 920), as amended, regulating the handling of kiwifruit grown in California, 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 (Department) is issuing this proposed rule in conformance with Executive Order 12866.

This proposed rule has been reviewed under Executive Order 12778, Civil Justice Reform. This action is not intended to have retroactive effect. This proposed rule would 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 in equity to review the Secretary's ruling on the petition, provided a bill in equity 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 Administrator of the Agricultural Marketing Service (AMS) has considered the economic impact of this rule 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 65 handlers of California kiwifruit subject to regulation under the order and approximately 600 kiwifruit producers in the production area. Small agricultural service firms are defined by the Small Business Administration (13 CFR 121.601) as those whose annual receipts are less than \$5,000,000, and small agricultural producers have been defined as those having annual receipts of less than \$500,000. A majority of handlers and producers of California kiwifruit may be classified as small entities.

This proposal is in accordance with § 920.52(a)(3) of the order which authorizes regulations to establish the pack of the container or containers which may be used in the packaging or

handling of kiwifruit. Under the terms of the marketing order, fresh market shipments of California kiwifruit are required to be inspected and are subject to grade, size, maturity, pack and container requirements. Among the pack requirements, is a size variation tolerance requirement which specifies that not more than 5 percent, by count, of kiwifruit in any container may fail to meet the pack requirements of § 920.302(a)(4). The size variation tolerance does not apply to other pack requirements such as how the fruit fills the cell compartments, cardboard fillers, or molded trays, or any weight requirements.

The Kiwifruit Administrative Committee (committee), the agency responsible for local administration of the marketing order, met on February 8, 1995, and recommended by unanimous vote to relax the current size variation tolerance from 5 percent to 10 percent for bag, volume fill, bulk, cell compartments, cardboard fillers, or molded tray containers of Size 45 kiwifruit for pack under the Federal marketing order for kiwifruit grown in California.

The order authorizes under § 920.52 the establishment of pack requirements. Section 920.302(a)(4) of the rules and regulations outlines the pack requirements for fresh shipments of California kiwifruit. Section 920.302(a)(4)(i) outlines pack requirements for proper size, and size variation, and contains a table that provides minimum net weights for count designation of kiwifruit packed in containers with cell compartments, cardboard fillers, or molded trays. Section 920.302(a)(4)(ii) outlines pack requirements for fruit size variation in bags, volume fill and bulk containers and includes a table that specifies numerical size designations that are used to determine kiwifruit sizes. These size designations are defined by numerical counts, which establish the maximum number of fruit per 8-pound sample for each of the established sizes.

The committee recommended increasing the size variation tolerance for Size 45 containers from 5 percent to 10 percent, by count, of kiwifruit in any container, because handlers cannot visually determine if fruit in a Size 45 container would meet the 5 percent tolerance.

Packout by fruit size, of Size 45 containers, increased from 1.80 percent for the 1993-94 season to 14.34 percent for the 1994-95 season. This increase in packout, of Size 45 fruit, is a result of blending Size 49 fruit into Size 45 fruit containers and as a result of weather conditions in the central and southern