

**DEPARTMENT OF AGRICULTURE****Agricultural Marketing Service****7 CFR Part 920****[Docket No. FV98-920-2 FR]****Kiwifruit Grown in California;  
Temporary Suspension of an  
Inspection Requirement****AGENCY:** Agricultural Marketing Service, USDA.**ACTION:** Final rule.

**SUMMARY:** This rule temporarily suspends an inspection requirement for kiwifruit covered under the California kiwifruit marketing order. The marketing order regulates the handling of kiwifruit grown in California, and is administered locally by the Kiwifruit Administrative Committee (Committee). Prior to this suspension, certification of any kiwifruit which was inspected and certified as meeting grade, size, quality, or maturity requirements in effect under the marketing order was valid until December 31 of the current fiscal year or 21 days from the date of inspection, whichever is later. This rule enables handlers to ship kiwifruit without the necessity for reinspection and recertification and the costs associated with such requirements. This temporary suspension was unanimously recommended by the Committee and is expected to reduce handler costs and to increase grower returns, while continuing to provide consumers with the same high quality fruit as was available under previous requirements.

**EFFECTIVE DATE:** September 1, 1998 through July 31, 1999.

**FOR FURTHER INFORMATION CONTACT:** Rose Aguayo, 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: (209) 487-5901, Fax: (209) 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) 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 final 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 rule in conformance with Executive Order 12866.

This final 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 final rule temporarily suspends an inspection requirement for kiwifruit covered under the California kiwifruit marketing order. This rule temporarily suspends the current limitation of the inspection certificate validation period and enables handlers to ship kiwifruit without the necessity for reinspection and recertification. The rule will be in effect during the 1998-99 fiscal year.

Section 920.55 of the order requires that prior to handling any variety of California kiwifruit, such kiwifruit shall be inspected by the Federal or Federal-State Inspection Service (inspection service) and certified as meeting the applicable grade, size, quality, or maturity requirements in effect pursuant to § 920.52 or § 920.53. Section 920.55 also provides authority for the establishment, through the order's administrative rules and regulations, of a period prior to shipment during which inspections must be performed.

Section 920.155 of the order's administrative rules and regulations

prescribes that the certification of grade, size, quality, and maturity of kiwifruit pursuant to § 920.52 or § 920.53 during each fiscal year is valid until December 31 of such year or 21 days from the date of inspection, whichever is later. Any inspected kiwifruit to be shipped after the certification period lapses must be reinspected and recertified before shipping.

At its meeting on February 11, 1998, the Committee unanimously recommended suspending § 920.155 for the 1998-99 fiscal year. The Committee made this recommendation in an effort to reduce the additional costs of reinspection. In recent years, after cultural and post-harvest expenses have been paid, many kiwifruit growers have lost money or merely recovered their production costs with little or no profit. Because storage and handling operations have improved in the industry, and as a result of a fruit ripening program being utilized by the industry, the Committee believes it may no longer be necessary to have fruit reinspected to provide consumers with a high quality product. The recommended suspension is for a one-year period so the effects can be evaluated. The Committee further recommended that this suspension be in effect no later than September 1, 1998, to enable handlers to make operational decisions in time for the 1998 harvest and shipping season.

When the order was promulgated, authority was included to limit the length of time inspection certificates would be valid. This authority was provided because the condition of kiwifruit can change while it is held in cold storage.

The industry has estimated that approximately 30 percent of the inspected kiwifruit is subject to reinspection each year at a cost of approximately \$0.03 per tray equivalent (a tray equivalent being 7 pounds of kiwifruit), and that a minimal amount, approximately 1 percent, of reinspected fruit fails to meet order requirements.

As the inspection service has not yet established the 1998-99 reinspection rates, the total costs for the industry are based on the past season's rates. These annual costs were estimated to be approximately \$50,000 for the 1998-99 season.

By suspending the reinspection requirement, handlers will be able to reduce handling costs by conducting their own reinspection of fruit before shipment, when necessary. The Committee believes that consumers will continue to receive the same high quality fruit as was available when reinspection was conducted by the

inspection service. Handlers have continually upgraded their cold storage and handling operations, resulting in fewer fruit condition problems. In recent seasons, improved storage facilities have resulted in fewer storage-related condition problems, such as black sooty mold. In addition, processing and packing equipment utilized by handlers has improved in recent years, resulting in less damage to fruit in the handling process, thus resulting in fewer condition problems. Finally, the industry's ripening program has resulted in earlier seasonal shipments and a decreased amount of inspected fruit remaining in cold storage beyond the maximum time for which an inspection certificate is valid.

The Committee believes that eliminating the reinspection requirement will not have a negative impact on any aspect of the industry; however, it wishes to approach this issue with caution. Thus, the Committee recommended temporarily suspending § 920.155 for the 1998–99 fiscal year as a “pilot test,” so it can evaluate the results after the season. The Committee expects this action to reduce handler costs by \$50,000, resulting in increased grower returns, while continuing to provide consumers with the same high quality fruit as provided under previous requirements.

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 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 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 60 handlers of California kiwifruit subject to regulation under the marketing order and approximately 450 producers in the production area. Small agricultural producers are defined by the Small Business Administration (13 CFR 121.601) as those whose annual receipts are less than \$500,000, and small agricultural service firms are defined as those whose annual receipts are less than \$5,000,000. One of the 60 handlers subject to regulation has annual kiwifruit receipts of at least \$5,000,000. This figure excludes receipts from any

other sources. The remaining 59 handlers have annual receipts less than \$5,000,000, excluding receipts from other sources. In addition, 10 of the 450 producers subject to regulation have annual sales of at least \$500,000, excluding receipts from any other sources. The remaining 440 producers have annual sales less than \$500,000, excluding receipts from any other sources. Therefore, a majority of handlers and producers are classified as small entities.

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evaluated. The Committee further recommended that this suspension be in effect no later than September 1, 1998, to enable handlers to make operational decisions in time for the 1998 harvest and shipping season.

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The industry has estimated that approximately 30 percent of the inspected kiwifruit is subject to reinspection each year at a cost of approximately \$0.03 per tray equivalent, and that a minimal amount, approximately 1 percent, of reinspected fruit fails to meet order requirements.

Although the inspection service has not yet established the 1998–99 inspection rates, based on the past season's rates, total reinspection costs for the industry are expected to be approximately \$50,000 for the 1998–99 fiscal year.

Handlers will be able to reduce handling costs by conducting their own reinspection of fruit before shipment, when necessary. The Committee believes that consumers will continue to receive the same high quality fruit as was available when reinspection was conducted by the inspection service. Handlers have continually upgraded their cold storage and handling operations, resulting in fewer fruit condition problems. In recent seasons, improved storage facilities have resulted in fewer storage-related condition problems, such as black sooty mold. In addition, processing and packing equipment utilized by handlers has improved in recent years, resulting in less damage to fruit in the handling process, thus resulting in fewer condition problems. Finally, the industry's ripening program has resulted in earlier seasonal shipments and a decreased amount of inspected fruit remaining in cold storage beyond the maximum time for which an inspection certificate is valid.

The Committee believes that eliminating the reinspection requirement will not have a negative impact on any aspect of the industry; however, it wishes to approach this issue with caution. Thus, the Committee recommended temporarily suspending § 920.155 for the 1998–99 fiscal year as a “pilot test,” so it can evaluate the results after the season. The Committee expects this action to reduce handler costs by \$50,000, resulting in increased grower returns, while continuing to provide consumers with the same high

quality fruit as provided under previous requirements.

The 1998–99 kiwifruit crop estimate was revised in April 1998 from 10 to 12 million tray equivalents to 8.5 million tray equivalents. Based on recent experience, approximately 30 percent of the inspected kiwifruit is subject to reinspection. The 1998–99 reinspection fees have not yet been established by the inspection service, however, preliminary estimates indicate that these rates will be slightly higher than the 1997–98 rates. The 1997–98 rates were \$0.032 per tray/volume fill/count fill container, \$0.047 per 3 layer/master container, and \$0.0047 per pound for bins. The inspection service estimates that reinspection costs will continue to be approximately \$42,000 and that with the addition of mileage and overtime fees, the inspection service estimates that the total annual costs to the industry will continue to be approximately \$50,000. Therefore, the suspension of the reinspection requirement is expected to result in an annual savings of \$50,000 for the 1998–99 fiscal year.

The Committee discussed a number of alternatives to this rule, including making inspection certificates valid to January 31, or modifying the reinspection process by requiring inspection for condition only, but it was determined that neither of these alternatives would reduce reinspection costs. The Committee also discussed the possibility of reducing the sample size from the current one-half of 1 percent; however, the inspection service advised the Committee that further reduction of the sample size would jeopardize the integrity of the inspection.

Another alternative discussed was the elimination of in-line inspections altogether, but this was determined to be unacceptable to the industry. Use of in-line inspection provides handlers assurance that the fruit is making grade at the time of packing. Any problems that may exist can be identified immediately and corrected, thus avoiding the additional costs of repacking at the time of shipment.

The Committee also considered increasing the use of inspection waivers as a means to lower costs. However, the Committee could not reach a consensus on an acceptable and equitable means to increase the issuance of waivers throughout the industry, and, thus, it was determined to be an unacceptable alternative.

As another possibility, the Committee discussed alternative inspection methods. It was decided that they would not be a viable option at this time.

Following discussion of these alternatives, the Committee concluded that temporarily suspending § 920.155 is in the best interest of the industry, as this suspension is expected to save as much as \$50,000 in reinspection fees and to increase grower returns, while continuing to provide consumers with the same high quality fruit as provided under previous reinspection requirements.

This action will not impose any additional reporting or recordkeeping requirements on either small or large kiwifruit 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.

As noted in the initial regulatory flexibility analysis, the Department has not identified any relevant Federal rules that duplicate, overlap, or conflict with this final rule.

In addition, the Committee's February 11, 1998, meeting was widely publicized throughout the kiwifruit industry and all interested persons were invited to attend the meeting and participate in Committee deliberations on all issues. Like all Committee meetings, the February 11, 1998, meeting was a public meeting and all entities, both large and small, were able to express views on this issue. The Committee itself is composed of 12 members. Two of these members are handlers and producers, nine are producers only, and one is a public member. The majority of the Committee members are small entities. In addition, a survey on the options of eliminating or keeping the reinspection requirement was mailed to all growers and handlers of California kiwifruit. Of the 485 surveys mailed, 159 were returned to the Committee by the deadline of February 6, 1998, for a response rate of 33 percent. Growers accounted for 77 percent of the total surveys returned by the deadline, and of those, 67 percent were in favor of eliminating reinspection. Finally, interested persons were invited to submit information on the regulatory and informational impacts of this action on small businesses.

A proposed rule concerning this action was published in the **Federal**

**Register** on June 5, 1998 (63 FR 30655). Copies of the rule were also mailed or sent via facsimile to all Committee members and kiwifruit handlers. Finally, the rule was made available through the Internet by the Office of the Federal Register.

A 30-day comment period was provided to allow interested persons to respond to the proposal. No comments were received.

After consideration of all relevant matter presented, including the information and recommendation submitted by the Committee and other available information, it is hereby found that the provisions of the regulation, as hereinafter set forth, should be suspended to effectuate the declared policy of the Act.

It is further found that good cause exists for not postponing the effective date of this rule until 30 days after publication in the **Federal Register** (5 U.S.C. 553) because handlers need this action in place by September 1 to provide sufficient time to plan for the upcoming marketing season. Harvest is expected to begin the end of September or early October and handlers want to take advantage of the relaxation as soon as possible. Further, handlers are aware of this rule, which was recommended at a public meeting. Also, a 30-day comment period was provided for in the proposed rule and no comments were received.

#### **List of Subjects in 7 CFR Part 920**

Kiwifruit, Marketing agreements, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, 7 CFR part 920 is amended as follows:

#### **PART 920—KIWIFRUIT GROWN IN CALIFORNIA**

1. The authority citation for 7 CFR part 920 continues to read as follows:

**Authority:** 7 U.S.C. 601–674.

#### **§ 920.155 [Suspended]**

2. In part 920, § 920.155 is suspended in its entirety effective September 1, 1998, through July 31, 1999.

Dated: July 29, 1998.

**Robert C. Keeney,**  
*Deputy Administrator, Fruit and Vegetable Programs.*

[FR Doc. 98–20791 Filed 8–3–98; 8:45 am]

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