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DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 920

[Docket No. FV98-920-4 IFR]

Kiwifruit Grown in California; Relaxation of Pack Requirements

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Interim final rule with request for comments.

SUMMARY: This rule relaxes the pack requirements prescribed 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). This rule increases the size variation tolerance for Size 42 kiwifruit and increases the maximum number of fruit per 8-pound sample for Sizes 42 through 30. In addition, it suspends, for the 1998-99 season, the minimum net weight requirements for kiwifruit packed in containers with cell compartments, cardboard fillers, or molded trays. These changes were unanimously recommended by the Committee and are expected to reduce handler packing costs, increase producer returns, and enable handlers to compete more effectively in the marketplace.

DATES: This document is effective September 4, 1998. The suspension of § 920.302(a)(4)(iii) is effective September 4, 1998, through July 31, 1999. Comments received prior to November 2, 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; or E-mail: moabdocketclerk@usda.gov. 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: Rose M. Aguayo, Marketing Specialist, California Marketing Field Office, Marketing Order Administration Branch, F&V, 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 rule is issued under Marketing Order No. 920, as amended (7 CFR part 920), 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 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 increases the size variation tolerance for Size 42 kiwifruit and increases the maximum number of fruit per 8-pound sample for Sizes 42 through 30. In addition, it suspends, for the 1998-99 season, the minimum net weight requirements for kiwifruit packed in containers with cell compartments, cardboard fillers, or molded trays. These changes were unanimously recommended by the Committee and are expected to reduce handler packing costs, increase producer returns, and enable handlers to compete more effectively in the marketplace.

Under the terms of the order, fresh market shipments of kiwifruit grown in California are required to be inspected and meet grade, size, maturity, pack, and container requirements. Section 920.52 authorizes the establishment of pack requirements. Section 920.302(a)(4) of the order's administrative rules and regulations outlines pack requirements for fresh shipments of California kiwifruit.

Section 920.302(a)(4)(ii) provides pack requirements for kiwifruit packed in cell compartments, cardboard fillers, or molded trays and includes a table that specifies numerical size designations and size variation tolerances. It also provides pack requirements for kiwifruit packed in bags, volume fill, or bulk containers, and includes a separate table that specifies numerical size designations and size variation tolerances. Paragraph (a)(4)(ii) also provides that not more than 10 percent, by count, of the containers in any lot and not more than 5 percent, by count, of kiwifruit in any one container (except that for Size 42 kiwifruit, the tolerance, by count, in any one container, may not be more than 10 percent, and except that for Size 45 kiwifruit, the tolerance by count, in any one container, may not be more than 25

percent) may fail to meet the requirements of this paragraph.

Section 920.302(a)(4)(iii) provides requirements for fruit packed in containers with cell compartments, cardboard fillers, or molded trays and requires that specific minimum net weights per size designation be met.

Section 920.302(a)(4)(iv) establishes a maximum number of fruit per 8-pound sample for each numerical count size designation for fruit packed in bags, volume fill, or bulk containers.

The amount of kiwifruit supplied to the domestic market by California handlers has declined 22 percent, since the 1992-93 season. In addition, producer prices have steadily declined in spite of a continuous increase in the U.S. per capita consumption of kiwifruit. When the order was implemented in 1984, the average Free-on-Board (FOB) value was \$1.14 per pound. This average has steadily decreased to \$0.53 per pound for the 1997-98 season. The Committee reviewed FOB values and determined that the average FOB value for the 1992-93 season through the 1997-98 season was \$0.55 per pound. To address these concerns, the industry held several industry-wide planning sessions during May and June 1998.

The Committee subsequently met on July 8, 1998, and unanimously recommended modifying the pack regulations under § 920.302 as follows:

(1) Increase the size variation tolerance, from 10 percent, by count, in any one container, to 25 percent, by count, for Size 42 kiwifruit;

(2) Increase the maximum number of fruit per 8-pound sample for Sizes 42, 39, 36, 33, and 30 of kiwifruit packed in bags, volume fill, or bulk containers; and

(3) Temporarily suspend, for the 1998-99 season, the minimum net weight requirements for kiwifruit packed in containers with cell compartments, cardboard fillers, or molded trays.

Increase in Size Variation Tolerance for Size 42 Kiwifruit

Currently, a size variation tolerance of 1/4-inch (6.4 mm) difference is allowed between the widest and narrowest kiwifruit in any Size 42 container utilizing cell compartments, cardboard fillers, or molded trays and a 3/8-inch (9.5 mm) size variation difference is allowed between the widest and narrowest kiwifruit packed in a Size 42 bag, volume fill, or bulk container. Not more than 10 percent, by count, of the containers in any lot and not more than 5 percent, by count, of kiwifruit in any container may fail to meet the

established size variations for Sizes 39 and larger.

Prior to the 1996-97 season, handlers were experiencing difficulty meeting the size variation tolerances for Sizes 42 and 45 kiwifruit because it is difficult to separate the round, narrow fruit from the flatter, broader fruit. Weight sizers will not separate this fruit because the fruit may weigh exactly the same yet be of different shapes requiring them to be packed into different boxes in order to stay within the size variation requirements. This sizing problem occurs mostly in 40 series fruit where size variations are often indiscernible to the eye and calipers are needed to detect differences. Fruit packed in the 40 series consistently provides lower returns to California producers than larger sized fruit and also is the most costly to pack.

The Committee determined that the best way to address the sizing problem was to increase the size variation tolerance, by count, in any one container, for Sizes 42 and 45 kiwifruit. Section 920.302(a)(4) of the order's administrative rules and regulations was revised by a final rule issued September 19, 1997 (52 FR 49128), to include a provision that increased the size variation tolerance, by count, in any one container, from 5 percent to 10 percent for Size 42 kiwifruit. That rule also increased the size variation tolerance, by count, for Size 45 kiwifruit from 10 percent, by count, to 25 percent, by count.

During the 1997-98 season, the increased size variation tolerances for Sizes 42 and 45 benefitted the industry by easing the packing burden and reducing costs, while maintaining uniform looking boxes of fruit desired by customers.

Since the 1997-98 harvest, the industry held several industry-wide planning sessions and considered ways to reduce handler packing costs, increase producer returns, and enable handlers to compete more effectively in the marketplace.

The three recommendations to relax packing requirements made by the Committee on July 8, 1998, were the final result of these discussions. The recommendation to increase the size variation tolerance for Size 42 fruit from 10 percent, by count, to 25 percent, by count, was made because the Committee realized that increasing the number of fruit in an 8-pound sample for Size 42 fruit would make it difficult for handlers to meet the established size variation requirements. Increasing the size variation tolerance for Size 42 fruit will ease the handler packing burden by adding several more pieces of fruit to

the 8-pound sample, and will reduce handler packing costs.

Additionally, increasing the size variation tolerance for Size 42 from 10 percent, by count, to 25 percent, by count, will increase the number of kiwifruit that may exceed the 3/8-inch size variation requirement in bags, volume fill, or bulk containers. When applied to a 22-pound volume fill container, this increase in the size variation tolerance will allow approximately 37 pieces of fruit out of 146 to exceed the 3/8-inch tolerance versus 15 pieces of fruit per 22-pound volume fill container at the current 10 percent tolerance level.

Very little Size 42 kiwifruit is packed in single layer containers with cell compartments, cardboard fillers, or molded trays. However, Size 42 fruit is packed in 3-layer containers with cell compartments, cardboard fillers, or molded trays. Increasing the size variation tolerance to 25 percent, by count, will allow approximately 31 pieces of fruit out of 126 to exceed the 1/4-inch tolerance versus the 12 pieces of fruit per 3-layer container at the current 10 percent tolerance level. Increasing the size variation tolerance for Size 42 fruit will reduce packing costs.

The Committee expects that increasing the size variation tolerance for Size 42 kiwifruit will reduce packing costs because the additional tolerance will make it easier to pack round and flat Size 42 fruit without slowing down the packing line. The Committee anticipates that producer returns will increase as a portion of the fruit previously packed as Size 45 will be able to be packed as Size 42. Approximately 75 percent of all California kiwifruit is shipped in 22-pound volume fill containers. Retailers pay approximately \$1.14 more for a 22-pound volume fill container of Size 42 fruit than for a similar container of Size 45 fruit. Lastly, the Committee expects this change to benefit the industry by providing retailers and consumers with uniform containers of kiwifruit.

Increasing the Maximum Number of Fruit per 8-Pound Sample

Currently, under the rules and regulations, kiwifruit packed in bags, volume fill, or bulk containers, must not exceed the maximum number of fruit per an 8-pound sample per numerical count size designation.

The Committee determined that increasing the maximum number of fruit per 8-pound sample for Sizes 42 through 30 will increase the number of fruit packed in each bag, volume-fill, or bulk container and will help lessen the sizing differences between California

and imported kiwifruit. The Committee believes that lessening the size differences should help California handlers compete more effectively in the marketplace.

The Committee unanimously recommended increasing the maximum number of fruit per 8-pound sample as shown in the following chart:

Tray equivalency size designation	Maximum number of fruit per 8 pound sample
21	22
25	27
27/28	30
30	33 (32)*
33	36 (35)*
36	42 (40)*
39	48 (45)*
42	53 (50)*
45	55

* Prior number of fruit per 8-pound sample.

This chart is commonly referred to as the "Size Designation Chart" in the industry. Increasing the maximum number of fruit per 8-pound sample will allow some smaller-sized fruit to be packed into a larger-size category. This rule allows three more pieces of fruit to be packed per 8-pound sample in Sizes 42 and 39, two more pieces of fruit to be packed in Size 36, and one more piece of fruit to be packed in Sizes 33 and 30. It also reduces the percentage of fruit packed in the 40 series and increases the percentage of fruit packed in sizes 39 and 36, which are the preferred sizes by U.S. retail. Thus, handlers will be better able to meet the needs of buyers, because kiwifruit sells by the piece, and buyers desire as much fruit in each container as the container can comfortably hold. This change does not affect the minimum size and will not allow fruit currently considered as "undersized" to be packed. The Committee further believes that increasing the maximum number of fruit in the 8-pound sample will help lessen the sizing differences between California and imported kiwifruit. Lessening the size differences should help California handlers compete more effectively in the marketplace.

Minimum Net Weight Requirements

Currently, fruit packed in containers with cell compartments, cardboard fillers, or molded trays are required to meet the minimum net weight requirements as shown in the following chart:

Count designation of fruit	Minimum net weight of fruit (Pounds)
34 or larger	7.5
35 to 37	7.25
38 to 40	6.875
41 to 43	6.75
44 and smaller	6.5

Prior to the 1989-90 season, tray weights were voluntary and 73.5 percent of the crop was packed in trays. During the 1989-90 season, tray weights were mandated, as there were many new packers involved in the kiwifruit packing process and stricter regulations were viewed as necessary to provide uniform container weights by size. However, since that season less and less fruit has been tray packed.

During the 1997-98 season, only 15.5 percent of the crop was packed into molded trays (singles and three-layers) and less than 1 percent of this fruit was rejected for failure to meet minimum tray weights. As a consequence, the Committee believes that minimum tray weight requirements may no longer be necessary to maintain uniformity in the marketplace. It further believes that suspension of this requirement will help reduce tray pack packing costs for both large and small handlers. Therefore, the Committee unanimously recommended that minimum net weights for kiwifruit packed in cell compartments, cardboard fillers, or molded trays be temporarily suspended for the 1998-99 season. The recommended suspension is for one season so the effects of the suspension can be evaluated. The Committee further recommended that this suspension begin no later than September 20, 1998, to enable handlers to make operational decisions in time for the 1998-99 harvest and shipping season. The 1998-99 season ends July 31, 1999.

Initial Regulatory Flexibility Analysis

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 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 the kiwifruit handlers and producers may be classified as small entities.

This rule increases the size variation tolerance for Size 42 kiwifruit and increases the maximum number of fruit per 8-pound sample for Sizes 42 through 30. In addition, it suspends, for the 1998-99 season, the minimum net weight requirements for kiwifruit packed in containers with cell compartments, cardboard fillers, or molded trays. These changes were unanimously recommended by the Committee and are expected to reduce handler packing costs, increase producer returns, and enable handlers to compete more effectively in the marketplace.

Under the terms of the order, fresh market shipments of kiwifruit grown in California are required to be inspected and meet grade, size, maturity, pack, and container requirements. Section 920.52 authorizes the establishment of pack requirements. Section 920.302(a)(4) of the order's administrative rules and regulations outlines pack requirements for fresh shipments of California kiwifruit.

Section 920.302(a)(4)(ii) provides pack requirements for kiwifruit packed in cell compartments, cardboard fillers, or molded trays and includes a table that specifies numerical size designations and size variation tolerances. It also provides pack requirements for kiwifruit packed in bags, volume fill, or bulk containers, and includes a separate table that specifies numerical size designations and size variation tolerances. Paragraph (a)(4)(ii) provides that not more than 10 percent, by count, of the containers in

any lot and not more than 5 percent, by count, of kiwifruit in any one container (except that for Size 42 kiwifruit, the tolerance, by count, in any one container, may not be more than 10 percent, and except that for Size 45 kiwifruit, the tolerance, by count, in any one container, may not be more than 25 percent) may fail to meet the requirements of this paragraph.

Section 920.302(a)(4)(iii) provides requirements for fruit packed in containers with cell compartments, cardboard fillers, or molded trays and requires that specific minimum net weights per size designation be met.

Section 920.302(a)(4)(iv) establishes a maximum number of fruit per 8-pound sample for each numerical count size designation for fruit packed in bags, volume fill, or bulk containers.

The amount of kiwifruit supplied to the domestic market by California handlers has declined 22 percent since the 1992–93 season. In addition, producer prices have steadily declined, in spite of a continuous increase in the U.S. per capita consumption of kiwifruit. When the order was implemented in 1984, the average Free-on-Board (FOB) value was \$1.14 per pound. This average has steadily decreased to \$0.53 per pound for the 1997–98 season. The Committee reviewed FOB values and determined that the average FOB value for the 1992–93 season through the 1997–98 season was \$0.55 per pound. To address these concerns, the industry held several industry-wide planning sessions during May and June 1998.

The Committee subsequently met on July 8, 1998, and unanimously recommended modifying § 920.302 of the order's administrative rules and regulations to make the following changes:

(1) Increase the size variation tolerance, from 10 percent, by count, in any one container, to 25 percent, by count, for Size 42 kiwifruit;

(2) Increase the maximum number of fruit per 8-pound sample for Sizes 42, 39, 36, 33, and 30 of kiwifruit packed in bags, volume fill, or bulk containers; and

(3) Temporarily suspend, for the 1998–99 season, the minimum net weight requirements for kiwifruit packed in containers with cell compartments, cardboard fillers, or molded trays.

Increase in Size Variation Tolerance for Size 42 Kiwifruit

Currently, a size variation tolerance of 1/4-inch (6.4 mm) difference is allowed between the widest and narrowest kiwifruit in any Size 42 container

utilizing cell compartments, cardboard fillers, or molded trays and a 3/8-inch (9.5 mm) size variation difference is allowed between the widest and narrowest kiwifruit packed in a Size 42 bag, volume fill, or bulk container. Not more than 10 percent, by count, of the containers in any lot and not more than 5 percent, by count, of kiwifruit in any container may fail to meet the established size variations for Sizes 39 and larger.

Prior to the 1996–97 season, handlers were experiencing difficulty meeting the size variation tolerances for Sizes 42 and 45 kiwifruit because it is difficult to separate the round, narrow fruit from the flatter, broader fruit. Weight sizers will not separate this fruit because the fruit may weigh exactly the same yet be of different shapes requiring them to be packed into different containers in order to stay within the size variation requirements. This sizing problem occurs mostly in 40 series fruit where size variations are often indiscernible to the eye and calipers are needed to detect differences. Fruit packed in the 40 series consistently provides lower returns to California producers than larger sized fruit and also is the most costly to pack.

The Committee determined that the best way to address the sizing problem was to increase the size variation tolerance, by count, in any one container, for Sizes 42 and 45 kiwifruit. Section 920.302(a)(4) of the order's administrative rules and regulations was revised by a final rule issued September 19, 1997 (52 FR 49128) to include a provision that increased the size variation tolerance, by count, in any one container, from 5 percent to 10 percent for Size 42 kiwifruit. That rule also increased the size variation tolerance, by count, for Size 45 kiwifruit from 10 percent, by count, to 25 percent, by count.

During the 1997–98 season, the increased size variation tolerances for Sizes 42 and 45 benefitted the industry by easing the packing burden and reducing costs, while maintaining uniform looking boxes of fruit desired by customers.

Since the 1997–98 harvest, the industry has held several industry-wide planning sessions and considered ways to reduce handler packing costs, increase producer returns, and enable handlers to compete more effectively in the marketplace. The three recommendations to relax pack requirements made by the Committee on July 8, 1998, were the final result of these discussions. The recommendation to increase the size variation tolerance for Size 42 fruit from 10 percent, by count, to 25 percent, by count, was

made because the Committee realized that increasing the number of fruit in an 8-pound sample for Size 42 fruit would make it difficult to meet the established size variation requirements. Increasing the size variation tolerance for Size 42 fruit will ease the packing burden created by adding several more pieces of fruit to the 8-pound sample, and will reduce handler packing costs.

Additionally, increasing the size variation tolerance for Size 42 from 10 percent, by count, to 25 percent, by count, will increase the number of kiwifruit that may exceed the 3/8-inch (9.5 mm) size variation requirement in bags, volume fill, or bulk containers. When applied to a 22-pound volume fill container, this increase in the size variation tolerance will allow approximately 37 pieces of fruit out of 146 to exceed the 3/8-inch (9.5 mm) tolerance versus 15 pieces of fruit per 22-pound volume fill container at the current 10 percent tolerance level.

Very little Size 42 kiwifruit is packed in single layer containers with cell compartments, cardboard fillers, or molded trays. However, Size 42 fruit is packed in 3-layer containers with cell compartments, cardboard fillers, or molded trays. Increasing the size variation tolerance to 25 percent, by count, will allow approximately 31 pieces of fruit out of 126 to exceed the 1/4-inch (6.4 mm) tolerance versus the 12 pieces of fruit per 3-layer container at the current 10 percent tolerance level.

The impact of this change on producers and handlers is expected to be beneficial for all levels of business, but especially beneficial for small businesses. Often times, the very small packing operations have older, outdated sizing equipment which makes it difficult to size kiwifruit as precisely as to what the order's rules and regulations require. More hand labor is required in order to "fine tune" the sizing process. More hand labor slows the packing line and increases packing costs.

The Committee expects that increasing the size variation tolerance for Size 42 kiwifruit will reduce packing costs because the additional tolerance will make it easier to pack round and flat Size 42 fruit without slowing down the packing line. Additionally, the Committee expects producer returns to increase as a portion of the fruit previously packed as Size 45 will be able to be packed as Size 42. Approximately 75 percent of all kiwifruit is shipped in 22-pound volume fill containers. Retailers pay approximately \$1.14 more for a 22-pound volume fill container of Size 42 fruit than for a similar container of Size 45 fruit. Lastly, the Committee expects

this change will benefit the industry by providing retailers and consumers with uniform containers of kiwifruit.

Increasing the Maximum Number of Fruit per 8-Pound Sample

Currently, under the rules and regulations, kiwifruit packed in bags, volume fill, or bulk containers, must not exceed the maximum number of fruit per an 8-pound sample per numerical count size designation.

The Committee determined that increasing the maximum number of fruit per 8-pound sample for Sizes 42 through 30 will increase the number of fruit packed in each bag, volume-fill, or bulk container and will help lessen the sizing differences between California and imported kiwifruit. The Committee believes lessening the size differences should help California handlers compete more effectively in the marketplace.

The Committee unanimously recommended increasing the maximum number of fruit per 8-pound sample as shown in the following chart:

Tray equivalency size designation	Maximum number of fruit per 8 pound sample
21	22
25	27
27/28	30
30	* 33 (32)
33	* 36 (35)
36	* 42 (40)
39	* 48 (45)
42	* 53 (50)
45	55

* Prior number of fruit per 8-pound sample.

This chart is commonly referred to as the "Size Designation Chart" in the industry. Increasing the maximum number of fruit per 8-pound sample will allow some smaller-sized fruit to be packed into a larger-size category. This rule allows three more pieces of fruit to be packed per 8-pound sample in Sizes 42 and 39, two more pieces of fruit to be packed in Size 36, and one more piece of fruit to be packed in Sizes 33 and 30. It also reduces the percentage of fruit packed in the 40 series and increases the percentage of fruit packed in sizes 39 and 36, which are the preferred sizes by U.S. retail. Thus, handlers will be better able to meet the needs of buyers because kiwifruit sells by the piece and buyers desire more fruit in each container. This change does not affect the minimum size and will not allow fruit currently considered as "undersized" to be packed. The Committee believes increasing the maximum number of fruit in the 8-

pound sample will help lessen the sizing differences between California and imported kiwifruit. Lessening the size differences should help California handlers compete more effectively in the marketplace.

The increase in the maximum number of fruit per 8-pound sample is not so significant that consumers or retailers will notice a visual size difference in the fruit being offered. The California Kiwifruit Commission, which administers a State program utilized to promote kiwifruit grown in California, has conducted kiwifruit sizing studies over the past 4 years. These studies show that there is only an average of $\frac{3}{32}$ -inch to $\frac{4}{32}$ -inch difference in fruit length between sizes, and $\frac{2}{32}$ -inch to $\frac{3}{32}$ -inch difference in fruit width. These differences are indistinguishable to the eye.

Further, the 1998-99 crop is expected to approximate the 1997-98 crop. The Committee estimated that utilizing the new size designations will yield the California kiwifruit industry \$32,106,395 in FOB value versus the \$30,931,451 received for the 1997-98 season. This is an additional \$1.17 million in FOB value for the 1998-99 season.

The Committee anticipates that these changes will equally benefit small and large businesses, enable handlers to compete more effectively in the marketplace, and help increase producer returns.

Minimum Net Weight Requirements

Currently, fruit packed in containers with cell compartments, cardboard fillers, or molded trays are required to meet the minimum net weight requirements as shown in the following chart:

Count designation of fruit	Minimum net weight of fruit (Pounds)
34 or larger	7.5
35 to 37	7.25
38 to 40	6.875
41 to 43	6.75
44 and smaller	6.5

Prior to the 1989-90 season, tray weights were voluntary and 73.5 percent of the crop was packed in trays. During the 1989-90 season, tray weights were mandated, as there were many new packers involved in the kiwifruit packing process and stricter regulations were viewed as necessary to provide uniformity in tray weights. However, since that season less and less fruit has been packed in tray style packs.

During the 1997-98 season, only 15.5 percent of the crop was packed into

molded trays (singles and three-layers) and less than 1 percent of this fruit was rejected for failure to meet minimum tray weights. As a consequence, the Committee believes that minimum tray weight requirements may no longer be needed to assure uniform container weights in the marketplace. It further believes that suspension of this requirement will help reduce packing costs for both large and small handlers. Therefore, the Committee unanimously recommended that the minimum net weights for kiwifruit packed in cell compartments, cardboard fillers, or molded trays be temporarily suspended for the 1998-99 season. The recommended suspension is for one season so the effects can be evaluated. The Committee further recommended that the suspension begin no later than September 20, 1998, to enable handlers to make operational decisions in time for the 1998-99 harvest and shipping season. The 1998-99 season ends July 31, 1999.

Packing costs for handlers for a 22-pound volume fill container range from approximately \$0.25 to \$0.75 per container. It is anticipated that the potential cost savings per 22-pound volume fill container will be around \$0.01. The crop estimate for the 1998-99 season is 2,705,000, 22-pound volume fill container equivalents. It is estimated that the three recommended changes could result in a potential savings in packing costs for handlers of approximately \$27,000 during the 1998-99 season. The Committee and the Federal-State Inspection Service determined that these changes will not result in a reduction in inspection costs as the inspection process is essentially the same.

There is wide-spread agreement in the industry for the need to relax pack requirements. The Committee considered other alternatives to relaxing packing requirements but determined that these suggestions will not adequately address the industry's problems.

One suggestion was to suspend all pack requirements and to make all pack requirements voluntary. Another suggestion was to terminate the order. The Committee did not adopt these suggestions because it believes they will result in a vast array of packs without uniformity, and that this will cause disorderly marketing and confusion in the marketplace. The Committee wants to maintain the reputation California has established for uniformly packed containers of kiwifruit to prevent such problems.

Another suggestion presented was that the size markings should be based

on the number of pieces of fruit per pound. The Committee did not adopt this suggestion because it believes such marking practices would continue to cause inconsistencies in the marketplace. The Committee considered a suggestion to lower the minimum maturity requirement, but determined that the current minimum maturity requirement of 6.5 percent soluble solids was appropriate and should remain unchanged.

Another suggestion presented was to reduce the number of size designations. Some Committee members thought that fewer size designations might lessen confusion in the marketplace. The Committee did not adopt this suggestion because retailers are familiar with the various size designations utilized by handlers and have not expressed concerns with the number of size designations.

After considering these alternatives, the Committee recommended increasing the size variation tolerance for Size 42 kiwifruit, increasing the maximum number of fruit per 8-pound sample for Sizes 42 through 30, and suspending, for the 1998-99 season, the minimum tray weight requirements for kiwifruit packed in cell compartments, cardboard fillers, or molded trays. The Committee expects these relaxations to pack requirements to reduce handler packing costs, increase producer returns, and enable handlers to compete more effectively in the marketplace.

These changes address the marketing and shipping needs of the kiwifruit industry and are in the interest of handlers, producers, buyers, and consumers. The impact of these changes on producers and handlers is expected to be beneficial for all levels of business.

This rule 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 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 kiwifruit industry and all interested persons were invited to attend the meeting and participate in Committee deliberations. Like all Committee meetings, the July 8, 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. Three of these members are

handlers and producers, eight are producers only, and one is a public member. The majority of the Committee members 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 relaxation of two pack requirements and the suspension of the minimum net weight requirements currently prescribed under the California kiwifruit 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 relaxes pack requirements; (2) the 1998-99 harvest is expected to begin the end of September, and this rule should be in effect before that time so producers and handlers can make plans to operate under the relaxed requirements; (3) the Committee unanimously recommended these changes at a public meeting and interested parties had an opportunity to provide input; and (4) 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 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.

2. Section 920.302 is amended by suspending paragraph (a)(4)(iii) effective September 4, 1998, through July 31, 1999, and revising the last sentence of paragraph (a)(4)(ii), and the table in paragraph (a)(4)(iv) to read as follows:

§ 920.302 Grade, size, pack, and container regulations.

(a) * * *

(4) * * *

(ii) * * * Not more than 10 percent, by count of the containers in any lot and not more than 5 percent, by count, of kiwifruit in any container, (except that for Sizes 42 and 45 kiwifruit, the tolerance, by count, in any one container, may not be more than 25 percent) may fail to meet the requirements of this paragraph.

* * * * *

(iv) * * *

Column 1 numerical count size designation	Column 2 maximum number of fruit per 8-pound sample
21	22
25	27
27/28	30
30	33
33	36
36	42
39	48
42	53
45	55

* * * * *

Dated: August 28, 1998.

Robert C. Keeney,

Deputy Administrator, Fruit and Vegetable Programs.

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DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 1106

[DA-98-08]

Milk in the Southwest Plains Marketing Area; Suspension of Certain Provisions of the Order

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule; suspension.

SUMMARY: This document suspends certain sections of the Southwest Plains Federal milk marketing order. The suspension removes portions of the supply plant shipping standard and the producer milk delivery requirement. The suspension, which was requested by Kraft Foods, Inc. (Kraft), is necessary to prevent uneconomic and inefficient movements of milk and to ensure that producers historically associated with the market will continue to have their milk pooled under the Southwest Plains order.