

Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 920

[Docket No. FV01-920-1 PR]

Kiwifruit Grown in California; Removal of Certain Inspection and Pack Requirements

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule.

SUMMARY: This rule invites comments on the removal of certain inspection and pack requirements prescribed under the California kiwifruit marketing order (order). The order regulates the handling of kiwifruit grown in California and is administered locally by the Kiwifruit Administrative Committee (Committee). This rule would remove the requirement that fruit must be reinspected if it has not been shipped by specified dates, and would also remove the minimum net weight requirements for kiwifruit tray packs. These changes are expected to reduce handler packing costs, increase grower returns, and enable handlers to compete more effectively in the marketplace.

DATES: Comments must be received by June 14, 2001.

ADDRESSES: Interested persons are invited to submit written comments concerning this proposal. Comments must be sent to the Docket Clerk, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, room 2525-S, P.O. Box 96456, Washington, DC 20090-6456; Fax: (202) 720-8938, or E-mail: moab.docketclerk@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, 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 complying with this regulation by contacting Jay Guerber, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, P.O. Box 96456, room 2525-S, Washington, DC 20090-6456; telephone: (202) 720-2491, Fax: (202) 720-8938, or E-mail: Jay.Guerber@usda.gov.

SUPPLEMENTARY INFORMATION: This proposal 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 proposal has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is not intended to have retroactive effect. This proposal 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 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 proposal invites comments on the removal of certain inspection and pack requirements prescribed under the order. The order regulates the handling of kiwifruit grown in California and is administered locally by the Kiwifruit Administrative Committee (Committee). This rule would remove the requirement that fruit must be reinspected if it has not been shipped by specified dates, and would also remove the minimum net weight requirements for kiwifruit tray packs. These changes are expected to reduce handler packing costs, increase grower returns, and enable handlers to compete more effectively in the marketplace.

Removal of Reinspection Requirement

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(b) provides authority for the establishment, through the order's rules and regulations, of a period prior to shipment during which inspections must be performed.

Prior to its suspension for 1998-1999 season, § 920.155 of the order's rules and regulations specified that the certification of grade, size, quality, and maturity of kiwifruit pursuant to § 920.52 or § 920.53 during each fiscal year was valid until December 31 of such year or 21 days from the date of inspection, whichever is later. Any inspected kiwifruit shipped after the certification period lapsed was required to be reinspected and recertified before shipment.

Section 920.155 was suspended for the 1998-1999 season by a final rule published August 4, 1998 (63 FR 41390). The Committee recommended this suspension to lessen the expenses upon the many kiwifruit growers who had either lost money or merely recovered their production costs in recent years. It concluded that the cost of reinspecting kiwifruit was too high to justify requiring it in view of the limited benefit reinspection provided. The Committee also believed it was no

longer necessary to have fruit reinspected to provide consumers with a high quality product because storage and handling operations had improved in the industry.

During the 1998–1999 season, handlers voluntarily checked stored fruit prior to shipment to ensure that the condition of the fruit had not deteriorated. Suspension of the reinspection requirement enabled handlers to ship quality kiwifruit during the 1998–1999 season without the necessity for reinspection and recertification and the costs associated with such requirements. However, because the harvest started later than normal and more fruit was in-line inspected and shipped directly to buyers, less fruit was repacked and available for evaluation than anticipated.

Therefore, at its February 25, 1999, meeting, the Committee unanimously recommended suspending § 920.155 of the order for one more season. Section 920.155 was suspended for the 1999–2000 season by a final rule published on July 29, 1999 (64 FR 41010).

During the 1999–2000 season a severe frost reduced the crop size from the estimated 9 million tray equivalents to 6 million tray equivalents. A tray equivalent is equal to approximately 7 pounds of fruit. This significant crop reduction and the excellent quality of the fruit resulted in limited quantities of fruit remaining in cold storage for repacking and evaluation. The Committee wanted to fully evaluate the suspension of the reinspection requirement during a normal season. Therefore the Committee, at its February 24, 2000, meeting, unanimously recommended suspending § 920.155 for another season, the 2000–2001 season. Section 920.155 was suspended for the 2000–2001 season by a final rule published on June 14, 2000 (65 FR 37265).

The 2000–2001 season was normal and enabled the industry to conclude that the suspensions have indeed helped handlers reduce packing costs and to compete more effectively in the marketplace. Therefore, at its February 28, 2001, meeting the Committee recommended removing this inspection requirement for the 2001–2002 and future seasons. As previously experienced, this change is expected to result in reduced handler packing costs, increased growers returns, and enable handlers to compete more effectively in the marketplace.

Removal of Minimum Net Weight Requirements for Trays

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 minimum size, pack, and container requirements.

Section 920.302(a)(4) of the order's rules and regulations outlines pack requirements for fresh shipments of California kiwifruit.

Section 920.302(a)(4)(iii) specifies minimum net weight requirements for fruit of various sizes packed in containers with cell compartments, cardboard fillers, or molded trays.

Prior to the 1989–1990 season, there were no minimum tray weight requirements, although 73.5 percent of the crop was packed in trays. During the 1989–1990 season, minimum 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 for each size. However, since that season the proportion of the crop packed in trays has steadily declined.

During the 1997–1998 season, only 15.5 percent of the crop was tray packed and less than 1 percent of this fruit was rejected for failure to meet minimum tray weights. As a consequence, the Committee believed that minimum tray weight requirements might no longer be necessary to maintain uniformity in the marketplace.

Prior to the 1998–1999 season handlers were 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 |

The Committee met on July 8, 1998, and unanimously recommended suspension of the minimum net weight requirements for kiwifruit packed in cell compartments, cardboard fillers, or molded trays for the 1998–1999 season. Section 920.302(a)(4)(iii) was suspended for the 1998–1999 season by an interim final rule which was published September 3, 1998 (63 FR 14861) and finalized July 29, 1999 (64 FR 41019).

Even though the fruit was shorter, more full-bodied, and heavier during

the 1998–1999 season, handlers were able to reduce packing costs and to compete more effectively in the market. The industry continued to pack well-filled trays without having to spend the extra time weighing them. There was no reduction in the uniform appearance of fruit packed into trays. The consensus of the industry was that the absence of tray weights had no impact during the 1998–1999 season due to the exceptionally heavy weight of the fruit.

The Committee, at its February 25, 1999, meeting unanimously recommended suspending the minimum net weight requirements for the 1999–2000 season to evaluate the suspended requirements during a season when the fruit shape and density were normal. This suspension was implemented by a final rule published on July 29, 1999 (64 FR 41010).

As previously mentioned, the 1999–2000 crop was approximately three million tray-equivalents shorter than estimated due to a severe frost during the spring of 1999. This shortage of fruit resulted in limited quantities of fruit available for evaluation. Because of the uncharacteristic fruit in the 1998–1999 season and the short crop in the 1999–2000 season, the Committee recommended suspending the minimum net weight requirement for another year of evaluation. Therefore, at its February 24, 2000, meeting, the Committee once again unanimously recommended continuing the suspension of § 920.302(a)(4)(iii) for another season, the 2000–2001 season. The suspension was implemented through July 31, 2001, by a final rule issued June 14, 2000 (65 FR 37265). The 2000–2001 season was normal and enabled the industry to conclude that the suspensions have helped handlers reduce packing costs and to compete more effectively in the marketplace. Therefore, at its February 28, 2001, meeting, the Committee recommended removing this pack requirement for the 2001–2002 and future seasons. As previously experienced, this change is expected to result in reduced handler packing costs, increased growers returns, and enable handlers to compete more effectively in the marketplace, as previously experienced.

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 50 handlers of California kiwifruit subject to regulation under the marketing order and approximately 350 producers in the production area. Small agricultural producers are defined by the Small Business Administration (13 CFR 121.201) 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. All of the handlers have annual receipts of less than \$5,000,000, excluding receipts from other sources. Three hundred forty-five producers have annual sales of 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 would remove § 920.155 which requires that fruit be reinspected if it has not been shipped by specified dates, and would remove paragraph (a)(4)(iii) of § 920.302 which specifies minimum net weight requirements for kiwifruit tray packs. These changes are expected to reduce handler-packing costs, increase grower returns, and enable handlers to compete more effectively in the marketplace. Authority for this action is provided in §§ 920.52 and 920.55 of the order.

Removal of Reinspection Requirement

Removing the requirement that kiwifruit must be reinspected if has not been shipped by a certain date would have a minimal impact on the quality of fruit shipped. Prior to its suspension for 1998–1999 season, § 920.155 of the order’s rules and regulations specified that the certification of grade, size, quality, and maturity of kiwifruit pursuant to § 920.52 or § 920.53 during each fiscal year was valid until December 31 of such year or 21 days from the date of inspection, whichever is later. Any inspected kiwifruit shipped after the certification period lapsed was required to be reinspected and recertified before shipment.

Section 920.155 was suspended for the 1998–1999 season by a final rule published August 4, 1998 (63 FR 41390). The Committee recommended this suspension to lessen the expenses upon the many kiwifruit growers who had either lost money or merely

recovered their production costs in recent years. It concluded that the cost of reinspecting kiwifruit was too high to justify requiring it in view of the limited benefit reinspection provided. Total average costs for reinspection was estimated to be \$50,000 a year. The Committee also believed it was no longer necessary to have fruit reinspected to provide consumers with a high quality product because storage and handling operations had improved in the industry.

During the 1998–1999 season, handlers voluntarily checked stored fruit prior to shipment to ensure that the condition of the fruit had not deteriorated. Quality control efforts in place within the industry combined with improved storage due to research and technological advances has ensured that quality fruit reaches the market.

Suspension of the reinspection requirement enabled handlers to ship quality kiwifruit during the 1998–1999 season without the necessity for reinspection and recertification and the costs associated with such requirements. However, because the harvest started later than normal and more fruit was in-line inspected and shipped directly to buyers, less fruit was repacked and available for evaluation than anticipated.

Therefore, at its February 25, 1999, meeting, the Committee unanimously recommended suspending § 920.155 of the order for one more season. Section 920.155 was suspended for the 1999–2000 season by a final rule published on July 29, 1999 (64 FR 41010).

During the 1999–2000 season a severe frost reduced the crop size from the estimated 9 million tray equivalents to 6 million tray equivalents. A tray equivalent is equal to approximately 7 pounds of fruit. This significant crop reduction and the excellent quality of the fruit resulted in less fruit remaining in cold storage for repacking and evaluation.

The Committee believed that the industry realized benefits from the suspension of the reinspection requirement, and recommended evaluating the results of the suspended reinspection requirements during a normal season. Thus the Committee, at its February 24, 2000, meeting, unanimously recommended suspending § 920.155 for the 2000–2001 season. This suspension was implemented by a final rule published on June 14, 2000 (65 FR 37265). The 2000–2001 season was normal and enabled the industry to conclude that the suspensions have helped handlers reduce packing costs and to compete more effectively in the marketplace. The kiwifruit industry

estimated that removal of the reinspection requirement has resulted in cost savings to the industry of approximately \$50,000 a year.

Therefore, the Committee, at its February 28, 2001, meeting, unanimously recommended removing § 920.155 for the 2001–2002 and future seasons.

Removal of Minimum Net Weight Requirements for Trays

Removing the minimum tray weight requirements for kiwifruit packed in cell compartments, cardboard fillers, or molded trays would have a minimal impact on the appearance of tray packs. 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.

Prior to the 1989–1990 season, there were no minimum tray weight requirements although 73.5 percent of the crop was packed in trays. During the 1989–1990 season, minimum 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 for each size. However, since that season, the proportion of the crop packed in trays has steadily declined.

During the 1997–1998 season, only 15.5 percent of the crop was tray packed and less than 1 percent of this fruit was rejected for failure to meet minimum tray weights. As a consequence, the Committee believed that minimum tray weight requirements might no longer be necessary to maintain uniformity in the marketplace.

Prior to the 1998–1999 season handlers were 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 |

Therefore, at its meeting on July 8, 1998, the Committee unanimously recommended suspension of the minimum net weight requirements for kiwifruit packed in cell compartments, cardboard fillers, or molded trays for the 1998–1999 season. Section 920.302(a)(4)(iii) was suspended for the 1998–1999 season by an interim final rule published September 3, 1998 (63 FR 14861).

Even though the fruit was shorter, more full-bodied, and heavier during the 1998–1999 season, handlers were able to reduce packing costs and to compete more effectively in the marketplace. The industry continued to pack well-filled trays without having to spend the extra time weighing them. There was no reduction in the uniform appearance of fruit packed into trays. The consensus of the industry that season was that the absence of tray weights had no negative impact during the 1998–1999 season due to the exceptionally heavy weight of the fruit.

The Committee, at its February 25, 1999, meeting, unanimously recommended suspending the minimum net weight requirements for the 1999–2000 season to evaluate the suspended requirements during a season when the fruit shape and density were normal. This suspension was implemented by a final rule published on July 29, 1999 (64 FR 41010).

As previously mentioned, the 1999–2000 crop was approximately three million tray-equivalents shorter than estimated due to a severe frost during the spring of 1999. This shortage of fruit resulted in limited quantities of fruit available for evaluation. Because of the uncharacteristic fruit in the 1998–1999 season and the short crop in the 1999–2000 season, the Committee voted to suspend the minimum net weight requirement for another year of evaluation. Therefore, at its February 24, 2000, meeting, the Committee once again unanimously recommended continuing the suspension of § 920.302(a)(4)(iii) for another season, the 2000–2001 season. This suspension was implemented by a final rule issued June 14, 2000 (65 FR 37265) and is in effect until July 31, 2001.

The 2000–2001 season was normal and enabled the Committee to conclude that the suspensions have helped handlers reduce packing costs and to compete more effectively in the marketplace. The Committee and the Federal-State Inspection Service also have concluded that removing the minimum tray weight requirements would not result in a reduction in inspection costs as the inspection process is essentially the same. The Committee, at its February 28, 2001, meeting, unanimously recommended removing paragraph (a)(4)(iii) of § 920.302 for the 2001–2002 and all future seasons. The Committee also noted that the minimum size requirement should be maintained on all kiwifruit regardless of pack style.

These changes address the marketing and shipping needs of the kiwifruit industry and are in the interests of

handlers, growers, buyers, and consumers. The impact of these changes is expected to be beneficial to all handlers and growers regardless of size.

The Committee discussed alternatives to this change, including continuing the temporary suspensions for another year. The industry believes that it has had adequate time to evaluate these changes. The suspensions helped handlers reduce packing costs and compete more effectively in the marketplace without an adverse affect on quality or appearance of the fruit. Therefore, the Committee recommended removal of §§ 920.155 and 920.302(a)(4)(iii) for the 2001–2002 and future seasons.

This proposed rule would relax inspection and pack requirements under the kiwifruit marketing order.

Accordingly, this action would 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.

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

In addition, the Committee's meeting was widely publicized throughout the kiwifruit industry and all interested persons were invited to attend the meetings and participate in Committee deliberations on all issues. Like all Committee meetings, the February 28, 2001, meeting was a public meeting and all entities, both large and small, were able to express their views on this issue. The majority of the industry are small entities. Finally, interested persons are invited to submit information on the regulatory and informational impacts of this action on small businesses.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at: <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.

A 30-day comment period is provided to allow interested persons to respond to this proposal. Thirty days is deemed appropriate because this rule would need to be in place by August 1, 2001, as the current suspensions expire on July 31, 2001, and handlers need to make operational decisions in time for the 2001–2002 season. All written comments timely received will be

considered before a final determination is made on this matter.

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 proposed to be 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 [Removed]

2. In part 920, § 920.155 is removed in its entirety.

§ 920.302 [Amended]

3. In § 920.302, paragraph (a)(4)(iii) is removed and paragraphs (a)(4)(iv), (v), and (vi) are redesignated as paragraphs (a)(4) (iii), (iv), and (v), respectively.

Dated: May 9, 2001.

Kenneth C. Clayton,

Acting Administrator, Agricultural Marketing Service.

[FR Doc. 01–12140 Filed 5–14–01; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 930

[Docket No. FV01–930–4 PR]

Tart Cherries Grown in the States of Michigan, et al.; Temporary Suspension of a Provision Regarding a Continuance Referendum Under the Tart Cherry Marketing Order

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule.

SUMMARY: This proposed rule requests comments on the temporary suspension of an order provision which requires a continuance referendum to be conducted on the marketing order for tart cherries during March 2002. The proposed suspension would enable the U.S. Department of Agriculture (USDA or Department) to postpone conducting the continuance referendum until the completion of amendatory order proceedings. The Cherry Industry Administrative Board (Board) recommended a delay in holding the continuance referendum to allow the industry to evaluate the results of any approved amendments. A continuance