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## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

#### 7 CFR Part 920

[Docket No. FV04-920-1 FR]

#### Kiwifruit Grown in California; Relaxation of Pack and Container Requirements

**AGENCY:** Agricultural Marketing Service, USDA.

**ACTION:** Final rule.

**SUMMARY:** This rule revises pack and container requirements currently prescribed for California kiwifruit 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 adds a new size designation to the allowable size designations for packs of kiwifruit; revises the standard packaging requirements to require volume filled containers of kiwifruit designated by weight to hold 19.8-pounds (9-kilograms) net weight of kiwifruit, unless such containers hold less than 15 pounds or more than 35 pounds net weight of kiwifruit; requires the quantity statement to be indicated in terms of both "count" and "size" for all kiwifruit packed into cell compartments, cardboard fillers, or molded trays; and exempts all varieties of kiwifruit from the "tightly packed" standard pack requirement. This rule is expected to help handlers compete more effectively in the marketplace, better meet the needs of retailers, reduce handler packing costs, and to improve handler and grower returns.

**EFFECTIVE DATE:** September 9, 2004.

**FOR FURTHER INFORMATION CONTACT:** Terry Vawter, 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, 1400 Independence Avenue SW., STOP 0237, Washington, DC 20250-0237; 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, 1400 Independence Avenue SW., STOP 0237, Washington, DC 20250-0237; telephone: (202) 720-2491, Fax: (202) 720-8938, or E-mail: [Jay.Guerber@usda.gov](mailto:Jay.Guerber@usda.gov).

**SUPPLEMENTARY INFORMATION:** This final 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 (USDA) 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 USDA 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 USDA 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 USDA'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 revises pack and container requirements currently prescribed for California kiwifruit under the order. This rule: (1) Adds a new size designation to the allowable size designations for packs of kiwifruit; (2) revises the standard packaging requirements to require volume filled containers of kiwifruit designated by weight to hold 19.8-pounds (9-kilograms) net weight of kiwifruit, unless such containers hold less than 15 pounds or more than 35 pounds net weight of kiwifruit; (3) requires the quantity statement to be indicated in terms of both "count" and "size" for all kiwifruit packed into cell compartments, cardboard fillers, or molded trays; and (4) exempts all varieties of kiwifruit from the "tightly packed" standard pack requirement.

The committee recommended these changes at its March 10, 2004 meeting. This rule is expected to help handlers compete more effectively in the marketplace, better meet the needs of retailers, and reduce packing costs. This rule is also expected to improve handler and grower returns.

#### Additional Numerical Count Size Designation

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 specifies pack requirements for fresh shipments of California kiwifruit.

Section 920.302(a)(4)(ii)(B) provides that kiwifruit packed in individual consumer packages, bags, volume filled, or bulk containers, may not vary more than 1/2-inch in diameter for size designations 30 or larger.

Section 920.302(a)(4)(iii) contains a table commonly referred to as the "Size Designation Chart." This chart specifies numerical count size designations and the maximum number of fruit per 8-pound sample for each numerical count size designation for fruit packed in individual consumer packages, bags, volume filled, or bulk containers.

In 1985, the committee recommended and the USDA approved establishment of the first numerical count size

designation chart by publishing a final rule in the **Federal Register** on September 9, 1985 (50 FR 36567). This regulation established size designation 49 defined as a maximum of 64 pieces of fruit in an 8-pound sample, as the minimum size. It also established four other size designations and required that kiwifruit packed in bags, volume filled, or bulk containers be “fairly uniform in size.” At that time, “fairly uniform in size” meant that size designation 30 or larger could not vary more than 1/2 inch in diameter, size designations 33 and 36 could not vary more than 3/8 of an inch, and size designations 39 and smaller could not vary more than 1/4 inch in diameter. Diameter was defined to mean the greatest dimension measured at right angles to a line from stem to blossom end. Some tolerances were provided.

Over the years, numerical count size designations have been added, removed, and the maximum number of fruit per numerical count size designation has been revised to accommodate new packaging and changing market conditions. The committee recommended and the USDA approved revisions to the size designation chart by publishing the following interim and final rules in the **Federal Register**: August 16, 1993 (58 FR 43243); September 2, 1994 (59 FR 45617); September 3, 1998 (63 FR 46861); December 1, 1988 (53 FR 48513); July 29, 1999 (64 FR 41010); October 29, 2001 (66 FR 1413); March 14, 2002 (67 FR 11396); and August 22, 2002 (67 FR 54327).

In recent years, many California growers have increased the size of California kiwifruit through various cultural practices. During the 2003–2004 season, growers produced a crop with unusually large sizes. Handlers experienced difficulty staying within the size variation tolerance allowed for the largest size, size 20. Kiwifruit larger than size 20 had to be blended into the size 20 designation, as there was no larger size designation established for the 2003–04 season. This blending required handlers to take special care to stay within the size variation tolerance and reduced the uniformity of the pack size. Handlers also incurred additional costs in meeting the requirements.

Thus, the committee, at its March 10, 2004, meeting, unanimously recommended adding size designation 18, defined as a maximum of 25 pieces of fruit per 8-pound sample, to the size designation chart. This change provides handlers with a total of eleven numerical count size designations as follows:

SIZE DESIGNATION CHART

| Column 1 size designation | Column 2 maximum number of fruit per 8 pound sample |
|---------------------------|---|
| 18*                       | 25  |
| 20                        | 27  |
| 23                        | 30  |
| 25                        | 32  |
| 27/28                     | 35  |
| 30                        | 39  |
| 33                        | 43  |
| 36                        | 46  |
| 39                        | 49  |
| 42                        | 53  |
| 45                        | 55  |

\* New size designation.

Additionally, for clarification, the title “Size Designation Chart” is added to the top of the chart.

The new size designation is expected to ease packing requirements, by allowing handlers to stay within size variances for larger sized fruit and is expected to improve handler and grower returns, as larger-sized fruit commands higher prices. This action does not affect import requirements.

**Standardization of Packaging Requirement for Volume Filled Containers Designated by Net Weight**

Section 920.52(a)(3) of the order authorizes the establishment of weight requirements for containers of California kiwifruit.

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

In a volume filled container, fairly uniform size kiwifruit are loosely packed without cell compartments, cardboard fillers, or molded trays. Handlers may ship volume filled containers marked with either the appropriate count (number of pieces of fruit) or net weight (total weight of pieces of fruit in the container). Handler shipments are based upon the preference of the receiver.

In 1994, the committee unanimously recommended and USDA established standard packaging for certain volume filled containers designated by weight, as published in the **Federal Register** on October 25, 1994 (59 FR 53563). At that time, 52 percent of the total crop was packed into volume filled containers. The percentage of the total crop packed into volume filled containers increased to 85 percent during the 2001–02 season.

In the 2001–02 season, imports from the Northern hemisphere (Greece, Italy, and France) totaled approximately 17 percent of the U.S. market share. The

majority of imported kiwifruit was shipped in 19.8-pound (9-kilogram) volume filled containers; whereas the order limited California handlers to 22-pound (10-kilogram) net weight volume filled containers. With the 22-pound provisions, handlers could not meet buyer demands for other types of packaging.

In an effort to meet buyer demands for other types of packaging, the standardized packaging requirement of 22-pounds (10-kilograms) net weight for certain volume filled containers was suspended for the 2002–2003 and 2003–2004 seasons. These suspensions were implemented by an interim final rule published in the **Federal Register** on August 22, 2002 (67 FR 54327); a final rule published on November 21, 2002 (67 FR 76140); and another final rule published in the **Federal Register** on July 28, 2003 (68 FR 44191). The suspension published in the **Federal Register** on July 28, 2003 was in effect until July 31, 2004. Additionally, the final rule published in the **Federal Register** on July 28, 2003 (68 FR 44191) removed a pack requirement in § 920.302(a)(4)(iv) and paragraph (a)(4)(v) was redesignated as paragraph (a)(4)(iv).

However, during the 2002–2003 and 2003–2004 seasons, since handlers and retailers were not limited to a specific net weight for volume filled containers designated by weight, some confusion appeared in the marketplace. Without a specific net weight for volume filled containers, more than one net weight was packed by handlers.

In an effort to determine the best means of ensuring more orderly marketing, the committee conducted a survey of kiwifruit handlers and growers during the 2003–2004 season. The survey results clearly showed that the industry favored establishment of a standardized packaging requirement for volume filled containers of kiwifruit designated by weight to hold 19.8-pound (9-kilograms) net weight of kiwifruit, unless such containers hold less than 15 pounds or more than 35 pounds net weight of kiwifruit.

Accordingly, the committee, on March 10, 2004, unanimously recommended revising the standard packaging requirements for volume filled containers of kiwifruit designated by weight to hold 19.8-pounds (9-kilograms) net weight of kiwifruit, unless such containers hold less than 15 pounds or more than 35 pounds net weight of kiwifruit.

This recommended change is expected to allow the industry to compete more effectively in the marketplace with its foreign

competition, allow continued packing of the new variety of kiwifruit in 14-pound containers, and may improve grower returns. This action does not affect import requirements.

#### Container Marking Requirements

Section 920.52 authorizes the establishment of pack, and container requirements for California kiwifruit.

Section 920.303 of the order's administrative rules and regulations outlines specific container marking requirements for fresh shipments of California kiwifruit.

Section 920.303(c)(1) provides that the quantity statement shall be indicated in terms of count for kiwifruit packed in cell compartments, cardboard fillers, or molded trays, and the contents shall conform to the count.

Historically, the industry and buyers have associated count (number of pieces of fruit) with fruit size designations (maximum number of pieces of fruit in an 8-pound sample). Molded trays were originally designed in the early 1980's to accommodate fruit of the corresponding size from the numerical count size designation chart. For example, count 36 trays (trays that held 36 pieces of fruit) would accommodate size designation 36 fruit.

As previously mentioned, numerous changes have been made to the size designation chart over the years. Other changes have included removal of the minimum tray weight requirements, published in the **Federal Register** on July 30, 2001 (66 FR 39270), and the addition of the new molded tray inserts with smaller cup sizes. Currently, handlers can pack five sizes of fruit (33, 36, 39, 42, and 45) into three tray counts (33, 36, and 39), with the tray weighing as little as 5 pounds. These differences may cause confusion in the marketplace, especially if buyers assume that count is equivalent to size.

Thus, the committee, at its March 10, 2004 meeting, recommended that both "count" and "size" be marked on containers with cell compartments, cardboard fillers, or molded trays. Under this recommendation, containers will be marked with the size of the fruit as specified in the size designation chart and the number of pieces of fruit in the box. For example, a tray marked with size designation 45 could hold 36 pieces of fruit. Retailers can clearly discern the number of pieces of fruit packed into the container and the size of that fruit. Of the eleven members present at that meeting, ten voted for this change, and one voted against it. The one member who voted against this recommendation believes that requiring both "count" and "size" to be marked on containers of

California kiwifruit would impose additional inspection requirements on California handlers. This member believes that this recommendation would place the California handler at a disadvantage in competing against imported kiwifruit, as importers do not have to comply with container marking requirements.

In its deliberations, the committee discussed inspection requirements. Committee members mentioned that currently inspectors count the number of fruit in the container. Others mentioned that requiring the quantity statement to be indicated in terms of both "count" and "size" for all kiwifruit packed into cell compartments, cardboard fillers, or molded trays would require inspectors to also verify the size markings. An analysis of inspection costs indicates there would likely be an overall increase for the industry of 1.5 percent or about \$2,529. Handlers in the industry contract with the USDA Inspection Service to perform either a block or an in-line inspection. Inspectors that perform in-line inspection inspect the fruit at the time of packing; whereas, block inspections occur after the fruit has been packed and prior to shipment. The additional costs would be incurred by handlers who use the block inspection method for their initial inspections, and those handlers who have fruit reinspected prior to shipment. The block inspection method is used for 13 percent of initial inspections and for all reinspections. In recent seasons, in-line inspections accounted for 87 percent of all initial inspections. Reinspections are required if fruit is restyled or repacked.

The committee believes that marking both "count" and "size" on containers eliminates possible confusion in the marketplace. This action does not affect import requirements.

#### Standard Pack "Tightly Packed" Requirement

Section 920.52(a)(2) of the order authorizes the establishment of grade standards.

Section 920.302(a)(1) of the order's administrative rules and regulations states the minimum grade shall be at least KAC No. 1 quality.

Section 920.302(b) defines the term KAC No. 1 quality as kiwifruit that meets the requirements of U.S. No. 1 grade as defined in 7 CFR 51.2335 through 51.2340 of the United States Standards for Grades of Kiwifruit (standards), except that the kiwifruit shall be "not badly misshapen," and an additional 7 percent tolerance is provided for "badly misshapen." In addition, the "Hort16A" variety of

kiwifruit is exempt from the "tightly packed" standard as defined in § 51.2338(a) of the standards.

The standards define standard pack requirements, require containers to be well filled, and require the contents to be tightly packed, but not excessively or unnecessarily bruised by overfilling or oversizing for fruit packed in cell compartments, cardboard fillers, or molded trays. This is commonly referred to in the industry as the "tight-fill" requirement.

In 1990, these "tight-fill" provisions were established in § 920.302(b) to ensure that "Hayward" variety kiwifruit (the predominant kiwifruit variety produced in the production area) fit tightly into the tray-liner cups, as published in the **Federal Register** on October 18, 1990 (55 FR 42179). Some kiwifruit handlers believe that kiwifruit packed tightly into the cups of the tray-liners are less subject to movement, and, therefore, less damage.

A new kiwifruit cultivar, the *Actinidia chinensis* "Hort16A," commonly referred to as "gold" kiwifruit, was recently introduced in California and is being sold commercially. The "Hort16A" variety is currently packed into a special shallow molded tray with a notch for the beak, which minimizes damage to the fruit. This variety, when packed in the shallow tray, may not meet the "tightly packed" requirement for standard pack under the standards. Therefore, on March 12, 2003, the committee unanimously recommended, and USDA subsequently approved, an exemption for all "gold" kiwifruit varieties from the order's "tightly filled" requirement. This exemption was implemented through a final rule published in the **Federal Register** on July 28, 2003 (68 FR 44191).

During the last several years, the value of the "tight-fill" requirement has decreased due to manufacturer changes in the shape and cuts of the molded trays.

Thus, the committee, at its March 10, 2004, meeting, recommended eliminating the "tight-fill" requirement. The majority of the committee members agreed that the tight-fill requirement is no longer necessary, as they believe handlers would continue to pack fruit that tightly fits into the cup of the molded tray to prevent damage to the fruit and to meet buyer demands for uniformly-sized kiwifruit packs. Of the eleven members present, ten voted for this change. The one member voting against this recommendation preferred keeping the "tight-fill" requirement, because he believes that handlers would be disadvantaged in the market place by

loose packs. The committee discussed leaving the “tight-fill” requirement in place, but concluded that elimination of the “tight-fill” pack requirement would relax handler pack and inspection requirements, and increase handler and grower returns. This action does not affect import requirements.

**Final 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 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 45 handlers of California kiwifruit subject to regulation under the marketing order and approximately 270 growers in the production area. Small agricultural service firms are defined by the Small Business Administration (13 CFR 121.201) as those whose annual receipts are less than \$5,000,000, and small agricultural producers are defined as those whose annual receipts are less than \$750,000. None of the 45 handlers subject to regulation have annual kiwifruit sales of at least \$5,000,000. In addition, six growers subject to regulation have annual sales exceeding \$750,000. Therefore, a majority of the kiwifruit handlers and growers may be classified as small entities.

This rule revises pack requirements prescribed under the California kiwifruit order. This rule: (1) Adds a new size designation to the allowable size designations for packs of kiwifruit; (2) revises the standard packaging requirements to require volume filled containers of kiwifruit designated by weight to hold 19.8-pounds (9-kilograms) net weight of kiwifruit, unless such containers hold less than 15 pounds or more than 35 pounds net weight of kiwifruit; (3) requires the quantity statement to be indicated in terms of “count” and “size” for kiwifruit packed in cell compartments, cardboard fillers, or molded trays; and (4) exempts all varieties of kiwifruit from the “tightly packed” standard pack requirement. The committee recommended these changes at its

March 10, 2004, meeting. These changes are expected to help handlers compete more effectively in the marketplace, better meet the needs of retailers, and to improve grower returns.

Authority for these actions is provided in § 920.52 of the order.

**Additional Numerical Count Size Designation**

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 920.302(a)(4) of the order’s administrative rules and regulations specifies pack requirements for fresh shipments of California kiwifruit.

Section 920.302(a)(4)(ii)(B) provides that kiwifruit packed in individual consumer packages, bags, volume fill, or bulk containers, may not vary more than ½-inch in diameter for size designations 30 or larger.

Section 920.302(a)(4)(iii) contains a table commonly referred to as the “Size Designation Chart.” This chart specifies numerical count size designations and the maximum number of fruit per 8-pound sample for each numerical count size designation for fruit packed in individual consumer packages, bags, volume filled, or bulk containers.

In 1985, the committee recommended and the USDA approved establishment of the first numerical count size designations by publishing a final rule in the **Federal Register** on September 9, 1985 (50 FR 36567). This regulation established size designation 49 defined as a maximum of 64 pieces of fruit in an 8-pound sample, as the minimum size. It also established four other size designations and required that kiwifruit packed in bags, volume filled, or bulk containers be “fairly uniform in size.” At that time, “fairly uniform in size” meant that size designation 30 or larger could not vary more than ½ inch in diameter, size designations 33 and 36 could not vary more than ⅜ of an inch, and size designations 39 and smaller could not vary more than ¼ inch in diameter. “Diameter” was defined to mean the greatest dimension measured at right angles to a line from stem to blossom end; with some tolerances provided.

Over the years, numerical count size designations have been added, deleted, and the maximum number of fruit per numerical count size designation has been revised to accommodate new packaging and changing market conditions. The committee recommended and the USDA approved revisions to the size designation chart by publishing the following interim and

final rules in the **Federal Register**: August 16, 1993 (58 FR 43243); September 2, 1994 (59 FR 45617); September 3, 1998 (63 FR 46861); December 1, 1988 (53 FR 48513); July 29, 1999 (64 FR 41010); October 29, 2001 (66 FR 1413); March 14, 2002 (67 FR 11396); and August 22, 2002 (67 FR 54327).

In recent years, many California growers have increased the size of California kiwifruit through various cultural practices. During the 2003–2004 season, growers produced a crop with unusually large sizes. Handlers experienced difficulty staying within the size variation tolerance allowed for the largest size, size designation 20. Kiwifruit larger than size 20 had to be blended into the size 20 designation, as there was no larger size designation established for the 2003–04 season. This blending requires handlers to take special care to stay within the size variation tolerance and reduces the uniformity of the pack size.

Thus, the committee, at its March 10, 2004, meeting, unanimously recommended adding size designation 18, defined as a maximum of 25 pieces of fruit per 8-pound sample, to the size designation chart. This change provides handlers with a total of eleven numerical count size designations as follows:

**SIZE DESIGNATION CHART**

| Column 1 size designation | Column 2 maximum number of fruit per 8 pound sample |
|---------------------------|---|
| 18 *                      | 25  |
| 20                        | 27  |
| 23                        | 30  |
| 25                        | 32  |
| 27/28                     | 35  |
| 30                        | 39  |
| 33                        | 43  |
| 36                        | 46  |
| 39                        | 49  |
| 42                        | 53  |
| 45                        | 55  |

\*New size designation.

Additionally, for clarification, the title “Size Designation Chart” will be added to the top of the chart.

The committee discussed alternatives to this change including not adding size 18 to the order’s administrative rules and regulations, but concluded that this change provides an additional pack option to handlers and might help increase handler and grower returns. Almost 10 percent (over 4,000 tray equivalents) of the fruit packed as size 20 as of March 31, 2004, could have been packed as the new proposed size

18. Packing 4,000 tray equivalents (te) as size 18 could have increased grower returns approximately 5 cents per pound more than size 20 kiwifruit (4000 te  $\times$  7 pounds/te equals 28,000 pounds  $\times$  \$.05 FOB per pound equals \$1,400). This change does not affect import requirements.

#### Standardization of Packaging Requirement for Volume Filled Containers Designated by Weight

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

In a volume filled container, fairly uniform size kiwifruit are loosely packed without cell compartments, cardboard fillers, or molded trays. Handlers may ship volume filled containers marked by either the appropriate count (number of pieces of fruit) or net weight (total weight of pieces of fruit in the container). Handler shipments are based upon the preference of the receiver.

In 1994, the committee unanimously recommended and USDA established standard packaging for certain volume filled containers designated by weight, as published in the **Federal Register** on October 25, 1994 (59 FR 53563). At that time, 52 percent of the total crop was packed into volume filled containers. The percentage of the total crop packed into volume filled containers increased to 85 percent during the 2001–02 season.

In 2001–02, imports from the Northern Hemisphere (Greece, Italy, and France) totaled approximately 17 percent of the U.S. market share. The majority of imported kiwifruit was shipped in 19.8-pound (9-kilogram) volume filled containers; whereas the order limited California handlers to 22-pound (10-kilogram) net weight volume filled containers. With the 22-pound provisions, handlers could not meet buyer demands for other types of packaging.

In an effort to meet buyer demands for other types of packaging, the standardized packaging requirement of 22-pounds (10-kilograms) net weight for certain volume filled containers was suspended for the 2002–2003 and 2003–2004 seasons. These suspensions were implemented by an interim final rule published in the **Federal Register** on August 22, 2002 (67 FR 54327); a final rule published on November 21, 2002 (67 FR 76140); and another final rule published in the **Federal Register** on July 28, 2003 (68 FR 44191). The suspension published in the **Federal Register** on July 28, 2003, was in effect until July 31, 2004. Additionally, the

final rule published in the **Federal Register** on July 28, 2003 (68 FR 44191) removed a pack requirement in § 920.302 (a)(4)(iv) and paragraph (a)(4)(v) was redesignated as paragraph (a)(4)(iv). The provisions removed required containers to hold a quantity of kiwifruit equal to 3 times the size designation marked on the container. For example, if a container was marked as “size 33,” the container had to hold 99 pieces of fruit.

However, during the 2002–2003 and 2003–2004 seasons, since handlers were not limited to a specified net weight for volume fill containers, some confusion appeared in the market place. Without a specific net weight for volume filled containers, more than one net weight was packed by handlers.

In an effort to determine the best means of ensuring more orderly marketing, the committee conducted a survey of kiwifruit handlers and growers during the 2003–2004 season. The survey results clearly showed that the industry favored establishment of a standardized packaging requirement for volume filled containers of kiwifruit designated by weight of 19.8-pound (9-kilograms) net weight of kiwifruit, unless such containers hold less than 15 pounds or more than 35 pounds net weight of kiwifruit.

Thus, the committee, on March 10, 2004, unanimously recommended revising the standard packaging requirements for volume filled containers of kiwifruit designated by weight to hold 19.8-pounds (9-kilograms) net weight of kiwifruit, unless such containers hold less than 15 pounds or more than 35 pounds net weight of kiwifruit.

The committee discussed alternatives to the recommended change, including removing the standardized volume fill net weight requirement from the order's administrative rules and regulations but did not adopt this alternative, as it believes that a standardized volume fill is necessary to achieve orderly marketing of California kiwifruit.

The committee also discussed establishing a standard packing requirement that would require volume filled containers of kiwifruit designated by weight to hold 19.8-pounds (9 kilograms) net weight of kiwifruit, unless such containers hold less than 10-pounds or more than 35-pounds net weight of kiwifruit. The committee did not adopt this suggestion, as it believes that it is important to accommodate the “Hort16A” variety which is packed in a 14-pound volume filled container.

Finally, the committee discussed reinstating the 22-pound (10-kilogram) net weight standard packaging

requirement for volume filled containers. The committee calculated that utilizing a 19.8-pound (9-kilo) net weight standard volume fill pack would increase the cost of packaging by 10 percent, generate approximately 10 percent more total volume filled boxes than the 22-pound standard; would increase the grower return by 20 percent, thereby offsetting the 10 percent increase in packaging costs; and would better serve the industry.

This recommended change will allow the industry to compete more effectively in the market place with its foreign competition, to continue packing the new variety of kiwifruit in 14-pound containers, and is expected to improve grower returns. This change does not affect import requirements.

#### Container Marking Requirements

Section 920.303 of the order's administrative rules and regulations outlines specific container marking requirements for fresh shipments of California kiwifruit.

Section 920.303(c)(1) provides that the quantity shall be indicated in terms of count for kiwifruit packed in cell compartments, cardboard fillers, or molded trays, and the contents shall conform to the count.

Historically, the industry and buyers have associated count (number of pieces of fruit) with fruit size designations (maximum number of pieces of fruit in an 8-pound sample). Molded trays were originally designed in the early 1980's to accommodate fruit of the corresponding size from the numerical count size designation chart. For example, count 36 trays (trays that held 36 pieces of fruit) would accommodate size designation 36 fruit.

As previously mentioned, numerous changes have been made to the size designation chart over the years. Other changes have included removal of the minimum tray weight requirements (66 FR 39270; July 30, 2001), and the addition of the new molded tray inserts with smaller cup sizes. Currently, handlers can pack five sizes of fruit (33, 36, 39, 42, and 45) into three tray counts (33, 36, and 39), with the tray weighing as little as 5 pounds. These differences may cause confusion in the market place, especially if buyers assume that count is equivalent to size.

Thus, committee at its March 10, 2004, meeting recommended that both “count” and “size” be marked on containers with cell compartments, cardboard fillers, or molded trays. The committee discussed several alternatives to this change. The first alternative considered was to reinstate tray weights. The committee felt this

requirement would be too restrictive as it would dictate what size fruit had to be packed into a specific tray and that this might result in handlers having to repack kiwifruit that did not meet established minimum tray weight requirements. They were concerned that reinstating minimum tray weights might result in increased handler costs.

The second alternative discussed by the committee was to regulate the size of the molded cup. However, the committee determined that regulating the size of the molded cup would not be feasible at this time and could result in higher packing costs.

Finally, the committee discussed not changing the container marking requirements to include both "count" and "size" for kiwifruit packed in cell compartments, cardboard fillers, or molded trays. However, the committee agreed that it was important to specify both "count" and "size" to ensure that fruit size was clearly specified. Under this recommendation, containers will be marked with the size of the fruit as specified in the size designation chart and the number of pieces of fruit in the box. For example, a tray marked with size designation 45 and could hold 36 pieces of fruit. Retailers will be able to clearly discern the number of pieces of fruit packed into the container and the size of that fruit. Of the eleven members present, ten voted for this change. The one member voting against this recommendation believes that requiring both "count" and "size" to be marked on containers of California kiwifruit would result in additional inspection requirements and increased inspection costs for California handlers. This member believes that this recommendation would place California handlers at a disadvantage in competing against imported kiwifruit, as importers do not have to comply with container marking requirements.

In its deliberations, the committee discussed inspection requirements. Committee members mentioned that currently inspectors count the number of fruit in the container. Others mentioned that requiring the quantity statement to be indicated in terms of both "count" and "size" for all kiwifruit packed into cell compartments, cardboard fillers, or molded trays would require inspectors to also verify the size markings.

An analysis of inspection costs indicates that there would likely be an overall increase for the industry of 1.5 percent or about \$2,529. Handlers in the industry contract with the USDA Inspection Service to perform either a block or an in-line inspection. Inspectors that perform in-line

inspection inspect the fruit at the time of packing, whereas, block inspections occur after the fruit has been packed, just prior to shipment. The additional costs would be incurred by handlers who use the block inspection method for their initial inspections, and those handlers who have fruit reinspected prior to shipment. The block inspection method is used for 13 percent of initial inspections and for all reinspections. In recent seasons, in-line inspections accounted for 87 percent of all initial inspections. Reinspections are required if fruit is restyled or repacked.

Additionally, the committee mentioned that the recommended change does not mandate that the "count" and the "size" be the same, as a tray marked with size designation 45 could still hold count 36 fruit and still weigh as little as 5 pounds.

This change is expected to eliminate any confusion in the marketplace and does not affect import requirements.

#### **Standard Pack "Tightly Packed" Requirement**

Section 920.302(a)(1) of the order's administrative rules and regulations states the minimum grade shall be at least KAC No. 1 quality.

Section 920.302(b) defines the term KAC No. 1 quality as kiwifruit that meets the requirements of U.S. No. 1 grade as defined in 7 CFR 51.2335 through 51.2340 of the standards, except that the kiwifruit shall be "not badly misshapen" and an additional 7 percent tolerance is provided for badly misshapen fruit and except that the "Hort16A" variety of kiwifruit is exempt from the "tightly packed" standard as defined in § 51.2338(a) of the standards.

The standards define standard pack requirements, require containers to be well filled, and require the contents to be tightly packed, but not excessively or unnecessarily bruised by overfilling or oversizing for fruit packed in cell compartments, cardboard fillers, or molded trays. This is commonly referred to in the industry as the "tight-fill" requirement.

These "tight-fill" provisions were established under the order to ensure that the "Hayward" variety (the predominant kiwifruit variety produced in the production area) fits tightly into the tray-liner cups (55 FR 42179, October 18, 1990). Some kiwifruit handlers believe that kiwifruit packed tightly into the cups of the tray-liners are less subject to movement and therefore less damage.

A new kiwifruit cultivar, the *Actinidia chinensis* "Hort16A," commonly referred to as "gold"

kiwifruit, was recently introduced in California and is being harvested and sold commercially. To minimize damage, the "Hort16A" variety is packed into a special shallow molded tray with a notch for the beak. The "Hort16A" kiwifruit, when packed in this shallow tray, may not meet the "tightly packed" requirement for standard pack under the standards. Therefore, on March 12, 2003, the committee unanimously recommended an exemption for all "gold" kiwifruit varieties from the order's "tightly packed" requirement. This recommendation was implemented by USDA through a final rule published in the **Federal Register** on July 28, 2003 (68 FR 44191).

During the last several years, the value of the "tight-fill" requirement has decreased due to manufacturer changes in the shape and cuts of the molded trays.

Thus, the committee, at its March 10, 2004, meeting, recommended that the "tight-fill" requirement be eliminated. The majority of the committee members agreed that the tight-fill requirement is no longer necessary, as they believe handlers would continue to pack fruit that is tightly fit into the cup of the molded tray to prevent damage to the fruit and to meet buyer demands for uniform sized kiwifruit packs. Of the eleven members present, ten voted for this change. The one member voting against this recommendation preferred keeping the "tight-fill" requirement, because he believes that handlers would be disadvantaged in the market place by loose packs.

The committee discussed leaving the "tight-fill" requirement in place, but concluded that handlers would continue to pack fruit that is tightly fit into the cup of the molded tray to prevent damage to the fruit and to meet buyer demands for uniform sized kiwifruit packs without the "tight-fill" pack requirement. This revision relaxes handler pack and inspection requirements, and may increase handler and grower returns. This revision does not impact import regulations, as pack and container requirements are not regulated under import regulations.

This final rule relaxes pack and container requirements under the kiwifruit order. Accordingly, these actions 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.

As noted in the initial regulatory flexibility analysis, USDA has not identified any relevant Federal rules that duplicate, overlap, or conflict with this proposed rule. However, as previously stated, California kiwifruit must meet the "tight-fill" requirements, as specified in the standards (7 CFR 51.2335 through 51.2340) issued under the Agricultural Marketing Act of 1946 (7 U.S.C. 1621 through 1627).

In addition, 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 on all issues. Like all committee meetings, the March 12, 2003, meeting, was a public meeting and all entities, both large and small, were able to express their views on these issues. Finally, interested persons were invited to submit information on the regulatory and informational impacts of this action on small businesses, as requested in the proposed rule.

A proposed rule concerning this action was published in the **Federal Register** on July 28, 2004 (69 FR 44975). Copies of the rule were provided to all committee members and kiwifruit handlers. The rule was also made available through the Internet by USDA and the Office of the Federal Register. A 15-day comment period, which ended on August 12, 2004, was provided to allow interested persons to respond to the proposal. No comments were received; and, thus, no changes will be made to the rule as proposed.

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.

After consideration of all relevant matters presented, including the information and recommendation of the committee and other available information, it is hereby found that this rule, as hereinafter set forth, will tend 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 shipments of 2004 crop kiwifruit are expected to begin in early September and these changes should be effective by that time. Moreover, prompt implementation will provide handlers time to plan accordingly.

**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.

**§ 920.302 [Amended]**

■ 2. In § 920.302, paragraphs (a)(4)(iii), (a)(4)(iv), and (b) are revised to read as follows:

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

- (a) \* \* \*
- (4) \* \* \*

(iii) When kiwifruit is packed in individual consumer packages, bags, volume fill or bulk containers, the following table specifying the size designation and maximum number of fruit per 8-pound sample is to be used:

SIZE DESIGNATION CHART

| Column 1 size designation | Column 2 maximum number of fruit per 8 pound sample |
|---------------------------|---|
| 18 .....                  | 25  |
| 20 .....                  | 27  |
| 23 .....                  | 30  |
| 25 .....                  | 32  |
| 27/28 .....               | 35  |
| 30 .....                  | 39  |
| 33 .....                  | 43  |
| 36 .....                  | 46  |
| 39 .....                  | 49  |
| 42 .....                  | 53  |
| 45 .....                  | 55  |

(iv) All volume fill containers of kiwifruit designated by weight shall hold 19.8-pounds (9-kilograms) net weight of kiwifruit unless such containers hold less than 15 pounds or more than 35 pounds net weight of kiwifruit.

(b) *Definitions.* The term *KAC No. 1 quality* means kiwifruit that meets the requirements of the U.S. No. 1 grade as defined in the United States Standards for Grades of Kiwifruit (7 CFR 51.2335 through 51.2340) except that the kiwifruit shall be "not badly misshapen," and an additional tolerance of 7 percent is provided for kiwifruit that is "badly misshapen," and except that all varieties of kiwifruit are exempt from the "tightly packed" standard as defined in § 51.2338(a) of the U.S.

Standards for Grades of Kiwifruit. The terms *fairly uniform in size and diameter* mean the same as defined in the U.S. Standards for Grades of Kiwifruit.

\* \* \* \* \*

■ 3. In § 920.303, paragraph (c)(1) is revised to read as follows:

**§ 920.303 Container marking regulations.**

\* \* \* \* \*

(c) \* \* \*

(1) The quantity shall be indicated in terms of count and size for kiwifruit packed in cell compartments, cardboard fillers, or molded trays, and the contents shall conform to the count.

\* \* \* \* \*

Dated: September 2, 2004.

A.J. Yates,

Administrator, Agricultural Marketing Service.

[FR Doc. 04–20415 Filed 9–7–04; 8:45 am]

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**DEPARTMENT OF AGRICULTURE**

**Agricultural Marketing Service**

**7 CFR Part 924**

[Docket No. FV04–924–1 FR]

**Fresh Prunes Grown in Designated Counties in Washington and in Umatilla County, OR; Increased Assessment Rate**

**AGENCY:** Agricultural Marketing Service, USDA.

**ACTION:** Final rule.

**SUMMARY:** This rule increases the assessment rate established for the Washington-Oregon Fresh Prune Marketing Committee (Committee) for the 2004–2005 and subsequent fiscal periods from \$1.50 to \$1.75 per ton of prunes handled. The Committee locally administers the marketing order which regulates the handling of fresh prunes grown in designated counties in Washington and in Umatilla County, Oregon. Authorization to assess prune handlers enables the Committee to incur expenses that are reasonable and necessary to administer the program. The fiscal period began April 1 and ends March 31. The assessment rate will remain in effect indefinitely unless modified, suspended, or terminated.

**EFFECTIVE DATE:** September 9, 2004.

**FOR FURTHER INFORMATION CONTACT:** Teresa L. Hutchinson, Marketing Specialist, Northwest Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1220 SW., Third Avenue,