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DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Parts 920 and 944

[Doc. No. AMS-FV-13-0032; FV13-920-1 IR]

**Kiwifruit Grown in California and Imported Kiwifruit;
Relaxation of Minimum Grade Requirement**

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Interim rule with request for comments.

SUMMARY: This rule relaxes the minimum grade requirement under the marketing order for kiwifruit grown in California (order), and for kiwifruit imported into the United States that are shipped to the fresh market, by increasing the tolerance of kiwifruit which is "badly misshapen" from 7 percent to 16 percent. The order is administered locally by the Kiwifruit Administrative Committee (Committee). This change is intended to facilitate the packing of fruit to meet the minimum grade requirement of "KAC No. 1", and reduce costs associated with re-sorting and repacking this grade of fruit. The change in the import regulation is required under section 8e of the Agricultural Marketing Agreement Act of 1937.

DATES: [INSERT DATE 3 DAYS AFTER THE DATE OF PUBLICATION IN THE FEDERAL REGISTER]; comments received by [INSERT DATE 60

DAYS AFTER THE DATE OF PUBLICATION IN THE FEDERAL REGISTER] 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, Marketing Order and Agreement Division, Fruit and Vegetable Program, AMS, USDA, 1400 Independence Avenue SW, STOP 0237, Washington, DC 20250-0237; Fax: (202) 720-8938; or Internet: <http://www.regulations.gov>. All comments should reference the document 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, or can be viewed at: <http://www.regulations.gov>. All comments submitted in response to this rule will be included in the record and will be made available to the public. Please be advised that the identity of the individuals or entities submitting the comments will be made public on the Internet at the address provided above.

FOR FURTHER INFORMATION CONTACT: Kathie M. Notoro, Marketing Specialist, or Martin Engeler, Regional Director, California Marketing Field Office, Marketing Order and Agreement Division, Fruit and Vegetable Program, AMS, USDA;

Telephone: (559) 487-5901, Fax: (559) 487-5906, or E-mail: Kathie.Notoro@ams.usda.gov or Martin.Engeler@ams.usda.gov.

Small businesses may request information on complying with this regulation by contacting Jeffrey Smutny, Marketing Order and Agreement Division, Fruit and Vegetable Program, AMS, USDA, 1400 Independence Avenue SW, STOP 0237, Washington, DC 20250-0237; Telephone: (202) 720-2491, Fax: (202) 720-8938, or E-mail: Jeffrey.Smutny@ams.usda.gov.

SUPPLEMENTARY INFORMATION: This rule is issued under Marketing Order No. 920, as amended (7 CFR part 920), regulating the handling of kiwifruit 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."

This rule is also issued under section 8e of the Act, which provides that whenever certain specified commodities, including kiwifruit, are regulated under a Federal marketing order, imports of these commodities into the United States are prohibited unless they meet the same or comparable grade, size, quality, or maturity requirements as those in effect for the domestically produced commodities.

The Department of Agriculture (USDA) 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.

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.

There are no administrative procedures which must be exhausted prior to any judicial challenge to the provisions of import regulations issued under section 8e of the Act.

Under the terms of the marketing order, fresh market shipments of California kiwifruit are required to be inspected and are subject to grade, size, maturity, pack, and container requirements. Current requirements include specifications that such shipments be at least Size 45, grade at least KAC No. 1 quality, and contain a minimum of 6.2 percent soluble solids.

This rule relaxes the minimum grade requirement under the definition for KAC No. 1 kiwifruit quality by increasing the tolerance for "badly misshapen" fruit from 7 percent to 16 percent. The Committee unanimously recommended these changes at a meeting on March 27, 2013.

Section 920.52 of the order provides, in part, the authority to regulate the handling of kiwifruit and specifically, in paragraph (a) (1), the Secretary may limit, during any period or periods, the shipment of any particular grade, size, quality, maturity, or pack, or any combination thereof, of any variety or varieties of kiwifruit grown in the production area.

Section 920.302 establishes regulations regarding grade, size, pack, and container regulations. Paragraph (a) (1) specifies that the minimum grade be at least KAC No.1 quality and paragraph (b) defines that 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 a 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.

At its meeting, the Committee recommended revising paragraph (b) of 920.302 to increase the tolerance for "badly misshapen" fruit from 7 percent to 16 percent. "Badly misshapen fruit" is defined in the United States Standards for Kiwifruit as fruit that is so decidedly deformed that its appearance is seriously affected.

Most kiwifruit naturally grow in an "egg" shape. A small percentage of fruit develop into a flat, wide, almost square shape. Such fruit, if it is wider than it is tall, is considered to be badly misshapen. Identification of badly misshapen fruit is performed visually during the packing process, and this fruit is manually sorted out by

packinghouse employees. The flat/wide fruit is separated from the cylindrical fruit and packed into different boxes so that there is a uniformity of shape within the containers.

However, during the inspection process, badly misshapen fruit is identified using calipers that precisely measure the dimensions of the fruit. Consequently, fruit that appears to meet the grade requirement based on visual observation occasionally fails to meet the requirements when measured with calipers. Containers of packed KAC No. 1 fruit sometimes exceed the tolerance for misshapen fruit by two or three pieces of fruit and are required to be re-sorted and repacked, resulting in increased costs.

The end of season packout by grade for kiwifruit for 2011/12 resulted in 1 percent U.S. Fancy, 94 percent U.S. No. 1, and 5 percent KAC No. 1. Although it accounts for only 5 percent of the industry pack, KAC No. 1 fruit is the most difficult to pack because of the discrepancy between visually identifying misshapen fruit and identifying such fruit with calipers during the inspection process.

Increasing the tolerance for badly misshapen fruit is expected to reduce the incidence of containers of KAC No. 1 fruit failing to meet grade requirements, thereby reducing

costs associated with repacking and re-sorting failing fruit. It is also expected to help facilitate and streamline the packing process by avoiding disruptions associated with repacking and re-sorting fruit.

Section 8e of the Act provides that when certain domestically produced commodities, including kiwifruit, are regulated under a Federal marketing order, imports of that commodity must meet the same or comparable grade, size, quality, and maturity requirements. Since this action would relax the minimum grade requirement by increasing the tolerance of kiwifruit which is "badly misshapen" from 7 percent to 16 percent under the domestic handling regulations, a corresponding change to the import regulations must also be considered.

Minimum grade, size, quality, and maturity requirements for kiwifruit imported into the United States are currently in effect under § 944.550 (7 CFR 944.550). Paragraph (a) of this section specifies a tolerance of 7 percent for badly misshapen fruit. This rule would increase the tolerance for imported kiwifruit that is badly misshapen from 7 percent to 16 percent to be consistent with the requirements for California kiwifruit regulated under the order. The increase in the tolerance for imports

is expected to reduce the incidence of product that fails to meet the minimum grade requirement of KAC No. 1. This would help reduce costs associated with product that fails to meet import requirements, and would help to facilitate the importation of kiwifruit.

Initial Regulatory Flexibility Analysis

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA) (5 U.S.C. 601-612), 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. Import regulations issued under the Act are based on those established under Federal marketing orders.

There are approximately 178 kiwifruit growers subject to regulation under the marketing order and approximately 28 handlers in the production area. There are

approximately 53 importers of kiwifruit. Small agricultural service firms, which include kiwifruit handlers and importers, are defined by the Small Business Administration (SBA) (13 CFR 121.201) as those having annual receipts of less than \$7,000,000, and small agricultural producers are defined as those having annual receipts less than \$750,000.

The California Agricultural Statistical Service (CASS) reported total California kiwifruit production for the 2011-12 season at 37,700 tons, with an average price of \$775 per ton. Based on the average price and shipment information provided by the CASS and the Committee, the majority of kiwifruit handlers would be considered small businesses under the SBA definition. Based on kiwifruit production and price information, as well as the total number of California kiwifruit growers, the average annual grower revenue is less than \$750,000. Thus, the majority of California kiwifruit producers may also be classified as small entities. In addition, based on data from the U.S. Census Bureau, Department of Commerce, the value of imported kiwifruit for 50 of the 53 importers was less than \$7,000,000. Thus, it can be concluded that the majority of

kiwifruit importers may be classified as small entities.

This rule relaxes the minimum grade requirement currently specified in § 920.302 (b) of the regulations under the order by increasing the tolerance for kiwifruit that is "badly misshapen" from 7 percent to 16 percent under the definition for KAC No. 1 quality.

This action does not impose any additional costs on the industry. It is expected to reduce costs to handlers and growers of kiwifruit, and to increase efficiencies in the packing process. Containers of packed kiwifruit occasionally fail to meet the minimum grade requirement of KAC No. 1 quality because two or three pieces of misshapen fruit in a container cause the container to exceed the allowable tolerance for such fruit. The fruit in these containers must then be re-sorted and repacked to meet the minimum grade requirement. There are costs associated with re-sorting and repacking. Assuming a labor cost of \$8.50 per hour and an estimated time of five to ten minutes to re-sort and repack a container of fruit, the direct additional cost per container of fruit could be up to \$1.40. Other costs associated with repacking and re-sorting fruit include employee supervision, and the unstacking and re-stacking of pallets in order to do the

work. These latter types of costs are difficult to estimate due to differences in various packing operations. Some of these costs incurred by handlers are passed on to the growers. In addition to these costs, the re-sorting and repacking of fruit causes inefficiencies in the packing process, as packing lines can be interrupted and employees are diverted from other duties to repack fruit.

Increasing the tolerance for misshapen fruit will reduce the amount of product that fails to meet the minimum grade, thus reducing re-sorting and repacking costs and reducing inefficiencies in the packing process.

The quality of fruit to consumers is not expected to be significantly affected. Based on Committee data, 95 percent of kiwifruit under the order is packed to a higher grade standard than the minimum grade of KAC No.1. Of the 5 percent packed as KAC No.1, only a small percentage of those shipments will be affected by allowing two or three additional misshapen pieces of fruit in the container.

Regarding alternatives to this action, the Committee discussed changing the current parameters for misshapen fruit; from "fruit that is not wider than tall" to fruit that is a certain percentage wider than it is tall. This alternative would allow for flatter/wider fruit to be

packed than what is currently allowed and would be even more difficult to accurately sort fruit visually. The industry does not want to pack more fruit that is flatter and wider; they want to make it easier to accurately identify and pack the KAC No. 1 grade fruit as it is currently defined. Therefore, the Committee rejected this alternative.

In accordance with the Paperwork Reduction Act of 1995, (44 U.S.C. Chapter 35), the order's information collection requirements have been previously approved by the Office of Management and Budget (OMB) and assigned OMB No. 0581-0189, Generic Fruit Crops. No changes in those requirements as a result of this action are necessary. Should any changes become necessary, they would be submitted to OMB for approval.

This rule will not impose any additional reporting or recordkeeping requirements on either small or large kiwifruit handlers in California or importers. 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.

AMS is committed to complying with the E-Government Act, to promote the use of the Internet and other

information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

In addition, USDA has not identified any relevant Federal rules that duplicate, overlap or conflict with this rule.

Further, the Committee meeting was widely publicized throughout the California kiwifruit industry. All interested persons were invited to attend the meeting and participate in Committee deliberations. Like all Committee meetings, the March 27, 2013, meeting was a public meeting. All entities, both large and small, were able to express their views on this issue. Also, the embassies of those countries that export fruit to the United States and known kiwifruit importers will be notified of this interim rule upon its publication. Finally, interested persons are invited to submit comments on this interim rule, including 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:

www.ams.usda.gov/MarketingOrdersSmallBusinessGuide. Any

questions about the compliance guide should be sent to Jeffrey Smutny at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

This rule invites comments on relaxing the minimum grade requirements for domestic and imported kiwifruit. Any comments received will be considered prior to finalization of this rule.

In accordance with section 8e of the Act, the United States Trade Representative has concurred with the issuance of this rule.

After consideration of all relevant material presented, including the Committee's recommendation, and other information, it is found that this interim rule, as hereinafter set forth, will tend to effectuate the declared policy of the Act.

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 action relaxes the current minimum grade requirement under the order; (2) this

change needs to be in effect by September 15, 2013; (3) the Committee 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

7 CFR Part 920

Kiwifruit, Marketing agreements.

7 CFR Part 944

Avocados, Food grades and standards, Grapefruit, Grapes, Imports, Kiwifruit, Limes, Olives, Oranges.

For the reasons set forth in the preamble, 7 CFR parts 920 and 944 are amended as follows:

PART 920 - KIWIFRUIT GROWN IN CALIFORNIA

1. The authority citation for 7 CFR parts 920 and 944 continues to read as follows:

Authority: 7 U.S.C. 601-674.

2. In § 920.302, revise paragraph (b) to read as follows:

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

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(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 16 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.

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PART 944 - FRUITS; IMPORT REGULATIONS

3. In § 944.550, revise paragraph (a) to read as follows:

§ 944.550 Kiwifruit import regulation.

(a) Pursuant to section 8e of the Agricultural Marketing Agreement Act of 1937, as amended, the importation into the United States of any kiwifruit is prohibited unless such kiwifruit meets all the requirements of a 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 16 percent is provided for kiwifruit that is "badly misshapen," and except that such kiwifruit shall have a minimum of 6.2 percent soluble solids. Such fruit shall be at least Size 45, which means there shall be a maximum of 55 pieces of fruit and the average weight of all samples in a specific lot must weigh at least 8 pounds (3.632 kilograms), provided that no individual sample may be less than 7 pounds 12 ounces (3.472 kilograms).

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Dated: July 16, 2013

Rex A. Barnes,
Associate Administrator
Agricultural Marketing Service

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