

eight voted for this change and four voted against it. Opponents of this recommendation preferred standard packaging, but could not agree whether the 22-pound (10-kilogram) or 19.8-pound (9-kilogram) net weight containers should be the standard. The majority of the Committee believes that handlers and growers will benefit by being able to meet buyer's preferences for alternate containers. Small and large growers and handlers are expected to continue benefiting from this change. This suspension will be in effect until July 31, 2004.

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 Grade Standards, except that the kiwifruit shall be "not badly misshapen" and an additional 7 percent tolerance is provided for "badly misshapen" fruit. Section 51.2338(a) of the Grade Standards defines standard pack requirements, requires containers to be well filled; and requires the contents to be tightly packed, but not excessively or unnecessarily bruised by overfilling or oversizing.

The Grade Standard's "tightly packed" 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). Kiwifruit that is packed tightly into the cups of the tray-liners is less subject to movement and therefore less damage.

Recently, a new kiwifruit cultivar, the *Actinidia chinensis* "Hort16A" has been introduced in California and is expected to be harvested and sold commercially during the 2003–04 season. The "Hort16A" is referred to as a "gold" variety because the internal flesh is a yellow to gold color when fully mature. The "Hort16A" kiwifruit is more susceptible to bruising and injury and has a protrusion on the blossom end, referred to as a "beak." Therefore, the "Hort16A" must be handled differently than the "Hayward" variety. Care must be taken during the packing process to protect the beak. To minimize damage, the "Hort16A" 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 Grade Standards.

Therefore, the Committee, at its March 12, 2003, meeting, unanimously recommended an exemption for all "gold" kiwifruit varieties from the order's "tightly packed" requirement. However, the "Hort16A" with its unique "beak" is currently the only known commercially produced "gold" kiwifruit. Because it is not known whether other "gold" kiwifruit varieties will experience the same difficulty in meeting the "tightly packed" standard pack requirement, this final rule limits the exemption to the "Hort16A" variety.

This change is expected to enable handlers to be more competitive in the marketplace and to provide consumers with higher quality "Hort16A" kiwifruit.

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 46 handlers of California kiwifruit subject to regulation under the marketing order and approximately 300 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 46 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 final rule revises pack requirements prescribed under the California kiwifruit order. This rule: (1) Removes the requirement that the count must equal three times the size

designation for shipments in volume filled containers in which the quantity is specified by count; (2) continues to suspend, for the 2003–04 season, the standard packaging requirement that requires volume filled containers of kiwifruit designated by weight to hold 22-pounds (10-kilograms) net weight of kiwifruit, unless such containers hold less than 10-pounds or more than 35-pounds net weight of kiwifruit; and (3) exempts the "Hort16A" kiwifruit variety from the "tightly packed" standard pack requirement.

The Committee recommended these changes at its March 12, 2003, 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.

Volume Filled Containers Designated by Count

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

Section 920.302(a)(4)(iv) of the order's administrative rules and regulations provides that for volume filled containers in which the quantity is specified by count, the count must equal three times the size designation in accordance with tolerances specified in the Grade Standards listed in 7 CFR 51.2328(c)(2). For example, if the fruit has a size designation of "30" marked on the container, then three times the size designation or 90 kiwifruit must be packed into the container and the container must be marked with "90 count."

During the early 1990's handlers packed kiwifruit into several styles of containers: trays, bins, consumer packs, and volume filled containers. Volume filled containers were designated by size and also by either net weight or count. It was a customary industry practice to pack the equivalent of three single layer trays into a volume filled container and to specify the quantity of the kiwifruit placed into the volume filled container as the count.

In 1993, the Committee recommended and the USDA established a pack requirement under the order's administrative rules and regulations which specified that for shipments in volume filled containers in which the quantity is specified by count, the count must equal three times the size designation in accordance with tolerances specified in 7 CFR 51.2328(c)(2) of the Grade Standards, (58 FR 43243, April 16, 1993). This requirement was established to ensure