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. FV97–920–2 PR]

Kiwifruit Grown in California; Proposed Relaxation in Pack Requirements

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule.

SUMMARY: This proposal invites comments on revisions to pack requirements for Size 42 and Size 45 kiwifruit under the Federal marketing order for kiwifruit grown in California. This rule would increase the size variation tolerance for Size 42 kiwifruit from 5 percent, by count, to 10 percent, by count, and would increase the size variation tolerance for Size 45 kiwifruit from 10 percent, by count, to 25 percent, by count. This relaxation was recommended by the Kiwifruit Administrative Committee (committee), the agency responsible for local administration of the marketing order. The committee expects this rule to reduce handler costs, increase grower returns, and allow the kiwifruit industry to meet the increased demand for lower priced kiwifruit.

DATES: Comments must be received by August 8, 1997.

ADDRESSES: Interested persons are invited to submit written comments concerning this proposal. Comments must be submitted in triplicate to the Docket Clerk, Fruit and Vegetable Division, AMS, USDA, P.O. Box 96456, room 2525–S, Washington, DC 20090–6456, FAX (202) 720–5698. 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 Aguayo, Marketing Specialist, or Kurt Kimmel, Regional Manager, California Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Division, AMS, USDA, 2202 Monterey St., suite 102B, Fresno, California 93721, telephone (209) 487–5901, FAX (209) 487–5906. Small businesses may request information on compliance with this regulation by contacting Jay Guerber, Marketing Order Administration Branch, Fruit and Vegetable Division, AMS, USDA, P.O. Box 96456, room 2525–S, Washington, DC 20090–6456, telephone (202) 720–2491, FAX (202) 720–5698.

SUPPLEMENTARY INFORMATION: This proposed rule is issued under Marketing Order No. 920 (7 CFR part 920), as amended, 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 proposed rule in conformance with Executive Order 12866.

This proposed rule has been reviewed under Executive Order 12988, Civil Justice Reform. This action is not intended to have retroactive effect. This proposed rule 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 principle place of business, has jurisdiction in equity to review the Secretary's ruling on the petition, provided a bill in equity is filed not later than 20 days after the date of the entry of the ruling.

This proposal invites comments on revisions to pack requirements for Size 42 and Size 45 kiwifruit under the Federal marketing order for kiwifruit grown in California. This rule would increase the size variation tolerance for Size 42 kiwifruit from 5 percent, by count, to 10 percent, by count, and would increase the size variation tolerance for Size 45 kiwifruit from 10 percent, by count, to 25 percent, by count.

Section 920.52 authorizes the establishment of pack requirements. Section 920.302(a)(4) of the rules and regulations outlines the pack requirements for fresh shipments of California kiwifruit. Under § 920.302(a)(4)(I) of the rules and regulations, kiwifruit packed in containers with cell compartments, cardboard fillers, or molded trays shall be of proper size and fairly uniform in size. Section 920.302(a)(4)(ii) outlines pack requirements for kiwifruit packed in cell compartments, cardboard fillers or molded trays and includes a table that specifies numerical size designations and the size variation tolerances. It also outlines pack requirements for kiwifruit packed in bags, volume fill or bulk containers, and includes a separate table that specifies numerical size designations and size variation tolerances. This section provides that not more than 10 percent, by count of the containers in any lot may fail to meet pack requirements. It also provides that not more than 5 percent, by count, of kiwifruit in any container, (except that for Size 45 kiwifruit, the tolerance, by count, in any one container, may not be more than 10 percent) may fail to meet pack requirements. This size variation tolerance does not apply to other pack requirements such as how the fruit fills the cell compartments, cardboard fillers, or molded trays, or any weight requirements.

Prior to the 1995–1996 season, handlers were experiencing difficulty meeting the size variation tolerance for Size 45 kiwifruit. Size 45 is the minimum size. The committee determined that the best solution was to increase the size variation tolerance, by count, in any one container, for Size 45 kiwifruit. Section 920.302 (a)(4) was revised by a final rule issued June 21, 1995 (60 FR 32257) to include a provision that increased the size variation tolerance, by count, in any one

container, from 5 percent to 10 percent for Size 45 kiwifruit.

This increased size variation tolerance for Size 45 kiwifruit has been utilized for two seasons. Handlers are still experiencing difficulty discerning if size variation tolerances for smaller fruit are being met during the packing process.

As the size of the kiwifruit increases, so does the size of the variation allowed. In the larger kiwifruit sizes, failure to meet the required size variation standards results in packs that are visibly irregular in size. In Size 42 and Size 45 packs, however, when the respective 5 and 10 percent tolerances are exceeded, the variation is difficult to detect visually. A size variation of ¼-inch (6.4 mm) difference is allowed between the widest and narrowest kiwifruit in any Size 42 container utilizing cell compartments, cardboard fillers or molded trays and a ⅜-inch (9.5 mm) size variation difference is allowed between the widest and narrowest kiwifruit in a Size 42 bag, volume fill or bulk container. A ¼-inch (6.4 mm) size variation difference is allowed between the widest and narrowest kiwifruit in any Size 45 container.

Packers must separate the round and flat shaped kiwifruit into two different containers in order to meet the size variation requirements. During the packing operation, a mechanical sizer routinely sorts the kiwifruit by shape and size. The kiwifruit which is missed by the mechanical sizer must be manually sorted by the handler. If size variation tolerances are not being met, packers must slow down the pack line and increase efforts to separate the round and flat kiwifruit to ensure that current size variation requirements are met. Since it is not economically feasible for each handler to be equipped with a caliper to measure size variation, they rely on their visual judgement. During inspection, calipers are utilized by the inspectors to determine if the size variation is met for Size 42 and Size 45 containers. The industry views this separation of Size 42 and 45 round and flat shaped kiwifruit into two different containers by shape as an added cost, that is particularly detrimental because this fruit returns little if any money back to the grower. The higher costs of sizing the fruit during the packing operation may have cost the industry sales as well.

Further, this sizing of kiwifruit may not be apparent to consumers. Usually a pallet of Size 42 kiwifruit includes containers of round fruit and containers of flat fruit. When a pallet of Size 42 kiwifruit reaches the retailer, a container of round fruit may be displayed. As the kiwifruit is sold, a container of the Size 42 flat fruit may be commingled with the remaining round fruit. The consumer would then see this commingled fruit with slightly different shapes on display. The size variation standards that the packer strived so hard to stay within during the packing process are erased.

The committee met on April 16, 1997, and recommended by a vote of eight in favor and one opposed to relax the pack requirements in effect under the order pertaining to size variation tolerances for Size 42 and Size 45 kiwifruit. The committee recommended increasing size variation tolerances for kiwifruit, in any one container, from 5 percent, by count, to 10 percent, by count, for Size 42 kiwifruit and from 10 percent, by count, to 25 percent, by count, for Size 45 kiwifruit and further recommended that this rule be effective in September for the 1997–1998 season. The season normally begins the end of September or the first week of October. The increased size variation tolerances would apply to any container of kiwifruit.

This proposed rule would reduce costs for handlers by allowing them to operate in a more efficient and cost-effective manner and would enable the industry to meet the increased demand in the marketplace for lower priced, uniform containers of kiwifruit. Through these cost savings, growers would be expected to receive higher returns.

There is support in the industry to increase these size variation tolerances. The one committee member who opposed the recommendation believes it would lower the quality of California kiwifruit.

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA), the Agricultural Marketing Service (AMS) has considered the economic impact of this rule on small entities. Accordingly, the 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 rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf. Thus, both statutes have small entity orientation and compatibility.

There are approximately 60 handlers of California kiwifruit subject to regulation under the order and approximately 450 kiwifruit producers in the production area. Small agricultural service firms are defined by the Small Business Administration (13 CFR 121.601) as those whose annual receipts are less than $5,000,000, and small agricultural producers have been defined as those having annual receipts of less than $500,000. One of the 60 handlers subject to regulation has annual kiwifruit sales of at least $5,000,000, and the remaining 59 handlers have sales less than $5,000,000, excluding receipts from any other sources. Ten of the 450 producers subject to regulation have annual sales of at least $500,000, and the remaining 440 producers have sales less than $500,000, excluding receipts from any other sources. Therefore, a majority of handlers and producers of California kiwifruit may be classified as small entities.

Section 920.52 authorizes the establishment of pack requirements. Section 920.302(a)(4)(ii) outlines pack requirements for kiwifruit packed in any container and contains tables that specify numerical size designations and size variation tolerances. This rule would increase the size variation tolerance for Size 42 kiwifruit from 5 percent, by count, to 10 percent, by count, and would increase the size variation tolerance for Size 45 kiwifruit from 10 percent, by count, to 25 percent, by count. This relaxation was recommended by the committee, the agency responsible for local administration of the marketing order.

In the larger kiwifruit sizes, failure to meet the required size variation standards results in packs that are visibly irregular in size. In Size 42 and Size 45, however, when the respective 5 and 10 percent tolerances are exceeded, the variation is difficult to detect visually. However, packers must separate the round and flat shaped kiwifruit into two different containers in order to meet the size variation requirements within each container for Size 42 and Size 45 kiwifruit. The industry views this separation of Size 42 and 45 round and flat shaped kiwifruit into two different containers by shape as an added cost, that is particularly detrimental because this fruit returns little if any money back to the grower. The higher costs of sizing the fruit during the packing operation may have cost the industry sales as well.

Further, this sizing of kiwifruit may not be apparent to consumers. Usually a pallet of Size 42 kiwifruit includes containers of round fruit and containers of flat fruit. When a pallet of Size 42 kiwifruit reaches the retailer, a container of round fruit may be displayed. As the kiwifruit is sold, a container of the Size 42 flat fruit may be commingled with the remaining round fruit and the current size variation standards that the packer strived so hard

to stay within during the packing process are erased.

This proposed rule should reduce costs for handlers by allowing them to operate in a more efficient and cost-effective manner and to meet the increased demand in the marketplace for lower priced, uniform containers of kiwifruit.

Approximately 74 percent of all kiwifruit shipped during the 1996–1997 season was shipped in bags, volume fill or bulk containers. The proposed increase in tolerance in Size 42 from 5 percent, by count, to 10 percent, by count, would increase the number of kiwifruit that may exceed the ⅜″ size variation requirement in bags, volume fill, or bulk containers. Since the individual fruit weight of a Size 42 kiwifruit is approximately 0.160 ounces, a 22-pound volume fill container of Size 42 kiwifruit would contain approximately 138 fruit. An increased tolerance of 10 percent per container would allow approximately 14 kiwifruit to exceed the ⅜″ tolerance versus 7 kiwifruit at the 5 percent tolerance rate. As a result, handlers would be able to operate more efficiently with this increased tolerance.

The proposed increase in tolerance in Size 45 from 10 percent, by count, to 25 percent, by count, would increase the number of kiwifruit that may exceed the ¼″ size variation requirement. Since the individual fruit weight of a Size 45 kiwifruit is approximately 0.145 ounces, a 22-pound volume fill container of Size 45 kiwifruit contains approximately 151 kiwifruit. An increased tolerance of 25 percent, by count, per container would allow 37 kiwifruit out of 151 kiwifruit to exceed the ¼″ tolerance versus 15 kiwifruit at the 10 percent tolerance rate. With this increased tolerance, handlers expect to be able to pack round and flat shaped kiwifruit into one container, thereby reducing costs.

This action is not expected to reduce the quality of the kiwifruit pack. Consumers would not see any changes to the product at retail, because the produce staff at the stores already commingle round and flat kiwifruit in their display bins. Also, the allowed variation would be at a reasonable level and retailers would still receive a fairly uniform box of fruit.

California kiwifruit packing operations range from very small operations, employing as few as 2 persons, to large operations employing as many as 150 people per shift. The 1997–1998 season crop estimate is projected to be 10 to 12 million tray equivalents. A tray equivalent is 7 pounds of fruit. Handlers pack from several hundred to over 25,000 tray equivalents during the season. Packing costs for volume fill containers range from approximately $0.25 to 0.75 per container. The 60 packing sheds can be divided into 3 size categories of small, medium, and large. Small sheds would consist of 25 employees or less, medium sheds 26–75 employees, and large sheds would consist of 76 or more employees. The committee anticipates that labor devoted to packout, on average, would be decreased by 1 to 3 employees per packing shed. The committee estimates cost savings of approximately $0.01 per tray equivalent. Based on a projected crop estimate of 10 to 12 million tray equivalents, a savings of $100,000 to $120,000 could be realized for the 1997–1998 season.

The committee discussed numerous alternatives to this change, including eliminating all pack requirements, increasing the size variation tolerance to establish a Size 42–45 container by blending the packing of Size 42 and Size 45 kiwifruit into one container, reducing the minimum size from Size 45 to Size 49, eliminating Size 45 and making Size 42 the minimum size, making Size 45 requirements more restrictive, reducing the maximum to 53 kiwifruit in the 8 pound sample, lowering the minimum maturity to 6.2 percent, and increasing the degree, or size of the variation allowed, from ¼-inch to ⅜-inch for Size 45 kiwifruit. After lengthy discussion, all of these alternatives were deemed unacceptable. The general consensus was that eliminating all pack requirements could adversely affect quality. The committee wishes to continue utilizing separate Size 42 and Size 45 containers at this time because handlers are able to market each size. Reducing the minimum size from Size 45 to Size 49 would not benefit the industry because growers and handlers could not make a profit growing, packing and selling Size 49.

It was the general consensus that eliminating Size 45 and making Size 42 the minimum size, or making Size 45 requirements more restrictive, by reducing the maximum to 53 kiwifruit in the 8 pound sample, would impose more stringent requirements on California growers and handlers and eliminate salable fruit from markets. Committee members deemed lowering the minimum maturity to 6.2 percent unacceptable as kiwifruit picked below the current minimum maturity of 6.5 percent may shrivel in cold storage. The last alternative considered was to increase the degree, or size of the variation allowed, from ¼-inch to ⅜-inch for Size 45 kiwifruit. It was the consensus of the committee that such an increase would allow undesired blending of undersize kiwifruit. The end result would be a container with visibly different fruit sizes, including undersize fruit. This alternative was deemed not acceptable as the industry desires to pack a uniform container of kiwifruit.

This proposed rule would relax pack requirements under the kiwifruit marketing order and these requirements would be applied uniformly to all handlers. 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.

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 April 16, 1997, meeting was a public meeting and all entities, both large and small, were able to express views on this issue. Finally, interested persons are invited to submit information on the regulatory and informational impacts of this action on small businesses.

A 30-day comment period is provided to allow interested persons to respond to this proposal. 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.

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.

2. In § 920.302 paragraph (a)(4)(ii) is amended by revising the last sentence to read as follows:

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

(a) * * *

(4) * * * (ii)* * * Not more than 10 percent, by count of the containers in any lot and not more than 5 percent, by count, of kiwifruit in any container, (except that for Size 42 kiwifruit, the

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

Dated: July 2, 1997.

Eric M. Forman,

Director, Fruit and Vegetable Division.

[FR Doc. 97–17866 Filed 7–8–97; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

12 CFR Part 9

[Docket No. 97–14]

RIN 1557–AB63

Fiduciary Activities of National Banks

AGENCY: Office of the Comptroller of the Currency, Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Office of the Comptroller of the Currency (OCC) is proposing to amend the rules governing national banks' fiduciary activities by issuing an interpretive ruling to clarify the types of investment advisory activities that come within the scope of these rules.

DATES: Comments must be received by September 8, 1997.

ADDRESSES: Comments should be directed to: Communications Division, Office of the Comptroller of the Currency, 250 E Street, SW, Washington, DC 20219, Attention: Docket No. 97–14. Comments will be available for public inspection and photocopying at the same location. In addition, comments may be sent by fax to (202) 874–5274, or by electronic mail to regs.comments@occ.treas.gov.

FOR FURTHER INFORMATION CONTACT: Andrew Gutierrez, Attorney, Legislative and Regulatory Activities Division, (202) 874–5090; Lisa Lintecum, Director, Asset Management, (202) 874–5419; Dean Miller, Special Advisor, Fiduciary Activities, (202) 874–4852; Laurie Edlund, National Bank Examiner, Fiduciary Activities, (202) 874–3828; Donald Lamson, Assistant Director, Securities and Corporate Practices Division, (202) 874–5210.

SUPPLEMENTARY INFORMATION:

Background

On December 30, 1996, the OCC issued a final rule revising 12 CFR part 9, effective January 29, 1997 (61 FR 68543). Among other changes, the final rule revised the terms that specify the types of activities governed by part 9. In particular, the final rule replaced the former regulation's terms ''fiduciary'' and ''managing agent'' with the term ''fiduciary capacity,'' found at § 9.2(e). Under the revised part 9, if a national bank acts in a fiduciary capacity while engaging in a certain activity, then part 9 governs that activity.

One of the fiduciary capacities set forth in § 9.2(e) is ''investment adviser, if the bank receives a fee for its investment advice.'' The concept of investment adviser for a fee is new to part 9, and the OCC's addition of this term to the list of fiduciary capacities raised questions from the banking industry about what activities entail providing investment advice for a fee.

Interpretive Letter #769

In response to these inquiries, the OCC issued Interpretive Letter #769 (January 28, 1997). In that interpretive letter, the OCC clarified that ''investment adviser'' generally means a national bank that is providing advice or recommendations concerning the purchase or sale of specific securities, such as a national bank engaged in portfolio advisory and management activities (including acting as investment adviser to a mutual fund). Moreover, the OCC explained that the qualifying phrase ''if the bank receives a fee for its investment advice'' excludes from part 9's coverage those activities in which investment advice is merely incidental to other services. Generally, if a national bank receives a fee for providing certain services, and a significant portion of that fee is attributable to the provision of investment advice (*i.e.*, advice or recommendations concerning the purchase or sale of specific securities), then part 9 governs that activity. In effect, the OCC explained, the new term ''fiduciary capacity'' generally includes those activities that the former regulation covered and does not capture additional lines of business.

In the interpretive letter, the OCC indicated that it generally will consider full-service brokerage services to involve investment advice for a fee only if a non-bank broker engaged in that activity is considered an investment adviser under the Investment Advisers Act of 1940 (Advisers Act) (15 U.S.C. 80b–1 *et seq.*).[1] The Advisers Act, at section 202(a)(11)(C) (15 U.S.C. 80b–2(a)(11)(C)), excludes from its definition of investment adviser any broker or dealer whose performance of investment advisory services is solely incidental to the conduct of its business as a broker or dealer and who receives no special compensation for providing investment advice.

The OCC also addressed in the interpretive letter whether certain other activities came within the scope of part 9.

Proposal

The OCC proposes to add a new interpretation to part 9, at § 9.101, codifying the clarification contained in Interpretive Letter #769. To the extent that particular facts require additional clarifications, the OCC will address those situations on a case-by case basis as necessary.

Request for Comments

The OCC invites comments on any aspect of this proposal, including suggestions on whether any specific activities should be added to or removed from the list of activities that generally do not involve investment advice for a fee, found at proposed § 9.101(b)(2).

Regulatory Flexibility Act

Pursuant to section 605(b) of the Regulatory Flexibility Act, the OCC certifies that this proposal will not have a significant economic impact on a substantial number of small entities in accord with the spirit and purposes of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Accordingly, a regulatory flexibility analysis is not required. The proposal merely clarifies the scope of the regulation, and does not add any new requirements.

Executive Order 12866

The Office of Management and Budget has concurred with the OCC's determination that this proposal is not a significant regulatory action under Executive Order 12866.

Unfunded Mandates Reform Act of 1995

The OCC has determined that this proposal will not result in expenditures by state, local, and tribal governments, or by the private sector, of $100 million or more in any one year. Accordingly, a budgetary impact statement is not required under section 202 of the Unfunded Mandates Reform Act of 1995. The proposal merely clarifies the scope of the regulation, and does not add any new requirements.

[1] Banks are excluded from the Advisers Act's definition of investment adviser. 15 U.S.C. 80b–2(a)(11)(A).