

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 920

[Docket No. FV06-920-1 IFR]

**Kiwifruit Grown in California; Relaxation of Container
Marking Requirements**

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Interim final rule with request for comments.

SUMMARY: This rule relaxes the container marking requirements for kiwifruit covered 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). Currently, kiwifruit that has been inspected, meets applicable grade and size requirements, and is subsequently placed into new containers must, be positive lot identified, which requires reinspection. This rule establishes procedures for handlers to ship such kiwifruit without positive lot identification (PLI), and announces the Agricultural Marketing Service's intention to request emergency approval by the Office of Management and Budget (OMB) of a new information collection. This rule is

intended to reduce handler inspection costs and facilitate the marketing of kiwifruit.

DATES: Effective [Insert date 1 day after the date of publication in the Federal Register]. Pursuant to the Paperwork Reduction Act, comments on the information collection burden that will result from this rule must be received by [Insert date 60 days after the date of publication in the Federal Register] which 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 Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue SW, STOP 0237, Washington, DC 20250-0237; Fax: (202) 720-8938, E-mail: moab.docketclerk@usda.gov, or Internet: <http://www.regulations.gov>. All comments should reference the docket number and the date and page number of this issue of the **Federal Register** and will be made available for public inspection in the Office of the Docket Clerk during regular business hours, or can be viewed at:

<http://www.ams.usda.gov/fv/moab.html>.

FOR FURTHER INFORMATION CONTACT: Shereen Marino, Marketing Specialist, or Kurt J. Kimmel, Regional Manager, California

Marketing Field Office, Marketing Order Administration
Branch, Fruit and Vegetable Programs, AMS, USDA, telephone:
(559) 487-5901, Fax: (559) 487-5906, or E-mail:
Shereen.Marino@usda.gov, or Kurt.Kimmel@usda.gov.

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.

SUPPLEMENTARY INFORMATION: This 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 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 rule relaxes the container marking requirements for kiwifruit covered under the order. Currently, kiwifruit that has been inspected, meets applicable grade and size requirements, and is subsequently placed into new containers, must be positive lot identified, which requires reinspection. This rule establishes procedures for handlers

to ship such kiwifruit without PLI. This rule is intended to reduce handler inspection costs and facilitate the marketing of kiwifruit. The Committee unanimously recommended this change at its April 6, 2006, meeting.

Section 920.52(a) of the order provides authority for grade, size, pack, container, and container marking requirements for shipments of fresh kiwifruit. Section 920.55 of the order requires inspection and certification of kiwifruit prior to shipment by Federal or Federal-State Inspection Service (FSIS). Section 920.302 of the order's regulations specifies applicable grade, size, pack, and container requirements and § 920.303 specifies applicable container marking requirements.

Paragraph (d) of § 920.303 requires that containers of kiwifruit be positive lot identified prior to shipment. PLI helps to ensure that a specific load or lot of kiwifruit can be linked to an inspection certificate and provides verification that the fruit was inspected. No less than 75 percent of the containers of kiwifruit on a pallet must be marked with a lot stamp number corresponding to the lot inspection conducted by the FSIS. This lot stamp number is a PLI number that can be matched to an inspection certificate. Individual consumer packages within a master

container, and containers being directly loaded into a vehicle for export under FSIS supervision are exempt from PLI. Individual consumer packages placed directly on a pallet, and plastic containers of kiwifruit must be positive lot identified.

Currently, kiwifruit that has been inspected and certified, and is subsequently placed into new containers, must be positive lot identified. When such kiwifruit is placed into new containers, the PLI mark on the container is lost and thus the lot is not easily identified. The new containers must be reinspected and marked with a new PLI number. Reinspection costs for such kiwifruit account for roughly 20 percent of annual inspection costs for handlers.

In an effort to reduce handler costs, the Committee recommended establishing procedures for handlers to ship previously inspected kiwifruit placed in new containers without PLI. Handlers will have the option of having such kiwifruit reinspected and marked with a PLI number or requesting a verification number under a new verification process. Such kiwifruit must be of the same grade and size as originally inspected. The handler must contact the FSIS to obtain a verification number prior to shipment, and plainly mark one end of each container with the letter "R"

and the verification number. The letter "R" and the verification number must not be less than one-half inch in height. The handler must submit a Kiwifruit Verification Form to the FSIS within 3 business days of such request, and provide the following information from the original inspection: (i) the positive lot identification numbers; (ii) the identity of the handler; (iii) the inspection certificate numbers; (iv) the grade and size of the kiwifruit; (v) the number and type of containers; and (vi) the handler's brand; and the following information on the kiwifruit placed into new containers: (i) the number and type of containers; and (ii) the applicable brand. The verification number will be linked to the PLI number, thus providing a method to trace the fruit back to the original inspection certificate. The FSIS will maintain the Kiwifruit Verification Forms. The Committee will make use of completed forms to audit handlers as needed to ensure compliance, pursuant to authority provided in § 920.61.

Accordingly, a new paragraph (f) is added to § 920.303 that establishes the verification procedures described above. Additionally, a new sentence is added to the beginning of paragraph (d) in that section to clarify that except as provided in the new paragraph (f), containers of

kiwifruit must be positive lot identified prior to shipment in accordance with specified requirements. Paragraph (d) is modified further for clarification purposes to change the term "lot stamp number" to "positive lot identified," and to change the term "plastic container" to "reusable plastic container."

Initial Regulatory Flexibility Analysis

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA), the Agricultural Marketing Service (AMS) has considered the economic impact of this action on small entities. Accordingly, AMS has prepared this initial regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and the rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf. Thus, both statutes have small entity orientation and compatibility.

There are approximately 37 handlers of kiwifruit subject to regulation under the marketing order and approximately 220 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 \$6,500,000, and small agricultural producers are defined as those whose annual receipts are less than \$750,000. None of the 37 handlers subject to regulation have annual kiwifruit sales of \$6,500,000. In addition, six growers subject to regulation have annual sales exceeding \$750,000. Therefore, all of the kiwifruit handlers and a majority of the growers may be classified as small entities.

This rule relaxes the container marking requirements currently specified in § 920.303. Currently, kiwifruit that has been inspected, meets applicable grade and size requirements, and is subsequently placed into new containers must be positive lot identified, which requires reinspection. This rule establishes procedures for handlers to ship such kiwifruit without PLI. This rule adds a new paragraph (f) to § 920.303 that establishes the verification procedures. Handlers must obtain a verification number from the FSIS, mark their new containers with such number and the letter "R," and submit a Kiwifruit Verification Form to the FSIS. The verification number can be linked to the original PLI number, thereby providing a method to trace the fruit

back to the original inspection certificate. This action is intended to reduce handler inspection costs and facilitate the marketing of kiwifruit. This rule also makes minor modifications to paragraph (d) of § 920.303 for clarification purposes. Authority for this action is provided in §§ 902.52(a)(3) and 920.55 of the order.

The impact of this change on handlers was discussed by the Committee. Reinspection costs due to current PLI requirements account for roughly 20 percent of annual inspection costs for the industry. Additionally, an average of 20 percent of the crop is placed into new containers annually. The following table shows inspection costs for in-line inspection, lot inspection, and kiwifruit placed into new containers for 2001 to 2005.

Year	In-Line	Lot	New Containers	Total Cost
2001-02	\$107,702	\$15,254	\$38,411	\$161,367
2002-03	\$96,376	\$24,866	\$35,521	\$156,763
2003-04	\$111,228	\$12,064	\$29,197	\$152,489
2004-05	\$129,197	\$24,319	\$31,415	\$184,931

This change reduces inspection costs because handlers have the option of using the new verification process instead of having kiwifruit reinspected to conform to PLI

requirements. Additionally, reinspection can delay shipments because kiwifruit cannot be shipped until reinspection has been completed by the FSIS.

The Committee considered the alternative of maintaining the status quo, but this was not viable. As an option to reinspection, identity of the lot can be achieved through the verification number, which provides a trace back to the original inspection certificate. Additionally, such kiwifruit has already met the minimum requirements of the marketing order. It is anticipated that the rule provides a cost savings to handlers.

This action imposes an additional reporting and recordkeeping burden on California kiwifruit handlers. This action requires a new Committee form that must be completed by handlers and provided to the FSIS. The information collection requirement is discussed later in this document. 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. Finally, USDA has not identified any relevant Federal rules that duplicate, overlap, or conflict with this rule.

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 April 6, 2006, meeting was a public meeting and all entities, both large and small, were encouraged to express their views on these issues. Finally, interested persons are invited to submit information on the regulatory and informational impacts of this action on small businesses.

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

<http://www.ams.usda.gov/fv/moab.html>. Any questions about the compliance guide should be sent to Jay Guerber at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), this notice announces that AMS is requesting emergency approval from the Office of Management and Budget (OMB) for a new information collection request under OMB No. 0581-NEW. Upon approval by OMB, this

collection will be merged with the forms currently approved for use under OMB No. 0581-0189, "Generic OMB Fruit Crops." The emergency request was necessary because insufficient time was available to follow normal clearance procedures.

Title: Kiwifruit Grown in California, Marketing Order No. 920.

OMB No.: 0581-NEW.

Expiration Date of Approval: Emergency request.

Type of Request: New collection.

Abstract: The information collection requirement in this request is essential to provide handlers with a procedure to ship kiwifruit that has been inspected, meets applicable grade and size requirements, and is subsequently placed into new containers without PLI.

On April 6, 2006, the Committee unanimously recommended relaxing the container marking requirements prescribed under the order. Currently, kiwifruit that has been inspected, meets applicable grade and size requirements, and is subsequently placed into new containers must be positive lot identified, which requires reinspection. This rule establishes procedures for handlers to ship such kiwifruit without PLI. Kiwifruit handlers must submit a new Kiwifruit Verification Form to the FSIS and report information prior

to shipment. On this form, handlers must report information from the original inspection certificate (PLI and inspection certification numbers, handler name, grade and size, number and type of containers, and brand), and information for such kiwifruit placed into new containers (number and type of container, and brand). The FSIS will assign verification numbers for lots of such kiwifruit in order to provide a trace back to the original inspection certificate. This action is intended to reduce handler inspection costs and facilitate the marketing of kiwifruit.

The information collected is used only by authorized representatives of USDA, including AMS, Fruit and Vegetable Programs regional and headquarters' staff, and authorized employees and agents of the Committee. Authorized Committee employees, agents, and the industry are the primary users of the information and AMS is the secondary user.

Kiwifruit Verification Form

Estimate of Burden: Public reporting burden for this collection of information is estimated to be no more than .25 hour per response.

Respondents: Kiwifruit handlers.

Estimated Number of Respondents: 30.

Estimated Number of Responses per Respondent: 150.

Estimated Total Annual Burden on Respondents: 1,125 hours.

Comments: Comments are invited on: (1) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Comments should reference OMB No. 0581-NEW and the California kiwifruit marketing order, and be sent to the USDA in care of the Docket Clerk at the previously mentioned address. All comments received will be available for public inspection during regular business hours at the same address.

All responses to this notice will be summarized and included in the request for OMB approval. All comments will

also become a matter of public record. As previously mentioned, because there was insufficient time for a normal clearance procedure and prompt implementation is needed, AMS is requesting emergency approval for the use of this form October 11, 2006, because the season began August 1. As previously mentioned, upon OMB approval, this collection will be merged with the forms currently approved for use under OMB No. 0581-0189 "Generic OMB Fruit Crops."

The 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 summary, this rule establishes procedures for handlers to ship kiwifruit that has been inspected, meets applicable grade and size requirements, and is subsequently placed into new containers without PLI. This rule is intended to reduce handler inspection costs and facilitate the marketing of kiwifruit. The additional reporting requirement will contribute to the efficient operation of the program and assist in ensuring handler compliance with marketing order provisions. Any comments received will be considered prior to finalization of this rule.

After consideration of all relevant material presented, including the Committee's recommendation, and other information, it is found that this interim final 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 in 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 good cause exists for not postponing the effective date of this rule until 30 days after publication in the **Federal Register** because: (1) This rule should be in place as soon as possible because the 2006-07 season began on August 1, 2006, and handlers will begin shipping kiwifruit by mid-September; (2) the Committee unanimously recommended this change at a public meeting and all interested parties had an opportunity to provide input; (3) this rule relaxes requirements currently in effect and kiwifruit producers and handlers are aware of this rule and need no additional time to comply with the relaxed requirements; (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 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.

2. In § 920.303, revise paragraph (d), and add a new paragraph (f) to read as follows:

§ 920.303 Container marking regulations.

* * * * *

(d) Except as provided in paragraph (f) of this section, containers of kiwifruit must be positive lot identified prior to shipment in accordance with the following requirements. All exposed or outside containers of kiwifruit, but not less than 75 percent of the total containers on the pallet, shall be positive lot identified with a plain mark corresponding to the lot inspection conducted by an authorized inspector, except for individual consumer packages within a master container and containers that are being directly loaded into a vehicle for export

shipment under the supervision of the Federal or Federal-State Inspection Service. Individual consumer packages of kiwifruit placed directly on a pallet shall have all outside or exposed packages on a pallet positive lot identified with a plain mark corresponding to the lot inspection conducted by an authorized inspector or have one inspection label placed on each side of the pallet. Reusable plastic containers of kiwifruit, placed on a pallet, shall be positive lot identified in accordance with Federal or Federal-State Inspection Service procedures and shall have required information on the cards of the individual containers, as provided in this section of the regulations.

* * * * *

(f) Kiwifruit that has been inspected and certified, and is subsequently placed into new containers, does not have to be positive lot identified, as prescribed in paragraph (d) of this section: Provided, That:

(1) Such kiwifruit is of the same grade and size as originally inspected; and

(2) the handler requests a verification number from the Federal or Federal-State Inspection Service prior to shipment; plainly marks one end of each container with such number and the letter "R," both of which shall be at least

one-half inch in height; and submits a Kiwifruit Verification Form to the Federal or Federal-State Inspection Service within 3 business days of such request. The handler shall provide the following information on the Kiwifruit Verification Form.

- (i) From the original inspection:
 - (A) The positive lot identification numbers;
 - (B) The identity of the handler;
 - (C) The inspection certificate numbers;
 - (D) The grade and size of the kiwifruit;
 - (E) The number and type of containers; and
 - (F) The handler's brand; and
- (ii) On the kiwifruit placed into new containers:

- (A) The number and type of containers; and
- (B) The applicable brand.

Dated:

Lloyd C. Day
Administrator
Agricultural Marketing Service