considered the economic impact of this rule on small entities.

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 65 handlers of California kiwifruit subject to regulation under the order and approximately 600 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. A majority of handlers and producers of California kiwifruit may be classified as small entities.

Section 920.52(a)(3) of the order authorizes regulations to establish the pack of the container or containers which may be used in the packaging or handling of kiwifruit. 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. Among the pack requirements, is a size variation tolerance requirement which specifies that not more than 5 percent, by count, of kiwifruit in any container may fail to meet the pack requirements of § 920.302 (a)(4). The 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.

The Kiwifruit Administrative Committee (committee), the agency responsible for local administration of the marketing order, met on February 8, 1995, and recommended by unanimous vote to relax the current size variation tolerance from 5 percent to 10 percent for bag, volume fill, bulk, cell compartments, cardboard fillers, or molded tray containers of Size 45 kiwifruit for pack under the Federal marketing order for kiwifruit grown in California.

Section 920.52 of the order 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. Section

920.302(a)(4)(i) outlines pack requirements for proper size, and size variation, and contains a table that provides minimum net weights for count designation of kiwifruit packed in containers with cell compartments, cardboard fillers, or molded trays. Section 920.302(a)(4)(ii) outlines pack requirements for fruit size variation in bags, volume fill and bulk containers and includes a table that specifies numerical size designations that are used to determine kiwifruit sizes. These size designations are defined by numerical counts, which establish the maximum number of fruit per 8-pound sample for each of the established sizes.

Packout by fruit size, of Size 45 containers, increased from 1.80 percent for the 1993-94 season to 14.34 percent for the 1994-95 season. This increase in packout, of Size 45 fruit, is a result of blending Size 49 fruit into Size 45 fruit containers and as a result of weather conditions in the central and southern parts of California which produced a larger percentage of smaller and flatter kiwifruit. Generally Size 45 fruit is a rounder fruit. Blending occurs because adjoining size designations have size tolerances that partially overlap and kiwifruit within either size tolerance may be packed in either size designation. In larger sized fruit, handlers see more of a variety of shapes and pack boxes of round fruit and boxes of flat fruit for each size in order to stay within the size variation requirements. For economic and practical reasons, most handlers pack boxes that include both the round Size 45 fruit, as well as smaller flat fruit.

During the past season, a number of handlers experienced increased difficulty in meeting the size variation tolerance in the Size 45 containers. Currently, a variation of 1/4-inch (6.4 mm) difference is allowed between the widest and narrowest pieces of fruit in a Size 45 pack for all containers. There is a tolerance of 5 percent for fruit that exceeds the 1/4-inch variation, meaning that up to 5 percent of the fruit in any one container could exceed the 1/4-inch variation. As the size of the fruit increases, so does the size of the variation allowed. In the larger fruit sizes, failure to meet the required size variation standards results in packs that are visibly irregular in size. In Size 45, however, when the 5 percent tolerance is exceeded, the variation is difficult to detect visually. During the packing operation, a mechanical sizer routinely sorts the fruit by shape and size. The fruit which is missed by the mechanical sizer must be correctly sorted by the handler. Since it is not economically feasible for each handler to be equipped with a caliper to measure size variation, they rely on their visual judgment. During inspection, calipers are utilized by the inspectors to determine if the size variation is met for Size 45 containers. The 5 percent tolerance requirement is seldom met, but the fruit is found to vary slightly above the allowed tolerance of 5 percent (within 6–8 percent tolerance). Handlers have found that it is cost-prohibitive to slow down their operations in an attempt to stay within the current tolerance levels and to recondition the fruit that fails inspection.

The committee's intention in increasing the size variation tolerance is to set an acceptable size variation tolerance that can be visually discerned while the packing operation is in progress and results in a Size 45 container that is uniform in size.

The industry supports the increase in the size variation tolerance to 10 percent, by count, for the fruit in any Size 45 container. An alternative studied by the committee field staff and considered by the committee was to increase the degree, or size of the variation allowed, from 1/4-inch to 3/8inch. Throughout the season, fruit was measured and sample boxes were made up depicting this increased variation. It was the consensus of the field staff, inspection service and industry handlers that such an increase would allow for the blending up of undersize fruit. The end result would be a box that visibly showed a variation of fruit size, including undersize fruit. This was deemed not acceptable as the industry desires to pack a uniform box of fruit.

Another alternative examined and effectuated by this rule increases the 5 percent size variation tolerance level to 10 percent. Throughout the season, field staff observed and polled handlers and inspectors on problems encountered with Size 45. The overwhelming majority of the cases where Size 45 fruit was rejected for size variation, the tolerance level was in the 6 percent to 8 percent range. It was not possible to distinguish a box at 10 percent variation from one at 5 percent, without the use of a caliper. The general consensus was that once a 10 percent tolerance was exceeded, the variation became more visibly apparent and the handlers would recognize the need for repacking before calling for inspection.

This rule relaxes the tolerance for Size 45 packs by increasing the number of Size 45 kiwifruit allowed in the container that are not within the ¹/₄-inch variance. For example, the pieces of fruit, which vary more than 1/4-inch in a 22-pound volume fill container, could increase from 2 pieces to 5 pieces. This