

than every ninety (90) days, a status report from the Chief of the PACA Branch who shall respond thereto within fourteen (14) days of receiving the request. When an investigation is terminated, the Secretary shall, within fourteen (14) days, notify the subject of the investigation of the termination. In every case in which notice or response is required under this subsection such notice or response shall be accomplished by personal service or by posting the notice or response by certified mail to the last known address of the subject of the investigation.

[62 FR 15089, Mar. 31, 1997]

PART 47—RULES OF PRACTICE UNDER THE PERISHABLE AGRICULTURAL COMMODITIES ACT

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AUTHORITY: 5 U.S.C 553; 7 U.S.C. 499f; 7 U.S.C. 499o; 7 CFR 2.22(a)(1)(viii)(L), 2.79(a)(8)(xiii).

SOURCE: 10 FR 2209, Feb. 27, 1945, unless otherwise noted.

EDITORIAL NOTE: Nomenclature changes to part 47 appear at 64 FR 38108, July 15, 1999.

GENERAL PROVISIONS

§ 47.1 Meaning of words.

Words in the regulations in this part in the singular form shall be deemed to import the plural, and vice versa, as the case may demand.

§ 47.2 Definitions.

As used in the regulations in this part, the terms as defined in section 1 of the Act shall apply with equal force and effect. Unless otherwise defined, the following terms whether used in the regulations in this part, in the Act, or in the trade shall be construed as follows:

(a) *Act* means the Perishable Agricultural Commodities Act, 1930, approved June 10, 1930, as amended (46 Stat. 531, 7 U.S.C., 499a *et seq.*, and 499b), and legislation supplementary thereto and amendatory thereof.

(b) *Department* means the United States Department of Agriculture.

(c) *Secretary* means the Secretary of Agriculture of the United States, or any officer or employee of the Department to whom authority has heretofore been delegated, or to whom authority may hereafter be delegated, to act in his or her stead.

(d) *Service* means the Agricultural Marketing Service, United States Department of Agriculture.

(e) *Associate Administrator* means the Associate Administrator of the Service, or any officer or employee of the Service to whom authority has heretofore lawfully been delegated, or to whom authority may hereafter lawfully be delegated, to act in his or her stead.

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(f) *General Counsel* means the General Counsel of the Department or any employee of the Office of the General Counsel to whom the authority to act in his or her stead has heretofore been or may hereafter be delegated.

(g) *Fruit and Vegetable Programs* means the Fruit and Vegetable Programs of the Agricultural Marketing Service.

(h) *Deputy Administrator* means the Deputy Administrator of the Fruit and Vegetable Programs or any officer or employee of the Fruit and Vegetable Programs to whom authority has heretofore lawfully been delegated, or to whom authority may hereafter lawfully be delegated by the Deputy Administrator, to act in his stead.

(i) *Examiner*. In connection with reparation proceedings, the term “examiner” is synonymous with “presiding officer” and means any attorney employed in the Office of the General Counsel of the Department, or in connection with reparation proceedings conducted pursuant to the documentary procedure in § 47.20, the term “examiner” may mean any other employee of the PACA Branch whose work is reviewed by an attorney employed in the Office of the General Counsel of the Department.

(j) *Examiner’s report*. In connection with reparation proceedings, “examiner’s report” means the examiner’s report to the Secretary, and includes the examiner’s proposed (i) findings of fact and conclusions with respect to all material issues of fact, law or discretion, as well as the reasons or basis therefore, (ii) order and (iii) rulings on findings, conclusions and orders submitted by the parties.

(k) *Hearing* means that part of the proceeding which involves the submission of evidence and may or may not include an oral hearing.

(l) *Hearing Clerk* means the Hearing Clerk, United States Department of Agriculture, Washington, DC 20250.

(m) *Disciplinary proceeding* means any proceeding (other than a reparation proceeding) arising under the Act, in which proceeding it is required by law that the order or other determination duly issued shall be made only after an opportunity for a hearing, and, if a hearing be held, only upon the basis of

a record made in the course of such hearing.

(n) *Reparation proceeding* means a proceeding in which money damages are claimed and in which the Department is not a party.

(o) *Party* includes the Department in those instances in which a proceeding is instituted upon moving papers filed by an officer or employee of the Department in an official capacity.

(p) *Complainant* means the party upon whose moving paper the proceeding is instituted.

(q) *Respondent* means the party proceeded against, whether the proceeding is instituted by the Department or by a private person.

(r) *Moving paper* means any formal complaint, petition, or order to show cause, by virtue of which a proceeding under the Act is instituted.

(s) *Mail* means to deposit an item in the United States Mail with postage affixed and addressed as necessary to cause it to be delivered to the address shown by ordinary mail, or by certified mail or registered mail if specified, or to cause a properly addressed item to be delivered by a commercial or private mail delivery service to the address shown.

(t) *Re-mail* means to mail by ordinary mail to an address an item that has been returned after being sent to the same address by certified or registered mail or by a commercial or private mail delivery service.

[10 FR 2209, Feb. 27, 1945; 10 FR 8685, July 13, 1945, as amended at 11 FR 224, Jan. 4, 1946; 12 FR 5483, Aug. 13, 1947; 19 FR 57, Jan. 6, 1954; 38 FR 30445, Nov. 5, 1973; 56 FR 174, Jan. 3, 1991; 60 FR 8459, Feb. 14, 1995; 64 FR 38105, July 15, 1999]

§ 47.3 Institution of proceedings.

(a) *Informal complaints*. (1) Any interested person (including any officer or agency of any State or Territory having jurisdiction over commission merchants, dealers, or brokers in such State or Territory, and any employee of the Department) desiring to complain of any violation of any provision of the Act by any commission merchant, dealer, or broker may file with the Deputy Administrator an informal complaint. Informal complaints may

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be made the basis of either a disciplinary complaint, or a claim for damages, or both. If the informal complaint is to be made the basis of a claim for damages, it must be received by the Deputy Administrator within 9 months after the cause of action accrues; if the informal complaint is not to be made the basis of a claim for damages, it may be filed at any time within 2 years after the violation of the act occurred: *Provided*, That the 2-year limitation herein prescribed shall not apply to complaints charging flagrant or repeated violations of the act.

(2) Informal complaints may be made in writing by telegram, by letter, or by facsimile transmission, setting forth the essential details of the transaction complained of. So far as practicable, every such informal complaint shall state such of the following items as may be applicable:

- (i) The name and address of each person and of the agent, if any, representing him in the transaction involved;
- (ii) Quantity and quality or grade of each kind of produce shipped;
- (iii) Date of shipment;
- (iv) Carrier identification;
- (v) Shipping and destination points;
- (vi) If a sale, the date, sale price, and amount actually received;
- (vii) If a consignment, the date, reported proceeds, gross and net;
- (viii) Amount of damages claimed, if any; and
- (ix) Statement of other material facts including terms of contract.

(3) The informal complaint should, so far as practicable, be accompanied by true copies of all available papers relating to the transaction complained about, including shipping documents, letters, telegrams, invoices, manifests, inspection certificates, accounts sales, and any special contracts or agreements.

(4) The informal complaint shall be accompanied by a filing fee of \$100 as authorized by the Act.

(b) *Investigations and disposition of informal complaints.* (1) Upon receipt of all the information and supporting evidence submitted by the person filing the informal complaint, the Deputy Administrator shall cause such investigation to be made as, in the Deputy

Administrator's opinion, is justified by the facts. If such investigation discloses that no violation of the Act has occurred, no further action shall be taken and the person filing the informal complaint shall be so informed.

(2) If the statements in the informal complaint and the investigation thereunder seem to warrant such action, and, in any case except one of wilfulness or one in which public health, interest or safety otherwise requires, which may result in the suspension or revocation of a license, the Deputy Administrator, in an effort to effect an amicable or informal adjustment of the matter, shall give written notice to the person complained against of the facts or conduct concerning which complaint is made, and shall afford such person an opportunity, within a reasonable time fixed by the Deputy Administrator, to demonstrate or achieve compliance with the applicable requirements of the Act and regulations promulgated thereunder.

[10 FR 2211, Feb. 27, 1945, as amended at 12 FR 1025, Feb. 13, 1947; 56 FR 174, Jan. 3, 1991; 60 FR 8459, Feb. 14, 1995; 64 FR 38106, July 15, 1999; 73 FR 31017, May 30, 2008]

§ 47.4 Service and proof of service.

(a) *Who shall make service.* Copies of all documents or papers required or authorized by the rules in this part to be filed with the Fruit and Vegetable Programs shall be served on the parties by the Fruit and Vegetable Programs, and copies of all documents or papers required or authorized by the rules in this part to be filed with the Hearing Clerk shall be served on the parties by the Hearing Clerk, unless any such document or paper is served by some other employee of the Department, or by a U.S. Marshal or deputy marshal, or as otherwise provided herein, or as otherwise directed by the presiding officer or Judicial Officer.

(b) *Service on Party.* (1) Any complaint or other document initially served on a person to make that person a party respondent in a proceeding, a final order, or other document specifically ordered by the presiding officer or Judicial Officer to be served by certified or registered mail, or commercial or private mail delivery service,

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shall be deemed to be received by any party to a proceeding on the date of delivery by certified or registered mail, or commercial or private mail delivery service to the last known principal place of business of such party, last known principal place of business of the attorney or representative of record of such party, last known residence of such party if an individual: Provided, That, if any such document or paper is sent by certified, registered, commercial, or private mail, but is returned, it shall be deemed to be received by such party on the date of the re-mailing by ordinary mail to the same address.

(2) Any document or paper, other than one specified in paragraph (b)(1) of this section or written questions for a deposition as provided in § 47.16(d)(2), shall be deemed to be received by any party to a proceeding on the date of mailing by ordinary mail to the last known principal place of business of such party, last known principal place of business of the attorney or representative of record of such party, or last known residence of such party if an individual.

(3) Any document or paper served other than by certified, registered, commercial, or private mail on any party to a proceeding shall be deemed to be received by such party on the date of:

(i) Delivery to any responsible individual at, or leaving in a conspicuous place at, the last known principal place of business of such party, last known principal place of business of the attorney or representative of record of such party, or last known residence of such party if an individual, or

(ii) Delivery to such party if an individual, to an officer or director of such party if a corporation, or to a member of such party if a partnership, at any location.

(c) *Service on another.* Any subpoena or other document or paper served on any person other than a party to a proceeding shall be deemed to be received by such person on the date of:

(1) Delivery by certified, registered, commercial, private or mail to the last known principal address of such person, last known principal place of business of the attorney or representative

of record of such person, or last known residence of such person if an individual;

(2) Delivery other than by mail to any responsible individual at, or leaving in a conspicuous place at, any such location; or

(3) Delivery to such party if an individual, to an officer or director of such party if a corporation, or to a member of such party if a partnership, at any location.

(d) *Proof of service.* Any of the following, in the possession of the Department, showing such service, shall be deemed to be accurate:

(1) A certified or registered mail receipt returned by the postal service with a signature, or a signed receipt returned by a private or commercial mail delivery service;

(2) An official record of the postal service;

(3) An entry on a docket record or a copy placed in a docket filed by the Hearing Clerk of the Department or by an employee of the Hearing Clerk in the ordinary course of business;

(4) A certificate of service, which need not be separate from and may be incorporated in the document or paper of which it certifies service, showing the method, place and date of service in writing and signed by an individual with personal knowledge thereof, *Provided*, That such certificate must be verified by oath or declaration under penalty of perjury if the individual certifying service is not a party to the proceeding in which such document or paper is served, an attorney or representative of record for such a party, or an official or employee of the United States or of a State or political subdivision thereof.

[56 FR 174, Jan. 3, 1991; 56 FR 5151, Feb. 8, 1991, as amended at 60 FR 8459, Feb. 14, 1995; 64 FR 38106, July 15, 1999]

§ 47.5 Scope and applicability of rules of practice.

Sections 47.6 through 47.25 shall be applicable to the procedure governing the filing and disposition of formal complaints in reparation proceedings. Sections 47.47 through 47.68 shall be applicable to the proceedings for determining whether a person is responsibly connected with a licensee under the

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Perishable Agricultural Commodities Act. Sections 47.1 through 47.5 and § 47.46 shall be applicable to all proceedings under §§ 47.6 through 47.25. Sections 47.1 and 47.2, except for § 47.2 (i) through (r), shall be applicable to all proceedings under §§ 47.47 through 47.68. In addition, except to the extent that they are inconsistent with §§ 1.130 through 1.151 of this chapter, §§ 47.1 through 47.5 and 47.46 are also applicable to procedures governing the filing and disposition of formal complaints and other moving papers relating to administrative proceedings to enforce the Act pursuant to §§ 1.130 through 1.151 of this chapter.

[43 FR 30787, July 18, 1978, as amended at 60 FR 8459, Feb. 14, 1995]

RULES APPLICABLE TO REPARATION PROCEEDINGS

§ 47.6 Formal complaints.

(a) *Filing; contents; number of copies.*

(1) If the procedure provided in § 47.3(b) fails to effect an amicable or informal settlement, the person who filed the informal complaint may, if further proceedings are desired, file a formal complaint with the Fruit and Vegetable Programs. The formal complaint shall be filed within ninety days of notification of the opportunity to proceed formally. Failure to file a formal reparation complaint within the time prescribed shall result in the waiver of further proceedings on the claim alleged in the informal complaint.

(2) The formal complaint shall set forth the information and be accompanied by the papers indicated in § 47.3(a)(2) and (3), including a statement of the amount of damages claimed, with the basis therefor, and the method of determination. The original and three copies shall be furnished for filing, and service on the respondent. If there is more than one respondent, a further copy shall be furnished for each additional respondent.

(b) *Bond Required if Complainant is Nonresident.* If formal complaint for reparation is filed by a nonresident of the United States, complainant shall first file a bond in double the amount of the claim either with a surety company approved by the Treasury Department of the United States as surety or

with two personal sureties, each of whom shall be a citizen of the United States and shall qualify as financially responsible for the entire amount of the bond. The bond shall run to the respondent and be conditioned upon the payment of costs, including reasonable attorney's fees, for the respondent if the respondent shall prevail, and of any reparation award that may be issued by the Secretary against the complainant on any counterclaim asserted by respondent: *Provided*, That the furnishing of a bond may be waived at the discretion of the Secretary if the complainant is a resident of a country which permits the filing of a complaint in an administrative forum or its equivalent which is substantially similar to that provided under the Perishable Agricultural Commodities Act by a resident of the United States against a citizen of that country without the furnishing of a bond. Nothing in this section shall limit the discretion of the Secretary to deny such a waiver in order to effectuate the purposes of the Act or to protect the interests of the businesses concerned.

(c) *Service upon respondent; proof of service.* Upon receipt by the Fruit and Vegetable Programs of the formal complaint, the accompanying papers and the \$500 handling fee authorized by the Act, a copy thereof shall be served by the Fruit and Vegetable Programs upon the respondent in accordance with § 47.4 of this part. If the complaint is not in the proper form, the Fruit and Vegetable Programs shall return it and inform the complainant of the deficiencies therein.

(d) *Amendments.* At any time prior to the close of the hearing, the complaint may be amended; but, in case of an amendment adding new provisions, the hearing shall, if the respondent so requests, be adjourned for a reasonable time to be determined by the examiner: *Provided*, That, if the amendment introduces a new or different cause of action, it must be filed within 9 months after the cause of action accrued. Amendments subsequent to the first amendment or subsequent to the filing of an answer by the respondent may be made only with leave of the examiner

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or with the written consent of the adverse party.

[10 FR 2209, Feb. 27, 1945, as amended at 56 FR 176, Jan. 3, 1991; 64 FR 38106, July 15, 1999; 73 FR 31017, May 30, 2008]

§ 47.7 Report of investigation.

Where the facts and circumstances are deemed by the Deputy Administrator to warrant such action, the Fruit and Vegetable Programs shall serve upon each of the parties a copy of the report made by the Fruit and Vegetable Programs in connection with its investigation of the informal or formal complaint. Whenever the Secretary, or the Deputy Administrator, or the examiner deems it necessary, a supplemental investigation shall be made by the Fruit and Vegetable Programs and a copy of the report thereon shall be served upon the parties. If an answer is filed by respondent, a copy of any report or reports of investigation served upon the parties shall be filed with the Hearing Clerk and shall be considered as part of the evidence in the proceeding: *Provided*, That either party shall be permitted to submit evidence in rebuttal in the same manner as is provided in the regulations in this part for the submission of other evidence in the proceeding.

[24 FR 10055, Dec. 12, 1959]

§ 47.8 The answer.

(a) *Filing and service*. Within 20 days after service of the formal complaint, unless extension of time has been requested and granted, the respondent may file with the Fruit and Vegetable Programs, an answer, in triplicate, signed by the respondent or his attorney. A copy of the answer shall be served upon the complainant by the Fruit and Vegetable Programs as provided in § 47.4. If the answer includes a counterclaim, the answer shall be accompanied by the \$300 handling fee required by the Act for formal complaints.

(b) *Contents*. Such answer shall contain (1) a precise statement of the facts which constitute the grounds of defense, including any set-off or counterclaim, and shall specifically admit, deny, or explain each of the allegations of the complaint, unless respondent is

without knowledge, in which case the answer shall so state; or (2) a statement that the respondent admits all of the allegations of the complaint; or (3) a statement containing an admission of liability in an amount less than that alleged in the complaint (in which event, an order may be made, pursuant to section 7(a) of the Act, directing payment of the undisputed amount), and a denial, as in paragraph (b)(1) of this section, of liability for the remaining amount. The answer may contain a waiver of hearing.

(c) *Failure to file answer; effect of*. Failure to file an answer within the time prescribed shall constitute a waiver of hearing and an admission of the facts alleged in the complaint. If the facts deemed admitted are considered insufficient to support the amount of reparation sought, the proceeding shall continue on the question of damages only.

(d) *Procedure upon admission of facts*. Upon the admission, in the answer or by failure to file an answer, of all the material allegations of fact contained in the complaint, an order may be issued without further procedure, official notice being taken of the license status of the respondent and the date of filing of the informal complaint, as disclosed by the records of the Department.

[10 FR 2212, Feb. 27, 1945, as amended at 24 FR 10055, Dec. 12, 1959; 64 FR 38106, July 15, 1999]

§ 47.9 The reply.

(a) *Filing and service*. If the answer asserts a counterclaim or a set-off, the complaining party, within 20 days after service of the answer, may file a reply with the Fruit and Vegetable Programs. A copy of the reply shall be served upon the respondent by the Fruit and Vegetable Programs as provided in § 47.4.

(b) *Contents*. The reply shall be confined strictly to the matters alleged in the counterclaim or set-off in the answer. It shall contain a precise statement of the facts which constitute the grounds of defense to the counterclaim or set-off, and shall specifically admit, deny, or explain each of the allegations of the counterclaim or set-off, unless the complainant is without knowledge,

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in which case the reply shall so state; or a statement that the complainant admits all of the allegations of the counterclaim or set-off; or a statement containing an admission of liability in an amount less than that alleged in the counterclaim or set-off and a denial of liability for the remaining amount.

(c) *Failure to file reply.* Failure to file a reply shall be deemed a waiver of hearing on the counterclaim or set-off and an admission of the allegations contained in the counterclaim or set-off. If no reply is filed, the allegations of the counterclaim or set-off shall be deemed admitted.

[10 FR 2209, Feb. 27, 1945, as amended at 56 FR 174, Jan. 3, 1991; 64 FR 38106, July 15, 1999]

§ 47.10 Docketing of proceeding.

Immediately following the expiration of the period of time heretofore prescribed for the filing of the answer or reply, the Fruit and Vegetable Programs shall transmit all of the papers which have been filed in the proceeding to the Hearing Clerk, who shall assign a docket number to the proceeding. Thereafter the proceeding may be identified by such number.

§ 47.11 Examiners.

(a) *Disqualification.* No person who (1) has any pecuniary interest in any matter of business involved in the proceeding, or (2) is related within the third degree by blood or marriage to any of the persons involved in the proceeding shall serve as examiner in such proceeding.

(b) *Request for disqualification of examiner.* Any party may file with the Hearing Clerk a timely request, in affidavit form, for the disqualification of the examiner, which request shall set forth with particularity the grounds of alleged disqualification. After such investigation or hearing as the Secretary may deem necessary, the Secretary shall either deny or grant the request. If the request is granted, another examiner shall be assigned to the proceeding. If the request is denied, the request, any record made thereon, and the finding and order of the Secretary thereon shall be made a part of the record.

(c) *Powers.* Subject to review by the Secretary, as provided in this Part, the

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examiner who is an attorney employed in the Office of the General Counsel of the Department, in any proceeding assigned to him or her, shall have power to:

- (1) Rule upon motions and requests;
 - (2) Set the time, place, and manner of the hearing, adjourn the hearing, and change the time, place, and manner of the hearing;
 - (3) Administer oaths and affirmations and take affidavits;
 - (4) Issue subpoenas over the facsimile signature of the Secretary requiring the attendance and testimony of witnesses and the production of books, contracts, papers, and other documentary evidence;
 - (5) Summon and examine witnesses and receive evidence;
 - (6) Take, or order (over the facsimile signature of the Secretary) the taking of, depositions;
 - (7) Admit or exclude evidence;
 - (8) Hear oral argument on facts or law;
 - (9) Require each party, prior to any hearing, to provide all other parties and the examiner with a copy of any exhibit that the party intends to introduce into evidence;
 - (10) Require each party, prior to any deposition, to provide all other parties and the examiner with a copy of any document that the party intends to use to examine a deponent;
 - (11) Require that any hearing to be conducted by telephone or audio-visual telecommunication be conducted at locations at which the parties and the examiner are able to transmit and receive documents during the hearing;
 - (12) Require that any deposition to be conducted by telephone or audio-visual telecommunication be conducted at locations at which the parties are able to transmit and receive documents during the deposition;
 - (13) Do all acts and take all measures necessary for the maintenance of order and for the efficient conduct of the proceeding.
- (d) *Who may act in absence of examiner.* In case of the absence, illness, resignation, or death of the examiner who has been assigned to a proceeding, or, in case the General Counsel determines

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that, for other good cause, such examiner should not act, the powers and duties to be performed by the examiner under these rules of practice in connection with such proceeding may, subject to the provisions of paragraph (a) of this section, be assigned to another examiner.

[10 FR 2212, Feb. 27, 1945; 11 FR 224, Jan. 4, 1946, as amended at 24 FR 10055, Dec. 12, 1959; 38 FR 30445, Nov. 5, 1973; 60 FR 8459, Feb. 14, 1995; 64 FR 38106, July 15, 1999]

§ 47.12 Intervention.

At any time after the institution of a proceeding and before it has been submitted to the Secretary for final consideration, the Secretary or the examiner as defined in § 47.2(i)(1) may, upon petition in writing and for good cause show, permit any person to intervene therein. The petition shall state with preciseness and particularity:

(a) The petitioner's relationship to the matters involved in the proceeding; (b) the nature of the material the petitioner intends to present in evidence; (c) the nature of the argument the petitioner intends to make; and (d) any other reason that the petitioner should be allowed to intervene.

[10 FR 2209, Feb. 27, 1945, as amended at 60 FR 8459, Feb. 14, 1995; 64 FR 38107, July 15, 1999]

§ 47.13 Motions and requests.

(a) *General.* (1) All motions and requests made after the formal filing of the proceeding with the Hearing Clerk shall be filed with the Hearing Clerk, except that those made during an oral hearing may be stated orally and made a part of the transcript or recording.

(2) The examiner may rule upon all motions and requests filed or made prior to the transmittal of the record to the Secretary as hereinafter provided. The Secretary shall rule upon all motions and requests filed after that time.

(b) *Certification to the Secretary.* The submission or certification of any motion, request, objection, or other question to the Secretary prior to transmittal of the record to the Secretary as provided in this part shall be made by and in the discretion of the examiner. The examiner may either rule upon or certify the motion, request, objection,

or other question to the Secretary, but not both.

[10 FR 2209, Feb. 27, 1945; 11 FR 224, Jan. 4, 1946, as amended at 38 FR 30445, Nov. 5, 1973; 60 FR 8459, Feb. 14, 1995]

§ 47.14 Prehearing conferences.

(a) In any proceeding in which it appears that a conference will expedite the proceeding, the examiner, at any time prior to or during the course of the oral hearing, may request the parties or their counsel to appear at a conference before the examiner to consider:

- (1) The simplification of the issues;
- (2) The necessity or the desirability of amendments to the pleadings;
- (3) The possibility of obtaining stipulations of fact and of documents which will avoid unnecessary proof;
- (4) The limitation of the number of expert or other witnesses; or
- (5) Such other matters as may expedite and aid in the disposition of the proceeding.

(b) No transcript or recording of the conference shall be made. If the conference is conducted by correspondence, the examiner shall forward copies of letters and documents to the parties as circumstances require. The correspondence in connection with a conference shall not be part of the record. The examiner shall prepare and file for the record a written summary of the action agreed upon or taken at the conference, which shall incorporate any written stipulations or agreements made by the parties at the conference or as a result of the conference.

(c) *Manner of the Conference.* (1) The conference shall be conducted by telephone or correspondence unless the examiner determines that conducting the conference by audio-visual telecommunication:

- (i) Is necessary to prevent prejudice to a party;
- (ii) Is necessary because of a disability of any individual expected to participate in the conference; or
- (iii) Would cost less than conducting the conference by telephone or correspondence. If the examiner determines that a conference conducted by audio-visual telecommunication would measurably increase the United States Department of Agriculture's cost of

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conducting the conference, the conference shall be conducted by personal attendance of any individual who is expected to participate in the conference, by telephone, or by correspondence.

(2) If the conference is not conducted by telephone or correspondence, the conference shall be conducted by audio-visual telecommunication unless the examiner determines that conducting the conference by personal attendance of any individual who is expected to participate in the conference:

(i) Is necessary to prevent prejudice to a party;

(ii) Is necessary because of a disability of any individual expected to participate in the conference; or

(iii) Would cost less than conducting the conference by audio-visual telecommunication.

[60 FR 8460, Feb. 14, 1995]

§ 47.15 Oral hearing before the examiner.

(a) *When permissible.* (1) Where the amount of the damages claimed, either in the complaint or in the counterclaim, does not exceed \$30,000 (excluding interest), an oral hearing shall not be held, unless deemed necessary or desirable by the Fruit and Vegetable Programs or unless granted by the examiner as defined in § 47.2(i)(1), upon application of complainant or respondent setting forth the peculiar circumstances making an oral hearing necessary for a proper presentation of the case.

(2) Where the amount of damages claimed, either in the complaint or in the counterclaim, is in excess of \$30,000 (excluding interest), the procedure provided in this section (except as provided in § 47.20(b)(2)) shall be applicable.

(b) *Request for hearing.* Any party may request an oral hearing on the facts by including such request in the complaint. Failure to request an oral hearing within the time allowed for filing of the reply, or within 10 days after the expiration of the time allowed for filing an answer, shall constitute a waiver of such hearing, and any party so failing to request an oral hearing will be deemed to have agreed that the proceeding may be decided upon a

record formed under the documentary procedure provided in § 47.20.

(c) *Time, place, and manner.* (1) If and when the proceeding has reached the stage of oral hearing, the examiner, giving careful consideration to the convenience of the parties, shall set a time for hearing and shall file with the Hearing Clerk a notice stating the time and place of hearing. Unless the parties otherwise agree, the place of the hearing shall be the place in which the respondent is engaged in business. This notice shall state whether the hearing will be conducted by telephone, audio-visual telecommunication, or personal attendance of any individual expected to participate in the hearing and the examiner's determination regarding the manner of the hearing shall be made in accordance with paragraphs (c)(3) and (c)(4) of this section. If any change in the time, place, or manner of the hearing is made, the examiner shall file with the Hearing Clerk a notice of the change. The notice of any change in the time, place, or manner of the hearing shall be served on the parties, unless it is made during the course of an oral hearing and made part of the transcript or recording, or actual notice is given to the parties.

(2)(i) If and when the proceeding has reached the stage of oral hearing, any party may move that the hearing be conducted by telephone or personal attendance of any individual expected to attend the hearing rather than by audio-visual telecommunication. Any motion that the hearing be conducted by telephone or personal attendance of any individual expected to attend the hearing must be accompanied by a memorandum in support of the motion stating the basis for the motion and the circumstances that require the hearing to be conducted other than by audio-visual telecommunication.

(ii) Within 10 days after the examiner issues a notice stating the manner in which the hearing is to be conducted, any party may move that the examiner reconsider the manner in which the hearing is to be conducted. Any motion for reconsideration must be accompanied by a memorandum in support of the motion stating the basis for the motion and the circumstances that require the hearing to be conducted other

than in accordance with the examiner's notice.

(3) The hearing shall be conducted by audio-visual telecommunication unless the examiner determines that conducting the hearing by personal attendance of any individual expected to attend the hearing:

(i) Is necessary to prevent prejudice to a party;

(ii) Is necessary because of a disability of any individual expected to participate in the hearing; or

(iii) Would cost less than conducting the hearing by audio-visual telecommunication. If the examiner determines that a hearing conducted by audio-visual telecommunication would measurably increase the United States Department of Agriculture's cost of conducting the hearing, the hearing shall be conducted by personal attendance of any individual who is expected to participate in the hearing or by telephone.

(4) The examiner may, in his or her sole discretion or in response to a motion by a party to the proceeding, conduct the hearing by telephone if the examiner finds that a hearing conducted by telephone:

(i) Would provide a full and fair evidentiary hearing;

(ii) Would not prejudice any party; and

(iii) Would cost less than conducting the hearing by audio-visual telecommunication or personal attendance of any individual who is expected to participate in the hearing.

(d) *Appearances*—(1) *Representation*. In any proceeding under the Act, the parties may appear in person or by counsel or other representative.

(2) *Failure to appear*. If any party to the proceeding, after being duly notified, fails to appear at the hearing, the party shall be deemed to have waived the right to an oral hearing in the proceeding. In the event that a party appears at the hearing and no party appears for the opposing side, the examiner may determine whether the party who is present shall present his or her evidence, in whole or in part, in the form of affidavits or by oral testimony.

(3) *Debarment of counsel or representative*. (i) Whenever, while a proceeding is pending before him or her, the exam-

iner finds that a person acting as counsel or representative for any party to the proceeding is guilty of unethical or unprofessional conduct, the examiner may order that such person be precluded from further acting as counsel or representative in such proceeding. An appeal to the Secretary may be taken from any such order, but the proceeding shall not be delayed or suspended pending disposition of the appeal: *Provided*, That the examiner may suspend the proceedings for a reasonable time for the purpose of enabling the party to obtain other counsel or representative.

(ii) In case the examiner has issued an order precluding a person from further acting as counsel or representative in the proceeding, the examiner, within a reasonable time thereafter, shall submit to the Secretary a report of the facts and circumstances surrounding the issuance of the order and shall recommend what action the Secretary should take respecting the appearance of such person as counsel or representative in other proceedings before the Secretary. Thereafter, the Secretary may, after notice and an opportunity for hearing, issue such order respecting the appearance of such person as counsel or representative in proceedings before the Secretary as the Secretary finds to be appropriate.

(e) *Order of proceeding*. The complainant shall proceed first at the hearing and shall have the burden of proof, except that a party asserting a set-off or counterclaim shall have the burden of proof on such issue.

(f) *Written statements of direct testimony*. (1) Except as provided in paragraph (f)(2) of this section, each party must exchange with all other parties a written narrative verified statement of the oral direct testimony that the party will provide at any hearing to be conducted by telephone; the direct testimony of each employee or agent of the party that the party will call to provide oral direct testimony at any hearing to be conducted by telephone; and the direct testimony of each expert witness that the party will call to provide oral direct testimony at any hearing to be conducted by telephone. The written direct testimony of witnesses shall be exchanged by the parties at

least 10 days prior to the hearing. The oral direct testimony provided by a witness at a hearing conducted by telephone will be limited to the presentation of the written direct testimony, unless the examiner finds that oral direct testimony which is supplemental to the written direct testimony would further the public interest and would not constitute surprise.

(2) The parties shall not be required to exchange testimony in accordance with this paragraph if the hearing is scheduled to begin less than 20 days after the examiner's notice stating the time of the hearing.

(g) *Evidence*—(1) *In general.* (i) The testimony of witnesses at a hearing shall be upon oath or affirmation, subject to cross-examination, and shall be reported verbatim.

(ii) Any witness may, in the discretion of the examiner, be examined separately and apart from all other witnesses except those who may be parties to the proceeding.

(iii) The examiner shall exclude, insofar as practicable, evidence which is immaterial, irrelevant, or unduly repetitious, or which is not of the sort upon which responsible persons are accustomed to rely.

(2) *Objections.* (i) If a party objects to the admission or rejection of any evidence or to the limitation of the scope of any examination or cross-examination, the party shall state briefly the grounds of such objections, whereupon an automatic exception will follow if the objection is overruled by the examiner. The transcript or recording shall not include argument or debate thereon except as ordered by the examiner. The ruling of the examiner on any objection shall be a part of the transcript or recording.

(ii) Only objections made before the examiner may subsequently be relied upon in the proceeding.

(3) *Depositions.* The deposition of any witness shall be admitted in the manner provided in and subject to the provisions of § 47.16.

(4) *Affidavits.* Except as is otherwise provided in these rules, affidavits may be admitted only if the evidence is otherwise admissible and the parties agree (which may be determined by their

failure to make timely objections) that affidavits may be used.

(5) *Proof and authentication of official records or documents.* An official record or document, if admissible for any purpose, shall be admissible in evidence without the production of the person who made or prepared the same. Such record or document shall be evidenced by an official publication thereof or by a copy attested by the person having legal authority to make such attestation. The person attesting the copy shall make a certificate showing such authority.

(6) *Exhibits.* (i) All written statements, charts, tabulations, or similar data offered in evidence at the hearing shall, after identification by the proponent and upon a satisfactory showing of the admissibility of the contents thereof, be numbered as exhibits, received in evidence, and made a part of the record. Unless the examiner finds that the furnishing of copies is impracticable, a copy of each exhibit shall be filed with the examiner for the use of each other party to the proceeding. The examiner shall advise the parties as to the exact number of copies which will be required to be filed.

(ii) If the testimony of a witness refers to a statute, a report, document, recording, or transcript, the examiner, after inquiry relating to the identification of such statute, report, document, recording, or transcript, shall determine whether the same shall be produced at the hearing and physically be made a part of the evidence as an exhibit, or whether it shall be incorporated into the evidence by reference. If relevant and material matter offered in evidence is embraced in a report, document, recording, or transcript containing immaterial or irrelevant matter, such immaterial or irrelevant matter shall, insofar as practicable, be designated by the party and segregated and excluded.

(7) [Reserved]

(8) *Offer of proof.* Whenever evidence is excluded from the record, the party offering such evidence may make an offer of proof, which shall be included in the transcript or recording. The offer of proof shall consist of a brief statement describing the evidence to be offered. If the evidence consists of a

brief oral statement or of an exhibit, it shall be inserted into the transcript or recording in toto. In such event, it shall be considered a part of the transcript or recording if the Secretary decides that the examiner's ruling in excluding the evidence was erroneous. The examiner shall not allow the insertion of such evidence in toto if the taking of such evidence will consume a considerable length of time at the hearing. In the latter event, if the Secretary decides that the examiner erred in excluding the evidence, and that such error was substantial, the hearing shall be reopened to permit the taking of such evidence.

(h) *Oral argument before examiner.* The examiner may permit the parties or their counsel to argue orally at the hearing or at some other time prior to the transmittal of the record to the Secretary as provided in this part. Such argument may be limited by the examiner to any extent that the examiner finds necessary for the expeditious or proper disposition of the proceeding.

(i) *Transcript or recording.* (1) Hearings to be conducted by telephone shall be recorded verbatim by electronic recording device. Hearings conducted by audio-visual telecommunication or the personal attendance of any individual who is expected to participate in the hearing shall be transcribed, unless the examiner finds that recording the hearing verbatim would expedite the proceeding and the examiner orders the hearing to be recorded verbatim.

(2) If a hearing is recorded verbatim, a party requests the transcript of a hearing or part of a hearing, and the examiner determines that the disposition of the proceeding would be expedited by a transcript of the hearing or part of a hearing, the examiner shall order the verbatim transcription of the recording as requested by the party.

(3) If a reporter transcribes or records the testimony at a hearing, the reporter shall deliver the original transcript or recording, with exhibits thereto attached, to the examiner, who will retain such copy for the official file and for use in preparing his or her report. The reporter will also deliver to the examiner such other copy or copies as may be ordered by the Department,

which copy or copies the examiner will forward to the Hearing Clerk.

(4) Parties to the proceeding, or others, who desire a copy of the transcript or recording of the hearing may place orders at the hearing with the reporter, who will furnish and deliver such copies direct to the purchaser upon payment of the applicable rate.

[10 FR 2213, Feb. 27, 1945; 11 FR 224, Jan. 4, 1946, as amended at 24 FR 10055, Dec. 12, 1959; 27 FR 12398, Dec. 14, 1962; 38 FR 30445, Nov. 5, 1973; 47 FR 21234, May 18, 1982; 60 FR 8460, Feb. 14, 1995; 64 FR 38107, July 15, 1999]

§ 47.16 Depositions.

(a) *Application for taking deposition.* Upon the application of a party to the proceeding, the examiner as defined in § 47.2(i)(1) may, except as provided in paragraph (b) of this section, at any time after the filing of the moving papers, order, over the facsimile signature of the Secretary, the taking of testimony by deposition. The application shall be in writing, shall be filed with the Hearing Clerk, and shall set forth:

(1) The name and address of the proposed deponent; (2) the name and address of the person (referred to hereinafter in this section as the "officer"), qualified under the regulations in this part to take depositions, before whom the proposed examination is to be made; (3) the proposed time of the deposition which, unless otherwise agreed, shall be at least 30 days after the date of the mailing of the application; (4) the proposed place of the deposition; (5) the proposed manner in which the deposition is to be conducted (telephone, audio-visual telecommunication, or by personal attendance of the individuals who are expected to participate in the deposition); and (6) the reasons for taking the deposition.

(b) *Examiner's order for taking deposition.* (1) If, after examination of the application, the examiner is of the opinion that the deposition should be taken, or if the parties are using depositions in lieu of affidavits pursuant to § 47.20(b)(2), the examiner shall order the taking of the deposition. In no case, except for good cause shown, may the examiner order the taking of a deposition less than 10 days prior to the designated date of deposition. The

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order shall be filed with the Hearing Clerk upon the parties in accordance with §47.4.

(2) The order shall state:

(i) The time of the deposition (which unless otherwise agreed shall not be less than 20 days after the filing of the order);

(ii) The place of the deposition;

(iii) The manner of the deposition (telephone, audio-visual telecommunication, or personal attendance of those who are to participate in the deposition);

(iv) The name of the officer before whom the deposition is to be made; and

(v) The name of the deponent.

(3) The deposition shall be conducted in the manner (telephone, audio-visual telecommunication, or personal attendance of those who are to participate in the deposition) agreed to by the parties.

(4) If the parties cannot agree on the manner in which the deposition is to be conducted:

(i) The deposition shall be conducted by telephone unless the examiner determines that conducting the deposition by audio-visual telecommunication:

(A) Is necessary to prevent prejudice to a party;

(B) Is necessary because of a disability of any individual expected to participate in the deposition; or

(C) Would cost less than conducting the deposition by telephone.

(ii) If the deposition is not conducted by telephone, the deposition shall be conducted by audio-visual telecommunication unless the examiner determines that conducting the deposition by personal attendance of any individual who is expected to participate in the deposition:

(A) Is necessary to prevent prejudice to a party;

(B) Is necessary because of a disability of any individual expected to participate in the deposition; or

(C) Would cost less than conducting the deposition by telephone or audio-visual telecommunication.

(c) *Qualification of officer.* The deposition shall be made before the examiner or before an officer authorized by the law of the United States or by the law of the place of the examination to ad-

minister oaths, or before an officer authorized by the Secretary to administer oaths.

(d) *Procedure on examination.* (1) The deponent shall be examined under oath or affirmation and shall be subject to cross-examination. The testimony of the deponent shall be recorded by the officer or some person under the officer's direction. In lieu of oral examination, parties may transmit written questions to the officer prior to examination and the officer shall propound the written questions to the deponent.

(2) The applicant shall arrange for the examination of the witness either by oral examination or by written questions. If the place of business of the opposing party is more than 100 miles from the place of the examination, the applicant will be required to conduct the examination by means of written questions, unless the parties otherwise agree or the examiner otherwise orders. If the examination is conducted by means of written questions, copies of the applicant's questions must be received by the other party to the proceeding and the officer at least 10 days prior to the date set for the examination unless otherwise agreed, and any cross questions of a party other than the applicant must be received by the applicant and the officer at any time prior to the time of the examination.

(e) *Certification by officer.* The officer shall certify on the deposition that the deponent was duly sworn by the officer and that the deposition is a true record of the deponent's testimony. The officer shall then securely seal the deposition, together with one copy thereof (unless there are more than two parties to a proceeding, in which case there should be another copy for each additional party), in an envelope and mail the same by registered mail to the Hearing Clerk.

(f) *Use of depositions.* A deposition taken in accord with this section or in accord with the provisions of the Rules of Civil Procedure of the Courts of the United States, may be used in a proceeding under the act if the examiner finds that the evidence is otherwise admissible. If a deposition has been taken, and the party upon whose application it was taken refuses to offer it

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in evidence, the other party may offer the deposition, or any part thereof, in evidence.

[10 FR 2209, Feb. 27, 1945, as amended at 56 FR 174, Jan. 3, 1991; 60 FR 8461, Feb. 14, 1995; 64 FR 38107, July 15, 1999]

§47.17 Subpoenas.

(a) *Issuance of subpoenas.* The attendance of witnesses and the production of documentary evidence from any place in the United States on behalf of any party to the proceeding may, by subpoena, be required at any designated place of hearing or at any designated place for the taking of a deposition. Subpoenas may be issued by the Secretary, or by the examiner, over the facsimile signature of the Secretary upon a reasonable showing by the applicant of the grounds, necessity, and reasonable scope thereof. Except for good cause shown, applications for subpoenas shall be filed with the Hearing Clerk at least 30 days prior to the designated date of hearing or deposition. Except for good cause shown, the examiner shall not issue subpoenas less than 20 days prior to the designated date of hearing or deposition.

(b) *Application for subpoena duces tecum.* Subpoenas for the production of documentary evidence shall be issued only upon a verified written application. Such application shall specify, as exactly as possible, the documents desired and shall show their competency, relevancy, materiality, and the necessity for their production.

(c) *Service of subpoenas.* Subpoenas may be served by any person not less than 18 years of age. The party at whose instance a subpoena is issued shall be responsible for service thereof. Subpoenas shall be served as provided in §47.4.

[10 FR 2209, Feb. 27, 1945; 11 FR 224, Jan. 4, 1946; 19 FR 57, Jan. 6, 1954, as amended at 38 FR 30445, Nov. 5, 1973; 56 FR 175, Jan. 3, 1991; 60 FR 8462, Feb. 14, 1995; 64 FR 38107, July 15, 1999]

§47.18 Fees and mileage.

Witnesses who are subpoenaed and who appear in the proceeding, including witnesses whose depositions are taken, shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and per-

sons taking depositions shall be entitled to the same fees as are paid for like services in the courts of the United States, to be paid by the party at whose request the deposition is taken. Witness fees and mileage shall be paid by the party at whose instance the witnesses appear, and claims therefor shall be presented to such party.

§47.19 Post-hearing procedure before the examiner.

(a) *Certification of transcript or recording.* As soon as practicable after receipt of the transcript or recording, the examiner shall prepare his or her certificate stating that, to the best of his or her knowledge and belief, the transcript or recording is a true, correct, and complete transcript or recording of the testimony given at the hearing, except in such particulars as the examiner shall specify, and that the exhibits transmitted are all the exhibits received in evidence at the hearing, with such exceptions as the examiner shall specify. The original of such certificate shall be attached to the original transcript or recording and a copy of such certificate shall be furnished to each of the parties and to the Hearing Clerk. The examiner shall correct the original copy of the transcript or recording by adding or crossing out (but without obscuring the text) at the appropriate places any words necessary to make the text conform to the correct meaning, as certified by the examiner.

(b) *Proposed findings of fact, conclusions, and order.* The examiner shall decide and shall announce at the hearing whether proposed findings of fact, conclusions, and order may be filed by the parties. If allowed by the examiner, he or she shall announce a definite calendar day as the time within which these documents may be filed. Such findings of fact, conclusions, and order shall be based solely upon the evidence of record. They may be accompanied by supporting briefs and by a statement of objections made to the rulings of the examiner at the hearing.

(c) *Briefs.* If the examiner does not allow proposed findings of fact, conclusions, and order to be filed, the parties shall be given until a definite calendar day to file briefs.

(d) *Claim for award of fees and expenses*—(1) *Filing.* Prior to the close of the hearing, or within 20 days thereafter, each party may file with the Hearing Clerk a claim for the award of the fees and expenses which he incurred in connection with the oral hearing. No award of fees and expenses to the prevailing party and against the losing party shall be made unless a claim therefor has been filed, and failure to file a claim within the time allowed shall constitute a waiver thereof.

(2) *Fees and expenses which may be awarded to prevailing party.* The term “fees and expenses,” as used in section 7(a) of the Act, includes:

(i) Reasonable fees of an attorney or authorized representative for appearance at the hearing and for the taking of depositions necessary for introduction at the hearing; (ii) fees and mileage for necessary witnesses at the rates provided for witnesses in the courts of the United States; (iii) fees for the notarizing of a deposition and its reduction to writing; (iv) fees for serving subpoenas; and (v) other fees and expenses necessarily incurred in connection with the oral hearing. Fees and expenses which are not considered to be reasonable or necessarily incurred in connection with the oral hearing will not be awarded.

(3) *Form of claim.* A claim for fees and expenses shall be in the form of a written itemized statement of the fees and expenses claimed, which shall include an explanation of how each item was computed, to which there shall be attached an affidavit, made by the party or the party’s authorized attorney or agent having knowledge of the facts, that each such item is correct and has been necessarily incurred in connection with the oral hearing in the proceeding and that the services for which fees are claimed were actually and necessarily performed.

(4) *Service of claim.* A copy of each such claim filed shall be served by the Hearing Clerk on the other party or parties to the proceeding.

(5) *Objections to claim.* Within 20 days after being served with a copy of a claim for fees and expenses, the party so served may file with the Hearing Clerk written objections to the allowance of any or all of the items claimed.

If evidence is offered in support of an objection, it must be in affidavit form. A copy of any such objections shall be served by the Hearing Clerk on the other party or parties.

(6) *Reply to objections to claim.* A claimant who is served with a copy of objections to his or her claim may, within 20 days after such service, file with the Hearing Clerk a reply to such objection. If evidence is offered in support of a reply, it must be in affidavit form. A copy of any such reply shall be served by the Hearing Clerk on the other party or parties.

(7) *Further inquiry by examiner.* Whenever it is deemed desirable or necessary for the proper disposition of a claim, the examiner may request statements as to specific matters from either or both parties. Any statements so furnished shall be served by the examiner on the other party.

(8) *Number of copies.* All documents or papers authorized by this paragraph to be filed with the examiner shall be filed in triplicate: *Provided,* That, where there are more than two parties to the proceeding an additional copy shall be filed for each additional party.

(e) *The examiner’s report.* The examiner, with the assistance and collaboration of such employees of the Department as may be assigned for the purpose, and within a reasonable time after the termination of the periods allowed for the filing of the submissions of the parties allowed by this section, shall prepare, upon the basis of the evidence received at the hearing and with due consideration of submissions of the parties filed pursuant to this section, his or her report. Such report shall be filed with the Hearing Clerk and shall be prepared in the form of a final order for the signature of the Secretary, but shall not be served upon the parties, unless and until it shall have been signed by the Secretary, as hereinafter provided.

[38 FR 30445, Nov. 5, 1973, as amended at 41 FR 50803, Nov. 18, 1976; 56 FR 175, Jan. 3, 1991; 60 FR 8462, Feb. 14, 1995; 64 FR 38107, July 15, 1999]

§ 47.20 Documentary procedure.

(a) *In general.* The documentary procedure described in this section shall, whenever it is applicable as provided in

paragraph (b) of this section, take the place and serve in lieu of the oral hearing procedure hereinbefore provided. Under the documentary procedure, the pleadings of the parties, if verified in accordance with paragraph (h) of this section, and any report of investigation filed with the Hearing Clerk pursuant to § 47.7 will be considered as evidence in the proceeding. Under the shortened procedure, the pleadings of the parties, if verified in accordance with paragraph (h) of this section, and any report of investigation filed with the Hearing Clerk pursuant to § 47.7, will be considered as evidence in the proceeding. In addition, the parties may submit written proof in support of the complaint, answer, or reply, as the case may be, in the form of verified statements or depositions. After the close of the evidence, the parties may file briefs.

(b) *When applicable*—(1) *Where damages claimed do not exceed \$30,000.* The documentary procedure provided for in this section shall (except as provided in § 47.15(a)) be used in all reparation proceedings in which the amount of damages claimed, either in the complaint or in the counterclaim, does not exceed \$30,000 (excluding interest).

(2) *Where damages claimed exceed \$30,000.* In any proceeding in which the amount of damages claimed, either in the complaint or in the counterclaim, is greater than \$30,000 (excluding interest), the examiner, whenever he or she is of the opinion that proof may be fairly and adequately presented by use of the documentary procedure provided for in this section, shall suggest to the parties that they consent to the use of such procedure. Parties are free to consent to such procedure if they choose, and declination of consent will not affect or prejudice the rights or interests of any party. A party, if he or she has not waived oral hearing, may consent to the use of the documentary procedure on the condition that depositions rather than affidavits be used. In such case, if the other party agrees, depositions shall be required to be filed in lieu of verified statements. If any party who has not waived oral hearing does not consent to the use of the documentary procedure, the proceeding will be set for oral hearing. The suggestion

that the documentary procedure be used need not originate with the examiner. Any party may address a request to the examiner asking that the documentary procedure be used.

(c) *Complainant's opening statement.* Within twenty (20) days after service of respondent's answer, complainant may file a verified opening statement, accompanied by any pertinent documents, which documents must be identified in the statement. If the answer is verified, complainant's evidence concerning the allegations of the answer should be included in the opening statement.

(d) *Respondent's answering statement.* Within twenty (20) days after service of complainants' opening statement or service of notice by the examiner that complainant has not filed an opening statement, respondent may file a verified answering statement, accompanied by any pertinent documents, which documents must be identified in the statement.

(e) *Complainant's statement in reply.* If respondent files an answering statement, complainant may, within twenty (20) days after service thereof upon complainant, file a verified statement in reply, accompanied by any pertinent documents, which documents must be identified in the statement.

(f) *Use of depositions in lieu of verified statements.* Depositions may be used in lieu of verified statements under paragraphs (c), (d), and (e) of this section.

(g) *Briefs.* Promptly after the conclusion of the presentation of evidence, the examiner shall notify the parties that they may file briefs within twenty (20) days after the receipt of such notice.

(h) *Verification.* Verification shall be made under oath of any facts set forth in the pleading or statement, by the person who signs the pleading or statement. Certification by a notary public is insufficient. The form of verification may be as follows:

_____, being first duly sworn, says that he (or she) has read the foregoing document and knows the contents thereof and that the facts set forth therein are true, except as to matters therein stated on information and belief, and as to such matters he believes them to be true, and that he (or she) is duly authorized to sign the document.

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Subscribed and sworn to before me this
day of _____, 19____.
(Notary Public)

(i) *Stipulations.* In addition to or in lieu of the statements referred to in this section, the parties may file with the Hearing Clerk stipulations of fact signed by the parties or their representatives. Such stipulations filed with the Hearing Clerk shall become a part of the record.

(j) *Waiver of right to file.* Failure to file, within the time prescribed, any document authorized by this section shall constitute a waiver of the right to file such document.

(k) *The examiner's report.* Within a reasonable time after the time allowed for filing briefs, the examiner shall prepare his or her report in the manner prescribed in § 47.19(d).

(l) *Assignment for oral hearing.* Whenever it is deemed desirable or necessary for the proper disposition of the proceeding, the examiner, upon his or her own or any party's motion, may order the proceeding set down for oral hearing at any stage of the proceeding.

[27 FR 12398, Dec. 14, 1962, as amended at 47 FR 21234, May 18, 1982; 56 FR 175, Jan. 3, 1991; 60 FR 8462, Feb. 14, 1995; 64 FR 38107, July 15, 1999]

§ 47.21 Transmittal of record.

The Hearing Clerk, immediately after the filing of the examiners' report, shall transmit to the Secretary the record of the proceeding. Such record shall include: The pleadings; motions and requests filed, and rulings thereon; the report of investigation conducted by the Fruit and Vegetable Programs; the transcript or record of the testimony taken at the hearing, together with the exhibits filed therein; any statements or stipulations filed under the documentary procedure; any documents or papers filed in connection with conferences; such proposed findings of fact, conclusions, and orders and briefs as may have been permitted to be filed in connection with the hearing as provided in § 47.19(b) and (c); such statements of objections, and briefs in support thereof, as may have been filed in the proceeding; and the examiner's report.

[64 FR 38108, July 15, 1999]

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§ 47.22 Argument before Secretary.

(a) *Oral argument.* There shall be no right to oral argument other than as provided in § 47.15(h).

(b) *Briefs.* The Secretary will consider any proposed findings of fact, conclusions, and orders, statements of objections, and briefs filed as provided in § 47.19(b). Briefs filed in accordance with § 47.19(c) and those filed in support of statements of fact will also be considered by the Secretary.

[10 FR 2209, Feb. 27, 1945, as amended at 12 FR 1026, Feb. 13, 1947; 60 FR 8462, Feb. 14, 1995]

§ 47.23 Issuance of order.

As soon as practicable after the receipt of the record from the Hearing Clerk, the Secretary, upon the basis of and after due consideration of the record, shall issue his or her order in the proceeding. Unless the Secretary disagrees with the order as drafted for his or her signature by the examiner, as provided in § 47.19(d), the Secretary shall issue as his or her order the order so prepared by the examiner. If the Secretary deems it advisable to do so, the Secretary may direct that the order be served upon the parties as a tentative order and that the parties be allowed such period of time, not to exceed 20 days, as the Secretary may specify, within which to file exceptions thereto and written argument or briefs in support of such exceptions.

[10 FR 2209, Feb. 27, 1945, as amended at 60 FR 8462, Feb. 14, 1995]

§ 47.24 Rehearing, reargument, reconsideration of orders, reopening of hearings, reopening after default.

(a) *Petitions to rehear, reargue, and reconsider.* A petition for rehearing or reargument of the proceeding, or for reconsideration of the order, shall be made by petition to the Secretary filed with the Hearing Clerk within 20 days after the date of service of the order. Every such petition shall state specifically the matters claimed to have been erroneously decided and the alleged errors. If the Secretary concludes that the questions raised by the petition have been sufficiently considered in the issuance of the order, the Secretary

shall dismiss the petition without service on the other party. Otherwise, the Secretary shall direct that a copy of the petition be served upon such party by the Hearing Clerk. The filing of a petition to rehear or reargue a proceeding, or to reconsider an order, shall automatically operate to set aside the order pending final action on the petition. Only one petition to rehear, reargue, or reconsider will be accepted from each party, except when a mathematical or typographical error appears in either the original decision and order or in the decision on reconsideration.

(b) *Petition to reopen.* A petition to reopen the hearing to take further evidence may be filed with the examiner at any time prior to the issuance of the final order. Every such petition shall state briefly the nature and purpose of the evidence to be adduced, shall show that such evidence is not merely cumulative, and shall set forth a good reason why such evidence was not adduced at the hearing. Every such petition shall be served by the Hearing Clerk on the other party in the proceeding.

(c) *Procedure for disposition of petitions.* Within 20 days following the service of any petition provided for in this section, the other party to the proceeding may file with the Hearing Clerk an answer thereto. In the event that any such petition is granted the applicable rules of practice shall be followed.

(d) *Reopening after default.* The party in default in the filing of an answer or reply required or authorized under this part may petition to reopen the proceeding at any time prior to the expiration of 20 days from the date of service of the default order. If, in the judgment of the examiner, after notice to and consideration of the views of the other party(ies), there is good reason for granting such relief, the party in default will be allowed 20 days from the date of the order reopening the proceeding to file an answer.

[10 FR 2209, Feb. 27, 1945, as amended at 56 FR 175, Jan. 3, 1991; 60 FR 8462, Feb. 14, 1995; 64 FR 38108, July 15, 1999; 65 FR 29941, May 10, 2000]

§ 47.25 Filing; extensions of time; effective date of filing; computations of time; official notice.

(a) *Filing, number of copies.* Except as is provided otherwise herein, all documents or papers required or authorized by these rules to be filed with the Hearing Clerk shall be filed in triplicate: *Provided*, That, where there are more than two parties to the proceeding, a sufficient number of copies shall be filed so as to provide for service upon all the parties to the proceeding. Any document or paper required or authorized by the regulations in this part to be filed with the Hearing Clerk shall, during the course of an oral hearing, be filed with the examiner.

(b) *Extensions of time.* The time for the filing of any document or paper (except an informal complaint) required or authorized under the regulations in this part to be filed may be extended by the examiner (before the transmittal of the record to the Secretary) or by the Secretary (after such transmittal), if, in the judgment of the examiner or the Secretary, as the case may be, there is good reason for the extension.

(c) *Effective date of filing.* Any document or paper required or authorized under the regulations in this part to be filed shall be deemed to be filed when it reaches the Department in Washington, DC; or, if filed with any officer or employee of the Regulatory Branch of the Fruit and Vegetable Programs at any place outside the District of Columbia, it shall be deemed to be filed at the time when it is received by such officer or employee.

(d) *Computations of time.* Saturdays, Sundays and holidays shall be included in computing the time allowed for the filing of any document or paper: *Provided*, That, when such time expires on a Saturday, Sunday or Federal holiday, such period shall be extended to include the next following business day.

(e) *Official notice.* In any proceeding official notice may be taken of (1) such matters as are judicially noticed by the courts of the United States; (2) any other matter of technical, scientific, or

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commercial fact of established character; and (3) relevant publications and records of the Department.

[10 FR 2217, Feb. 27, 1945; 11 FR 224, Jan. 4, 1946, as amended at 24 FR 10055, Dec. 12, 1959; 56 FR 175, Jan. 3, 1991; 60 FR 8462, Feb. 14, 1995; 64 FR 38108, July 15, 1999]

RULES APPLICABLE TO DISCIPLINARY PROCEEDINGS

§ 47.46 Rule applicable to all proceedings.

The Secretary may act in the place and stead of an examiner or judge in any proceeding hereunder. When the Secretary so acts, the Hearing Clerk shall transmit the record to the Secretary at the expiration of the period provided for the filing of proposed findings of fact, conclusions and orders, and the Secretary shall thereupon, after due consideration of the record, issue his or her final order in the proceeding: *Provided*, That the Secretary may issue a tentative order in which event the parties shall be afforded an opportunity to file exceptions before the issuance on the final order.

[12 FR 1026, Feb. 13, 1947, as amended at 38 FR 30447, Nov. 5, 1973; 60 FR 8462, Feb. 14, 1995]

RULES APPLICABLE TO THE DETERMINATION AS TO WHETHER A PERSON IS RESPONSIBLY CONNECTED WITH A LICENSEE UNDER THE PERISHABLE AGRICULTURAL COMMODITIES ACT

§ 47.47 Additional definitions.

The following definitions, which are in addition to those in § 47.2 (a) through (h), shall be applicable to proceedings under §§ 47.47 through 47.49.

(a) *Chief* means the Chief of the PACA Branch, or any officer or employee to whom authority has heretofore lawfully been delegated or to whom authority may hereafter lawfully be delegated by the Chief, to act in such capacity.

(b) *PACA Branch* means that PACA Branch of the Fruit and Vegetable Programs.

(c) *Petition for review* means the document filed requesting review by an Administrative Law Judge of the Chief's determination.

[61 FR 11504, Mar. 21, 1996]

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§ 47.48 Scope and applicability.

These rules govern the determination of whether a person is responsibly connected with licensees under the Perishable Agricultural Commodities Act of 1930, as amended, or with persons whose license issued under the act has been suspended, revoked, or terminated or with persons who transact business subject to the act, but fail to obtain the required license.

[43 FR 30788, July 18, 1978]

§ 47.49 Determinations.

(a) The PACA Branch shall determine whether a person was at the time in issue responsibly connected with a licensee whose license is subject to suspension, revocation, or termination or which is subject to having the facts and circumstances of violations of the act published. Such determination shall be made on the basis of license records on file with the PACA Branch, and such other information as may be available.

(b) Upon determining that a person was responsibly connected at the time in issue with a licensee which is subject to the suspension or revocation of its license, or which is subject to having the facts and circumstances of violations of the Act published, and that the employment status and licensing of such person may be restricted, the PACA Branch shall notify the person in writing of his or her status and of any employment and licensing restrictions resulting therefrom.

(c) If a person believes he or she was not responsibly connected with a licensee at the time in issue, he or she may submit the reasons for such belief in written form, along with all pertinent documents, within 30 days of the receipt of such notification to the Chief, who will promptly review the matter and advise the person in writing of the Chief's determination and the reasons for reaching such determination.

(d) Within 30 days of receipt of notification of the Chief's determination, a person who disagrees with such determination may file with the Hearing Clerk, pursuant to § 1.130-1.151 of this

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title, a petition for review of the determination.

[43 FR 30788, July 18, 1978, as amended at 60 FR 8462, Feb. 14, 1995; 61 FR 11504, Mar. 21, 1996]

PART 48—REGULATIONS OF THE SECRETARY OF AGRICULTURE FOR THE ENFORCEMENT OF THE PRODUCE AGENCY ACT

DEFINITIONS

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AUTHORITY: Sec. 3, 44, Stat. 1355, as amended; 7 U.S.C. 494.

SOURCE: 24 FR 7127, Sept. 3, 1959, unless otherwise noted.

DEFINITIONS

§ 48.1 Meaning of words.

Words in this part in the singular form shall be deemed to import the plural, and vice versa, as the case may demand.

§ 48.2 Definitions.

Unless the context otherwise requires, the following terms shall be construed as follows:

(a) *Act* means "An act to prevent the destruction or dumping, without good and sufficient cause therefor, of farm produce received in interstate commerce by commission merchants and others, and to require them truly and correctly to account for all farm produce received by them," approved March 3, 1927 (44 Stat. 1355; 7 U.S.C. 491-497).

(b) *Person* means an individual, partnership, association or corporation.

(c) *Secretary* means the Secretary of Agriculture of the United States, or any officer or employee of the Department to whom authority has heretofore been delegated, or to whom authority may hereafter be delegated, to act in his stead.

(d) *Service* means the Consumer and Marketing Service, United States Department of Agriculture.

(e) *Deputy Administrator* means the Deputy Administrator for Marketing Services, or any officer or employee of the Service, to whom authority has heretofore lawfully been delegated, or to whom authority may hereafter lawfully be delegated, to act in his stead.

(f) *Director* means the Director of the Fruit and Vegetable Division of the Service, or any officer or employee of the Division to whom authority has heretofore lawfully been delegated, or to whom authority may hereafter lawfully be delegated by the Director to act in his stead.

(g) *Produce* means all fresh fruits and fresh vegetables generally considered by the trade as perishable fruits and vegetables, melons, dairy or poultry products, or any perishable farm products of any kind or character.

(h) *Truly and correctly to account* means, unless otherwise stipulated by the parties, that the consignee of produce shall, within ten days after the final sale is made of any produce received for sale on consignment in interstate commerce or in the District of Columbia, render to the consignor thereof a true and correct itemized statement of the gross sales as well as all selling charges and all other charges or expenses paid and a statement of the net proceeds or deficit, and make full payment to the consignor of the net proceeds so received together with a full explanation of the disposition of any and all produce not sold.

(i) *Good and sufficient cause* means, with respect to destroyed, abandoned, discarded, or dumped produce, that the produce so dealt with had no commercial value, or that some other legal justification for so dealing with such produce existed, such as an order of condemnation by a health officer or definite authority from the shipper.