

**DEPARTMENT OF AGRICULTURE****Office of the Secretary of Agriculture****7 CFR Parts 0 and 1****Agricultural Marketing Service****7 CFR Parts 47, 50, 51, 52, 53, 54, and 97****Grain Inspection, Packers and Stockyards Administration****9 CFR Chapter II and Part 202****Rules of Practice**

**AGENCY:** Office of the Secretary of Agriculture, USDA.

**ACTION:** Final rule.

**SUMMARY:** We are amending the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes, the Rules of Practice Governing Cease and Desist Proceedings Under Section 2 of the Capper-Volstead Act, the Rules of Practice Under the Perishable Agricultural Commodities Act, and the Rules of Practice Applicable to Reparation Proceedings Under the Packers and Stockyards Act. This final rule provides that conferences shall be conducted by telephone or correspondence, hearings shall be conducted by audio-visual telecommunication, and depositions shall be conducted either in the manner agreed to by the parties or by telephone, unless the person conducting the proceeding determines that the conference, hearing, or deposition may be conducted by some other means. The final rule also provides for the use of recordings of hearings and depositions and the exchange of written narrative statements of the direct testimony prior to hearings to be conducted by telephone. These amendments will save the government and those who participate in the proceedings time and money.

In addition, this rule amends 9 CFR chapter II to reflect the abolishment of the Packers and Stockyards Administration and the establishment of the Grain Inspection, Packers and Stockyards Administration in the recent Department of Agriculture reorganization.

**EFFECTIVE DATE:** This final rule is effective March 16, 1995, except for the amendments to the chapter heading of 9 CFR chapter II and the references to the agency name in the chapter which are effective upon publication in the **Federal Register**.

**FOR FURTHER INFORMATION CONTACT:**

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**SUPPLEMENTARY INFORMATION:****Background**

The Department conducts a number of adjudicatory proceedings in which conferences, depositions, and hearings are held. Many of these conferences, depositions, and hearings are conducted by personal attendance which necessitates travel by those who participate in the conferences, depositions, and hearings.

Generally, conferences at which personal attendance is required are attended by the person conducting the proceeding (an administrative law judge, hearing officer, examiner, or presiding officer), the parties to the proceeding, and counsel for the parties to the proceeding. Depositions are attended by an officer authorized to administer oaths, a court reporter, the parties, counsel for the parties, and the deponent. Hearings are attended by the person conducting the proceeding, the parties to the proceeding, counsel for the parties to the proceeding, a court reporter, and witnesses called by the parties.

The costs associated with travel to conferences, depositions, and hearings (meals, lodging, and actual travel expense) are often substantial. These travel costs burden all taxpayers and particularly burden the individuals who attend these proceedings. In addition to expenditure of money, individuals personally attending the proceedings often must spend valuable time traveling to and from these conferences, depositions, and hearings.

**Proposed Rule**

Therefore, on February 25, 1994, we published a document in the **Federal Register** (59 FR 9114-9136) proposing to amend the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 CFR 1.130 through 1.151) (referred to as the "Uniform Rules" below), the Rules of Practice Governing Cease and Desist Proceedings Under Section 2 of the Capper-Volstead Act (7 CFR 1.160 through 1.175) (referred to as the "Capper-Volstead Rules" below), the Rules of Practice Under the Perishable Agricultural Commodities Act Applicable to Reparation Proceedings (7 CFR 47.1 through 47.25 and 47.46)

(referred to as the "PACA Reparation Rules" below), the Rules of Practice Under the Perishable Agricultural Commodities Act Applicable to Determinations as to Whether a Person is Responsibly Connected With A Licensee Under the Perishable Agricultural Commodities Act (7 CFR 47.1, 47.2(a) through 47.2(h), and 47.47 through 47.68) (referred to as the "PACA Responsibly Connected Rules" below), and the Rules of Practice Applicable to Reparation Proceedings Under the Packers and Stockyards Act (9 CFR 202.101 through 202.123) (referred to as the "P&S Reparation Rules" below). Specifically, we proposed to provide that: (1) Conferences may be conducted by telephone, correspondence, audio-visual telecommunication, or by personal attendance of the participants; (2) depositions and hearings may be conducted by telephone, audio-visual telecommunication, or personal attendance of the participants; (3) hearings and depositions may be recorded rather than transcribed; and (4) prior to a hearing, parties exchange written narrative statements of the direct testimony they intend to introduce at the hearing.

**Comments on the Proposed Rule**

We solicited comments concerning the proposal for a 60-day comment period ending April 26, 1994. We received 12 comments by that date. One of the commenters requested that we reopen and extend the comment period. In response to that request, on June 22, 1994, we published a document in the **Federal Register** (59 FR 32138) reopening and extending the comment period until July 22, 1994. We received two additional comments by the close of the reopening and extension of the comment period. The fourteen comments were from the following organizations and individual: (1) The Administrative Law Section of the American Bar Association; (2) the Agriculture Law Committee, Administrative Law Section of the American Bar Association; (3) the American Meat Institute; (4) the Eastern Meat Packers Association; (5) the Federal Administrative Law Judges Conference; (6) the Forum of United States Administrative Law Judges; (7) Janet L. Heins; (8) Holland & Knight; (9) the Livestock Marketing Association; (10) the National Association of Perishable Agricultural Receivers; (11) Olsson, Frank and Weeda, P.C.; (12) the Society for Animal Protective Legislation; (13) the United Fresh Fruit & Vegetable Association; and (14) the Western States Meat Association.

All of the commenters generally opposed the proposed rule. However, many of these commenters supported some aspects of the proposal. Seven of the commenters stated that the Department should experiment with adjudicatory proceedings conducted by telecommunication, two commenters praised the Department's effort to save money expended on adjudicatory proceedings, and two of the commenters supported the elimination of gender specific references.

The comments and our responses to those comments are as follows.

### 1. Constitutional Due Process

Ten commenters stated that a hearing conducted by telecommunication would violate the constitutional right to due process.

We disagree with these comments. Prior to drafting the proposed rule, we carefully examined whether hearings conducted by telecommunication provide a full and fair evidentiary hearing that comports with due process. We concluded that the due process clause does not preclude the use of telecommunication in adjudicatory proceedings.

The memorandum containing our analysis and findings was placed in the rulemaking record upon publication of the proposed rule. As we stated in that memorandum, due process is flexible and calls for such procedural protections as the particular situation demands. *Morrissey v. Brewer*, 408 U.S. 471 (1972). The courts have applied a balancing test that examines: (1) The private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Mathews v. Eldridge*, 424 U.S. 319 (1976).

The question of what process is due requires flexibility rather than an either/or analysis which assumes that either face-to-face oral hearings are always required or that face-to-face oral hearings are never required. The proposed rule provides such flexibility. Hearings would be conducted by telephone, audio-visual telecommunication, or by the personal attendance of any individual who is expected to participate in the hearing. Under the proposal, the person conducting the proceeding would determine which method of conducting the hearing is to be used in a particular

instance based, in part, on the need to conduct the hearing in a manner that would not prejudice any of the parties to the proceeding. (See proposed 7 CFR 1.141(b) (3) and (4), 1.168(b) (3) and (4), 47.15(c) (3) and (4), and 47.49(f) (2) and (3) and 9 CFR 202.112(a) (3) and (4).)

Despite our view that the proposal provides the person conducting the proceeding with sufficient flexibility to tailor the manner in which a hearing is conducted so that due process is provided, we have made changes that address the due process concerns raised by the commenters.

Specifically, the final rule provides that the hearings held under the Uniform Rules, the Capper-Volstead Rules, the PACA Reparation Rules, the PACA Responsibly Connected Rules, and the P&S Reparation Rules shall be conducted by audio-visual telecommunication unless the person conducting the proceeding determines that conducting the hearing by personal attendance of any individual who is expected to participate in the hearing: (1) Is necessary to prevent prejudice to a party; (2) is necessary because of a disability of any individual expected to participate in the hearing; or (3) would cost less than conducting the hearing by audio-visual telecommunication.

The person conducting the proceeding may, in his or her sole discretion or in response to a motion by a party to the proceeding, conduct the hearing by telephone only if the person conducting the proceeding finds that a hearing conducted by telephone: (1) Would provide a full and fair evidentiary hearing; (2) would not prejudice any party; and (3) 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. (See 7 CFR 1.141(b) (3) and (4), 1.168(b) (3) and (4), 47.15(c) (3) and (4), and 47.49(f) (2) and (3) and 9 CFR 202.112(a) (3) and (4) in this final rule.)

### 2. Compliance with the Administrative Procedure Act

Four commenters stated that a hearing conducted by telecommunication would violate the Administrative Procedure Act. All four commenters stated that a hearing conducted by telecommunication would deprive the parties of their right to cross-examine witnesses in violation of 5 U.S.C. 556(d). Two commenters stated that a hearing conducted by telecommunication would deprive the judge of the ability to control the proceeding to ensure that only reliable evidence is received. One commenter stated that a hearing conducted by

telecommunication would deprive the parties of the right to participate in the hearing in violation of 5 U.S.C. 554(c) and the right to present oral or documentary evidence in violation of 5 U.S.C. 556(d).

We disagree with these comments. Prior to drafting the proposed rule, we carefully examined whether hearings conducted by telecommunication would violate the Administrative Procedure Act. We concluded that the Administrative Procedure Act does not preclude the use of telecommunication in adjudicatory proceedings. The memorandum containing our analysis and findings was placed in the rulemaking record upon publication of the proposed rule.

There is no provision in the Administrative Procedure Act that explicitly requires face-to-face adjudicatory hearings and we found nothing to indicate that Congress intended to exclude the use of telecommunication in adjudicatory proceedings conducted pursuant to the Administrative Procedure Act. As previously discussed in this rulemaking document, this final rule amends the Uniform Rules, the Capper-Volstead Rules, the PACA Reparation Rules, the PACA Responsibly Connected Rules, and the P&S Reparation Rules to provide that the hearings shall be conducted by audio-visual telecommunication unless the person conducting the proceeding determines that conducting the hearing by personal attendance of any individual who is expected to participate in the hearing: (1) Is necessary to prevent prejudice to a party; (2) is necessary because of a disability of any individual expected to participate in the hearing; or (3) would cost less than conducting the hearing by audio-visual telecommunication. A hearing conducted by audio-visual telecommunication allows full cross-examination with an ability to observe the demeanor of the witness; provides an opportunity to transmit and receive documents by the use of facsimile; provides for a prior exchange of exhibits; and allows the person conducting the proceeding full control of the course of the hearing. If a hearing conducted by telecommunication would not constitute a full and fair hearing, the person conducting the hearing may require a face-to-face hearing.

Further, the final rule provides that the person conducting the proceeding may, in his or her sole discretion or in response to a motion by a party to the proceeding, conduct the hearing by telephone only if the person conducting the proceeding finds that a hearing conducted by telephone: (1) Would

provide a full and fair evidentiary hearing; (2) would not prejudice any party; and (3) 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.

Toward this end, we proposed to amend the Uniform Rules, the Capper-Volstead Rules, the PACA Reparation Rules, the PACA Responsibly Connected Rules, and the P&S Reparation Rules to authorize the person conducting a proceeding to: (1) Require each party to provide all other parties and the person conducting the proceeding with a copy of any exhibit that the party intends to introduce into evidence prior to any hearing to be conducted by telephone or audio-visual telecommunication; and (2) require that any hearing to be conducted by telephone or audio-visual telecommunication be conducted at locations at which the parties and the person conducting the proceeding are able to transmit documents during the hearing. These proposed provisions (see proposed 7 CFR 1.144(c) (9) and (11), 1.173(d) (7) and (8), 47.11(c) (9) and (11), and 47.56 (g) and (h) and 9 CFR 202.118(a) (8) and (10)) regarding the exchange of exhibits prior to a hearing conducted by telecommunication and the ability to transmit documents during a hearing conducted by telecommunication are designed to ensure that all parties have a full opportunity to participate in the hearing, present oral or documentary evidence, and cross-examine witnesses.

We have retained these provisions in the final rule with one minor modification to correct an oversight in the proposed rule. As stated above, proposed 7 CFR 1.144(c)(11), 1.173(d)(8), 47.11(c)(11), and 47.56(h) and 9 CFR 202.118(a)(10) would authorize a person conducting a proceeding to require that any hearing to be conducted by telephone or audio-visual telecommunication be conducted at locations at which the parties and the person conducting the proceeding are able to transmit documents during the hearing. We have amended 7 CFR 1.144(c)(11), 1.173(d)(8), 47.11(c)(11), and 47.56(h) and 9 CFR 202.118(a)(10) to authorize a person conducting a proceeding to require that any hearing to be conducted by telephone or audio-visual telecommunication be conducted at locations at which the parties and the person conducting the proceeding are able to transmit and receive documents during the hearing.

### 3. Statutory Requirements

One commenter stated that the plain meaning of statutes that require hearings to be held "before the Secretary" is that face-to-face hearings are required. Therefore, any hearings under those statutes which are conducted by telecommunication would be inconsistent with those statutes.

Numerous hearings conducted under the rules of practice which this final rule amends are conducted pursuant to statutes that require hearings "before the Secretary." We fully examined whether hearings conducted by telecommunication in which some or all of the evidence is introduced at locations other than the location at which the person conducting the proceeding is situated would violate statutes that require hearings to be conducted "before the Secretary." We concluded that such hearings would not violate these statutes. The memorandum containing our analysis and findings was placed in the rulemaking record upon publication of the proposed rule.

A few courts have found that telephone hearings were insufficient due to language of the statute under which the hearings were conducted. For example, in *Purba v. Immigration & Naturalization Service*, 884 F. 2d 516 (9th Cir. 1989), the court held that a deportation hearing must be conducted in the physical presence of the immigration judge, absent the consent of the parties, because the statute under which the hearing was held required the hearing to be "before" the judge. The court found the plain meaning of the word "before" is "in the presence of," "in sight of," or "face-to-face with" a person and that conducting the hearing by telephone was not a hearing "before" the judge. However, the Supreme Court has recently held that where Congress has not decided, any alternative dictionary definition of a word that has a rational effect under a statute is a possibility for agency choice, and the courts are to defer to the agency's choice of the interpretation of the word, if it is reasonable. *National Railroad Passenger Corp. v. Boston and Maine Corp.*, \_\_\_ U.S. \_\_\_, 112 S. Ct. 1394 (1992).

The eleventh circuit, applying the rationale in *National Railroad Passenger Corp.*, found that a hearing conducted by telephone did not violate the Immigration and Nationality Act that provides that a "[d]etermination of deportability \* \* \* shall be made only on the record in a proceeding before a special inquiry officer." *Bigby v. United States Immigration and Naturalization Service*, 21 F. 3d 1059 (11th Cir. 1994). (Emphasis added.) The eleventh circuit

explicitly rejected the argument that "before" was susceptible of only one meaning. The court found that the word "before" did not of necessity mean "in front of" or "in the presence of," thereby mandating that the special inquiry officer be physically present at a hearing required to be held "before" the special inquiry officer. The court found that "before" could be used in a jurisdictional sense and mean "to be judged or acted on by" or "under the official or formal consideration of." The court, citing *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), held that "[i]n the absence of unambiguous congressional intent, we defer to an agency's reasonable interpretation of a statute it is charged with administering.

None of the statutes that require proceedings to be conducted "before the Secretary" under which hearings are conducted pursuant to the rules of practice amended by this final rule define the word "before" nor do these statutes provide any clear indication of congressional intent with respect to the meaning of the word "before" as used in these statutes. Therefore, it is reasonable for the Department to find that the word "before," as used in these statutes, is jurisdictional and means "to be judged or acted on by," "under the official or formal consideration of," or "under the cognizance or jurisdiction of."

### 4. Credibility Determinations

Seven commenters stated that hearings conducted by telecommunication negatively impact credibility determinations. Five commenters focused exclusively on the need for the judge to observe demeanor to determine credibility. One commenter stated that it is important for all participants to assess credibility of other participants. Four commenters raised the specter of witnesses reading prepared statements without the knowledge of all participants.

Hearings conducted by audio-visual telecommunication do not impact credibility determinations because the fact finder is able to see and hear witnesses in a hearing conducted by audio-visual telecommunication in much the same manner and to the same extent as the fact finder would see and hear witnesses in a face-to-face hearing. Hearings conducted by telephone may, but do not necessarily, negatively impact credibility determinations.

While we believe that the proposal provides the person conducting the proceeding with sufficient flexibility to tailor the manner in which a hearing is conducted so that credibility

determinations are not negatively impacted, in the final rule we made substantial changes to these proposed provisions which address the concerns regarding credibility raised by the commenters. The final rule provides that hearings conducted under the Uniform Rules, the Capper-Volstead Rules, the PACA Reparation Rules, the PACA Responsibly Connected Rules, and the P&S Reparation Rules shall be conducted by audio-visual telecommunication unless the person conducting the proceeding determines that conducting the hearing by personal attendance of any individual who is expected to participate in the hearing: (1) Is necessary to prevent prejudice to a party; (2) is necessary because of a disability of any individual expected to participate in the hearing; or (3) would cost less than conducting the hearing by audio-visual telecommunication.

The person conducting the proceeding may, in his or her sole discretion or in response to a motion by a party to the proceeding, conduct the hearing by telephone only if the person conducting the proceeding finds that a hearing conducted by telephone: (1) Would provide a full and fair evidentiary hearing; (2) would not prejudice any party; and (3) 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. (See 7 CFR 1.141(b) (3) and (4), 1.168(b) (3) and (4), 47.15(c) (3) and (4), and 47.49(f) (2) and (3) and 9 CFR 202.112(a) (3) and (4) in this final rule.)

We do expect that, after the effective date of this final rule, a number of hearings will be conducted by telephone based upon a finding by the person conducting the proceeding that a hearing conducted by telephone will provide a full and fair evidentiary hearing; will not prejudice any party; and will cost less than conducting the hearing by audio-visual telecommunication or personal attendance of any individual who is expected to participate in the hearing.

Numerous courts have found that hearings conducted by telephone do not increase the risk of error because witness demeanor cannot be viewed. In *Casey v. O'Bannon*, 536 F. Supp. 350 (E.D. Pa. 1982), the court determined that plaintiffs failed to prove that the constitution compels face-to-face hearings and that there is a risk of an erroneous deprivation by virtue of the telephone procedures as they currently exist. The court was influenced by testimony at trial showing that "hearing examiners can effectively judge credibility over the phone by noting

voice responses, pauses, levels of irritation and other factors" and a survey showing that 82% of examiners who have presided over telephone hearings believe they can judge credibility in hearings conducted by telephone. *Id.*, at 353-54, citing *Attitudes Towards the Use of the Telephone in Administrative Fair Hearings, The California Experience*, 31 Admin. L. Rev. 247 (1979).

Further, in *Utica Mutual Ins. Co. v. Vincent*, 375 F.2d 129, 131 (2d Cir. 1967), the Second Circuit stated, "Utica finds in the due process clause of the Fifth Amendment a requirement that when there are issues of credibility, as was assumed to be true here, no determination of fact may be made unless the decider has either seen the witnesses himself or has been furnished with a report as to the credibility by another who has \* \* \*. We discern no such absolute in the history laden words of the Fifth Amendment; Utica would freeze what is usually a sensible rule of judicial administration into a constitutional imperative." The court further noted that when the Constitution was adopted the settled practice in the English chancery courts was to take evidence almost wholly by deposition. *Id.*, at 131 n. 3. *Utica* was cited as support in at least two other federal cases involving the fact finder's inability to observe demeanor. See *Moore v. Ross*, 687 F.2d 604, 609-10 (2d Cir. 1982), cert. denied, 459 U.S. 1115 (1983); *Blake v. Ambach*, 691 F.Supp. 651, 655-56 (S.D.N.Y. 1988).

Numerous state courts have also upheld the use of telephone hearings under circumstances in which the issue of demeanor and credibility was raised. In *Babcock v. Employment Division*, 696 P.2d 19, 21 (Or. App 1985), the court considered credibility the most difficult issue for unemployment compensation telephone hearings, yet stated that while "[p]hysical appearance can be a clue to credibility, \* \* \* of equal or greater importance is what a witness says and how she says it." The Oregon appellate court was satisfied "that the audible indicia of a witness' demeanor are sufficient for a referee to make an adequate judgment as to believability." *Id.*

In *State, ex. rel. Human Services Department v. Gomez*, 657 P.2d 117, 124 (N.M. 1983), the court rejected Gomez's contention that the telephonic hearing was not meaningful because his efforts to remain on welfare depended upon his credibility and the hearing officer could not judge credibility without seeing him. The court did state that credibility may be a minimal factor in disability determination, but "a

requirement that the hearing officer also see Gomez testify \* \* \* would impose the rigidities of judicial procedure on what is supposed to be an informal proceeding." *Id.*, at 124-25.

#### 5. Exchange of Direct Testimony of Each Witness a Party Will Call

We proposed to amend the Uniform Rules, the Capper-Volstead Rules, the PACA Reparation Rules, the PACA Responsibly Connected Rules, and the P&S Reparation Rules to provide that unless the hearing is scheduled to begin less than 20 days after the person conducting the proceeding issues a notice stating the time of the hearing, each party must exchange, in writing, with all other parties, a verified narrative statement of the direct testimony of each witness that the party will call to provide oral direct testimony at the hearing. (See proposed 7 CFR 1.141(g), 1.168(f), 47.15(f), and 47.58(a) and 9 CFR 202.112(e).)

One commenter objected to the exchange of direct testimony of each witness. Two commenters stated that they had no objection to the exchange of direct testimony as long as each witness is required "to appear in court for cross-examination."

The requirement that parties exchange the written narrative statements of the direct testimony of witnesses the parties intend to call at a hearing may, in some instances, necessitate a significant expenditure of time and resources. Based on our past experience, many administrative proceedings conducted under the rules of practice which we are amending are settled just prior to the scheduled date of hearing. In these circumstances, the preparation and exchange of a written verified narrative statement of the oral direct testimony of each witness the parties intend to call would constitute an unnecessary expenditure of time and resources. One of the purposes of this final rule is to make adjudicatory proceedings conducted by the Department as efficient as possible. Therefore, this final rule limits the provisions regarding the exchange of written verified narrative statements of the oral direct testimony of witnesses the parties intend to call to hearings to be conducted by telephone. Except as discussed below, we have retained the provision regarding the exchange of written verified narrative statements of oral direct testimony prior to hearings conducted by telephone to expedite these hearings, prevent surprise, ensure that all parties have a full opportunity to participate in the hearing and cross-examine witnesses, and assist the

person conducting the hearing with credibility determinations.

Proposed 7 CFR 1.141(g), 1.168(f), 47.15(f), and 47.58(a) and 9 CFR 202.112(e) would have required each party to obtain written verified narrative statements of oral direct testimony of all witnesses the party intends to call to provide oral direct testimony. Under the proposal, testimony would be limited to the written direct testimony. Occasionally parties call hostile witnesses or witnesses over whom they have no control to provide oral direct testimony at hearings in proceedings conducted under the Uniform Rules, the Capper-Volstead Rules, the PACA Reparation Rules, the PACA Responsibly Connected Rules, and the P&S Reparation Rules. Requiring a party to obtain and exchange written verified narrative statements from hostile witnesses and witnesses over whom a party has no control could result in a party's inability to introduce relevant and material evidence at a hearing. Therefore, this final rule provides that each party need only obtain and exchange written verified narrative statements of the oral direct testimony of the following witnesses that the party intends to call at hearings to be conducted by telephone: (1) The party; (2) the employees and agents of the party; and (3) the party's expert witnesses. 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 person conducting the hearing finds that oral direct testimony which is supplemental to the written direct testimony would further the public interest and would not constitute surprise.

#### 6. *Verbatim Recordings in Lieu of Transcripts*

We proposed to amend the Uniform Rules, the Capper-Volstead Rules, the PACA Reparation Rules, the PACA Responsibly Connected Rules, and the P&S Reparation Rules to provide for the use of recordings of hearings, and, where applicable, depositions. Four commenters opposed the use of recordings. One commenter objected to the use of recordings of hearings and depositions rather than transcripts, but did not state the basis for the objection. Three commenters stated that the review of a recording is more time-consuming than the review of a transcript of the same proceeding and the citation of relevant portions of a recording more difficult than the citation of relevant portions of a transcript. Two commenters stated that transcripts of prehearing conferences are

necessary at a hearing in order to refer to evidentiary rulings made in prehearing conferences and transcripts of depositions are necessary for the proper cross-examination of witnesses. One commenter noted that the Department would have to purchase equipment to enable its counsel to review recordings.

We made changes based on these comments. The final rule requires that 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 person conducting the hearing finds that recording the hearing verbatim would expedite the proceeding and the person conducting the hearing orders the hearing to be recorded verbatim. The person conducting the hearing shall certify that to the best of his or her knowledge and belief the recording with exhibits that were accepted into evidence is the record of the hearing. The final rule provides that if a party requests the transcript of a hearing or part of a hearing and the person conducting the hearing determines that the disposition of the proceeding would be expedited by a transcript of the hearing or part of a hearing, the person conducting the hearing shall order the verbatim transcription of the recording as requested by the party. (See 7 CFR 1.141(i), 1.168(h), 47.15(i), and 47.60 and 9 CFR 202.112(i) in this final rule.) The final rule provides that transcripts and recordings of hearings conducted under the Uniform Rules and the Capper-Volstead Rules shall be made available to any person at actual cost of duplication. (See 7 CFR 1.141(i) and 1.168(h) in this final rule.) We have retained the provisions regarding the cost and availability of transcripts that are currently in the PACA Reparation Rules, the PACA Responsibly Connected Rules, and the P&S Reparation Rules (see current 7 CFR 47.15(g) and 47.60 and 9 CFR 202.112(h)) and have applied these cost and availability provisions to recordings. (See 7 CFR 47.15(i) and 47.60 and 9 CFR 202.112(i) in this final rule.)

The discretion provided to the person conducting the hearing to order that a transcript be provided to a party rather than a recording will ensure that transcripts are available when a party does not have access to equipment that enables that party to use recordings. Further, we believe that parties will be able to review recordings as quickly as

they review transcripts by using the fast forward and reverse modes that are available on most recording devices. In addition, relevant portions of recordings can be referenced by time, revolution, or some other method, as determined by the person conducting the proceeding.

Prior to this rulemaking proceeding, none of the rules of practice which are the subject of this rulemaking proceeding required that prehearing conferences be recorded and we did not propose to require the transcription of prehearing conferences. Therefore, the comment regarding the transcription of prehearing conferences in order to refer to evidentiary rulings made in prehearing conferences is beyond the scope of this rulemaking proceeding.

#### 7. *"Practical" Problems*

Four commenters stated that hearings conducted by telecommunication would result in what the commenters characterized as "practical problems."

(a) One commenter stated that hearings conducted by telecommunication would impair the ability of the parties to observe documents and call witnesses.

We proposed to amend the Uniform Rules, the Capper-Volstead Rules, the PACA Reparation Rules, the PACA Responsibly Connected Rules, and the P&S Reparation Rules to authorize the person conducting a proceeding to: (1) Require each party to provide all other parties and the person conducting the proceeding with a copy of any exhibit that the party intends to introduce into evidence prior to any hearing to be conducted by telephone or audio-visual telecommunication; and (2) require that any hearing to be conducted by telephone or audio-visual telecommunication be conducted at locations at which the parties and the person conducting the proceeding are able to transmit documents during the hearing. These proposed provisions (see proposed 7 CFR 1.144(c) (9) and (11), 1.173(d) (7) and (8), 47.11(c) (9) and (11), and 47.56 (g) and (h) and 9 CFR 202.118(a) (8) and (10)) regarding the exchange of exhibits prior to a hearing conducted by telecommunication and the ability to transmit documents during a hearing conducted by telecommunication are designed to ensure that all parties have a full opportunity to participate in the hearing, present oral or documentary evidence, and cross-examine witnesses.

As we stated above, we have retained these provisions in the final rule with one minor modification to correct an oversight in the proposed rule.

Further, we proposed to amend the Uniform Rules, the Capper-Volstead

Rules, the PACA Reparation Rules, the PACA Responsibly Connected Rules, and the P&S Reparation Rules to provide that unless the hearing is scheduled to begin less than 20 days after the person conducting the proceeding issues a notice stating the time of the hearing, each party must exchange, in writing, with all other parties, the direct testimony of each witness that the party will call to provide oral direct testimony at the hearing. (See proposed 7 CFR 1.141(g), 1.168(f), 47.15(f), and 47.58(a) and 9 CFR 202.112(e).) The written direct testimony must be in narrative form and must be verified. 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 the hearing will be limited to the presentation of the written direct testimony, unless the person conducting the proceeding finds that oral direct testimony which is supplemental to the written direct testimony would expedite the proceeding and would not constitute surprise. These provisions regarding exchange of direct testimony are designed to ensure that all parties have a full opportunity to participate in the hearing, and cross-examine witnesses. As discussed above, we have limited the provisions regarding the exchange of written verified narrative statements of oral direct testimony to hearings to be conducted by telephone and to certain specified witnesses.

These provisions will ensure that parties to adjudicatory proceedings conducted under the rules of practice which we are amending will have ample opportunity to observe documents.

We do not agree with the comment that parties will have any more difficulty calling witnesses in a hearing conducted by telecommunication than parties will have when calling witnesses in a face-to-face hearing. The commenter did not provide any basis for this concern.

(b) One commenter stated that no provision can be made in hearings conducted by telecommunication for—the introduction of real evidence, the examination of a witness regarding documents that the witness has in his or her possession on entering the courtroom, the examination of a witness regarding his or her ability to read at a distance, the request that a witness draw a picture; or any “other unexpected events.”

We have not made any change based on this comment. Very few of the hearings conducted under the rules of practice which this final rule amends necessitate the introduction of real

evidence, the examination of a witness regarding documents that the witness has in his or her possession on entering the courtroom, the examination of a witness regarding his or her ability to read at a distance, or the request that a witness draw a picture.

As discussed previously in this rulemaking document, the final rule provides that the person conducting the proceeding may require hearings conducted by telecommunication to be held at locations at which the parties and the person conducting the proceeding are able to transmit and receive documents during the hearing. This requirement will enable parties to examine witnesses regarding documents that the witness has in his or her possession on entering the courtroom and the ability to read at a distance, and to request witnesses to draw pictures or diagrams in hearings conducted by telecommunication.

If real evidence is to be introduced in a hearing, the hearing or that part of the hearing in which the real evidence is to be introduced can be conducted by the personal attendance of those who are to participate in the hearing. As stated above, the person conducting the proceeding can require the hearing to be conducted by personal attendance of any individual who is expected to participate in the hearing if personal attendance is necessary to prevent prejudice to a party. The inability of a party to introduce admissible evidence because a hearing is conducted by telecommunication may prejudice a party, and, in such circumstances, a face-to-face hearing will be conducted.

(c) Two commenters stated that hearings conducted by telecommunication would reduce the appearance of justice.

We disagree with the comment and have not made any change based on this comment. The quality of justice will not be affected by this final rule. If any party will be prejudiced by a hearing conducted by telecommunication, the person conducting the proceeding will require the hearing to be conducted by personal attendance of any individual who is expected to participate in the hearing. The use of audio-visual technology preserves due process, promotes ease of participation by those for whom travel is difficult, and allows each party and the person conducting the proceeding to participate fully and with the effect of face-to-face confrontation. Therefore, we believe that this final rule will in fact heighten the appearance and fact of justice done.

(d) Two commenters stated that hearings conducted by

telecommunication would make sequestration difficult.

A person conducting a hearing by telecommunication could order sequestration in the same manner in which it is ordered in a face-to-face hearing. We agree that, in most situations, the person conducting a hearing by telecommunication will not be in a position to determine whether a sequestration order has been followed. We expect that all parties in adjudicatory proceedings conducted by the Department and counsel to those parties will make every effort to comply with lawful orders issued by the person conducting the proceeding.

(e) Two commenters stated that hearings conducted by telecommunication would make recesses impractical.

We disagree and have made no change based on these comments. Recesses can be called as easily in a hearing conducted by telecommunication as in a hearing conducted by personal attendance of those involved with the hearing.

(f) Four commenters stated that prompting witnesses at hearings conducted by telecommunication would be difficult to control.

Prompting of witnesses can occur in face-to-face hearings, but we do agree that, in some situations, it may be more difficult for a person conducting a hearing to detect witness prompting at a hearing conducted by telecommunication than to detect witness prompting at a hearing conducted by personal attendance of participants. However, prompting of witnesses in hearings conducted by audio-visual telecommunication will be far more difficult to conceal from other parties and the person conducting a hearing than in hearings conducted by telephone. In fact, current audio-visual technology can provide the person conducting the proceeding and the parties with virtually unlimited vision in the room in which a hearing is being conducted. We believe that the potential prompting problem is minimized by making audio-visual hearings the prevalent method of hearing.

(g) Two commenters stated that hearings conducted by telecommunication could be negated by a signal or power failure or electronic interference.

We disagree. If a signal or power failure were to occur, the hearing would be adjourned until such time as the hearing could be resumed. That portion of the hearing which is completed prior to the signal or power failure would not be negated. A signal or power failure which causes the adjournment of a

hearing conducted by telecommunication is not different than an event, such as a power failure or fire in the building in which a hearing is being conducted, that may cause the person conducting a face-to-face hearing to temporarily adjourn a hearing.

(h) One commenter stated that the rules of practice would be subject to challenge which would add to uncertainty and cost money to defend.

While proceedings conducted by telecommunication could be challenged, we believe that these challenges can be easily defended. Above, we cited a number of cases in which adjudicatory proceedings conducted by telecommunication have been challenged, and the state and federal agencies conducting proceedings by telecommunication have prevailed.

(i) Two commenters stated that hearings conducted by telecommunication would often necessitate the employment of multiple counsel by each party to observe witness demeanor at each location at which a hearing is being held.

The final rule does not require counsel to be present at the location at which a witness is testifying in a proceeding conducted by telecommunication. While we do not believe that the presence of counsel at each location at which witnesses testify is necessary, a party may choose to have counsel present at some or all of the locations at which witnesses testify in hearings conducted by telecommunication. Such an expenditure would be at the option of each party to the proceeding.

#### 8. The Rulemaking Record

Six commenters stated that the rulemaking record is deficient.

(a) Four commenters stated that the cost-benefit analysis is inadequate or nonexistent.

We have not made any change based upon these comments. In accordance with Executive Order 12866, we prepared an assessment in connection with the preparation of the notice of proposed rulemaking which preceded this final rule. The assessment, which was included in the rulemaking record, contains a discussion of the costs and benefits associated with the proposed rule. Again, in accordance with Executive Order 12866, we prepared an assessment in connection with the preparation of this final rule. The assessment, which was included in the rulemaking record, contains a discussion of the costs and benefits associated with the final rule.

(b) Two commenters stated that there was no "justification of the technical

feasibility of conducting cross-examination *via* audio-visual devices."

We have not made any change based upon these comments. Prior to preparing the proposed rule, we thoroughly examined the range of equipment available to conduct adjudicatory proceedings by telecommunication. We found that both the telephone and audio-visual telecommunication equipment are generally adequate to conduct cross-examinations. Again, the final rule amends the Uniform Rules, the Capper-Volstead Rules, the PACA Reparation Rules, the PACA Responsibly Connected Rules, and the P&S Reparation Rules, to provide that hearings will be conducted by the personal attendance of any individual who is expected to participate in the hearing if the person conducting the proceeding finds that personal attendance: (1) is necessary to prevent prejudice to a party; (2) is necessary because of a disability of any individual expected to participate in the hearing; or (3) would cost less than conducting the hearing by audio-visual telecommunication. The person conducting the proceeding may, in his or her sole discretion or in response to a motion by a party to the proceeding, conduct the hearing by telephone only if the person conducting the proceeding finds that a hearing conducted by telephone: (1) would provide a full and fair evidentiary hearing; (2) would not prejudice any party; and (3) 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.

(c) One commenter stated that it did not have adequate notice of the proposed rule, and, therefore, the comment period should be extended.

On June 22, 1994, in response to this comment, we published a document in the **Federal Register** (59 FR 32138) reopening and extending the comment period until July 22, 1994.

#### 9. Suggestions

(a) Five commenters stated that the Department should experiment with proceedings conducted by telecommunication on a limited basis.

We have not made any change based upon these comments. The use of telecommunication in adjudicatory proceedings is not new. Numerous state and federal agencies have conducted adjudicatory proceedings by telecommunication in the past. We believe that experience of other state and federal agencies is sufficient to enable the Department to forego the

implementation of telecommunication on an experimental basis.

(b) Five commenters stated that hearings should only be conducted by telecommunication when the parties agree.

We have not made any change based on this comment. The final rule provides the parties with ample opportunity to make the person conducting the proceeding aware of the parties' preferences regarding the manner in which the hearing should be conducted and to persuade the person conducting the proceeding to conduct the hearing in a manner other than that ordered by the person conducting the proceeding. Specifically, the final rule amends the Uniform Rules, the Capper-Volstead Rules, the PACA Reparation Rules, the PACA Responsibly Connected Rules, and the P&S Reparation Rules to provide that 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. Further, within 10 days after the person conducting the proceeding issues a notice stating the manner in which the hearing is to be conducted, any party may move that the person conducting the proceeding reconsider the manner in which the hearing is to be conducted. (See 7 CFR 1.141(b)(2), 1.168(b)(2), 47.15(c)(2), and 47.53 (b) and (c) and 9 CFR 202.112(b) (2) and (3) in this final rule.)

(c) Two commenters stated that the parties should elect the manner in which depositions are to be held and judges should only be involved if the parties cannot agree.

We agree with the commenters with respect to the PACA Reparation Rules and the P&S Reparation Rules. We proposed to amend the Uniform Rules, the PACA Reparation Rules, and the P&S Reparation Rules to provide that a deposition shall be conducted by telephone unless the person conducting the proceeding determines that conducting the deposition by audio-visual telecommunication: (1) Would cost less than conducting the deposition by telephone; (2) is necessary to prevent prejudice to a party; or (3) is necessary because of a disability of any individual expected to participate in the deposition. If the deposition is not conducted by telephone, the deposition shall be conducted by audio-visual telecommunication unless the person conducting the proceeding determines that conducting the deposition by personal attendance of any individual who is expected to participate in the deposition: (1) Would cost less than

conducting the deposition by telephone or audio-visual telecommunication; (2) is necessary to prevent prejudice to a party; or (3) is necessary because of a disability of any individual expected to participate in the deposition.

However, the government is never a party in proceedings conducted under the PACA Reparation Rules and the P&S Reparation Rules and incurs very little cost associated with depositions taken in PACA and P&S reparation proceedings. Therefore, the final rule provides that in proceedings conducted under the PACA Reparation Rules and the P&S Reparation Rules the parties may agree upon the manner in which the depositions are to be conducted and the person conducting the proceeding will only determine the manner in which a deposition is to be conducted when the parties cannot agree. (See 7 CFR 47.16(b) (3) and (4) and 9 CFR 202.109(d) (4) and (5) in this final rule.)

(d) One commenter opposed the proposal, but urged the Department to modernize its rules and to form an ad hoc committee to review the rules.

We welcome any comments or petitions for rulemaking which any interested member of the public may wish to make regarding any of the Department's rules of practice, but we do not believe that it is necessary to form a committee to review the Department's rules or practice. The Department regulation regarding petitions for issuance, amendment, or repeal of a rule is set forth in 7 CFR 1.28.

(e) Two commenters supported conducting conferences by telephone when the judge decides that the use of the telephone is appropriate.

We did not make any change based on these comments. The proposed rule provided that conferences are to be held either by telephone or by correspondence unless certain findings are made by the person conducting the proceeding. The final rule retains those provisions.

### Conclusion

Based on the rationale in the proposed rule and this rulemaking document, we are adopting the provisions of the proposal as a final rule except as previously discussed in this rulemaking document and except for minor editorial changes for clarity. In addition, since the preparation of the notice of proposed rulemaking 7 CFR 180.300 has been redesignated as 7 CFR 97.300. Therefore, we have removed the amendment of 7 CFR 180.300 in this final rule and, instead, amended 7 CFR 97.300.

Further, based upon the general need to allow the person conducting the proceeding to tailor the manner in which the proceeding is conducted to prevent prejudice to any party and to ensure that any hearing is a full and fair evidentiary hearing, we have eliminated all of the provisions which appeared in the proposal concerning interlocutory appeal. Specifically, we proposed to amend 7 CFR 1.143(e) to allow any party to appeal to the Judicial Officer a Judge's order: (1) To conduct a conference by audio-visual telecommunication or personally attend a conference; (2) to conduct a hearing by audio-visual telecommunication or personally attend a hearing; or (3) to conduct a deposition by audio-visual telecommunication or personally attend a deposition. Further, we proposed to amend 7 CFR 47.13(b) to allow any party to appeal to the Secretary an examiner's order: (1) To conduct a conference by audio-visual telecommunication or personally attend a conference; (2) to conduct a hearing by audio-visual telecommunication or personally attend a hearing; or (3) to conduct a deposition by audio-visual telecommunication or personally attend a deposition. Further still, we proposed to amend 7 CFR 1.172(e) to allow any party to appeal to the Judicial Officer a Judge's order: (1) To conduct a conference by audio-visual telecommunication or personally attend a conference; or (2) to conduct a hearing by audio-visual telecommunication or personally attend a hearing. Finally, we proposed to amend 9 CFR 202.118(b) to allow any party to appeal to the Judicial Officer a presiding officer's order: (1) To conduct a conference by audio-visual telecommunication or personally attend a prehearing conference; (2) to conduct an oral hearing by audio-visual telecommunication or personally attend an oral hearing; or (3) to conduct a deposition by audio-visual telecommunication or personally attend a deposition. None of these proposed amendments concerning interlocutory appeal have been adopted in this final rule.

Further, the proposed rule amended the Uniform Rules, the PACA Responsibly Connected Rules, and the P&S Reparation Rules to require hearings to be recorded verbatim by an electronic recording device. Only if a party to the proceeding requests a transcript of the hearing or a part of the hearing and the person conducting the proceeding determines that the disposition of the proceeding would be expedited by a transcript of the hearing could the person conducting the

proceeding order the verbatim transcription of the recording as requested by the party. We proposed to require that any presiding person's order to transcribe a hearing and the basis for the order be reduced to a written order and filed with the Hearing Clerk. We have eliminated the requirement that the order of the person conducting the proceeding and the basis of that order be reduced to a written order and filed with the Hearing Clerk. (See 7 CFR 1.141(i) and 47.60 and 9 CFR 202.112(i) in this final rule.) We do not believe that an order regarding transcription of a hearing must be handled in a manner different than any other order issued by the person conducting the proceeding.

Finally, the Department will bear the entire cost of audio-visual transmission and only some of the travel costs related to face-to-face hearings, conferences, and depositions. Therefore, there could be rare circumstances in which the overall cost of conducting a conference, hearing, or deposition by audio-visual telecommunication may be cheaper than conducting the same conference, hearing, or deposition in some other manner and at the same time the Department's cost of conducting the conference, hearing, or deposition by audio-visual telecommunication could be higher than conducting that conference, hearing, or deposition in some other manner. In order to avoid a measurable increase in costs to the Department, this final rule provides that if the person conducting the proceeding finds that a hearing or deposition conducted by audio-visual telecommunication would measurably increase costs to the Department, the hearing or deposition shall be conducted by personal attendance or by telephone. If the person conducting the proceeding finds that a conference conducted by audio-visual telecommunication would measurably increase costs to the Department, the conference shall be conducted by personal attendance, by telephone, or by correspondence. (See 7 CFR 1.140(c), 1.141(b), 1.148(b), 1.167(b), 1.168(b), 47.14(c), and 47.15(c), and 9 CFR 202.110(b) and 202.112(a) in this final rule.) We did not make this change with respect to depositions conducted under the PACA Reparation Rules or the P&S Reparation Rules because the government is never a party in proceedings conducted under those rules and incurs very little cost associated with depositions taken in PACA and P&S reparation proceedings.

**Establishment of the Grain Inspection, Packers and Stockyards Administration**

Pursuant to Public Law 103-354, the Federal Crop Insurance Reform and Department of Agriculture Reorganization Act of 1994, the Secretary of Agriculture published a notice of the Department's reorganization establishing the Grain Inspection, Packers and Stockyards Administration (59 FR 66517). This rule includes amendments to 9 CFR chapter II which are necessary to bring agency regulations in alignment with the departmental reorganization.

**Executive Order 12866 and Regulatory Flexibility Act**

We are issuing this final rule in conformance with Executive Order 12866. This rule has been determined to be significant and has been reviewed by the Office of Management and Budget under Executive Order 12866.

This final rule provides for conducting certain conferences, depositions, and hearings in connection with proceedings under the Uniform Rules, the Capper-Volstead Rules, the PACA Reparation Rules, the PACA Responsibly Connected Rules, and the P&S Reparation Rules by telecommunication. Further, the final rule provides for the use of recordings in connection with depositions and hearings conducted under the Uniform Rules, the Capper-Volstead Rules, the PACA Reparation Rules, the PACA Responsibly Connected Rules, and the P&S Reparation Rules. Finally, this final rule requires each party to exchange, in writing, with all other parties in the proceeding a verified narrative statement of the oral direct testimony of certain specified witnesses the party intends to call in hearings to be conducted by telephone. These amendments are designed to save money associated with the purchase of transcripts and time and money associated with travel to conferences, depositions, and hearings.

Most of the costs of the proceedings conducted under the Uniform Rules, the Capper-Volstead Rules, the PACA Reparation Rules, the PACA Responsibly Connected Rules, and the P&S Reparation Rules are borne by the United States, which is not a small entity. The vast majority of conferences, hearings, and depositions held under the rules we are amending are conducted at locations convenient to the private individuals participating in the proceeding. Therefore, the United States will incur most of the costs associated with travel in connection with the proceedings. Further, most conferences

held under the rules that we are amending are currently held by telephone, unless the conference is held during the hearing. Therefore, this final rule will not result in a change with respect to the manner in which most conferences are conducted.

Nonetheless, we believe that private individuals who participate in conferences, depositions, and hearings conducted by telecommunication, which will be paid for by the United States, will reduce costs which are associated with travel, even to convenient locations, and private parties who participate in these proceedings will save the difference between the cost of transcripts and recordings in depositions and hearings in which recordings are used.

Most of the private individuals who participate in proceedings conducted under the Uniform Rules, the Capper-Volstead Rules, the PACA Reparation Rules, the PACA Responsibly Connected Rules, and the P&S Reparation Rules are small entities. This final rule will result in a small economic impact on private individuals who participate in the proceedings in question.

Under these circumstances, the Secretary has determined that this action will not have a significant economic impact on a substantial number of small entities.

**Executive Order 12778**

This rule has been reviewed under Executive Order 12778, Civil Justice Reform. This rule: (1) Preempts all State and local laws and regulations that are inconsistent with this rule; (2) has no retroactive effect; and (3) does not require administrative proceedings before parties may file suit in court challenging this rule.

**Paperwork Reduction Act**

The Paperwork Reduction Act of 1980 does not apply to this rule because the rule does not seek answers to identical questions or impose reporting or record keeping requirements on 10 or more persons, and the information collected is not used for general statistical purposes.

**List of Subjects***7 CFR Part 0*

Conflict of interest.

*7 CFR Part 1*

Administrative practice and procedure, Agriculture, Antitrust, Blind, Claims, Concessions, Cooperatives, Equal access to justice, Federal buildings and facilities, Freedom of information, Lawyers, Privacy.

*7 CFR Part 47*

Administrative practice and procedure, Agricultural commodities, Agricultural Marketing Service, Brokers.

*7 CFR Part 50*

Administrative practice and procedure, Agricultural commodities, Agricultural Marketing Service.

*7 CFR Part 51*

Agricultural commodities, Food grades and standards, Fruits, Nuts, Reporting and recordkeeping requirements, Vegetables.

*7 CFR Part 52*

Food grades and standards, Food labeling, Frozen foods, Fruit juices, Fruits, Reporting and recordkeeping requirements, Vegetables.

*7 CFR Part 53*

Cattle, Hogs, Livestock, Sheep.

*7 CFR Part 54*

Food grades and standards, Food labeling, Meat and meat products.

*7 CFR Part 97*

Administrative practice and procedure, Labeling, Plants.

*9 CFR Part 202*

Agriculture, Animals, Administrative practice and procedure, Reparation proceedings.

Accordingly, 7 CFR part 0, part 1, subpart H and subpart I, part 47, part 50, part 51, part 52, part 53, part 54, and part 97 and 9 CFR part 202 are amended as follows:

**TITLE 7—[AMENDED]****SUBTITLE A—OFFICE OF THE SECRETARY OF AGRICULTURE****PART 0—EMPLOYEE RESPONSIBILITIES AND CONDUCT**

1. The authority citation for part 0 is revised to read as follows:

**Authority:** E.O. 11222, 30 FR 6469, 3 CFR, 1965 Comp., page 306; 5 CFR 735.104; 18 U.S.C. 207(j), unless otherwise noted.

**§ 0.735-11 [Amended]**

2. Section 0.735-11 is amended as follows:

a. In paragraph (b)(6), by adding the words "or such monitoring or recording occurs in the course of a Department of Agriculture proceeding conducted by telephone or audio-visual telecommunication and the person conducting the proceeding is an administrative law judge, hearing officer, examiner, or presiding officer" immediately before the semicolon.

b. In paragraph (b)(7), by adding the words "or such monitoring or recording occurs in the course of a Department of Agriculture proceeding conducted by telephone or audio-visual telecommunication and the person conducting the proceeding is an administrative law judge, hearing officer, examiner, or presiding officer" immediately before the semicolon.

## PART 1—ADMINISTRATIVE REGULATIONS

3. The authority citation for part 1, subpart H, is revised to read as follows:

**Authority:** 5 U.S.C. 301; 7 U.S.C. 61, 87e, 149, 150gg, 162, 163, 164, 228, 268, 499o, 608c(14), 1592, 1624(b), 2151, 2621, 2714, 2908, 3812, 4610, 4815, 4910; 15 U.S.C. 1828; 16 U.S.C. 620d, 1540(f), 3373; 21 U.S.C. 104, 111, 117, 120, 122, 127, 134e, 134f, 135a, 154, 463(b), 621, 1043; 43 U.S.C. 1740; 7 CFR 2.35, 2.41.

### § 1.131 [Amended]

4. In § 1.131, paragraph (a), the second sentence is revised to read "Section 1.26 shall be inapplicable to proceedings covered by this subpart."

### § 1.132 [Amended]

5. Section 1.132 is amended as follows:

a. In paragraph (d), the reference to "459g" is removed and "450g" added in its place.

b. In paragraph (d), the reference to "1970 ed. appendix, p. 550" is removed and "App. (1988)" added in its place.

c. In paragraph (d), the reference to "7 CFR 2.35(a)" is removed and "§ 2.35(a) of this chapter" added in its place.

d. Section 1.132 is amended by removing all alphabetical paragraph designations and placing the definitions in alphabetical order.

### § 1.133 [Amended]

6. In § 1.133, paragraph (a)(1), the first sentence is amended by removing the words "of this subpart".

### § 1.140 [Amended]

7. In § 1.140, the section heading is revised to read as set forth below; paragraph (a)(1) introductory text is amended by removing the word "prehearing" and revising the second sentence to read "Reasonable notice of the time, place, and manner of the conference shall be given."; paragraph (b) is amended by removing the word "prehearing"; and paragraph (c) is revised to read as follows:

### § 1.140 Conferences and procedure.

\* \* \* \* \*

(c) *Manner of Conference.* (1) The conference shall be conducted by telephone or correspondence unless the

Judge 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 Judge determines that a conference conducted by audio-visual telecommunication would measurably increase the United States Department of Agriculture's cost of 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 Judge 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.

\* \* \* \* \*

### § 1.141 [Amended]

8. Section 1.141 is amended as follows:

a. Paragraph (b) is revised to read as set forth below.

b. Paragraph (e) is amended by removing the words "of these rules" both times they appear.

c. Paragraph (g)(7) is amended by adding the words "or recording" immediately after the word "transcript" each of the three times the word "transcript" appears.

d. Paragraphs (g) and (h) are redesignated as paragraphs (h) and (i) respectively.

e. New paragraph (g) is added to read as set forth below.

f. Redesignated paragraph (i) is revised to read as set forth below.

### § 1.141 Procedure for hearing.

\* \* \* \* \*

(b) *Time, place, and manner.* (1) If any material issue of fact is joined by the pleadings, the Judge, upon motion of any party stating that the matter is at issue and is ready for hearing, shall set a time, place, and manner for hearing as soon as feasible after the motion is filed,

with due regard for the public interest and the convenience and necessity of the parties. The Judge shall file with the Hearing Clerk a notice stating the time and place of the hearing.<sup>3</sup> 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. The Judge's determination regarding the manner of the hearing shall be made in accordance with paragraphs (b)(3) and (b)(4) of this section. If any change in the time, place, or manner of the hearing is made, the Judge shall file with the Hearing Clerk a notice of such change, which notice shall be served upon 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 any material issue of fact is joined by the pleadings and the matter is at issue and is ready for 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 Judge issues a notice stating the manner in which the hearing is to be conducted, any party may move that the Judge 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 Judge's notice.

<sup>3</sup> The place of hearing in a proceeding under the Packers and Stockyards Act shall be set in accordance with the Packers and Stockyards Act (7 U.S.C. 228 (e) and (f)). In essence, if there is only one respondent, the hearing is to be held as near as possible to the respondent's place of business or residence depending on the availability of an appropriate location for conducting the hearing. If there is more than one respondent and they have their places of business or residence within a single unit of local government, a single geographical area within a State, or a single State, the hearing is to be held as near as possible to their places of business or residence depending on the availability of an appropriate location for conducting the hearing. If there is more than one respondent, and they have their places of business or residence distant from each other, 7 U.S.C. 228 (e) and (f) have no applicability.

(3) The hearing shall be conducted by audio-visual telecommunication unless the Judge determines that conducting the hearing by personal attendance of any individual who is expected to participate in 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 Judge 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 Judge 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 Judge 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.

\* \* \* \* \*

(g) *Written statements of direct testimony.* (1) Except as provided in paragraph (g)(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 Judge 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 Judge's notice stating the time of the hearing.

\* \* \* \* \*

(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 Judge finds that recording the hearing verbatim would expedite the proceeding and the Judge orders the hearing to be recorded verbatim. The Judge shall certify that to the best of his or her knowledge and belief any recording made pursuant to this paragraph with exhibits that were accepted into evidence is the record of the hearing.

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

(3) Recordings or transcripts of hearings shall be made available to any person at actual cost of duplication.

**§ 1.142 [Amended]**

9. Section 1.142 is amended as follows:

a. In paragraph (a), the heading is amended by adding the words "or recording" immediately after the word "transcript".

b. Paragraph (a)(1) is amended by adding the words "or recording" immediately after the word "transcript".

c. Paragraph (a)(2) is amended by adding the words "or recording" immediately after the word "transcript" both times the word "transcript" appears.

d. Paragraph (a)(3) is amended by adding the words "or recording" immediately after the word "transcript" each of the three times the word "transcript" appears.

e. Paragraph (c)(2) is amended by removing the words "of the record" and adding the words "or recording" in their place.

**§ 1.144 [Amended]**

10. Section 1.144 is amended as follows:

a. Paragraph (c)(2) is revised to read as set forth below.

b. Paragraphs (c)(9) and (c)(10) are redesignated as paragraphs (c)(13) and (c)(14) respectively.

c. New paragraphs (c)(9), (c)(10), (c)(11), and (c)(12) are added to read as set forth below.

**§ 1.144 Judges.**

\* \* \* \* \*

(c) \* \* \*

(2) Set the time, place, and manner of a conference and the hearing, adjourn the hearing, and change the time, place, and manner of the hearing;

\* \* \* \* \*

(9) Require each party to provide all other parties and the Judge with a copy of any exhibit that the party intends to introduce into evidence prior to any hearing to be conducted by telephone or audio-visual telecommunication;

(10) Require each party to provide all other parties with a copy of any document that the party intends to use to examine a deponent prior to any deposition to be conducted by telephone or audio-visual telecommunication;

(11) Require that any hearing to be conducted by telephone or audio-visual telecommunication be conducted at locations at which the parties and the Judge 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;

\* \* \* \* \*

**§ 1.145 [Amended]**

11. Section 1.145 is amended as follows:

a. In paragraph (a), the reference to "§ 1.141(g)(2)" is removed and "§ 1.141(h)(2)" added in its place.

b. In paragraph (c), the second sentence is amended by adding the words "or recording" immediately after the word "transcript".

**§ 1.147 [Amended]**

12. In section 1.147, paragraph (c)(2) is amended by removing the words "of this part"; and paragraph (d) is amended by removing the words "of this part".

**§ 1.148 [Amended]**

13. Section 1.148 is amended as follows:

a. Paragraph (b) is revised to read as set forth below:

b. In paragraph (f), the words "or recording" are added immediately after the word "transcript" in the paragraph heading; in paragraph (f)(1), once; in paragraph (f)(2), twice; and in paragraph (f)(3), twice.

**§ 1.148 Depositions.**

\* \* \* \* \*

**(b) Judge's order for taking deposition.**

(1) If the Judge finds that the testimony may not be otherwise available at the hearing, the taking of the deposition may be ordered. The order shall be filed with the Hearing Clerk and shall state:

- (i) The time of the deposition;
- (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. The officer and the time, place, and manner need not be the same as those suggested in the motion for the deposition.

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

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

- (i) Is necessary to prevent prejudice to a party;
- (ii) Is necessary because of a disability of any individual expected to participate in the deposition; or
- (iii) Would cost less than conducting the deposition by telephone or audio-visual telecommunication.

\* \* \* \* \*

**§ 1.149 [Amended]**

14. In § 1.149, paragraph (b), the last sentence is amended by removing the words "of this part".

15. The authority citation for part 1, subpart I, is revised to read as follows:

**Authority:** 7 U.S.C. 291, 292; 7 CFR 2.35, 2.41.

**§ 1.161 [Amended]**

16. Section 1.161 is amended as follows:

a. In paragraph (c), the words "or her" are added immediately after the word "his".

b. In paragraph (g), the reference to "1976 ed., appendix, p. 764" is removed and "App. (1988)" added in its place.

c. In paragraph (g), the reference to "7 CFR 2.35" is removed and "§ 2.35(a) of this chapter" added in its place.

d. In paragraph (g), the words "or she" are added immediately after the word "he".

e. Section 1.161 is amended by removing all alphabetical paragraph designations and placing the definitions in alphabetical order.

**§ 1.162 [Amended]**

17. Section 1.162 is amended as follows:

a. In paragraph (b), in the first sentence, the word "part" is removed and the word "paragraph" added in its place.

b. In paragraph (b), in the first sentence, the word "he" is removed and the words "the Secretary" added in its place.

c. In paragraph (b), in the second sentence, the word "he" is removed and ", the Secretary" added in its place.

**§ 1.164 [Amended]**

18. In § 1.164, paragraph (a), the first sentence is amended by removing the word "his" and adding the words "the respondent's" in its place.

**§ 1.167 [Amended]**

19. Section 1.167 is revised to read as follows:

**§ 1.167 Conference**

(a) *Purpose.* Upon motion of a party or upon the Judge's own motion, the Judge may direct the parties to attend a conference when the Judge finds that the proceeding would be expedited by discussions on matters of procedure and/or possible stipulations. The conference may include discussions regarding:

- (1) Simplification of the issues;
- (2) Limitation of expert or other witnesses;
- (3) The orderly presentation of evidence; and
- (4) Any other matters that may expedite and aid in the disposition of the proceeding.

(b) *Manner of the Conference.* (1) The conference shall be conducted by telephone or correspondence unless the Judge 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 Judge determines that a conference conducted by audio-visual telecommunication would measurably increase the United States Department of Agriculture's cost of 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 Judge 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.

**§ 1.168 [Amended]**

20. Section 1.168 is amended as follows:

a. In paragraph (e)(1), the first sentence is amended by removing the word "reported" and adding the words "transcribed or recorded" in its place.

b. In paragraph (e)(2), the first sentence is amended by removing the word "he" and by adding the words "the party" in its place.

c. In paragraph (e)(2), the second sentence is amended by adding the words "or recording" immediately after the word "transcript".

d. Paragraph (e)(6) is amended by adding the words "or recording" immediately after the word "transcript" each of the three times the word "transcript" appears.

e. Paragraphs (b), (c), (d), and (e) are redesignated as (c), (d), (e), and (g) respectively.

f. New paragraphs (b), (f), and (h) are added to read as follows:

**§ 1.168 Procedure for hearing.**

\* \* \* \* \*

(b) *Manner of hearing.* (1) The Judge shall file with the Hearing Clerk a notice stating whether the hearing will be conducted by telephone, audio-visual telecommunication, or personal attendance of any individual expected to attend the hearing and the Judge's determination regarding the manner of

hearing shall be made in accordance with paragraphs (b)(3) and (b)(4) of this section. If any change in the manner of the hearing is made, the Judge shall file with the Hearing Clerk a notice of the change, which notice 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) 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 Judge issues a notice stating the manner in which the hearing is to be conducted, any party may move that the Judge 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 Judge's notice.

(3) The hearing shall be conducted by audio-visual telecommunication unless the Judge determines that conducting the hearing by personal attendance of any individual who is expected to participate in 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 Judge 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 Judge 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 Judge 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.

\* \* \* \* \*

(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 Judge 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 Judge's notice stating the time of the hearing.

\* \* \* \* \*

(h) *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 Judge finds that recording the hearing verbatim would expedite the proceeding and the Judge orders the hearing to be recorded verbatim. The Judge shall certify that to the best of his or her knowledge and belief any recording made pursuant to this paragraph with exhibits that were accepted into evidence is the record of the hearing.

(2) If a hearing is recorded verbatim, a party requests the transcript of a hearing or part of a hearing, and the Judge determines that the disposition of the proceeding would be expedited by a transcript of the hearing or part of a

hearing, the Judge shall order the verbatim transcription of the recording as requested by the party.

(3) Recordings or transcripts of hearings shall be made available to any person at actual cost of duplication.

\* \* \* \* \*

**§ 1.169 [Amended]**

21. Section 1.169 is amended as follows:

- a. In paragraph (a), the heading is revised to read "*Corrections to transcript or recording.*"
- b. In paragraph (a)(1), the words "or recording" are added immediately after the word "transcript".
- c. In paragraph (a)(2), the words "or recording" are added immediately after the word "transcript" both times the word "transcript" appears.
- d. In paragraph (a)(3), the words "or recording" are added immediately after the word "transcript" each of the three times the word "transcript" appears.
- e. In paragraph (c), in the last sentence, the word "herein" is removed.

**§ 1.170 [Amended]**

22. Section 1.170 is amended as follows:

- a. In paragraph (a), in the second sentence, the reference to "§ 1.167(e)(2)" is removed and "§ 1.168(g)(2)" added in its place.
- b. In paragraph (c), the words "or recording" are added immediately after the word "transcript".
- c. In paragraph (i), in the last sentence, the word "herein" is removed.

**§ 1.171 [Amended]**

23. Section 1.171 is amended by removing the word "herein".

**§ 1.172 [Amended]**

24. In § 1.172, paragraph (a) is amended by adding the words "or recording" immediately after the word "transcript".

**§ 1.173 [Amended]**

25. Section 1.173 is amended as follows:

- a. In paragraph (b)(1), the words "or herself" are added immediately after the word "himself".
- b. In paragraph (b)(2), the word "he" is removed and the words "the Judge" added in its place.
- c. In paragraph (b)(2), the words "or herself" are added immediately after the word "himself".
- d. In paragraph (d), in the introductory language, the words "or her," are added immediately after the word "him".
- e. Paragraph (d)(2) is revised to read as set forth below.

f. Paragraph (d)(7) is redesignated as paragraph (d)(9).

g. New paragraphs (d)(7) and (d)(8) are added to read as set forth below.

h. In paragraph (e), the word "his" is removed and the words "the Judge's" added in its place.

i. In paragraph (e), the word "him" is removed and the words "the Judge" are added in its place both times the word "him" appears.

#### § 1.173 Judges.

\* \* \* \* \*

(d) \* \* \*

(2) Set the time, place, and manner of any conference, set the manner of the hearing, adjourn the hearing, and change the time, place, and manner of the hearing;

\* \* \* \* \*

(7) Require each party to provide all other parties and the Judge with a copy of any exhibit that the party intends to introduce into evidence prior to any hearing to be conducted by telephone or audio-visual telecommunication;

(8) Require that any hearing to be conducted by telephone or audio-visual telecommunication be conducted at locations at which the parties and the Judge are able to transmit and receive documents during the hearing;

\* \* \* \* \*

#### § 1.174 [Amended]

26. In § 1.174, paragraph (c) is amended by adding the words "or recording" immediately after the word "transcript".

### SUBTITLE B—REGULATIONS OF THE DEPARTMENT OF AGRICULTURE

#### CHAPTER I—AGRICULTURAL MARKETING SERVICE

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

27. The authority citation for part 47 is revised to read as follows:

**Authority:** 7 U.S.C. 499o; 7 CFR 2.17(a)(8)(xiii), 2.50(a)(8)(xiii).

#### § 47.2 [Amended]

28. Section 47.2 is amended as follows:

a. In paragraph (c), the words "or her" are added immediately after the word "his".

b. In paragraph (e), the words "or her" are added immediately after the word "his".

c. In paragraph (f), the words "or her" are added immediately after the word "his".

d. In paragraph (h), the words "or her" are added immediately after the word "his".

#### § 47.3 [Amended]

29. Section 47.3 is amended as follows:

a. In paragraph (b)(1), in the first sentence, the word "his" is removed and the words "the Director's" added in its place.

b. Paragraph (c) is revised to read as follows:

#### § 47.3 Institution of proceedings.

\* \* \* \* \*

(c) *Status of person filing informal complaint.* The person filing an informal reparation complaint shall not be a party to any disciplinary proceeding which may be instituted as a result of the informal reparation complaint. The person filing an informal reparation complaint shall have no legal status in the reparation proceeding, except as he or she may be subpoenaed as a witness or deposed without expense to him or her.

#### § 47.4 [Amended]

30. In section 47.4, paragraph (b)(2) is amended by removing the words "of this part".

#### § 47.5 [Amended]

31. Section 47.5 is amended by removing the words "of these regulations in this part" and "of the regulations in this part" and revising the last sentence to read as follows:

#### § 47.5 Scope and applicability of rules of practice.

\* \* \* 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.

#### § 47.11 [Amended]

32. Section 47.11 is amended as follows:

a. In paragraph (b), in the second sentence, the word "he" is removed and the words "the Secretary" are added in its place.

b. In paragraph (c), in the introductory language, the words "elsewhere in the regulations" are removed.

c. In paragraph (c), in the introductory language, the words "or her" are added immediately after the word "him".

d. Paragraph (c)(2) is revised to read as set forth below.

e. Paragraph (c)(9) is redesignated as (c)(13).

f. New paragraphs (c)(9), (c)(10), (c)(11), and (c)(12) are added to read as set forth below.

g. In paragraph (d), the word "him" is removed and the words "the examiner" added in its place.

#### § 47.11 Examiners.

\* \* \* \* \*

(c) \* \* \*

(2) Set the time, place, and manner of the hearing, adjourn the hearing, and change the time, place, and manner of the hearing;

\* \* \* \* \*

(9) Require each party to provide all other parties and the examiner with a copy of any exhibit that the party intends to introduce into evidence prior to any hearing to be conducted by telephone or audio-visual telecommunication;

(10) Require each party to provide all other parties with a copy of any document that the party intends to use to examine a deponent prior to any deposition to be conducted by telephone or audio-visual telecommunication;

(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;

\* \* \* \* \*

#### § 47.12 [Amended]

33. Section 47.12 is amended by removing the word "he" and adding the words "the petitioner" each of the three times the word "he" appears.

#### § 47.13 [Amended]

34. Section 47.13 is amended as follows:

a. In paragraph (a)(1), the words "or recording" are added immediately after the word "transcript".

b. Paragraph (b) is revised to read as follows:

#### § 47.13 Motions and requests.

\* \* \* \* \*

(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.

**§ 47.14 [Amended]**

35. Section 47.14 is revised to read as follows:

(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 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.

**§ 47.15 [Amended]**

36. Section 47.15 is amended as follows:

a. Paragraph (c) is revised to read as set forth below.

b. In paragraph (d)(2), the word "he" is removed and the words "the party" are added in its place.

c. In paragraph (d)(2), the words "or her" are added immediately after the word "his".

d. In paragraph (d)(3)(i), the words "or her" are added immediately after the word "him".

e. In paragraph (f)(2)(i), the word "he" is removed and the words "the party" are added in its place.

f. In paragraphs (f)(2)(i), the words "or recording" are added immediately after the word "transcript" both times the word "transcript" appears.

g. In paragraph (f)(6)(ii), "recording," is added immediately after "document," both times "document," appears.

h. In paragraph (f)(8), the words "or recording" are added immediately after the word "transcript" the three times the word "transcript" appears.

i. In paragraph (g), in the first sentence, the words "hereinafter provided" are removed and the words "provided in this part" are added in their place.

j. In paragraph (g), in the second sentence, the word "he" is removed and the words "the examiner" are added in its place.

k. Paragraphs (f), (g), and (h) are redesignated as (g), (h), and (i) respectively.

l. A new paragraph (f) is added to read as set forth below.

m. Redesignated paragraph (i) is revised to read as set forth below.

**§ 47.15 Oral hearing before examiner.**

\* \* \* \* \*

(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.

\* \* \* \* \*

(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.

\* \* \* \* \*

(i) *Script 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.

\* \* \* \* \*

#### § 47.16 [Amended]

37. Section 47.16 is amended as follows:

a. Paragraphs (a)(3) and (a)(4) are revised and (a)(5) and (a)(6) are added to read as set forth below.

b. Paragraph (b) is revised to read as set forth below.

c. Paragraph (d)(1) is revised to read as set forth below.

d. In paragraph (e), in the first sentence, the word "him" is removed and the words "the officer" added in its place.

e. In paragraph (e), in the second sentence, the word "He" is removed and the words "The officer" added in its place.

#### § 47.16 Depositions.

(a) \* \* \*

(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, the examiner shall order the taking of the deposition. The order shall be filed with the hearing clerk and shall

be served by 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.

\* \* \* \* \*

(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.

\* \* \* \* \*

**§ 47.17 [Amended]**

38. In § 47.17, paragraph (c), the last sentence is amended by removing the words "of this part".

**§ 47.19 [Amended]**

39. Section 47.19 is amended as follows:

a. In paragraph (a), the heading is revised to read "*Certification of transcript or recording*".

b. In paragraph (a), the words "or recording" are added immediately after the word "transcript" each of the five times the word "transcript" appears.

c. In paragraph (a), the words "or her" are added immediately after the word "his" both times the word "his" appears.

d. In paragraph (a) the word "he" is removed and the words "the examiner" added in its place both times the word "he" appears.

e. In paragraph (b), in the second sentence, the words "or she" are added immediately after the word "he".

f. In paragraph (d)(3), the word "his" is removed and the words "the party's" are added in its place.

g. In paragraph (d)(6), in the first sentence, the words "or her" are added immediately after the word "his".

h. In paragraph (e), the words "or her" are added immediately after the word "his".

**§ 47.20 [Amended]**

40. Section 47.20 is amended as follows:

a. In paragraph (b)(2), the words "or she" are added immediately after the word "he" both times the word "he" appears.

b. In paragraph (h), "(or she)" is added immediately after the word "he" both times the word "he" appears.

c. In paragraph (k), the words "or her" are added immediately after the word "his".

d. In paragraph (l), the words "or her" are added immediately after the word "his".

**§ 47.21 [Amended]**

41. Section 47.21 is amended by adding the words "or recording" immediately after the word "transcript" and by removing the word "prehearing".

**§ 47.22 [Amended]**

42. In § 47.22, paragraph (a) is amended by removing the reference to "§ 47.15(g)" and adding "§ 47.15(h)" in its place.

**§ 47.23 [Amended]**

43. Section 47.23 is amended by removing the word "he" and adding the words "the Secretary" in its place each

of the three times the word "he" appears; and by adding the words "or her" immediately after the word "his" each of the three times the word "his" appears.

**§ 47.24 [Amended]**

44. In § 47.24, paragraph (a) is amended by removing the word "he" and adding the words "the Secretary" in its place both times the word "he" appears.

**§ 47.25 [Amended]**

45. In § 47.25, paragraph (e) is amended by removing the words "the regulations in", and by adding the words "or her" immediately after the word "him".

**§ 47.46 [Amended]**

46. Section 47.46 is amended by removing the word "he" and adding the words "the Secretary" both times the word "he" appears; and adding the words "or her" immediately after the word "his".

**§ 47.47 [Amended]**

47. Section 47.47 is amended as follows:

a. In the introductory language, the reference to "7 CFR 47.2 (a) through (h)" is removed and "§§ 47.2 (a) through (h)" added in its place.

b. In the introductory language, the reference to "7 CFR 47.47 through 47.68" is removed and "§§ 47.47 through 47.68" added in its place.

c. Section 47.47 is amended by removing all paragraph designations and placing the definitions in alphabetical order.

**§ 47.49 [Amended]**

48. In section 47.49, paragraph (f) is revised to read as follows:

**§ 47.49 Determinations.**

\* \* \* \* \*

(f)(1) The presiding officer will order that an oral hearing be held if one is requested by the petitioner, or if the presiding officer determines that an oral hearing is necessary. A verbatim record shall be made of the hearing. In the event that an oral hearing is neither requested by the petitioner, nor ordered by the presiding officer, the presiding officer shall provide the petitioner a copy of the official file, and give the parties an opportunity to submit documents and other evidence to support their positions, as well as written arguments pertaining to their positions.

(2) If an oral hearing is held, it shall be conducted by audio-visual telecommunication unless the presiding officer determines that conducting the

hearing by the 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 presiding officer 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.

(3) The presiding officer 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 presiding officer 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.

**§ 47.53 [Amended]**

49. Section 47.53 is revised to read as follows:

§ 47.53 *Notice of time, place, and manner of hearing and provision of the official file.*

(a) Upon assignment of the matter for oral hearing, the presiding officer shall notify the parties by serving them with copies of the notice of hearing, stating the time and place of the hearing. The notice shall state whether the oral hearing will be conducted by telephone, audio-visual telecommunication, or personal attendance of any individual expected to attend the hearing, and the presiding officer's determination regarding the manner of the hearing shall be made in accordance with § 47.49(f)(2) and § 47.49(f)(3). The parties will be notified as soon as possible of any change in the time, place, or manner of the hearing.

(b) If the presiding officer orders an 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.

(c) Within 10 days after the presiding officer issues a notice stating the manner in which the hearing is to be conducted, any party may move that the presiding officer 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 presiding officer's notice.

(d) Upon assignment of the matter for oral hearing, the presiding officer shall make the official file a part of the records of the proceeding and shall provide the petitioner with a copy of the official file.

#### § 47.56 [Amended]

50. Section 47.56 is amended as follows:

a. Paragraph (b) is revised to read as set forth below.

b. Paragraphs (g) and (h) are redesignated as paragraphs (i) and (j) respectively.

c. New paragraphs (g) and (h) are added to read as set forth below.

#### § 47.56 Powers of presiding officer.

\* \* \* \* \*

(b) Set the time, place, and manner of the hearing, adjourn the hearing, and change the time, place, and manner of the hearing;

\* \* \* \* \*

(g) Require each party to provide all other parties and the presiding officer with a copy of any exhibit that the party intends to introduce into evidence prior to any hearing to be conducted by telephone or audio-visual telecommunication;

(h) Require that any hearing to be conducted by telephone or audio-visual telecommunication be conducted at locations at which the parties and the presiding officer are able to transmit and receive documents during the hearing;

\* \* \* \* \*

#### § 47.58 [Amended]

51. Section 47.58 is amended as follows:

a. In paragraph (b), the words "or recording" are added immediately after the word "transcript" both times the word "transcript" appears.

b. In paragraph (f), the words "or recording" are added immediately after

the word "transcript" both times the word "transcript" appears.

c. Paragraphs (a), (b), (c), (d), (e), and (f) are redesignated as (b), (c), (d), (e), (f), and (g) respectively.

d. A new paragraph (a) is added to read as follows:

#### § 47.58 Evidence.

(a) *Written statements of direct testimony.* (1) Except as provided in paragraph (a)(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 presiding officer 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 presiding officer's notice stating the time of the hearing.

\* \* \* \* \*

#### § 47.59 [Amended]

52. Section 47.59 is amended as follows:

a. The section heading is revised to read "*Filing transcripts or recordings and exhibits.*"

b. In section 47.59, the words "or recording" are added immediately after the word "transcript" each of the five times the word "transcript" appears.

#### § 47.60 [Amended]

53. Section 47.60 is revised to read as follows:

#### § 47.60 Transcript or recording.

(a) 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 presiding officer finds that recording the hearing verbatim would expedite the proceeding and the presiding officer orders the hearing to be recorded verbatim. The presiding officer shall certify that to the best of his or her knowledge and belief any recording made pursuant to this paragraph with exhibits that were accepted into evidence is the record of the hearing.

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

(c) Parties to the proceeding 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 therefore at the rate provided by the contract between the reporter and the Department for such reporting services.

#### § 47.62 [Amended]

54. In § 47.62, the last sentence is amended by removing the words "of this part".

### PART 50—RULES OF PRACTICE GOVERNING WITHDRAWAL OF INSPECTION AND GRADING SERVICES

55. The authority citation for part 50 is revised to read as follows:

**Authority:** 7 U.S.C. 1621 *et seq.*; 7 CFR 2.35, 2.41.

56. Part 50 is revised to read as follows:

### PART 50—RULES OF PRACTICE GOVERNING WITHDRAWAL OF INSPECTION AND GRADING SERVICES

#### Subpart A—General

Sec.

50.1 Scope and applicability of rules of practice.

#### Subpart B—Supplemental Rules of Practice

50.10 Definitions.

50.11 Conditional withdrawal of service.

50.12 Summary suspension of service.

#### Subpart A—General

#### § 50.1 Scope and applicability of rules of practice.

(a) The Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes set forth in §§ 1.130

through 1.151 of this title are rules of practice applicable to adjudicatory proceedings under the regulations promulgated under 7 U.S.C. 1621 *et seq.* for denial or withdrawal of inspection, certification, or grading service. In addition, the supplemental rules of practice in subpart B of this part shall be applicable to adjudicatory proceedings under the regulations promulgated under 7 U.S.C. 1621 *et seq.* for denial or withdrawal of inspection, certification, or grading service.

(b) Neither the rules of practice in §§ 1.130 through 1.151 of this title nor the supplemental rules of practice in subpart B of this part modify existing procedures for refusing to inspect, grade, or certify a specific lot of a product because of adulteration, improper preparation of the lot for grading, improper presentation of the lot for grading, or because of failure to comply with any similar requirements set forth in applicable regulations.

**Subpart B—Supplemental Rules of Practice**

**§ 50.10 Definitions.**

*Director.* The Director of the Division or any employee of the Division to whom authority to act in his or her stead is delegated.

*Division.* The Division of the Agricultural Marketing Service, United States Department of Agriculture, initiating the withdrawal of inspection, certification, or grading service.

*Mailing.* Depositing an item in the United States mail with postage affixed and addressed as necessary to cause the item to be delivered to the address shown by ordinary mail, certified mail, or registered mail.

**§ 50.11 Conditional withdrawal of service.**

(a) The Director may withdraw grading or inspection service from a person for correctable cause. The grading or inspection service withdrawn, after appropriate corrective action is taken, will be restored immediately, or as soon thereafter as a grader or inspector can be made available.

(b) Written notice of withdrawal of grading or inspection service under this section shall be given to the person from whom grading or inspection services will be withdrawn in advance of withdrawal, whenever it is feasible to provide such an advance written notice. If advance written notice is not given, the withdrawal action and the reasons for the withdrawal shall be confirmed as promptly as circumstances permit, unless the deficiency which is the basis

for the withdrawal has already been corrected.

**§ 50.12 Summary suspension of service.**

(a) *General.* In any situation in which the integrity of grading or inspection service would be jeopardized if the grading or inspection service were continued pending a decision in a proceeding to withdraw grading or inspection service, such service to the respondent may be suspended effective on the third day after mailing of a written notice of the suspension of service to the respondent's last known address or designated address or upon actual receipt of the written notice, whichever is earlier.

(b) *Actual or threatened physical violence.* In any case of actual or threatened physical violence to an inspector or grader, grading and inspection services to the respondent may be suspended prior to the transmittal of the written notice of suspension to the respondent. A written notice shall be given as promptly as circumstances permit.

**PART 51 [AMENDED]**

57. The authority citation for part 51 is revised to read as follows:

**Authority:** 7 U.S.C. 1622, 1624; 7 CFR 2.17, 2.50; unless otherwise noted.

**§ 51.46 [Amended]**

58. Section 51.46 is amended by revising the last sentence to read "The Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes set forth in §§ 1.130 through 1.151 of this title and the Supplemental Rules of Practice in part 50 of this chapter shall govern proceedings conducted pursuant to this section."

**PART 52 [AMENDED]**

59. The authority citation for part 52 is revised to read as follows:

**Authority:** 7 U.S.C. 1622, 1624; 7 CFR 2.17, 2.50.

**§ 52.54 [Amended]**

60. In § 52.54, paragraph (a) is amended by revising the last sentence to read "The Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes set forth in §§ 1.130 through 1.151 of this title and the Supplemental Rules of Practice in part 50 of this chapter shall be applicable to such debarment action."

**PART 53—LIVESTOCK (GRADING, CERTIFICATION, AND STANDARDS)**

61. The authority citation for part 53 is revised to read as follows:

**Authority:** 7 U.S.C. 1622, 1624; 7 CFR 2.17, 2.50.

**§ 53.13 [Amended]**

62. In § 53.13, paragraph (a)(2) is revised to read as follows:

**§ 53.13 Denial or withdrawal of service.**

(a) \* \* \*  
 (2) *Procedure.* All cases arising under this paragraph shall be conducted in accordance with the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes set forth in §§ 1.130 through 1.151 of this title and the Supplemental Rules of Practice in part 50 of this chapter.

\* \* \* \* \*

**PART 54—MEATS, PREPARED MEATS, AND MEAT PRODUCTS (GRADING, CERTIFICATION, AND STANDARDS)**

63. The authority citation for part 54 is revised to read as follows:

**Authority:** 7 U.S.C. 1622, 1624; 7 CFR 2.17, 2.50.

**§ 54.11 [Amended]**

64. In § 54.11, paragraph (a)(2) is revised to read as follows:

**§ 54.11 Denial or withdrawal of service.**

(a) \* \* \*  
 (2) *Procedure.* All cases arising under this paragraph shall be conducted in accordance with the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes set forth in §§ 1.130 through 1.151 of this title and the Supplemental Rules of Practice in part 50 of this chapter.

\* \* \* \* \*

**PART 97—PLANT VARIETY PROTECTION**

65. The authority citation for part 97 is revised to read as follows:

**Authority:** 7 U.S.C. 2321, 2326, 2352, 2353, 2356, 2371, 2402(b), 2403, 2426, 2427, 2501(c); 7 CFR 2.17, 2.50.

**§ 97.300 [Amended]**

66. In § 97.300, paragraph (d), the last sentence is revised to read "If a formal hearing is requested, the proceeding shall be conducted in accordance with the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes set forth in §§ 1.130 through 1.151 of this title."

**TITLE 9—[AMENDED]****Chapter II—Grain Inspection, Packers and Stockyards Administration (Packers and Stockyards Programs), Department of Agriculture**

67. The heading of 9 CFR chapter II is revised to read as set forth above.

68. In 9 CFR chapter II, consisting of parts 200 to 205, all references to "Packers and Stockyards Administration" are revised to read "Grain Inspection, Packers and Stockyards Administration (Packers and Stockyards Programs)" and all references to "P&SA" are revised to read "GIPSA".

**PART 202—RULES OF PRACTICE GOVERNING PROCEEDINGS UNDER THE PACKERS AND STOCKYARDS ACT**

69. The authority citation for part 202 is revised to read as follows:

**Authority:** 7 U.S.C. 228(a); 7 CFR 2.17(e), 2.56.

**§ 202.102 [Amended]**

70. Section 202.102 is amended by removing all paragraph designations and placing the definitions in alphabetical order.

**§ 202.103 [Amended]**

71. In § 202.103, paragraph (a), the second sentence is amended by removing the words "the provisions of".

**§ 202.105 [Amended]**

72. In § 202.105, paragraph (f)(2) is amended by removing the words "of this part".

**§ 202.109 [Amended]**

73. Section 202.109 is amended as follows:

a. Paragraph (a)(5) is revised to read as set forth below.

b. In paragraph (c)(2), in the second sentence, the word "pace" is removed and the word "place" is added in its place.

c. Paragraph (d) is revised to read as set forth below.

d. In paragraph (g), the words "or recording" are added immediately after the word "transcript" each of the four times the word "transcript" appears.

e. In paragraph (h), the words "or recording" are added immediately after the word "transcript" each of the four times the word "transcript" appears.

f. In paragraph (i), the words "or recording" are added immediately after the word "transcript" each of the six times the word "transcript" appears and, in the first sentence, the words "the provisions of" are removed.

g. In paragraph (j), the word "therein" is removed and the words "in the deposition" added in its place.

h. In paragraph (l), the words "or recording" are to be added immediately after the word "transcript" both times the word "transcript" appears.

**§ 202.109 Rule 9: Depositions.**

(a) \* \* \*

(5) if oral, a suggested time and place where the proposed deposition is to be made and a suggested manner in which the proposed deposition is to be conducted (telephone, audio-visual telecommunication, or by personal attendance of the individuals who are expected to participate in the deposition). The application for an order for the taking of testimony by deposition shall be made in writing, unless it is made orally on the record at an oral hearing.

\* \* \* \* \*

(d) *Order.* (1) The presiding officer, if satisfied that good cause for taking the deposition is present, may order the taking of the deposition.

(2) The order shall be served on the parties and shall include:

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

(ii) The name of the deponent;

(iii) Whether the deposition will be oral or on written questions;

(iv) If the deposition is oral, the manner in which the deposition is to be conducted (telephone, audio-visual telecommunication, or personal attendance of those who are to participate in the deposition); and

(v) The time, which shall not be less than 20 days after the issuance of the order, and place.

(3) The officer, time, place, and manner of the deposition as stated in the presiding officer's order need not be the same as the officer, time, place, and manner suggested in the application.

(4) 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.

(5) 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 presiding officer 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 presiding officer 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.

\* \* \* \* \*

**§ 202.110 [Amended]**

74. Section 202.110 is amended as follows:

a. In paragraph (a), the last sentence, the words "or recording" are added immediately after the word "transcript".

b. Paragraph (b) is revised to read as set forth below.

**§ 202.110 Rule 10: Prehearing Conference.**

\* \* \* \* \*

(b) *Manner of the prehearing conference.* (1) The prehearing conference shall be conducted by telephone or correspondence unless the presiding officer determines that conducting the prehearing 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 prehearing conference; or

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

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

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

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

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

**§ 202.112 [Amended]**

75. Section 202.112 is amended as follows:

a. Paragraph (a) is revised to read as set forth below.

b. Paragraph (b) is revised to read as set forth below.

c. In paragraph (e)(2), in the second sentence, the words "or recording" are added immediately after the word "transcript", and the word "thereon" is removed and the words "on objections" added in its place.

d. In paragraph (e)(3), the words "or recording" are added immediately after the word "transcript" both times the word "transcript" appears.

e. In paragraph (e)(5), the word "thereof" is removed and the words "of the Department" added in its place, and the word "therein" is removed and the words "in the record of the Department" added in its place.

f. Paragraphs (e), (f), (g), (h), (i), and (j) are redesignated as (f), (g), (h), (i), (j), and (k) respectively.

g. New paragraph (e) is added to read as set forth below.

h. Redesignated paragraph (i) is revised to read as set forth below.

i. In redesignated (j), the heading is revised to read "*Filing, and presiding officer's certificate, of the transcript or recording.*"; the words "or recording" are added immediately after the word "transcript" each of the 10 times the word "transcript" appears; and the words "or recorded" are added immediately after the word "transcribed".

j. In redesignated paragraph (k), the heading is revised to read "*Keeping of copies of the transcript or recording.*"; and the words "or recording" are added immediately after the word "transcript" each of the three times the word "transcript" appears.

**§ 202.112 Rule 12: Oral hearing.**

(a) *Time, place, and manner.* (1) If and when the proceeding has reached the stage where an oral hearing is to be held, the presiding officer shall set a time, place, and manner for oral hearing. The time shall be set based upon careful consideration to the convenience of the parties. The place shall be set in accordance with paragraph (a)(2) of this section and careful consideration to the convenience of the parties. The manner in which the

hearing is to be conducted shall be determined in accordance with paragraphs (a)(3) and (a)(4) of this section.

(2) The place shall be set in accordance with paragraphs (e) and (f) of section 407 of the Act, if applicable. In essence, under paragraphs (e) and (f) of section 407 of the Act, if the complainant and the respondent, or all of the parties, if there are more than two, have their principal places of business or residence within a single unit of local government, a single geographical area within a State, or a single State, the oral hearing is to be held as near as possible to such places of business or residence, depending on the availability of an appropriate location for conducting the hearing. If the parties have such places of business or residence distant from each other, then paragraphs (e) and (f) of section 407 of the Act are not applicable.

(3) The oral hearing shall be conducted by audio-visual telecommunication unless the presiding officer determines that conducting the oral hearing by personal attendance of any individual who is expected to participate in 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 presiding officer 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 presiding officer 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 presiding officer 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.

(b) *Notice.* (1) A notice stating the time, place, and manner of oral hearing shall be served on each party prior to the time of the oral hearing. The notice shall state whether the oral hearing will

be conducted by telephone, audio-visual telecommunication, or personal attendance of any individual expected to participate in the hearing. If any change is made in the time, place, or manner of the oral hearing, a notice of the change shall be served on each party prior to the time of the oral hearing as changed, unless the change is made during the course of an oral hearing and shown in the transcript or on the recording. Any party may waive such notice, in writing, or orally on the record at an oral hearing and shown in the transcript or on the recording.

(2) If the presiding officer orders an 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.

(3) Within 10 days after the presiding officer issues a notice stating the manner in which the hearing is to be conducted, any party may move that the presiding officer 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 presiding officer's notice.

\* \* \* \* \*

(e) *Written statements of direct testimony.* (1) Except as provided in paragraph (e)(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 presiding officer 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 presiding officer's notice stating the time of the hearing.

\* \* \* \* \*

(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 presiding officer finds that recording the hearing verbatim would expedite the proceeding and the presiding officer orders the hearing to be recorded verbatim. The presiding officer shall certify that to the best of his or her knowledge and belief any recording made pursuant to this paragraph with exhibits that were accepted into evidence is the record of the hearing.

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

(3) Parties to the proceeding who desire copies of the transcript or recording of the oral hearing may make arrangements with the reporter, who will furnish and deliver such copies direct to such parties, upon receipt from such parties of payment for the transcript or recording, at the rate provided by the contract between the reporter and the Department for such reporting service.

\* \* \* \* \*

**§ 202.115 [Amended]**

76. Section 202.115 is amended as follows:

a. Paragraph (b), the second sentence is amended by adding the words "or recording" immediately after the word "transcript".

b. Paragraph (d) is revised to read as set forth below.

**§ 202.115 Rule 15: Submission for final consideration.**

\* \* \* \* \*

(d) *Oral argument.* There shall be no right to oral argument other than that provided in rule 12(h), § 202.112(h).

**§ 202.118 [Amended]**

77. Section 202.118 is amended as follows:

a. Paragraph (a)(1) is revised to read as set forth below.

b. In paragraph (a)(7), the word "and" is removed.

b. Paragraph (a)(8) is redesignated as paragraph (a)(12).

c. New paragraphs (a)(8), (a)(9), (a)(10), and (a)(11) are added to read as set forth below.

**202.118 Rule 18: Presiding officer.**

(a) \* \* \*

(1) Set the time, place, and manner of a prehearing conference and an oral hearing, adjourn the oral hearing from time to time, and change the time, place, and manner of oral hearing;

\* \* \* \* \*

(8) Require each party to provide all other parties and the presiding officer with a copy of any exhibit that the party intends to introduce into evidence prior to any oral hearing to be conducted by telephone or audio-visual telecommunication;

(9) Require each party to provide all other parties with a copy of any document that the party intends to use to examine a deponent prior to any deposition to be conducted by telephone or audio-visual telecommunication;

(10) Require that any hearing to be conducted by telephone or audio-visual telecommunication be conducted at locations at which the parties and the presiding officer are able to transmit and receive documents during the hearing;

(11) 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; and

\* \* \* \* \*

Done in Washington, D.C., this 31st day of January, 1995.

**Richard E. Rominger,**

*Acting Secretary of Agriculture.*

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