

any portion of the head exclusive of wrapper leaves. Sales made on a percentage of a U.S. grade, without specifying the percentage of condition defects separately from the permanent defects, fall under this provision, and the lettuce may not contain more than a total of 15 percent condition defects at destination. However, if the condition defects are specified, provision No. 3 will apply.

(3) If the contract specifies a percentage of individual or combined condition defects, the lettuce at destination may contain either of the following, whichever is greater:

(i) One and one-half times the specified percentage of damage or serious damage by condition defects: *Provided*, That, if serious damage is not specified, one-half of the allowance at destination may be serious damage, including therein not more than one-quarter of the total allowance may be decay affecting any portion of the head exclusive of wrapper leaves. (For example, a lot sold as "16 percent tipburn" could have a total of 24 percent damage by tipburn at destination, including not more than 12 percent serious damage of which not more than 6 percent may be decay affecting any portion of the head exclusive of wrapper leaves.) or

(ii) Up to 15 percent, by count, of the heads in any lot which are damaged by condition defects, including therein not more than 9 percent serious damage of which not more than 5 percent may be decay affecting any portion of the head exclusive of wrapper leaves.

Unless otherwise agreed to by the parties, condition defects will be considered to be damage as defined in the U.S. Standards for Lettuce.

(4) If the contract clearly indicates by descriptive terms that the lettuce is of inferior quality, larger allowances for damage by condition defects than those specified above will be applied.

(5) If the buyer and the seller agree to percentages for defects at destination, higher or lower than those specified above, such percentages will determine whether good delivery is made.

[26 FR 12209, Dec. 21, 1961. Redesignated at 28 FR 7067, July 11, 1963]

#### MISREPRESENTATION OR MISBRANDING

#### § 46.45 Procedure in administering section 2(5) of the Act.

It is a violation of section 2(5) for a commission merchant, dealer or broker to misrepresent by word, act, mark, stencil, label, statement, or deed, the character, kind, grade, quality, quantity, size, pack, weight, condition, degree of maturity, or State, country, or region of origin of any perishable agricultural commodity received, shipped, sold, or offered to be sold in interstate or foreign commerce.

(a) *Violations.* Violations are considered to be serious, very serious, or repeated and/or flagrant, depending upon the circumstances of the misrepresentation.

(1) *Serious violations.* Include the following:

(i) Any lot of a perishable agricultural commodity shown by official inspection to contain scorable defects, off-size, off-count, exceeding the tolerance(s) in an amount up to and including double the tolerance provided in the applicable grades, standards or inspection procedures;

(ii) Any lot of perishable agricultural commodity officially certified as failing to meet the declared weight;

(iii) Any lot of a perishable agricultural commodity in which the State, country, or region of origin of the produce is misrepresented because the lot is made up of containers with various labels or markings that reflect more than one incorrect State, country or region of origin. Example: A lot with containers individually marked to show the origin as Idaho or Maine or Colorado when the produce was grown in Wisconsin; or

(iv) Any other physical act, verbal or written declaration, or record entry that misrepresents a lot of a perishable agricultural commodity to the same extent as the examples listed.

(2) *Very serious violations.* Include the following:

(i) Any lot of a perishable agricultural commodity shown by official inspection to contain scorable defects, off-size, off-count, in excess of double the tolerance(s) provided in the applicable grades, standards or inspection procedures;

(ii) Any lot of a perishable agricultural commodity packed in containers showing a single point of origin, which is other than that in which the produce was grown, such as containers marked "California" when the produce was grown in Arizona;

(iii) Any lot of a perishable agricultural commodity officially certified as having an average net weight more than four percent below the declared weight;

(iv) Multiple sales or shipments of a misrepresented perishable agricultural commodity within a seven day period that can be attributed to one cause; or

(v) Any other physical act, verbal or written declaration, or record entry that misrepresents a lot of a perishable agricultural commodity to the same extent as the examples listed.

(3) *Flagrant violations.* Include, but are not necessarily limited to, the following examples:

(i) Shipment or sale of a lot of a perishable agricultural commodity from shipping point after notification by official inspection that the inspected commodity fails to comply with any marking on the container without first correcting the misbranding;

(ii) To offer for resale or consignment, a lot of a perishable agricultural commodity that has been officially inspected at destination and found to be misbranded without advising a prospective receiver that the lot is misbranded and that the misbranding must be corrected before resale. When a resale or consignment is finalized, *written* notice must be given that the lot is misbranded and must be corrected before resale; or

(iii) To withhold or fail to disclose known material facts with respect to a misrepresentation or misbranding.

(b) *Evidence.* (1) Evidence concerning a misrepresentation or misbranding includes official certificates of an inspection made by any person authorized by the Department to inspect fruits and vegetables or other public certifiers, and includes investigations and audit findings and any business records, testimony or other evidence bearing on the subject.

(2) When a lot of a perishable agricultural commodity has been officially inspected, and certification is made that

the descriptive container markings are correct, but a subsequent inspection reverses the original findings, both inspection certificates will be accepted as evidence to show that the shipper/seller has *not* misrepresented the lot. The receiver of the commodity will be in violation if the misrepresentation is not corrected before the commodity is shipped, sold or offered for resale.

(c) *Sanctions*—(1) *Informal.* When liability for a violation of section 2(5) of the Act is to be settled informally, the violator may:

(i) Be given written warnings; or

(ii) Be given notice that liability for a violation may be settled by admitting the violation in writing and paying a penalty in an amount satisfactory to the Secretary in lieu of formal disciplinary action. In the event of a formal proceeding to suspend or revoke the license of such person because he has committed other violation(s), the admitted violation(s) will not be used to support the formal complaint but may be admitted to show a course of conduct prior to the filing of the formal complaint;

(iii) The schedule for informal disposition is as follows:

Violation		Disposition
1st .....	.....	(1)
2d .....	.....	(1)
	(2)	(3)
3d .....	\$200	\$250
4th .....	350	500
5th .....	500	1,000
6th .....	1,000	2,000
7th .....	2,000	2,000

<sup>1</sup> Warning letter.

<sup>2</sup> If serious violation.

<sup>3</sup> Very serious violation.

Informal disposition of misrepresentation violations is not limited to seven occurrences and will be considered for further violations.

(2) *Formal.* Formal proceedings to suspend or revoke a license may be instituted at any time against a person who has committed repeated and/or flagrant violations.

(d) *Cumulative record.* A cumulative record of licensee's misrepresentation violations will be maintained with the following limitations:

(1) Two years after the date it was committed or after payment of a monetary penalty, the violation will not be used as a basis for instituting formal disciplinary action. However, it may be cited as a part of the pattern of violations if formal proceedings are instituted and will be used in determining the level of monetary penalty for informal settlements.

(2) The record of violations *not* involved in formal proceedings will be expunged if there are no violations during a twenty-four (24) month period from the date of the most recent violation, or after thirty-six (36) months from the date of said violation, unless it was made a part of a formal disciplinary complaint.

(e) *Summary of procedure*—(1) *Compilation of authority*. The rules defining misrepresentation, including misbranding, and for determining liability and disposition of violations are contained in the Act (7 U.S.C. 499 *et seq.*), in particular sections 2(5) and 8 (7 U.S.C. 499b(5) and 499h), §46.45 of the Regulations (7 CFR 46.45), the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted By the Secretary (7 CFR 1.130 *et seq.*), and in the Administrative Procedure Act (5 U.S.C. 551 *et seq.*).

(2) *Evidence of misrepresentation*. Evidence of misrepresentation or misbranding violations includes results of official inspections, audit findings, business records, or other documentation or testimony bearing on the subject. When a lot of fruits and vegetables has been officially inspected, and certification made that the descriptive markings on the container do not misrepresent the produce, but a subsequent inspection reverses the original finding (such as to grade, size, weight, etc.), the shipper/seller will *not* be charged with violation of the Act. However, the misrepresentation must be corrected before the lot is shipped, sold, or offered for resale.

(3) *Warning letters*. When informal settlement of liability is appropriate, violators are given two written warnings and an opportunity to take preventive action before formal action is considered. Warning letters include an explanation of the requirements of the Act and recommendations of ac-

tions which the violator can take to avoid future violations.

(4) *Informal sanctions*. Violations subsequent to the sending of the warning letters referred to above, other than flagrant violations, may be settled informally pursuant to paragraph (c)(1) of this section. This procedure permits the violator to resolve the matter by payment of a monetary penalty pursuant to a schedule set out in lieu of a formal proceeding.

(5) *Formal sanctions*. In cases involving repeated or flagrant violations of the Act, formal proceedings seeking the suspension or revocation of the violator's license may be instituted pursuant to the Rules of Practice governing such matters (7 CFR 1.130 *et seq.*). Except in cases of willfulness or where the public health, interest, or safety requires otherwise, a violator must be given written warning and opportunity to demonstrate or achieve compliance with the Act before its license can be suspended or revoked (5 U.S.C. 551 *et seq.*). The warning letters referred to above serve this purpose. If formal proceedings are instituted, the violator is afforded an oral hearing, if requested, before an Administrative Law Judge, an opportunity to appeal an adverse decision to the Department's Judicial Officer, and a further opportunity to appeal an adverse final decision to the appropriate United States Circuit Court of Appeals.

(6) *Use of record of misrepresentation*. A cumulative record of misrepresentation is maintained. It is used as a basis for determining whether a warning letter should be considered, and, if so, the amount of monetary penalty which is appropriate, or whether there is cause for instituting a formal disciplinary proceeding seeking suspension or revocation of the violator's license. But after payment of a monetary penalty or after two years from the date of the last violation, no formal disciplinary use can be made of the previous record of violation. The record of misrepresentation shall be erased if there are no further violations in the twenty-four (24) month period immediately following the most recent violation, or after

36 months from the date of each individual violation unless it is involved in formal disciplinary proceedings.

[43 FR 4964, Feb. 7, 1978, as amended at 46 FR 22746, Apr. 21, 1981; 47 FR 21234, May 18, 1982]

STATUTORY TRUST

**§ 46.46 Statutory trust.**

(a) *Scope.* The requirements of this section cover all transactions existing as of and entered into on or after the effective date of these regulations which have been issued pursuant to Pub. L. 98–273.

(b) *Definitions.* (1) “Received” means the time when the buyer, receiver, or agent gains ownership, control, or possession of the perishable agricultural commodities: *Provided*, That when perishable agricultural commodities have not been received as described above, and where there is a rejection without reasonable cause as provided in § 46.2(bb) and (cc), the goods will be considered to have been received when proffered.

(2) “Dissipation” means any act or failure to act which could result in the diversion of trust assets or which could prejudice or impair the ability of unpaid suppliers, sellers, or agents to recover money owed in connection with produce transactions.

(3) “Default” means the failure to pay promptly money owed in connection with transactions in perishable agricultural commodities; *i.e.*, within the period of time applicable to the type of transaction as established by the provisions of the regulations (§ 46.2(aa)), or as otherwise agreed upon by the parties.

(4) “Calendar days” as used in section 5(c) 3 of the Act means every day of the week, including Saturdays, Sundays, and holidays, except that if the thirtieth calendar day falls on a Saturday, Sunday, or holiday, the final day with respect to the time for filing a written notice of intent to preserve the benefit of the trust shall be the next day upon which there is postal delivery service.

(c) *Trust assets.* The trust is made up of perishable agricultural commodities received in all transactions, all inventories of food or other products derived from such perishable agricultural com-

modities, and all receivables or proceeds from the sale of such commodities and food or products derived therefrom. Trust assets are to be preserved as a nonsegregated “floating” trust. Commingling of trust assets is contemplated.

(d) *Trust benefits.* (1) When a seller, supplier or agent who has met the eligibility requirements of paragraphs (f) (1) and (2) of this section transfers ownership, possession, or control of goods to a commission merchant, dealer, or broker, it automatically becomes eligible to participate in the trust. Participants who preserve their rights to benefits in accordance with paragraph (g) of this section remain beneficiaries until they are paid in full.

(2) Commission merchants, dealers, and brokers acting on behalf of others have the duty to preserve their principals’ rights to trust benefits by filing timely written notice with their customers and with the Secretary in accordance with paragraph (g) of this section. The responsibility for filing the notice to protect the principals’ rights is obligatory and cannot be avoided by the agent or receiver by means of a contract provision. Persons acting as agents also have the responsibility to negotiate contracts which entitle their principals to the protection of the trust provisions: *Provided*, That a principal may elect to waive its right to trust protection. To be effective, the waiver must be in writing and separate and distinct from any agency contract, must be signed by the principal prior to the time affected trading contracts are negotiated, must clearly state the principal’s intent to waive its right to become a trust beneficiary on a given transaction, or a series of transactions, and must include the date the agent’s authority to act on its behalf expires. In the event an agent fails to perform the duty of protecting its principal’s rights to trust benefits, it may be held liable to the principal for damages. The principal must preserve its rights to trust benefits by filing appropriate notices with the agent and/or the buyer and the Secretary in accordance with paragraph (g) of this section.

(e) *Trust maintenance.* (1) Commission merchants, dealers and brokers are required to maintain trust assets in a