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PART 200 [RESERVED]

PART 201—REGULATIONS UNDER THE PACKERS AND STOCKYARDS ACT

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AUTHORITY: 7 U.S.C. 204, 228, 7 CFR 2.17(e), 2.56.

DEFINITIONS

§ 201.1 Meaning of words.

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

[19 FR 4524, July 22, 1954]

§ 201.2 Terms defined.

The definitions of terms contained in the Act shall apply to such terms when used in the Regulations under the Packers and Stockyards Act, 9 CFR part 201; Rules of Practice Governing Proceedings under the Packers and Stockyards Act, 9 CFR part 202; Statements of General Policy under the Packers and Stockyards Act, 9 CFR part 203; and Organization and Functions, 9 CFR part 204. In addition the following terms used in these parts shall be construed to mean:

(a) *Act* means the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. 181 et seq.).

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

(c) *Secretary* means the Secretary of Agriculture of the United States, or any officer or employee of the Department authorized to act for the Secretary.

(d) *Administration* or *agency* means the Grain Inspection, Packers and Stockyards Administration (Packers and Stockyards Programs).

(e) *Administrator* or *agency head* means the Administrator of the Administration or any person authorized to act for the Administrator.

(f) *Regional Supervisor* means the regional supervisor of the Grain Inspection, Packers and Stockyards Administration (Packers and Stockyards Programs) for a given area or any person authorized to act for the regional supervisor.

(g) *Person* means individuals, partnerships, corporations, and associations.

(h) *Registrant* means any person registered pursuant to the provisions of the Act and the regulations in this part.

(i) *Stockyard* means a livestock market which has received notice under section 302(b) of the Act that it has been determined by the Secretary to come within the definition of ''stockyard'' under section 302(a) of the Act.

(j) *Schedule* means a tariff of rates and charges filed by stockyard owners and market agencies.

(k) *Custom Feedlot* means any facility which is used in its entirety or in part for the purpose of feeding livestock for the accounts of others, but does not include feeding incidental to the sale or transportation of livestock.

[46 FR 50510, Oct. 14, 1981]

ADMINISTRATION

§ 201.3 Authority.

The Administrator shall perform such duties as the Secretary may require in enforcing the provisions of the act and the regulations in this part.

[19 FR 4524, July 22, 1954]

APPLICABILITY OF INDUSTRY RULES

§ 201.4 Bylaws, rules and regulations, and requirements of exchanges, associations, or other organizations; applicability, establishment.

(a) The regulations in this part shall not prevent the legitimate application or enforcement of any valid bylaw, rule or regulation, or requirement of any exchange, association, or other organization, or any other valid law, rule or regulation, or requirement to which any packer, stockyard owner, market agency, or dealer shall be subject which is not inconsistent or in conflict with the act and the regulations in this part.

(b) Market agencies selling livestock on commission shall not, in carrying out the statutory duty imposed upon them by section 307 of title III of the act, permit dealers, packers, or others representing interests which conflict with those of consignors, to participate, directly or indirectly, in determination of the need for, or in the establishment of, regulations governing,

or practices relating to, the responsibilities, duties, or obligations of such market agencies to their consignors.

(7 U.S.C. 181 et seq.)

[19 FR 4524, July 22, 1954, as amended at 44 FR 45361, Aug. 2, 1979]

REGISTRATION

§201.10 Requirements and procedures.

(a) Every person operating or desiring to operate as a market agency or dealer as defined in section 301 of the Act shall apply for registration under the Act. To apply for registration, such persons shall file a properly executed application for registration, on forms furnished by the Agency, and the bond as required in §201.27 through 201.34.

(b) Each application for registration shall be filed with the regional supervisor for the region in which the applicant proposes to operate. If the Administrator has reason to believe that the applicant is unfit to engage in the activity for which application has been made, a proceeding shall be promptly instituted in which the applicant will be afforded opportunity for full hearing in accordance with the rules of practice governing such proceedings, for the purpose of showing cause why the application for registration should not be denied. In the event it is determined that the application should be denied, the applicant shall not be precluded, as soon as conditons warrant, from again applying for registration.

(c) Any person regularly employed on salary, or other comparable method of compensation, by a packer to buy livestock for such packer shall be subject to the registration requirements of the Act and the regulations. Such person shall be registered as a dealer to purchase livestock for slaughter.

(d) Every person clearing or desiring to clear the buying operations of other registrants shall apply for registration as a market agency providing clearing services by filing a properly executed application, on forms furnished by the Agency, and the bond as required in §201.27 through 201.34.

(Approved by the Office of Management and Budget under control number 0590–0001)

(7 U.S.C. 203, 204, 207, 217a, 222 and 228)

[49 FR 33003, Aug. 20, 1984, as amended at 54 FR 37094, Sept. 7, 1989; 56 FR 2127, Jan. 22, 1991]

§201.11 Suspended registrants; officers, agents, and employees.

Any person whose registration has been suspended, or any person who was responsible for or participated in the violation on which the order of suspension was based, may not register in his own name or in any other manner within the period during which the order of suspension is in effect, and no partnership or corporation in which any such person has a substantial financial interest or exercises management responsibility or control may be registered during such period.

(7 U.S.C. 203, 204, 207, 217a and 228)

[49 FR 33003, Aug. 20, 1984]

SCHEDULES OF RATES AND CHARGES

§201.17 Requirements for filing tariffs.

(a) *Schedules of rate changes for stockyard services.* Each stockyard owner and market agency operating at a posted stockyard shall file with the regional supervisor for the region in which they operate a signed copy of all schedules of rates and charges, supplements and amendments thereto. The schedules, supplements and amendments must be conspicuously posted for public inspection at the stockyard, and filed with the regional supervisor, at least 10 days before their effective dates, except as provided in paragraphs (b) and (c) of this section. Each schedule, supplement and amendment shall set forth its effective date, a description of the stockyard services rendered, the stockyard at which it applies, the name and address of the stockyard owner or market agency, the kind of livestock covered by it, and any rules or regulations which affect any rate or

charge contained therein. Each schedule of rates and charges filed shall be designated by successive numbers. Each supplement and amendment to such schedule shall be numbered and shall designate the number of the schedule which it supplements or amends.

(b) *Feed charges.* When the schedule in effect provides for feed charges to be based on an average cost plus a specified margin, the 10-day filing and notice provision contained in section 306(c) of the Act is waived. A schedule of the current feed charges based on average feed cost and showing the effective date shall be conspicuously posted at the stockyard at all times. Changes in feed charges may become effctive 2 days after the change is posted at the stockyard.

(c) *Professional veterinary services.* The 10-day filing and notice provision contained in section 306(a) of the Act is waived for a schedule of charges for professional veterinary services. A schedule of charges for professional veterinary services rendered by a veterinarian at a posted stockyard shall be conspicuously posted at the stockyard at all times. The schedule of charges and any supplement or amendment thereto may become effective 2 days after the schedule, supplement, or amendment is posted at the stockyard.

(d) *Joint schedules.* If the same schedule is to be observed by more than one market agency operating at any one stockyard, one schedule will suffice for such market agencies. The names and business addresses of those market agencies adhering to such schedule must appear on the schedule.

(Approved by the Office of Management and Budget under control number 0590–0001)

(7 U.S.C. 203, 204, 207, 217a, 222 and 228)

[49 FR 33003, Aug. 20, 1984]

GENERAL BONDING PROVISIONS

§ 201.27 Underwriter; equivalent in lieu of bonds; standard forms.

(a) The surety on bonds maintained under the regulations in this part shall be a surety company which is currently approved by the United States Treasury Department for bonds executed to the United States; and which has not failed or refused to satisfy its legal obligations under bonds issued under said regulations.

(b) Any packer, market agency, or dealer required to maintain a surety bond under these regulations may elect to maintain, in whole or partial substitution for such surety bond, a bond equivalent, or combination thereof, must be the total amount of the surety bond otherwise required under these regulations. Any such bond equivalent must be in the form of:

(1) A trust fund agreement governing funds actually deposited or invested in fully negotiable obligations of the United States or Federally-insured deposits or accounts in the name of and readily convertible to currency by a trustee as provided in § 201.32, or

(2) A trust agreement governing funds which may be drawn by a trustee as provided in § 201.32, under one or more irrevocable, transferrable, standby letters of credit, issued by a Federally-insured bank or institution and physically received and retained by such trustee.

(c) The provisions of §§ 201.27 through 201.34 shall be applicable to the trust fund agreements, trust agreements and letters of credit authorized in paragraph (b) of this section.

(d) Bonds, trust fund agreements, letters of credit and trust agreements shall be filed on forms approved by the Administrator.

(Approved by the Office of Management and Budget under control number 0590–0001)

[56 FR 2128, Jan. 22, 1991, as amended at 61 FR 36279, July 10, 1996]

§ 201.28 Duplicates of bonds or equivalents to be filed with Regional Supervisors.

Fully executed duplicates of bonds, trust fund agreements, and trust agreements maintained under the regulations in this part, and fully executed duplicates of all endorsements, amendments, riders, indemnity agreements, and other attachments thereto, and photographically reproduced copies of any letter of credit or amendment thereto, shall be filed with the Regional Supervisor for the region in which the registrant, packer, or person applying for registration resides, or in the case of a corporation, where the

corporation has its home office: *Provided*, that if such registrant, packer, or person does not engage in business in such area, the foregoing documents shall be filed with the Regional Supervisor for the region in which the place of business of the registrant or packer or person is located.

(Approved by the Office of Management and Budget under control number 0590–0001)

[56 FR 2128, Jan. 22, 1991]

MARKET AGENCY, DEALER AND PACKER BONDS

§ 201.29 Market agencies, packers and dealers required to file and maintain bonds.

(a) Every market agency, packer, and dealer, except as provided in paragraph (d) of this section, and except packer buyers registered as dealers to purchase livestock for slaughter only, shall execute and maintain a reasonable bond on forms approved by the Administrator containing the appropriate condition clauses, as set forth in § 201.31 of the regulations, applicable to the activity or activities in which the person or persons propose to engage, to secure the performance of obligations incurred by such market agency, packer, or dealer. No market agency, packer, or dealer required to maintain a bond shall conduct his operations unless there is on file and in effect a bond complying with the regulations in this part.

(b) Every market agency buying on a commission basis and every dealer buying for his own account or for the accounts of others shall file and maintain a bond. If a registrant operates as both a market agency buying on a commission basis and as a dealer, only one bond to cover both buying operations need be filed. Any person operating as a market agency selling on a commission basis and as a market agency buying on a commission basis or as a dealer shall file and maintain separate bonds to cover his selling and buying operations.

(c) Each market agency and dealer whose buying operations are cleared by another market agency shall be named as clearee in the bond filed and maintained by the market agency registered to provide clearing services. Each market agency selling livestock on a commission basis shall file and maintain its own bond.

(d) Every packer purchasing livestock,irectly or through an affiliate or employee or a wholly-owned subsidiary, except those packers whose annual purchases do not exceed $500,000, shall file and maintain a reasonable bond. In the event a packer maintains a wholly-owned subsidiary or affiliate to conduct its livestock buying, the wholly-owned subsidiary or affiliate shall be registered as a packer buyer for its parent packer firm, and the required bond shall be maintained by the parent packer firm.

(7 U.S.C. 204, 228(a))

[48 FR 8806, Mar. 2, 1983]

§ 201.30 Amount of market agency, dealer and packer bonds.

(a) *Market agency selling livestock on commission.* To compute the required amount of bond coverage, divide the dollar value of livestock sold during the preceding business year, or the substantial part of that business year, in which the market agency did business, by the actual number of days on which livestock was sold. The divisor (the number of days on which livestock was sold) shall not exceed 130. The amount of bond coverage must be the next multiple of $5,000 above the amount so determined. When the computation exceeds $50,000, the amount of bond coverage need not exceed $50,000 plus 10 percent of the excess over $50,000, raised to the next $5,000 multiple. In no case shall the aamount of bond coverage for a market agency selling on commission be less than $10,000 or such higher amount as required to comply with any State law.

(b) *Market agency buying on commission or dealer.* The amount of bond coverage must be based on the average amount of livestock purchased by the dealer or market agency during a period equivalent to 2 business days. To compute the required amount of bond coverage, divide the total dollar value of livestock purchased during the preceding business year, or substantial part of that business year, in which the dealer or market agency or both did business, by one-half the number of

days on which business was conducted. The number of days in any business year, for purposes of this regulation, shall not exceed 260. Therefore, the divisor (one-half the number of days on which business was conducted) shall not exceed 130. The amount of the bond coverage must be the next multiple of $5,000 above the amount so determined. When the computation exceeds $75,000, the amount of bond coverage need not exceed $75,000 plus 10 percent of the excess over $75,000, raised to the next $5,000 multiple. In no case shall the amount of bond coverage be less than $10,000 or such higher amount as required to comply with any State law.

(c) *Market agency acting as clearing agency*. The amount of bond coverage must be based on the average amount of livestock purchased by all persons for whom the market agency served as a clearor during a period equivalent to 2 business days. To compute the required amount of bond coverage, divide the total dollar value of livestock purchased by all persons for whom the market agency served as a clearor during the preceding business year, or substantial part of that business year, in which the market agency acting as clearing agency did business, by one-half the number of days on which business was conducted. The number of days in any business year, for purposes of this regulation, shall not exceed 260. Therefore, the divisor (one-half the number of days on which business was conducted) shall not exceed 130. The amount of bond coverage must be the next multiple of $5,000 above the amount so determined. When the computation exceeds $75,000, the amount of bond coverage need not exceed $75,000 plus 10 percent of the excess over $75,000, raised to the next $5,000 multiple. In no case shall the amount of bond coverage be less than $10,000 or such higher amount as required to comply with any State law.

(d) *Packer.* The amount of bond coverage must be based on the average amount of livestock purchased by the packer during a period equivalent to 2 business days. To compute the required amount of bond coverage, divide the total dollar value of livestock purchased during the preceding business year, or substantial part of that business year, in which the packer did business, by one-half the number of days on which business was conducted. The number of days in any business year, for purposes of this regulation, shall not exceed 260. Therefore, the divisor (one-half the number of days on which business was conducted) shall not exceed 130. The amount of the bond coverage must be the next multiple of $5,000 above the amount so determined. In no case shall the amount of bond coverage for a packer be less than $10,000.

(e) If a person applying for registration as a market agency or dealer has been engaged in the business of handling livestock before the date of the application, the value of the livestock handled, if representative of future operations, must be used in computing the required amount of bond coverage. If the applicant for registration is a successor in business to a registrant formerly subject to these regulations, the amount of bond coverage of the applicant must be at least that amount required of the prior registrant, unless otherwise determined by the Administrator. If a packer becomes subject to these regulations, the value of livestock purchased, if representative of future operations, must be used in computing the required amount of bond coverage. If a packer is a successor in business to a packer formerly subject to these regulations, the amount of bond coverage of the successor must be at least that amount required of the prior packer, unless otherwise determined by the Administrator.

(f) Whenever the Administrator has reason to believe that a bond is inadequate to secure the performance of the obligations of the market agency, dealer or packer covered thereby, the Administrator shall notify such person to adjust the bond to meet the requirements the Administrator determines to be reasonable.

(7 U.S.C. 204, 228(a))

[48 FR 8806, Mar. 2, 1983]

§ 201.31 Conditions in market agency, dealer and packer bonds.

Each market agency, dealer and packer bond shall contain conditions

applicable to the activity or activities in which the person or persons named as principal or clearees in the bond propose to engage, which conditions shall be as follows or in terms to provide equivalent protection:

(a) *Condition Clause No. 1: When the principal sells livestock for the accounts of others.* If the said principal shall pay when due to the person or persons entitled thereto the gross amount, less lawful charges, for which all livestock is sold for the accounts of others by said principal.

(b) *Condition Clause No. 2: When the principal buys livestock for his own account or for the accounts of others.* If the said principal shall pay when due to the person or persons entitled thereto the purchase price of all livestock purchased by said principal for his own account or for the accounts of others, and if the said principal shall safely keep and properly disburse all funds, if any, which come into his hands for the purpose of paying for livestock purchased for the accounts of others.

(c) *Condition Clause No. 3: When the principal clears other registrants buying livestock and thus is responsible for the obligations of such other registrants.* If the said principal, acting as a clearing agency responsible for the financial obligations of other registrants engaged in buying livestock, viz: (Insert here the names of such other registrants as they appear in the application for registration), or if such other registrants, shall (1) pay when due to the person or persons entitled thereto the purchase price of all livestock purchased by such other registrants for their own account or for the accounts of others; and (2) safely keep and properly disburse all funds coming into the hands of such principal or such other registrants for the purpose of paying for livestock purchased for the accounts of others.

(d) *Condition Clause No. 4: When the principal buys livestock for his own account as a packer.* If the said principal shall pay when due to the person or persons entitled thereto the purchase price of all livestock purchased by said principal for his own account.

[47 FR 32695, July 29, 1982]

§ 201.32 Trustee in market agency, dealer and packer bonds.

Bonds may be in favor of a trustee who shall be a financially responsible, disinterested person satisfactory to the Administrator. State officials, secretaries or other officers of livestock exchanges or of similar trade associations, attorneys at law, banks and trust companies, or their officers, are deemed suitable trustees. If a trustee is not designated in the bond and action is taken to recover damages for breach of any condition thereof, the Administrator shall designate a person to act as trustee. In those States in which a State official is required by statute to act or has agreed to act as trustee, such official shall be designated by the Administrator as trustee when a designation by the Administrator becomes necessary.

[41 FR 53774, Dec. 9, 1976]

§ 201.33 Persons damaged may maintain suit; filing and notification of claims; time limitations; legal expenses.

Each bond and each bond equivalent filed pursuant to the regulations in this part shall contain provisions that:

(a) Any person damaged by failure of the principal to comply with any condition clause of the bond or bond equivalent may maintain suit to recover on the bond or bond equivalent even though such person is not a party named in the bond or bond equivalent;

(b) Any claim for recovery on the bond or bond equivalent must be filed in writing with either the surety, if any, or the trustee, if any, or the Administrator, and whichever of these parties receives such a claim shall notify the other such party or parties at the earliest practical date;

(c) The Administrator is authorized to designate a trustee pursuant to § 201.32;

(d) The surety on the bond, or the trustee on the bond equivalent, as the case may be, shall not be liable to pay any claim if it is not filed in writing within 60 days from the date of the transaction on which the claim is based or if suit thereon is commenced less than 120 days or more than 547 days from the date of the transaction on which the claim is based;

(e) The proceeds of the bond or bond equivalent, as the case may be, shall not be used to pay fees, salaries, or expenses for legal representation of the surety or the principal.

[56 FR 2128, Jan. 22, 1991]

§ 201.34 Termination of market agency, dealer and packer bonds.

(a) Each bond shall contain a provision requiring that, prior to terminating such bond, at least 30 days notice in writing shall be given to the Administrator, Grain Inspection, Packers and Stockyards Administration (Packers and Stockyards Programs), U.S. Department of Agriculture, Washington, DC 20250, by the party terminating the bond. Such provision may state that in the event the surety named therein writes a replacement bond for the same principal, the 30-day notice requirement may be waived and the bond will be terminated as of the effective date of the replacement bond.

(b) Each bond filed by a market agency who clears other registrants who are named in the bond shall contain a provision requiring that, prior to terminating the bond coverage of any clearee named therein, at least 30 days notice in writing shall be given to the Administrator, Grain Inspection, Packers and Stockyards Administration (Packers and Stockyards Programs), U.S. Department of Agriculture, Washington, DC 20250, by the surety. Such written notice shall be in the form of a rider or endorsement to be attached to the bond of the clearing agency.

(c) Each trust fund agreement and trust agreement shall contain a provision requiring that, prior to terminating such agreement, at least 30 days notice in writing shall be given to the Administrator, Grain Inspection, Packers and Stockyards Administration, U.S. Department of Agriculture, Washington, DC 20250, by the party terminating the agreement. Such provision shall state that in the event the principal named therein files an acceptable bond or bond equivalent to replace the agreement, the 30-day notice requirement may be waived and the agreement will be terminated as of the effective date of the replacement bond or bond equivalent.

(Approved by the Office of Management and Budget under control number 0590–0001)

[47 FR 32695, July 29, 1982, as amended at 54 FR 26349, June 23, 1989; 61 FR 36279, July 10, 1996]

PROCEEDS OF SALE

§ 201.39 Payment to be made to consignor or shipper by market agencies; exceptions.

(a) No market agency shall, except as provided in paragraph (b) of this section, pay the net proceeds or any part thereof, arising from the sale of livestock consigned to it for sale, to any person other than the consignor or shipper of such livestock except upon an order from the Secretary or a court of competent jurisdiction, unless (1) such market agency has reason to believe that such person is the owner of the livestock, (2) such person holds a valid, unsatisfied mortgage or lien upon the particular livestock, or (3) such person holds a written order authorizing such payment executed by the owner at the time of or immediately following the consignment of such livestock: *Provided*, That this paragraph shall not apply to deductions made from sales proceeds for the purpose of financing promotion and research activities, including educational activities, relating to livestock, meat, and other products covered by the Act, carried out by producer-sponsored organizations.

(b) The net proceeds arising from the sale of livestock, the ownership of which has been questioned by a market agency duly authorized to inspect brands, marks, and other identifying characteristics of livestock may be paid in accordance with the directions of such brand inspection agency if the laws of the State from which such livestock originated or was shipped to market make provision for payment of the proceeds in the manner directed by the brand inspection agency and if the market agency to which the livestock was consigned, and the consignor or consignors concerned, are unable to establish the ownership of the livestock

within a reasonable period of time, not to exceed 60 days after sale.

(7 U.S.C. 181 et seq.)

[19 FR 4528, July 22, 1954, as amended at 28 FR 7218, July 13, 1963; 44 FR 45361, Aug. 2, 1979]

§ 201.42 Custodial accounts for trust funds.

(a) *Payments for livestock are trust funds.* Each payment that a livestock buyer makes to a market agency selling on commission is a trust fund. Funds deposited in custodial accounts are also trust funds.

(b) *Custodial accounts for shippers' proceeds.* Every market agency engaged in selling livestock on a commission or agency basis shall establish and maintain a separate bank account designated as ''Custodial Account for Shippers' Proceeds,'' or some similar identifying designation, to disclose that the depositor is acting as a fiduciary and that the funds in the account are trust funds.

(c) *Deposits in custodial accounts.* The market agency shall deposit in its custodial account before the close of the next business day (the next day on which banks are customarily open for business whether or not the market agency does business on that day) after livestock is sold (1) the proceeds from the sale of livestock that have been collected, and (2) an amount equal to the proceeds receivable from the sale of livestock that are due from (i) the market agency, (ii) any owner, officer, or employee of the market agency, and (iii) any buyer to whom the market agency has extended credit. The market agency shall thereafter deposit in the custodial account all proceeds collected until the account has been reimbursed in full, and shall, before the close of the seventh day following the sale of livestock, deposit an amount equal to all the remaining proceeds receivable whether or not the proceeds have been collected by the market agency.

(d) *Withdrawals from custodial accounts.* The custodial account for shippers' proceeds shall be drawn on only for payment of (1) the net proceeds to the consignor or shipper, or to any person that the market agency knows is entitled to payment, (2) to pay lawful charges against the consignment of livestock which the market agency shall, in its capacity as agent, be required to pay, and (3) to obtain any sums due the market agency as compensation for its services.

(e) *Accounts and records.* Each market agency shall keep such accounts and records as will disclose at all times the handling of funds in such custodial accounts for shippers' proceeds. Accounts and records must at all times disclose the name of the consignors and the amount due and payable to each from funds in the custodial account for shippers' proceeds.

(f) *Insured banks.* Such custodial accounts for shippers' proceeds must be established and maintained in banks whose deposits are insured by the Federal Deposit Insurance Corporation.

(g) *Certificates of deposit and/or savings accounts.* Funds in a custodial account for shippers' proceeds may be maintained in an interest-bearing savings account and/or invested in one or more certificates of deposit, to the extent that such deposit or investment does not impair the ability of the market agency to meet its obligations to its consignors. The savings account must be properly designated as a party of the custodial account of the market agency in its fiduciary capacity as trustee of the custodial funds and maintained in the same bank as the custodial account. The certificates of deposit, as property of the custodial account, must be issued by the bank in which the custodial account is kept and must be made payable to the market agency in its fiduciary capacity as trustee of the custodial funds.

(Approved by the Office of Management and Budget under control number 0590–0001)

[47 FR 32696, July 29, 1982, as amended at 54 FR 26349, June 23, 1989]

ACCOUNTS AND RECORDS

§ 201.43 Payment and accounting for livestock and live poultry.

(a) *Market agencies to make prompt accounting and transmittal of net proceeds.* Each market agency shall, before the close of the next business day following the sale of any livestock consigned to it for sale, transmit or deliver to the consignor or shipper of the livestock,

or the duly authorized agent, in the absence of any knowledge that any other person, or persons, has any interest in the livestock, the net proceeds received from the sale and a true written account of such sale, showing the number, weight, and price of each kind of animal sold, the date of sale, the commission, yardage, and other lawful charges, and such other facts as may be necessary to complete the account and show fully the true nature of the transaction.

(b) *Prompt payment for livestock and live poultry—terms and conditions.* (1) No packer, market agency, or dealer shall purchase livestock for which payment is made by a draft which is not a check, unless the seller expressly agrees in writing before the transaction that payment may be made by such a draft. (In cases of packers whose average annual purchases exceed $500,000, and market agencies and dealers acting as agents for such packers, see also § 201.200).

(2)(i) No packer, market agency, or dealer purchasing livestock for cash and not on credit, whether for slaughter or not for slaughter, shall mail a check in payment for the livestock unless the check is placed in an envelope with proper first class postage prepaid and properly addressed to the seller or such person as he may direct, in a post office, letter box, or other receptacle regularly used for the deposit of mail for delivery, from which such envelope is scheduled to be collected (A) before the close of the next business day following the purchase of livestock and transfer of possession thereof, or (B) in the case of a purchase on a ''carcass'' or ''grade and yield'' basis, before the close of the first business day following determination of the purchase price.

(ii) No packer, market agency, or dealer purchasing livestock for slaughter, shall mail a check in payment for the livestock unless (A) the check is made available for actual delivery and the seller or his duly authorized representative is not present to receive payment, at the point of transfer of possession of such livestock, on or before the close of the next business day following the purchase of the livestock and transfer of possession thereof, or, in the case of a purchase on a ''carcass'' or ''grade and yield'' basis, on or before the close of the first business day following determination of the purchase price; or unless (B) the seller expressly agrees in writing before the transaction that payment may be made by such mailing of a check.

(3) Any agreement referred to in paragraph (b) (1) or (2) of this section shall be disclosed in the records of any market agency or dealer selling such livestock, and in the records of the packer, market agency, or dealer purchasing such livestock, and retained by such person for such time as is required by any law, or by written notice served on such person by the Administrator, but not less than two calendar years from the date of expiration thereof.

(4) No packer, live poultry dealer, market agency, or livestock dealer shall as a condition to its purchase of livestock or poultry, impose, demand, compel or dictate the terms or manner of payment, or attempt to obtain a payment agreement from a seller through any threat of retaliation or other form of intimidation.

(c) *Purchaser to promptly reimburse agents.* Each packer, market agency, or dealer who utilizes or employs an agent to purchase livestock for him, shall, in transactions where such agent uses his own funds to pay for livestock purchased on order, transmit or deliver to such agent the full amount of the purchase price before the close of the next business day following receipt of notification of the payment of such purchase price, unless otherwise expressly agreed between the parties before the purchase of the livestock. Any such agreement shall be disclosed in the records of the principal and in the records of any market agency or dealer acting as such agent.

(Approved by the Office of Management and Budget under control number 0590–0001)

(7 U.S.C. 228, 7 U.S.C. 222, and 15 U.S.C. 46)

[49 FR 6083, Feb. 17, 1984, as amended at 49 FR 8235, Mar. 6, 1984; 54 FR 16355, Apr. 24, 1989]

§ 201.44 Market agencies to render prompt accounting for purchases on order.

Each market agency shall, promptly following the purchase of livestock on a commission or agency basis, transmit

or deliver to the person for whose account such purchase was made, or the duly authorized agent, a true written account of the purchase showing the number, weight, and price of each kind of animal purchased, the names of the persons from whom purchased, the date of purchase, the commission and other lawful charges, and such other facts as may be necessary to complete the account and show fully the true nature of the transaction.

(Approved by the Office of Management and Budget under control number 0590–0001)

(7 U.S.C. 181 et seq.)

[44 FR 45360, Aug. 2, 1979, as amended at 54 FR 26349, June 23, 1989]

§ 201.45 Market agencies to make records available for inspection by owners, consignors, and purchasers.

Each market agency engaged in the business of selling or buying livestock on a commission or agency basis shall, on request from an owner, consignor, or purchaser, make available copies of bills covering charges paid by such market agency for and on behalf of the owner, consignor, or purchaser which were deducted from the gross proceeds of the sale of livestock or added to the purchase price thereof when accounting for the sale or purchase.

(Approved by the Office of Management and Budget under control number 0590–0001)

(7 U.S.C. 181 et seq.; Pub. L. 96–511, 94 Stat. 2812 (44 U.S.C. 3501 et seq.))

[19 FR 4528, July 22, 1954, as amended at 44 FR 45361, Aug. 2, 1979; 47 FR 746, Jan. 7, 1982; 54 FR 26349, June 23, 1989]

§ 201.49 Requirements regarding scale tickets evidencing weighing of livestock and live poultry.

(a) *Livestock*. When livestock is weighed for the purpose of purchase or sale, a scale ticket shall be issued which shall be serially numbered and used in numerical sequence. Sufficient copies shall be executed to provide a copy to all parties to the transaction. In instances where the weight values are automatically recorded directly on the account of purchase, account of sale or other basic record, this record may serve in lieu of a scale ticket. When livestock is purchased on a carcass weight or carcass grade and weight basis, the hot carcass weights shall be recorded using a scale equipped with a printing device, and such printed weights shall be retained as part of the person or firm's business records to substantiate settlement on each transaction. Scale tickets issued under this section shall show:

(1) The names and location of the agency performing the weighing service,

(2) The date of the weighing;

(3) The name of the buyer and seller or consignor, or a designation by which they may be readily identified;

(4) The number of head;

(5) Kind of livestock;

(6) Actual weight of each draft of livestock; and

(7) The name, initials, or number of the person who weighed the livestock, or if required by State law, the signature of the weigher.

(b) *Poultry*. When live poultry is weighed for the purpose of purchase, sale, acquisition, or settlement by a live poultry dealer, a scale ticket shall be issued which shall show:

(1) The name of the agency performing the weighing service;

(2) The name of the live poultry dealer;

(3) The name and address of the grower, purchaser, or seller;

(4) The name or initials or number of the person who weighed the poultry, or if required by State law, the signature of the weigher;

(5) The location of the scale;

(6) The gross weight, tare weight, and net weight;

(7) The date and time gross weight and tare weight are determined;

(8) The number of poultry weighed;

(9) The weather conditions;

(10) Whether the driver was on or off the truck at the time of weighing; and

(11) The license number of the truck or the truck number; *provided*, that when live poultry is weighed on a scale other than a vehicle scale, the scale ticket need not show the information specified in paragraphs (b)(9)–(11) of this section. Scale tickets issued under this paragraph shall be at least in duplicate form and shall be serially numbered and used in numerical sequence. One copy shall be furnished to the

grower, purchaser, or seller, and one copy shall be furnished to or retained by the live poultry dealer.

(Approved by the Office of Management and Budget under control number 0590–0001)

[61 FR 36281, July 10, 1996]

TRADE PRACTICES

§ 201.53 Persons subject to the Act not to circulate misleading reports about market conditions or prices.

No packer, live poultry dealer, stockyard owner, market agency, or dealer shall knowingly make, issue, or circulate any false or misleading reports, records, or representation concerning the market conditions or the prices or sale of any livestock, meat, or live poultry.

[54 FR 16355, Apr. 24, 1989]

§ 201.55 Purchases, sales, acquisitions, and settlements to be made on actual weights.

When livestock or live poultry is bought, sold, acquired, or settled on a weight basis, settlement therefor shall be on the basis of the actual weight on the scale ticket. If the actual weight used is not obtained on the date and at the place of transfer of possession, this information shall be disclosed with the date and location of the weighing on the accountings, bills, or statement issued. Any adjustment to the actual weights shall be fully and accurately explained on the accountings, bills, or statements issued and records shall be maintained to support such adjustment.

(Approved by the Office of Management and Budget under control number 0590–0001)

[61 FR 36281, July 10, 1996]

§ 201.56 Market agencies selling on commission; purchases from consignment.

(a) *Livestock to be sold openly at highest available bid.* Every market agency engaged in the business of selling livestock on a commission or agency basis shall sell the livestock consigned to it openly, at the highest available bid, and in such a manner as to best promote the interest of each consignor.

(b) *Purchases from consignment.* No market agency engaged in the business of selling livestock on a commission basis shall purchase livestock from consignments, and no such market agency shall permit its owners, officers, agents, employees or any firm in which such market agency or its owners, officers, agents, or employees have an ownership or financial interest to purchase livestock consigned to such market agency, without first offering the livestock for sale in an open and competitive manner to other available buyers, and then only at a price higher than the highest available bid on such livestock.

(c) *Key employees not to purchase livestock out of consignments.* No market agency engaged in selling livestock on commission shall permit its auctioneers, weighmasters, or salesmen to purchase livestock out of consignment for any purpose for their own account, either directly or indirectly.

(d) *Purchase from consignments; disclosure required.* When a market agency purchases consigned livestock or sells consigned livestock to any owner, officer, agent, employee, or any business in which such market agency, owner, officer, agent, or employee has an ownership or financial interest, the market agency shall disclose on the account of sale the name of the buyer and the nature of the relationship existing between the market agency and the buyer.

(Approved by the Office of Management and Budget under control number 0590–0001.)

(7 U.S.C. 228, 7 U.S.C. 222, and 15 U.S.C. 46)

[49 FR 6084, Feb. 17, 1984, as amended at 49 FR 13003, Apr. 2, 1984; 58 FR 52886, Oct. 13, 1993]

§ 201.61 Market agencies selling or purchasing livestock on commission; relationships with dealers.

(a) *Market agencies selling on commission.* No market agency selling consigned livestock shall enter into any agreement, relationship or association with dealers or other buyers which has a tendency to lessen the loyalty of the market agency to its consignors or impair the quality of the market agency's selling services. No market agency selling livestock on commission shall provide clearing services for any independent dealer who purchases livestock from consignment to such market

agency without disclosing, on the account of sale to the consignor, the name of the buyer and the nature of the financial relationship between the buyer and the market agency.

(b) *Market agencies buying on commission.* No market agency purchasing livestock on commission shall enter into any agreement, relationship, or association with dealers or others which will impair the quality of the buying services furnished to its principals. No market agency purchasing livestock on commission shall, in filling orders, purchase livestock from a dealer whose operations it clears or finances without disclosing the relationship between the market agency and dealer to its principals on the accountings furnished to the principals.

(Approved by the Office of Management and Budget under control number 0590–0001)

(7 U.S.C. 228, 7 U.S.C. 222, and 15 U.S.C. 46)

[49 FR 6085, Feb. 17, 1984, as amended at 60 FR 42779, Aug. 17, 1995]

§ 201.67 Packers not to own or finance selling agencies.

No packer subject to the Act shall have an ownership interest in, finance, or participate in the management or operation of a market agency selling livestock on a commission basis, nor shall such a market agency permit a packer to have an ownership interest in, finance, or participate in the management or operation of such market agency.

(7 U.S.C. 228, 228b, 222, 15 U.S.C. 46)

[49 FR 32844, Aug. 17, 1984]

§ 201.69 Furnishing information to competitor buyers.

No packer, dealer, or market agency, in connection with transactions subject to the provisions of the act, shall, in person, or through employed buyers, for the purpose of restricting or limiting competition, manipulating livestock prices, or controlling the movement of livestock, prior to, or during the conduct of, his buying operations: (a) Furnish competitor packers, dealers, market agencies, or their buyers or representatives, similarly engaged in buying livestock, with information concerning his proposed buying operations, such as the species, classes, volume of livestock to be purchased, or prices to be paid; or (b) furnish any other buying information to competitor buyers.

[19 FR 4531, July 22, 1954, as amended at 24 FR 3183, Apr. 24, 1959]

§ 201.70 Restriction or limitation of competition between packers and dealers prohibited.

Each packer and dealer engaged in purchasing livestock, in person or through employed buyers, shall conduct his buying operations in competition with, and independently of, other packers and dealers similarly engaged.

[24 FR 3183, Apr. 24, 1959]

SERVICES

§ 201.71 Scales; accurate weights, repairs, adjustments or replacements after inspection.

(a) All scales used by stockyard owners, market agencies, dealers, packers, and live poultry dealers to weigh livestock, livestock carcasses, or live poultry for the purpose of purchase, sale, acquisition, or settlement shall be installed, maintained, and operated to insure accurate weights. Such scales shall meet applicable requirements contained in the General Code, Scale Code, and Weights Code of the 1996 edition of National Institute of Standards and Technology Handbook 44, ''Specifications, Tolerances, and Other Technical Requirements for Weighing and Measuring Devices,'' which is hereby incorporated by reference. This incorporation by reference was approved by the Director of the Federal Register on January 11, 1989. These materials are incorporated as they exist on the date of approval and a notice of any change in these materials will be published in the FEDERAL REGISTER. This handbook is for sale by the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402. It is also available for inspection at the Office of the Federal Register Information Center, 800 North Capitol Street, NW., suite 700, Washington, DC 20408.

(b) All scales used by stockyard owners, market agencies dealers, packers, and live poultry dealers to weigh livestock or live poultry for the purpose of

purchase, sale, acquisition, or settlement and all scales used for the purchase, sale, acquisition, or settlement of livestock on a carcass weight basis shall be equipped with a printing device which shall be used for recording weight values on a scale ticket or other document used for this purpose.

(c) All vehicle scales used to weigh livestock or live poultry for purposes of purchase, sale, acquisition or settlement shall be of sufficient length and capacity to weigh the entire vehicle as a unit: Provided, That a trailer may be uncoupled from the tractor and weighed as a single unit.

(d) No scales shall be operated or used by any stockyard owner, market agency, dealer, packer, or live poultry dealer to weigh livestock, livestock carcasses or live poultry for purposes of purchase, sale, acquisition or settlement unless it has been found upon test and inspection, as specified in § 201.72 of the regulations, to be in a condition to give accurate weight. If a scale is inspected or tested and found incorrect or inaccurate or if any repairs, adjustments or replacements are made to a scale, it shall not be used until it has been inspected and tested and met all accuracy requirements specified in the regulations.

(7 U.S.C. 222 and 228 and 15 U.S.C. 46)

[49 FR 37374, Sept. 24, 1984, as amended at 61 FR 36282, July 10, 1996]

§ 201.72 Scales; testing of.

(a) Each stockyard owner, market agency, dealer, packer, or live poultry dealer who weighs livestock or live poultry for purposes of purchase, sale, acquisition or settlement, or who weighs livestock carcasses for the purpose of purchase on a carcass weight basis, or who furnishes scales for such purposes, shall cause such scales to be tested by competent persons in accordance with the regulations at least twice during each calendar year at intervals of approximately six months. More frequent testing will be required in cases where the scale does not maintain accuracy between tests.

(b) Each stockyard owner, market agency, dealer, packer or live poultry dealer who weighs livestock, livestock carcasses or live poultry for purposes of purchase, sale, acquisition or settlement shall furnish reports of such tests and inspections on forms prescribed by the Administrator. The stockyard owner, market agency, dealer, packer or live poultry dealer shall retain one copy of the test and inspection report and shall file one copy with the regional office for the region in which the scale is located.

(c) When the scales used for weighing livestock, livestock carcasses or live poultry are tested and inspected by an agency of a State or municipality or other governmental subdivision, the forms ordinarily used by such agency for reporting test and inspection of scales shall be accepted in lieu of the forms prescribed for this purpose by the Administrator if such forms contain substantially the same information.

(Approved by the Office of Management and Budget under control number 0590–0001)

(7 U.S.C. 222 and 228 and 15 U.S.C. 46)

[49 FR 37374, Sept. 24, 1984, as amended at 54 FR 16355, Apr. 24, 1989]

§ 201.73 Scale operators to be qualified.

Stockyard owners, market agencies, dealers, packers and live poultry dealers shall employ qualified persons to operate scales for weighing livestock, livestock carcasses or live poultry for the purpose of purchase, sale acquisition or settlement, and they shall require such employees to operate the scales in accordance with the regulations.

[54 FR 16356, Apr. 24, 1989]

§ 201.73–1 Instructions for weighing livestock.

Stockyard operators, market agencies, dealers, and packers who operate scales on which livestock is weighed in purchase or sales transactions are responsible for the accurate weighing of such livestock. They shall supply copies of the instructions in this section to all persons who perform weighing operations for them and direct such person to familiarize themselves with the instructions and to comply with them at all times. This section shall also apply to any additional weighers

who are employed at any time. Weighers must acknowledge their receipt of these instructions and agree to comply with them, by signing in duplicate, P&SA Form 215 provided by the Packers and Stockyards Programs. One copy of the form is to be filed with a regional office of the Packers and Stockyards Programs and the other retained by the agency employing the weighers.

(a) *Balancing the empty scale.* (1) The empty scale shall be balanced each day before weighing begins, and maintained in correct balance which weighing operations continue. The zero balance shall be verified at intervals of not more than 15 drafts or 15 minutes, whichever is completed first. In addition, the zero balance of the scale shall be verified whenever a weigher resumes weighing duties after an absence from the scale and also whenever a load exceeding half the scale capacity or 10,000 pounds (whichever is less) has been weighed and is followed by a load of less than 1,000 pounds, verification to occur before the weighing of the load of less than 1,000 pounds.

(2) The time at which the empty scale is balanced or its zero balance verified shall be recorded on scale tickets or other permanent records. Balance tickets must be filed with other scale tickets issued on that date.

(3) Before balancing the empty scale, the weigher shall assure himself that the scale gates are closed and that no persons or animals are on the scale platform or in contact with the stock rack, gates, or platform. If the scale is balanced with persons on the scale platform, the zero balance shall be verified whenever there is a change in such persons. When the scale is properly balanced and ready for weighing, the weigher shall so indicate by an appropriate signal.

(4) Weighbeam scales shall be balanced by first seating each poise securely in its zero notch and then moving the balance ball to such position that a correct zero balance is obtained. A scale equipped with a balance indicator is correctly balanced when the pointer comes to rest at zero. A scale not equipped with a balance indicator is correctly balanced if the weighbeam, when released at the top or bottom of the trig loop, swings freely in the trig loop in such manner that it will come to rest at the center of the trig loop.

(5) Dial scales shall be balanced by releasing all drop weights and operating the balance ball or other balancing device to obtain a correct zero balance. The indicator must visually indicate zero on the dial and the ticket printer must record a correct zero balance.

(6) Electronic digital scales should be properly warmed up before use. In most cases, it is advisable to leave the electric power on continuously. The zero load balance shall be verified by recording the zero balance on a scale ticket. The main indicating element and the remote visual weight display shall indicate zero when the balance is verified. The proper procedure for balancing this type of scale will vary according to the manufacturer. Refer to the operator's manual for specific instructions.

(b) *Weighing the load.* (1) Before weighing a draft of livestock, the weigher shall assure himself that the entire draft is on the scale platform with the gates closed and that no persons or animals off the scale are in contact with the platform, gates, or stock rack.

(i) On a weighbeam scale with a balance indicator, the weight of a draft shall be determined by seating the poises at such positions that the pointer will come to rest within the central target area or within ¼ (0.25) inch of the zero mark.

(ii) On a weighbeam scale without a balance indicator, the weight shall be determined by seating the poises at such positions that the weighbeam, when released from the top or bottom of the trig loop, will swing freely and come to rest at the approximate center of the trig loop.

(iii) On a dial scale, the weight is indicated automatically when the indicator moves around the dial face and comes to rest.

(iv) On an electronic digital scale, the weight of a draft is indicated automatically when the weight value indicated stabilized.

(2) The correct weight of a livestock draft is the value in pounds indicated

when a correct load balance is obtained. The weigher should always concentrate his attention upon the beam tip, balance indicator or dial indicator while weighing and not concern himself with reading the visible weight indications until correct load balance is obtained. On electronic digital scales, the weigher should concentrate on the pulsing or flickering of weight values to assure that the unit indicates a stable weight before activating the print button.

(c) *Recording the weight.* (1) The weight of each draft shall be recorded immediately after the load balance is obtained and before any poises are moved or the load is removed from the scale platform. The weigher shall make certain that the printed weight record agrees with the weight value visually indicated when correct load balance is obtained. He shall also assure himself that the printed weight value is distinct and legible.

(2) The weight printing device on a scale shall be operated only to produce a printed or impressed record of the weight value while the livestock load is on the scale and correctly balanced. If the weight value is not printed clearly and correctly, the ticket shall be marked void and a new one printed before the livestock is removed from the scale.

(d) *Scale tickets.* (1) Scale tickets used to record the weight values of livestock in purchase or sales transactions shall be used, at any given scale, in the order of their consecutive serial numbers unless otherwise marked to show the order of their use. All tickets shall show the date of the weighing and the name or initials of the weigher performing the weighing service.

(2) No scale tickets shall be destroyed or otherwise disposed of because they are soiled, damaged, incorrectly executed, or voided. They shall be preserved and filed to comprise a complete serial number sequence.

(3) No scale ticket shall be used to record the weight of a livestock draft for ''catch-weight,'' inventory, transportation charge or other nonsale purposes unless the ticket is clearly marked to show why the weight was determined.

(4) When weight values are recorded by means of automatic recording equipment directly on the accounts of sale or other basic records, such record may serve in lieu of a scale ticket.

(e) *Weigher's responsibilities.* (1) The primary responsibility of a weigher is to determine and accurately record the weight of livestock drafts without prejudice or favor to any person or agency and without regard for livestock ownership, price, condition, fill, shrink, or other considerations. A weigher shall not permit the representations or attitudes of any persons or agencies to influence his judgment or action in performing his duties.

(2) Unused scale tickets, or those which are partially executed but without a printed weight value, shall not be left exposed or accessible to unauthorized personnel. All such tickets shall be kept under lock when the weigher is not at his duty station.

(3) Accurate weighing and correct weight recording require that a weigher shall not permit his operations to be hurried to the extent that inaccurate weights or incorrect weight records may result. Each draft of livestock must be weighed accurately to the nearest minimum weight value that can be indicated or recorded. Manual operations connected with balancing, weighing, and recording shall be performed with the care necessary to prevent damage to the accurately machined and adjusted parts of weighbeams, poises, and printing devices.

(4) Livestock owners, buyers, or others having legitimate interest in a livestock draft must be permitted to observe the balancing, weighing, and recording procedures, and a weigher shall not deny them that right or withhold from them any information pertaining to the weight of that draft. He shall check the zero balance of the scale or reweigh a draft of livestock when requested by such parties.

(f) *Sensitivity control.* (1) A scale must be sensitive in response to platform loading if it is to yield accurate weights. It, therefore, is the duty of a weigher to assure himself that interferences, weighbeam friction, or other factors do not impair sensitivity. He should satisfy himself, at least twice

each day, that the scale is sufficiently sensitive, and if the following requirements are not met, he should report the facts to his superior or employer immediately.

(2) A weighbeam scale with a balance indicator is sufficiently sensitive if, when the scale is balanced with the pointer at the center of the target, movement of the fractional poise one graduation will change the indicator rest point ¼ inch (0.25) or the width of the central target area, whichever is greater.

(3) A weighbeam scale without a balance indicator is sufficiently sensitive if, when the scale is balanced with the weighbeam at the center of the trig loop, movement of the fractional poise two graduations will cause the weighbeam to come to rest at the bottom of the trig loop.

(4) Adjustable damping devices are incorporated in balance indicators and in dial scales to absorb the effects of load impact and assist in bringing the indicator to rest. The weigher should be familiar with the location and adjustment of these damping devices and should keep them adjusted so that the pointer will oscillate freely through at least one complete cycle of movement before coming to rest at its original position.

(5) Friction at weighbeam bearings may reduce the sensitivity of the scale, cause sluggish weighbeam action and affect weighing accuracy. A weigher should inspect the weighbeam assembly daily to make certain that there is clearance between the weighbeam and the pivot bearings.

(6) Interferences or binding of the scale platform, stock rack, gates or other ''live'' parts of the scale are common causes of weighing inaccuracy. A weigher should satisfy himself, at the beginning of each weighing period, that all such ''live'' parts have sufficient clearance to prevent interferences.

(g) *General precautions.* (1) The poises of weighbeam scales are carefully adjusted and sealed to a definite weight at the factory and any change in that weight seriously affects weighing accuracy. A weigher, therefore, should be certain that poise parts do not become broken, loose or lost and that no material is added to a poise. Balancing or weighing shall not be performed while a scale ticket is in the slot of a weighbeam poise.

(2) Stops are provided on scale weighbeams to prevent movement of poises back of the zero graduation when balancing or weighing. When the stops become worn or broken and allow a poise to be set behind the zero position, this condition should be reported and corrected without delay.

(3) Foreign objects or loose material in the form of nuts, bolts, washers or other material on any part of the weighbeam assembly, including the counter-balance hanger or counter-balance weights, are potential sources of weighing error. Loose balancing material must be enclosed in the shot cup of the counter-balance hanger, and counter-balance weights must not be of the slotted type which can readily be removed.

(4) Whenever for any reason a weigher has reason to believe that a scale is not functioning properly or not yielding correct weight values, he shall discontinue weighing, report the facts to the parties responsible for scale maintenance, and request inspection, test, or repair of the scale.

(5) When a scale has been adjusted, modified, or repaired in any manner which may affect the accuracy of weighing or weight recording, the weigher shall not use the scale until it has been tested and inspected and found to be accurate.

(6) Count-off men, gate men, or others assigned to open or close scale gates or to drive livestock on or off the scale, shall perform those functions as directed by the weigher's signals or spoken instructions. They shall prevent persons or animals off the scale from being in contact with any part of the scale platform, stock rack, or gates while the scale is being balanced or used for weighing. They shall not open gates or remove livestock from the scale until directed by the weigher.

(Approved by the Office of Management and Budget under control number 0590–0001)

(7 U.S.C. 222 and 228 and 15 U.S.C. 46)

[39 FR 40277, Nov. 15, 1974, as amended at 49 FR 39516, Oct. 9, 1984; 61 FR 36282, July 10, 1996]

§ 201.76 Reweighing.

Stockyard owners, market agencies, dealers, packers and live poultry dealers shall reweigh livestock, livestock carcasses or live poultry on request of any authorized representative of the Secretary.

[54 FR 16356, Apr. 24, 1989]

§ 201.81 Suspended registrants.

No stockyard owner, packer, market agency, or dealer shall employ any person who has been suspended as a registrant to perform activities in connection with livestock transactions subject to the jurisdiction of the Secretary under the Act during the period of such suspension: *Provided,* That the provisions of this section shall not be construed to prohibit the employment of any person who has been suspended as a registrant until such time as the person demonstrates solvency or obtains the bond required under the Act and regulations. No such person shall be employed, however, until after the expiration of any specified period of suspension contained in the order of suspension.

(7 U.S.C. 222 and 228 and 15 U.S.C. 46)

[49 FR 37374, Sept. 24, 1984]

§ 201.82 Care and promptness in weighing and handling livestock and live poultry.

(a) Each stockyard owner, market agency, dealer, packer and live poultry dealer shall exercise reasonable care and promptness with respect to loading, transporting, holding, yarding, feeding, watering, weighing or otherwise handling livestock or live poultry to prevent waste of feed, shrinkage, injury, death or other avoidable loss.

(b) Whenever live poultry is obtained under a poultry growing arrangement, the poultry shall be transported promptly after loading and the gross weight for grower payment purposes shall be determined immediately upon arrival at the processing plant, holding yard, or other scale normally used for such purpose.

[54 FR 16356, Apr. 24, 1989; 54 FR 18713, May 2, 1989]

INSPECTION OF BRANDS

§ 201.86 Brand inspection: Application for authorization, registration and filing of schedules, reciprocal arrangements, and maintenance of identity of consignments.

(a) *Application for authorization.* Any department or agency or duly-organized livestock association of any State in which branding or marking of livestock as a means of establishing ownership prevails by custom or statute, which desires to obtain an authorization to charge and collect a fee for the inspection of brands, marks, and other identifying characteristics of livestock, as provided in section 317 of the Act, shall file with the Administrator an application in writing for such authorization. In case two or more applications for authorization to collect a fee for the inspection of brands, marks, and other identifying characteristics of livestock are received from the same State, a hearing will be held to determine which applicant is best qualified.

(b) *Registration and filing of schedules.* Upon the issuance of an authorization to an agency or an association, said agency or association shall register as a market agency in accordance with the provisions of §201.10, except that no bond need be filed or maintained, and shall file a schedule of its rates and charges for performing the service in the manner and form prescribed by §201.17.

(c) *Reciprocal arrangements.* Any authorized agency or association may make arrangements with an association or associations in the same or in another State, where branding or marking livestock prevails by custom or statute, to perform inspection service at stockyards on such terms and conditions as may be approved by the Administrator: *Provided,* That such arrangements will tend to further the purpose of the Act and will not result in duplication of charges or services.

(d) *Maintenance of identity of consignments.* All persons having custody at the stockyard of livestock subject to inspection shall preserve the identity of the consignment until inspection has been completed by the authorized inspection agency. Agencies authorized

to conduct such inspection shall perform the work as soon after receipt of the livestock as practicable and as rapidly as is reasonably possible in order to prevent delay in marketing, shrinkage in weight, or other avoidable losses.

(Approved by the Office of Management and Budget under control number 0590–0001)
(7 U.S.C. 203, 204, 207, 217a, 222 and 228)

[49 FR 33005, Aug. 20, 1984]

GENERAL

§201.94 Information as to business; furnishing of by packers, live poultry dealers, stockyard owners, market agencies, and dealers.

Each packer, live poultry dealer, stockyard owner, market agency, and dealer, upon proper request, shall give to the Secretary or his duly authorized representatives in writing or otherwise, and under oath or affirmation if requested by such representatives, any information concerning the business of the packer, live poultry dealer, stockyard owner, market agency, or dealer which may be required in order to carry out the provisions of the Act and regulations in this part within such reasonable time as may be specified in the request for such information.

(Approved by the Office of Management and Budget under control number 0590–0001)

[54 FR 16356, Apr. 24, 1989, as amended at 54 FR 26349, June 23, 1989]

§201.95 Inspection of business records and facilities.

Each stockyard owner, market agency, dealer, packer, and live poultry dealer, upon proper request, shall permit authorized representatives of the Secretary to enter its place of business during normal business hours and to examine records pertaining to its business subject to the Act, to make copies thereof and to inspect the facilities of such persons subject to the Act. Reasonable accommodations shall be made available to authorized representatives of the Secretary by the stockyard owner, market agency, dealer, packer, or live poultry dealer for such examination of records and inspection of facilities.

(Approved by the Office of Management and Budget under control number 0590–0001)

[54 FR 16356, Apr. 24, 1989, as amended at 54 FR 26349, June 23, 1989]

§201.96 Unauthorized disclosure of business information prohibited.

No agent or employee of the United States shall, without the consent of the stockyard owner, market agency, dealer, packer or live poultry dealer concerned, divulge or make known in any manner, any facts or information regarding the business of such person acquired through any examination or inspection of the business or records of the stockyard owner, market agency, dealer, packer or live poultry dealer, or through any information given by the stockyard owner, market agency, dealer, packer, or live poultry dealer pursuant to the Act and regulations, except to such other agents or employees of the United States as may be required to have such knowledge in the regular course of their official duties or except insofar as they may be directed by the Administrator or by a court of competent jurisdiction, or except as they may be otherwise required by law.

[54 FR 16356, Apr. 24, 1989]

§201.97 Annual reports.

Every packer, live poultry dealer, stockyard owner, market agency, and dealer (except a packer buyer registered to purchase livestock for slaughter only) shall file annually with the Administration a report on prescribed forms not later than April 15 following the calendar year end or, if the records are kept on a fiscal year basis, not later than 90 days after the close of his fiscal year. The Administrator on good cause shown, or on his own motion, may grant a reasonable extension of the filing date or may waive the filing of such reports in particular cases.

(Approved by the Office of Management and Budget under Control No. 0590–0001)

[54 FR 16356, Apr. 24, 1989]

§ 201.98 Packers and dealers not to charge, demand, or collect commission, yardage, or other service charges.

No packer or dealer shall, in connection with the purchase of livestock in commerce, charge, demand, or collect from the seller of the livestock any compensation in the form of commission, yardage, or other service charge unless the charge is for services mandated by law or statute and is not inconsistent with the provisions of the Act.

[61 FR 36282, July 10, 1996]

§ 201.99 Purchase of livestock by packers on a carcass grade, carcass weight, or carcass grade and weight basis.

(a) Each packer purchasing livestock on a carcass grade, carcass weight, or carcass grade and weight basis shall, prior to such purchase, make known to the seller, or to his duly authorized agent, the details of the purchase contract. Such details shall include, when applicable, expected date and place of slaughter, carcass price, condemnation terms, description of the carcass trim, grading to be used, accounting, and any special conditions.

(b) Each packer purchasing livestock on a carcass grade, carcass weight, or carcass grade and weight basis, shall maintain the identity of each seller's livestock and the carcasses therefrom and shall, after determination of the amount of the purchase price, transmit or deliver to the seller, or his duly authorized agent, a true written account of such purchase showing the number, weight, and price of the carcasses of each grade (identifying the grade) and of the ungraded carcasses, an explanation of any condemnations, and any other information affecting final accounting. Packers purchasing livestock on such a basis shall maintain sufficient records to substantiate the settlement of each transaction.

(c) When livestock are purchased by a packer on a carcass weight or carcass grade and weight basis, purchase and settlement therefor shall be on the basis of carcass price. This paragraph does not apply to purchases of livestock by a packer on a guaranteed yield basis.

(d) Settlement and final payment for livestock purchased by a packer on a carcass weight or carcass grade and weight basis shall be on actual hot weights. The hooks, rollers, gambrels or other similar equipment used at a packing establishment in connection with the weighing of carcasses of the same species of livestock shall be uniform in weight. The tare shall include only the weight of such equipment.

(e) Settlement and final payment for livestock purchased by a packer on a USDA carcass grade shall be on an official (final—not preliminary) grade. If settlement and final payment are based upon any grades other than official USDA grades, such other grades shall be set forth in detailed written specifications which shall be made available to the seller or his duly authorized agent. For purposes of settlement and final payment for livestock purchased on a grade or grade and weight basis, carcasses shall be final graded before the close of the second business day following the day the livestock are slaughtered.

(Approved by the Office of Management and Budget under control number 0590–0001)

(Pub. L. 96–511, 94 Stat. 2812 (44 U.S.C. 3501 et seq.); 7 U.S.C. 222 and 228 and 15 U.S.C. 46)

[33 FR 2762, Feb. 9, 1968, as amended at 33 FR 5401, Apr. 5, 1968; 49 FR 37375, Sept. 24, 1984; 54 FR 37094, Sept. 7, 1989]

POULTRY—PACKERS AND LIVE POULTRY DEALERS

§ 201.100 Records to be furnished poultry growers and sellers.

(a) *Contracts; contents.* Each live poultry dealer who enters into a growout (feeding) contract with a poultry grower shall furnish the grower a true written copy of the contract, which shall clearly specify:

(1) The duration of the contract and conditions for the termination of the contract by each of the parties; and

(2) All terms relating to the payment to be made to the poultry grower, including among others, where applicable, the following:

(i) The party liable for condemnations, including those resulting from plant errors;

(ii) The method for figuring feed conversion ratios;

(iii) The formula or method used to convert condemnations to live weight;

(iv) The per unit charges for feed and other inputs furnished by each party; and

(v) The factors to be used when grouping or ranking poultry growers.

(b) *Settlement sheets; contents; supporting documents.* Each live poultry dealer, who acquires poultry pursuant to a contract with a poultry grower, shall prepare a true and accurate settlement sheet (final accounting) and furnish a copy thereof to the poultry grower at the time of settlement. The settlement sheet shall contain all information necessary to compute the payment due the poultry grower. For all such arrangements in which the weight of birds affects payment, the settlement sheet shall show, among other things, the number of live birds marketed, the total weight and the average weight of the birds, and the payment per pound.

(c) *Condemnation and grading certificates.* Each live poultry dealer, who acquires poultry pursuant to a contract with a poultry grower which provides that official U.S. Department of Agriculture condemnations or grades, or both, are a consideration affecting payment to the grower, shall obtain an official U.S. Department of Agriculture condemnation or grading certificate, or both, for the poultry and furnish a copy thereof to the poultry grower prior to or at the time of settlement.

(d) *Grouping or ranking sheets.* Where the contract between the live poultry dealer and the poultry grower provides for payment to the poultry grower based upon a grouping or ranking of poultry growers delivering poultry during a specified period, the live poultry dealer shall furnish the poultry grower, at the time of settlement, a copy of a grouping or ranking sheet which shows the grower's precise position in the grouping or ranking sheet for that period. The grouping or ranking sheet need not show the names of other growers, but shall show the actual figures upon which the grouping or ranking is based for each grower grouped or ranked during the specified period.

(e) *Live poultry purchases.* Each live poultry dealer who purchases live poultry shall prepare and deliver a purchase invoice to the seller at time of settlement. The purchase invoice shall contain all information necessary to compute payment due the seller. When U.S. Department of Agriculture condemnations or U.S. Department of Agriculture grades, or both, of poultry purchased affect final payment, copies of official U.S. Department of Agriculture condemnation certificates or grading certificates, or both, shall be furnished to the seller at or prior to the time of settlement.

(Approved by the Office of Management and Budget under control number 0590–0001)

[54 FR 16356, Apr. 24, 1989; 54 FR 18713, May 2, 1989]

§ 201.108–1 Instructions for weighing live poultry.

Live poultry dealers who operate scales on which live poultry is weighed for purposes of purchase, sale, acquisition, or settlement are responsible for the accurate weighing of such poultry. They shall supply copies of the instructions in this section to all persons who perform weighing operations for them and direct such persons to familiarize themselves with the instructions and to comply with them at all times. This section shall also apply to any additional weighers who are employed at any time. Weighers must acknowledge their receipt of these instructions and agree to comply with them by signing in duplicate, a form provided by the Packers and Stockyards Programs, Grain Inspection, Packers and Stockyards Administration. One copy of this form is to be filed with a regional office of the Packers and Stockyards Programs, Grain Inspection, Packers and Stockyards Administration and the other copy retained by the Agency employing the weighers. The following instructions shall be applicable to the weighing of live poultry on all scales, except that paragraph (c)(1) of this section is only applicable to the weighing of live poultry on vehicle scales.

(a) *Balancing the empty scale.* (1) The scale shall be maintained in zero balance at all times. The empty scale shall be balanced each day before weighing begins and thereafter its zero balance shall be verified before any poultry is weighed. In addition, the

zero balance of the scale shall be verified whenever a weigher resumes weighing duties after an absence from the scale.

(2) Before balancing the empty scale, the weigher shall notify parties outside the scale house of his/her intention and shall be assured that no persons or vehicles are in contact with the platform. When the empty scale is balanced and ready for weighing, the weigher shall so indicate by appropriate signal.

(3) Weighbeam scales shall be balanced by first seating each poise securely in its zero notch and then moving the balance ball to such position that a correct zero balance is obtained. A scale equipped with a balance indicator is correctly balanced when the indicator comes to rest in the center of the target area. A scale not equipped with a balance indicator is correctly balanced if the weighbeam, when released at the top or bottom of the trig loop, swings freely in the trig loop in such manner that it will come to rest at the center of the trig loop.

(4) Dial scales shall be balanced by releasing all drop weights and operating the balance ball or other balancing device to obtain a correct zero balance. The indicator must visibly indicate zero on the dial reading face and the ticket printer must record a correct zero balance. ''Balance tickets'' shall be filed with other scale tickets issued on that date.

(5) Electronic digital scales should be properly warmed up before use. In most cases it is advisable to leave the electric power on continuously. The zero balance shall be verified by recording the zero balance on a scale ticket. The main indicating element and the remote visual weight display shall indicate zero when the balance is verified. The proper procedure for balancing this type of scale will vary according to the manufacturer. Refer to the operator's manual for specific instructions.

(6) A balance ball or other balancing device shall be operated only when balancing the empty scale and shall not be operated at any time or for any other purpose.

(7) The time at which the empty scale is balanced or its zero balance verified shall be marked on scale tickets or other permanent records.

(b) *Sensitivity control.* (1) A scale must be sensitive in response to platform loading if it is to yield accurate weights. It, therefore, is the duty of a weigher to assure himself that interferences, weighbeam friction, or other factors do not impair sensitivity. He shall satisfy himself, at least twice each day, that the scale is sufficiently sensitive, and, if the following requirements are not met, he must report the facts to his superior or employer immediately.

(2) A weighbeam scale with a balance indicator is sufficiently sensitive if, when the scale is balanced with the indicator at the center of the target, movement of the fractional poise one graduation will change the indicator rest point (¼) inch (0.25) or the width of the central target area, whichever is greater.

(3) A weighbeam scale without a balance indicator is sufficiently sensitive if, when the scale is balanced with the weighbeam at the center of the trig loop, movement of the fractional poise two graduations will cause the weighbeam to come to rest at the bottom of the trig loop.

(4) Adjustable damping devices are incorporated in balance indicators and in dial scales to absorb the effects of load impact and to bring the indicator to rest. The weigher must be familiar with the location and adjustment of these damping devices and keep them so adjusted that when the indicator is displaced from a position of rest, it will oscillate freely through at least one complete cycle of movement before coming to rest at its original position.

(5) Friction at weighbeam bearings may reduce the sensitiveness of the scale, cause sluggish weighbeam action and affect weighing accuracy. A weigher must inspect the weighbeam assembly daily to make certain that there is clearance between the weighbeam and the pivot bearings.

(6) Interferences or binding of the scale platform, or other ''live'' parts of the scale, are common causes of weighing inaccuracy. A weigher shall satisfy himself, at the beginning of each weighing period, that all such ''live'' parts have sufficient clearance to prevent interference.

(c) *Weighing the load.* (1) Vehicle scales used to weigh live poultry shall be of sufficient length and capacity to weigh an entire vehicle as a unit; provided, that a trailer may be uncoupled from a tractor and weighed as a single unit. Before weighing a vehicle, either coupled or uncoupled, the weigher shall be assured that the entire vehicle is on the scale platform and that no persons are on the scale platform.

(i) On a weighbeam scale with a balance indicator the weight of a vehicle shall be determined by moving the poises to such positions that the indicator will come to rest within the central target area.

(ii) On a weighbeam scale without a balance indicator the weight shall be determined by moving the poises to such positions that the weighbeam, when released from the top or bottom of the trig loop, will swing freely in the trig loop and come to rest at the approximate center of the trig loop.

(iii) On a dial scale the weight of a vehicle is indicated automatically when the indicator revolves around the dial face and comes to rest.

(iv) On an electronic digital scale the weight of a vehicle is indicated automatically when the weight value indicated is stable.

(2) The correct weight is the value in pounds indicated by a weighbeam, dial or digital scale when a stable load balance is obtained. In any case, the weigher should concentrate on the beam tip, balance indicator, dial or digital indicator while weighing and not be concerned with reading the visible weight indications until a stable load balance is obtained. On electronic digital scales, the weigher should concentrate on the pulsing or flickering of weight values to assure that the unit indicates a stable weight before activating the print button.

(d) *Recording the weight.* (1) The gross or tare weight shall be recorded immediately after the load balance is obtained and before any poises are moved or load removed from the scale platform. The weigher shall make certain that the printed weight record agrees with the weight value visibly indicated on the weighbeam, dial or digital indicator when correct load balance is obtained. The weigher shall also assure that the printed weight value is sufficiently distinct and legible.

(2) The weight printing device on a scale shall be operated only to produce a printed or impressed record of the weight while the load is on the scale and correctly balanced. If the weight is not printed clearly and correctly, the ticket shall be marked void and a new one printed before the load is removed from the scale.

(e) *Weigher's responsibilities.* (1) The primary responsibility of a weigher is to determine and record the true weight of live poultry without prejudice or favor to any person or agency and without regard for poultry ownership, price, condition, shrink, or other considerations. A weigher shall not permit the representations or attitudes of any persons or agencies to influence their judgment or action in performing his/her duties.

(2) Scale tickets issued shall be serially numbered and used in numerical sequence. Sufficient copies shall be executed to provide a copy to all parties to the transaction. Unused scale tickets or those which are partially executed shall not be left exposed or accessible to other parties. All such tickets shall be kept under lock when the weigher is not at his duty station.

(3) Accurate weighing and weight recording require that a weigher shall not permit operations to be hurried to the extent that inaccurate weights or incorrect weight records may result. The gross, tare and net weights must be determined accurately to the nearest minimum graduation. Manual operations connected with balancing, weighing, and recording shall be performed with the care necessary to prevent damage to the accurately machined and adjusted parts of weighbeams, poises, and printing devices. Rough handling of these parts shall be avoided.

(4) Poultry growers, live poultry dealers, sellers, or others having legitimate interest in a load of poultry are entitled to observe the balancing, weighing, and recording procedures. A weigher shall not deny such persons that right or withhold from them any information pertaining to the weight. The weigher shall check the zero balance of the scale or reweigh a load of

poultry when requested by such parties or duly authorized representatives of the administrator.

(f) *General precautions.* (1) The poises of weighbeam scales are carefully adjusted and sealed to a definite weight at the factory and any change in that weight seriously affects weighing accuracy. A weigher, therefore, shall observe if poise parts are broken, loose or lost or if material is added to a poise and shall report any such condition to his/her superior or employer. Balancing or weighing shall not be performed while a scale ticket is in the slot of a weighbeam poise.

(2) Stops are provided on scale weighbeams to prevent movement of poises back of the zero graduation when balancing or weighing. When the stops become worn or broken and allow a poise to be set behind the zero position, this condition must be reported by the weigher to their superior or employer and corrected without delay.

(3) Motion detection circuits are a part of electronic scales. They are designed to prevent the printing of weight values if the load has not stabilized within prescribed limits. The weighmaster's duty is to print the actual weight of the load within these limits. This requires printing the actual weight of the load, not one of the other weights that may be within the motion detection limits.

(4) Foreign objects or loose material in the form of nuts, bolts, washers, or other material on any part of the weighbeam assembly, including the counter-balance hanger or counter-balance weights, are potential sources of weighing error. Loose balancing material must be enclosed in the shot cup of the counter-balance hanger and counter-balance weights must not be of the slotted type which can readily be removed.

(5) Whenever, for any reason, a weigher has reason to believe that a scale is not functioning properly or not yielding correct weight values, the weigher shall discontinue weighing, report the facts to the parties responsible for scale maintenance and request inspection, test or repair of the scale.

(6) When a scale has been adjusted, modified, or repaired in any manner which can affect the accuracy of weighing or weight recording, the weigher shall not use the scale until it has been tested and inspected and found to be accurate.

[37 FR 4955, Mar. 8, 1972, as amended at 61 FR 36282, July 10, 1996]

§ 201.200 Sale of livestock to a packer on credit.

(a) No packer whose average annual purchases of livestock exceed $500,000 shall purchase livestock on credit, and no dealer or market agency acting as an agent for such a packer shall purchase livestock on credit, unless: (1) Before purchasing such livestock the packer obtains from the seller a written acknowledgment as follows:

On this date I am entering into a written agreement for the sale of livestock on credit to _____, a packer, and I understand that in doing so I will have no rights under the trust provisions of section 206 of the Packers and Stockyards Act, 1921, as amended (7 U.S.C. 196, Pub. L. 94–410), with respect to any such credit sale. The written agreement for such selling on credit

Covers a single sale.
Provides that it will remain in effect until (date).
Provides that it will remain in effect until canceled in writing by either party.
(Omit the provisions not applicable.)
Date _____
Signature _____

(2) Such packer retains such acknowledgment, together with all other documents, if any, setting forth the terms of such credit sales on which the purchaser and seller have agreed, and such dealer or market agency retains a copy thereof, in his records for such time as is required by any law, or by written notice served on such person by the Administrator, but not less than two calendar years from the date of expiration of the written agreement referred to in such acknowledgment; and

(3) Such seller receives a copy of such acknowledgment.

(b) Purchasing livestock for which payment is to be made by a draft which is not a check, shall constitute purchasing such livestock on credit within the meaning of paragraph (a) of this section. (See also § 201.43(b)(1).)

(c) The provisions of this section shall not be construed to permit any

transaction prohibited by §201.61(a) relating to financing by market agencies selling on a commission basis.

(Approved by the Office of Management and Budget under control number 0590–0001)

(Sec. 401, 42 Stat. 168 (7 U.S.C. 221); sec. 409, as added by sec. 7, 90 Stat. 1250 (7 U.S.C 228b); 7 CFR 2.17, 2.54; 42 FR 35625; Pub. L. 96–511, 94 Stat. 2812 (44 U.S.C. 3501 et seq.); 7 U.S.C. 222 and 228 and 15 U.S.C. 46)

[42 FR 49929, Sept. 8, 1977, as amended at 49 FR 39516, Oct. 9, 1984; 54 FR 37094, Sept. 7, 1989]

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

RULES OF PRACTICE APPLICABLE TO RATE PROCEEDINGS

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202.118 Rule 18: Presiding officer.
202.119 Rule 19: Fees of witnesses.
202.120 Rule 20: Official notice.
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202.122 Rule 22: Ex parte communications.
202.123 Rule 23: Action by Secretary.

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

SOURCE: 43 FR 30510, July 14, 1978, unless otherwise noted.

RULES OF PRACTICE APPLICABLE TO RATE PROCEEDINGS

SOURCE: Sections 202.1 through 202.7 appear at 53 FR 51236, Dec. 21, 1988, unless otherwise noted.

§202.1 Applicability of other rules.

The Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes, 7 CFR part 1, subpart H, are applicable to all rate proceedings under Sections 304, 305, 306, 307 and 310 of the Packers and Stockyards Act, 1921, as amended, 7 U.S.C. 205, 206, 207, 208 and 211, except insofar as those Rules are in conflict with any provision herein.

§202.2 Definitions.

As used in these rules:

(a) *Rate proceeding* means a proceeding involving the determination and prescription of any rate or charge made or proposed to be made for any stockyard service furnished at a stockyard by a stockyard owner or market agency, or a proceeding involving any rule, regulation or practice affecting any such rate or charge; and

(b) *Administrator* means the Administrator of the Grain Inspection, Packers and Stockyards Administration (Packers and Stockyards Programs) (GIPSA), or any officer or employee of GIPSA to whom authority has heretofore been delegated, or to whom authority may hereafter be delegated, to act for the Administrator.

§202.3 Institution of proceedings.

(a) *Informal complaint.* Any interested person desiring to complain of the lawfulness of any rate or charge made or proposed to be made for any stockyard service furnished at a stockyard by a stockyard owner or market agency, or rule, regulation or practice affecting any such rate or charge, may file an informal complaint with the Administrator.

(b) *Investigation.* If there appears to be any reasonable ground for doing so, the Administrator will investigate the

matter complained of. If the Administrator reasonably believes that there are not sufficient facts to form the basis for further proceeding, the matter may be dropped. If it is dropped, the person filing the informal complaint will be informed.

(c) *Status of person filing.* A person filing an informal complaint will be a party to a rate proceeding if the Administrator files such person's informal complaint as a formal complaint, or if the Judge permits such person to intervene upon written application.

(d) *Formal complaint.* A rate proceeding may be instituted only upon filing of a formal complaint by the Administrator. A formal complaint may be filed on the initiative of the Administrator, or on the basis of an informal complaint, or by filing the informal complaint as a formal complaint. A formal complaint filed by the Administrator, or a summary thereof, will be published in the FEDERAL REGISTER, together with notice of the time by which, and the place where, any interested person may file a written request to be heard.

§ 202.4 Answer and reply.

Respondent is not required to file an answer. If an answer is filed, complainant is not required to file a reply.

§ 202.5 Hearing.

The hearing will be oral unless all parties waive oral hearing. It will be written if not oral. Notice of the date, time and place of oral hearing, or of the date and place for filing of written submissions in a written hearing, will be served on the Administrator and the respondent, and on such other persons as have requested in writing to be heard.

§ 202.6 Taking no position on the merits.

The proceeding may be instituted by filing of the informal complaint as a formal complaint, and the Administrator may take no position on the merits of the case.

§ 202.7 Modification or vacation of final order.

(a) *Informal petition.* Any interested person may file an informal petition to modify or vacate a final order at any time. Any such petition must be filed with the Administrator, be based on matters arising after the issuance of the final order, and set forth such matters, and the reasons or conditions relied on, with such particularity as is practicable. Any such informal petition will be handled as otherwise provided for an informal complaint.

(b) *Formal motion.* A final order may be modified or vacated at any time only upon filing of a formal motion by the Administrator. Such a motion may be filed on the initiative of the Administrator, on the basis of an informal petition, or by filing of an informal petition as a formal motion.

(c) *Publication.* If the modification or vacation sought would involve an increase of a rate or charge lawfully prescribed by the Secretary, or involve a rate or charge in addition to what is specified in the final order, or involve a regulation or practice so affecting such a rate or charge, the formal motion, or a summary thereof, will be published in the FEDERAL REGISTER, together with notice of the place, and the time by which, any interested person may file a written request to be heard.

(d) *Proceedings.* Proceedings upon such a formal motion will be as otherwise provided for a formal complaint.

RULES OF PRACTICE APPLICABLE TO REPARATION PROCEEDINGS

§ 202.101 Rule 1: Meaning of words.

In these rules, words in the singular form shall be deemed to import the plural, and vice versa, as the case may demand.

§ 202.102 Rule 2: Definitions.

Terms defined in the Act shall mean the same in these rules as in the Act. In addition, and except as may be provided otherwise in these rules:

Act means the Packers and Stockyards Act, 1921, and legislation supplementary thereto and amendatory thereof, 7 U.S.C. 181 et seq.;

Agency means those divisions and offices of the Grain Inspection, Packers and Stockyards Administration (Packers and Stockyards Programs) of the Department which are charged with administration of the Act;

Agency Head means the Administrator, Grain Inspection, Packers and Stockyards Administration (Packers and Stockyards Programs) of the Department, or any officer or employee of the Agency to whom authority is lawfully delegated to act for the Administrator;

Complainant means the party who files a complaint and claims reparation, or on whose behalf a complaint is filed and reparation is claimed, in a reparation proceeding;

Department means the United States Department of Agriculture;

Docketing of a reparation proceeding means transmittal of papers to the Hearing Clerk and assignment of a docket number as provided in Rule 8, § 202.108, of these rules;

Hearing means that part of a reparation proceeding which involves the submission of evidence for the record and means either an oral or a written hearing;

Hearing Clerk means the Hearing Clerk of the Department (see 7 CFR 2.25(a)(3));

Judicial Officer means the official of the Department delegated authority by the Secretary, pursuant to the Act of April 4, 1940 (7 U.S.C. 450c–450g) and Reorganization Plan No. 2 of 1953, to perform the function involved (see 7 CFR 2.35);

Mail means to deposit an item in the United States mail with postage affixed and addressed as necessary to cause it to be delivered to the address shown by ordinary mail, or by certified or registered mail if specified.

Presiding Officer means any attorney who is employed in the Office of the General Counsel of the Department and is assigned so to act in a reparation proceeding;

Re-mail means to mail by ordinary mail to an address an item that has been returned after being sent to the same address by certified or registered mail.

Reparation proceeding or *Proceeding* means a proceeding under the Act before the Secretary, in which an order for the payment of money is claimed and in which the Secretary is not a party of record;

Report means the report to the Judicial Officer of the presiding officer's recommended findings of fact and conclusions with respect to all material issues of fact, law or discretion, as well as the reasons or basis therefor, and order, in a reparation proceeding.

Respondent means the party against whom a complaint is filed and reparation is claimed, in a reparation proceeding;

Secretary means the Secretary of Agriculture of the United States, or any officer or employee of the Department to whom authority is lawfully delegated to act for the Secretary;

[43 FR 30510, July 14, 1978, as amended at 46 FR 60414, Dec. 10, 1981; 55 FR 41183, Oct. 10, 1990; 60 FR 8465, Feb. 14, 1995]

§ 202.103 Rule 3: Beginning a reparation proceeding.

(a) *Filing.* A reparation proceeding is begun by filing a complaint. Any interested person (including any agency of a state or territory having jurisdiction over persons subject to the Act in such state or territory) desiring to complain of anything done or omitted to be done by any stockyard owner, market agency, or dealer in violation of sections 304, 305, 306, or 307, or of an order of the Secretary made under title III, of the Act, may file a complaint to begin a reparation proceeding.

(b) *Form.* The complaint must be in writing, state the facts of the matter complained of, identify each person complained against (respondent), and identify each person who complains against such respondent and claims reparation from such respondent. It may be on a printed form supplied by the Agency, or may be a formal document, or may be a letter, mailgram, or telegram. It may be typewritten or handwritten. If it is not on a printed form supplied by the Agency, the Agency Head may, prior to docketing of the proceeding, recommend to the complainant that an amended complaint be filed on such a printed form.

(c) *Contents and attachments.* So far as practicable, the complaint should include the following items as applicable:

(1) Date and place where the alleged violation occurred;

(2) Quantity and quality of the livestock involved;

(3) Whether a sale is involved and, if so, the date, sale price, and amount actually paid and received;

(4) Whether a consignment is involved and, if so the date, reported proceeds, gross, net;

(5) Amount of reparation claimed, and method of computation;

(6) Name and address of each partner or member, if a partnership or joint venture is involved;

(7) Name and address of each person involved, including any agent representing the complainant or the respondent in the transaction involved;

(8) Other material facts, including terms of contract; and

(9) True copies of all available papers relating to the transaction complained about, including shipping documents, letters, telegrams, invoices, manifests, accounts of sales, and special contracts or agreements, and checks and drafts. If it appears that any such item has been omitted from the complaint, the Agency Head may, prior to docketing of the proceeding, recommend to the complainant that such item be supplied by written amendment to the complaint.

(d) *Where to file.* The complaint should be transmitted or delivered to any area office of the Agency, or to the headquarters of the Agency in Washington, DC, or delivered to any full time employee of the Agency.

(e) *Time for filing.* The complaint must be received by the Department within 90 days after accrual of the cause of action alleged in it. If a complaint is transmitted or delivered to an office of the Department, it shall be deemed to be received by the Department when it reaches such office. If a complaint is delivered to a full time employee of the Agency, it shall be deemed to be received by the Department when it is received by such employee.

(f) *Amendment.* The complaint may be amended at any time prior to the close of an oral hearing or the filing of the last evidence in a written hearing, except that:

(1) An amendment cannot add a respondent if it is filed more than 90 days after accrual of the cause of action against such respondent;

(2) An amendment cannot state a new and different cause of action if it is filed more than 90 days after accrual of such new and different cause of action; and

(3) After the first amendment, or after the filing of an answer by the respondent, an amendment may not be filed without the written consent of the respondent, or leave of the presiding officer, or, prior to docketing of the proceeding, leave of the Agency Head. Any such amendment must be filed in writing and signed by the complainant or the attorney or representative of the complainant. If any such amendment is filed before the initial service of the complaint on the respondent, it shall be served on the respondent only if the complaint is served as provided in Rule 4(b), § 202.104(b). If any such amendment is filed after such service, it shall be served on the respondent in any case.

(g) *Withdrawal.* At any time, a complainant may withdraw a complaint filed by or on behalf of the same complainant, thus terminating the reparation proceeding on such complaint unless a counterclaim or another complaint is pending therein. If a complainant fails to cooperate with the Secretary in the disposition of the matter complained of, such complainant may be presumed to desire to withdraw the complaint filed by or on behalf of such complainant, after service on the parties of written notice of the facts of such failure and reasonable opportunity for such complainant to state whether such presumption is correct.

[43 FR 30510, July 14, 1978, as amended at 60 FR 8465, Feb. 14, 1995]

§ 202.104 Rule 4: Agency action.

(a) *Informal disposition.* If there appears to be any reasonable ground for doing so, the Agency Head shall investigate the matter complained of. If the Agency Head reasonably believes that there are not sufficient facts to form the basis for further proceeding, the matter may be dropped, without prejudice to subsequent court action on the same cause of action; if it is dropped, the person filing the complaint shall be informed. If the statements in the complaint, and information obtained in the

investigation, seem to warrant such action, the Agency Head may make an effort to obtain the consent of the parties to an amicable or informal adjustment of the matter by communication with the parties or their attorneys or representatives. Such communication may be written or oral or both.

(b) *Service of complaint.* If the matter is not disposed of as provided in paragraph (a), the complaint, together with any amendment which has been filed, shall be served on the respondent with a notice that an answer is required.

(c) *Service of report of investigation.* A report prepared by the Agency, of its investigation of the matter complained of, and supplements to such a report, may be served on the parties and made a part of the record of the proceeding. Whether such a report or supplement shall be prepared, and whether it shall be served on the parties and made a part of the record, and its contents, shall be in the discretion of the Agency Head. The Judicial Officer shall consider information in such a report or supplement as part of the evidence in the proceeding, to the extent that such information is relevant and material to the proceeding. Any party may submit evidence in rebuttal of such information as is provided generally in these rules for the submission of evidence. Oral testimony, to the extent credible, shall be given greater weight as evidence than such information.

§ 202.105 Rule 5: Filing; time for filing; service.

(a) *Filing; number of copies.* Prior to docketing of a proceeding under these rules, all documents and papers other than the initial complaint, filed in the proceeding, shall be filed with the Agency. After such docketing of a proceeding, all such documents and papers shall be filed with the hearing clerk, *Provided,* That all such documents and papers, except a petition for disqualification of a presiding officer, shall be filed with the presiding officer if the parties have been served with written notice to do so. Each such document or paper shall be filed in quadruplicate with an extra copy for each party in excess of two, except as otherwise provided in these rules. Any document or paper not filed in the required number of copies, except an initial complaint, may be returned to the party filing it.

(b) *Effective date of filing.* Any document or paper other than an initial complaint, filed in a proceeding under these rules, shall be deemed to be filed at the time when it reaches the headquarters of the Department in Washington DC, or, if authorized to be filed with an officer or employee of the Department at any place outside the District of Columbia, it shall be deemed to be filed at the time when it reaches the office of such officer or employee.

(c) *Additional time for filing.* The time for the filing of any document or paper other than an initial complaint, in a proceeding under these rules, may upon request be extended as reasonable, by the agency head prior to docketing of the proceeding, or by the presiding officer, or by the judicial officer; notice of any extension of time shall be served on all parties. After docketing of the proceeding, in all instances in which time permits, notice of a request for extension of time shall be given to parties other than the one filing such request, with opportunity to submit views concerning the request.

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

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

(f) *Service on party.* (1) Any complaint or other document initially served on a person to make that person a party respondent in a proceeding, a final order,

or other document specifically ordered by the presiding officer or Judicial Officer to be served by certified or registered mail, shall be deemed to be received by any party to a proceeding on the date of delivery by certified or registered mail to the last known principal place of business of such party, last known principal place of business of the attorney or representative of record of such party, or last known residence of such party if an individual, *provided that,* if any such document or paper is sent by certified on registered mail but is returned marked by the postal service as unclaimed or refused, it shall be deemed to be received by such party on the date of remailing by ordinary mail to the same address.

(2) Any document or paper, other than one specified in paragraph (f)(1) of this section or written questions for a deposition as provided in § 202.109(c)(3), shall be deemed to be received by any party to a proceeding on the date of mailing by ordinary mail to the last known principal place of business of such party, last known principal place of business of the attorney or representative or record of such party, or last known residence of such party if an individual.

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

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

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

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

(1) Delivery by certified mail or registered mail to the last known principal place of business of such person, last known principal place of business of the attorney or representative of record of such person, or last known residence of such person if an individual;

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

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

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

(1) A certified or registered mail receipt returned by the postal service with a signature;

(2) An official record of the postal service;

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

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

[43 FR 30510, July 14, 1978, as amended at 55 FR 41183, Oct. 10, 1990; 60 FR 8465, Feb. 14, 1995]

§ 202.106 Rule 6: Answer.

(a) *Filing and service.* Within 20 days after service on a respondent, of a complaint or amendment of a complaint, such person shall file an answer in writing, signed by such person or by the attorney or representative of such person. If a respondent desires an oral hearing, a request for it should be included with the answer of such person. If any answer or amended answer is filed, it shall be served on the complainant.

(b) *Required contents.* If a respondent desires to make a defense, the answer of such person shall contain a precise statement of the facts which constitute the grounds of defense, and shall specifically admit, deny, or explain each of the allegations of the complaint, except that, if the respondent is without knowledge, such answer shall state that. If a respondent does not desire to make a defense, the answer of such person shall contain an admission of all the allegations of the complaint, or an admission of liability to the complainant in the full amount claimed by the complainant as reparation, or both. An answer may be stricken for failure to comply with these requirements; notice of an order so striking an answer shall be served on the parties; within 20 days after service on a respondent of such a notice, such person shall file an answer which complies with these requirements.

(c) *Setoff, counterclaim or cross-claim.* The answer may assert a setoff, counterclaim, or cross-claim, or any combination thereof. No counterclaim or cross-claim shall be considered unless it is based on a violation for which the act authorizes reparation to be ordered to be paid, and filed within 90 days after accrual of the cause of action alleged therein: *Provided,* That a counterclaim not filed within such time limit may be considered if based on a transaction complained of in the complaint. Any cross-claim asserted against a co-respondent, based on a violation for which the act authorizes reparation to be ordered to be paid, and filed within 90 days after accrual of the cause of action alleged therein, shall be served on such person as a complaint; within 20 days after such service, such person shall file an answer thereto in compliance with the above requirements for an answer to a complaint.

(d) *Failure to file.* If a respondent fails to file an answer as required above, such persons shall be deemed to have admitted all the allegations of the complaint or cross-claim against such person, and to have consented to the issuance of a final order in the proceeding, based on all evidence in the record. For this purpose, the evidence in the record may include information contained in a report of investigation made a part of the record pursuant to rule 4(c), § 202.104(c), and evidence received in a hearing, oral or written, held subsequent to the expiration of the time for filing such answer, but shall not be limited to such information and evidence. Such a respondent shall not be entitled to service provided in these rules, of any notice or document except the final order in the proceeding.

§ 202.107 Rule 7: Reply.

(a) *Filing and service.* If the answer asserts a counterclaim or a setoff, the complainant may file a reply in writing within 20 days after service of the answer on such person. If any reply or amended reply is filed, it shall be served on the respondent.

(b) *Contents.* The reply shall be confined strictly to the matters alleged in the counterclaim or setoff asserted in the answer. It shall contain a precise statement of the facts which constitute the grounds of defense to the counterclaim or setoff and shall specifically admit, deny, or explain each of the allegations of the answer constituting such counterclaim or setoff, except that, if the complainant is without knowledge, the reply shall state that.

(c) *Failure to file.* If no reply is filed, the allegations of the answer shall be regarded as denied.

[43 FR 30510, July 14, 1978, as amended at 55 FR 41184, Oct. 10, 1990]

§ 202.108 Rule 8: Docketing of proceeding.

Promptly following receipt of the answer, or the reply (if the answer asserts a counterclaim or a setoff), or following the expiration of the period of time prescribed above for the filing of the answer or of the reply, the agency head shall transmit all of the papers which have been filed in the proceeding (including the investigation report if any has been served on the parties) to the hearing clerk, who shall assign a docket number to the proceeding. Thereafter the proceeding shall be referred to by such number. The hearing clerk shall promptly transmit all such papers to the Office of the General Counsel for assignment of a presiding officer.

§ 202.109 Rule 9: Depositions.

(a) *Application.* Any party may file an application for an order for the taking of testimony by deposition, at any time after docketing of a proceeding and before the close of an oral hearing or the filing of such party's evidence in a written hearing therein. The application shall set forth: (1) The name and address of the proposed deponent; (2) the name and address of the person (referred to in this section as the ''officer'') before whom the proposed examination is to be made; (3) the reasons why such deposition should be taken, which must show that it may be able to be used as set forth in paragraph (i) of this section; (4) whether the proposed examination is to be on interrogatories or oral; and (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.

(b) *Response; service.* If any such application is made orally on the record at an oral hearing, each party other than the applicant, present at such hearing, may respond to it orally. If any such application is in writing it shall be served on each party other than the applicant, and each such other party shall have not less than 20 days, from the date of service on such party of the application, to file a written response to it.

(c) *Written questions (interrogatories).* (1) If the examination will be oral, parties who will not be present or represented at it may file written questions with the officer prior to the time of the examination.

(2) The presiding officer may direct, or the parties may agree, that the deposition, if taken, shall be taken by means of written questions. If the presiding officer finds, upon the protest of a party to the proceeding, that such party has a principal place of business or residence more than 100 miles from the place of the examination and that it would constitute an undue hardship on such party to be present or represented at an oral examination at such place, the deposition, if taken, shall be taken by means of written questions. In any such case, the presiding officer shall state on the record at the oral hearing that, or shall serve the parties with notice that, the deposition, if taken, shall be taken by means of written questions.

(3) If the examination is conducted by means of written questions, copies of the applicant's questions must be received by the other party to the proceeding and the officer at least 10 days prior to the date set for the examination unless otherwise agreed, and any cross questions of a party other than the applicant must be received by the applicant and the officer at any time prior to the time of the examination.

(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.

(e) *Qualifications of officer.* No deposition shall be made except before an officer authorized by the law of the United States or by the law of the place of the examination to administer oaths, or before an officer authorized by the Secretary to administer oaths, or before the presiding officer. No deposition shall be made before an officer who is a relative (within the third degree by blood or marriage), employee, attorney, or representative of any party (or an employee of an attorney or representative of any party), or who is financially interested in the result of the proceeding.

(f) *Procedure on examination.* The deponent shall be examined under oath or affirmation, and the testimony of the deponent shall be recorded by the officer, or by some person under the direction and in the presence of the officer. If the examination is on interrogatories, they shall be propounded by the officer. If the examination is oral, the deponent shall be examined first by the party at whose instance the deposition is taken, or the representative of such party, and shall be subject to cross-examination by any other party or the representative thereof who is present at the examination; the officer shall propound any interrogatories filed with the officer by parties not present or represented at the examination.

(g) *Certification and filing by officer.* The officer shall certify on the transcript or recording that the deponent was duly sworn by the officer and that the transcript or recording is a true record of the deponent's testimony, with such exceptions as the certificate shall specify. The officer shall then securely seal the transcript or recording, together with three copies of the transcript or recording, with an extra copy for each party in excess of two, in an envelope, and mail the same by registered or certified mail to the presiding officer.

(h) *Service; correction.* After the transcript or recording is received by the presiding officer, it shall promptly be served on all parties. Any party, within 20 days after such service, may file a written motion proposing corrections to the transcript or recording. Any such motion shall be served on each party other than the one filing it, who shall have 10 days to file a written response to it. Any such response shall be served on each party other than the one filing it. Such documents, if filed, shall be a part of the record of the proceeding if any portion of the transcript or recording is made a part of the record. All portions of the transcript or recording which are not referred to in any such motion shall be presumed to be accurate except for obvious typographical errors.

(i) *Use.* If a written hearing is held, a transcript or recording, of a deposition ordered and taken in accord with this section, may be made a part of the record as evidence by any party, by written motion filed with such party's evidence. If an oral hearing is held, except as otherwise provided in these rules, such a transcript or recording may be made a part of the record as evidence, on written motion filed by any party, or oral motion of any party made at the oral hearing, if no party objects after reasonable notice and opportunity to do so, or if the presiding officer finds that the evidence is otherwise admissible and:

(1) That the witness is dead;

(2) That the witness is unable to attend or testify for any good reason including age, sickness, infirmity, or imprisonment;

(3) That the party offering the transcript or recording has tried without success to procure the attendance of the witness by subpena; or

(4) That such exceptional circumstances exist as to make it desirable, in the interests of justice and with due regard to the importance of presenting the testimony orally before the presiding officer, to allow the transcript or recording to be used.

If any portion of a transcript or recording of a deposition is made a part of the record as evidence on motion of any party, any other party may make a part of the record as evidence the remainder, or any other portion, of the transcript or recording.

(j) *Expenses.* Fees and reimbursements payable to an officer taking a deposition, or other person recording the testimony in the deposition, shall be paid by the party at whose instance the deposition is taken.

(k) *Subpenas.* No subpena can issue, to compel attendance, testimony, or production of documentary evidence, at an examination under this rule 9.

(l) *Agreement of parties.* In any case, any transcript or recording of any deposition, or any part of such a transcript or recording, may be made a part of the record as evidence by agreement of the parties other than a party failing to file an answer as required in these rules.

[43 FR 30510, July 14, 1978, as amended at 55 FR 41184, Oct. 10, 1990; 60 FR 8465, Feb. 14, 1995]

§ 202.110 Rule 10: Prehearing conference.

(a) The presiding officer, at any time prior to the commencement of the hearing, may request the parties or their counsel to appear at a conference before the presiding officer to consider:

(1) The simplification of issues;

(2) The necessity of amendments to pleadings;

(3) The possibility of obtaining stipulations of fact and of the authenticity, accuracy, and admissibility of documents, which will avoid unnecessary proof;

(4) The limitation of the number of expert or other witnesses;

(5) The negotiation, compromise, or settlement of issues;

(6) The exchange of copies of proposed exhibits;

(7) The identification of documents or matters of which official notice may be requested;

(8) A schedule to be followed by the parties for completion of the actions decided at the conference; or

(9) Such other matters as may expedite and aid in the disposition of the proceeding.

No transcript or recording of such a conference shall be made, but the presiding officer shall prepare and file for the record a written summary if any action is 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.

(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 audio-visual telecommunication.

[43 FR 30510, July 14, 1978, as amended at 60 FR 8466, Feb. 14, 1995]

§ 202.111 Rule 11: Hearing, oral or written.

(a) *When held.* A hearing, oral or written, shall be held unless:

(1) Each respondent admits or is deemed to admit sufficient allegations of the complaint to support the full amount claimed by the complainant as reparation;

(2) Each respondent admits liability to the complainant in the full amount claimed by the complainant as reparation;

(3) Before a hearing has been completed the parties agree in writing that the proceeding may be decided on the basis of the record as it stands at the time such agreement is filed; or

(4) Before a hearing has been completed the parties settle their dispute or the complainant withdraws the complaint.

(b) *Whether oral or written.* The hearing provided for in paragraph (a) of this section shall be oral if:

(1) $10,000 or more is in controversy and any respondent files a written request for an oral hearing with such respondent's answer; or

(2) $10,000 or more is in controversy and any complainant files a written request for an oral hearing on or before the 20th day after service on such complainant of notice that no respondent has filed a timely request for an oral hearing; or

(3) Less than $10,000 is in controversy and the presiding officer determines, upon written request by any party thereto, that an oral hearing is necessary to establish the facts and circumstances giving rise to the controversy. The hearing shall be written if not oral.

(c) *Withdrawal of request.* If $10,000 or more is in controversy and a party has timely filed a request for oral hearing, such party may withdraw such request at any time prior to completion of an oral hearing. If such a withdrawal leaves no pending request for oral hearing in the proceeding, and if the presiding officer has not decided that the hearing should be oral, each other party shall be served with notice of this and shall be given 20 days to request an oral hearing. If any party files a request for oral hearing in such time, the hearing shall be oral in accordance with paragraph (b) of this section.

(d) *Presiding Officer's recommendation.* The presiding officer may recommend voluntary withdrawal of a request for oral hearing, timely filed. Declining to make such withdrawal shall not affect the rights or interests of any party.

(e) *Representation.* Any party may appear in an oral hearing, or file evidence in a written hearing, in person or by counsel or other representative. For unethical or contumacious conduct in or in connection with a proceeding, the presiding officer may preclude a person from further acting as attorney or representative for any party to the proceeding; any such order of the presiding officer shall be served on the parties; an appeal to the Judicial Officer may be taken from any such order immediately.

[51 FR 42083, Nov. 21, 1986, as amended at 55 FR 41184, Oct. 10, 1990]

§ 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.

(c) *Failure to appear.* If any party to the proceeding, after being duly notified, fails to appear at the oral hearing in person or by counsel or other representative, such party shall be deemed to have waived the right to add any further evidence to the record in the proceeding, or to object to the admission of any evidence; if the parties who are present are all adverse to such

party, they shall have an election to present evidence, in whole or in part, in the form of oral testimony before the presiding officer, affidavits, or depositions.

(d) *Order of proceeding.* Complainant shall proceed first, if present at the commencement of the oral hearing.

(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.

(f) *Evidence*—(1) *In general.* The testimony of witnesses at an oral hearing shall be on oath or affirmation and subject to cross-examination. Any witness other than a party may be examined separately and apart from all other witnesses, in the discretion of the presiding officer. The presiding officer shall exclude evidence which is immaterial, irrelevant, or unduly repetitious, or which is not of the sort on which responsible persons are accustomed to rely, insofar as practicable.

(2) *Objections.* If a party objects to the admission of any evidence or to the limitation of the scope of any examination or cross-examination or to any other ruling of the presiding officer, such party shall state briefly the grounds of such objection, and the presiding officer shall rule on it. The transcript or recording shall include argument or debates on objections, except as ordered by the presiding officer, and shall include the ruling of the presiding officer. Objections not made before the presiding officer may not subsequently be relied on in the proceeding.

(3) *Offer of proof.* Whenever evidence is excluded by the presiding officer, the party offering such evidence may make an offer of proof. The offer of proof shall consist of a brief statement, which shall be included in the transcript or recording, describing the evidence excluded. If the evidence consists of a brief oral statement, it shall be included in full in the transcript or recording. If the evidence consists of an exhibit, it shall be marked for identification and inserted in the record. In either such event, if the judicial officer decides that the presiding officer's ruling in excluding the evidence was erroneous and prejudicial, such evidence shall be considered a part of the record. If the taking of such evidence will consume a considerable length of time at the hearing, the presiding officer shall not allow the insertion of such evidence in full and, if the judicial officer decides that the presiding officer's ruling in excluding the evidence was erroneous and prejudicial, the hearing shall be reopened to permit the taking of such evidence.

(4) *Depositions and affidavits.* Except as is otherwise provided in these rules, admission of the deposition of any witness shall be subject to the provisions of rule 9, § 202.109, and affidavits, and statements under penalty of perjury as provided in 28 U.S.C. 1746, Pub. L. 94–550, may be admitted only if the evidence is otherwise admissible and no party objects.

(5) *Department records.* A true copy of any written entry in any record of the Department, made by an officer or employee of the Department in the course of the official duty of such officer or employee, and relevant to the issues involved in the hearing, shall be admissible as prima facie evidence of the

facts stated in the record of the Department, without the production of such officer or employee.

(6) *Exhibits.* (i) For each exhibit offered by a party, copies in addition to the original shall be filed with the presiding officer for the use of all other parties to the proceeding, except where the presiding officer finds that the furnishing of copies is impracticable. The presiding officer shall tell the parties the number of copies required to be filed, make the proper distribution of the copies, and have this noted on the record.

(ii) If the testimony of a witness refers to any document, the presiding officer shall determine whether it shall be produced at the hearing and made a part of the record as an exhibit, or whether it shall be incorporated in the record by reference.

(iii) If relevant and material matter is embraced in a document containing irrelevant or immaterial matter, such irrelevant or immaterial matter shall be designated by the party offering the document in evidence, and shall be segregated and excluded, insofar as practicable.

(g) *Subpenas*—(1) *Issuance.* The attendance and testimony of witnesses and the production of documentary evidence, from any place in the United States, on behalf of any party to the proceeding, may be required by subpena at any designated place for oral hearing. Subpenas may be issued by the presiding officer, on a written application filed by a party, showing the grounds and necessity thereof, and, with respect to subpenas for the production of documentary evidence, showing their competency, relevancy, and materiality and the necessity for their production. Subpenas may be issued on the motion of the presiding officer.

(2) *Service; proof of service.* A subpena may be served by any natural person over the age of 18 years. The party at whose instance a subpena is issued shall be responsible for serving it, however, at the request of such party the Secretary will attempt to serve it.

(h) *Oral argument.* The presiding officer shall permit oral argument by the parties or their counsel who are present at an oral hearing, but may limit such argument to any extent that the presiding officer finds necessary for the expeditious or proper disposition of the case.

(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.

(j) *Filing, and presiding officer's certificate, of the transcript or recording.* As soon as practicable after the close of the oral hearing, the reporter shall transmit to the presiding officer the original transcript or recording of the testimony, and as many copies of the transcript or recording as may be required by paragraph (j) of this section for the area offices of the Agency and as may be required for the Washington office of the Agency. At the same time the reporter shall also transmit a copy of the transcript or recording to each party who shall have arranged and paid for it, as provided in paragraph (h) of

this section. Upon receipt of the transcript or recording, the presiding officer shall attach to the original transcript or recording a certificate stating that, to the best of the presiding officer's knowledge and belief, the transcript or recording is a true, correct, and complete transcript or recording of the testimony given at the hearing and that the exhibits mentioned in it are all the exhibits received in evidence at the hearing, with such exceptions as the certificate shall specify. Such certificate shall be served on each party and a copy thereof shall be attached to each copy of the transcript or recording received by the presiding officer. In accordance with such certificate the presiding officer shall note, on the original transcript or recording, each correction detailed in such certificate by adding or crossing out (but without obscuring the texts as orginally transcribed or recorded) at the appropriate places any words necessary to make the text conform to the correct meaning, as certified by the presiding officer. The presiding officer shall send the copies of the transcript or recording to the hearing clerk who shall send them to the Agency.

(k) *Keeping of copies of the transcript or recording.* During the period in which the proceeding has an active status in the Department, a copy of the transcript or recording shall be kept at the area office of the Agency most convenient to the respondent; however, if there are two or more respondents and they are located in different regions, such copy of the transcript or recording shall be kept at the area office of the Agency nearest to the place where the hearing was held. In addition, a copy of the transcript or recording shall be kept at the area office of the Agency most convenient to the complainant. Any such copy shall be available for examination during official hours of business at the area office, but shall remain the property of the Department and shall not be removed from such office.

[43 FR 30510, July 14, 1978, as amended at 55 FR 41184, Oct. 10, 1990; 60 FR 8466, Feb. 14, 1995]

§ 202.113 Rule 13: Written hearing.

(a) *Evidence.* As used in this section, the term ''evidence'' shall mean depositions, affidavits, or statements under penalty of perjury as provided in 28 U.S.C. 1746, Pub. L. 94–550, of persons having knowledge of the facts, or documents properly identified by such deposition, affidavit, or statement, or otherwise authenticated in such a manner that they would be admissible in evidence at an oral hearing, except as provided hereinafter. Testimony on deposition, to the extent credible, shall be given greater weight as evidence, than such affidavits or statements. In a case in which a party, entitled to oral hearing as provided in rule 11, § 202.111, withdraws such party's request for oral hearing on condition that only depositions be used if a written hearing is held, only depositions, and documents properly identified therein, shall be made a part of the record as evidence by the parties if a written hearing is held.

(b) *Verification.* Any facts must be verified, by oath or affirmation before a person legally authorized to administer oaths or before a person designated by the Secretary for the purpose (except in the case of a statement under penalty of perjury as provided in 28 U.S.C. 1746, Pub. L. 94–550), by a person who states, in the deposition, affidavit, or statement, that such person has actual knowledge of the facts. Except under unusual circumstances, which shall be set forth in the deposition, affidavit, or statement, any such person shall be one who would appear as a witness if an oral hearing were held.

(c) *Complainant's evidence.* The complainant shall be served with notice of an opportunity to file evidence. Within 20 days after such service, the complainant may file evidence. What the complainant files in response to that notice shall be served promptly on the respondent.

(d) *Respondent's evidence.* After expiration of the time for the filing of complainant's evidence, the respondent shall be served with notice of an opportunity to file evidence. Within 20 days after such service, the respondent may file evidence. What the respondent files

in response to that notice shall be served promptly on the complainant.

(e) *Complainant's rebuttal.* If the respondent files anything pursuant to paragraph (d) of this section, the complainant shall be served with notice of an opportunity to file evidence in rebuttal of what the respondent has filed. Within 20 days after such service, the complainant may file such evidence, which shall be confined strictly to rebuttal of what the respondent has filed. What the complainant files in response to that notice shall be served promptly on the respondent.

(f) *Failure to file.* Failure to file any evidence authorized under this section, within the time prescribed, shall constitute a waiver of the right to file such evidence.

(g) *Extension of time for depositions.* If any party timely files an application for an order for the taking of testimony by deposition pursuant to rule 9, § 202.109, time for the filing of such party's evidence shall be extended as reasonable, to permit consideration of the application, and taking of depositions if ordered.

(h) *Investigation report.* No provision of this rule 13 shall change the status of an investigation report served on the parties and made a part of the record pursuant to rule 4, § 202.104.

[43 FR 30510, July 14, 1978, as amended at 55 FR 41184, Oct. 10, 1990]

§ 202.114 Rule 14: Post-hearing procedure.

(a) *Oral hearing.* Any party present or represented at an oral hearing, desiring to file any written argument or brief, proposed findings of fact, conclusions, and order, or statement of objections to rulings made by the presiding officer, must so inform the presiding officer at the oral hearing; upon being so informed, the presiding officer shall set a reasonable time for the filing of such documents, and state it on the record at the oral hearing.

(b) *Written hearing.* After filing of the last evidence in a written hearing, notice shall be served on each party that such party may file, within 20 days after such service on such party, written argument of brief, proposed findings or fact, conclusions, and order.

(c) *Service; delay in preparation of report.* If any such document is filed by any party, it shall be served on all other parties. The report shall not be prepared before expiration of such time for filing.

[43 FR 30510, July 14, 1978, as amended at 55 FR 41184, Oct. 10, 1990]

§ 202.115 Rule 15: Submission for final consideration.

(a) *Report.* The presiding officer, with the assistance and collaboration of such employees of the Department as may be assigned for the purpose, shall prepare a report. The report shall be prepared on the basis of the evidence in the record, including the investigation report if one is prepared by the agency head and served on the parties, and any allegations admitted or deemed to be admitted, and any stipulations. The report shall be prepared in the form of a final order for signature by the judicial officer, and shall be filed with the hearing clerk. The report shall not be served on the parties unless and until it is signed by the judicial officer.

(b) *Record.* At the same time as the report is filed with the hearing clerk, the record shall also be filed with the hearing clerk. The record shall include: Pleadings; motions and requests filed and rulings thereon; the investigation report if one is prepared by the agency head and served on the parties; the transcript or recording of an oral hearing, and exhibits received, if an oral hearing was held; evidence filed by the parties if a written hearing was held; documents filed in connection with pre-hearing conferences; any proposed findings of fact, conclusions and orders, statements of objections, and briefs; any stipulations; and proof of service.

(c) *Submission to judicial officer.* Unless the hearing clerk reasonably believes that the record is not complete and in proper order, the record and the report shall be submitted to the judicial officer for decision.

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

[43 FR 30510, July 14, 1978, as amended at 60 FR 8467, Feb. 14, 1995]

§ 202.116 Rule 16: Issuance of order.

(a) As soon as practicable after the receipt of the record and report from the hearing clerk, the judicial officer, on the basis of and after due consideration of the record, shall issue an order in the proceeding, which shall be served on the parties.

(b) If the judicial officer deems it advisable to do so, the order may be made a tentative order. In such event, a presiding officer shall be assigned and the tentative order shall be served on each party, and each party shall have 20 days in which to file written exceptions to it, and arguments or briefs in support of such exceptions. If no party timely files exceptions, the tentative order shall automatically become the final order in the proceeding, and notice of such fact shall be served on the parties. If any party timely files such exceptions, they shall be handled in the same manner as a petition filed under rule 17, § 202.117.

§ 202.117 Rule 17: Petition to reopen a hearing; to rehear or reargue a proceeding; to reconsider an order; or to set aside a default order.

(a) *Filing of petition*—(1) *To reopen a hearing.* Any party may file a petition to reopen a hearing to take further evidence, at any time prior to the issuance of the final order, or prior to a tentative order becoming final. Such a petition must state the nature and purpose of the evidence to be offered, show that it is not merely cumulative, and state a good reason why it was not offered at the hearing if oral, or filed in the hearing if written.

(2) *To rehear or reargue a proceeding or reconsider an order.* Any party may file a petition to rehear or reargue a proceeding or reconsider an order of the judicial officer, at any time within 20 days after service on such party of such order. Such a petition must specify the matters claimed to have been erroneously decided, and the basis for the petitioner's claim that such matters were erroneously decided.

(3) *To set aside a default order.* Any respondent against whom an order is issued by the judicial officer, upon failure to file an answer as required, may file a petition to set aside such order, at any time within 20 days after service on such respondent of such order. Such a petition must state a good reason why an answer was not filed as required.

(b) *Brief or memorandum of law.* If such a petitioner wishes to file a brief or memorandum of law in support of such a petition, it must be filed with such petition.

(c) *Procedure.* A presiding officer shall be assigned upon the filing of any such petition, or upon notice to the hearing clerk (which may be written or oral, or by telephone) that any party intends to file any such petition. The party filing any such petition shall be referred to as the complainant or respondent, depending on the original designation of such party in the proceeding; such party shall have the burden of establishing that such petition should be granted. If a petition to reopen is timely filed, the order shall not be issued pending decision whether to grant or deny the petition. If a petition to rehear or reargue or reconsider, or to set aside a default order, is timely filed, operation of the order shall be stayed automatically pending decision whether to grant or deny it; if such a petition is not timely filed, operation of the order shall not be stayed unless the Judicial Officer shall determine otherwise.

(d) *Service; answer.* No such petition shall be granted unless it, with the brief or memorandum of law in support of it, if any, is first served on each party to the proceeding other than the one filing it. Each such other party, within 20 days after such service on such party, may file an answer to such petition. If any such party wishes to file a brief or memorandum of law in support of such an answer, it must be filed with such answer. Any such answer, with the brief or memorandum of law in support of it, if any, shall be served on each party to the proceeding other than the one filing it. Any such petition may be denied without such service.

(e) *Submission for decision; service of order.* The presiding officer shall prepare a recommendation with respect to the petition, and submit it to the judicial officer for decision. Such a recommendation shall be prepared in the form of a final order for signature by

the judicial officer. It shall not be served on the parties unless and until it is signed by the judicial officer. The order of the judicial officer shall be served on the parties.

(f) *Practice upon decision.* If the judicial officer decides to reopen a hearing, or to rehear or permit reargument of a proceeding, or to set aside a default order, a presiding officer shall be assigned and the rules of practice shall be followed thereafter as applicable.

§ 202.118 Rule 18: Presiding officer.

(a) *Powers.* Subject to review as provided elsewhere in these rules, the presiding officer assigned to any proceeding shall have power to:

(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;

(2) Administer oaths and affirmations;

(3) Issue subpenas requiring the attendance and testimony of witnesses and the production of documentary evidence at an oral hearing;

(4) Summon and examine witnesses and receive evidence at an oral hearing;

(5) Take or order the taking of depositions;

(6) Admit or exclude evidence;

(7) Hear oral argument on facts or law;

(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

(12) Do all acts and take all measures necessary for the maintenance of order and the efficient conduct of the proceeding, including the exclusion of contumacious counsel or other persons.

(b) *Motions and requests.* The presiding officer is authorized to rule on all motions and requests filed in the proceeding prior to submission of the presiding officer's report to the judicial officer, *Provided,* That a presiding officer is not authorized to dismiss a complaint. Submission or certification of any question to the judicial officer, prior to submission of the report, shall be in the discretion of the presiding officer.

(c) *Reassignment.* For any good reason, including absence, illness, resignation, death, or inability to act, of the attorney assigned to act as a presiding officer in any proceeding under these rules, the powers and duties of such attorney in the proceeding may be assigned to any other attorney who is employed in the Office of the General Counsel of the Department, without abatement of the proceeding.

(d) *Disqualification.* No person shall be assigned to act as a presiding officer in any proceeding who (1) has any material pecuniary interest in any matter or business involved in the proceeding; (2) is related within the third degree by blood or marriage to any party to the proceeding; or (3) has any conflict of interest which might impair such person's objectivity in the proceeding. A person assigned to act as a presiding officer shall ask to be replaced, in any proceeding in which such person believes that reason exists for disqualification of such person.

(e) *Procedure on petition for disqualification.* Any party may file a petition for disqualification of the presiding officer, which shall set forth with particularity the grounds of alleged disqualification. Any such petition shall be filed with the hearing clerk, who shall immediately transmit it to the judicial officer and inform the presiding officer. The record of the proceeding also shall immediately be transmitted to the judicial officer. After

such investigation or hearing as the judicial officer deems necessary, the judicial officer shall either deny the petition or direct that another presiding officer be assigned to the proceeding. The petition, and notice of the order of the judicial officer, shall be made a part of the record and served on the parties; if any record is made on such a petition, it shall be a part of the record of the proceeding.

[43 FR 30510, July 14, 1978, as amended at 60 FR 8467, Feb. 14, 1995]

§ 202.119 Rule 19: Fees of witnesses.

Witnesses subpenaed before the presiding officer, and witnesses whose depositions are taken, shall be entitled to the same fees and mileage as are paid for like services in the courts of the United States. Fees and mileage shall be paid by the party at whose instance the witness appears or the deposition is taken.

§ 202.120 Rule 20: Official notice.

Official notice shall be taken of such matters as are judicially noticed by the courts of the United States and of any other matter of technical or scientific fact of established character: *Provided,* That the parties shall be given notice of matters so noticed, and shall be given adequate opportunity to show that such facts are erroneously noticed.

§ 202.121 Rule 21: Intervention.

At any time after docketing of a proceeding and before commencement of a hearing, oral or written, therein, the presiding officer may, upon petition, and for good cause shown, permit any person to intervene therein. The petition shall state with preciseness and particularity: (a) The petitioner's relationship to the matters involved in the proceeding; (b) the nature of the material the petitioner intends to present in evidence; (c) the nature of the argument the petitioner intends to make; and (d) the reasons why the petitioner should be allowed to intervene. Any such petition, and notice of the order thereon, shall be served on the parties and made a part of the record in the proceeding.

§ 202.122 Rule 22: Ex parte communications.

(a) At no stage of the proceeding between its docketing and the issuance of the final decision shall the presiding officer or judicial officer discuss ex parte the merits of the proceeding with any party, or attorney or representative of a party: *Provided,* That procedural matters shall not be included within this limitation; and *Provided further,* That the presiding officer or judicial officer may discuss the merits of the case with such a person if all parties to the proceeding or their attorneys or representatives have been served with notice and an opportunity to participate. A memorandum of any such discussion shall be included in the record.

(b) No party, or attorney or representative of a party, or other person not an employee of the Department, shall make or knowingly cause to be made to the presiding officer or judicial officer an ex parte communication relevant to the merits of the proceeding.

(c) If the presiding officer or judicial officer receives an ex parte communication in violation of this section, the one who receives the communication shall place in the public record of the proceeding:

(1) Such communication if written, or a memorandum stating the substance of such communication if oral; and

(2) A copy of any written response or a memorandum stating the substance of any oral response thereto.

(d) Copies of all such items placed or included in the record, as provided in this section, shall be served on all parties.

(e) For purposes of this section ''ex parte communication'' means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but it shall not include a request for a status report on any matter or the proceeding.

§ 202.123 Rule 23: Action by Secretary.

The Secretary may act in the place and stead of a presiding officer or the

judicial officer in any proceeding hereunder, or any matter in connection therewith.

PART 203—STATEMENTS OF GENERAL POLICY UNDER THE PACKERS AND STOCKYARDS ACT

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AUTHORITY: 7 CFR 2.17(e), 2.56

§ 203.1 [Reserved]

§ 203.2 Statement of general policy with respect to the giving by meat packers of meat and other gifts to Government employees.

(a) In recent months, the Department has received information, confirmed by investigation, that a number of packers subject to the Packers and Stockyards Act have made gifts of meat to Government employees responsible for conducting service activities of the Department. Such gifts have the implications of fraud, even if not made specifically for the purpose of influencing these employees in the performance of their duties.

(b) It is a violation of the Meat Inspection Act for any person, firm, or corporation to give to any employee of the Department performing duties under such act anything of value with intent to influence such employee in the discharge of his duties, or for such employee to receive from any person, firm, or corporation engaged in interstate or foreign commerce any gift given with any intent or purpose whatsoever (21 U.S.C. 90). Under the Federal meat grading regulations, the giving or attempting to give by a packer of anything of value to any employee of the Department authorized to perform any function under such regulations is a basis for the withdrawal of Federal meat grading service (7 CFR 53.13). The receiving by an employee of the Department of any gift from any person for whom grading, inspection, or other service work is performed is specifically prohibited by Departmental regulations.

(c) Upon the basis of paragraphs (a) and (b) of this section, it is the view of the Department that it is an unfair and deceptive practice in violation of section 202(a) of the Packers and Stockyards Act (7 U.S.C. 192(a)) for any person subject to the provisions of Title II of said Act to give or offer to give meat, money, or anything of value to any Government employee who performs inspection, grading, reporting, or regulatory duties directly relating to the purchase or sale of livestock or the preparation or distribution of meats, meat food products, livestock products in unmanufactured form, poultry or poultry products.

(Sec. 407, 42 Stat. 169; 7 U.S.C. 228; 9 CFR 201.3)

[26 FR 710, Jan. 25, 1961; 29 FR 4081, Mar. 28, 1964]

§203.3 [Reserved]

§203.4 Statement with respect to the disposition of records by packers, live poultry dealers, stockyard owners, market agencies and dealers.

(a) *Records to be kept.* Section 401 of the Packers and Stockyards Act (7 U.S.C. 221) provides, in part, that every packer, live poultry dealer, stockyard owner, market agency, and dealer shall keep such accounts, records, and memoranda as fully and correctly disclose all transactions involved in his business, including the true ownership of such business by stockholding or otherwise. In order to properly administer the P&S Act, it is necessary that records be retained for such periods of time as may be required to permit the Grain Inspection, Packers and Stockyards Administration (Packers and Stockyards Programs) a reasonable opportunity to examine such records. Section 401 of the Act does not, however, provide for the destruction or disposal of records. Therefore, the Grain Inspection, Packers and Stockyards Administration (Packers and Stockyards Programs) has formulated this policy statement to provide guidance as to the periods of time after which records may be disposed of or destroyed.

(b) *Records may be disposed of after two years except as otherwise provided.* Except as provided in paragraph (c) of this section, each packer, live poultry dealer, stockyard owner, market agency, and dealer may destroy or dispose of accounts, records, and memoranda which contain, explain, or modify transactions in its business subject to the Act after such accounts, records, and memoranda have been retained for a period of two full years; *Provided,* That the following records made or kept by a packer may be disposed of after one year: cutting tests; departmental transfers; buyers' estimates; drive sheets; scale tickets received from others; inventory and products in storage; receiving records; trial balances; departmental overhead or expense recapitulations; bank statements, reconciliations and deposit slips; production or sale tonnage reports (including recapitulations and summaries of routes, branches, plants, etc.); buying or selling pricing instructions and price lists; correspondence; telegrams; teletype communications and memoranda relating to matters other than contracts, agreements, purchase or sales invoices, or claims or credit memoranda; and *Provided further,* That microfilm copies of records may be substituted for and retained in lieu of the actual records.

(c) *Retention for longer periods may be required.* The periods specified in paragraph (b) of this section shall be extended if the packer, live poultry dealer, stockyard owner, market agency, or dealer is notified in writing by the Administrator that specified records should be retained for a longer period pending the completion of any investigation or proceedings under the Act.

(d) *Unauthorized disposal of records.* If it is found that any person subject to the Act has disposed of accounts, records, and memoranda which are necessary to fully and correctly disclose all transactions in its business prior to the periods specified in this statement, consideration will be given to the issuance of a complaint charging a violation of section 401 of the Act and seeking an appropriate order. The administrative proceeding initiated will be conducted in accordance with the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary (7 CFR 1.130 *et seq.*).

(Approved by the Office of Management and Budget under control number 0590–0001)

(7 U.S.C. 228, 7 U.S.C. 222, and 15 U.S.C. 46)

[49 FR 6085, Feb. 17, 1984, as amended at 54 FR 16357, Apr. 24, 1989]

§203.5 Statement with respect to market agencies paying the expenses of livestock buyers.

It has become a practice in certain areas of the country for market agencies, engaged in the business of selling consigned livestock on a commission basis, to pay certain of the business or personal expenses incurred by buyers attending livestock sales conducted by such market agencies, such as, expenses for meals, lodging, travel, entertainment and long distance telephone calls. Investigation by the Grain Inspection, Packers and Stockyards Administration (Packers and Stockyards Programs), discloses that this practice

tends to become a method of competition between similarly engaged market agencies and results in undue and unreasonable cost burdens on such market agencies and the livestock producers who sell their livestock through such market agencies.

It is the view of the Grain Inspection, Packers and Stockyards Administration (Packers and Stockyards Programs) that it constitutes violations of the Packers and Stockyards Act, 1921, as amended (7 U.S.C. 181 et seq.), for any market agency engaged in the business of selling consigned livestock on a commission basis, to pay, directly or indirectly, any personal or business expenses of livestock buyers attending sales conducted by such market agency. In the future, if any market agency engages in such practice, consideration will be given by the Grain Inspection, Packers and Stockyards Administration (Packers and Stockyards Programs) to the issuance of a complaint charging the market agency with violation of the Act. In the formal administrative proceeding initiated by any such complaint, the Judicial Officer of the Department will determine, after full hearing, whether the market agency has violated the Act and should be ordered to cease and desist from continuing such violation, and whether the registration of such market agency should be suspended for a reasonable period of time.

(Secs. 407, 4, 42 Stat. 169, 72 Stat. 1750; 7 U.S.C. 228. Interprets or applies secs. 304, 307, 312, 42 Stat. 164, 165, 167; 7 U.S.C. 205, 208, 213)

[29 FR 311, Jan. 14, 1964; 29 FR 3304, Mar. 12, 1964, as amended at 32 FR 7700, May 26, 1967]

§ 203.6 [Reserved]

§ 203.7 Statement with respect to meat packer sales and purchase contracts.

(a) The Grain Inspection, Packers and Stockyards Administration (Packers and Stockyards Programs) receives numerous complaints concerning the failure or refusal of buyers to pay the full purchase price for, or to accept delivery of, their purchases of meat and meat food products and sellers failing to meet contractual specifications. Most such complaints arise out of disputes concerning condition, grade, weight, or shipping instructions.

(b) It is believed that both seller and buyer should take the following points into consideration when selling and buying meat and meat food products:

(1) *Terms of shipment and time of arrival.* Terms and conditions of shipment and delivery should be specified in the contract and both parties should understand fully all terms and conditions of the contract. Any deviation from normal practices, such as a guaranty by the shipper as to the date of arrival at destination, or a deviation from the normal meaning of terms, should also be fully understood and made a part of the contract.

(2) *Quality and condition.* (i) A seller has the responsibility of making certain that the meat and meat food products shipped are in accordance with the terms of the contract specifications.

(ii) When a buyer believes that the shipment does not meet the terms of the contract, he should immediately contact the seller or the seller's agent and advise him of the nature of the complaint. This affords the seller an opportunity to renegotiate the contract, to personally inspect the meat or meat food products, or to have an impartial party inspect or examine the meat or meat food products. Inspection and examination service of this type is available nationally through the USDA meat grading service and locally through various impartial persons or agencies.

(iii) All terms of a transaction should be made clear in the contract, whether written or verbal. If there is any chance of misunderstanding, a written confirmation should be exchanged between the parties. In any case where a contract dispute cannot be settled between the parties and either party intends to file a complaint, such complaint should be brought to the attention of the nearest Grain Inspection, Packers and Stockyards Administration (Packers and Stockyards Programs) area office as soon as possible. However, a concerted effort on the part of both buyer and seller to negotiate clear and complete contracts will greatly reduce misunderstandings which can result in the filing of complaints with the Administration.

(c) If the Grain Inspection, Packers and Stockyards Administration (Packers and Stockyards Programs) has reason to believe that any packer unjustifiably (1) has refused to pay the contractual price for meat or meat food products purchased, (2) has refused to accept a shipment of meat or meat food products, or (3) has failed to ship meat or meat food products in accordance with the terms of the contract specifications, consideration will be given to the issuance of a complaint charging the packer with violation of section 202 of the Act. In the formal administrative proceeding initiated by any such complaint, the Judicial Officer of the Department will determine, upon the basis of the record in the proceeding, whether the packer has violated the Act and should be ordered to cease and desist from continuing such violation.

(Secs. 407(a), 4, 42 Stat. 169, 72 Stat. 1750; 7 U.S.C. 228(a). Interprets or applies sec. 202, 42 Stat. 161 et seq., as amended; 7 U.S.C. 192)

[30 FR 14966, Dec. 3, 1965, as amended at 32 FR 7701, May 26, 1967]

§§ 203.8—203.9 [Reserved]

§ 203.10 Statement with respect to insolvency; definition of current assets and current liabilities.

(a) Under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. 181 et seq.), the principal test of insolvency is to determine whether a person's current liabilities exceed his current assets. This current ratio test of insolvency under the Act has been reviewed and affirmed by a United States Court of Appeals. *Bowman v. United States Department of Agriculture,* 363 F. 2d 81 (5th Cir. 1966).

(b) For the purposes of the administration of the Packers and Stockyards Act, 1921, the following terms shall be construed, respectively, to mean:

(1) *Current assets* means cash and other assets or resources commonly identified as those which are reasonably expected to be realized in cash or sold or consumed during the normal operating cycle of the business, which is considered to be one year.

(2) *Current liabilities* means obligations whose liquidation is reasonably expected to require the use of existing resources principally classifiable as current assets or the creation of other current liabilities during the one year operating cycle of the business.

(c) The term current assets generally includes: (1) Cash in bank or on hand; (2) sums due a market agency from a custodial account for shippers' proceeds; (3) accounts receivable, if collectable; (4) notes receivable and portions of long-term notes receivable within one year from date of balance sheet, if collectable; (5) inventories of livestock acquired for purposes of resale or for purposes of market support; (6) feed inventories and other inventories which are intended to be sold or consumed in the normal operating cycle of the business; (7) accounts due from employees, if collectable; (8) accounts due from officers of a corporation, if collectable; (9) accounts due from affiliates and subsidiaries of corporations if the financial position of such subsidiaries and affiliates justifies such classification; (10) marketable securities representing cash available for current operations and not otherwise pledged as security; (11) accured interest receivable; and (12) prepaid expenses.

(d) The term current assets generally excludes: (1) Cash and claims to cash which are restricted as to withdrawal, such as custodial funds for shippers' proceeds and current proceeds receivable from the sale of livestock sold on a commission basis; (2) investments in securities (whether marketable or not) or advances which have been made for the purposes of control, affiliation, or other continuing business advantage; (3) receivables which are not expected to be collected within 12 months; (4) cash surrender value of life insurance policies; (5) land and other natural resources; and (6) depreciable assets.

(e) The term current liabilities generally includes: (1) Bank overdrafts (per books); (2) amounts due a custodial account for shippers' proceeds; (3) accounts payable within one year from date of balance sheet; (4) notes payable or portions thereof due and payable within one year from date of balance sheet; (5) accruals such as taxes, wages, social security, unemployment compensation, etc., due and payable as of the date of the balance sheet; and (6)

all other liabilities whose regular and ordinary liquidation is expected to occur within one year.

(Sec. 407(a), 42 Stat. 169, 72 Stat. 1750; 7 U.S.C. 228(a). Interprets or applies secs. 202, 307, 312, 502, 505; 42 Stat. 161 et seq., as amended; 7 U.S.C. 192, 208, 213, 218a, 218d)

[32 FR 6901, May 5, 1967]

§ 203.11 [Reserved]

§ 203.12 Statement with respect to providing services and facilities at stockyards on a reasonable and nondiscriminatory basis.

(a) Section 304 of the Packers and Stockyards Act (7 U.S.C. 205) provides that: ''All stockyard services furnished pursuant to reasonable request made to a stockyard owner or market agency at such stockyard shall be reasonable and nondiscriminatory and stockyard services which are furnished shall not be refused on any basis that is unreasonable or unjustly discriminatory * * *.''

(b) Section 305 of the Act (7 U.S.C. 206) states that: ''All rates or charges made for any stockyard services furnished at a stockyard by a stockyard owner or market agency shall be just, reasonable, and nondiscriminatory * * *.''

(c) Section 307 (7 U.S.C. 208) provides that: ''It shall be the duty of every stockyard owner and market agency to establish, observe, and enforce just, reasonable, and nondiscriminatory regulations and practices in respect to the furnishing of stockyard services * * *.''

(d) Section 312(a) (7 U.S.C. 213(a)) provides that: ''It shall be unlawful for any stockyard owner, market agency, or dealer to engage in or use any unfair, unjustly discriminatory, or deceptive practice or device in connection with determining whether persons should be authorized to operate at the stockyards, or with the receiving, marketing, buying, or selling on a commission basis or otherwise, feeding, watering, holding, delivery, shipment, weighing or handling, in commerce, of livestock.''

(e) Section 301(b) (7 U.S.C. 201(b)) defines ''stockyard services'' as any ''services or facilities furnished at a stockyard in connection with the receiving, buying, or selling on a commission basis or otherwise, marketing, feeding, watering, holding, delivery, shipment, weighing, or handling, in commerce, of livestock.''

(f) It is the view of the Grain Inspection, Packers and Stockyards Administration (Packers and Stockyards Programs) that it is a violation of sections 304, 307, and 312(a) of the Act for a stockyard owner or market agency to discriminate, in the furnishing of stockyard services or facilities or in establishing rules or regulations at the stockyard, because of race, religion, color, or national origin of those persons using the stockyard services or facilities. Such services and facilities include, but are not limited to, the restaurant, restrooms, drinking fountains, lounge accommodations, those furnished for the selling, weighing, or other handling of the livestock, and facilities for observing such services.

(g) If the Grain Inspection, Packers and Stockyards Administration (Packers and Stockyards Programs) has reason to believe that any stockyard owner or market agency has so discriminated in the furnishing of stockyard services or facilities, consideration will be given to the issuance of a complaint charging the stockyard or market agency with violations of the Act.

(Sec. 407(a), 42 Stat. 159, 72 Stat. 1750; 7 U.S.C. 228(a). Interprets or applies secs. 304, 307, 312, 42 Stat. 161 et seq., as amended, 7 U.S.C. 205, 208, 213)

[33 FR 17621, Nov. 26, 1968]

§ 203.13 [Reserved]

§ 203.14 Statement with respect to advertising allowances and other merchandising payments and services.

The Guidelines

1. *Who is a customer?* (a) A *customer* is a person who buys for resale directly from the packer, or through the packer's agent or broker; and in addition, a customer is any buyer of the packer's product for resale who purchases from or through a wholesaler or other intermediate reseller.

(NOTE: In determining whether a packer has fulfilled its obligations toward its customers, the Grain Inspection, Packers and Stockyards Administration (Packers and Stockyards Programs) will recognize that there may be some exceptions to this general definition of ''customer.'' For example, the

purchaser of distress merchandise would not be considered a ''customer'' simply on the basis of such purchase. Similarly, a retailer who purchases solely from other retailers or one who makes only sporadic purchases, or one who does not regularly sell the packer's product or who is a type of retail outlet not usually selling such products will not be considered a ''customer'' of the packer unless the packer has been put on notice that such retailer is selling its product.)

(b) *Competing customers* are all businesses that compete in the resale of the packer's products of like grade and quality at the same functional level of distribution, regardless of whether they purchase direct from the packer or through some intermediary.

Example: A packer sells directly to some independent retailers, sells to the headquarters of chains and of retailer-owned cooperatives, and also sells to wholesalers. The direct-buying independent retailers, the headquarters of chains and of retailer-owned cooperatives, and the wholesalers' independent retailer customers are customers of the packer. Individual retail outlets which are part of the chains or members of the retailer-owned cooperatives are not customers of the packer.

2. *Definition of services. Services* are any kind of advertising or promotion of a packer's product, including but not limited to, cooperative advertising, handbills, window and floor displays, demonstrators and demonstrations, customer coupons, and point of purchase activity.

3. *Need for a plan.* If a packer makes payments or furnishes services, it should do so under a plan that meets several requirements. If there are many competing customers to be considered, or if the plan is at all complex, the packer would be well advised to put its plan in writing. The requirements are:

(a) Proportionally equal terms—The payments or services under the plan should be made available to all competing customers on proportionally equal terms. This means that payments or services should be made proportionately on some basis that is fair to all customers who compete in the resale of the packer's products. No single way to achieve the proper proportion is prescribed, and any method that treats competing customers on proportionally equal terms may be used. Generally, this can best be done by basing the payments made or the services furnished on the dollar volume or on the quantity of goods purchased during a specified period. Other methods which are fair to all competing customers are also acceptable.

Example 1: A packer may properly offer to pay a specified part (say 50 percent) of the cost of local advertising up to an amount equal to a set percentage (such as 5 percent) of the dollar volume of such purchases during a specified time.

Example 2: A packer may properly place in reserve for each customer a specified amount of money for each unit purchased and use it to reimburse those customers for the cost of advertising and promoting the packer's product during a specified time.

Example 3: A packer's plan should not provide an allowance on a basis that has rates graduated with the amount of goods purchased, as for instance, 1 percent of the first $1,000 purchases per month, 2 percent on second $1,000 per month, and 3 percent on all over that.

(b) Packer's duty to inform—The packer should take reasonable action, in good faith, to inform all its competing customers of the availability of its promotional program. Such notification should include all the relevant details of the offer in time to enable customers to make an informed judgment whether to participate. Where such one-step notification is impracticable, the packer may, in lieu thereof, maintain a continuing program of first notifying all competing customers of the types of promotions offered by the packer and a specific source for the customer to contact in order to receive full and timely notice of all relevant details of the packer's promotions. Such notice should also inform all competing customers that the packer offers advertising allowances and/or other promotional assistance that are usable in a practical business sense by all retailers regardless of size. When a customer indicates its desire to be put on the notification list, the packer should keep that customer advised of all promotions available in its area as long as the customer so desires. The packer may make the required notification by any means it chooses; but in order to show later that it gave notice to a certain customer, it is in a better position to do so if it was given in writing or a record was prepared at the time of notification showing date, person notified, and contents of notification.

If more direct methods of notification are impracticable, a packer may employ one or more of the following methods, the sufficiency of which will depend upon the complexity of its own distribution system. Different packers may find that different notification methods are most effective for them:

(1) The packer may enter into contracts with its wholesaler, distributors or other third parties which conform to the requirements of item 5, infra.

(2) The packer may place appropriate announcements on product containers or inside thereof with conspicuous notice of such enclosure on the outside.

(3) The packer may publish notice of the availability and essential features of a promotional plan in a publication of general distribution in the trade.

Example 1: A packer has a wholesaler-oriented plan directed to wholesalers distributing its products to retailing customers. It should notify all the competing wholesalers distributing its products of the availability of this plan, but the packer is not required to notify retailing customers.

Example 2: A packer who sells on a direct basis to some retailers in an area, and to other retailers in the area through wholesalers, has a plan for the promotion of its products at the retail level. If the packer directly notifies not only all competing direct purchasing retailers but also all competing retailers purchasing through the wholesalers as to the availability, terms and conditions of the plan, the packer is not required to notify its wholesalers.

Example 3: A packer regularly engages in promotional programs and the competing customers include large direct purchasing retailers and smaller customers who purchase through wholesalers. The packer may encourage, but not coerce, the retailer purchasing through a wholesaler to designate a wholesaler as its agent for receiving notice of, collecting, and using promotional allowances for the customer. If a wholesaler or other intermediary by written agreement with a retailer is actually authorized to collect promotional payments from suppliers, the packer may assume that notice of and payment under a promotional plan to such wholesaler or intermediary constitutes notice and payment to the retailer.

(A packer should not rely on a written agreement authorizing an intermediary to receive notice of and/or payment under a promotional plan for a retailer if the packer knows, or should know, that the retailer was coerced into signing the agreement. In addition, a packer should assume that an intermediary is not authorized to receive notice of and/or payment under a promotional plan for a retailer unless there is a written authorization signed by such retailer.)

(c) Availability to all competing customers—The plan should be such that all types of competing customers may participate. It should not be tailored to favor or discriminate against a particular customer or class of customers but should, in its terms, be usable in a practical business sense by all competing customers. This may require offering all such customers more than one way to participate in the plan or offering alternative terms and conditions to customers for whom the basic plan is not usable and suitable. The packer should not, either expressly or by the way the plan operates, eliminate some competing customers, although it may offer alternative plans designed for different customer classes. If it offers alternative plans, all of the plans offered should provide the same proportionate equality and the packer should inform competing customers of the various alternative plans.

When a packer, in good faith, offers a basic plan, including alternatives, which is reasonably fair and nondiscriminatory and refrains from taking any steps which would prevent any customer, or class of customers, from participating in its program, it shall be deemed to have satisfied its obligation to make its plan functionally available to all customers, and the failure of any customer or customers to participate in the program shall not be deemed to place the packer in violation of the provisions of the Packers and Stockyards Act.

Example 1: A packer offers a plan of short term store displays of varying sizes, including some which are suitable for each of its competing customers and at the same time are small enough so that each customer may make use of the promotion in a practical business sense. The plan also calls for uniform, reasonable certification of performance by the retailer. Because they are reluctant to process a reasonable amount of paperwork, some small retailers do not participate. This fact is not deemed to place a packer in violation of Item 3(c) and it is under no obligation to provide additional alternatives.

Example 2: A packer offers a plan for cooperative advertising on radio, television, or in newspapers of general circulation.[1] Because the purchases of some of its customers are too small, this offer is not ''functionally available'' to them. The packer should offer them alternative(s) on proportionally equal terms that are usable by them and suitable for their business.

(d) Need to understand terms—In informing customers of the details of a plan, the packer should provide them sufficient information to give a clear understanding of the exact terms of the offer, including all alternatives, and the conditions upon which payment will be made or services furnished.

(e) Checking customer's use of payments—The packer should take reasonable precautions to see that services it is paying for are furnished and also that it is not overpaying for them. Moreover, the customer should expend the allowance solely for the purpose for which it was given. If the packer knows or should know that what it pays or furnishes is not being properly used by some

[1] In order to avoid the tailoring of promotional programs that discriminate against particular customers or class of customers, the packer in offering to pay allowances for newspaper advertising should offer to pay the same percentage of the cost of newspaper advertising for all competing customers in a newspaper of the customer's choice, or at least in those newspapers that meet the requirements for second class mail privileges.

customers, the improper payments or services should be discontinued.[2]

A packer who, in good faith, takes reasonable and prudent measures to verify the performance of its competing customers will be deemed to have satisfied its obligations under the Act. Also, a packer who, in good faith, concludes a promotional agreement with wholesalers or other intermediaries and who otherwise conforms to the standards of Item 5 shall be deemed to have satisfied this obligation. If a packer has taken such steps, the fact that a particular customer has retained an allowance in excess of the cost, or approximate cost if the actual cost is not known, of services performed by the customer shall not alone be deemed to place a packer in violation of the Act.

(When customers may have different but closely related costs in furnishing services that are difficult to determine such as the cost for distributing coupons from a bulletin board or using a window banner, the packer may furnish to each customer the same payment if it has a reasonable relationship to the cost of providing the service or is not grossly in excess thereof.)

4. *Competing customers.* The packer is required to provide in its plan only for those customers who compete with each other in the resale of the packer's products of like grade and quality. Therefore a packer should make available to all competing wholesalers any plan providing promotional payments or services to wholesalers, and similarly should make available to all competing retailers any plan providing promotional payments or services to retailers. With these requirements met, a packer can limit the area of its promotion. However, this section is not intended to deal with the question of a packer's liability for use of an area promotion where the effect may be to injure the packer's competition.

5. *Wholesaler or third party performance of packer's obligations.* A packer may, in good faith, enter into written agreements with intermediaries, such as wholesalers, distributors or other third parties, including promoters of tripartite promotional plans, which provide that such intermediaries will perform all or part of the packer's obligations under this part. However, the interposition of intermediaries between the packer and its customers does not relieve the packer of its ultimate responsibility of compliance with the provisions of the Packers and Stockyards Act. The packer, in order to demonstrate its good faith effort to discharge its obligations under this part, should include in any such agreement provisions that the intermediary will:

(1) Give notice to the packer's customers in conformity with the standards set forth in items 3(b) and (d), supra;

(2) Check customer performance in conformity with the standards set forth in item 3(e), supra;

(3) Implement the plan in a manner which will insure its functional availability to the packer's customers in conformity with the standards set forth in item 3(c), supra (This must be done whether the plan is one devised by the packer itself or by the intermediary for use by the packer's customers.); and

(4) Provide certification in writing and at reasonable intervals that the packer's customers have been and are being treated in conformity with the agreement.

A packer who negotiates such agreements with its wholesalers, distributors or third party promoters will be considered by the Administration to have justified its ''good faith'' obligations under this section only if it accompanies such agreements with the following supplementary measures: At regular intervals the packer takes affirmative steps to verify that its customers are receiving the proportionally equal treatment to which they are entitled by making spot checks designed to reach a representative cross section of its customers. Whenever such spot checks indicate that the agreements are not being implemented in such a way that its customers are receiving such proportionally equal treatment, the packer takes immediate steps to expand or to supplement such agreements in a manner reasonably designed to eliminate the repetition or continuation of any such discriminations in the future.

Intermediaries, subject to the Packers and Stockyards Act, administering promotional assistance programs on behalf of a packer may be in violation of the provisions of the Packers and Stockyards Act, if they have agreed to perform the packer's obligations under the Act with respect to a program which they have represented to be usable and suitable for all the packer's competing customers if it should later develop that the program was not offered to all or, if offered, was not usable or suitable, or was otherwise administered in a discriminatory manner.

6. *Customer's liability.* A customer, subject to the Packers and Stockyards Act, who knows, or should know, that it is receiving payments or services which are not available on proportionally equal terms to its competitors engaged in the resale of the same packer's products may be in violation of the provisions of the Act. Also, customers (subject to the Packers and Stockyards Act) that make unauthorized deductions from purchase invoices for alleged advertising or other promotional allowances may be proceeded against under the provisions of the Act.

[2] The granting of allowances or payments that have little or no relationship to cost or approximate cost of the service provided by the retailer may be considered a violation of section 202 of the Act.

Example: A customer subject to the Act should not induce or receive an allowance in excess of that offered in the packer's advertising plan by billing the packer at ''vendor rates'' or for any other amount in excess of that authorized in the packer's promotion program.

7. *Meeting competition.* A packer charged with discrimination under the provisions of the Packers and Stockyards Act may defend its actions by showing that the payments were made or the services were furnished in good faith to meet equally high payments made by a competing packer to the particular customer, or to meet equivalent services furnished by a competing packer to the particular customer. This defense, however, is subject to important limitations. For instance, it is insufficient to defend solely on the basis that competition in a particular market is very keen, requiring that special allowances be given to some customers if a packer is ''to be competitive.''

8. *Cost justification.* It is no defense to a charge of unlawful discrimination in the payment of an allowance or the furnishing of a service for a packer to show that such payment or service could be justified through savings in the cost of manufacture, sale, or delivery.

(Approved by the Office of Management and Budget under control number 0590–0001)

[58 FR 52886, Oct. 13, 1993; 58 FR 58902, Nov. 4, 1993]

§ 203.15 Trust benefits under sections 206 and 207 of the Act.

(a) Within the times specified under sections 206(b) and 207(d) of the Act, any livestock seller, live poultry seller or grower, to preserve his interest in the statutory trust, must give written notice to the appropriate packer or live poultry dealer and file such notice with the Secretary. One of the ways to satisfy the notification requirement under these provisions is to make certain that notice is given to the packer or live poultry dealer within the prescribed time by letter, mailgram, or telegram stating:

(1) Notification to preserve trust benefits:

(2) Identification of packer or live poultry dealer;

(3) Identification of seller or poultry grower;

(4) Date of the transaction;

(5) Date of seller's or poultry grower's receipt of notice that payment instrument has been dishonored (if applicable); and

(6) Amount of money due; and to make certain that a copy of such letter, mailgram, or telegram is filed with a GIPSA Regional Office or with GIPSA, USDA, Washington, DC 20250, within the prescribed time.

(b) While the above information is desirable, any written notice which informs the packer or live poultry dealer and the Secretary that the packer or live poultry dealer has failed to pay is sufficient to meet the above-mentioned statutory requirement if it is given within the prescribed time.

(Approved by the Office of Management and Budget under control number 0590–0001)

[54 FR 16357, Apr. 24, 1989]

§ 203.16 Mailing of checks in payment for livestock purchased for slaughter, for cash and not on credit.

(a) The Grain Inspection, Packers and Stockyards Administration (Packers and Stockyards Programs) recognizes that one who sells livestock to a packer, market agency, or dealer, who is purchasing for slaughter, may not intend to be present at the point of transfer of possession of the livestock, to receive payment, at the time a check in payment for such livestock may be delivered by the purchaser, and may not wish to authorize a representative to receive such a check; or for other reasons such a seller may prefer that such a purchaser make payment by mailing a check within the time limit as prescribed in section 409(a) of the Act. In cases when the seller does not intend to be present, he may use the following form of notification to the purchaser:

I do not intend to be present at the point of transfer of possession of livestock sold by me to (name of packer, market agency, or dealer) for the purpose of receiving a check in payment for such livestock.

I hereby direct (name of packer, market agency, or dealer) to make payment for livestock purchased from me, by mailing a check for the full amount of the purchase price before the close of the next business day following the purchase of livestock and transfer of possession thereof or, in the case of a purchase on a ''carcass'' or ''grade and yield'' basis, not later than the close of the first business day following determination of the purchase price.

This does not constitute an extension of credit to (name of packer, market agency or

dealer). This is subject to cancellation by me at any time, and if not cancelled by (date), it shall terminate on that date.

If the seller, for reasons other than not being present to receive payment, prefers to have the packer, market agency, or dealer make payment by mailing a check within the time limit as provided in section 409(a), he may use the above form but should not include the statement in the first sentence that he does not intend to be present.

(b) The Grain Inspection, Packers and Stockyards Administration (Packers and Stockyards Programs) believes that such an agreement would not constitute an extension of credit within the meaning of section 206 of the Act because it would not give the purchaser any more time to issue a check than is provided in section 409(a).

(Approved by the Office of Management and Budget under control number 0590–0001)

(Sec. 401, 42 Stat. 168 (7 U.S.C 221); sec. 407, 42 Stat. 169 (7 U.S.C. 228); sec. 409, as added by sec. 7, 90 Stat. 1250 (7 U.S.C. 228b); 7 CFR 2.17, 2.54; 42 FR 35625; Pub. L. 96–511, 94 Stat. 2812 (44 U.S.C. 3501 et seq.); 7 U.S.C. 222 and 228 and 15 U.S.C. 46)

[42 FR 49929, Sept. 28, 1977, as amended at 49 FR 39516, Oct. 9, 1984]

§ 203.17 Statement of general policy with respect to rates and charges at posted stockyards.

(a) Requests have been received from stockyard operators, market agencies, and livestock producers urging a reduction of rate regulation at posted stockyards. Their requests are based on the belief that competition among markets will set a level of rates and charges fair to both the market operator and to the livestock producer. Grain Inspection, Packers and Stockyards Administration (Packers and Stockyards Programs) will accept for filing tariffs containing any level of charges after 10 days' notice to the public and to the Secretary as required by the Act.

(b) Grain Inspection, Packers and Stockyards Administration (Packers and Stockyards Programs) will not investigate the level of rates and charges established by stockyard owners and market agencies for reasonableness except upon receipt of a valid complaint or under compelling circumstances warranting such an investigation. Stockyard owners and market agencies will have substantial flexibility in setting their own rates and charges.

(c) Complaints filed about the reasonableness of rates and charges will be investigated to determine the validity of such complaints and appropriate action taken if warranted.

(d) Grain Inspection, Packers and Stockyards Administration (Packers and Stockyards Programs) will continue to insure that the schedules of rates and charges filed with the Department are applied uniformly and in a nondiscriminatory manner.

(Approved by the Office of Management and Budget under control number 0590–0001)

(7 U.S.C. 203, 204, 207, 217a, 222 and 228)

[49 FR 33004, Aug. 20, 1984]

§ 203.18 Statement with respect to packers engaging in the business of custom feeding livestock.

(a) In its administration of the Packers and Stockyards Act, the Grain Inspection, Packers and Stockyards Administration (Packers and Stockyards Programs) has sought to promote and maintain open and fair competition in the livestock and packing industries, and to prevent unfair or anticompetitive practices when they are found to exist. It is the opinion of the Administration that the ownership or operation of custom feedlots by packers presents problems which may, under some circumstances, result in violations of the Packers and Stockyards Act.

(b) Packers contemplating entering into such arrangements with custom feedlots are encouraged to consult with the Administration prior to the commencement of such activities. Custom feedlots are not only places of production, but are also important marketing centers, and in connection with the operation of a custom feedlot, it is customary for the feedlot operator to assume responsibility for marketing fed livestock for the accounts of feedlot customers. When a custom feedlot is owned or operated by a packer, and when such packer purchases fed livestock from the feedlot, this method of operation potentially gives rise to a conflict of interest. In such situations, the packer's interest in the fed livestock as a buyer is in conflict with its

obligations to feedlot customers to market their livestock to the customer's best advantage. Under these circumstances, the packer should take appropriate measures to eliminate any conflict of interest. At a minimum, such measures should insure:

(1) That feedlot customers are fully advised of the common ties between the feedlot and the packer, and of their rights and options with respect to the marketing of their livestock;

(2) That all feedlot customers are treated equally by the packer/custom feedlot in connection with the marketing of fed livestock; and

(3) That marketing decisions rest solely with the feedlot customer unless otherwise expressly agreed.

(c) Packer ownership or operation of custom feedlots may also give rise to competitive problems in some situations. Packers contemplating or engaging in the business of operating a custom feedlot should carefully review their operations to assure that no restriction of competition exists or is likely to occur.

(d) The Grain Inspection, Packers and Stockyards Administration (Packers and Stockyards Programs) does not consider the existence of packer/custom feedlot relationships, by itself, to constitute a violation of the Act. In the event it appears that a packer/custom feedlot arrangement gives rise to a violation of the Act, an investigation will be made on a case-by-case basis, and, where warranted, appropriate action will be taken.

(Approved by the Office of Management and Budget under control number 0590–0001)

(7 U.S.C. 203, 204, 207, 217a, 222 and 228)

[49 FR 33004, Aug. 20, 1984]

§ 203.19 Statement with respect to packers engaging in the business of livestock dealers or buying agencies.

(a) In its administration of the Packers and Stockyards Act, the Grain Inspection, Packers and Stockyards Administration (Packers and Stockyards Programs) has sought to prevent conflicts of interest and to maintain open and fair competition in the livestock and meat packing industries. The ownership or operation of livestock dealers or buying agencies by packers, under some circumstances, may result in violations of the Packers and Stockyards Act.

(b) Traditionally, livestock dealers and buying agencies purchase livestock for resale or to fill orders for farmers, ranchers, producers, other livestock firms and packers. When a livestock dealer or buying agency is owned or operated by a packer, and when such packer is also buying livestock for its own operational requirements, there is a potential conflict of interest. Furthermore, the purchase and sale of livestock by meat packers may result in control of markets and prices which could adversely affect both livestock producers, competing packers, and consumers.

(c) Arrangements between packers and dealers or buying agencies which do not normally create a conflict of interest or result in a restraint of competition include:

(1) Operations utilizing different species or classes of livestock; (2) operations where the business activities are widely separated geographically; and (3) operations where tie-in purchases or sales are not involved. Packers contemplating engaging in the business of a livestock dealer or a buying agency are encouraged to consult with the Grain Inspection, Packers and Stockyards Administration (Packers and Stockyards Programs) prior to the commencement of such activities.

(d) In the event a packer/dealer or a packer/buying agency arrangement appears to give rise to a violation of the Act, an investigation will be made on a case-by-case basis and, where warranted, appropriate action will be taken.

(Approved by the Office of Management and Budget under control number 0590–0001)

(7 U.S.C. 228, 228b, 222, 15 U.S.C. 46)

[49 FR 32845, Aug. 17, 1984; 54 FR 26349, June 23, 1989]

PART 204—ORGANIZATION AND FUNCTIONS

PUBLIC INFORMATION

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204.1 Introduction.
204.2 Organization.
204.3 Delegation of authority.
204.4 Public inspection and copying.

204.5 Indexes.
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204.7 Appeals.

AUTHORITY: 5 U.S.C. 552.

SOURCE: 49 FR 46528, Nov. 27, 1984, unless otherwise noted.

PUBLIC INFORMATION

§204.1 Introduction.

The Grain Inspection, Packers and Stockyards Administration (Packers and Stockyards Programs) hereby describes its central and field organization; indicates the established places at which, and methods whereby, the public may secure information; directs attention to the general course and method by which its functions are channeled; and sets forth the procedures governing the availability of opinions, orders, and other records in the files of said Administration.

§204.2 Organization.

(a) The Grain Inspection, Packers and Stockyards Administration (Packers and Stockyards Programs) consists of a headquarters office located in the South Building of the U.S. Department of Agriculture in Washington, DC, and 12 regional offices. The Washington headquarters office is organized to include the Office of the Administrator and two Divisions, the Packer and Poultry Division and the Livestock Marketing Division.

(b) *Office of the Administrator.* This office has overall responsibility for administering the provisions of the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. 181 *et seq.*), for enforcement of the Truth-in-Lending Act (15 U.S.C. 1601–1665) with respect to any activities subject to the Packers and Stockyards Act and for executing assigned civil defense and defense mobilization activities. These responsibilities include formulation of current and long-range programs relating to assigned functions; execution of the policies and programs administered by the Grain Inspection, Packers and Stockyards Administration (Packers and Stockyards Programs); review and evaluation of program operations for uniform, effective, and efficient administration of the Packers and Stockyards Act; and maintenance of relations and communications with producer and industry groups.

(1) *Administrator.* The Secretary of Agriculture has delegated responsibility for administration of the Packers and Stockyards Act to the Administrator who is responsible for the general direction and supervision of programs and activities assigned to the Grain Inspection, Packers and Stockyards Administration (Packers and Stockyards Programs) except such activities as are reserved to the Judicial Officer (32 FR 7468). The Administrator reports to the Assistant Secretary for Marketing and Inspection Services.

(2) *Deputy Administrator.* The Deputy Administrator assists the Administrator in the overall responsibility for the general direction and supervision of programs and activities assigned to the Grain Inspection, Packers and Stockyards Administration (Packers and Stockyards Programs).

(3) *Assistant to the Administrator.* The Assistant to the Administrator participates with the Administrator and Deputy Administrator in the development and analysis of policies and programs, and directs the management support services and related activities of the Grain Inspection, Packers and Stockyards Administration (Packers and Stockyards Programs).

(4) *Director, Industry Analysis Staff.* The Director of the Industry Analysis Staff participates with the Administrator and Deputy Administrator in the development and analysis of policies and programs and directs economic studies of structure and performance of the livestock, meat, and poultry marketing, processing, and wholesaling industries. The results of these studies are used to provide economic advice to the Administrator in developing overall policy on antitrust matters and effects of practices or impediments in the marketing system. The Director works closely with the Directors of the Packer and Poultry and the Livestock Marketing Divisions in connection with investigations to provide economic advice and expert testimony in trials and administrative hearings. The Director also coordinates activities and works closely with the Federal Trade Commission and Justice

Department in studying the effects of mergers and antitrust matters in the livestock, meat packing and poultry industries.

(c) *Packer and Poultry Division.* This Division carries out the enforcement of the provisions of the Packers and Stockyards Act relating to packers and live poultry dealers and handlers. The responsibilities and functions include: Determination of applicability of the provisions of the Act to individual packer and poultry operations; surveillance of these operations; investigation of complaints; initiation of formal proceedings, when warranted, to correct illegal practices; and maintenance of working relationships with the meat packer and poultry industries. These responsibilities and functions are accomplished with programs and activities directed through the Livestock Procurement Branch, Meat Merchandising Branch, and Poultry Branch. The Division Director participates with the Administrator and Deputy Administrator in the development and evaluation of policies and programs to fulfill the Agency's responsibilities and functions. The Director implements and directs the policies and programs pertaining to the Packer and Poultry Division through the three branches.

(d) *Livestock Marketing Division.* This Division enforces those provisions of the Packers and Stockyards Act relating to stockyard owners, market agencies, and dealers. The responsibilities and functions include: determination of the applicability of the jurisdiction, bonding, financial and trade practice provisions of the Act to individual operations; supervision of the installation, maintenance, and testing of scales; surveillance and investigations of stockyards, market agencies, and dealers; initiation of formal proceedings, when warranted, to correct illegal practices; and maintenance of working relationships with producer and industry groups. These responsibilities and functions are accomplished with programs and activities directed through the Financial Protection Branch, Marketing Practices Branch, and Scales and Weighing Branch. The Division Director participates with the Administrator and Deputy Administrator in the development and evaluation of policies and programs to fulfill the Agency's responsibilities and functions. The Director implements and directs the policies and programs pertaining to the Livestock Marketing Division through the three branches.

(e) *Field Services.* (1) The field services of the Grain Inspection, Packers and Stockyards Administration (Packers and Stockyards Programs) is divided into 12 regional offices. These offices are responsible for supervision of operations of stockyard companies, market agencies, dealers, packers and live poultry dealers and handlers to assure compliance with the Act. They formulate recommendations relating to the enforcement of the Act; receive and investigate complaints, including reparation complaints; audit books, records, and reports of persons subject to the Act; conduct investigations to determine the existence of and develop evidence of unfair, deceptive, and discriminatory trade practices; prepare investigative reports and recommend corrective action; assist in the prosecution of cases; review applications for registration and rate changes for accuracy and compliance; and maintain relationships with producers, the trade, States and other groups interested in the welfare of the livestock, meat packing, and poultry industries concerning enforcement of the Act.

(2) The addresses and the States covered by these offices, which are under regional supervisors, are as follows:

Atlanta—Room 338, 1720 Peachtree Street, NW., Atlanta, Georgia 30309 (Alabama, Florida, Georgia, South Carolina)

Bedford—Turnpike Road, Box 101E, Bedford, Virginia 25423 (District of Columbia, Delaware, Maryland, North Carolina, Virginia, West Virginia)

Denver—208 Livestock Exchange Building, Denver, Colorado 80216 (Colorado, Montana, New Mexico, Utah, Wyoming)

Fort Worth—Room 8A36, Federal Building, 819 Taylor Street, Fort Worth, Texas 76102 (Oklahoma, Texas)

Indianapolis—Room 434 Federal Building and U.S. Courthouse, 46 E. Ohio Street, Indianapolis, Indiana 46204 (Illinois, Indiana, Kentucky, Michigan, Ohio)

Kansas City—828 Livestock Exchange Building, Kansas City, Missouri 64102 (Kansas, Missouri)

Lawndale—15000 Aviation Boulevard, Room 2W6, P.O. Box 6102, Lawndale, California 90261 (Arizona, California, Hawaii, Nevada)

Memphis—Room 459, Federal Building, 167 Main Street, Memphis, Tennessee 38103 (Arkansas, Louisiana, Mississippi, Tennessee)

North Brunswick—825 Georges Road, Room 303, North Brunswick, New Jersey 08902 (Connecticut, Maine, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Vermont)

Omaha—909 Livestock Exchange Building, Omaha, Nebraska 68107 (Iowa, Nebraska)

Portland—9370 S.W. Greenburg Road, Suite E, Portland, Oregon 97223 (Alaska, Idaho, Oregon, Washington)

South St. Paul—208 Post Office Building, Box 8, South St. Paul, Minnesota 55075 (Minnesota, North Dakota, South Dakota, Wisconsin)

§204.3 Delegation of authority.

(a) *Deputy Administrator.* Under the direction of the Administrator, the Deputy Administrator is hereby delegated authority to perform all the duties and exercise all the functions and powers which are now or which may hereafter be, vested in the Administrator (including the power of redelegation).

(b) *Division Directors.* The Directors of the Industry Analysis Staff, the Livestock Marketing Division, and the Packer and Poultry Division, under administrative and technical direction of the Administrator and the Deputy Administrator, are hereby individually delegated authority, in connection with the respective functions assigned to each of said organizational units in §204.2 to perform all the duties and to exercise all the functions and powers which are now, or which may hereafter be, vested in the Administrator (including the power of redelegation) except such authority as is reserved to the Administrator and Deputy Administrator under paragraph (g) of this section.

(c) *Regional Supervisors.* (1) The Regional Supervisors of the Grain Inspection, Packers and Stockyards Administration (Packers and Stockyards Programs) are hereby individually delegated authority under the provisions of section 402 of the Packers and Stockyards Act, 1921, as amended (7 U.S.C. 222), to issue special orders pursuant to the provisions of section 6(b) of the Federal Trade Commission Act (15 U.S.C. 46(b)), and, with respect thereto, to issue notices of default provided for in section 10 of the Federal Trade Commission Act (15 U.S.C. 50); to notify persons deemed to be subject to the bonding requirements in 7 U.S.C. 204 of their obligations to file bonds or trust fund agreements in conformity with regulations issued under this chapter including authority to determine that a bond is inadequate under §201.30(f) of this chapter and to give notice to the person of the amount of bond required; to notify persons deemed to be subject to the reporting requirements in §201.97 of this chapter of their obligations to file annual reports; and to grant reasonable requests for extensions of 30 days or less for the filing of such annual reports.

(2) The Regional Supervisors are hereby individually delegated authority, when there is reason to believe that there is a question as to the true ownership of livestock sold by any person, to disclose information relating to such questionable ownership to any interested person.

(d) *Investigative employees.* All employees of the Grain Inspection, Packers and Stockyards Administration (Packers and Stockyards Programs) assigned to or responsible for investigations in the enforcement of the Packers and Stockyards Act, 1921, as amended (7 U.S.C. 181 *et seq.*), or the enforcement of the Truth-in-Lending Act (15 U.S.C. 1601–1665), with respect to any activities subject to the Packers and Stockyards Act, are hereby individually delegated authority under the Act of January 31, 1925, 43 Stat. 803, 7 U.S.C. 2217, to administer to or take from any person an oath, affirmation, or affidavit whenever such oath, affirmation, or affidavit is for use in any prosecution or proceeding under or in the enforcement of the aforementioned Acts. This authority may not be redelegated and will automatically expire upon the termination of the employment of such employees with the Grain Inspection, Packers and Stockyards Administration (Packers and Stockyards Programs).

(e) *Concurrent authority.* No delegation prescribed herein shall preclude

the Administrator or Deputy Administrator from exercising any of the powers or functions or from performing any of the duties conferred upon them, and any such delegation is subject at all times to withdrawal or amendment by the Administrator or Deputy Administrator or the Division Director responsible for the function involved.

(f) *Prior delegations.* All prior delegations and redelegations of authority relating to any function or activity covered by these delegations of authority shall remain in effect except as they are inconsistent herewith or are hereafter amended or revoked. Nothing herein shall affect the validity of any action heretofore taken under prior delegations or redelegations of authority or assignment of functions.

(g) *Reservations of authority.* It is hereby reserved to the Administrator and Deputy Administrator authority with respect to proposed rulemaking and final action for the issuance of regulations (§ 201.1 of this chapter *et seq.*), rules of practice governing proceedings (§ 202.1 of this chapter *et seq.*), and statements of general policy (§ 203.1 of this chapter *et seq.*), and the issuance of moving papers as prescribed in the rules of practice governing formal adjudicatory administrative proceedings instituted by the Secretary (7 CFR part 1, subpart H, § 1.133); and the authority to make final determinations in accordance with the provisions of 7 CFR Part 1, Subpart A, as to the availability of official records and information made or obtained in connection with the administration of the Packers and Stockyards Act which are considered exempt from disclosure under § 204.7 of this part. Further, authority to issue subpenas (7 U.S.C. 222 and 15 U.S.C. 49) is reserved to the Administrator and Deputy Administrator.

§ 204.4 Public inspection and copying.

(a) Facilities for public inspection and copying of the indexes and materials required to be made available under 7 CFR 1.2(a) will be provided by the Grain Inspection, Packers and Stockyards Administration (Packers and Stockyards Programs) during normal hours of operation. Requests for this information should be made to the Freedom of Information Act Officer, Grain Inspection, Packers and Stockyards Administration (Packers and Stockyards Programs, United States Department of Agriculture, Washington, DC 20250.

(b) Copies of such materials may be obtained in person or by mail. Applicable fees for copies will be charged in accordance with the regulations prescribed by the Director of Information, Office of Governmental and Public Affairs, USDA.

§ 204.5 Indexes.

Pursuant to the regulations in 7 CFR 1.4(b), the Grain Inspection, Packers and Stockyards Administration (Packers and Stockyards Programs) will maintain and make available for public inspection and copying current indexes of all material required to be made available in 7 CFR 1.2(a). Notice is hereby given that publication of these indexes is unnecessary and impractical, since the material is voluminous and does not change often enough to justify the expense of publication.

§ 204.6 Requests for records.

(a) Requests for records under 5 U.S.C. 552(a)(3) shall be made in accordance with 7 CFR 1.3(a). Authority to make determinations regarding initial requests in accordance with 7 CFR 1.4(c) is delegated to the Freedom of Information Act Officer of the Grain Inspection, Packers and Stockyards Administration (Packers and Stockyards Programs). Requests should be submitted to the FOIA Officer at the following address: Freedom of Information Act Officer (FOIA Request), Grain Inspection, Packers and Stockyards Administration (Packers and Stockyards Programs), United States Department of Agriculture, Washington, DC 20250.

(b) The request shall identify each record with reasonable specificity as prescribed in 7 CFR 1.3.

(c) The FOIA Officer is authorized to receive requests and to exercise the authority to (1) make determination to grant requests or deny initial requests; (2) extend the administrative deadline; (3) make discretionary release of exempt records; and (4) make determinations regarding charges pursuant to the fee schedule.

§ 204.7 Appeals.

Any person whose request under § 204.6 of this part is denied shall have the right to appeal such denial in accordance with 7 CFR 1.3(e). Appeals shall be addressed to the Administrator, Grain Inspection, Packers and Stockyards Administration (Packers and Stockyards Programs), U.S. Department of Agriculture, Washington, DC 20250.

PART 205—CLEAR TITLE—PROTECTION FOR PURCHASERS OF FARM PRODUCTS

DEFINITIONS

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AUTHORITY: Section 1324(I), Pub. L. 99–198, 99 Stat. 1535, 7 U.S.C. 1631; 7 CFR 2.17 (e)(3), 2.56(a)(3), as amended June 17, 1986, 51 FR 22795; Sections 662 and 663, Pub. L. 104–127.

SOURCE: 51 FR 29451, Aug. 18, 1986, unless otherwise noted.

DEFINITIONS

§ 205.1 Definitions.

Terms defined in section 1324 of the Food Security Act of 1985, Pub. L. 99–198, 99 Stat. 1535, 7 U.S.C. 1631, shall mean the same in this part as therein. In addition, except as otherwise specified, as used in this part:

(a) *The Secretary* means the Secretary of Agriculture of the United States;

(b) *The Section* means section 1324 of the above-cited Act, and ''subsection'' means a subsection of that Section;

(c) SYSTEM means *central filing system* as defined in subsection (c)(2);

(d) *EFS* means *effective financing statement* as defined in subsection (c)(4);

(e) *System operator* means Secretary of State or other person designated by a State to operate a system;

(f) *Registrant* means any buyer of farm products, commission merchant, or selling agent, as referred-to in the Section, registered with a system under subsection (c)(2)(D);

(g) *Master list* means the accumulation of data in paper, electronic, or other form, described in subsection (c)(2)(C);

(h) *Portion* means portion of the master list distributed to registrants under subsection (c)(2)(E);

(i) *UCC* or *Uniform Commercial Code* means the Uniform Commercial Code prepared under the joint sponsorship of the American Law Institute and the National Conference of Commissioners on Uniform State Laws, and in effect in most States of the United States at the time of enactment of Pub. L. 99–198.

REGULATIONS

§ 205.101 Certification—request and processing.

(a) To obtain certification of a system, a written request for certification must be filed together with such documents as show that the system complies with the Section. If such material is voluminous, a summary, table of contents, and index must accompany it as necessary to facilitate review.

(b) The request must:

(1) Include an introductory explanation of how the system will operate;

(2) Identify the information which will be required to be supplied on an EFS;

(3) Identify where an EFS, amendment thereto, or continuation thereof, will be filed and, if elsewhere than with the system operator, explain how and in what form the system operator will receive information needed to compile and update the master list;

(4) Explain the method for recording the date and hour of filing of an EFS, amendment thereto, or continuation thereof;

(5) Explain how the master list will be compiled, including the method and form of storage and arrangement of information, explain the method and form of retrieval of information from the master list, the method and form of distribution of portions of the master list to registrants as required by subsection (c)(2)(E), and the method and form of furnishing of information orally with written confirmation as required by subsection (c)(2)(F) (details of computer hardware and software need not be furnished but the results it will produce must be explained);

(6) Explain how the list of registrants will be compiled, including identification of where and how they will register, what information they must supply in connection with registration, and the method and form of storage and retrieval of such information (details of computer hardware and software need not be furnished but the results it will produce must be explained);

(7) Show how frequently portions of the master list will be distributed regularly to registrants;

(8) Show the farm products according to which the master list will be organized;

(9) Show how the system will interpret the term ''crop year'' and how it will classify as to crop year an EFS not showing crop year;

(10) Show what fee will be charged and explain how the costs of the system will be covered if not by such fee and the general revenue of the State; and

(11) Include copies of:

(i) All State legislation or other legal authority under which the system is created and operated, and the system operator is designated;

(ii) All regulations, rules and requirements issued under such legislation or other legal authority and governing operation of the system, designation of the system operator, and use of the system by members of the public; and

(iii) All printed and electronic forms required to be used in connection with the system.

(c) Any such request and attachments must be filed in triplicate (one copy for public inspection, a second copy for use in GIPSA, and a third copy for use in the Office of the General Counsel, USDA). All three copies must be received in the headquarters of the Grain Inspection, Packers and Stockyards Administration Packers and Stockyards Programs), USDA, Washington, DC 20250.

(d) A refusal to certify such a system, if any, will be explained in writing. Reconsideration of such a refusal must be requested in writing with specification of errors believed to have been made.

(e) To make changes to an existing certified central filing system, including changes necessitated or made possible by amendments to the Act, a written request to amend the existing certified central filing system must be filed together with such documents as are necessary to show that the system complies with the Act. The request must contain relevant new information consistent with the requirements specified elsewhere in this section.

[51 FR 29451, Aug. 18, 1986, as amended at 61 FR 54728, Oct. 22, 1996]

§ 205.102 Name of person subjecting a farm product to a security interest, on EFS and master list—format.

On an EFS, and on a master list, the name of the person subjecting a farm product to a security interest must appear as follows:

(a) In the case of a natural person, the surname (last name or family name) must appear first;

(b) In the case of a corporation or other entity not a natural person, the name must appear beginning with the first word or character not an article or punctuation mark.

§ 205.103 EFS—minimum information.

(a) The minimum information necessary on an EFS is as follows:

(1) Crop year *unless* every crop of the farm product in question, for the duration of the EFS, is to be subject to the particular security interest;

(2) Farm product name (see §§ 205.106, 205.206);

(3) Each county or parish in the same State where the farm product is produced or to be produced;

(4) Name and address of each person subjecting the farm product to the security interest, whether or not a debtor (see § 205.102);

(5) Social security number or, if other than a natural person, IRS taxpayer identification number, of each such person;

(6) Further details of the farm product subject to the security interest *if needed* to distinguish it from other such product owned by the same person or persons but not subject to the particular security interest (see § 205.207); and

(7) Secured party name and address.

(b) A requirement of additional information on an EFS is discretionary with the State.

(c) Whether to permit one EFS to reflect multiple products, or products in multiple counties, is discretionary with the State.

§ 205.104 Registration of buyer, commission merchant, or selling agent—minimum information.

(a) The minimum information necessary on a registration of a buyer, commission merchant, or selling agent is as follows:

(1) Buyer, commission merchant, or selling agent name and address;

(2) Farm product or products (see §§ 205.106, 205.206) in which registrant is interested; and

(3) If registrant is interested only in such product or products produced in a certain county or parish, or certain counties or parishes, in the same State, the name of each such county or parish.

(b) A registrant, if not registered for any specified county or parish, or counties or parishes, must be deemed to have registered for all counties and parishes shown on the master list.

(c) A requirement of additional information on a registration form is discretionary with the State.

§ 205.105 Master list and portion thereof distributed to registrants—format.

(a) The master list must contain all the information on all the EFS's filed in the system, so arranged that it is possible to deliver to any registrant all such information relating to any product, produced in any county or parish (or all counties or parishes), for any crop year, covered by the system. The system must be able to deliver all such information to any registrant, either in alphabetical order by the word appearing first in the name of each person subjecting a product to a security interest (see § 205.102), in numerical order by social security number (or, if other than a natural person, IRS taxpayer identification number) of each such person, or in both alphabetical and numerical orders, as requested by the registrant.

(b) Section (c)(2)(E) requires the portion to be distributed in ''written or printed form.'' This means recording on paper by any technology in a form that can be read by humans without special equipment. The system may, however, honor requests from registrants to substitute recordings on any medium by any technology including, but not limited to, electronic recording on tapes or discs in machine-readable form, and on photographic recording on microfiche. It also includes, if requested by registrants, electronic transmissions whereby registrants can print their own paper copies.

(c) After distribution of a portion of a master list, there can be supplementary distribution of a portion showing only changes from the previous one. However, if this is done, cumulative supplements must be distributed often enough that readers can find all the information given to them for any one crop year in no more than three distributions.

[51 FR 29451, Aug. 18, 1986, as amended at 61 FR 54728, Oct. 22, 1996]

§ 205.106 Farm products.

The farm products, according to which the master list must be organized as required by subsection (c)(2), and which must be identified on an EFS as required by subsection (c)(4)(D)(iv), must be specific commodities, species of livestock, and specific products of crops or livestock. The Section does not permit miscellaneous categories.

§ 205.107 Crop year.

(a) The crop year, according to which subsection (c)(2)(C)(ii)(IV) requires the master list to be arranged ''within each such product,'' must be:

(1) For a crop grown in soil, the calendar year in which it is harvested or to be harvested;

(2) For animals, the calendar year in which they are born or acquired;

(3) For poultry or eggs, the calendar year in which they are sold or to be sold.

(b) An EFS or notice thereof which does not show crop year (the Section does not require it to do so) must be regarded as applicable to the crop or product in question for every year for which subsection (c)(4)(F) makes the EFS effective.

INTERPRETIVE OPINIONS

§ 205.201 System operator.

The system operator can be the Secretary of State of a State, or any designee of the State pursuant to its laws. Note that the provision in subsection (c)(2) for a system refers to operation by the Secretary of State of a State, but the definition in (c)(11) of ''Secretary of State'' includes ''designee of the State.''

§ 205.202 "Effective financing statement" or EFS.

(a) An EFS under subsection (c)(4) need not be the same as a financing statement or security agreement under the Uniform Commercial Code (or equivalent document under future successor State law), but can be an entirely separate document meeting the definition in (c)(4). Note that (c)(4) contains a comprehensive definition of the term which does not include any requirement that the EFS be the instrument by which a security interest is created or perfected. Note also the House Committee Report on Pub. L. 99–198, No. 99–271, Part 1, September 13, 1985, at page 110: ''[T]he bill would not preempt basic state-law rules on the creation, perfection, or priority of security interests.''

(b) An EFS may be filed electronically provided a State allows electronic filing of financing statements without the signature of the debtor under applicable State law under provisions of the Uniform Commercial Code or may be a paper document. An electronically filed EFS need not be a paper document and need not be signed. If an original or reproduced paper document of an EFS is filed with the State, it must be signed by both the secured party and the debtor, and be filed by the secured party.

(c) Countermeasures against mishandling after filing, such as a requirement that a copy be date stamped and returned to the secured party, are discretionary with the State. If a State chooses to adopt such countermeasures, it is responsible for establishing procedures for recording the date and time when an EFS is received, and for meeting all legal requirements associated with filing and distributing information about security interests as required by § 205.101.

[51 FR 29451, Aug. 18, 1986, as amended at 61 FR 54728, Oct. 22, 1996]

§ 205.203 Place of filing EFS.

The place of filing an EFS is wherever State law requires, which need not be with the system operator so long as the system operator receives the information needed for the master list, including the information required in subsection (c)(4)(D). Note that the requirements in subsection (c)(4) for an EFS include the requirement that it be ''filed with the Secretary of State,'' but the definition in (c)(11) of ''Secretary of State'' includes ''designee of the State,'' and the requirements in (c)(2) for a system refer in (A) to filing with the system operator of ''effective financing statements *or notice of such financing statements.*'' (emphasis added)

§ 205.204 Filing "notice" of EFS.

(a) If an EFS is filed somewhere other than with the system operator, and if notice of it is filed with the system operator, such notice could be electronic filing, telephoned information, or any other form of notice which gives the system operator the information needed for the master list. Such notice need not be signed. Note that the Section does not contain any requirement for such notice except the one in subsection (c)(4)(B) that an EFS must be filed somewhere pursuant to State law as discussed above.

(b) Countermeasures against falsifications, errors or omissions in such notices or in the handling of them by the system operator, such as requirements that the notices be on paper and signed, with copies date-stamped and returned to the persons filing them, however advisable they might be from other standpoints, are discretionary with the State and not required by the Section.

§ 205.205 Fees.

The Section provides at subsection (c)(4)(H) for a fee for filing an EFS. The fee can be set in any manner provided by the law of the State in which such EFS is filed. The basis for this is that (c)(4)(H) provides for the fee to be set by the ''Secretary of State'' but (c)(11) defines the latter term to include ''designee of the State.'' The fee structure is discretionary with the State.

§ 205.206 Farm products.

(a) The master list must be organized by farm product as required by subsection (c)(2), and the farm product must be identified on an EFS as required by subsection (c)(4)(D)(iv). The following is a list of such farm products.

Rice, rye, wheat, other food grains (system must specify by name)

Barley, corn, hay, oats, sorghum grain, other feed crops (system must specify by name)

Cotton

Tobacco

Flaxseed, peanuts, soybeans, sunflower seeds, other oil crops (system must specify by name)

Dry beans, dry peas, potatoes, sweet potatoes, taro, other vegetables (system must specify by name)

Artichokes, asparagus, beans lima, beans snap, beets, Brussels sprouts, broccoli, cabbage, carrots, cauliflower, celery, corn sweet, cucumbers, eggplant, escarole, garlic, lettuce, onions, peas green, peppers, spinach, tomatoes, other truck crops (system must specify by name)

Melons (system must specify by name)

Grapefruit, lemons, limes, oranges, tangelos, tangerines, other citrus fruits (system must specify by name)

Apples, apricots, avocados, bananas, cherries, coffee, dates, figs, grapes (& raisins), nectarines, olives, papayas, peaches, pears, persimmons, pineapples, plums (& prunes), pomegranates, other noncitrus fruits (system must specify by name)

Berries (system must specify by name)

Tree nuts (system must specify by name)

Bees wax, honey, maple syrup, sugar beets, sugar cane, other sugar crops (system must specify by name)

Grass seeds, legume seeds, other seed crops (system must specify by name)

Hops, mint, popcorn, other miscellaneous crops (system must specify by name)

Greenhouse & nursery products produced on farms (system must specify by name)

Mushrooms, trees, other forest products (system must specify by name)

Chickens, ducks, eggs, geese, turkeys, other poultry or poultry products (system must specify by name)

Cattle & calves, goats, horses, hogs, mules, sheep & lambs, other livestock (system must specify by name)

Milk, other dairy products produced on farms (system must specify by name)

Wool, mohair, other miscellaneous livestock products produced on farms (system must specify by name)

Fish, shellfish

Other farm products (system must specify by name).

(b) Note the definition of the term ''farm product'' at subsection (c)(5), and the Conference Report on Pub. L. 99–198, No. 99–447, December 17, 1985, at page 486.

(c) A State may establish a system for specified products and not for all. A State establishing a system for specified products and not for all will be deemed to be ''a State that has established a central filing system'' as to the specified products, and will be deemed not to be such a State as to other products.

§ 205.207 "Amount" and "reasonable description of the property."

(a) The ''amount'' of farm products and ''reasonable description of the property including county or parish,''

on an EFS and on the master list under subsections (c)(4)(D)(iv) and (2)(C)(iii), need not be shown on every EFS and master list entry.

(b) Any EFS and master list entry will identify a product. If they do not show an amount, this constitutes a representation that all of such product owned by the person in question is subject to the security interest in question.

(c) Any EFS and master list entry will identify each county or parish in the same State where the product is or is to be produced. If they do not show any further identification of the location of the product, this constitutes a representation that all such product produced in each such county or parish, owned by such person, is subject to the security interest.

(d) The need to supply additional information arises only where some of that product owned by that person is subject to the security interest and some is not.

(e) The additional information about amount and property must be sufficient to enable a reader of the information to identify what product owned by that person is subject, as distinguished from what of the same product owned by the same person is not subject. The precision needed, in the description of the amount and location, would vary from case to case.

(f) The basis for this is the purpose of the entire exercise, to make information available as necessary to enable an identification of what product is subject to a security interest as distinguished from what is not.

§ 205.208 Distribution of portions of master list—registration—information to non-registrants on request.

(a) The provisions in the Section regarding registration of ''buyers of farm products, commission merchants, and selling agents,'' ''regular'' distribution of ''portions'' of the master list, furnishing of ''oral confirmation * * * on request,'' and the effect of all this, that is, subsections (c)(2) (D), (E) and (F), (e)(2) and (3), and (g)(2) (C) and (D), must be read together.

(b) The Section does not require such persons to register. Not registering with a particular system operator has the effect, under subsections (e)(2) and (g)(2)(C), of making such persons, whether they are inside or outside the State covered by that system, subject to security interests shown on that system's master list whether or not such persons know about them, so that such persons for their own protection will need to query the system operator about any seller ''engaged in farming operations,'' of a farm product produced in the State covered by that system, with whom they deal.

(c) The effect of registration by such persons with a particular system is to get them on the list for regular distribution of portions of that system's master list, the portions to be determined by the registration. They are subject only to security interests shown on the portions which they receive, and are not subject to such interests as are shown on the master list but not shown on portions which they receive. Also, if a particular security interest is shown on the master list, but has been placed on it since the last regular distribution of portions of that list to registrants, registrants would not be subject to that security interest. These conclusions are based on the provisions in subsections (e)(3)(A) and (g)(2)(D)(i) that such persons are subject to a security interest only if they receive ''written notice * * * that specifies both the seller and the farm product.''

(d) A question arises as to the length of time for which a registration is effective, and whether a registrant, wishing to change registration as to county or product, can amend an existing registration or must file a new one. This is discretionary with the State since the Section is silent about it.

(e) A question arises whether persons can register to receive only portions of the list for products in which they do not deal, and thus not be subject to security interests in products in which they deal because they are registrants but do not receive written notice of them. For example, can cattle dealers register to receive portions of the master list only for oranges, and thus take cattle free and clear of security interests shown on the master list, but as to which they do not receive written notice because they have not registered

to receive the portion for cattle? Registrants will be deemed to be registered only *as to those portions* of the master list for which they register, and will be deemed to have failed to register as to those portions for which they do not register.

(f) The Section requires ''regular'' distribution, to registrants, of portions of the master list as amended from time to time by the filing of EFS's and amendments to EFS's. The requirement that the distribution be ''regular'' necessarily refers to an interval specified in advance. The interval may vary according to product and region. The frequency of such distribution must be a consideration in review for certification since distribution must be timely to serve its purpose. While subsection (c)(2)(E) (providing that distribution be made ''regularly as prescribed by the State'') gives each State discretion to choose the interval between distributions, whatever interval a State chooses will inevitably make possible some transactions in which security interests are filed in the system but registrants are not subject to them.

(g) Legislative history of the Section shows that buyers, commission merchants, and selling agents are not intended to be liable for errors or other inaccuracies generated by the system. See Nov. 22, 1985 Cong. Rec., Senate, pg. S16300, and Dec. 18, 1985 Cong. Rec., House, pg. H12523.

(h) In furnishing to non-registrants ''oral confirmation within 24 hours of any [EFS] on request followed by written confirmation,'' by a system operator pursuant to subsection (c)(2)(F), any failure in use of a telephone caused by a ''busy signal'' could not be the basis of liability of the system operator. The basis for this is that subsection (c)(2)(F) does not mention telephones. Also, while it mentions *furnishing* information orally, it does not contain any provision as to how queries are to be *received,* that is, orally, in writing, or otherwise.

(i) Of course it is to be expected that telephones would be used in most cases, but use of them is not required by the legislation and is discretionary with the State.

(j) In the matter of receiving queries and giving oral replies to them, subsection (c)(2)(F) will be complied with if a system operator maintains an office and staff where a query can be received on business days and during business hours such as are regular in the State, and where an oral reply will be available on the regular business day following the day on which the query is received, at or before the time of day when it was received.

(k) Written confirmation is required, by subsection (c)(2)(F), to be given to any non-registered buyer, commission merchant, or selling agent.

(l) Such a written confirmation pursuant to subsection (c)(2)(F) does not alter the liability of the non-registrant querying the system and receiving information about a security interest recorded in it. The basis of this, as above, is that non-registrants are subject to security interests recorded in a system whether or not they know about them, and must query the system for their own protection.

(m) The Section does not specify when or how the written confirmation must be furnished, but provides only that it must follow the oral information. Thus the time and method of furnishing written confirmation is discretionary with the State.

§ 205.209 Amendment or continuation of EFS.

(a) The ''material change,'' required by subsection (c)(4)(E) to be reflected in an amendment to an EFS and master list entry, is whatever change would render the master list entry no longer informative as to what is subject to the security interest in question. That will vary from case to case. The basis for this is the purpose for which the information is supplied, that is, to make information available, to a buyer, commission merchant, or selling agent who proposes to enter into a transaction in a product, whether it is subject to a security interest. The requirement to amend arises when the information already made available no longer serves the purpose and other information is needed in order to do so.

(b) Where an owner of a product makes a change, such as planting a different crop or purchasing different animals from what was represented, without informing the secured party, so that the master list entry is rendered not informative, but the EFS and master list are not amended through no fault of the secured party, the Section is silent as to the consequences. However, see the legislative history cited in § 205.208(f).

(c) The amendment must be filed in the same manner as the original filing. Note the requirement of section (c)(4)(E). The amendment may be filed electronically provided a State allows electronic filing of financing statements without the signature of the debtor under applicable State law under provisions of the Uniform Commercial Code. An electronically filed amendment need not be signed. However, if an original or reproduced paper document is filed, the amendment must be signed by the secured party and the debtor, and be filed by the secured party.

(d) A continuation of an EFS is subject to the same requirement as an amendment. The EFS as first filed expires in a given time. A continuation modifies it as to its expiration date and thus is an amendment.

[51 FR 29451, Aug. 18, 1986, as amended at 61 FR 54728, Oct. 22, 1996]

§ 205.210 Effect of EFS outside State in which filed.

(a) A question arises whether, if an EFS is filed in one State, a notice of it can be filed in another State and shown on the master list for the second State. There is nothing in the Section to prevent this, but it would serve no purpose.

(b) The Section provides only for filing an EFS, covering a given product, in the system for the State in which it is produced. Upon such filing in such system, subsections (e)(2) and (g)(2)(C) make buyers, commission merchants and selling agents *not registered* with that system subject to the security interest in that product whether or not they know about it, *even if they are outside that State.* Subsections (e)(3) and (g)(2)(D) make persons *registered* with that system subject if they receive written notice of it *even if they are outside that State.* All of these provisions apply only where an EFS is filed in the system for the State in which the product is produced. They do not apply to a filing in another system.

(c) What constitutes ''receipt'' of notice is determined by the law of the State in which the intended recipient of notice resides. This is based on subsection (f) which follows provisions for notice to buyers, and (g)(3) which follows provisions for notice to commission merchants and selling agents. Each of those provisions uses the word ''buyer'' but it means ''intended recipient of notice.''

§ 205.211 Applicability of court decisions under the UCC.

(a) Court decisions under the Uniform Commercial Code (UCC), about the scope of the ''farm products'' exception in Section 9–307(1) thereof, and interpreting the terms therein, particularly ''person engaged in farming operations'' which is not defined in the Section, are applicable to an extent in interpreting the Section. The basis of this is the legislative intent of the Section to pre-empt State laws reflecting that ''farm products'' exception, as shown in the House Committee Report on Pub. L. 99–198, No. 99–271, Part 1, September 13, 1985, at pages 108 *et seq.*

(b) That UCC Section 9–307(1) reads as follows:

> (1) A buyer in ordinary course of business (subsection (9) of Section 1–201) *other than a person buying farm products from a person engaged in farming operations* takes free of a security interest created by his seller even though the security interest is perfected and even though the buyer knows of its existence. (emphasis added)

§ 205.212 "Buyer in ordinary course of business" and "security interest."

The terms ''buyer in ordinary course of business'' and ''security interest'' are defined in subsections (c) (1) and (7). There are differences between those definitions and the UCC definitions of the same terms. In interpreting those differences, the following would be pertinent:

(a) The legislative intent discussed above in § 205.211, to pre-empt State laws reflecting the ''farm products'' exception; and

(b) The legislative intent shown in subsections (a) and (b) that certain persons take free and clear of certain interests of a ''secured lender'' ''when the seller fails to repay the lender,'' unless such persons have information about such interests made available to them as provided in the Section.

§ 205.213 Obligations subject—"person indebted"—"debtor."

(a) A debt need not exist at the time of filing of an EFS. The basis for this is that subsection (c)(4) does not require the EFS, and subsection (c)(2)(C) does not require the master list, to show any amount of debt.

(b) The Section does not provide for the transaction in which one person subjects a product to a security interest for another's debt. However the terms ''person indebted'' and ''debtor'' in the Section refer to the person who owns a product and subjects it to a security interest, whether or not that person owes a debt to the secured party. The basis for this is the purpose for which the information is supplied. Any buyer of a farm product, commission merchant, or selling agent querying a master list or system operator about a prospective seller of a farm product is interested in whether that seller has subjected that product to a security interest, not in whether the debt is owed by that seller or by another.

(c) Security interests existing prior to establishment of a system can be filed in such a system and reflected in the master list if documents are in existence or are created which meet the requirements of subsection (c)(4) besides filing, if such documents are filed wherever State law requires, and if the system operator receives the information about them needed for the master list.

(d) A system can be in compliance with the Section, although it reflects security interests not supported by EFS's as defined in the legislation, and although it reflects security interests on items other than farm products. However, subsections (e) (2) and (3), and (g)(2) (C) and (D), will apply only as to entries reflecting farm products and supported by EFS's as defined in the Section, and it must be possible to distinguish the entries to which these provisions apply from the other entries.

§ 205.214 Litigation as to whether a system is operating in compliance with the Section.

(a) The requirements for a system in subsection (c) are written as the definition of the term ''central filing system,'' so that failure of a system to meet any such requirement, either at the time of its establishment or later, will mean that it is not a ''central filing system'' as defined.

(b) The issue whether a system, after certification, is operating in compliance, thus whether it is a ''central filing system'' as defined, could be litigated and ruled on in a case involving only private parties, such as a lender and a buyer of a farm product. The only immediate effect of a finding in such a case, that a system is not a ''central filing system'' as defined, would be that the rights of the secured party in the case would be as if the State had no system. However, others would be in doubt as to whether they could safely rely on the same system.