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SUBCHAPTER B—MARKETING OF PERISHABLE AGRICULTURAL COMMODITIES

PART 46—REGULATIONS (OTHER THAN RULES OF PRACTICE) UNDER THE PERISHABLE AGRICULTURAL COMMODITIES ACT, 1930

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DEFINITIONS

§ 46.1 Words in singular form.

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

§ 46.2 Definitions.

The terms defined in the first section of the Act shall have the same meaning as stated therein. Unless otherwise defined, the following terms whether used in the regulations, in the Act, or in the trade shall be construed as follows:

(a) *Act* means the Perishable Agricultural Commodities Act, 1930, approved June 10, 1930, and legislation supplementary thereto and amendatory thereof (46 Stat. 531; 7 U.S.C. 499a–499r).

CROSS REFERENCE: For Rules of Practice under the Act, see Part 47 of this chapter.

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

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

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

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

(f) *Division* means the Fruit and Vegetable Division of the Service.

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

(h) *In commerce* means interstate or foreign commerce as defined in paragraphs (3) and (8) of the first section of the Act.

(i) *Person* means any individual, partnership, limited liability company, corporation, association, or separate legal entity.

(j) *Retailer* is a dealer engaged in the business of selling any perishable agricultural commodity at retail; *Provided,* That occasional sales at wholesale shall not be deemed to remove a dealer from the category of retailer if less than 5 percent of annual gross sales is derived from wholesale transactions.

(k) *Firm* means any person engaged in business as a commission merchant, dealer, or broker.

(l) *Licensee* means any firm who holds an unrevoked and valid unsus-pended license issued under the Act.

(m) *Dealer* means any person engaged in the business of buying or selling in wholesale or jobbing quantities in commerce and includes:

(1) Jobbers, distributors and other wholesalers;

(2) Retailers, when the invoice cost of all purchases of produce exceeds $230,000 during a calendar year. In computing dollar volume, all purchases of fresh and frozen fruits and vegetables are to be counted, without regard to quantity involved in a transaction or whether the transaction was intrastate, interstate or foreign commerce;

(3) Growers who market produce grown by others.

(4) The term ''dealer'' does not include persons buying produce, other than potatoes, for canning and/or processing within the State where grown, whether or not the canned or processed product is to be shipped in interstate or foreign commerce, unless such product is frozen, or packed in ice, or consists of cherries in brine.

(n) *Broker* means any person engaged in the business of negotiating sales and purchases of produce in commerce for or on behalf of the vendor or the purchaser, respectively, except that no person shall be deemed to be a ''broker'' within the meaning of the Act if such person is an independent agent negotiating sales for or on behalf of the vendor and if the only sales of such commodities negotiated by such

person are sales of frozen fruits and vegetables having an invoice value not in excess of $230,000 in any calendar year.

(o) *Shipper* means any person operating at shipping point who is engaged in the business of purchasing produce from growers or others and distributing such produce in commerce by resale or other methods, or who handles such produce on joint account with others.

(p) *Grower* means any person who raises produce for marketing.

(q) *Growers' agent* means any person operating at shipping point who sells or distributes produce in commerce for or on behalf of growers or others and whose operations may include the planting, harvesting, grading, packing, and furnishing containers, supplies, or other services.

(r) *Receiving market commission merchant* means any person operating on a receiving market who is engaged in the business of receiving produce in commerce for sale, on commission, for or on behalf of another.

(s) *Joint account transaction* means a produce transaction in commerce in which two or more persons participate under a limited joint venture arrangement whereby they agree to share in a prescribed manner the costs, profits, or losses resulting from such transaction.

(t) *Produce* means any perishable agricultural commodity, as defined in paragraph (4) of the first section of the Act.

(u) *Fresh fruits and fresh vegetables* include all produce in fresh form generally considered as perishable fruits and vegetables, whether or not packed in ice or held in common or cold storage, but does not include those perishable fruits and vegetables which have been manufactured into articles of food of a different kind or character. The effects of the following operations shall not be considered as changing a commodity into a food of a different kind or character: Water, steam, or oil blanching, battering, coating, chopping, color adding, curing, cutting, dicing, drying for the removal of surface moisture; fumigating, gassing, heating for insect control, ripening and coloring; removal of seed, pits, stems, calyx, husk, pods rind, skin, peel, et cetera; polishing, precooling, refrigerating, shredding, slicing, trimming, washing with or without chemicals; waxing, adding of sugar or other sweetening agents; adding ascorbic acid or other agents to retard oxidation; mixing of several kinds of sliced, chopped, or diced fruit or vegetables for packaging in any type of containers; or comparable methods of preparation.

(v) *Frozen fruits and vegetables* include all produce defined in paragraph (u) of this section when such produce is in frozen form.

(w) *Cherries in brine* means cherries packed in an aqueous solution containing sulphur dioxide or other bleaching agent of sufficient strength to preserve the product, with or without the addition of hardening agents.

(x) *Wholesale or jobbing quantities,* as used in paragraph (6) of the first section of the Act, means aggregate quantities of all types of produce totaling one ton (2,000 pounds) or more in weight in any day shipped, received, or contracted to be shipped or received.

(y) *Truly and correctly to account* means, in connection with:

(1) Consignments, to account by rendering a true and correct statement showing the date of receipt and date of final sale, the quantities sold at each price, or other disposition of the produce, and the proper, usual or specifically agreed upon selling charges and expenses properly incurred or agreed to in the handling thereof, plus any other information required by §46.29;

(2) Joint account transactions, to account by rendering a true and correct statement showing the date of receipt and date of final sale, the quantities sold at each price or other disposition of produce, the joint account cost of the produce, and the expenses properly incurred or other charges specifically agreed to in the handling thereof, plus any other information required by §46.29;

(3) Buying brokerage transactions, to account by rendering a true and correct itemized statement showing the cost of the produce, the expenses properly incurred, and the amount of brokerage charged.

(z) *Account promptly,* except when otherwise specifically agreed upon by

the parties, means rendering to the principal a true and correct accounting:

(1) In connection with buying brokerage transactions, within 24 hours after the date of shipment;

(2) In connection with consignment or joint account transactions, within 10 days after the date of final sale with respect to each shipment, or within 20 days from the date the goods are accepted at destination, whichever comes first: *Provided*, That whenever a grower's agent or shipper distributes individual lots of produce for or on behalf of others, accounting to the principal shall be made within 30 days after receipt of the shipment from the principal for sale or within 5 days after the date the agent receives payment for the goods, whichever comes first. Whenever a grower's agent or shipper harvests, packs, or distributes entire crops or multiple lots therefrom for or on behalf of others, an accounting on the initial shipment shall be rendered within 30 days after receipt of the goods for sale. Accountings for subsequent shipments shall be made at 10-day intervals from the date of the accounting for the initial shipment and a final accounting for the season shall be made to each principal within 30 days from the date the agent receives the last shipment for the season from that principal: *Provided further*, That whenever the marketing agreement between a principal and agent includes a provision for storage of goods prior to sale, the agent shall render accountings of inventory and expenses incurred to date at 30-day intervals from the date the goods are received by the agent until sales from storage begin, And *Provided further*, That nothing in the regulations in this part shall prohibit cooperative associations from accounting to their members on the basis of seasonal pools or other arrangements provided by their regulations or bylaws; and

(3) In connection with a consignment or joint account transaction, within 10 days after the date of receipt of payment of a carrier claim filed.

(aa) *Full payment promptly* is the term used in the Act in specifying the period of time for making payment without committing a violation of the Act. ''Full payment promptly,'' for the purpose of determining violations of the Act, means:

(1) Payment of net proceeds for produce received on consignment or the pro-rata share of the net profits for produce received on joint account, within 10 days after the date of final sale with respect to each shipment, or within 20 days from the date the goods are accepted at destination, whichever comes first;

(2) Payment by growers, growers' agents, or shippers of deficits on consignments or joint account transactions, within 10 days after the day on which the accounting is received;

(3) Payment of the purchase price, brokerage, and other expenses to buying brokers who pay for the produce, within 10 days after the day on which the broker's invoice is received by the buyer;

(4) Payment of brokerage earned and other expenses in connection with produce purchased or sold, within 10 days after the day on which the broker's invoice is received by the principal;

(5) Payment for produce purchased by a buyer, within 10 days after the day on which the produce is accepted;

(6) Payment to growers, growers' agents, or shippers by terminal market agents or brokers, who are selling for the account of a grower, growers' agent, or shipper and are authorized to collect from the buyer or receiver, within 5 days after the agent or broker receives payment from the buyer or receiver;

(7) Payment to the principal, within 10 days after receipt, of net proceeds realized from a carrier claim in connection with a consignment transaction or, in connection with a joint account transaction, payment to the joint account partners of their share of the joint account net proceeds realized from a carrier claim;

(8) Payment by growers agents or shippers who distribute individual lots of produce for or on behalf of others, within 30 days after receipt of the goods from the principal for sale or within 5 days after the date the agent receives payment for the goods, whichever comes first;

(9) Whenever a grower's agent or shipper harvests, packs, or distributes entire crops or multiple lots therefrom for or on behalf of others, payment for the initial shipment shall be made within 30 days after receipt of the goods for sale or within 5 days after the date the agent receives payment for the goods, whichever comes first. Payment for subsequent shipments shall be made at 10-day intervals from the date of the accounting for the initial shipment or within 5 days after the date the agent receives payment for the goods, whichever comes first, and final payment for the seasons shall be made to each principal within 30 days from the date the agent receives the last shipment for the season from that principal;

(10) When contracts are based on terms other than those described in these regulations, payment is due the supplier-seller within 20 days from the date of acceptance of the shipment under the terms of the contract and §46.2(dd).

(11) Parties who elect to use different times of payment than those set forth in paragraphs (aa) (1) through (10) of this section must reduce their agreement to writing before entering into the transaction and maintain a copy of the agreement in their records. If they have so agreed, then payment within the agreed upon time shall constitute ''full payment promptly'': *Provided*, That the party claiming the existence of such an agreement for time of payment shall have the burden of proving it.

Nothing in the regulations in this part shall limit the seller's privilege of shipping under a closed or advise bill of lading or other arrangement requiring cash on delivery unless there has been express prior agreement to the contrary between the parties; or prohibit cooperative associations from settling with their members on the basis of seasonal pools or other arrangements provided by their regulations or bylaws. If there is a dispute concerning a transaction, the foregoing time periods for prompt payment apply only to payment of the undisputed amount.

(bb) *Reject without reasonable cause* means in connection with purchases, consignments, or joint account transactions: (1) Refusing or failing without legal justification to accept produce within a reasonable time; (2) advising the seller, shipper, or his agent that produce, complying with contract, will not be accepted; (3) indicating an intention not to accept produce through an act or failure to act inconsistent with the contract; or (4) any rejection following an act of acceptance.

(cc) *Reasonable time*, as used in paragraph (bb) of this section, means:

(1) For frozen fruits and vegetables with respect to rail shipments, 48 hours after notice of arrival and the produce is made accessible for inspection, and with respect to truck shipments, not to exceed 12 hours after the receiver or a responsible representative is given notice of arrival and the produce is made accessible for inspection;

(2) For fresh fruits and vegetables with respect to rail shipments, not to exceed 24 hours after notice of arrival and the car has been placed in a location where the produce is made accessible for inspection; and with respect to truck shipments, not to exceed 8 hours after the receiver or a responsible representative is given notice of arrival and the produce is made accessible for inspection; and, with respect to boat shipments, not to exceed 24 hours after the produce is unloaded and made accessible for inspection and the receiver is given notice thereof;

(3) If, within the applicable period, the receiver cannot make a thorough inspection due to adverse weather condition or applies for but cannot obtain Federal inspection before the end of this period, and so notifies the consignor within the applicable period, the period shall be extended until weather conditions permit inspection or until Federal inspection is made, as the case may be, plus two hours after either an oral or written report of the results of such inspection is made available to the receiver; and

(4) In computing the time periods specified above, (i) for shipments arriving on non-work days or after the close of regular business hours on work days when a representative of the receiver having authority to reject shipments is not present, non-working hours preceding the start of regular business hours on the next working day shall

not be included; and (ii) for shipments arriving during regular business hours when a representative of the receiver having authority to reject shipments customarily is present, the period shall run without interruption except that, for shipments arriving less than two hours before the close of regular business hours, the unexpired balance of the time period shall be extended and run from the start of regular business hours on the next working day.

(dd) *Acceptance* means:

(1) Any act by the consignee signifying acceptance of the shipment, including diversion or unloading;

(2) Any act by the consignee which is inconsistent with the consignor's ownership, but if such act is wrongful against the consignor it is acceptance only if ratified by him; or

(3) Failure of the consignee to give notice of rejection to the consignor within a reasonable time as defined in paragraph (cc) of this section: *Provided,* That acceptance shall not affect any claim for damages because of failure of the produce to meet the terms of the contract.

(ee) *Employ* and *employment* mean any affiliation of any person with the business operations of a licensee, with or without compensation, including ownership or self-employment.

(ff) *Responsibly connected* means affiliation as individual owner, partner in a partnership, member, manager, officer, director or holder of more than a 10 percent ownership stake in a limited liability company, or officer, director or holder of more than 10 percent of the outstanding stock of a corporation or association.

(gg) *Branch or additional business facility,* as used in section 3(b) of the Act, means an office or outlet in a location other than that of the principal or main office of a firm, out of which or through which the firm purchases, sells, negotiates contracts, solicits, or handles consignments, or otherwise contracts in perishable agricultural commodities including seasonal, part-time and full-time operations. As used in this paragraph, ''branch or additional business facility'' includes, but is not limited to, the following:

(1) Jobbers, wholesalers, distributors—each location through which commodities are bought, sold or otherwise contracted;

(2) Retailers—each outlet through which retail sales of commodities are made and each office which purchases commodities;

(3) Trucker/dealer—a truck is a ''branch'' office if the driver is authorized to buy, sell or otherwise contract for commodities on behalf of the firm;

(4) Shippers—on-the-ground representatives making purchases, sales or otherwise contracting for commodities;

(5) Brokers—each office conducting contract negotiations including on-the-ground representatives negotiating contracts for commodities;

(6) Processors—each location at which commodities are purchased, sold or contracted to be purchased or sold;

(7) Cooperatives—each operation away from the main office that has responsibility to account for proceeds received from sales of commodities; or

(8) Seasonal/part-time operations—any facility with on-the-ground representatives making purchases, sales, or otherwise contracting for commodities.

(hh) *Good faith* means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade. The principle of good faith requires that a party to a transaction disclose in writing the existence of any collateral fees and expenses to all other parties to the transaction where the collateral fees and expenses affect a material term of the agreement.

(ii) *Grocery wholesaler* is a dealer primarily engaged in the full-line wholesale distribution and resale of grocery and related nonfood items (such as perishable agricultural commodities, dry groceries, general merchandise, meat, poultry, and seafood, and health and beauty care items) to retailers. This term does not include persons primarily engaged in the wholesale distribution and resale of perishable agricultural commodities rather than other grocery and related nonfood items. Specifically, for an entity to be considered a grocery wholesaler, 50 percent or more of its annual gross sales must be from the full-line distribution and resale of grocery and related nonfood items, and it cannot have

more than 50 percent of its sales in perishable agricultural commodities. ''Full line'' means that an entity must be supplying the retailer with a wide range of products such as the grocery and related nonfood items specified.

(Sec. 1, 46 Stat. 531, as amended; 7 U.S.C. 499a *et seq.*)

[28 FR 7067, July 11, 1963, as amended at 37 FR 14561, July 21, 1972; 44 FR 50575, Aug. 29, 1979; 47 FR 21234, May 18, 1982; 47 FR 47802, Oct. 28, 1982; 49 FR 45739, Nov. 20, 1984; 61 FR 13386, Mar. 27, 1996; 62 FR 15086, Mar. 31, 1997; 65 FR 24854, Apr. 28, 2000; 68 FR 23378, May 2, 2003]

LICENSES

§46.3 License required.

(a) No person shall at any time carry on the business of a commission merchant, dealer, or broker without a license which is valid and effective at such time.

(b) Separate licenses are required for each person. More than one trade name may be used by the same person only after such trade names have been approved in writing by the Director.

(c) Joint account arrangements between two or more licensees are not considered to result in separate firms and, therefore, do not require separate licenses.

§46.4 Application for license.

(a) Any person who desires to obtain a license shall make application therefor on the currently approved form to be obtained from the Director or his representatives.

(b) The applicant shall furnish the following information:

(1) Name or names in which business is conducted; place of business; mailing address; name, location and number of branches or additional business facilities, divisions or affiliates; name of firm succeeded and whether the applicant assumes responsibility of settling any complaints filed under the Act against the firm succeeded.

(2) Type of business (i.e., wholesale, retail, trucking, processing, commission merchant, or broker), and whether the fruits and/or vegetables handled are fresh or frozen, or cherries in brine.

(3) *Type of ownership.* If a corporation or limited liability company, the applicant shall furnish the month, day, and year incorporated or organized; the State in which incorporated or organized; the name in which incorporated or organized; and the address of the principal office. A limited liability company shall also furnish a copy of its articles of organization and its operating agreement.

(4) *Full legal name, all other names used, if any, and home address of owner.* If a partnership, the applicant shall furnish the legal names, all other names used, if any, and home address of all partners, indicating whether general, limited, or special partners. If a limited liability company, the applicant shall furnish the full legal names, all other names used, if any, and home address of all members, managers, officers, directors and holders of more than 10 percent of the ownership stake, and the percentage of ownership in the company held by each such person. If an association or corporation, the applicant shall furnish the full legal names, all other names used, if any, and home address of all officers, directors and holders of more than 10 percent of the outstanding stock and the percentage of stock held by each such person. Minors shall also furnish the full name and home address of their guardian. If the applicant is a trust, the name of the trust and the full name and home address of the trustee must be furnished. If the applicant is a limited liability company and a member or holder of more than 10 percent of the ownership stake is a partnership, another limited liability company, corporation, association, or separate legal entity, the applicant shall furnish the full legal names and home address of that member's partners, members, managers, directors, and officers.

(5) Date when first became subject to the Act. If business was conducted subject to the Act prior to the filing of an application for a license, applicant shall furnish an explanation for such violation as prescribed in section 3(a) of the Act.

(6) Whether the applicant, or in case the applicant is a partnership, any partner, or in case the applicant is a

limited liability company, any member, manager, officer, director or holder of more than 10 percent of the ownership stake, or in case the applicant is an association or corporation, any officer, director, or holder of more than 10 percent of the outstanding stock, has prior to the filing of the application:

(i) Been connected with any firm whose license is under suspension or has been revoked. If so, he shall furnish the name and address of the firm whose license is under suspension or has been revoked and the details of such connection, including the dates thereof;

(ii) Within three years been adjudicated or discharged as a bankrupt or was an officer, director, stockholder, partner, member, manager or owner of a firm adjudicated or discharged as a bankrupt.

(iii) Been convicted of one or more felonies in any State or Federal court. If so, he shall furnish the name and date of birth of the party convicted, alias if any, name, location of court and date convicted, nature of felony, sentence imposed, where and length of time served; if paroled, date parole terminated;

(iv) Ever been licensed under the Act. If so, he shall furnish the name and address of licensee and whether license is still in effect.

(7) Whether any person employed by the applicant has been responsibly connected with any firm whose license has been revoked, or is currently under suspension, or who has been found after notice and opportunity for hearing to have committed any flagrant or repeated violation of section 2 of the Act, or against whom there is an unpaid reparation award which has been issued within the past two years, subject to his right of appeal. If so, he shall furnish the full legal name of the person, the name of the firm involved, and the details of such connection, including the dates thereof.

(8) Any other information the Director deems necessary to establish the identity and eligibility of the applicant to obtain a license.

(c) The application shall be signed by the owner, all general partners, or in case the applicant is a limited liability company, a member or manager, or in case the applicant is an association, or corporation, a duly authorized officer.

(d) The application and fees shall be forwarded to the Director, Fruit and Vegetable Division, Agricultural Marketing Service, U.S. Department of Agriculture, Washington, D.C. 20250, or to his representative. An application which does not contain full or complete answers to all the questions, or is not properly signed, or not accompanied by the proper fee, or bond as required under paragraphs (c) and (e) of section 4 of the Act shall not be considered a valid application for license. The ''period not to exceed 30 days'' as prescribed in section 4(d) of the Act shall commence on the day that a valid application for license is received by the Director or his representative.

(e) If the application is incomplete, the Director may return the application to the applicant with a request that the application be completed by furnishing the missing data. If the applicant does not respond to this request within 30 days after it is mailed by the Director, the fees submitted shall be refunded.

(f) If the Director has reason to believe that the application contains inaccurate information, he may afford the applicant an opportunity to submit a corrected application or verify or explain information contained in the application. If the applicant submits a corrected application, the original application shall be considered withdrawn. If the applicant, in response to the Director's request, submits additional or corrected information for consideration in connection with his original application, the original application plus such information shall be considered as constituting a new application.

(g) Fees shall be refunded whenever an application is withdrawn without the filing of a new application.

(h) When a valid application is received and the provisions of paragraphs (b) and (c) of section 4 of the Act are applicable, the Director shall notify the applicant by letter of the pertinent provisions of this section and the reasons for denial of license and shall refund the fee.

(i) If the Director disapproves the use of a trade name which, in his opinion,

is deceiving, misleading or confusing to the trade, he shall return the application to the applicant for the selection of a different trade name. If the applicant does not return the application within thirty days after it was mailed by the Director, the fees submitted shall be refunded. The ''period not to exceed thirty days'' as prescribed in section 4(d) of the Act shall commence on the date that the application for license under the new name is received by the Director or his representative.

[28 FR 7067, July 11, 1963; 28 FR 7287, July 17, 1963, as amended at 44 FR 50575, Aug. 29, 1979; 65 FR 24854, Apr. 28, 2000]

§46.5 Bonds.

Bonds prescribed in section 4(c)(6), 4(e), 8(b), and 13(b) of the Act shall be in the form of cash or surety bonds in the form and amount satisfactory to the Director and shall not be less than $10,000. When cash is posted as surety, it shall be deposited into a special account of the United States Treasury and no interest is to accrue or be paid the licensee. When surety bonds are furnished, the surety shall be a company holding a certificate of authority from the Secretary of the Treasury under Act of Congress approved July 30, 1947 (6 U.S.C. 6 through 13) as acceptable surety on Federal bonds.

[44 FR 50575, Aug. 29, 1979]

§46.6 License fees.

(a) For retailers and grocery wholesalers making an initial application for license, the license fee is as follows:

(1) During the period November 15, 1995 through November 14, 1996, the license fee is $400 plus $200 dollars for each branch or additional business facility operated by the applicant in excess of nine. In no case shall the aggregate annual fees paid by any retailer or grocery wholesaler during such period exceed $4,000.

(2) The license fee during the period November 15, 1996 through November 14, 1997, is $300 plus $150 for each branch or additional business facility operated by the retailer or grocery wholesaler in excess of nine. In no case shall the aggregate fees paid by any retailer or grocery wholesaler during such period exceed $3,000.

(3) The license fee during the period November 15, 1997 through November 14, 1998, is $200 plus $100 for each branch or additional business facility operated by any retailer or grocery wholesaler in excess of nine. In no case shall the aggregate fees paid by any retailer or grocery wholesaler during such period exceed $2,000.

(4) Any retailer or grocery wholesaler making an initial license application during the 3-year phase-out period shall pay no fee for renewal of the license for subsequent years.

(5) A retailer or grocery wholesaler that holds a license as of November 15, 1995, shall pay the license fee required in paragraphs (a) (1), (2), and (3) of this section for the renewal of the license during the phase-out period.

(6) No license fee will be required after November 14, 1998 for making an initial application for, or for renewal of a license by a retailer or grocery wholesaler. However, a retailer or grocery wholesaler making an initial application for a license after November 14, 1998, shall pay a $100 administrative processing fee.

(b) For commission merchants, brokers, and dealers (other than grocery wholesalers and retailers) the annual license fee is $550 plus $200 dollars for each branch or additional business facility in excess of nine. In no case shall the aggregate annual fees paid by any such applicant exceed $4,000.

(c) The Director may require that fees be paid in the form of a money order, bank draft, cashier's check, or certified check made payable to ''USDA-AMS''. Authorized representatives of the Division may accept fees and issue receipts.

[62 FR 43455, Aug. 14, 1997]

§46.7 Issuance of license.

Upon receipt of a valid application accompanied by the proper fee for a license, and bond, if required, the Director shall, if the applicant is found to be eligible, issue a license certifying that the licensee is authorized to engage in the business of a commission merchant, dealer, or broker. All fees, and any additional sums assessed by the Director in accordance with the Act,

shall be deposited in a special fund designated as the ''Perishable Agricultural Commodities Act fund.''

§ 46.8 Copies of licenses.

Copies of licenses may be issued upon request and upon the payment of a fee of two dollars ($2) for each copy. Each copy shall bear the word ''copy'' in conspicuous letters on its face and shall be certified by the Director as a true copy of the original.

§ 46.9 Termination, suspension, revocation, cancellation of licenses; notices; renewal.

(a) Under section 3(c) of the Act the license can be suspended if the licensee continues to use a trade name after being notified by the Director that such trade name has been disapproved.

(b) Under section 4(a) of the Act, after October 1, 1962, the license of any individual, corporation or association shall automatically terminate on the date of discharge in bankruptcy and the license of any partnership shall automatically terminate on the date of the discharge in bankruptcy of any of the general partners in the partnership.

(c) Under section 4(c) of the Act if a license is issued under a bond and the bond is terminated for any reason without the approval of the Director, within four years from the date of the issuance of the license, the license shall be automatically cancelled as of the date of termination and no new license shall be issued to such person during the four-year period without a new surety bond covering the remainder of such period. Also, if the Director notifies the licensee that a bond in an increased amount is required and the licensee fails to provide such a bond within the specified time the license of such licensee shall be automatically suspended until such bond is provided.

(d) Under section 8(a) of the Act a license can be suspended or revoked for violations of section 2 of the Act or when the licensee is found guilty in a Federal Court of having violated section 14(b) of the Act.

(e) Under section 8(b) of the Act a license can be suspended or revoked if the licensee continues to employ any person in violation of the provisions of this section. Also, if any licensee is authorized to employ any person under a bond in accordance with this section and is notified by the Director subsequently to provide a bond in an increased amount and fails to provide such a bond within the time specified, approval of employment shall automatically terminate.

(f) Under section 8(c) of the Act a license can be revoked for any false or misleading statement, or through a misrepresentation or concealment or withholding of facts in connection with an application for a license.

(g) Under section 9 of the Act a license can be suspended if the licensee fails to 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 stock-holding or otherwise.

(h) Under section 13 of the Act a license can be suspended:

(1) If the licensee refuses to permit inspection of his records or of any lot of produce under his ownership or control; or

(2) If the licensee, subsequent to a determination in a formal disciplinary proceeding that it has violated the prompt payment provision of Section 2(4) of the Act, refuses to permit an inspection of its accounts, records and memoranda to insure that it is in compliance with the prompt payment provision of section 2(4) of the Act or fails or refuses to furnish, maintain, or adjust a surety bond in a form and amount satisfactory to the Secretary.

(i) Under section 4(a) of the Act, at least 30 days prior to the anniversary date of a valid and effective license, the Director shall mail a notice to the licensee at the last known address advising that the license will automatically terminate on its anniversary date unless an application for renewal is filed supplying all information requested on a form to be supplied by the Division, and unless the renewal fee (if any is applicable) is paid on or before such date. If the renewal application is not filed and/or the renewal fee (if required) is not paid by the anniversary date, the licensee may obtain a renewal of that license at any time within 30

days by submitting the required renewal application and/or paying the renewal fee (if required), plus $50. Within 60 days after the termination date of a valid and effective license, the former licensee shall be notified of such termination, unless a new license has been obtained in the meantime.

(j) Beginning on December 1, 1998, the renewal period for new licenses issued to retailers and grocery wholesalers is three years.

(k) Beginning on December 1, 1998, commission merchants, brokers, and dealers (other than grocery wholesalers and retailers) who are new or existing licensees, may choose to renew their licenses on an annual, biennial, or triennial basis. In the event that the holder of a multi-year license ceases business operations or undergoes a change in legal status that results in the issuance of a new license prior to the next license renewal date, a refund will be issued of any remaining full-year portion of advance fee paid, minus a $100 processing fee.

(l) Retailers and grocery wholesalers who are existing licensees as of December 1, 1998, will be phased into the three-year renewal process during the succeeding one-year as follows:

(1) Licenses held by retailers and grocery wholesalers ending in the digits ''0,'' ''3,'' ''6,'' or ''9,'' will be renewed on a triennial basis.

(2) Licenses held by retailers and grocery wholesalers ending in the digits ''1,'' ''4,'' or ''7,'' will be renewed for two years and thereafter on a triennial basis.

(3) Licenses held by retailers and grocery wholesalers ending in the digits ''2,'' ''5,'' or ''8,'' will renew their licenses after one year, and thereafter on a triennial basis.

[28 FR 7067, July 11, 1963; 28 FR 7287, July 17, 1963, as amended at 44 FR 50576, Aug. 29, 1979; 62 FR 15087, Mar. 31, 1997; 63 FR 64172, Nov. 19, 1998]

§46.10 Nonlicensed person; liability; penalty.

Any commission merchant, dealer, or broker who violates the Act by engaging in business subject to the Act without a license may settle its liability, if such violation is found by the Director not to have been willful but due to inadvertence, by submitting the required application and paying the amount of fees that it would have paid had it obtained and maintained a license during the period that it engaged in business subject to the Act, plus an additional sum not in excess of two hundred and fifty dollars ($250) as may be determined by the Director.

[62 FR 15087, Mar. 31, 1997]

§46.11 What constitutes valid license, form and use.

Each license shall bear a serial number, the names in which authorized to conduct business, type of ownership, if the business is individually owned, the name of the owner; if a partnership, the names of all general partners; if a limited liability company, the names of all members, managers, officers, directors and holders of more than 10 percent of the ownership stake, and the percentage of ownership in the company held by each such person; if a corporation or association, the names of all officers, directors, and shareholders of more than 10 percent of the outstanding stock and the percentage of stock held by each such person; the facsimile signature of the Deputy Administrator, the seal of the Department and shall be duly countersigned. The licensee may place upon his stationery, trucks, or business sign an inscription indicating that he is licensed under the Act, but such inscription must not be of such form or arrangement as to be deceptive or misleading to the public, nor shall any such inscription be displayed or used unless the person using the inscription has a license valid and effective at the time.

[28 FR 7067, July 11, 1963; 28 FR 7287, July 17, 1963, as amended at 65 FR 24854, Apr. 28, 2000]

§46.12 Forms of inscriptions.

The following inscriptions, for use with or without the license number, meet the foregoing requirements and may be used by licensees: ''Licensed by the U.S. Department of Agriculture under the Perishable Agricultural Commodities Act'', or ''Licensed under the PACA.''

§ 46.13 Address, ownership, changes in trade name, changes in number of branches, changes in members of partnership, and bankruptcy.

The licensee shall:

(a) Promptly report to the Director in writing;

(1) Any change of address;

(2) Any change in officers, directors, members, managers, holders of more than 10 percent of the outstanding stock in a corporation, with the percentage of stock held by such person, and holders of more than 10 percent of the ownership stake in a limited liability company, and the percentage of ownership in the company held by each such person;

(3) Any deletions or additions of trade names;

(4) Any change in the number and address of any branches or additional business facilities, and;

(5) When the licensee, or if the licensee is a partnership, any partner is subject to proceedings under the bankruptcy laws. A new license is required in case of a change in the ownership of a firm, the addition or withdrawal of partners in a partnership, or in case business is conducted under a different corporate charter, or in case a limited liability company conducts business under different articles or organization from those under which the license was originally issued.

(b) Obtain approval from the Director prior to using any trade name.

[44 FR 50576, Aug. 29, 1979, as amended at 65 FR 24855, Apr. 28, 2000]

ACCOUNTS AND RECORDS (GENERAL)

§ 46.14 General.

(a) Every commission merchant, dealer, and broker shall prepare and preserve for a period of two years from the closing date of the transaction the accounts, records, and memoranda required by the Act, which shall fully and correctly disclose all transactions involved in his business. Licensees shall keep records which are adapted to the particular business that the licensee is conducting and in each case such records shall fully disclose all transactions in the business in sufficient detail as to be readily understood and audited. It is impracticable to specify in detail every class of records which may be found essential since many different types of business are conducted in the produce industry and many different types of contracts are made covering a wide range of services by agents and others. The responsibility is placed on every licensee to maintain records which will disclose all essential facts regarding the transactions in his business.

(b) Every commission merchant, dealer, and broker shall prepare and preserve records and memoranda required by the Act which shall fully and correctly disclose the true ownership and management of such business during the preceding four years. Such records shall include the number and location of all branches or additional business facilities operated by or for the commission merchant, dealer or broker. In the case of a corporation, such records shall include the corporate charter, record of stock subscription and stock issued, the amounts paid in for stock and minutes of stockholders' and directors' meetings showing the election of directors and officers, resignations and other pertinent corporate actions. In the case of a partnership, the records shall contain a copy of the partnership agreement showing the type of partnership, the full names and addresses of all partners including general, special or limited partners, the partnership interest of each individual and any other pertinent records of the partnership.

[28 FR 7067, July 11, 1963; 28 FR 7287, July 17, 1963, as amended at 44 FR 50576, Aug. 29, 1979]

§ 46.15 Documents to be preserved.

Bills of lading, diversion orders, paid freight and other bills, car manifests, express receipts, confirmations and memorandums of sales, letter and wire correspondence, inspection certificates, invoices on purchases, receiving records, sales tickets, copies of statements (bills) of sales to customers, accounts of sales, papers relating to loss and damage claims against carriers, records as to reconditioning, shrinkage and dumping, daily inventories by lots, a consolidated record of all rebates and allowances made or received in connection with shipments handled for the account of another, an itemized daily

record of cash receipts, ledger records in which purchases and sales can be verified, and all other pertinent papers relating to the shipment, handling, delivery, and sale of each lot of produce shall be preserved for a period of 2 years.

§46.16 Method of preservation or storage of records.

All records required to be preserved under the Act shall be stored in an orderly manner and in keeping with sound business practices. The records being currently used shall be filed in order of dates, by serial numbers, alphabetically or by any other proper method which will enable the licensee to promptly locate and produce the records. Records in dead storage should be arranged in an orderly fashion, be packaged or wrapped to insure proper preservation, be adequately marked or identified, and stored in a safe, dry location. When part of the records are forwarded to others (such as accountants, traffic agencies, attorneys, etc.), proper notations should be filed in appropriate places in the records identifying the missing records and stating where they can be located.

§46.17 Inspection of records.

(a) Each licensee shall, during ordinary business hours, promptly upon request, permit any duly authorized representative of USDA to enter its place of business and inspect such accounts, records, and memoranda as may be material:

(1) In the investigation of complaints under the Act, including any petition, written notification, or complaint under section 6 of the Act,

(2) To the determination of ownership, control, packer, or State, country, or region of origin in connection with commodity inspections,

(3) To ascertain whether there is compliance with section 9 of the Act,

(4) In administering the licensing and bonding provisions of the Act,

(5) If the licensee has been determined in a formal disciplinary proceeding to have violated the prompt payment provision of section 2(4) of the Act, to determine whether, at the time of the inspection, there is compliance with that section.

(b) Any necessary facilities for such inspection shall be extended to such representative by the licensee, its agents, and employees.

[62 FR 15087, Mar. 31, 1997]

RECORDS OF MARKET RECEIVERS

§46.18 Record of produce received.

Market receivers shall keep in the order of receipt a record of all produce received and this record shall be in the form of a book (preferably a bound book) with numbered pages or comparable business record. This record shall clearly show for each lot the date of arrival and unloading; whether received by freight, express, truck, or otherwise; the car initials and number; the truck license number and the driver's name or the name of the trucking firm; the number of packages or the quantity received; the kind of produce; the name and address of the consignor or seller; whether the produce was purchased; consigned or received on joint account; and the disposition of the produce, whether jobbed or sold in carlots or trucklots, and the lot number assigned to the shipment by the receiver (as required by §46.20).

§46.19 Sales tickets.

Sales tickets shall bear printed serial numbers running consecutively and shall be used in numerical order so far as practicable. No serial number shall be repeated within a 90-day period. The sales tickets shall be prepared and all the details of the sale shall be entered on the tickets in a legible manner in order that an audit can be readily made. Erasures, strike-outs, changes, etc., should be held to the minimum. When errors are made in preparing sales tickets, the tickets should be voided. Each sales ticket shall show the date of sale, the purchaser's name (so far as practicable), the kind, quantity, the unit price, and the total selling price of the produce. Each sales ticket shall show the lot number of the shipment if the produce is being handled on consignment or on joint account. Sales tickets on all other lots of the same commodity which are on hand at the same time shall also show a lot number. The original or a legible

carbon copy of each sales ticket, including those voided or unused, shall be accounted for and shall be filed or stored either by dates of sales or in the order of the serial numbers for a period of two years.

§ 46.20 Lot numbers.

An identifying lot number shall be assigned to each shipment of produce to be sold on consignment or joint account or for the account of another person or firm. A lot number should be assigned to any purchased shipment in dispute between the parties to assist in proving damages. A lot number shall be assigned to each purchased shipment of similar produce on hand at that time or received later while the consigned or joint account or disputed lot is being sold. A lot number shall be assigned to each purchased shipment which is reconditioned if the seller is to be charged with the shrinkage or loss. The lot number shall be entered on the receiving record in connection with each shipment and entered on all sales tickets identifying and segregating the sales from the various shipments on hand. The lot number shall be entered on the sales tickets by the salesmen at the time of sale or by the produce dispatcher, and not by bookkeepers or others after the sales have been made. No lot number shall be repeated within a period of 30 days after the last sale from the preceding lot to which such number was assigned.

§ 46.21 Returns, rejections, or credit memorandums on sales.

In the event of the rejection and return of any produce sold for or on behalf of another, on consignment, or on joint account, or of any necessary allowance or adjustment being made to the buyers thereof, a credit memorandum showing the buyer's name, sales ticket number, lot number, date of the granting of the allowance, and amount of the credit or adjustment, with reasons therefor, shall be made or a notation shall be made on the original sales ticket referring to the adjustment and showing where the credit memorandum is filed. The credit memorandum shall be on a regular form, in a ledger book, or on a sales ticket or invoice properly completed to show the facts and shall be approved by a duly authorized person. Credits granted shall be entered in the same records as the original sales tickets.

§ 46.22 Accounting for dumped produce.

A clear and complete record shall be maintained showing justification for dumping of produce received on joint account, on consignment, or handled for or on behalf of another person if any portion of such produce regardless of percentage cannot be sold due to poor condition or is lost through resorting or reconditioning. In addition to the foregoing, if five percent or more of a shipment is dumped, an official certificate, or other adequate evidence, shall be obtained to prove the produce was actually without commercial value, unless there is a specific agreement to the contrary between the parties. The original certificate or other adequate evidence justifying dumping shall be forwarded to the consignor or joint account partner with the accounting and a copy shall be retained by the receiver.

§ 46.23 Evidence of dumping.

Reasonable cause for destroying any produce exists when the commodity has no commercial value or when it is dumped by order of a local health officer or other authorized official or when the shipper has specifically consented to such disposition. The term ''commercial value'' means any value that a commodity may have for any purpose that can be ascertained by the exercise of due diligence without unreasonable expense or loss of time. When produce is being handled for or on behalf of another person, proof as to the quantities of produce destroyed or dumped in excess of five percent of the shipment shall be provided by procuring an official certificate showing that the produce has no commercial value from any person authorized by the Department to inspect fruits and vegetables. Where such inspection service is not available certification may be obtained from (a) any health officer or food inspector of any State, county, parish, city or municipality or of the District

of Columbia; (b) any established commercial agency or service making inspections for the fruit and vegetable industry; or (c) when no inspector or health officer designated above is available consideration will be given to other evidence such as inspection and certification made by any two persons having no financial interest in the produce involved or in the business of any person financially interested therein, and who are unrelated by blood or marriage to any such financially interested person, and who, at the time of the inspection and certification, and for a period of at least one year immediately prior thereto, have been engaged in the handling of the same general kind or class of produce with respect to which the inspections and certification are to be made. Any certificate issued by any persons designated in paragraph (c) of this section shall include a statement that each of them possesses the requisite qualifications. Any such certificate shall properly identify the produce by showing the commodity, lot number, brand or principal identifying marks on the containers, quantity dumped, name and address of shipper, name and address of applicant, condition of the produce, time, place, and date of inspection and a statement that the produce possesses no commercial value.

RECORDS OF RETAILERS

§ 46.24 Records of retailers.

Notwithstanding the specific records and documents prescribed in the foregoing sections, licensees who purchase produce solely for sale at retail shall establish and maintain accounts and records, adapted to their type of operations, which will fully and correctly disclose all transactions relating to the purchase of produce. Such accounts and records should include the date of receipt of each lot, kind of produce, number of packages and quantity, price paid, evidence of agreement, or contract of purchase, bills of lading, paid bills, and any other documents relating to the purchase of produce.

AUCTION SALES

§ 46.25 Auction sales.

Commission merchants, dealers and brokers who offer produce for sale through auction companies which publish catalogs of offerings will be responsible for furnishing the auction company for publication true and correct information concerning the ownership of the produce. When the produce is offered for sale by an owner, his name shall be shown in the catalog listing as owner. When a joint account partner makes an offering, his name as well as that of his joint partner, or partners, shall be shown. When any person offers produce for sale at auction for the account of another, the name, or names of the owner, if known, and of his principal shall be shown. In addition to listing such name or names he may show that he is acting in the capacity of agent. If a person instructs an auction company to catalog a shipment without disclosing true ownership, if known, or the name of an agent's principal, he shall be deemed to have made a false or misleading statement within the meaning of the Act. Since sales at auctions normally involve additional expenses, a broker, grower's agent or commission merchant shall have prior consent from his principal before such disposition is accomplished. Where a dispute exists regarding the ownership of produce, it may be listed in the auction catalog as being offered for sale ''for the account of whom concerned'' with the name of the party making the offering shown as agent.

DUTIES OF LICENSEES

§ 46.26 Duties of licensees.

It is impracticable to specify in detail all of the duties of brokers, commission merchants, joint account partners, growers' agents and shippers because of the many types of businesses conducted. Therefore, the duties described in these regulations are not to be considered as a complete description of all of the duties required but is merely a description of their principal duties. The responsibility is placed on each licensee to fully perform any

specification or duty, express or implied, in connection with any transaction handled subject to the Act.

BROKERS

§ 46.27 Types of broker operations.

(a) Brokers carry on their business operations in several different ways and are generally classified by their method of operation. The following are some of the broad groupings by method of operation. The usual operation of brokers consists of the negotiation of the purchase and sale of produce either of one commodity or of several commodities. A broker is usually engaged by only one of the parties, but in negotiating a contract the broker acts as a special agent of first one and then the other party in conveying offers, counter offers, and acceptances between the parties. Once the contract is formed, and the confirmation issued, the broker's duties are usually ended, and the broker is not the proper party to whom notice of breach or of rejection should be directed. However, a broker receiving notice has a duty to promptly convey the notice to the proper party. Frequently, brokers never see the produce they are quoting for sale or negotiating for purchase by the buyer, and they carry out their duties by conveying information received from the parties between the buyer and seller until a contract is effected. Generally, the seller of the produce invoices the buyer, however, when there is a specific agreement between the broker and its principal, the seller invoices the broker who, in turn, invoices the buyer, collects, and remits to the seller. Under other types of agreements, the seller ships the produce to pool buyers, and the broker as an accommodation to the seller invoices the buyers, collects, and remits to the seller. Also, there are times when the broker is authorized by the seller to act much like a commission merchant, being given blanket authority to dispose of the produce for the seller's account either by negotiation of sales to buyers not known to the seller or by placing the produce for sale on consignment with receivers in the terminal markets.

(b) There is a second general grouping of brokers which are commonly referred to as buying brokers. Their operations are typified by the fact that they act as the buyer's representative in negotiating purchases at shipping points, terminal markets, or intermediate points. Their typical type of operation is to negotiate a purchase on the buyer's instructions and authorization. Sometimes the broker negotiates the purchase without seeing the produce. In other instances he may select the merchandise after forming an appraisal of the quality of the produce being offered for sale on the market. Generally, a purchase is made in the buyer's name and the seller invoices the buyer direct. On the other hand, acting on authority given him by the buyer, the broker may negotiate purchases in his own name, pay the seller for the produce, make arrangements for its loading and shipment, and bill the buyer direct for the cost price plus the brokerage fee and the cost of any agreed upon accessorial service charges such as ice, loading, etc.

[28 FR 7067, July 11, 1963; 28 FR 7287, July 17, 1963, as amended at 62 FR 15087, Mar. 31, 1997]

§ 46.28 Duties of brokers.

(a) *General.* The function of a broker is to facilitate good faith negotiations between parties which lead to valid and binding contracts. A broker who fails to perform any specification or duty, express or implied, in connection with any transaction is in violation of the Act, is subject to the penalties specified in the Act, and may be held liable for damages which accrue as a result of the violation. It shall be the duty of the broker to fully inform the parties concerning all proposed terms and conditions of the proposed contract. After all parties agree on the terms and the contract is effected, the broker shall prepare in writing and deliver promptly to all parties a properly executed confirmation or memorandum of sale setting forth truly and correctly all of the essential details of the agreement between the parties, including any express agreement as to the time when payment is due. The confirmation or memorandum of sale shall also identify the party who engaged the broker to

act in the negotiations. If the confirmation or memorandum of sale does not contain such information, the broker shall be presumed to have been engaged by the buyer. Brokers do not normally act as general agents of either party, and will not be presumed to have so acted. Unless otherwise agreed and confirmed, the broker will be entitled to payment of brokerage fees from the party by whom it was engaged to act as broker. The broker shall retain a copy of such confirmations or memoranda as part of its accounts and records. The broker who does not prepare these documents and retain copies in its files is failing to prepare and maintain complete and correct records as required by the Act. The broker who does not deliver copies of these documents to all parties involved in the transaction is failing to perform its duties as a broker. A broker who issues a confirmation or memorandum of sale containing false or misleading statements shall be deemed to have committed a violation of section 2 of the Act. If the broker's records do not support its contentions that a binding contract was made with proper notice to the parties, the broker may be held liable for any loss or damage resulting from such negligence, or for other penalties provided by the Act for failing to perform its express or implied duties. The broker shall take into consideration the time of delivery of the shipment involved in the contract, and all other circumstances of the transaction, in selecting the proper method for transmitting the written confirmation or memorandum of sale to the parties. A buying broker is required to truly and correctly account to its principal in accordance with §46.2(y)(3). The broker should advise the appropriate party promptly when any notice of rejection or breach is received, or of any other unforeseen development of which it is informed.

(b) *Brokerage fees.* A broker is not considered to be entitled to a brokerage fee unless he effects a sale or makes a valid and binding contract, fully performing his duties as a broker. Unless otherwise specifically agreed, the broker does not guarantee the performance of the contracting parties and is entitled to receive prompt payment of the brokerage fee whenever a valid and binding contract is negotiated. Brokerage fees may be charged to only one of the parties to the contract unless by prior agreement the parties agree to split the brokerage fee. If the brokerage fee is charged to both parties without a specific prior agreement, such action by the broker is a violation of the Act. A broker employed to negotiate the sale of produce may not employ another broker or selling agent, including auction companies, without the specific prior approval of his principal. When the broker is authorized to sell, invoice the buyer, collect and remit to his principal, he shall render an itemized accounting to the principal promptly on receipt of payment, showing the true gross selling price, all brokerage fees deducted, any auction charges and any other expenses incurred in connection with the sale of the shipment. The failure to account truly and correctly and make full payment promptly is a violation of the Act.

(c) *Broker's responsibility for payment.* In the absence of a specific agreement, a broker is not responsible for payment to the seller by the buyer. Agreement to collect from the buyer and remit to the seller is not a guarantee by the broker that the buyer will pay for the produce purchased, unless there is a specific agreement by the broker that he will pay if the buyer does not pay. A broker who agrees to collect funds from the buyer for his principal shall render an itemized accounting to the principal promptly on receipt of payment showing the true gross selling price, all brokerage fees deducted and all expenses including auction charges, incurred in connection with the sale of the shipment. The failure to account truly and correctly and make full payment promptly is a violation of the Act. While the broker is not obliged to furnish his principal information regarding the financial condition of the buyer, if the broker furnishes such information, he must truthfully report the information available to him, and any false or misleading statements for a fraudulent purpose to the principal to encourage the sale will be a violation of the Act. A buying broker who negotiates a purchase in his own name

under an agreement with his principal, is responsible for payment of the purchase price to the seller. A broker has no authority to grant allowances or adjust the seller's invoice price to the buyer without the specific prior approval of his principal.

(d) *Purchases and sales by brokers.* A person who operates in a dual capacity, both as a broker and a dealer, shall clearly disclose his status in each transaction to all parties with whom he is dealing. If such a person misrepresents himself as a broker to the buyer or the seller when he is acting as a dealer purchasing produce or selling produce he has purchased, he shall be considered to have violated the Act. When a person purchases or sells produce as a dealer, he shall not request or receive a brokerage fee from the buyer or the seller. A broker shall not negotiate a transaction where the broker is subject to the direct or indirect control of any party to the transaction other than his principal, or where the other party is subject to the direct or indirect control of the broker without fully disclosing the circumstances to his principal and obtaining his specific prior approval.

(e) *Filing carrier claims by brokers.* Without prior consent of the owner, a broker has no authority to file claims with carriers in his own name or any other name. A broker has no obligation to file carrier claims for the owners of the shipments. However, when a broker in a transaction receives information valuable to the owner in connection with carrier claim rights, the broker should promptly advise the owner. A broker who agrees to protect the carrier claims of owners shall at all times exercise reasonable care to fulfill such obligation. If a broker makes an agreement with a seller or a buyer to file and handle such a claim for the benefit of the owner of the produce, the claim shall be filed promptly with the carrier, supported by adequate evidence, and he shall take the necessary action to bring the matter to a conclusion. A copy of the claim shall be forwarded to the owner of the shipment when the claim is filed. When settlement of the claim is effected, the broker shall promptly remit the net amount due the owner, after deducting the agreed or customary charges for handling the claim. Adequate information shall be furnished the owner regarding the claim while the matter is being handled with the carrier. If the owner files the claim, the broker shall promptly furnish any necessary information available in his records which is requested by the owner.

[28 FR 7067, July 11, 1963; 28 FR 7287, July 17, 1963, as amended at 37 FR 14561, July 21, 1972; 62 FR 15087, Mar. 31, 1997]

RECEIVING MARKET COMMISSION MERCHANTS AND JOINT ACCOUNT PARTNERS

§ 46.29 Duties.

(a) *General.* All licensees who accept produce for sale on consignment or on joint account are required to exercise reasonable care and diligence in disposing of the produce promptly and in a fair and reasonable manner. A commission merchant engaged to sell consigned produce may not employ another person or firm, including auction companies, to dispose of all or part of such produce without the specific prior authority of the consignor. A commission merchant is not authorized to sell consigned produce outside the market area where he is located without obtaining the permission of the consignor. Averaging or pooling of sales is not permissible unless the receiver obtains the specific written permission of the consignor prior to rendering the accounting. Complete and detailed records shall be prepared and maintained by all commission merchants and joint account partners covering produce received, sales, quantities lost, dates and cost of repacking or reconditioning, unloading, handling, freight, demurrage or auction charges, and any other expenses which are deducted on the accounting, in accordance with the provisions of § 46.18 through § 46.23. When rendering account sales for produce handled for or on behalf of another, an accurate and itemized report of sales and expenses charged against the shipment shall be made. It is a violation of section 2 of the Act to fail to render true and correct accountings in connection with consignments or produce handled on joint account. Charges which cannot be supported by

proper evidence in the records of the commission merchant or joint account partner shall not be deducted. The commission merchant or joint account partner may be held liable for any financial loss and for other penalties provided by the Act, due to his negligence or failure to perform any specification or duty, express or implied, arising out of any transaction subject to the Act.

(b) *Commission charges.* Before accepting produce on consignment, the parties should reach a definite agreement on the amount of the commission and other charges which will be assessed by the commission merchant. In the absence of such an agreement, only the usual and customary commission and other charges shall be permitted. The receiver may not reconsign produce to another person or firm, including auction companies, and incur additional commissions, charges or expenses without the specific prior authority of the consignor. Unless otherwise agreed upon by the parties, joint account partners shall not charge a commission fee or other selling charges against the joint account for disposing of the produce. When a portion of a consigned shipment is purchased by the commission merchant he shall not charge or receive a commission fee for such sales.

(c) *Purchasing consigned produce.* A commission merchant or joint account partner may not purchase produce received on consignment or joint account or sell such produce to any person or firm over whose business he has direct or indirect control, or to any person or firm having direct or indirect control over his business, without specific prior authority of the consignor or the joint account partner. However, produce may be purchased by the commission merchant or joint account partner at reasonable market value to clean up remnants of shipments so accountings will not be unduly delayed, provided the accounting shows the quantity and price of the goods bought by the commission merchant or joint account partner. ''Remnants,'' as used here, mean small quantities remaining after the bulk of the shipment has been sold but shall not exceed 5 percent of the shipment. When consigned produce is purchased by a commission merchant he shall not charge or receive a commission fee for such sales.

(d) *Filing carrier claims.* Without the prior consent of the owner of the produce, a commission merchant has no authority to file claims with carriers in his own name or any other name: *Provided*, That the commission merchant may file a claim for breakage where the owner has been paid for the full value of the produce without any deduction for damage. Commission merchants have no obligation to file carrier claims on shipments for the owners. However, when a commission merchant in a transaction receives information valuable to the consignor in connection with carrier claim rights, the commission merchant should promptly advise the consignor. Before a commission merchant files a carrier claim on a consigned shipment, a specific agreement shall be reached with the consignor. If a commission merchant is authorized and agrees to file the claim, he shall forward a copy of the claim filed with the carrier to the consignor and shall exercise reasonable care to protect the interests of the consignor by filing the claim promptly and in the proper amount, supported by adequate evidence, and shall take the necessary action to bring the matter to a conclusion. When settlement of the claim is effected, he shall promptly remit the net amount due the consignor, after deducting the agreed handling charges. Full and complete information shall be furnished the consignor while the claim is being handled. If the consignor is to file the claim, the commission merchant shall exercise reasonable care to protect the claim rights of the consignor and shall promptly furnish all necessary information and evidence from his records to enable the consignor to file a proper claim. A joint account partner who files a carrier claim on behalf of the partnership shall forward a copy of the claim filed with the carrier to his partner, keep him advised of its status, and remit promptly his share of the net proceeds realized from such claim.

GROWERS' AGENTS AND SHIPPERS

§ 46.30 Types of operations by growers' agents and shippers.

(a) The usual operations of shippers consist of purchasing produce from growers in their own names. They distribute the produce in commerce by selling, consigning, or jointing the shipments, assuming any loss or profits that result from these operations. In addition, shippers may handle produce on joint account with growers or others.

(b) Growers' agents sell and distribute produce for or on behalf of growers and others and, in addition, may perform a wide variety of services, such as financing, planting, harvesting, grading, packing, furnishing labor, seed, containers, and other supplies or services. They usually distribute the produce in their own names and collect payment direct from the consignees. They render accountings to their principals, paying the net proceeds after deducting their expenses and fees. Some agents are limited by contract to making only sales and cannot joint or consign produce without obtaining the prior consent of the growers. Other agents are granted blanket authority by the growers to market and distribute the produce, using their discretion as to the best methods, depending on market conditions and the quality of the produce available. They can sell, consign or ship on joint account, use the services of brokers or sell through terminal market auctions. They are authorized to grant credits, make adjustments in the invoice price, handle claims with the carriers, or even abandon shipments, when circumstances justify such action, without consulting the growers. Some agents have an agreement with the growers to pool the produce and render accountings on the basis of the average or prorated selling prices after deducting the prorated expenses incurred for the various operations performed and the agents' selling fees. Some agents's contracts require an accounting on the basis of actual selling prices after deducting the actual expenses incurred for services performed and the selling fees. Some agents' contracts specify a fixed charge for harvesting, grading, packing, furnishing the container or other services, plus a selling fee, and thereby substantially reduce the record requirements necessary to prove the cost of the various operations.

§ 46.31 Duties of shippers.

(a) *General.* The responsibilities of shippers vary with their contracts with growers to purchase produce or to handle produce on joint account. Similarly, their responsibilities to their customers depend upon their contracts to sell, consign or joint account produce with dealers on terminal markets. Shippers shall pay promptly for produce purchased and any deficits incurred on consigned shipments. They shall fully comply with their obligations in connection with joint account transactions. A shipper who fails to perform any express or implied duty is in violation of the Act and may be held liable for any damages resulting therefrom. The shipper shall prepare and maintain records which fully and correctly disclose the details of his transactions.

(b) *Receiving records.* Each shipper shall prepare and maintain a record of all produce handled including his own production. This record shall be in the form of a book (preferably a bound book), with numbered pages or comparable business records. This receiving record shall show for each lot the date received, whether purchased or received on joint account, the quantity, quality, and kind of produce, the purchase price or joint account cost, and the name and address of the supplier. Shippers shall issue receipts to growers and others for all produce received.

(c) *Disposition records.* When a shipper purchases produce from growers or others, his records shall also show the disposition of the produce, whether sold or consigned, date of shipment, car number, or if shipped by truck, the license number, name and address of the carrier, name and address of the buyer, commission merchant or auction, and other pertinent details of the transaction, such as the terms of sale, selling price, and date of payment.

(d) *Joint accounts with growers.* When a shipper enters into a joint account transaction with growers or others, the agreement between the parties should

be reduced to a written contract clearly defining the duties and responsibilities of both parties and the extent of the shipper's authority in distributing the produce. The shipper shall prepare and maintain records to show in detail the actual expenses incurred for the services he furnishes, such as harvesting, grading, packing and selling the produce (unless a fixed charge is agreed upon by the parties to cover the cost of these services), methods of distribution and proceeds received for the produce. If a shipper is at the same time handling similar produce not involved in the joint account transaction, a lot number or other positive means of identification shall be assigned to each lot of produce received in order to segregate and identify the various lots of produce. If a shipper consigns all or part of the produce or employs the services of brokers or terminal market auctions, his records shall show the results of these transactions, including the expenses involved and the names and addresses of the commission merchants, brokers, and the auctions. The shipper shall render a detailed and accurate accounting and pay promptly the net proceeds due the joint partner, in accordance with §46.2(y), (z), and (aa). The accounting shall disclose the status of all claims collected or filed with the carriers.

(e) *Joint accounts with receivers.* When a shipper enters into a joint account agreement with a terminal market dealer, the agreement should be reduced to writing clearly defining the terms of the agreement. The shipper's records shall show the expenses which may be properly charged in accordance with the joint agreement, purchase price or joint account cost of the produce, and cost of harvesting, packing, grading, or other expenses. His records shall show the quantity and quality of the produce packed and shipped, the dates and methods of shipment, and all other pertinent details of his operation. At the conclusion of the transaction, a detailed and accurate accounting shall be furnished promptly to the joint partner, in accordance with §46.2(z). If a deficit results, the shipper shall pay promptly his share of the deficit.

§46.32 Duties of growers' agents.

(a) *General.* The duties, responsibilities, and extent of the authority of a growers' agent depend on the type of contract made with the growers. Agreements between growers and agents should be reduced to a written contract clearly defining the duties and responsibilities of both parties and the extent of the agent's authority in distributing the produce. When such agreements between the parties are not reduced to written contracts, the agent shall have available a written statement describing the terms and conditions under which he will handle the produce of the grower during the current season and shall mail or deliver this statement to the grower on or before receipt of the first lot. A grower will be considered to have agreed to these terms if, after receiving such statement, he delivers his produce to the agent for handling in the usual manner. In the event an unsolicited lot of produce is accepted by an agent for handling in his usual manner, he shall promptly deliver or mail a copy of such statement to the grower. A copy of this statement, showing the name of the grower and the date the statement was delivered to the grower, shall be retained in the agent's files. An agent who does not have in his files either written contracts or a written statement as required herein is failing to prepare and maintain full and complete records as required by the Act. *Provided*, That regulations or bylaws of cooperative marketing associations may be used in lieu of individual agreements or contracts to determine the methods of accounting and settlement with their grower members. An agent who fails to perform any specification or duty, express or implied, is in violation of the Act and may be held liable for any damages resulting therefrom and for other penalties provided under the Act for such failure.

(b) *Accounting for charges.* A growers' agent whose operations include such services as the planting, harvesting, grading, packing, furnishing of containers or other supplies, storing, selling or distributing produce for or on behalf of growers shall prepare and maintain complete records on all transactions in sufficient detail as to

be readily understood and audited. Agents must be in a position to render to the growers accurate and detailed accountings covering all aspects of their handling of the produce. Agents shall maintain a record of all produce received in the form of a book (preferably a bound book) with numbered pages or comparable business records, showing for each lot the date received, quantity, the kind of produce and the name and address of the grower. Agents shall issue receipts to growers and others for all produce received. A lot number or other positive means of identification shall be assigned to each lot in order to segregate the various lots of produce received from different growers from similar produce being handled at the same time. Each lot shall be so identified and segregated throughout all operations conducted by the agent, including the sale or other disposition of the produce. The records shall show the result of all packing and grading operations, including the quantity lost through packing and grading and the quantity and quality packed out. If the culls are sold, they shall be included in the accounting. Unless there is a specific agreement with the growers to pool all various growers' produce, the accounting to each of the growers shall itemize the actual expenses incurred for the various operations conducted by the agent and all the details of the disposition of the produce received from each grower including all sales, adjustments, rejections, details of consigned or jointed shipments and sales through brokers, auctions, and status of all claims filed with or collected from the carriers. The agent shall prepare and maintain full and complete records on all details of such distribution to provide supporting evidence for the accounting. If an agent is working under a pool agreement with growers, the accounting shall show how the pool cost and pool sales prices are computed. If the agent and the growers have agreed on a fixed charge to cover the various operations conducted by the agent, actual expenses incurred for these services covered by the agreement are not required to be shown in the accounting. The failure of the agent to render prompt, accurate and detailed accountings in accordance with § 46.2 (z) and (aa), is a violation of the Act.

(c) *Sales through brokers or auctions.* Unless a growers' agent is specifically authorized in his contract with the growers to use the services of brokers, commission merchants, joint partners, or auctions, he is not entitled to use these methods of marketing the growers' produce. Any expense incurred for such services, without the growers' permission, cannot be charged to the growers.

(d) *Filing of carrier claims.* Without the prior consent of the growers, an agent has no authority to file claims with the carriers in his own name or any other name. An agent has no obligation to file carrier claims on shipments for growers in the absence of a specific agreement to perform these duties. All information which an agent has received in handling the shipment which is essential for the growers to file such claims shall be made available to the growers. If an agent has an agreement with the growers to file and handle carrier claims, he shall exercise reasonable care in handling the claims with the carriers by filing the claim promptly in the proper amount, supported by adequate evidence, and take any necessary action to bring the matter to a conclusion.

(e) *Purchases and sales by growers' agents.* A person who operates in a dual capacity, both as a growers' agent and as a shipper, shall clearly disclose his status in each transaction to all parties with whom he is dealing. If such a person misrepresents himself as an agent, when he is acting as a shipper selling produce he has purchased, he shall be considered to have violated the Act. A growers' agent shall not charge or receive a fee from the seller or the buyer when he purchases or sells produce as a shipper. A growers' agent shall not negotiate a transaction where he is subject to the direct or indirect control of any party to such transactions, other than his principal, or where the other party is subject to the agent's direct or indirect control, without fully disclosing the circumstances to his principal and obtaining his specific prior approval.

(f) *Negligence of agent.* A growers' agent may be held liable for any loss or

damage resulting to the growers due to his negligence or failure to perform any specification or duty, express or implied, arising out of any undertaking in connection with transactions subject to the Act.

(g) *Responsibility for payment.* An agent is not responsible for the payment by the buyer who has purchased the growers' produce on credit, unless he guarantees payment or is negligent in extending credit. Agreement to collect from the buyer and remit to his principal is not a guarantee by the agent that the agent will pay if the buyer does not pay.

(h) *Responsibility for payment of selling fees and expenses to the growers' agent.* In the absence of a specific agreement to the contrary, the agent does not guarantee the performance of the contracting parties and he is entitled to the payment of his selling fees and expenses incurred in handling the produce of growers or others, providing he fully performs his duties as agent.

(i) *Agent's financial responsibility to buyers for failure to comply with contracts.* If a growers' agent contracts in his own name to deliver produce to a buyer and subsequently cannot deliver produce complying with the contract because the growers cannot or will not deliver such produce to him, he may be liable to the buyer for damages resulting from the breach of the contract.

CONVERSION OF FUNDS

§ 46.33 Conversion of funds.

Any licensee who collects or receives funds for or on behalf of another person or firm in connection with produce shall not make any use or disposition of such funds in his possession or control that will endanger or impair faithful and prompt payment to the owner or consignor of the produce or to any other person having a financial interest therein.

DISCLOSURE OF BUSINESS

§ 46.34 No disclosure of business of licensee.

No representative of the Department shall, without the consent of the licensee, divulge or make known, except to financially interested parties, or to other representatives of the Department who may be required to have such knowledge in the regular course of their official duties, or except insofar as he may be directed by the Secretary, Deputy Administrator, Director, or a court of competent jurisdiction, any facts or information regarding the business of such licensee which may come to the knowledge of such representative through an examination or inspection of the business or the accounts of the licensee, unless such facts or information should be testified to at a hearing authorized by the act because they are relevant and material to the issue in the case being heard.

SUSPENSION AND REVOCATION OF LICENSES

§ 46.35 Suspension or revocation order.

(a) Whenever the Secretary shall order the suspension or revocation of a license, the person against whom such order is directed shall be served by the Hearing Clerk with a copy of the order, and be notified of the effective date thereof. Service of orders shall be accomplished in accordance with § 47.4 of this chapter.

(b) Except in the case of any license automatically suspended by the Act, a reasonable time shall be allowed, which shall not be less than 10 days between the date of issuance of the order of suspension or revocation and the date upon which such order becomes effective, during which period the licensee may make all necessary arrangements with some other person, who has a valid and effective license to safeguard the interests of consignors or other innocent parties whose property or business may be affected by such suspension or revocation and during which the licensee may terminate his affairs and business relating to the handling of produce.

(c) After the revocation of his license or during the effective period of any suspension thereof, no person shall, either directly or indirectly, through any agent, employee, or otherwise, carry on the business of a commission merchant, dealer, or broker until his status as a licensee has been restored.

(d) The suspension or revocation of a license shall not prevent the licensee

from collecting amounts due on contracts entered into prior to the date of suspension or revocation or from remitting promptly to his principals and obligees.

PUBLICATION OF FACTS

§ 46.36 Publicity.

Upon the issuance by the Secretary of an order revoking or suspending a license, or in case of automatic suspension of a license for failure to pay a reparation award, the Director shall cause general publicity to be given to such fact, in order that those doing business with the licensee whose license has been revoked or suspended may take due notice thereof.

SUNDAYS AND HOLIDAYS

§ 46.37 Sundays and holidays excluded.

Sundays and holidays shall not be included in the computation of the 5-day period provided by section 7(d) of the Act nor in connection with the periods defined in § 46.43 with exception of paragraph (a) thereof.

§ 46.38 Sundays and holidays included.

Sundays and holidays shall be included in the computation of all other periods mentioned in the Act or in the regulations in this part.

COMMODITY INSPECTION

§ 46.39 Inspection of commodities.

Each licensee shall, during ordinary business hours, promptly upon request, permit any duly authorized representative of the Department to inspect any lot of produce under his ownership or control covered by the Act. Any necessary facilities for such inspection shall be extended to such representative by the licensee, his agents, and employees. The licensee shall be furnished a copy of any certificate or memorandum of inspection which is issued for any lot of produce which is inspected in accordance with this section.

§ 46.40 Inspection service.

The rules and regulations of the Secretary governing inspection and certification of fresh fruits and vegetables as outlined in Part 51 of this chapter; and frozen fruits and vegetables as outlined in Part 52 of this chapter, and amendments thereto, and such additional amendments as may from time to time be promulgated shall govern the inspection of such products under the Act and are hereby made a part of the regulations in this part.

LICENSEE'S RESPONSIBILITY FOR ACTS OF EMPLOYEES AND AGENTS

§ 46.41 Licensee's responsibility for acts of employees and agents.

In construing and enforcing the provisions of the Act and the regulations in this part, the act, omission, or failure of any agent, officer, or other person acting for or employed by a licensee, within the scope of his employment or office, shall in every case be deemed the Act, omission, or failure of the licensee.

[25 FR 4853, June 2, 1960. Redesignated at 28 FR 7067, July 11, 1963]

COPIES OF RECORDS

§ 46.42 Copies of records; how obtained.

Copies of records pertaining to licensees under the Act may be furnished under the conditions and at the prices prescribed in the regulations of the Department.

[25 FR 4853, June 2, 1960. Redesignated at 28 FR 7067, July 11, 1963]

TRADE TERMS AND DEFINITIONS

§ 46.43 Terms construed.

The following terms and definitions, when used in any contract or communication involving any transaction coming within the scope of the Act, shall be construed as follows:

(a) *Today's shipment*, or shipment on a specified date (such as *shipment September 12*), means in connection with shipments by rail, that the goods referred to shall be under billing by the transportation company on the date the order is given or on the date specified in time to be picked up by a train schedule to move that day's loadings from the shipping point. When used in connection with shipments by boat, this term shall mean that the goods

shall be placed alongside the boat and be under billing in time to be loaded and shipped on a boat scheduled to leave before midnight of the date specified. When used in connection with shipments by truck, this term shall mean that the goods shall be loaded and shall actually start from loading point to destination before midnight of the date specified.

(b) *Tomorrow's shipment* or *immediate shipment* means that the shipment referred to shall be under billing by the transportation company in time to move on a transportation facility scheduled to leave not more than 24 hours later than allowed under ''today's shipment.''

(c) *Quick shipment* means that the conditions of the offer, order, or confirmation will be met if the shipment is under billing by the transportation company in time to move on a transportation facility scheduled to leave not more than 48 hours later than allowed under ''today's shipment.''

(d) *Prompt shipment* means that the conditions of the offer, order, or confirmation will be met if the shipment is under billing by the transportation company in time to move on a transportation facility scheduled to leave not more than 72 hours later than allowed under ''today's shipment.''

(e) *Shipment first part of week* or *shipment early part of week* means that the produce referred to shall be under billing on Monday or Tuesday of the week specified in time to be picked up by a train scheduled to move these days' loadings from the shipping point. When used in connection with shipments by truck, this term shall mean that the goods shall be loaded and shall actually start from loading point to destination before midnight on Tuesday of the week specified.

(f) *Shipment middle of week* means that the produce referred to shall be under billing by the transportation company in time to move on a transportation facility scheduled to leave Wednesday or Thursday of the week specified. When used in connection with shipments by truck, this term shall mean that the goods shall be loaded and shall actually start from loading point to destination before midnight on Thursday of the week specified.

(g) *Shipment last of week* or *shipment latter part of week* means that the produce referred to shall be under billing by the transportation company in time to move on a transportation facility scheduled to leave on Friday or Saturday of the week specified. When used in connection with shipments by truck, this term shall mean that the goods shall be loaded and shall actually start from loading point to destination before midnight on Saturday of the week specified.

(h) *Shipment as soon as possible* or *Shipment as soon as car (truck) can be secured* means that the shipper is uncertain as to when the shipment can be made, but expects to make it within a reasonable time and will make it soon as possible. But in any case where these words are used the buyer shall, at any time after 7 days from the date the order is given, have the right to cancel the order or contract of sale, if notice of his decision so to cancel shall have been received by the shipper before shipment has been made.

(i) *F.o.b.* (for example, *f.o.b. Laredo, Tex.*, or *f.o.b. California*) means that the produce quoted or sold is to be placed free on board the boat, car, or other agency of the through land transportation at shipping point, in suitable shipping condition (see definitions of ''suitable shipping condition,'' paragraphs (j) and (k) of this section), and that the buyer assumes all risk of damage and delay in transit not caused by the seller irrespective of how the shipment is billed. The buyer shall have the right of inspection at destination before the goods are paid for to determine if the produce shipped complied with the terms of the contract at time of shipment, subject to the provisions covering suitable shipping condition.

(j) *Suitable shipping condition*, in relation to direct shipments, means that the commodity, at time of billing, is in a condition which, if the shipment is handled under normal transportation service and conditions, will assure delivery without abnormal deterioration at the contract destination agreed upon between the parties. If a good delivery standard for a commodity is set forth in §46.44, and that commodity at

the contract destination contains deterioration in excess of any tolerance provided therein, it will be considered abnormally deteriorated. The seller has no responsibility for any deterioration in transit if there is no contract destination agreed upon between the parties.

(k) *Suitable shipping condition,* in connection with reconsigned rolling or tramp cars, means that the commodity, at time of sale, meets the requirements of this phrase as defined in paragraph (j) of this section, relating to direct shipments.

(l) *F.o.b. acceptance* or *Shipping point acceptance* means that the buyer accepts the produce at shipping point and has no right of rejection. The buyer has recourse against the seller if the produce was not in suitable shipping condition (see definitions, paragraphs (j) and (k) of this section) or has recourse for a material breach of contract, providing the shipment is not rejected. The buyer's remedy under this method of purchase is by recovery of damages from the seller and not by rejection.

(m) *F.o.b. acceptance final* or *Shipping point acceptance final* means that the buyer accepts the produce at shipping point and has no right of rejection. Suitable shipping condition does not apply under this trade term. The buyer does have recourse for a material breach of contract, providing the shipment is not rejected. The buyer's remedy under this type of contract is by recovery of damages from the seller and not by rejection of the shipment.

(n) *F.o.b. steamer* means that the produce is to be placed free on board steamer at shipping point, in suitable shipping condition (see definitions of ''suitable shipping condition'', paragraphs (j) and (k) of this section) in accordance with the terms of the contract, and that the buyer assumes all responsibility and risk of damage thereafter.

(o) *F.a.s. steamer* means that the produce is to be delivered free alongside the steamer, in suitable shipping condition (see definitions of ''suitable shipping condition'', paragraphs (j) and (k) of this section), in accordance with the terms of the contract, and that the buyer assumes all responsibility and risk of damage thereafter.

(p) *Delivered* or *delivered sale* means that the produce is to be delivered by the seller on board car, or truck or on dock if delivered by boat, at the market in which the buyer is located, or at such other market as is agreed upon, free of any and all charges for transportation or protective service. The seller assumes all risks of loss and damage in transit not caused by the buyer For example, a sale of ''U.S. No. 1 potatoes delivered Chicago'' means that the potatoes, when tendered for delivery at Chicago, shall meet all the requirements of the U.S. No. 1 grade as to quality and condition.

(q) *In transit, roller,* or *rolling car* means that the produce referred to is in possession of the transportation company and under movement from shipping point when the quotation is made, and that the car is moving over a route in line of haul between the point of origin and the market in which delivery is to be made, and has been so moving since date of shipment, without any delay attributable to the shipper or his agent. Unless otherwise specifically agreed, if a roller, rolling car, or a car in transit is sold f.o.b. shipping point, the buyer shall be deemed to have assumed only the lowest all-rail freight charges applicable for the shipment between the point of origin and the contract destination agreed upon between the parties together with such other charges which would have accrued if the car had been originally shipped direct to the contract destination: *Provided,* That the buyer is not liable for payment for protective services if the seller does not inform him of the kind and extent of such services ordered from the carrier.

(r) *Tramp car* or *tramp car sale* means that the produce has left the shipping point under a bill of lading issued prior to the day on which the quotation is made and has moved or is moving over a route out of line of haul with the market in which it is to be delivered or in which it is being offered or quoted, or has been moving over a route in line of haul between the point of origin and the market in which it is to be delivered or in which it is being offered or quoted, but has been delayed in transit

by the seller, or has been held by the transportation company at diversion or other points en route awaiting instructions from the shipper and by such holding or delay has missed scheduled movement between points of shipment and the market in which it is to be delivered as the result of the transaction in question. Unless otherwise specifically agreed, if a ''tramp car'' is sold f.o.b. shipping point or a ''tramp car sale'' is made f.o.b. shipping point, the buyer shall be deemed to assume only the lowest authorized all-rail freight charges applicable for the shipment between the point of origin and the contract destination agreed upon between the parties, together with such other charges which would have accrued if the car had been originally shipped direct to the contract destination: *Provided*, That the buyer is not liable for payment for protective services if the seller does not inform him of the kind and extent of such services ordered from the carrier.

(s) *Rolling acceptance* means that the buyer accepts at time of purchase produce which is in the custody of the transportation company and under movement from shipping point, under the terms and conditions described in paragraphs (q) and (r) of this section, except that the buyer assumes full responsibility for transportation of the goods from time of purchase, has no recourse against the seller because of any change in condition after time of purchase unless the goods at the time of sale were not in suitable shipping condition, and has no right of rejection on arrival. The buyer's remedy under this method of purchase is by recovery of damages from the shipper and not by rejection of the shipment. By agreement between the parties, however, the purchase may be made subject to inspection at any specified point while the car is rolling or in transit and the point at which the buyer will assume transportation charges may be specified without affecting the time of acceptance of the commodity.

(t) *Rolling acceptance final* means the same as *Rolling acceptance* except that the buyer has no recourse against the seller because of any change in condition of the produce in transit. The buyer has recourse against the seller for any material breach of the contract providing the shipment is not rejected. The buyer's remedy under this type of contract is recovery of damages from the seller and not by rejection.

(u)(1) *Track sale* or *sale on track* means a sale of produce on track after transit and after inspection or opportunity for inspection by the buyer, or his agent, who shall be considered to have waived any right to reject the commodity so purchased upon receipt by him or his duly authorized representative from the seller or his duly authorized representative of the bill of lading, delivery order, or other document enabling him to obtain the goods from the carrier.

(2) The above definition shall not be construed as depriving the buyer of a right to reparation when the unloading of the car demonstrates that a part of the lading which was not accessible to inspection was of a quality or condition materially inferior to that portion which was accessible to inspection; but notice of intention to file a claim for reparation must be given the seller within 24 hours after receipt by the buyer of the delivery order or bill of lading.

(3) If the seller gives the date of arrival when quoting price, the buyer shall, in the absence of any written memorandum of sale to the contrary, assume all charges that accrue on the shipment from the date of its arrival. If the seller fails to furnish the date of arrival when quoting price the buyer may, in the absence of any written memorandum of sale which includes the date of arrival or specific written statement as to who shall assume such charges as have accrued after arrival, assume that the shipment arrived at point of sale on the day and date upon which the purchase was made, and shall be liable only for such charges as would properly attach to a shipment arriving on the date the purchase was made.

(v) *C.a.f.*, *c.a.c.*, and *c.i.f.* mean *cost and freight*, *cost and charges*, and *cost, insurance, and freight*, respectively. C.a.f. sales shall be deemed to be the same as f.o.b. sales, except that the selling price shall include the correct freight charges to destination. C.a.c. sales shall be deemed to be the same as

f.o.b. sales, except that the selling price includes the correct freight and refrigeration or heater charges to destination. C.i.f. sales shall be deemed to be the same as f.o.b. sales, except that the selling price includes insurance and the correct freight and refrigeration or heater charges to destination.

(w) *Carload, carlot,* or *car* when used in offers, quotations, or contracts in which the quantity is not more definitely specified, and in the absence of well-established trade custom or standard as to size of a ''carload,'' ''carlot,'' or ''car'' of the produce in question, means not less than the minimum quantity required by the carrier's tariff applicable to the movement, and not more than 10 percent in excess of such minimum tariff requirements, except that, where the carrier's tariffs provide alternative rates and minimum, the buyer shall state which tariff minimum must be observed, and, in event of failure so to do, the shipper may exercise his discretion, in no case, however, exceeding the higher alternative minimum quantity provided by the tariff, with only such variations therefrom as are permitted by this paragraph.

(x) *Shipping-point inspection* means that the seller is required to obtain Federal or Federal-State inspection, or such private inspection as has been mutually agreed upon, to show the compliance of the lot sold with the quality, condition, and grade specifications of the contract, and that the seller assumes the risk incident to incorrect certification.

(y) *Shipping-point inspection final,* or *inspection final* following the name of the State or point, as *California inspection final,* means that the seller is required to obtain Federal or Federal-State inspection, or such private inspection as has been mutually agreed upon, to show the compliance of the lot sold with the quality, condition, and grade specifications of the contract, and that the buyer assumes the risk incident to incorrect certification and is without recourse against the seller on account of quality, condition, and grade.

(z) *Subject approval Government inspection* means that the seller is required to obtain Federal or Federal-State inspection, or such private inspection as has been mutually agreed upon, and to correctly communicate, by wire or other agreed means, the statements on the certificate as to quality, condition and grade, and other essential information, whereupon the buyer, upon approval thereof, will be deemed to have accepted the produce without recourse against the seller on account of quality, condition, and grade.

(aa) *Guaranteed advance* used in connection with an advance payment on consigned produce means that the person making the advance guarantees that the net proceeds to the consignor shall at least equal the amount so advanced, and that the consignor cannot be held liable for any deficit resulting from the sale of the produce, if such deficit is not occasioned by or contributed to by an act of the consignor.

(bb) *Accommodation advance* or *regular advance,* used in connection with an advance of money or credit against anticipated net proceeds to be realized from the sale of consigned produce, means that the consignor has received an advance of money or credit and that, if the consigned produce does not sell for enough to cover the cost of transportation and handling, including customary or agreed commission and the advance made to him, the consignor must return to the person making the advance a sum equal to the deficit sustained.

(cc) *Price arrival,* in the absence of a contrary specific understanding, means that the produce is shipped either direct to the customer or to an agent of the consignor, for the benefit of the customer, the price to be subject to agreement between the customer and the consignor upon the arrival of the produce at the customer's destination, with sufficient time being permitted for inspection.

(dd) *F.o.b. inspection and acceptance arrival* means that the produce quoted or sold is to be placed by the seller free on board car or other agency of through transportation at shipping point, the cost of transportation to be borne by the buyer, but the seller to assume all risks of loss and damage in transit not caused by the buyer, who has the right to inspect the goods upon arrival and to reject them if, upon such inspection, they are found not to meet

the specifications of the contract of sale at destination. The buyer may not reject without reasonable cause. Such a sale is f.o.b. only as to price and is on a delivered basis as to grade, quality, and condition.

(ee) *F.o.b. sale at delivered price* means the same as f.o.b., except that transportation charges from shipping point to destination shall be borne by the seller; that is, the sale is f.o.b. as to grade, quality, and condition, and delivered as to price.

(ff) *Purchase after inspection* means a purchase of produce after inspection or opportunity for inspection by the buyer or his agent. Under this term the buyer has no right of rejection and waives all warranties as to quality or condition, except warranties expressly made by the seller.

(gg) *Cash sale* means that the buyer is required to pay the seller within 24 hours after his acceptance of the shipment.

(hh) *Joint Account—Split Above* means that the receiving joint partner will pay promptly the agreed cost of the shipment to his joint partner. After disposition of the produce, the parties will divide equally the profits on the shipment after deduction of the cost of the shipment and proper expenses from the gross proceeds. The receiving joint partner will pay all expenses and cannot recover any loss resulting from the joint venture.

(ii) *Commercial Unit* means a single shipment of one or more perishable agricultural commodities tendered for delivery on a single contract, such commercial unit must be accepted or rejected in its entirety. Acceptance of a commercial unit does not modify the parties' existing contractual rights and responsibilities.

[25 FR 4853, June 2, 1960, as amended at 26 FR 12209, Dec. 21, 1961. Redesignated at 28 FR 7067, July 11, 1963, and amended at 44 FR 50576, Aug. 29, 1979]

GOOD DELIVERY STANDARDS

§46.44 Good delivery.

Unless otherwise agreed to between the contracting parties, ''Good Delivery'' in connection with f.o.b. contracts of purchase and sale means that the commodity meets the requirements of the contract at time of loading or sale and, if the shipment is handled under normal transportation service and conditions, will meet the following additional requirements on delivery at the contract destination:

(a) *Lettuce.* (1) If the contract specifies a U.S. grade, the lettuce may contain an average of not more than 3 percent condition defects, including not more than 2 percent decay affecting any portion of the head exclusive of wrapper leaves in excess of the destination tolerances provided for the applicable grade in the U.S. Standards for Grades of Lettuce. (For example, the U.S. No. 1 grade provides a 12 percent tolerance for damage at destination. If a lot contains 5 percent damage by permanent grade factors, 7 percent of the tolerance can be applied to damage by condition factors. The additional 3 percent Good Delivery tolerance would then allow a total of 10 percent damage by condition factors in this shipment at destination.)

(2) If the contract does not specify a U.S. grade or percentage of condition defects, the lettuce at destination may contain a maximum of 15 percent, by count, of the heads in any lot which are damaged by condition defects, including therein not more than 9 percent serious damage of which not more than 5 percent may be decay affecting any portion of the head exclusive of wrapper leaves. Sales made on a percentage of a U.S. grade, without specifying the percentage of condition defects separately from the permanent defects, fall under this provision, and the lettuce may not contain more than a total of 15 percent condition defects at destination. However, if the condition defects are specified, provision No. 3 will apply.

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

(i) One and one-half times the specified percentage of damage or serious damage by condition defects: *Provided,* That, if serious damage is not specified, one-half of the allowance at destination may be serious damage, including therein not more than one-quarter of the total allowance may be

decay affecting any portion of the head exclusive of wrapper leaves. (For example, a lot sold as ''16 percent tipburn'' could have a total of 24 percent damage by tipburn at destination, including not more than 12 percent serious damage of which not more than 6 percent may be decay affecting any portion of the head exclusive of wrapper leaves.) or

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

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

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

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

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

MISREPRESENTATION OR MISBRANDING

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

It is a violation of section 2(5) for a commission merchant, dealer, or broker to misrepresent by word, act, mark, stencil, label, statement, or deed, the character, kind, grade, quality, quantity, size, pack, weight, condition, degree, or maturity, or State, country, region of origin of any perishable agricultural commodity received, shipped, sold, or offered to be sold in interstate or foreign commerce. However, a person other than the first licensee handling misbranded perishable agricultural commodities shall not be held liable for a violation of section 2(5) of the Act by reason of the conduct of another if the person did not have knowledge of the violation or lacked the ability to correct the violation.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(i) Be given written warnings; or

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

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

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

[1] Warning letter.
[2] If serious violation.
[3] Very serious violation.

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

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

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

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

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

(e) *Summary of procedure*—(1) *Compilation of authority*. The rules defining misrepresentation, including misbranding, and for determining liability and disposition of violations are contained in the Act (7 U.S.C. 499 *et seq.),* in particular sections 2(5) and 8 (7 U.S.C. 449b(5) and 499h), § 46.45 of the Regulations (7 CFR 46.45), the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted By the Secretary (7 CFR 1.130 *et seq.*), and in the Administrative Procedure Act (5 U.S.C. 551 *et seq.*).

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

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

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

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

(6) *Use of record of misrepresentation*. A cumulative record of misrepresentation is maintained. It is used as a basis for determining whether a warning letter should be considered, and, if so, the amount of monetary penalty which is appropriate, or whether there is cause for instituting a formal disciplinary proceeding seeking suspension or revocation of the violator's license. But after payment of a monetary penalty or after two years from the date of the last violation, no formal disciplinary use can be made of the previous record of violation. The record of misrepresentation shall be erased if there are no further violations in the twenty-four (24) month period immediately following the most recent violation, or after 36 months from the date of each individual violation unless it is involved in formal disciplinary proceedings.

[43 FR 4964, Feb. 7, 1978, as amended at 46 FR 22746, Apr. 21, 1981; 47 FR 21234, May 18, 1982; 62 FR 15088, Mar. 31, 1997]

STATUTORY TRUST

§ 46.46 Statutory trust.

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

considered to have been received when proffered.

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

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

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

(5) ''Ordinary and usual billing or invoice statements'' as used in section 5(c)(4) of the Act, and ''invoice or other billing statement'' as used in §46.46(f)(3), mean communications customarily used between parties to a transaction in perishable agricultural commodities in whatever form, documentary or electronic, for billing or invoicing purposes.

(b) *Trust assets.* The trust is made up of perishable agricultural commodities received in all transactions, all inventories of food or other products derived from such perishable agricultural commodities, and all receivables or proceeds from the sale of such commodities and food or products derived therefrom. Trust assets are to be preserved as a nonsegregated ''floating'' trust. Commingling of trust assets is contemplated.

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

(2) Any licensee, or person subject to license, who has a fiduciary duty to collect funds resulting from the sale or consignment of produce, and remit such funds to its principal, also has the duty to preserve its principal's rights to trust benefits in accordance with paragraph (f) of this section. The responsibility for filing the notice to preserve the principal's rights is obligatory and cannot be avoided by the agent by means of a contract provision. Persons acting as agents also have the responsibility to negotiate contracts which entitle their principals to the protection of the trust provisions: *Provided,* That a principal may elect to waive its right to trust protection. To be effective, the waiver must be in writing and separate and distinct from any agency contract, must be signed by the principal prior to the time affected transactions occur, must clearly state the principal's intent to waive its right to become a trust beneficiary on a given transaction, or a series of transactions, and must include the date the agent's authority to act on the principal's behalf expires. In the event an agent having a fiduciary duty to collect funds resulting from the sale or consignment of produce and remit such funds to its principal fails to perform the duty of preserving its principal's rights to trust benefits, it may be held liable to the principal for damages. A principal employing a collect and remit agent must preserve its rights to trust benefits against such agent by filing appropriate notices with the agent.

(d) *Trust maintenance.* (1) Commission merchants, dealers and brokers are required to maintain trust assets in a manner that such assets are freely available to satisfy outstanding obligations to sellers of perishable agricultural commodities. Any act or omission which is inconsistent with this responsibility, including dissipation of trust assets, is unlawful and in violation of section 2 of the Act, (7 U.S.C. 499b).

(2) Agents who sell perishable agricultural commodities on behalf of a principal are required to preserve the

principal's rights as a trust beneficiary as set forth in § 46.2(z), (aa) and paragraphs (d), (f), and (g) of this section. Any act or omission which is inconsistent with this responsibility, including failure to give timely notice of intent to preserve trust benefits, is unlawful and in violation of section 2 of the Act, (7 U.S.C. 499b).

(e) *Prompt payment and eligibility for trust benefits.* (1) The times for prompt accounting and prompt payment are set out in § 46.2(z) and (aa). Parties who elect to use different times for payment must reduce their agreement to writing before entering into the transaction and maintain a copy of their agreement in their records, and the times of payment must be disclosed on invoices, accountings, and other documents relating to the transaction.

(2) The maximum time for payment for a shipment to which a seller, supplier, or agent can agree and still qualify for coverage under the trust is 30 days after receipt and acceptance of the commodities as defined in § 46.2(dd) and paragraph (a)(1) of this section.

(3) The trust provisions do not apply to transactions between a cooperative association (as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)), and its members.

(4) The amount claimable against the trust by a beneficiary or grower will be the net amount due after allowable deductions of contemplated expenses or advances made in connection with the transaction by the commission merchant, dealer, or broker.

(f) *Filing notice of intent to preserve trust benefits.* (1) Notice of intent to preserve benefits under the trust must be in writing, must include the statement that it is a notice of intent to preserve trust benefits and must include information which establishes for each shipment:

(i) The names and addresses of the trust beneficiary, seller-supplier, commission merchant, or agent and the debtor, as applicable,

(ii) The date of the transaction, commodity, invoice price, and terms of payment (if appropriate),

(iii) The date of receipt of notice that a payment instrument has been dishonored (if appropriate), and

(iv) The amount past due and unpaid.

(2) Timely filing of a notice of intent to preserve benefits under the trust will be considered to have been made if written notice is given to the debtor within 30 calendar days:

(i) After expiration of the time prescribed by which payment must be made pursuant to regulation,

(ii) After expiration of such other time by which payment must be made as the parties have expressly agreed to in writing before entering into the transaction, but not longer than the time prescribed in paragraph (e)(2) of this section, or

(iii) After the time the supplier, seller or agent has received notice that a payment instrument promptly presented for payment has been dishonored. Failures to pay within the time periods set forth in paragraphs (f)(2)(i) and (ii) of this section constitute defaults.

(3) Licensees may chose an alternate method of preserving trust benefits from the requirements described in paragraphs (f) (1) and (2) of this section. Licensees may use their invoice or other billing statement to preserve trust benefits. The alternative method requires that the licensee's invoice or other billing statement, given to the debtor, contain:

(i) The statement: ''The perishable agricultural commodities listed on this invoice are sold subject to the statutory trust authorized by section 5(c) of the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. 499e(c)). The seller of these commodities retains a trust claim over these commodities, all inventories of food or other products derived from these commodities, and any receivables or proceeds from the sale of these commodities until full payment is received.''; and

(ii) The terms of payment if they differ from prompt payment set out in section 46.2(z) and (aa) of this part, and the parties have expressly agreed to such terms in writing before the affected transactions occur.

(Sec. 1, 46 Stat. 531, as amended; 7 U.S.C. 499a *et seq.)*

[49 FR 45740, Nov. 20, 1984, as amended at 62 FR 15088, Mar. 31, 1997; 62 FR 60999, Nov. 14, 1997]

OMB CONTROL NO.

§46.47 OMB control numbers assigned pursuant to the Paperwork Reduction Act.

The information collection requirements contained in this part have been approved by the Office of Management and Budget (OMB) under the provisions of 44 U.S.C. Chapter 35 and have been assigned OMB Control No. 0581–0031.

[49 FR 23826, June 8, 1984]

§46.48 Procedure for investigating complaints involving commodities of a unique nature or coming from a distinct geographic area.

(a) *Scope:* This section provides for the payment of fees and the investigation of allegations of misrepresentation or misbranding in which the commodity which is misbranded or misrepresented is purported to be a commodity of a unique name or geographical designation which is defined as:

(1) A perishable agricultural commodity as that term is defined under the Perishable Agricultural Commodities Act, 1930;

(2) Subject to a federal marketing order under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601 *et seq.*);

(3) Traditionally identified as being produced in a distinct geographic area, State, or region; and

(4) Of a unique identity, based on such distinct geographic area, which has been promoted with funds collected through producer contributions pursuant to such marketing order.

(b) *Filing complaints:* (1) Any person desiring to complain of a possible violation by any commission merchant, dealer, or broker as a result of misrepresentation or misbranding of any commodity subject to these regulations may file a complaint with the Secretary of Agriculture and request an investigation of the complaint by the Secretary.

(2) Complaints shall be made in writing setting forth all the essential details, including but not limited to:

(i) The name and address of each complaining person;

(ii) The name and address of each person against whom the complaint is made;

(iii) The commodity, approximate quantity of the commodity, and circumstances of alleged misrepresentation or misbranding;

(iv) The current location of the commodity;

(v) If shipped, the shipping and destination points of the commodity;

(vi) A statement of all other known material facts with respect to the complaint; and

(vii) Copies of any documents or evidence of any kind in the possession of the complainant regarding the alleged violation.

(3) The complaint shall be accompanied by a non-refundable $250.00 filing fee made payable to the Agricultural Marketing Service (see paragraph (e) of this section Collection of fees).

(4) The complaint, all supporting evidence, and fee should be mailed to: PACA Branch, room 2095 So., Fruit and Vegetable Division, AMS, USDA, P.O. Box 96456, Washington, DC 20090–6456.

(c) *Handling complaints.* (1) Upon receiving a written complaint, supporting evidence, and the $250.00 preliminary investigation fee from a complaining person, the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture shall order a preliminary investigation to determine if the complaint can be substantiated. If the initial investigation discloses no violation of the Act, no further action shall be taken and the complaining person shall be informed of the finding. The $250.00 filing fee shall be considered full payment for the preliminary investigation.

(2) If the Director finds reasonable cause for further investigation, the complaining person shall be duly notified of the findings. Prior to any further investigation, the Director shall advise the complaining person of the estimated fees and charges which the complaining person must pay. In calculating the estimated fees, the Director shall use the hourly salary rate of a GS–5, Step 4, for clerical time and GS–13, Step 1, for professional time, plus

benefits and other related expenses including travel associated with the investigation.

(3) At the conclusion of the investigation, the Department will inform the complaining person of the results, provided, however, that any findings, the release of which may jeopardize an ongoing formal disciplinary proceeding initiated under the PACA, may be withheld pending completion of the disciplinary case.

(d) *Investigative authority*. Investigation of a complaint of this Section shall be deemed to be an investigation under Section 6(b) of the Perishable Agricultural Commodities Act (7 U.S.C. 499f(b)).

(e) *Collection of fees*. (1) Any person bringing a complaint, alleging a violation of section 1309 of the Food, Agriculture, Conservation, and Trade Act of 1990 shall reimburse the Secretary of Agriculture for any and all costs associated with the enforcement of that section.

(2) A non-refundable $250.00 fee for the preliminary investigation shall accompany the written complaint.

(3) An estimate of fees and charges to conduct the further investigation calculated in accordance with paragraph (c)(2) of this section will be provided the complaining person.

(i) Payment of the fees and charges shall be collected in advance by the Secretary prior to continuation of investigation of a complaint.

(ii) Payment of fees and charges may be made by cash, check, or money order payable to the Agricultural Marketing Service.

(iii) In the event that the estimated fees and charges prove to be inadequate, the complaining person will be informed of the deficiency. Any complaining person that does not reimburse the Secretary full payment for fees and charges associated with a completed investigation shall be liable to be proceeded against in any court of competent jurisdiction in a suit by the United States to collect any monetary or other damages connected with the investigation.

(iv) The complaining person will be reimbursed by the Secretary for any overpayment of fees and charges, except for the $250.00 preliminary investigation fee which is nonrefundable.

[56 FR 51826, Oct. 16, 1991]

§ 46.49 Written notifications and complaints.

(a) *Written notification*, as used in section 6(b) of the Act, means:

(1) Any written statement reporting or complaining of a PACA violation(s) filed by any officer or agency of any State or Territory having jurisdiction over licensees or persons subject to license, or any other interested person who has knowledge of or information regarding a possible violation, other than an employee of an agency of USDA administering this Act or a person filing a complaint under Section 6(c);

(2) Any written notice of intent to preserve the benefits of the trust established under section 5 of this Act; or

(3) Any official certificate(s) of the United States Government or States or Territories of the United States.

(b) Any written notification may be filed by delivering it to any office of USDA or any official thereof responsible for administering the Act. A written notification which is so filed, or any expansion of an investigation resulting from any indication of additional further violations of the Act found as a consequence of an investigation based on written notification or complaint, shall also be deemed to constitute a complaint under section 13(a) of this Act.

(c) Upon becoming aware of a complaint under Section 6(a) or 6(b) of this Act, the Secretary will determine if reasonable grounds exist for an investigation of such complaint for disciplinary action. If the investigation substantiates the existence of violations, a formal disciplinary complaint may be filed by the Secretary as described under Section 6(c)(2) of the Act.

(d) Whenever an investigation, initiated as a result of a written notification or complaint under Section 6(b) of the Act, is commenced, or expanded to include new violations, notice shall be given by the Secretary to the subject of the investigation within thirty (30) days of the commencement or expansion of the investigation. Within one

hundred and eighty (180) days after giving initial notice, the Secretary shall provide the subject of the investigation with notice of the status of the investigation, including whether the Secretary intends to issue a complaint under Section 6(c)(2) of this Act, terminate the investigation, or continue or expand the investigation. Thereafter, the subject of the investigation may request in writing, no more frequently than every ninety (90) days, a status report from the Chief of the PACA Branch who shall respond thereto within fourteen (14) days of receiving the request. When an investigation is terminated, the Secretary shall, within fourteen (14) days, notify the subject of the investigation of the termination. In every case in which notice or response is required under this subsection such notice or response shall be accomplished by personal service or by posting the notice or response by certified mail to the last known address of the subject of the investigation.

[62 FR 15089, Mar. 31, 1997]

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

GENERAL PROVISIONS

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47.14 Prehearing conferences.
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47.16 Depositions.
47.17 Subpoenas.
47.18 Fees and mileage.
47.19 Post-hearing procedure before the examiner.
47.20 Documentary procedure.
47.21 Transmittal of record.
47.22 Argument before Secretary.
47.23 Issuance of order.
47.24 Rehearing, reargument, reconsideration of orders, reopening of hearings, reopening after default.
47.25 Filing; extensions of time; effective date of filing; computations of time; official notice.

RULES APPLICABLE TO DISCIPLINARY PROCEEDINGS

47.46 Rule applicable to all proceedings.

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

47.47 Additional definitions.
47.48 Scope and applicability.
47.49 Determinations.

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

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

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

GENERAL PROVISIONS

§47.1 Meaning of words.

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

§47.2 Definitions.

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

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

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

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