

PART 12—RULES RELATING TO REPARATIONS

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AUTHORITY: 7 U.S.C. 4a(j), 12(a)(5), and 18.

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SOURCE: 49 FR 6621, Feb. 22, 1984, unless otherwise noted.

Subpart A—General Information and Preliminary Consideration of Pleadings

§ 12.1 Scope and applicability of rules of practice relating to reparations.

(a) *Part 12 Reparation Rules.* These rules of practice are applicable to reparation applications filed pursuant to section 14 of the Commodity Exchange Act, as amended, 7 U.S.C. section 18. The rules in this part shall be construed liberally so as to secure the just, speedy and inexpensive determination of the issues presented with full protection for the rights of all parties.

(b) *Other rules of practice.* Unless specifically made applicable, other Rules of Practice promulgated under the Commodity Exchange Act, as amended, shall not apply to reparation matters.

(c) *Applicability of these part 12 Reparation Rules.* These rules shall apply in their entirety to all reparation complaints and matters relating thereto.

[49 FR 6621, Feb. 22, 1984, as amended at 59 FR 9635, Mar. 1, 1994]

§ 12.2 Definitions.

For purposes of this part:

Act means the Commodity Exchange Act, as amended, 7 U.S.C. 1, *et seq.*;

Administrative Law Judge means an administrative law judge appointed pursuant to the provisions of 5 U.S.C. 3105;

Commission means the Commodity Futures Trading Commission;

Commission decisional employee means an employee or employees of the Commission who are or may reasonably be expected to be involved in the decision-making process in any proceeding, including, but not limited to: A Judgment Officer; members of the personal staffs of the Commissioners, but not the Commissioners themselves; members of the staffs of the Administrative Law Judges, but not an Administrative Law Judge; members of the staffs of the Judgment Officers; members of the Office of the General Counsel; members of the staff of the Office of Proceedings; and other Commission em-

ployees who may be assigned to hear or to participate in the decision of a particular matter.

Complainant means a person who, individually or jointly with others, has applied to the Commission for a reparation award pursuant to section 14(a) of the Act, but shall not include a cross claimant or any other type of third party claimant. The term “complainant” under these rules applies equally to two or more persons who have applied jointly for a reparation award;

Complaint means any document which constitutes an application for a reparation award pursuant to section 14(a) of the Act, regardless of whether it is denominated as such;

Counterclaim means an application for a reparation award by a respondent against a complainant which satisfies the requirements of §12.19. A counterclaim does not mean a cross claim or other type of third party claim;

Director of the Office of Proceedings means an employee of the Commission who serves as the administrative head of that Office, with responsibility and authority to assure that these part 12 Reparation Rules are administered in a manner which will effectuate the purposes of section 14(b) of the Act. The Director is authorized to convene meetings of all personnel in the Office of Proceedings, including Administrative Law Judges and their personally assigned law clerks. The Director shall have the authority to delegate his duties to administer §§12.15, 12.24, 12.26 and 12.27, and, shall have the authority to assign and, if necessary, reassign the duties of, and set reasonable standards for performance for, all personnel in the Office, including the Judgment Officers, but not including Administrative Law Judges and their personally assigned law clerks;

Ex parte communication means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but does not include:

(1) A discussion, after consent has been obtained from all of the named parties, between a party and a Judgment Officer or Administrative Law Judge, or the staffs of the foregoing, pertaining solely to the possibility of

settling the case without the need for a decision;

(2) Requests for status reports, including questions relating to service of the complaint, and the registration status of any persons, on any matter or proceeding covered by these rules; or

(3) Requests made to the Office of Proceedings or the Office of the General Counsel for interpretation of these rules.

Formal decisional procedure means, where the amount of total damages claimed exceeds \$30,000, exclusive of interest and costs, a procedure elected by the complainant or a respondent where the parties may be granted an oral hearing. A formal decisional proceeding is governed by subpart E;

Hearing means that part of a proceeding which involves the submission of proof, either by oral presentation or written submission;

Interested person means any party, and includes any person or agency permitted limited participation or to state views in a reparation proceeding, or other person who might be adversely affected or aggrieved by the outcome of a proceeding (including the officers, agents, employees, associates, affiliates, attorneys, accountants or other representatives of such persons), and any other person having a direct or indirect pecuniary or other interest in the outcome of a proceeding;

Judgment Officer means an employee of the Commission who is authorized to conduct the proceeding and render a decision in a summary decisional proceeding or a voluntary decisional proceeding. In appropriate circumstances, the functions of a Judgment Officer may be performed by an Administrative Law Judge;

Office of the General Counsel refers to the members of the Commission's staff who provide assistance to the Commission in its direct review of any proceeding conducted pursuant to these rules;

Office of Proceedings means that Office within the Commission comprised of the Administrative Law Judges, Judgment Officers, the Director of that Office, the Proceedings Clerk, and members of the staffs of the foregoing, which administers these part 12 Reparation Rules, other than the rules au-

thorizing direct review by the Commission;

Order means the whole or any part of a final procedural or substantive disposition of a reparation proceeding by the Commission, an Administrative Law Judge, a Judgment Officer, or the Proceedings Clerk;

Party means a complainant, respondent or any other person or agency named or admitted as a party in a reparation matter;

Person means any individual, association, partnership, corporation or trust;

Pleading means the complaint, the answer to the complaint, any supplement or amendment thereto, and any reply to the foregoing;

Proceeding means a case in which the pleadings have been forwarded and in which a procedure has been commenced pursuant to § 12.26;

Proceedings Clerk means that member of the Commission's staff in the Office of Proceedings who shall maintain the Commission's reparation docket, assign reparation cases to an appropriate decisionmaking official, and act as custodian of the records of proceedings;

Punitive damages means damages awarded (no more than two times the amount of actual damages) in the case of any action arising from a willful and intentional violation in the execution of an order on the floor of a contract market. An order does not have to be actually executed to render a violation subject to punitive damages. As a prerequisite to an award of punitive damages, a complainant must claim actual and punitive damages, prove actual damages, and demonstrate that punitive damages are appropriate;

Registrant means any person who—

(1) Was registered under the Act at the time of the alleged violation;

(2) Is subject to reparation proceedings by virtue of section 4m of the Commodity Exchange Act, regardless of whether such person was ever registered under the Act; or

(3) Is otherwise subject to reparation proceedings under the Act;

Reparation award means the amount of monetary damages a party may be ordered to pay;

Respondent means any person or persons against whom a complainant

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seeks a reparation award pursuant to section 14(a) of the Act;

Summary decisional procedure means, where the amount of total damages claimed does not exceed \$30,000, exclusive of interest and costs, a procedure elected by the complainant or the respondent wherein an oral hearing need not be held and proof in support of each party's case may be supplied in the form and manner prescribed by §12.208. A summary decisional proceeding is governed by subpart D;

Voluntary decisional procedure means, regardless of the amount of damages claimed, a procedure which the complainant and the respondent have chosen voluntarily to submit their claims and counterclaims, allowable under these rules, for an expeditious resolution by a Judgment Officer. By electing the voluntary decisional procedure, parties agree that a decision issued by a Judgment Officer shall be without accompanying findings of fact and shall be final without right of Commission review or judicial review. A voluntary decisional proceeding is governed by subpart C of these rules.

[59 FR 9635, Mar. 1, 1994]

§ 12.3 Business address; hours.

The principal office of the Commission is located at Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581. It is open each day, except Saturdays, Sundays, and legal public holidays, from 8:15 a.m. until at least 4:45 p.m., eastern standard time or eastern daylight savings time, whichever is currently in effect in Washington, DC.

[49 FR 6621, Feb. 22, 1984, as amended at 60 FR 49335, Sept. 25, 1995]

§ 12.4 Suspension, amendment, revocation and waiver of rules.

(a) *Suspension or change of rules.* These rules may, from time to time, be suspended, amended or revoked in whole or in part. Notice of such action will be published in the FEDERAL REGISTER.

(b) *Commission waiver of procedures.* In the interest of expediting decision or to prevent undue hardship on any party or for other good cause the Commission may order the adoption of expedited

procedures, may waive any rule in this part in a particular case, and may order proceedings in accordance with its direction upon a determination that no party will be prejudiced thereby, and that the ends of justice will be served. Reasonable notice shall be given to all parties of any action taken pursuant to this provision.

§ 12.5 Computation of time.

(a) *In general.* In computing any period of time prescribed by these rules or allowed by the Commission, the Director of the Office of Proceedings, a Judgment Officer, or an Administrative Law Judge, the day of the act, event, or default from which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday or a legal holiday.

Intermediate Saturday, Sundays, and legal holidays shall be excluded from the computation only when the period of time prescribed or allowed is less than seven (7) days.

(b) *Date of service of orders.* In computing any period of time involving the date of service of an order, the date of service shall be the date the order is served by the Proceedings Clerk, which, unless otherwise indicated, shall be the date stamped on the order by the Proceedings Clerk.

[49 FR 6621, Feb. 22, 1984, as amended at 57 FR 20638, May 14, 1992]

§ 12.6 Extensions of time; adjournments; postponements.

(a) *In general.* Except as otherwise provided by law or by these rules, for good cause shown, the Commission, or a Judgment Officer, Administrative Law Judge, or the Director of the Office of Proceedings, before whom a matter is then pending, on their own motion or the motion of a party, may at any time extend or shorten the time limit prescribed by the rules for filing any document. In any instance in which a time limit is not prescribed for an action to be taken concerning any matter, the Commission or one of the

other officials mentioned above may set a time limit for that action.

(b) *Motions for extension of time.* Absent extraordinary circumstances, in any instance in which a time limit that has been prescribed for an action to be taken concerning any matter exceeds seven days from the date of the order establishing the time limit, requests for extension of time shall be filed at least five (5) days prior to the expiration of the time limit and shall explain why an extension of time is necessary.

[49 FR 6621, Feb. 22, 1984, as amended at 57 FR 20638, May 14, 1992; 59 FR 9636, Mar. 1, 1994]

§ 12.7 Ex parte communications in reparation proceedings.

(a) *Prohibitions against ex parte communications.* (1) No interested person outside the Commission shall make or knowingly cause to be made to any Commissioner, Administrative Law Judge, or Commission decisional employee an *ex parte* communication relevant to the merits of a proceeding.

(2) No Commissioner, Administrative Law Judge, or Commission decisional employee shall make or knowingly cause to be made to any interested person outside the Commission an *ex parte* communication relevant to the merits of a proceeding.

(b) *Procedures for handling ex parte communications.* A Commissioner, Administrative Law Judge or Commission decisional employee who receives, or who makes or knowingly causes to be made, an *ex parte* communication prohibited by paragraph (a) of this section shall:

(1) Place on the public record of the proceeding:

(i) All such written communications; (ii) Memoranda stating the substance of all such oral communications; and

(iii) All written responses, and memoranda stating the substance of all oral responses, to the materials described in paragraphs (b)(1) (i) and (ii) of this section; and

(2) Promptly give written notice of such communication and responses thereto to all parties to the proceedings to which the communication or responses relate.

(c) *Sanctions.* (1) Upon receipt of an *ex parte* communication knowingly made

or knowingly caused to be made by a party in violation of the prohibition contained in paragraph (a)(1) of this section, the Commission, Administrative Law Judge, or Judgment Officer may, to the extent consistent with the interests of justice and the policy of the Act, require the party to show cause why his claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation.

(2) Any attorney or accountant who knowingly makes or knowingly causes to be made, or who knowingly solicits or knowingly causes the solicitation of, an *ex parte* communication which violates the prohibitions contained in paragraph (a) of this section may be deemed to have engaged in unprofessional conduct of the type proscribed by 17 CFR 14.8(c).

(3) Any Commissioner, Administrative Law Judge, or Commission decisional employee who knowingly makes or knowingly causes to be made, or who knowingly solicits or knowingly causes the solicitation of, an *ex parte* communication which violates the prohibitions contained in paragraph (a) of this section may be deemed to have engaged in conduct of the type proscribed by 5 CFR 2635.101(b).

(d) *Applicability of prohibitions and sanctions against ex parte communications.* (1) The prohibitions of this section against *ex parte* communications shall apply:

(i) To any person who has actual knowledge that a proceeding has been or will be commenced by order of the Commission; and

(ii) To all persons after public notice has been given that a proceeding has been or will be commenced by order of the Commission.

(2) The prohibitions of this section shall remain in effect until a final order has been entered in the proceeding which is no longer subject to review by the Commission or to appellate review by a court.

[49 FR 6621, Feb. 22, 1984, as amended at 59 FR 9636, Mar. 1, 1994]

§ 12.8 Separation of functions.

(a) A Judgment Officer, or Administrative Law Judge will not be responsible to or subject to the supervision or direction of any officer, employee, or agent of the Commission engaged in the performance of investigative or prosecutorial functions for the Commission.

(b) No officer, employee, or agent of the Federal Government engaged in the performance of investigative or prosecutorial functions in connection with any proceeding shall, in that proceeding or a factually related proceeding, participate or advise in the decision of a Judgment Officer, or Administrative Law Judge, except as a witness in the proceeding, without the express written consent of the parties to the proceeding. This provision shall not apply to the Commissioners.

[49 FR 6621, Feb. 22, 1984, as amended at 57 FR 20638, May 14, 1992]

§ 12.9 Practice before the Commission.

(a) *Practice*—(1) *By non-attorneys*. An individual may appear *pro se* (on his own behalf); a general partner may represent the partnership; a *bona fide* officer of a corporation, trust or association may represent the corporation, trust or association.

(2) *By attorneys*. An attorney-at-law who is admitted to practice before the highest Court in any State or territory, or of the District of Columbia, who has not been suspended or disbarred from appearance and practice before the Commission in accordance with provisions of part 14 of this chapter may represent parties as an attorney in proceedings before the Commission.

(b) *Debarment of counsel or representative during the course of a proceeding*. (1) Whenever, while a proceeding is pending before him, a Judgment Officer or an Administrative Law Judge finds that a person acting as counsel or representative for any party to the proceeding is guilty of contemptuous conduct, such official may order that such person be precluded from further acting as counsel or representative in the proceeding. An immediate appeal to the Commission may be taken from any such order, pursuant to the provisions of §12.309, but the proceeding

shall not be delayed or suspended pending disposition of the appeal; *Provided*, That the official may suspend the proceedings for a reasonable time for the purpose of enabling the party to obtain other counsel or representative.

(2) Whenever the Judgment Officer or Administrative Law Judge has issued an order precluding a person from further acting as counsel or representative in a proceeding, such official, within a reasonable time thereafter, shall submit to the Commission a report of the facts and circumstances surrounding the issuance of the order and shall recommend what action the Commission should take respecting the appearance of such person as counsel or representative in other proceedings before the Commission.

(c) *Withdrawal of representation*. Withdrawal from representation of a party shall be only by leave of the decision-making official (or the Commission) before whom the proceeding is then pending. Such leave to withdraw may be conditioned on the attorney's (or representative's) submission of an affidavit averring that the party represented has actual knowledge of the withdrawal, and such affidavit shall include the name and address of a successor counsel (or representative) or a statement that the represented party has determined to proceed *pro se*, in which case, the statement shall include the address where that party can thereafter be served.

§ 12.10 Service.

(a) *General requirements*—(1) *When service is required; number of copies*. One copy of all motions, petitions or applications made in the course of a proceeding (unless made orally during a hearing), all proposed findings and conclusions (to the extent permitted by these rules), all notices of appeal, all briefs, and letters to the Commission, an employee thereof, or an Administrative Law Judge, shall be served by a party upon all other parties to the proceeding. This rule does not apply to a complaint filed pursuant to §12.13 of these rules, which shall only be filed with the Commission.

(2) *Filing with the Proceedings Clerk; proof of service*. All documents which are required to be served upon a party

shall be filed concurrently with the Proceedings Clerk, and shall meet the requirements as to form prescribed by §§ 12.11 and 12.12 of these rules. Unless otherwise provided in these rules a document shall be filed by delivering it in person or by mailing it, by first-class mail, post-paid, addressed to: Proceedings Clerk, Office of Proceedings, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581. To be timely filed a document must be delivered, or mailed, by first-class mail, to the Proceedings Clerk within the time prescribed for filing. Proof of filing shall be made by attaching to the document for filing an affidavit certifying that the attached document was deposited in the mail, with first-class postage prepaid, addressed to the Proceedings Clerk, Office of Proceedings, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581, on the date specified in the affidavit. Proof of service of a document shall be made by filing with the Proceedings Clerk, simultaneously with the filing of the required document, an affidavit of service executed by any person 18 years of age or older or a certificate of service executed by an attorney-at-law qualified to practice before the Commission. The proof of service shall identify the persons served, state that service has been made, set forth the date of service, and recite the manner of service.

(3) *Service of orders and decisions.* A copy of all notices, rulings, opinions, and orders of the Proceedings Clerk, the Director of the Office of Proceedings, a Judgment Officer, Administrative Law Judge, the Deputy General Counsel for Opinions or the Commission shall be served by the Proceedings Clerk on each of the parties.

(b) *How service is made.* Service shall be made either by personal service or by first-class mail. Service shall be complete at the time of personal service or upon deposit in the mails of a properly addressed and post-paid document. Where service is effected by mail, the time within which the person served may respond thereto shall be increased by five (5) days. For the purposes of this Rule, service of any document by the Proceedings Clerk upon

the Commission shall be regarded as service by mail.

(c) *Designation of person to receive service.* The first document filed in a proceeding by or on behalf of any party shall state on the first page thereof the name and post office address of the person who is authorized to receive service for him of all documents filed in the proceeding. Thereafter, service of documents shall be made upon the person authorized unless service on a different authorized person or on the party himself is ordered by a Judgment Officer, Administrative Law Judge or the Commission, or unless the person authorized is changed by the party upon due notice to all other parties. Parties shall file and serve notification of any changes in the information provided pursuant to this subparagraph as soon as practicable after the change occurs.

[49 FR 6621, Feb. 22, 1984; 49 FR 15070, Apr. 17, 1984, as amended at 57 FR 20638, May 14, 1992; 59 FR 9636, Mar. 1, 1994; 60 FR 49335, Sept. 25, 1995]

§ 12.11 Formalities of filing of documents with the Proceedings Clerk.

(a) *Number of copies.* Unless otherwise specifically provided, an original and one conformed copy of all documents shall be filed with the Proceedings Clerk.

(b) *Title page.* All documents filed with the Proceedings Clerk must include at the head thereof, or on a title page, the name of the Commission, the title of the proceeding, the docket number (if one has yet been assigned by the Proceedings Clerk), the subject of the particular document and the name of the person on whose behalf the document is being filed. In the complaint the title of the proceeding shall include the names of all the complainants and respondents, but in documents subsequently filed it is sufficient to state the name of the first complainant and first respondent named in the complaint.

(c) *Paper, spacing, type.* All documents filed under the Reparation Rules shall be typewritten, mimeographed, printed, or, if a party is not represented by counsel, in plainly legible handwriting; shall be on one grade of good white paper no less than 8 or more than 8½ inches wide and no less than

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10½ or more than 11½ inches long; and shall be bound on the top only. They shall be double-spaced, except for long quotations (3 or more lines) and footnotes which should be single-spaced.

(d) *Signature.* The original copy of all papers must be signed in ink by the person filing the same or by his duly authorized agent or attorney.

(e) *Length and form of briefs.* All briefs filed with the Proceedings Clerk containing more than 10 pages shall include an index and a table of cases and other authorities cited. The date of each brief shall appear on its front cover or title page and on its signature page. No brief shall exceed 35 pages in length, except with the permission of the Commission, or the Judgment Officer or Administrative Law Judge, before whom the matter is then pending.

§ 12.12 Signature.

(a) *By whom.* All documents filed with the Commission shall be signed personally:

(1) By the person or persons on whose behalf they are tendered for filing;

(2) By a general partner, officer or director of a partnership, corporation, association, or other legal entity; or

(3) By an attorney-at-law having authority with respect thereto.

The Proceedings Clerk may require appropriate evidence of the authority of a person subscribing a document on behalf of another person.

(b) *Effect.* The signature on any document of any person acting either for himself or as attorney or agent for another constitutes certification by him that:

(1) He has read the document subscribed and knows the contents thereof;

(2) If executed in any representative capacity, it was done with full power and authority to do so;

(3) To the best of his knowledge, information, and belief, every statement contained in the document is true and not misleading; and

(4) The document is not being interposed for delay.

§ 12.13 Complaint; election of procedure.

(a) *In general.* Any person complaining of a violation of any provision

of the Act or a rule, regulation or order of the Commission thereunder by any person who is a registrant (as defined in §12.2) may, at any time within two years after the cause of action accrues, apply to the Commission for a reparation award by filing a written complaint which satisfies the requirements of this rule.

(b) *Form of complaint.* The form of each complaint filed under paragraph (a) of this section shall meet the following requirements:

(1) *Content.* Each complaint shall include:

(i) The name, residence address, and telephone number (during business hours) of the complainant;

(ii) The name, address, and telephone number, if known, of each person alleged in the complaint to have violated the Act or any rule, regulation or order thereunder;

(iii) If known, the specific provisions of the Act, rule, regulation, or order claimed to have been violated;

(iv) A complete description of complainant's case, including, but not limited to:

(A) A description of all relevant facts concerning each and every act or omission which it is claimed constitutes a violation of the Act; and

(B) A description of all facts which show or tend to show the manner in which it is claimed that the complainant was injured by the alleged violations;

(v) The amount of damages the complainant claims to have suffered and the method by which those damages have been computed, the amount of punitive damages (no more than two times the amount of such actual damages) the complainant claims, if any, and how complainant plans to demonstrate that punitive damages are appropriate;

(vi) A statement indicating whether an arbitration proceeding or civil court litigation, based on the same set of facts set forth and involving any party named as a respondent in the complaint, has been instituted, and whether such a proceeding has reached a final disposition or is presently pending;

(vii) A statement indicating whether any of the respondents is the subject of

receivership or bankruptcy proceedings that are presently pending;

(viii) An election of a decisional procedure pursuant to subpart C, D, or E. (A procedure pursuant to subpart D may be elected only if the total amount of damages claimed, exclusive of interest and costs, does not exceed \$30,000. A procedure pursuant to subpart E may be elected only if the total amount claimed as damages, exclusive of interest and costs, exceeds \$30,000); and

(ix) A filing fee in the amount prescribed by §12.25 of these rules shall be submitted with the complaint at the time of its filing.

(2) *Subscription and verification of the complaint.* Each complaint shall be signed personally by an individual complainant or by a duly authorized officer or agent of a complainant who is not a natural person. His signature shall be given under oath or affirmation under penalty of law attesting either that he knows the facts set forth in the complaint to be true, or that he believes the facts set forth to be true, in which event the information upon which he formed that belief shall be set forth with particularity.

(3) *Time and place of filing of complaint.* A complaint shall be filed by delivering a copy thereof, in proper form, to the Commission at its principal offices in Washington, DC, addressed to the Office of Proceedings, attention of the Proceedings Clerk. The complaint may be filed in person, during normal business hours, or by certified mail, or registered mail with return receipt requested. If filing is by mail, it shall be addressed to the Proceedings Clerk, Office of Proceedings, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581. The complaint shall not be served on any person or party named therein. Upon the filing of the complaint and the appropriate filing fee, the Proceedings Clerk shall assign a docket number to the matter and shall maintain the official docket.

(4) *Bond required if complainant is non-resident; filing date of nonresident's complaint.* (1) If a complaint in reparations is filed by a nonresident of the United States, the complaint shall not be con-

sidered duly filed in proper form unless it is accompanied by:

(A) A bond in double the amount of the claim either with a surety company approved by the Treasury Department of the United States or two personal sureties, each of whom shall be a citizen of the United States and shall qualify as financially responsible for the entire amount of the bond, which bond shall run to the respondent and be conditioned upon the payment of costs (including reasonable attorney's fees, for the respondent if the respondent shall prevail) and any reparation award that may be issued by the Commission against the complainant on any counterclaim asserted by respondent; or

(B) A written request that the bond requirement be waived in accordance with section 14(c) of the Commodity Exchange Act, accompanied by sufficient proof that the country of which the complainant is a resident permits the filing of a complaint by a resident of the United States against a citizen of that country without the furnishing of a bond.

(ii) The provisions of paragraphs (b)(4)(i)(A) or (b)(4)(i)(B) of this section must be satisfied within two years after the complainant's cause of action accrues.

(iii) When mailed from a foreign country, a nonresident's complaint shall be deemed filed on the date that it is received in proper form by the Commission's Proceedings Clerk, not on the date of mailing from the country of origin.

[49 FR 6621, Feb. 22, 1984; 49 FR 15070, Apr. 17, 1984, as amended at 51 FR 35507, Oct. 6, 1986; 59 FR 9636, Mar. 1, 1994; 60 FR 49335, Sept. 25, 1995]

§ 12.14 Withdrawal of complaint.

At any time prior to service of notification to the complainant pursuant to §12.15(a) of the Director of the Office of Proceedings' determination to forward the complaint to a registrant, complainant may file a written notice of withdrawal of the complaint which shall terminate the Commission's consideration of the complaint without prejudice to complainant's right to refile a reparations complaint based upon the same set of facts within two years after the cause of action accrues. If the

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complainant has previously filed a notice of withdrawal of a complaint based upon the same set of facts, the notice of withdrawal of complaint shall terminate the case with prejudice to complainant's rights to re-file a complaint in reparations based on the same set of facts, but such termination shall be regarded by the Commission as without prejudice to complainant's right to seek redress in such alternative forums as may be available for adjudication of his claims.

§ 12.15 Notification of complaint.

(a) *Forwarding of complaint to registrant.* If, in the opinion of the Director of the Office of Proceedings, the facts set forth in a complaint warrant such action as to any of the registrants, a copy of the complaint, together with any attachments thereto, shall be forwarded by serving by registered mail or certified mail any such registrant named therein at an address previously designated with the Commission by the registrant for receipt of reparation complaints, as provided in Commission Regulation 17 CFR 3.30, or, if no such designation has been filed with the Commission, at such address as will accomplish actual notice to the respondent. Should the Director determine to forward the complaint, the complainant shall be notified of this determination at the time the complaint is forwarded.

(b) *Determination not to forward complaint.* The Director may, in his discretion, refuse to forward a complaint as to a particular respondent if it appears that the matters alleged therein are not cognizable in reparations, or that grounds exist pursuant to § 12.24 (c) or (d) for refusing to forward the complaint. If the Director of the Office of Proceedings should determine not to forward the complaint to all registrants named in the complaint in accordance with this Section, no proceeding shall be held thereon and the complainant shall be notified to that effect. If the Director determines to forward the complaint as to less than all of the registrants, the complainant shall be so notified. A termination of the complaint as to any registrant shall be regarded by the Commission as without prejudice to the right of the

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complainant to seek such alternative forms of relief as may be available.

§ 12.16 Response to complaint.

Within 25 days after the complaint has been served by the Office of Proceedings on the registrant, or within such additional time (not to exceed 10 days absent extraordinary circumstances) as the Director of the Office of Proceedings, or his/her delegee may grant, for good cause shown, each registrant shall either—

(a) Satisfy the complaint in accordance with § 12.17 of these rules; or

(b) Answer the complaint in the manner prescribed by § 12.18 of these rules.

[59 FR 9636, Mar. 1, 1994]

§ 12.17 Satisfaction of complaint.

A respondent may satisfy the complaint (a) by paying to the complainant either the amount to which the complainant claims to be entitled as set forth in the complaint or such other amount as the complainant will accept in satisfaction of his claim; and (b) by submitting to the Commission notice of satisfaction and withdrawal of the complaint, duly executed by the complainant and the respondent.

§ 12.18 Answer; election of procedure.

An answer filed pursuant to § 12.16 of these rules shall meet the following requirements:

(a) *Content.* Each answer shall contain:

(1) The full name, current address and telephone number (during business hours) of each respondent on whose behalf the answer is filed;

(2) A complete description of each registrant's case, including but not limited to, a precise and detailed statement of the facts which constitute each registrant's ground for defense;

(3) Admissions, if any, as to the registrant's liability for the amount (or any portion thereof) claimed as damages;

(4) A statement indicating whether the registrant is (and if the answer is filed on behalf of two or more registrants, which if any of them are) in receivership or subject to bankruptcy proceedings;

(5) A statement indicating whether an arbitration or civil court litigation,

based on the same set of facts set forth in the complaint (involving any or all of the parties named therein), is pending;

(6) A counterclaim which the registrant wishes to pursue under §12.19 of these rules;

(7) An election of an alternative decisional procedure pursuant to subparts C, D, or E of these rules. (A proceeding pursuant to subpart D may be elected only if the amount of actual damages claimed in the complaint or as counterclaims, exclusive of interest, costs, and punitive damages, does not exceed \$30,000. A procedure pursuant to subpart E may be elected only if the amount of actual damages claimed in the complaint or as counterclaims, exclusive of interest, costs, and punitive damages exceeds \$30,000;

(8) If appropriate, a filing fee in the amount prescribed by §12.25 shall be submitted with an answer at the time of its filing.

(b) *Motion for reconsideration of determination to forward the complaint.* An answer may include a motion for reconsideration of the determination to forward the complaint, specifying the grounds therefor, which the Director of the Office of Proceedings, in his discretion, may grant by terminating the case pursuant to §12.27, or deny by forwarding the pleadings and matters of record for an elected decisional proceeding pursuant to §12.26. The inclusion in an answer of a motion for reconsideration shall not preclude a respondent, if the motion is denied, from moving for dismissal at a later stage of the proceeding for the same reasons cited in a motion for reconsideration pursuant to this paragraph.

(c) *Subscription and verification of the answer.* An answer shall be signed personally by each registrant on behalf of whom it is filed or by a duly authorized officer or agent of any such registrant who is not a natural person. Each registrant's signature shall be given under oath, or by affirmation under penalty of law, attesting that he has read the answer; that to the best of his knowledge all of the statements in the answer, the counterclaim (if any), and the materials required by these rules to be appended thereto, are accurate and true, and that the answer (and counter-

claim, if any) has not been interposed for delay.

(d) *Affidavit of service.* The registrant shall file with his answer an affidavit showing that he has served a true copy of the answer upon the complainant, either personally or by first-class mail addressed to the complainant at the address set forth in the complaint.

(e) *Time and place of filing an answer.* An answer shall be filed by mailing or delivering a copy thereof, in proper form, to the Commission at its principal office in Washington, DC, addressed to the Office of Proceedings, Attention of the Proceedings Clerk. The answer may be filed in person, during normal business hours, or by certified mail, or registered mail with return receipt requested. If filing is by mail, it shall be addressed to the Proceedings Clerk, Office of Proceedings, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581.

[49 FR 6621, Feb. 22, 1984, as amended at 59 FR 9637, Mar. 1, 1994; 60 FR 49335, Sept. 25, 1995]

§ 12.19 Counterclaim.

A registrant may, at the time of filing an answer to a complaint, set forth as a counterclaim: (a) Facts alleging a violation and a request for a reparation award that would be a proper subject for a complaint under §12.13 of these rules; or

(b) Any claim which at the time the complaint is served the registrant has against the complainant if it arises out of the transaction or occurrence or series of transactions or occurrences set forth in the complaint.

§ 12.20 Response to counterclaim; reply; election of procedure.

(a) *Response to counterclaim.* If an answer asserts a counterclaim, the complainant shall, within thirty (30) days after service upon him of the answer by the respondent: (1) Satisfy the counterclaim as if it were a complaint, in the manner prescribed by §12.17 of these rules; or (2) file a reply to the counterclaim with the Commission.

(b) *Form and content of reply.* Should the complainant, under this paragraph, elect to file a reply to a counterclaim, the reply shall be strictly confined to

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the matters alleged in the counterclaim and shall conform to the form and content and other requirements set forth in § 12.18 of these rules.

(c) *Election of decisional procedure.* If neither the complainant nor the respondent, in the complaint or answer respectively, has previously made an election of the summary decisional procedure or the formal decisional procedure, the complainant may make such an election in his reply.

§ 12.21 Voluntary dismissal.

(a) At any time after the Director of the Office of Proceedings has served notification to the parties pursuant to § 12.15 of these rules of his determination to forward the complaint to the respondent for a response, either the complainant or the respondent may obtain dismissal of the complaint (or the proceeding, if one has commenced) by filing a stipulation of dismissal, duly executed by all of the complainants and each respondent against whom the complaint has been forwarded (or added as a party in the course of a proceeding); *Provided however,* That if the stipulation is filed after any respondent has filed an answer, the terms of the stipulation shall include a dismissal of any counterclaims in the answer.

(b) A dismissal of a complaint pursuant to this paragraph shall be with prejudice to complainant's right to refile a claim in reparations based upon the same set of facts as alleged in the dismissed complaint. Unless otherwise stated in the stipulation, a dismissal ordered pursuant to this paragraph shall be regarded by the Commission as without prejudice to the parties' right to seek redress in such alternative forums as may be available for adjudication of their claims.

(c) Upon receiving a written stipulation of dismissal which satisfies the requirements of this rule, the official before whom the matter or proceeding is pending shall issue an order of dismissal, and serve a copy thereof upon each of the parties.

(d) This rule shall be applicable at all stages of a reparation proceeding.

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§ 12.22 Default proceedings.

(a) *Institution of a default proceeding.* Failure timely to respond to a complaint or a counterclaim, as required by §§ 12.16 and 12.20 of these rules, or, if applicable, to pay a filing fee required by § 12.25(b) or (c), shall be treated as an admission of the allegations of the complaint or counterclaim by the non-responding party, shall constitute a waiver by such party of any decisional procedure afforded by these Rules on the facts set forth in the complaint or counterclaim, and shall result in the institution of a default proceeding.

(b) *Default procedure.* Upon a party's failure to respond timely to a complaint or counterclaim as prescribed in §§ 12.16 and 12.20 of these rules, or timely to comply with § 12.25 (b) or (c), the Director of the Office of Proceedings shall forward the pleadings, and other materials then of record, to a Judgment Officer or Administrative Law Judge who may thereafter enter findings and conclusions concerning the questions of violations and damages and, if warranted, enter a reparation award against the non-responding party. If the facts which are treated as admitted are considered insufficient to support a violation or the amount of reparations sought, the Judgment Officer or Administrative Law Judge may order production of supplementary evidence from the party not in default and may enter a default order and an award based thereon.

(c) *Finality.* A default order issued pursuant to this rule, or pursuant to any other provisions of these part 12 Reparation Rules, shall become the final decision and order of the Commission thirty (30) days after service thereof, unless the order is set aside pursuant to § 12.23(a) of these rules, or unless the Commission takes review of such order on its own motion on or before the thirtieth day.

[49 FR 6621, Feb. 22, 1984, as amended at 57 FR 20638, May 14, 1992]

§ 12.23 Setting aside of default.

(a) *Default order not final.* In order to prevent injustice or for good cause shown, and on such conditions as may be appropriate, a non-final default order (including any award therein)

may be set aside by the official who issued the order.

(1) *Procedure for setting aside non-final default order.* Any party or person who is the subject of a default order issued pursuant to these rules may, at any time before the order becomes final pursuant to §12.22(c), file and serve a motion to set aside the default, which shall set forth reasons why the act or omission for which the party was defaulted was not willful, why there is a reasonable likelihood of success for the party's claim or defense if heard on the merits, and why no prejudice will be sustained by other parties if the default is set aside. A motion to set aside a default order filed pursuant to this paragraph (a)(1) shall be decided, in the first instance, by the official who issued the default order.

(2) *Review.* A denial of a motion to set aside a non-final default order by the official who issued the order shall be treated as an initial decision, which may be appealed to the Commission in accordance with the requirements of §12.401 of these rules. A grant of a motion to set aside a non-final default order may be appealed only in accordance with the requirements of §12.309 of these rules.

(b) *Default order final.* A default order that has become final pursuant to §12.22(c) shall not be set aside except upon a motion filed and served by the defaulted party showing that he should be relieved from the default order because of fraud perpetrated on a decisionmaking official or the Commission, mistake, excusable neglect, or because the order is void for want of jurisdiction. Such a motion shall also show that, if the default order were set aside, there would be a reasonable likelihood of success for his claim or defense on the merits and that no party would be prejudiced thereby. Motions to set aside a final default order for fraud, mistake, or excusable neglect shall be filed within one year after the order was issued. All motions to set aside default orders shall be decided, in the first instance, by the official who issued the order. A denial of a motion to set aside a default order that has become final shall be treated as an initial decision, which may be appealed to the Commission in accordance with the re-

quirements of §12.401 of these rules. A grant of a motion to set aside a final default order shall be treated as a non-final order which may be appealed only in accordance with the requirements of §12.309 of these rules.

§ 12.24 Parallel proceedings.

(a) *Definition.* For purposes of this section, a parallel proceeding shall include:

(1) An arbitration proceeding or civil court proceeding, involving one or more of the respondents as a party, which is pending at the time the reparation complaint is filed and involves claims or counterclaims that are based on the same set of facts which serve as a basis for all of the claims in the reparations complaint, and which either:

(i) Was commenced at the instance of the complainant in reparations; or

(ii) Involves counterclaims by the complainant in reparations alleging violations of the Commodity Exchange Act, or any regulation or order issued thereunder; or

(iii) Is governed by a compulsory counterclaim rule of federal court procedure which required the complainant in reparations to assert all of his claims (including those based on alleged violations of the Commodity Exchange Act, and any regulation or order issued thereunder) as counterclaims in that proceeding;

(2) The appointment by a court of a receivership over the assets, property or proceeds of a respondent named in a reparation complaint where the responsibility of the receivership includes the resolution of claims made by customers; or

(3) A petition filed under any chapter of the Bankruptcy Code, 11 U.S.C. 101 *et seq.*, as amended, commenced pursuant to 11 U.S.C. 301 or 302 by a respondent in a reparation proceeding, or the issuance by a bankruptcy court of an order for relief after the filing against a respondent in a reparation proceeding of an involuntary petition in bankruptcy pursuant to 11 U.S.C. 303.

(b) *Notice.* At the time a complaint in reparations is filed pursuant to these rules, or at any time thereafter, any party, receiver or trustee, or counsel to any of the foregoing with knowledge of a parallel proceeding shall promptly

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notify the Commission, by first-class mail addressed to the Office of Proceedings, attention of the Proceedings Clerk, and serve notice on all other parties, including the receiver or trustee. The notice shall include the following information:

(1) The caption of the parallel proceeding;

(2) The name of the court or the arbitration tribunal (including address and phone number, if known);

(3) The docket number or numbers;

(4) The date the parallel proceeding was filed (and the current status if known); and

(5) If a proceeding in bankruptcy or receivership is pending, the date of the appointment and name and address of the receiver or trustee.

A copy of any relevant complaint, petition or order shall be attached to the notice.

(c) *Effect of pending arbitration or civil court litigation.* (1) The Director of the Office of Proceedings shall refuse to institute an elected decisional procedure concerning a reparation complaint filed under this part in which there is a parallel proceeding described in paragraph (a)(1) of this section and shall return the complaint to the complaining person. The effective date of the Director's termination of the complaint without prejudice shall be fifteen (15) days from the date of service of notice of the action taken pursuant to this paragraph.

(2) If notice of a parallel proceeding described in paragraph (a)(1) of this section is received before the initial decision is filed (or before a final decision under § 12.106 of the rules is entered), a proceeding in which a decisional procedure has been commenced shall be dismissed, without prejudice. The effective date of the order of dismissal shall be fifteen (15) days from the date of service of the order by the Proceedings Clerk.

(d) *Effect of receivership or bankruptcy proceedings.* (1) The Director of the Office of Proceedings shall refuse to institute an elected decisional procedure as to a respondent in any reparation complaint filed pursuant to this part who is the subject of a parallel proceeding described in paragraph (a)(2) or (a)(3) of this section, and shall notify

all parties, including the receiver or trustee, that as to that respondent a reparation proceeding shall not be instituted. The effective date of the Director's action shall be fifteen (15) days from the date of service of the notice thereof.

(2) A proceeding in which an elected decisional procedure has been commenced shall be ordered dismissed, without prejudice, as to any respondent who becomes the subject of a parallel proceeding described in paragraph (a)(2) or (a)(3) of this section if notice pursuant to paragraph (b) of this section is received before the filing of an initial decision (or before a final decision is issued pursuant to § 12.106) as to that respondent. The Proceedings Clerk shall notify all parties, including the receiver or trustee, of the order. The effective date of the order shall be fifteen (15) days from the date of the service of the order by the Proceedings Clerk.

(e) *Exceptions.* At the time notice of a parallel proceeding is filed pursuant to paragraph (b) of this section, or any time thereafter, any party, or the receiver or trustee, may file and serve upon other parties a statement in support of or in opposition to any action taken or to be taken pursuant to paragraph (c) or (d) of this section. This statement shall be addressed to the Office of Proceedings, attention of the Proceedings Clerk. Upon receipt of any such statement, the Proceedings Clerk shall immediately forward the statement to the official with responsibility over the case. The notice and the statements filed by the parties shall be reviewed by that official who, on or before the effective date of action taken pursuant to paragraphs (c)(1), (c)(2), (d)(1), and (d)(2), of this section, may take such actions as, in his opinion, are necessary to ensure that the parties to the matter or proceedings are not unduly prejudiced.

(f) *No right of appeal to the Commission.* Any action taken, or order issued, pursuant to paragraphs (c)(1), (c)(2), (d)(1), or (d)(2), of this section that has become effective shall be deemed a final order which is not subject to appeal pursuant to subpart F of these rules.

§ 12.25 Filing fees.

(a) *Fees payable upon filing a complaint.* (1) A complainant who, in the complaint, has elected the voluntary decisional procedure shall, at the time of filing the complaint, pay a filing fee of \$50.00;

(2) A complainant who, in the complaint wherein the amount of damages claimed does not exceed \$30,000, exclusive of interest and costs, has not elected the voluntary decisional procedure shall, at the time of filing the complaint, pay a filing fee of \$125.00.

(3) A complainant who, in the complaint wherein the amount of damages claimed exceeds \$30,000, exclusive of interest and costs, has not elected the voluntary decisional procedure shall, at the time of filing the complaint, pay a filing fee of \$250.00.

(b) *Fees payable upon filing an answer.* (1) If a complainant, in the complaint, has elected the voluntary decisional procedure, a respondent who, in his answer, elects the summary decisional procedure (available only where the amount of damages claimed in the complaint or as counterclaims does not exceed \$30,000) shall, at the time of filing the answer, pay a filing fee of \$75.00.

(2) If a complainant, in the complaint, has elected the voluntary decisional procedure, a respondent who, in his answer, elects the formal decisional procedure (available only where the amount of damages claimed in the complaint or as counterclaims exceeds \$30,000) shall, at the time of filing the answer, pay a filing fee of \$200.00.

(c) *Fees payable upon filing a reply.* In any case in which a counterclaim has been made, unless a complainant in the complaint, or the respondent in an answer, has elected the summary decisional procedure or the formal decisional procedure a complainant, who in his reply elects either of these procedures, shall, at the time of filing the reply, pay a filing fee of \$75.00 or \$200.00, respectively, depending whether the procedure elected by complainant is pursuant to subparts D or E.

[49 FR 6621, Feb. 22, 1984; 49 FR 15070, Apr. 17, 1984, as amended at 59 FR 9637, Mar. 1, 1994]

§ 12.26 Commencement of a reparation proceeding.

(a) *Commencement of voluntary decisional proceeding.* Where complainant and respondent in the complaint and answer have elected the voluntary decisional procedure pursuant to subpart C of these rules and the complainant has paid the filing fee required by § 12.25 of these rules, the Director of the Office of Proceedings shall, if in his opinion the facts warrant taking such action, forward the pleadings and all materials of record to the Proceedings Clerk for a proceeding to be conducted in accordance with subpart C of these rules. The Proceedings Clerk shall forthwith notify the parties of such action. Such notification shall be accompanied by an order issued by the Proceedings Clerk requiring the parties to complete all discovery, as provided in subpart B of these rules, within 50 days thereafter. A voluntary decisional proceeding commences upon service of such notification and order. As soon as practicable after service of such notification, the Proceedings Clerk shall assign the case to a Judgment Officer for a final decision.

(b) *Commencement of summary decisional proceeding.* Where the amount claimed as damages, exclusive of interest and costs, in the complaint or in counterclaim does not exceed \$30,000, and either a complainant or a respondent in the complaint, answer, or reply, has elected the summary decisional procedure pursuant to subpart D of these rules, and has paid the filing fee required by § 12.25, the Director of the Office of Proceedings shall, if in his opinion the facts warrant taking such action, forward the pleadings and all materials of record to the Proceedings Clerk for a proceeding to be conducted in accordance with subpart D of these rules. The Proceedings Clerk shall forthwith notify the parties of such action. Such notification shall be accompanied by an order issued by the Proceedings Clerk requiring the parties to complete all discovery, as provided in subpart B of these rules, within 50 days thereafter. A summary decisional proceeding commences upon service of

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such notification. As soon as practicable after service of such notification, the Proceedings Clerk shall assign the case to a Judgment Officer for disposition.

(c) *Commencement of formal decisional proceeding.* Where the amount claimed as damages in the complaint or as counterclaims exceeds \$30,000, exclusive of interest and costs, and either a complainant or a respondent in the complaint, answer or reply, has elected the formal decisional procedure pursuant to subpart E of these rules, and has paid the filing fee required by §12.25, the Director of the Office of Proceedings shall, if in his opinion the facts warrant taking such action, forward the pleadings and the materials of record to the Proceedings Clerk for a proceeding to be conducted in accordance with subpart E of these rules. The Proceedings Clerk shall forthwith notify the parties of such action. Such notification shall be accompanied by an order issued by the Proceedings Clerk requiring the parties to complete all discovery, as provided in subpart B, within 50 days thereafter. A formal decisional proceeding commences upon service of such notification and order. As soon as practicable after service of such notification, the Proceedings Clerk shall assign the case to an Administrative Law Judge for disposition.

[49 FR 6621, Feb. 22, 1984, as amended at 59 FR 9637, Mar. 1, 1994]

§ 12.27 Termination of consideration of pleadings.

If the Director of the Office of Proceedings should determine not to proceed in a manner set forth in §12.26 (a), (b), or (c), consideration of the complaint and the answer (and reply, if any) shall terminate, and no proceeding shall be held on the allegations in any such pleadings. Such termination shall be regarded by the Commission as without prejudice to the right of the parties to seek such alternative forms of relief as may be available to them. If the consideration of the pleadings should be terminated, the Proceedings Clerk shall immediately notify the parties to that effect by registered or certified mail. A determination by the Director not to proceed in the manner set forth in §12.26 (a), (b),

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or (c) of these rules is not subject to appeal pursuant to subpart F of these rules.

Subpart B—Discovery

§ 12.30 Methods of discovery.

(a) *In general.* Parties may obtain discovery by the following methods in accordance with the procedures and limitations set forth in the section indicated:

(1) Production of documents or other items (§ 12.31);

(2) Deposition on written interrogatories (§ 12.32);

(3) Admissions (§ 12.33).

(b) *Scope of discovery.* The scope of discovery is as follows:

(1) *Relevancy.* Except as provided below, discovery may be obtained regarding any matter not privileged, which is relevant to the subject matter in the pending proceeding, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible items, and the identity and location of persons having knowledge of any discoverable matters. Tax returns and personal bank account records shall not be discoverable, except upon motion by the party seeking discovery showing the need for disclosure of information contained therein, and that the same information could not be obtained through other means.

(2) *Protective orders.* Upon motion by a party or the person from whom discovery is sought, filed within twenty days after the objectionable discovery notice or request is served, and for good cause shown, the official presiding over discovery may issue any order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, or to prevent the raising of issues untimely or inappropriate to the proceeding, or the inappropriate disclosure of trade secrets or sensitive commercial or financial information. Relief through a protective order may include one or more of the following:

(i) That discovery not be had;

(ii) That discovery may be had only on specified terms and conditions;

(iii) That certain matters not be inquired into, or that the scope of the

discovery be limited to certain matters;

(iv) That a trade secret or other confidential commercial information not be disclosed or be disclosed only in a designated way; and

(v) That the parties simultaneously file specified documents or information in sealed envelopes to be opened only as directed by the decisionmaking official.

(3) *Motions for order compelling discovery.* It shall be the duty of a party to obtain an order compelling discovery from another party if the latter party fails to comply with a discovery notice, by filing a motion therefor within twenty days after the time allowed by these rules for compliance with the notice has expired.

(c) *Sanctions for abuse of discovery.* If an Administrative Law Judge or a Judgement Officer finds that any party, without substantial justification, has necessitated the filing of a motion for a protective order or for an order compelling discovery, or any other discovery-related motions, that party shall, if the motion is granted, be ordered to pay, at the termination of the proceeding, the reasonable expenses of the moving party incurred in filing the motion, unless the decisionmaking official finds that circumstances exist which would make an award of such expenses unjust. If a decisionmaking official finds that any party, without substantial justification, has filed a motion for a protective order or for an order compelling discovery, or any discovery-related motions, that party shall, if the motion is denied, be ordered to pay, at the termination of the proceeding, the reasonable expenses of an adverse party incurred in opposing the motion, unless the decisionmaker finds that circumstances exist which would make an award of such expenses unjust.

(d) *Time limit.* Absent an extension of time, all discovery notices or requests shall be served within (30) days (and all discovery shall be completed within (50) days) after the notification and the order required by §12.26 (a), (b), or (c) has been served on the parties. Upon motion by a party and for good cause shown, the time allowed for discovery

may be enlarged for one additional period not to exceed thirty (30) days.

[49 FR 6621, Feb. 22, 1984; 49 FR 15070, Apr. 17, 1984; 49 FR 17750, Apr. 25, 1984; 59 FR 9637, Mar. 1, 1994]

§ 12.31 Production of documents and tangible items.

(a) *By a party.* Any party, within the time prescribed in §12.30(d) and subject to the limitations in §12.30(a), may serve on any other party, a notice to produce copies of specifically designated categories of documents, papers, books, accounts, letters, photographs, objects, or tangible things which are in the party's possession, custody or control. A copy of the notice shall be served on all other parties to the proceeding. All documents requested in the notice to produce shall be served on the party seeking the discovery within twenty (20) days after service of the notice to produce.

(b) *By a non-party.* Any party may, by filing an appropriate motion showing the need for the materials and an application for a subpoena in accordance with the procedure prescribed in §12.313 and within the time prescribed by §12.30(d) of these rules, seek leave to serve upon a non-party a notice to produce copies of any specifically designated categories of materials as are described in paragraph (a) of this section. After an appropriate order and subpoena has been issued, such party may serve upon a non-party a notice to produce such materials. All materials requested in the notice to produce, and, if applicable, a detailed explanation of why any of the specified materials cannot be produced, shall be served on the party seeking discovery within such time (not to exceed thirty (30) days) as the subpoena shall specify. Enforcement of the order and subpoena may be sought in accordance with §12.313.

§ 12.32 Depositions on written interrogatories.

(a) *Notice.* Any party, within the time prescribed by §12.30(d), may serve on any other party or any officer or agent of a party a notice of the taking of a deposition on written interrogatories.

(b) *Number.* The number of written interrogatories served upon any one party shall not exceed thirty. For the

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purpose of this rule, each sub-interrogatory or divisible part of an interrogatory shall be regarded as one interrogatory. Leave to serve additional interrogatories shall not be granted absent extraordinary circumstances.

(c) *Reply.* (1) Each interrogatory served shall be answered by the party served or if the party is a corporation, partnership, association, or government agency, by any officer or agent thereof selected by the responding party.

(2) Each interrogatory shall be answered separately and fully in writing, unless objected to, in which event the reasons for objection shall be stated in lieu of an answer. For the purposes of this rule, an evasive or incomplete answer shall be treated as a failure to answer. The answers are to be signed and verified by the person making them. The person upon whom a notice to take a deposition on written interrogatories has been served shall serve a copy of the answers and objections within twenty (20) days after service of the interrogatories.

(d) *Deposition of a non-party.* The deposition on written interrogatories of a non-party may be taken only within the time prescribed by §12.30(d), and only pursuant to an order entered and subpoena issued in accordance with the provisions of §12.313 of these rules; provided however, that the deposition on written interrogatories of a Commission member or employee may only be taken upon a showing that the Commission member or employee has personal knowledge of the matters sought to be discovered (*i.e.*, not obtained pursuant to a Commission investigation), that the information sought to be discovered is material and that the information sought to be discovered is not available from other sources.

(e) *Filing of depositions on written interrogatories in a voluntary or summary decisional proceeding.* In proceedings commenced pursuant to §12.26 (a) and (b) of these rules, copies of all depositions on written interrogatories shall be filed by the party on whose behalf the discovery was obtained.

§ 12.33 Admissions.

(a) *Request for admissions.* Any party may, within the time permitted by

§12.30(d) of these rules, serve upon any other party a written request for admissions of the truth of any matters set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any document described in the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. A copy of the request shall be filed with the Proceedings Clerk.

(b) *Reply.* Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless within twenty (20) days after service of the request, the party upon whom the request is directed files and serves upon the party requesting the admission a verified written answer or objection to the matter. If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission and when good faith requires that a party qualify his answer and deny only a part of the matter of which an admission is requested, he shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give a lack of information or knowledge as a reason for failure to admit or deny unless he states that he has made reasonable inquiry and that the information known or reasonably available to him is insufficient to enable him to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; he may deny the matter or set forth reasons why he cannot admit or deny it.

(c) *Determining sufficiency of answers or objections.* The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the objecting party sustains his burden of showing that the objection is justified, the official presiding over discovery shall order that an answer be served. If such

official determines that an answer does not comply with the requirements of this rule, he may order either that the matter is admitted or that an amended answer be served.

(d) *Effect of admission.* Any matter admitted under this rule is conclusively established and may be used as proof against the party who made the admission. However, the discovery or decisionmaking official may permit withdrawal or amendment when the presentation of the merits of the proceeding will be served thereby and the party who obtains the admission fails to satisfy such official that withdrawal or amendments will prejudice him in maintaining his action or defense on the merits.

§ 12.34 Discovery by a decisionmaking official.

(a) *Applicability.* The provisions of this rule apply only to summary decisional proceedings and formal decisional proceedings commenced pursuant to § 12.26 (b) and (c). This rule does not apply to a voluntary decisional proceeding commenced pursuant to § 12.26(a). For the purposes of this rule, the term “decisionmaking official” shall mean a Judgment Officer or Administrative Law Judge assigned to render a decision in the proceeding.

(b) *Production of documents and tangible things—(1) Order for production.* A decisionmaking official may, upon his own motion, order a party or non-party to produce copies of specifically designated documents, papers, books, accounts, or tangible things (or categories of any of the foregoing) which are in the possession, custody or control of the party, non-party or agent thereof, against whom the order is directed. Except as provided in paragraph (b)(2) of this section, a party or non-party ordered to produce documents or any of the above items under this rule shall file and serve the documents and items listed in the order within twenty (20) days from the date of service of the order, or within such period of time as the decisionmaking official may direct. The decisionmaking official may issue subpoenas to compel the production by parties or non-parties of such documents and tangible things as are described in this section.

(2) *Trade secrets, commercially sensitive or confidential information.* If any party or person against whom an order to produce has been directed acting in good faith has reason to believe that any documents or other tangible thing ordered to be produced contains a trade secret, or commercially sensitive or other confidential information, the party or person may, in lieu of serving any such document, in accordance with paragraph (b)(1) of this section, file and serve a written request for confidential treatment of such documents. Any such request for confidential treatment shall be accompanied by a verified statement identifying with particularity the information on those documents considered to be trade secrets, commercially sensitive or confidential information, with reasons therefor, and indicating which portions, if any, of those documents may be served on other parties without disclosure of such information. Upon considering a request for confidential treatment in accordance with this subsection, the decisionmaking official may, if he finds that the information identified in the request warrants confidential treatment and is not probative of any material fact in controversy, make copies of the documents produced, delete such information from the copies, and serve the copies as modified upon the other parties, with or without an appropriate protective order limiting dissemination to the parties and their counsel, if any.

(3) *Inability to produce.* Any party or person who cannot produce documents or other tangible things called for in an order for production, because those documents or things are not in his possession, custody or control, shall file and serve within the time provided in paragraph (b)(1) of this section a verified statement identifying the documents which cannot be produced and setting forth with particularity the reasons for non-production.

(c) *Order for written testimony.* The decisionmaking official may, upon his own motion, order a party or non-party witness to submit verified statements or written responses to interrogatories, or both, as to all relevant matters within the party’s personal knowledge which are required in response to the

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order. A party or person ordered to file affidavits and/or verified written responses to interrogatories shall file and serve the documents within such period of time as the decisionmaking official may direct. The official may issue subpoenas to compel the filing by parties or non-parties of such verified statements and written responses as are described in this subsection.

§ 12.35 Consequences of a party's failure to comply with a discovery order.

If a party fails to comply with an order compelling discovery, or an order issued pursuant to §12.34, the official assigned to render the decision in the case may, upon motion by a party or on his own motion, take such action in regard thereto as is just, including but not limited to the following:

(a) Infer that the documents or things not produced would have been adverse to the party;

(b) Rule that for the purposes of the proceeding the information in or contents of the documents or things not produced be taken as established adversely to the party;

(c) Rule that the party may not be heard to object to introduction and use of secondary evidence to show what the withheld documents or other evidence would have shown;

(d) Rule that a pleading, or part of a pleading, or a motion or other submission by the party, to which the order for production related, be stricken;

(e) Dismiss the entire proceeding with prejudice to matters alleged in the complaint, but without prejudice to counterclaims; and

(f) Issue a default order and render a decision against the party, whose rights shall thereafter be determined by §§ 12.22 and 12.23 of these rules.

§ 12.36 Subpoenas to compel discovery.

An application for a subpoena requiring a party or non-party to comply with a discovery order issued pursuant to §§12.31 and 12.32, may be made, in writing, by any party without notice to other parties, and may be filed simultaneously with the motion for the discovery order. The standards for issuance or denial of such an application, the service requirement, and the

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method for enforcing such subpoenas shall be determined by the provisions of § 12.313 of these rules.

Subpart C—Rules Applicable to Voluntary Decisional Proceedings

§ 12.100 Scope and applicability of rules.

(a) *In general.* The rules set forth in this subpart are applicable only to proceedings forwarded pursuant to §12.26(a) of the Reparation Rules. The rules of subpart B permitting discovery are applicable in a voluntary decisional proceeding. Unless specifically made applicable, the rules prescribed in subparts D, E, and F shall not apply in a voluntary decisional proceeding.

(b) *Waiver by electing the voluntary decisional procedure.* By electing the voluntary decisional procedure, parties waive the opportunity for an oral hearing and whatever rights they may have otherwise had: to receive a written statement of the findings of fact upon which the final decision is based; to prejudgment interest in connection with a reparation award; to appeal to the Commission the final decision; and to appeal the final decision to a U.S. Court of Appeals pursuant to section 14(e) of the Commodity Exchange Act, 7 U.S.C. 18(e).

§ 12.101 Functions and responsibilities of the Judgment Officer.

The Judgment Officer shall be responsible for the fair and orderly conduct of the proceeding and shall have the authority:

(a) To rule upon discovery-related motions, and to issue orders pertaining to discovery;

(b) To take such action pursuant to §12.35 as is appropriate if a party fails to comply with a discovery order;

(c) To issue subpoenas pursuant to §12.36 of these rules;

(d) To issue orders of default for good cause shown against any party who fails to participate in the proceeding, or to comply with any provisions of these rules;

(e) To receive submissions of proof;

(f) Make the final decision in accordance with §12.106 of these rules; and

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(g) Issue such orders as are necessary and appropriate to effectuate the orderly conduct of the proceeding.

[49 FR 6621, Feb. 22, 1984; 49 FR 15070, Apr. 17, 1984]

§ 12.102 Disqualification of Judgment Officer.

(a) *At his own request.* A Judgment Officer may withdraw from a voluntary decisional proceeding when he considers himself to be disqualified on the grounds of personal bias, conflict of interest, or similar bases. In such event he shall immediately notify the Commission and each of the parties of his withdrawal and of his basis for such action.

(b) *Upon the request of a party.* Any party may request a Judgment Officer to disqualify himself on the grounds of personal bias, conflict of interest, or similar bases. Interlocutory review of an adverse ruling by the Judgment Officer may be sought without certification of the matter by the Judgment Officer only in accordance with the procedures set forth in §12.309 of the Reparation Rules.

§ 12.103 Filing of documents; subscription; service.

Except as otherwise specifically provided in these rules, all documents filed in a voluntary decisional proceeding, including (but not limited to) amended or supplemental pleadings, motions, discovery requests and responses thereto, and submissions of proof, shall meet the requirements of §§12.11 and 12.12 of the Reparation Rules as to form, and shall be filed and served in accordance with §12.10 of the Reparation Rules.

§ 12.104 Amendments to pleadings; motions.

(a) *Amendments and supplemental pleadings.* At any time prior to the issuance of the final decision, the parties may, by unanimous express written consent, amend or supplement the pleadings. Supplemental pleadings may set forth transactions or occurrences or events which have happened since the date of the pleadings to be amended or supplemented, and which are relevant to any of the issues involved.

(b) *Motions.* Except as specifically permitted by rule in this subpart, motions, other than discovery-related motions and motions relating to procedural orders, shall be prohibited. Motions for procedural orders, including motions for extension of time, may be acted upon at any time.

§ 12.105 Submission of proof only in documentary or tangible form.

Proof in support of the complaint and in support of the respondent's answer (including counterclaims, if any), and any reply thereto, may be found in those verified documents, in verified statements of non-party witnesses, in other verified statements of fact, and in other documents and tangible evidence. No oral testimony by, or examination of, the parties or their witnesses shall be permitted.

§ 12.106 Final decision and order.

(a) *When a final decision is required.* After all submissions of proof have been received, the Judgment Officer shall make the final decision. Upon its issuance, the final decision shall forthwith be filed with the Proceedings Clerk, and immediately served on the parties. The Proceedings Clerk shall also serve a notice, to accompany the final decision, of the effect of a failure by a party ordered to pay a reparation award to file the documents required by §12.407(c) of these rules.

(b) *Content of final decision.* The final decision shall contain:

(1) A briefly stated conclusion, not accompanied by findings of fact, as to whether the respondent violated any provision of the Act, Commission's regulations or orders, resulting in damages to the complainant; and

(2) If one or more counterclaims have been permitted in the proceeding, a brief conclusion, not accompanied by findings of fact, as to whether the complainant is liable to the respondent for such counterclaims; and

(3) A determination of the amount of damages, if any, sustained by complainant or respondent in connection with reparation claims or counterclaims, and an order against a party found liable for damages directing that party to pay an award. An award in

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favor of the complainant shall not exceed the amount of damages in the complaint (including any amendment thereto), and an award in favor of a respondent shall not exceed the amount of damages claimed in a counterclaim (including any amendment thereto).

A conclusion made pursuant to paragraph (b)(1) of this section shall not be deemed a finding of the Commission for the purposes of Section 8a of the Commodity Exchange Act.

(c) *No assessment of prejudgment interest or costs.* A party found liable for damages in a voluntary decisional proceeding shall not be assessed prejudgment interest, attorney's fees, or costs (other than the filing fee and costs assessed as a sanction for abuse of discovery).

(d) *Effect of final decision and order: No appeal.* A party may not appeal to the Commission a final decision issued pursuant to subpart C of these rules. In accordance with the election and waivers described in §12.100(b), a final decision may not be appealed to a U.S. Court of Appeals pursuant to section 14(e) of the Commodity Exchange Act, but a final decision shall be recognized as a final order of the Commission for all other purposes including the judicial enforcement of an award made in connection with the final decision pursuant to section 14(d) of the Commodity Exchange Act.

(e) *Effective date of final decision.* A final decision and order shall become effective thirty (30) days after service, unless the Commission pursuant to §12.403 takes review of the decision on its own motion on or before the thirtieth day. Any reparation award ordered in a final decision pursuant to this rule shall be satisfied in full within forty-five (45) days after service thereof, unless the Commission pursuant to §12.403(b) stays the duty of satisfaction. Any party who fails timely to satisfy such an award is subject to the automatic suspension provisions of §12.407(c).

[49 FR 6621, Feb. 22, 1984, as amended at 59 FR 9637, Mar. 1, 1994]

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Subpart D—Rules Applicable to Summary Decisional Proceedings

§ 12.200 Scope and applicability of rules.

The rules set forth in this subpart are applicable only to proceedings forwarded pursuant to §12.26(b) of the Reparation Rules. The rules in subpart B permitting discovery are applicable in a summary decisional proceeding. Unless specifically made applicable, the rules prescribed in subparts C and E shall not apply to such proceedings. Parties to a proceeding forwarded pursuant to §12.26(b) may, by signed agreement filed at any time prior to the issuance of the initial decision, or of any other order disposing of all issues in the proceeding, elect to have all of the issues in the proceeding decided pursuant to the voluntary decisional procedure. Upon receiving a timely filed stipulation signed by all parties evidencing such an election, the Judgment Officer shall conduct the proceeding and render a decision pursuant to subpart C of these rules.

§ 12.201 Functions and responsibilities of the Judgment Officer.

The Judgment Officer shall be responsible for the fair and orderly conduct of the proceeding and shall have the authority:

(a) In his discretion, to conduct pre-decision conferences in accordance with §12.206 of these rules;

(b) To rule upon all discovery-related motions, and to take such action pursuant to §12.35 as is appropriate if a party fails to comply with a discovery order;

(c) To issue orders for the production of documents and tangible things and orders for written testimony, as provided in §12.34 of these rules;

(d) To take such action as is appropriate under §12.35 of these rules, if a party fails to comply with an order issued by the Judgment Officer pursuant to §12.34;

(e) To rule on all motions permitted pursuant to §12.205;

(f) To issue default orders for good cause against parties who fail to participate in the proceeding or to comply with these rules;

(g) If an oral hearing is ordered, to preside at the hearing, which shall include the authority to receive relevant evidence, to administer oaths and affirmations, to examine witnesses, and to rule on offers of proof;

(h) To issue subpoenas in accordance with the provisions of §§ 12.34, 12.36 and 12.209 of these rules;

(i) To make the initial decision in accordance with § 12.210 of these rules; and

(j) To issue such orders as are necessary and appropriate to effectuate the orderly conduct of the proceeding.

[49 FR 6621, Feb. 22, 1984; 49 FR 15070, Apr. 17, 1984, as amended at 59 FR 9637, Mar. 1, 1994]

§ 12.202 Disqualification of Judgment Officer.

(a) *At his own request.* A Judgment Officer may withdraw from a summary decisional proceeding when he considers himself to be disqualified on the grounds of personal bias, conflict of interest, or similar bases. In such event, he shall immediately notify the Commission and each of the parties of his withdrawal and of his basis for such action.

(b) *Upon the request of a party.* Any party may request a Judgment Officer to disqualify himself on the grounds of personal bias, conflict of interest, or similar bases. Interlocutory review of an order denying such a request may be sought without certification of the matter by the Judgment Officer only in accordance with the procedures set forth in § 12.309 of the Reparation Rules.

§ 12.203 Filing of documents; subscription; service.

Except as otherwise specifically provided in these rules, all documents filed in a summary decisional proceeding, including (but not limited to) amended or supplemental pleadings, motions, discovery notices and responses thereto, documents produced or filed pursuant to § 12.34 of these rules, and submissions of proof, shall meet the requirements of §§ 12.11 and 12.12 of these rules as to form, and shall be filed and served in accordance with § 12.10 of the Reparation Rules.

§ 12.204 Amended and supplemental pleadings.

(a) *Amendments to pleadings.* At any time before the parties have concluded their submission of proof, the Judgment Officer may allow amendments of the pleadings either upon written consent of the parties, or for good cause shown, provided however, that any pleading as amended shall not contain an allegation of damages in excess of \$30,000. Any party may file a response to a motion to amend the pleadings within ten (10) days after the date of service upon him of the motion;

(b) *Supplemental pleadings.* At any time before the parties have concluded their submissions of proof, and upon such terms as are just, the Judgment Officer may, upon motion by a party, permit a party to serve a supplemental pleading setting forth transactions, occurrences or events which have happened since the date of the pleadings sought to be supplemented and which are relevant to any of the issues in the proceeding: *Provided However,* That any pleading as supplemented may not contain an allegation of damages in excess of \$30,000. Any party may file a response to a motion to supplement the pleadings within ten (10) days after the date of service upon him of the motion.

(c) *Pleadings to conform to the evidence.* When issues not raised by the pleadings but reasonably within the scope of a summary decisional proceeding are tried with the express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.

[49 FR 6621, Feb. 22, 1984, as amended at 59 FR 9637, Mar. 1, 1994]

§ 12.205 Motions.

(a) *In general.* Motions for relief not otherwise specifically provided for in subpart D of these rules, other than discovery-related motions and motions for extensions of time and similar procedural orders, shall not be allowed. Except as otherwise specifically provided in these rules, all motions permitted under these rules shall be directed to the Judgment Officer prior to the filing of the initial decision, and to

the Commission after the initial decision has been filed. Motions for extensions of time and similar procedural orders may be acted upon at any time, without awaiting a response thereto. Any party adversely affected by such action may request reconsideration, vacation or modification of such action.

(b) *Answer to motions.* Any party may serve and file a written response to a motion within ten (10) days after service of the motion upon him, or within such longer or shorter period as is established by these rules, or as the Judgment Officer or the Commission may direct.

(c) *Dismissal*—(1) *By the Judgment Officer.* A Judgment Officer, acting upon his own motion, may

(i) Dismiss the entire proceeding without prejudice to counterclaims, if he finds that the matters alleged in the complaint fail to state a claim cognizable in reparations; or

(ii) Order dismissal of any claim, counterclaim, or party from the proceeding if he finds, after review of the record, that such claim or counterclaim (by itself or as applied to any party) is not cognizable in reparations.

(2) *Motion for dismissal by a party.* Any party who believes that grounds exist for dismissal of the entire complaint, or of any claim therein, or of any counterclaim or party from the proceeding, may file a motion for dismissal specifying the claims or parties to be dismissed and the reasons therefor. Upon consideration of the whole record, the Judgment Officer may grant or deny such motion, in whole or in part.

(3) *Content and effect of order of dismissal.* Any order of dismissal entered pursuant to this rule shall contain a brief statement of the findings and conclusions which serve as the basis for the order. An order of dismissal of the entire proceeding pursuant to this rule shall have the effect of an initial decision (see §12.213(d)), and may be appealed to the Commission in accordance with the requirements of §12.401 of these rules.

§ 12.206 Pre-decision conferences.

At any time after a summary decisional proceeding has been commenced pursuant to §12.26(b), the Judgment Officer may, in his discretion,

conduct one or more pre-decision conferences to be held in Washington, DC or by telephone, with all parties, for the purposes of:

(a) Discussing the advisability of electing the voluntary decisional procedure;

(b) Encouraging settlement of the entire case, or any part thereof, (such discussions may be *ex parte* with the consent of all parties);

(c) Simplifying or clarifying issues;

(d) Obtaining stipulations, admissions of fact and of authenticity of documents;

(e) Discussing amendments or supplements to the pleadings;

(f) Encouraging an early settlement of disputes relating to discovery; and

(g) Discussing any matters of relevance in the proceeding.

At or following the conclusion of such a conference, the Judgment Officer may serve a pre-decision memorandum and order setting forth the agreements, if any, reached by the parties, any procedural determinations made by him, and the issues for resolution not disposed of by the admissions or agreements by the parties. Such order, when issued, shall control the subsequent course of the proceeding unless modified to prevent injustice.

§ 12.207 Summary disposition.

(a) *Filing of motions, answers.* Any party who believes that there is no genuine issue of material fact to be determined and that he is entitled to a decision as a matter of law concerning all issues of liability in the proceeding may file a motion for summary disposition at any time until the parties have concluded their submissions of proof. Any adverse party, within ten (10) days after service of the motion, may file and serve opposing papers or may countermove for summary disposition.

(b) *Supporting papers.* A motion for summary disposition shall include a statement of the material facts as to which the moving party contends there is no genuine issue, supported by the pleadings, and by affidavits, other verified statements, admissions, stipulations, and interrogatories. The motion may also be supported by briefs containing points and authorities in

support of the contention of the party making the motion. When a motion is made and supported as provided in this section, unless otherwise ordered by the Judgment Officer, an adverse party may not rest upon the mere allegations, but shall serve and file in response a statement setting forth those material facts as to which he contends a genuine issue exists, supported by affidavits and other verified material. He may also submit a brief of points and authorities.

(c) *Summary disposition upon motion of the Judgment Officer.* If the Judgment Officer believes that there may be no genuine issue of material fact to be determined and that one of the parties may be entitled to a decision as a matter of law, he may direct the parties to submit papers in support of and in opposition to summary disposition, substantially as provided in paragraphs (a) and (b) of this section.

(d) *Ruling on summary disposition.* The Judgment Officer may grant summary disposition if the undisputed pleaded facts, affidavits, other verified statements, admissions, stipulations, and matters of official notice show that (1) there is no genuine issue as to any material fact; (2) there is no necessity that further facts be developed in the record; and (3) a party is entitled to a decision in his favor as a matter of law.

(e) *Review of ruling; appeal.* An application for interlocutory review of an order denying a motion for summary disposition shall not be allowed. An order granting summary disposition as to all of the issues and all of the parties in the proceeding shall have the same effect as an initial decision (see §12.210(d)), and may be appealed to the Commission, in accordance with §12.401 of these rules.

§ 12.208 Submissions of proof.

(a) *Documentary evidence.* Each party may file and serve verified statements of fact and affidavits of non-party witnesses with personal knowledge of the facts which they aver to be true. Proof in support of the complaint and in support of the respondent's answer may be found in those verified documents, in affidavits of non-party witnesses, in other verified statements of fact, and

in other documents and tangible exhibits.

(b) *Oral testimony and examination.* The Judgment Officer may order an oral hearing for the presentation of testimony and examination of the parties and their witnesses when appropriate and necessary for the resolution of factual issues, upon motion by either a party or the Judgment Officer. An oral hearing held under this section will be convened by conference telephone call as provided in §12.209(b), except that an in-person hearing may be held in Washington, DC, under the circumstances set forth in §12.209(c).

[49 FR 6621, Feb. 22, 1984, as amended at 59 FR 9637, Mar. 1, 1994]

§ 12.209 Oral testimony.

(a) *Generally.* When the Judgment Officer determines that an oral hearing is necessary and appropriate, such oral hearing will be held either by telephone or in person in Washington, DC, as set forth below. The Judgment Officer, in his or her discretion with consideration for the convenience of the parties and their witnesses, will determine the time and date of such hearing. During an oral hearing, in his or her discretion, the Judgment Officer may regulate appropriately the course and sequence of testimony and examination of the parties and their witnesses and limit the issues.

(b) *Telephonic hearings.* When a Judgment Officer has determined to hold an oral hearing by telephone, an order to that effect will be issued at least 15 days prior to the hearing notifying the parties of the date and time of the hearing. The order will direct the parties to confirm, at least 48 hours in advance of the hearing, that the correct telephone numbers for the parties and their witnesses are on file with the Office of Proceedings, and warn that failure to provide correct telephone numbers may be deemed waiver of that party's right to participate in the hearing, to present evidence, or to cross-examine other witnesses. If a party is unavailable by telephone at the appointed time, any other party in attendance may present testimony, and the Judgment Officer also may impose any appropriate sanction listed in §12.35. All telephonic hearings will be recorded

electronically but will be transcribed only upon direction of the Judgment Officer (if necessary) or in the event of Commission review. The parties may secure a copy of the recording of the hearing from the Proceedings Clerk upon written request and payment of the cost of the recording.

(c) *Washington, DC hearings.* In exceptional circumstances and when an in-person hearing is determined to be necessary in resolving the issues, the Judgment Officer may order an in-person hearing in Washington, DC upon written request by a party and the agreement of at least one opposing party. The Judgment Officer will issue notice of the time, date, and location of an in-person hearing to the parties at least 30 days in advance of the hearing. Except as otherwise provided herein, an in-person hearing will be held and recorded in the manner prescribed in § 12.312(c) through (f) of these rules. A party not agreeing to appear at the hearing in Washington, DC, may be ordered to participate by telephone. Any party not appearing in person or by telephone will be deemed to have waived the right to participate in the hearing, to present evidence, or to cross-examine other witnesses; further, that party may be subject to such action under § 12.35 as the Judgment Officer may find appropriate. The Judgment Officer may order any party who requests or agrees to appear at a hearing in Washington, DC and fails to appear without good cause, to pay any reasonable costs unnecessarily incurred by parties appearing at such a hearing.

(d) *Compulsory process.* An application for a subpoena requiring a non-party to participate in a telephonic hearing or to appear at an in-person hearing in Washington, DC, may be made in writing to the Judgment Officer without notice to the other parties. The standards for issuance or denial of an application for a subpoena, the service and travel fee requirements, and the method for enforcing such subpoenas are set forth at § 12.313 of these rules.

[59 FR 9637, Mar. 1, 1994]

§ 12.210 Initial decision.

(a) *In general.* Proposed findings of fact and conclusions of law briefs shall

not be allowed. As soon as practicable after all submissions of proof have been received, the Judgment Officer shall make the initial decision, which he shall forthwith file with the Proceedings Clerk. Upon filing of an initial decision, the Proceedings Clerk shall immediately serve upon the parties a copy of the initial decision and a notification of the effect of a party's failure timely to appeal the initial decision to the Commission, as provided in paragraphs (d) and (e) of this section, as well as the effect of a failure by a party who has been ordered to pay a reparation award timely to file the documents required by § 12.407(c).

(b) *Content of initial decision.* In the initial decision in a summary decisional proceeding, the Judgment Officer shall:

(1) Include a brief statement of his findings as to the facts, with references to those portions of the record which support his findings;

(2) Make a determination whether or not the respondent has violated any provision of the Commodity Exchange Act, or rule, regulation or order thereunder;

(3) Make a determination whether the complainant is liable to any respondent who has made a counterclaim in the proceeding;

(4) Determine the amount of damages, if any, that the complainant has sustained as a result of respondent's violations, the amount of punitive damages, if any, for which respondent is liable to complainant, which shall not exceed \$30,000, exclusive of interest and costs; and the amount, if any, for which complainant is liable to respondents based on counterclaims, which, in aggregate, shall not exceed \$30,000, exclusive of interest and costs; and

(5) Include an order directing either the respondent or the complainant, depending upon whose liability is greater, to pay an amount based on the difference in the amounts determined pursuant to paragraph (b)(4) of this section, on or before a date fixed in the order.

(c) *Costs; prejudgment interest.* The Judgment Officer may, in the initial decision, award costs (including the costs of instituting the proceeding, and if appropriate, reasonable attorneys'

fees) and, if warranted as a matter of law under the circumstances of the particular case, prejudgment interest to the party in whose favor a judgment is entered.

(d) *Effect of initial decision.* The initial decision shall become the final decision and order of the Commission thirty (30) days after service thereof, except:

(1) The initial decision shall not become the final decision as to a party who shall have timely filed and perfected an appeal thereof to the Commission in accordance with §12.401 of these rules; and

(2) The initial decision shall not become final as to any party to the proceeding if, within thirty (30) days after service of the initial decision, the Commission itself shall have placed the case on its own docket for review or stayed the effective date of the initial decision.

(e) *Effect of failure to file and perfect an appeal to the Commission.* Unless the Commission takes review on its own motion, the timely filing and perfection of an appeal to the Commission of the initial decision is mandatory as a prerequisite to appellate judicial review of a final decision and order entered pursuant to these rules.

[49 FR 6621, Feb. 22, 1984, as amended at 59 FR 9638, Mar. 1, 1994]

Subpart E—Rules Applicable to Formal Decisional Proceedings

§ 12.300 Scope and applicability of rules.

The rules set forth in this subpart are applicable to proceedings forwarded pursuant to §12.26(c) of the Reparation Rules. The rules in subpart B permitting discovery are applicable in a formal decisional proceeding, as supplemented by §12.301. Unless specifically made applicable, the rules prescribed in subparts C and D shall not apply to formal decisional proceedings. Parties to a proceeding forwarded pursuant to §12.26(c) may, by written agreement filed at any time prior to the issuance of an initial decision, or of any other order disposing of all issues in the proceeding, elect to have all issues in the proceeding decided pursuant to the voluntary decisional procedure. Upon receiving a timely filed stipulation

signed by all parties evidencing such an election, the Administrative Law Judge shall conduct the proceeding and render a decision pursuant to subpart C of these rules.

§§ 12.301–12.302 [Reserved]

§ 12.303 Pre-decision conferences.

During the time period permitted for discovery pursuant to §12.30(d), and thereafter, the Administrative Law Judge may, in his discretion, conduct one or more pre-decision conferences to be held in Washington, DC or by telephone, with all parties for the purposes of:

(a) Discussing the advisability of electing the voluntary decisional procedure;

(b) Encouraging a settlement of the entire case, or any part thereof (such discussions may be *ex parte* with the consent of all parties);

(c) Simplifying or clarifying issues;

(d) Obtaining stipulations, admissions of fact and of authenticity of documents;

(e) Discussing amendments or supplements to the pleadings;

(f) Encouraging an early settlement of disputes relating to discovery; and

(g) Discussing any matters of relevance in the proceeding.

At or following the conclusion of a pre-decision conference, the Administrative Law Judge may serve a pre-decision memorandum and order setting forth the agreements reached by the parties, any procedural determinations made by him, and the issues for resolution not disposed of by admissions or agreements by the parties. Such an order shall control the subsequent course of the proceeding unless modified to prevent injustice.

[49 FR 6621, Feb. 22, 1984, as amended at 57 FR 20638, May 14, 1992]

§ 12.304 Functions and responsibilities of the Administrative Law Judge.

Once he has been assigned the case, the Administrative Law Judge shall be responsible for the fair and orderly conduct of a formal decisional proceeding and shall have the authority:

(a) To issue such orders as are described in §12.34 of these rules;

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(b) To issue subpoenas pursuant to §§ 12.34, 12.36, and 12.313 of these rules;

(c) To take such action as is appropriate pursuant to § 12.35 if a party fails to comply with a discovery order, or an order issued pursuant to § 12.34 of these rules;

(d) [Reserved]

(e) In his discretion, to conduct pre-decision conferences, for the purposes prescribed in § 12.303, at any time after a proceeding has commenced pursuant to § 12.26(c);

(f) To issue pre-hearing orders as required by § 12.312(a);

(g) To certify interlocutory matters to the Commission for its determination in accordance with § 12.309;

(h) To issue orders of dismissal pursuant to § 12.308;

(i) To issue default orders for good cause against parties who fail to participate in the proceeding, or to comply with these rules;

(j) If appropriate, to issue orders for summary disposition in the manner prescribed by § 12.310;

(k) If an oral hearing is ordered, to preside at the oral hearing, which shall include the authority to receive relevant evidence, to administer oaths and affirmations, to examine witnesses, and to rule on offers of proof;

(l) To make the initial decision; and

(m) To issue such orders, and take any other actions as are required to give effect to these rules.

[49 FR 6621, Feb. 22, 1984; 49 FR 15070, Apr. 17, 1984; 49 FR 17750, Apr. 25, 1984, as amended at 57 FR 20637, May 14, 1992]

§ 12.305 Disqualification of Administrative Law Judge.

(a) *At his own request.* An Administrative Law Judge may withdraw from a formal decisional proceeding when he considers himself to be disqualified on the grounds of personal bias, conflict of interest, or similar bases. In such event, he shall immediately notify the Commission and each of the parties of his withdrawal and of his basis for such action.

(b) *Upon the request of a party.* Any party may request an Administrative Law Judge to disqualify himself on the grounds of personal bias, conflict of interest, or similar bases. Interlocutory review of an order denying such a re-

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quest may be sought without certification of the matter by an Administrative Law Judge, only in accordance with the procedures set forth in § 12.309 of these rules.

§ 12.306 Filing of documents; subscription; service.

Except as otherwise specifically provided in these rules, all documents filed in a formal decisional proceeding including, but not limited to, amended or supplemental pleadings, motions, discovery notices or requests, and responses thereto, documents filed or produced pursuant to § 12.34 of these rules, and submissions of proof, shall meet the requirements of §§ 12.11 and 12.12 of the rules as to form, and shall be filed and served in accordance with § 12.10 of the Reparation Rules.

§ 12.307 Amended and supplemental pleadings.

(a) *Amendments to pleadings.* At any time before the parties have concluded their submissions of proof, the Administrative Law Judge may allow amendments of the pleadings either upon written consent of the parties or for good cause shown. Any party may file a response to a motion to amend the pleadings within ten (10) days after the date of service upon him of the motion.

(b) *Supplemental pleadings.* At any time before the parties have concluded their submissions of proof, and upon such terms as are just, an Administrative Law Judge may, upon motion by a party, permit a party to serve a supplemental pleading setting forth transactions, occurrences or events which have happened since the date of the pleadings sought to be supplemented and which are relevant to the issues in the proceeding. Any party may file a response to a motion to supplement the pleadings with ten (10) days after the date of service upon him of the motion.

(c) *Pleadings to conform to the evidence.* When issues not raised by the pleadings but reasonably within the scope of a formal decisional proceeding are tried with the express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.

§ 12.308 Motions.

(a) *In general.* An application for a form of relief not otherwise specifically provided for in this subpart E shall be made by a motion, which shall be in writing (unless made on the record during an oral hearing). The motion shall state the relief sought and the basis for the relief and may set forth the authority relied upon. All motions, unless otherwise provided in these rules, shall be directed to the Administrative Law Judge before the initial decision is filed, and to the Commission after the initial decision is filed.

(b) *Answer to motions.* Any party may serve and file a written response to a motion within ten (10) days after service of the motion upon him, or within such longer or shorter period as established by these rules, or as the Administrative Law Judge or the Commission may direct.

(c) *Dismissal*—(1) *By the Administrative Law Judge.* The Administrative Law Judge, acting on his own motion, may, at any time after he has been assigned the case:

(i) Dismiss the entire proceeding, without prejudice to counterclaims, if he finds that none of the matters alleged in the complaint state a claim that is cognizable in reparations; or

(ii) Order dismissal of any claim, counterclaim, or party from the proceeding if he finds that such claim or counterclaim (by itself, or as applied to a party) is not cognizable in reparations.

(2) *Motion for dismissal by a party.* Any party who believes that grounds exist for dismissal of the entire complaint, of any claim therein, of any counterclaim, or of a party from the proceeding, may file a motion for dismissal specifying the claims, counterclaims, or parties to be dismissed and the reasons therefor. Upon consideration of the whole record, the Administrative Law Judge may grant or deny such motion, in whole or in part.

(3) *Content and effect of order of dismissal.* Any order of dismissal entered pursuant to this rule shall contain a brief statement of the findings and conclusions which serve as the basis for the order. An order of dismissal of the entire proceeding pursuant to this rule shall have the effect of an initial deci-

sion which may be appealed to the Commission in accordance with the requirements set forth in §12.401 of these rules.

(d) *Motions for procedural orders.* Motions for procedural orders, including motions for extensions of time, may be acted on at any time, without awaiting a response thereto. Any party adversely affected by such action may request reconsideration, vacation or modification of such action.

(e) *Dilatory motions.* Repetitive or numerous motions dealing with the same subject matter shall not be permitted.

§ 12.309 Interlocutory review by the Commission.

Interlocutory review by the Commission of a ruling on a motion by an Administrative Law Judge may be sought only as prescribed in this rule:

(a) *When interlocutory appeal may be taken.* An interlocutory appeal may be permitted, in the discretion of the Commission, under the following circumstances:

(1) The appeal is from a ruling pursuant to §12.102, §12.202, or §12.305 refusing to grant a motion to disqualify a Judgment Officer or Administrative Law Judge;

(2) The appeal is from a ruling pursuant to §12.9 suspending an attorney from participation in a reparation proceeding;

(3) Upon a determination by the Administrative Law Judge certified to the Commission either in writing or on the record, that

(i) A ruling sought to be appealed involves a controlling question of law or policy;

(ii) An immediate appeal may materially advance the ultimate resolution of the issues in the proceeding; and

(iii) Subsequent reversal of the ruling would cause unnecessary delay or expense to the parties; or

(4) The appeal is from a ruling which satisfies the conditions of paragraphs (a)(3) (i)–(iii) of this section, despite the absence of certification, and extraordinary circumstances are shown to exist.

(b) *Procedure to obtain interlocutory review.* An application for interlocutory review may be served and filed within ten (10) days after service of a ruling

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described in paragraphs (a)(1), (a)(2), and (a)(4) of this section or of notice that a determination has been made pursuant to paragraph (a)(3) of this section. The application for interlocutory review shall contain:

(1) A statement of the facts necessary to an understanding of the controlling questions determined by the Administrative Law Judge, and to an understanding of the extraordinary circumstances warranting interlocutory review by the Commission;

(2) A statement of the question or issue involved in the ruling upon which the application for review is based;

(3) A statement of the reasons why, in the opinion of the party requesting review, the ruling was erroneous and should be reversed or modified; and

(4) A copy of all papers filed by the parties that relate to the subject matter of the ruling at issue, including the order containing the ruling.

Within seven (7) days after service of the application for interlocutory review, any party may file a response in opposition to the application.

(c) *Standard for review.* In the absence of extraordinary circumstances, the Commission will not review a ruling of an Administrative Law Judge prior to the Commission's consideration of the proceeding pursuant to subpart F of these rules. A Commission denial of an application for interlocutory review shall be without prejudice to the applying party's right to raise any argument made in the application as an issue in an appeal taken pursuant to subpart F of these rules.

(d) *Proceedings not stayed.* The filing of an application for interlocutory review and a grant of review shall not stay proceedings before an Administrative Law Judge (or a Judgment Officer, if applicable) unless that official or the Commission shall so order. The Commission will not consider a motion for a stay unless the motion shall have first been made to the Administrative Law Judge (or, if applicable, the Judgment Officer) and denied.

(e) *Interlocutory review by the Commission on its own motion.* Nothing in this rule should be construed as restricting the Commission from acting on its own motion to review on an interlocutory basis any ruling of an Administrative

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Law Judge, Proceedings Officer or a Judgment Officer in any proceeding commenced pursuant to § 12.26 of these rules.

§ 12.310 Summary disposition.

(a) *Filing of motions, answers.* Any party who believes that there is no genuine issue of material fact to be determined and that he is entitled to a decision as a matter of law concerning all issues of liability in the proceeding may file a motion for summary disposition at any time before a determination is made by the Administrative Law Judge to order an oral hearing in the proceeding. Any adverse party, within ten (10) days after service of the motion, may file and serve opposing papers or may countermove for summary disposition.

(b) *Supporting papers.* A motion for summary disposition shall include a statement of all material facts as to which the moving party contends that there is no genuine issue, supported by the pleadings, and by affidavits, other verified statements, admissions, stipulations, and interrogatories. The motion may also be supported by briefs containing points and authorities in support of the contention of the party making the motion. When a motion is made and supported as provided in this section, unless otherwise ordered by the Administrative Law Judge, an adverse party may not rest upon the mere allegations, but shall serve and file in response a statement setting forth those material facts as to which he contends a genuine issue exists, supported by affidavits and other verified material. He may also submit a brief of points and authorities.

(c) *Oral argument.* Oral argument may be heard at the discretion of the Administrative Law Judge and shall be heard in Washington, DC, or by telephonic conference call. Such argument shall be recorded, and written transcripts shall be made in the event that a grant or denial of summary disposition is reviewed by the Commission.

(d) *Summary disposition upon motion of the Administrative Law Judge.* If the Administrative Law Judge believes that there may be no genuine issue of material fact to be determined and that one

of the parties may be entitled to a decision as a matter of law, he may direct the parties to submit papers in support of and in opposition to summary disposition, and may hear oral argument, substantially as provided in paragraphs (a), (b) and (c) of this section.

(e) *Ruling on summary disposition.* The Administrative Law Judge shall grant summary disposition if the undisputed pleaded facts, affidavits, other verified statements, admissions, stipulations, and matters of official notice, show that (1) there is no genuine issue as to any material fact; (2) there is no necessity that further facts be developed in the record; and (3) a party is entitled to a decision as a matter of law.

(f) *Review of ruling; appeal.* An application for interlocutory review of an order denying a motion for summary disposition shall not be allowed. Interlocutory review of an order granting summary disposition which disposes of less than all of the issues in the proceeding may be sought only in accordance with § 12.309 of these rules. An order granting summary disposition which is dispositive of all issues, and as to all parties, in the proceeding may be appealed to the Commission in accordance with the requirements set forth in § 12.401 of these rules.

§ 12.311 Disposition of proceeding or issues without oral hearing.

If the Administrative Law Judge determines that the documentary proof and other tangible forms of proof submitted by the parties are sufficient to permit resolution of some or all of the factual issues in the proceeding without the need for oral testimony, he may order that all proof relating to such issues be submitted in documentary and tangible form, and dispose of such issues without an oral hearing. In such an event, proof in support of the complaint, answer, and reply, may be found in those verified documents, in depositions on written interrogatories, in admissible documents obtained through discovery, in other verified statements of fact, documents and tangible evidence.

§ 12.312 Oral hearing.

(a) *Notification; prehearing order.* If and when the proceeding has reached

the stage of an oral hearing, the Administrative Law Judge, giving due regard for the convenience of the parties, shall set a time for hearing, as well as a location prescribed by paragraph (b) of this section, and shall file with the Proceedings Clerk, for immediate service upon the parties:

(1) An order requiring the parties to file and serve, within fifteen days after service of the order, a prehearing memorandum setting forth briefly:

(i) A statement of all issues to be tried at the hearing;

(ii) An identification of each witness expected to be called by that party;

(iii) A summary of the testimony each witness is expected to provide; and

(2) A notice stating the time and location of the hearing.

Prior to the hearing, the Administrative Law Judge may issue an order based on the contents of the parties' memoranda filed pursuant to paragraph (a)(1) of this section, which, unless modified to prevent injustice, shall control the scope of matters to be tried at the oral hearing. If any change in the time or place of the hearing becomes necessary, it shall be made by the Administrative Law Judge, who, in such event, shall file with the Proceedings Clerk a notice of the change. Such notice shall be served upon the parties, unless it is made during the course of an oral hearing and made a part of the transcript. Hearings shall proceed expeditiously and, absent extraordinary circumstances, shall be held in one location and shall continue, without suspension, until concluded.

(b) *Location of hearing.* Unless the Director of the Office of Proceedings for reasons of administrative economy or practical necessity determines otherwise, and except as provided in this subparagraph, the location of an oral hearing shall be in one of the following cities: Albuquerque, N.M.; Atlanta, Ga.; Boston, Mass.; Chicago, Ill.; Cincinnati, Ohio; Columbia, S.C.; Denver, Colo.; Houston, Tex.; Kansas City, Mo.; Los Angeles, Cal.; Minneapolis, Minn.; New Orleans, La.; New York, N.Y.; Oklahoma City, Okla.; Phoenix, Ariz.; San Diego, Cal.; San Francisco, Cal.; Seattle, Wash.; St. Petersburg, Fla.;

and Washington, DC. The Administrative Law Judge may, in any case where a party avers, in an affidavit, that none of the foregoing cities is located within 300 miles of his principal residence, waive this paragraph and, upon giving due regard for the convenience of all of the parties, order that the hearing be held in a more convenient locale.

(1) *Who may appear.* The parties may appear in person, by counsel, or by other representatives of their choosing, subject to the provisions of §12.9 of these rules concerning practice before the Commission.

(2) *Effect of failure to appear.* If any party to the proceeding fails to appear at the hearing, or at any part thereof, he shall to that extent be deemed to have waived the opportunity for an oral hearing in the proceeding. The Administrative Law Judge, for just cause, may take such action as is appropriate pursuant to §12.35 of these rules against a party who fails to appear at the hearing. In the event that a party appears at the hearing and no party appears for the opposing side, the party who is present may present his evidence, in whole or in part, in the form of affidavits or by oral testimony, before the Administrative Law Judge.

(c) *Public hearings.* All oral hearings shall be public except that upon application of a party or affected witness the Administrative Law Judge may direct that specific documents or testimony be received and retained non-publicly in order to prevent unwarranted disclosure of trade secrets or sensitive commercial or financial information or an unwarranted invasion of personal privacy.

(d) *Conduct of the hearing.* Subject to paragraph (e) of this section, and except as otherwise provided, at an oral hearing every party shall be entitled to:

(1) *Conduct direct and cross-examination of parties and witnesses.* All witnesses at a hearing for the purpose of taking evidence shall testify under oath or affirmation, which shall be administered by the Administrative Law Judge. Unless otherwise ordered by the Administrative Law Judge, parties shall be entitled to present oral direct testimony and other documentary proof, and to conduct direct examina-

tion and cross examine adverse parties and witnesses. To expedite the hearing, the Administrative Law Judge may, in his discretion, order that the direct testimony of the parties and their witnesses be presented in documentary form, by affidavit, interrogatory, and other documents. In any event, the Administrative Law Judge, in his discretion, may permit cross examination, without regard to the scope of direct testimony, as to any matter which is relevant to the issues in the proceeding;

(2) *Introduce exhibits.* The original of each exhibit introduced in evidence or marked for identification shall be filed unless the Administrative Law Judge permits the substitution of copies for the original documents. A copy of each exhibit introduced by a party or marked for identification at his request shall be supplied by him to the Administrative Law Judge and to each other party to the proceeding. Exhibits shall be maintained by the reporter who shall serve as custodian of the exhibits until they are transmitted to the Proceedings Clerk pursuant to paragraph (f) of this section;

(3) *Make objections.* A party shall timely and briefly state the grounds relied upon for any objection made to the introduction of evidence. Formal exception to an adverse ruling shall not be required; and

(4) *Make offers of proof.* When an objection to a question propounded to a witness is sustained, the examiner may make a specific offer of what he expects to prove by the answer of the witness. Rejected exhibits, adequately marked for identification, shall be retained in the record so as to be available for consideration by any reviewing authority.

(e) *Admissibility of evidence.* Relevant, material and reliable evidence shall be admitted. Irrelevant, immaterial, unreliable and unduly repetitious evidence shall be excluded.

(f) *Record of an oral hearing.* Oral hearings for the purpose of taking evidence shall be recorded and shall be transcribed in written form under the supervision of the Administrative Law Judge by a reporter employed by the Commission for that purpose. The original transcript shall be a part of

the record and shall be the sole official transcript. Copies of transcripts, except those portions granted non-public treatment, shall be available from the reporter at rates not to exceed the maximum rates fixed by the contract between the Commission and the reporter. As soon as practicable after the close of the hearing, the reporter shall transmit to the Proceedings Clerk the transcript of the testimony and the exhibits introduced in evidence at the hearing, except such portions of the transcript and exhibits as shall have already been delivered to the Administrative Law Judge.

(g) *Proposed findings of fact and conclusions law; briefs.* An Administrative Law Judge, upon his own motion or upon motion of a party, may permit the filing of post-hearing proposed findings of fact and conclusions of law. Absent an order permitting such findings and conclusions, none shall be allowed. Unless otherwise ordered by the Administrative Law Judge and for good cause shown, the proposed findings and conclusions (including briefs in support thereof), shall not exceed twenty-five (25) pages and shall be filed not later than forty-five (45) days after the close of the oral hearing.

[49 FR 6621, Feb. 22, 1984; 49 FR 15070, Apr. 17, 1984]

§ 12.313 Subpoenas for attendance at an oral hearing.

(a) *In general*—(1) *Application for issuance of subpoenas.* An application for a subpoena requiring a party or other person to appear and testify at an oral hearing (subpoena *ad testificandum*) or to appear and testify and to produce specified documentary or tangible evidence at the hearing (subpoena *duces tecum*), shall (unless made orally at a hearing) be filed in writing and in duplicate, but need not be served upon other parties. The application shall be accompanied by the original and one copy of the subpoena.

(2) *Standards for issuance or denial of subpoenas.* The Administrative Law Judge considering any application for a subpoena shall issue the subpoena if he is satisfied the application complies with this rule and the request is not unreasonable, oppressive, excessive in scope or unduly burdensome. In the

event the Administrative Law Judge determines that a requested subpoena or any of its terms is unreasonable, oppressive, excessive in scope, or unduly burdensome, he may refuse to issue the subpoena, or may issue it only upon such conditions as he determines fairness requires.

(b) *Special requirements relating to application for an issuance of subpoenas for the appearance of commission employees*—

(1) *Form.* An application for the issuance of a subpoena shall be made in the form of a written motion served upon all other parties, if the subpoena would require the appearance of a Commissioner or an official or employee of the Commission.

(2) *Content.* The motion shall specifically describe the material to be produced, the information to be disclosed, or the testimony to be elicited from the witness, and shall show

(i) The relevance of the material, information, or testimony to the matters at issue in the proceeding;

(ii) The reasonableness of the scope of the proposed subpoena; and

(iii) That such material, information, or testimony is not available from other sources.

(3) *Rulings.* The motion shall be decided by the Administrative Law Judge and his order shall provide such terms and conditions for the production of the material, the disclosure of the information, or the appearance of the witnesses as may appear necessary and appropriate for the protection of the public interest.

(c) *Service of subpoenas*—(1) *How effected.* Service of a subpoena upon a party shall be made in accordance with § 12.10 of these rules. Service of a subpoena upon any other person shall be made by delivering a copy of the subpoena to him as provided in paragraph (c) (2) or (3) of this section, and by tendering to him the fees for one day's attendance and the mileage as specified in paragraph (e) of this section. When the subpoena is issued at the instance of any officer or agency of the United States, fees and mileage need not be tendered at the time of service.

(2) *Service upon a natural person.* Delivery of a copy of a subpoena and tender of fees and mileage to a natural person may be effected by (i) handing

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them to the person; (ii) leaving them at his office with the person in charge thereof or, if there is no one in charge, by leaving the subpoena in a conspicuous place therein; (iii) leaving them at his dwelling place or usual place of abode with some person of suitable age and discretion then residing therein; (iv) mailing them by registered or certified mail to him at his last known address; or (v) any other method whereby actual notice is given to him and the fees and mileage are timely made available.

(3) *Service upon other persons.* When the person to be served is not a natural person, delivery of a copy of the subpoena and tender of the fees and mileage may be effected by

(i) Handing them to a registered agent for service, or to any officer, director, or agent in charge of any office of such person;

(ii) Mailing them by registered or certified mail to any such representative at his last known address; or

(iii) Any other method whereby actual notice is given to any such representative and the fees and mileage are timely made available.

(d) *Motion to quash subpoena.* At or any time before the time specified in the subpoena for compliance therewith, a person upon whom a subpoena has been served may file a motion to quash or modify the subpoena with the Administrative Law Judge who issued the subpoena, and serve a copy of the motion on the party who requested the subpoena. Such motion shall include a brief statement of the reasons therefor. After due notice to the person upon whose request the subpoena was issued, and an opportunity for that person to respond, the Administrative Law Judge may (1) quash or modify the subpoena, or (2) condition denial of the application to quash or modify the subpoena upon just and reasonable terms, including, on the case of a subpoena *duces tecum*, a requirement that the person on whose behalf the subpoena was issued shall advance the reasonable cost of producing documentary or other tangible evidence.

(e) *Attendance and mileage fees.* Persons summoned to testify at a hearing under requirement of subpoenas are entitled to the same fees and mileage as

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are paid to witnesses in the courts of the United States. Fees and mileage shall be paid by the party at whose instance the persons are subpoenaed or called.

(f) *Enforcement of subpoenas.* Upon failure of any person to comply with a subpoena issued at the request of a party, that party may petition the Commission, in its discretion, to institute an action in an appropriate U.S. District Court for enforcement of the subpoena.

[49 FR 6621, Feb. 22, 1984; 49 FR 15070, Apr. 17, 1984]

§ 12.314 Initial decision.

(a) *In general.* The Administrative Law Judge as soon as practicable after the parties have completed their submissions of proof, or after the conclusion of an oral hearing if one is held, shall render the initial decision, which he shall forthwith file with the Proceedings Clerk, and a copy of which shall be served immediately by the Proceedings Clerk upon each of the parties. The Proceedings Clerk shall also serve a notice, to accompany the initial decision, of the effect of a party's failure timely to appeal to the Commission the initial decision, as provided in paragraphs (d) and (e) of this section, and the effect of a failure of a party who has been ordered to pay a reparation award timely to file the documents required by § 12.407(c).

(b) *Content of initial decision.* In the initial decision the Administrative Law Judge shall:

(1) Include a brief statement of his findings as to the facts, with references to those portions of the record which support his findings;

(2) Make a determination whether or not the respondent has violated any provision of the Commodity Exchange Act, or rule, regulation or order thereunder;

(3) Make a determination whether the complainant is liable to any respondent who has made a counterclaim in the proceeding;

(4) Determine the amount of damages, if any, that the complainant has sustained as a result of respondent's violations, the amount of punitive damages if warranted, and the amount, if any, for which complainant is liable

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to a respondent based on a counterclaim; and

(5) Include an order directing either the respondent or the complainant, depending upon whose liability is greater, to pay an amount based on the difference in the amounts determined pursuant to paragraph (b)(4) of this section, on or before a date fixed in the order.

(c) *Costs, prejudgment interest.* Except as provided in §§12.30(c) and 12.315 of these rules, the Administrative Law Judge may, in the initial decision, award costs (including the cost of instituting the proceeding and, if appropriate, reasonable attorney's fees) and, if warranted as a matter of law under the circumstances of the particular case, prejudgment interest, to the party in whose favor a judgment is entered.

(d) *Effect of initial decision.* The initial decision and order shall become the final decision and order of the Commission, without further order by the Commission, thirty (30) days after service thereof, except that:

(1) The initial decision shall not become the final decision as to a party who shall have timely filed and perfected an appeal thereof to the Commission, in accordance with §12.401 of these rules; and

(2) The initial decision shall not become final as to any party to the proceeding if, within thirty (30) days after service of the initial decision, the Commission itself shall have placed the case on its own docket for review or stayed the effective date of the initial decision.

(e) *Effect of failure to file and perfect an appeal to the Commission.* Unless the Commission takes review of an initial decision on its own motion, the timely filing and perfection of an appeal to the Commission of the initial decision is mandatory as a prerequisite to appellate judicial review of a final decision and order entered pursuant to these rules.

[49 FR 6621, Feb. 22, 1984; 49 FR 15070, Apr. 17, 1984, as amended at 59 FR 9638, Mar. 1, 1994]

§ 12.315 Consequences of overstating damages claims not in excess of \$30,000.

If a party, who has claimed damages in excess of \$30,000, is adjudged to be entitled to recover less than the sum or value of \$30,000, computed without regard to a damage award to which an opposing party may be adjudged to be entitled, and exclusive of interest and costs, the Administrative Law Judge may assess such party the cost of the transcript of an oral hearing, if such a hearing is held, and, depending upon whether such party paid any part of the filing fee for the proceeding, deny the party such costs or impose such costs on that party.

[49 FR 6621, Feb. 22, 1984, as amended at 59 FR 9638, Mar. 1, 1994]

Subpart F—Commission Review of Decisions

§ 12.400 Scope and applicability of rules.

The rules set forth in this subpart are applicable to proceedings forwarded pursuant to §12.26 (b) and (c) of these rules. Except as provided in §§12.106(e) and 12.403(b) of these rules, the rules set forth in this subpart are not applicable to proceedings forwarded pursuant to §12.26(a) of the Reparation Rules.

[49 FR 6621, Feb. 22, 1984; 49 FR 15070, Apr. 17, 1984]

§ 12.401 Appeal to the Commission.

(a) *How effected.* Any aggrieved party to a proceeding forwarded pursuant to §12.26 (b) or (c) of these rules may appeal to the Commission an initial decision or other disposition of the entire proceeding by complying with the requirements of this section. An appealing party shall serve upon all parties and file with the Proceedings Clerk a notice of appeal within fifteen (15) days after service of the initial decision or other order disposing of the entire proceeding. The notice need consist only of a brief statement indicating the filing party's intent to appeal the initial decision, and shall include the date upon which the initial decision was rendered, the names of all parties, and the docket number of the proceeding. A

non-refundable appellate filing fee in the amount of \$50 shall be paid at the time of filing a notice of appeal. The failure of a party timely to file and serve a notice of appeal, and to pay the appellate filing fee, in accordance with this paragraph, or to perfect the appeal in accordance with paragraph (b) of this section, shall constitute a voluntary waiver of any objection to the initial decision, or other order disposing of the proceeding, and of all further administrative or judicial review under these rules and the Commodity Exchange Act.

(b) *Perfecting the appeal; appeal brief.* An appeal shall be perfected by the appealing party by timely filing with the Proceedings Clerk an appeal brief which meets the requirements of paragraphs (b) and (d) of this section. An original and one copy of the appeal brief shall be filed within thirty (30) days after filing of the notice of appeal. By motion of the appealing party, the Commission may, for good cause shown, extend the time for filing the appeal brief. If the appeal brief is not filed within the time prescribed in this subparagraph, the Commission may, upon its own motion or upon motion by a party, dismiss the appeal, in which event the initial decision shall become the final decision and order of the Commission, effective upon service of the order of dismissal.

(c) *Answering brief.* Any party upon whom the appealing party serves a brief may, within thirty (30) days after service of the appeal brief, file an original and one copy of an answering brief, and serve one copy thereof, unless the time limit is extended by the Commission upon motion of the party and for good cause shown.

(d) *Briefs.* Parties filing an appeal brief or answering brief pursuant to this section shall meet the requirements of §12.11 of these rules as to form. The content of briefs shall satisfy the requirements of §10.102(d) of the Commission's regulations, 17 CFR 10.102(d), except that any party, with leave of the Commission, may file an informal document in lieu of a brief. No brief shall exceed thirty-five (35) pages in length without leave of the Commission.

(e) *Oral argument.* Any party may request, in writing and within the time provided for filing the initial briefs, the opportunity to present oral argument before the Commission, which the Commission may, in its discretion, grant or deny. In the event the Commission affords the parties the opportunity to present oral argument before the Commission, the oral argument shall proceed in accordance with the provisions of §10.103 of the Commission's regulations, 17 CFR 10.103.

(f) *Scope of review.* On review, the Commission may, in its discretion, consider *sua sponte* any issues arising from the record and may base its determination thereon, or limit the issues to those presented in the statement of issues in the briefs, treating those issues not raised as waived.

[49 FR 6621, Feb. 22, 1984; 49 FR 15070, Apr. 7, 1984]

§ 12.402 Appeal of disposition of less than all claims or parties in a proceeding.

(a) *In general.* Where two or more different claims for relief are presented, or where multiple parties are involved, in a proceeding forwarded pursuant to §12.26 (b) or (c) of these rules, the Judgment Officer or Administrative Law Judge, may upon his own motion or by motion of a party, direct that an initial decision or other order disposing of one or more, but fewer than all of the claims or parties, shall be final and immediately appealable to the Commission. Such a direction may be made only upon an express determination that there is no just reason for delay. When such a direction is made, a party may appeal the initial decision or order in accordance with the procedure prescribed by §12.401 of these rules.

(b) *When decision is not appealable.* In the absence of such a direction by the Judgment Officer or an Administrative Law Judge, an initial decision or order disposing of fewer than all of the claims or all of the parties shall be subject to revision by the decisionmaker at any time before a disposition is made of all remaining claims or parties, and no appeal may be taken to the Commission pursuant to this rule.

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§ 12.403 Commission review on its own motion.

(a) *In general.* The Commission may on its own motion, within 30 days after it has been served on all parties, determine to review an initial decision, or other order disposing of all issues in the proceeding as to all claims and all parties, in a proceeding forwarded pursuant to §12.26 (b) and (c) of these rules. In such event, the Commission may determine the scope of the issues on review, and make provisions for the filing of briefs or, if deemed appropriate, such other means for the parties to present their views. The parties shall be duly notified thereof by the Proceedings Clerk.

(b) *Commission review of a final decision in a voluntary decisional proceeding.* If such action is necessary to prevent manifest injustice, the Commission may, upon its own motion, review a final decision issued pursuant to §12.106 of these rules by appropriate order filed with the Proceedings Clerk within 30 days after service upon the parties of the final decision. In such event, the Commission may determine the scope of the issue on review, make provisions for the filing of briefs (or, if deemed appropriate, such other means for the parties to present their views). The parties shall be duly notified thereof by the Proceedings Clerk.

§ 12.404 The record of proceedings.

The record of proceedings on appeal before the Commission shall include: The pleadings; motions and requests filed, and rulings thereon; the transcript of the testimony taken at an oral hearing, together with the exhibits filed therein; the transcript of testimony taken during an oral examination by telephone; any statements or stipulations filed in any proceeding; any documents or papers filed in connection with prehearing conferences; such proposed findings of fact, conclusions, and orders and briefs as may have been permitted to be filed in connection with an oral hearing; such statements of objections, and briefs in support thereof, as may have been filed in the proceedings; and the initial (or

final) decision, or other order disposing of issues in the proceeding.

[49 FR 6621, Feb. 22, 1984, as amended at 59 FR 9638, Mar. 1, 1994]

§ 12.405 Leave to adduce additional evidence.

Any time prior to issuance of its final decision pursuant to §12.406, the Commission may, after notice to the parties and an opportunity for them to present their views, reopen the hearing to receive further evidence. The application shall show to the satisfaction of the Commission that the additional evidence is material, and that there were reasonable grounds for failure to adduce such evidence at the hearing. The Commission may receive the additional evidence or may remand the proceeding to the Judgment Officer or Administrative Law Judge to receive the additional evidence.

§ 12.406 Final decision of the Commission.

(a) *Opinion and order.* Unless the Commission, in accordance with paragraph (b) of this section, orders summary affirmance of the initial decision, the Commission's opinion and order in a proceeding appealed pursuant to §12.401 of these rules shall constitute the Commission's final decision, effective upon service. On review, the Commission may affirm, reverse, modify, set aside or remand for further proceedings, in whole or in part, the initial decision and make any findings or conclusions which in its judgment are warranted based on the record in the proceeding.

(b) *Order on summary affirmance.* If the Commission, in its opinion, finds that the result reached in the initial decision is substantially correct and that none of the arguments on appeal made by the appealing party raise any important question of law or policy, the Commission may, by appropriate order, summarily affirm the initial decision and order without opinion, which shall constitute the Commission's final decision, effective upon service. Unless the Commission expressly indicates otherwise in its order, an order of summary affirmance does

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not reflect a Commission determination to adopt the initial decision, including any rationale contained therein, as its opinion and order, and neither initial decision nor the Commission's order of summary affirmance shall serve as a Commission precedent in other proceedings.

(c) *Filing and service of final decision.* The Commission shall, upon issuance of a final decision pursuant to this § 12.406, file the final decision with the Proceeding's Clerk, who shall forthwith serve upon each of the parties a copy of the final decision as well as notice of the effect of a party's failure to pay a reparation award as provided in § 12.407 of these rules, and of an aggrieved party's right to obtain judicial review of the final decision pursuant to section 14(e) of the Act, 7 U.S.C. 18(e).

(d) *Date of the reparation order.* For purposes of computing the 30-day period for filing the appeal bond required by section 14(e) of the Act, 7 U.S.C. 18(e), "the date of the reparation order" shall be the date that the Commission's opinion and order (or order of summary affirmance, as the case may be) is filed with the Proceedings Clerk. This date shall be reflected by the date stamp on the first page of the Commission's order.

[49 FR 6621, Feb. 22, 1984, as amended at 53 FR 17692, May 18, 1988]

§ 12.407 Satisfaction of reparation award; enforcement; sanctions.

(a) *Satisfaction of reparation award—*
(1) *Where initial decision has become the final decision.* Any reparation award ordered in an initial decision, or similar dispositive order (but not a final decision issued pursuant to § 12.106 of these rules), shall be satisfied in full within forty-five (45) days after service of the initial decision, unless a timely appeal thereof has been perfected pursuant to § 12.401, or unless the Commission, pursuant to § 12.403(a), has stayed the effective date of the initial decision.

(2) *Final decision pursuant to § 12.406.* Any reparation award ordered in a final decision of the Commission issued pursuant to § 12.406 of these rules shall be satisfied in full within fifteen (15) days after service of the final decision, or such other longer period of time as may be specified in the final decision,

unless a petition for review is filed in accordance with section 14(e) of the Act, 7 U.S.C. 18(e).

(b) *Enforcement of reparation award.* If any person against whom a reparation award has been made does not timely comply with paragraph (a) or (b) of this section, the party in whose favor the award is made is entitled to seek enforcement of award in accordance with the procedure prescribed in section 14(d) of the Commodity Exchange Act, 7 U.S.C. 18(d).

(c) *Automatic suspension.* A person required to pay a reparation award shall be prohibited from trading on all contract markets and if such person is registered, his registration shall be suspended automatically, without further notice, unless such person shall, within fifteen (15) days after the time limit for satisfaction of an award (as prescribed in paragraph (a) or (b) of this section) expires, file with the Proceedings Clerk and serve on the other parties:

(1) A copy of a certified check or the equivalent showing satisfaction of the award; or

(2) A sworn release executed by each recipient of a reparation award, which has not been satisfied by payment with a certified check or the equivalent; or

(3) A verified statement that a judicial appeal has been filed and perfected in accordance with section 14(e) of the Act, 7 U.S.C. 18(e). (This paragraph is applicable only in proceedings commenced pursuant to § 12.26 (b) or (c), and only if the person has timely filed and perfected an appeal to the Commission as prescribed in § 12.401.)

(d) *Reinstatement.* The sanctions imposed in accordance with paragraph (c) of this section shall remain in effect until the person required to pay the reparation award demonstrates to the satisfaction of the Commission that he has paid the amount required in full with interest at the prevailing rate computed in accordance with 28 U.S.C. 1961 from the date directed in the final order to the date of payment, compounded annually.

(e) *Automatic suspension after appeal.* If on appeal to the U.S. Court of Appeals the appellee prevails, or if the appeal is dismissed, the automatic prohibition against trading and suspension of registration shall become effective

at the expiration of thirty (30) days from the date of judgment on the appeal, but if the judgment is stayed by a court of competent jurisdiction, the suspension shall become effective ten (10) days after the expiration of such stay, unless prior thereto the judgment of the court or the final order of the Commission has been satisfied.

[49 FR 6621, Feb. 22, 1984; 49 FR 15070, Apr. 17, 1984, as amended at 50 FR 40332, Oct. 3, 1985]

§ 12.408 Delegation of authority to the Deputy General Counsel for Opinions.

Pursuant to the authority granted under section 2(a)(4) and 2(a)(11) of the Commodity Exchange Act, as amended, 7 U.S.C. 4a(c) and 4a(j), the Commission hereby delegates, until such time as it orders otherwise, the following functions to the General Counsel, to be performed by him or such person or persons under his direction as he may designate from time to time:

(a) With respect to reparation proceedings conducted pursuant to section 14 of the Commodity Exchange Act, as amended, 7 U.S.C. 18, and subject to the Commission's Reparation Rules as set forth in part 12 of this chapter, to:

(1) Consider and decide miscellaneous procedural motions that may be directed to the Commission pursuant to part 12 of these rules after the initial decision or other order disposing of the entire proceeding has been filed;

(2) Remand, with or without specific instructions, initial decisions or other orders disposing of the entire proceeding to the appropriate officer (Director of the Office of Proceedings, Judgment Officer, or Administrative Law Judge) in the following situations:

(i) Where a default order or award has been made pursuant to part 12 of these rules and a motion to vacate the default or an equivalent request has been made; or

(ii) Where, in his judgment, clarification or supplementation of an initial decision or other order disposing of the entire proceeding prior to Commission review is appropriate; and

(iii) Where, in his judgment, a ministerial act necessary to the proper conduct of the proceeding has not been performed.

(3) Deny applications for interlocutory review by the Commission of a ruling of an Administrative Law Judge in cases in which the Administrative Law Judge has not certified the ruling to the Commission in the manner prescribed by § 12.309 of these rules, and the ruling does not concern the disqualification of, or a motion to disqualify, an Administrative Law Judge, or Judgment Officer, or the suspension of, or failure to suspend, an attorney from participating in reparation proceedings;

(4) Dismiss any appeal from an initial decision or other disposition of the entire proceeding by an Administrative Law Judge (or Judgment Officer), in a proceeding where such appeal is not filed or perfected in accordance with § 12.401, and deny any application for interlocutory review if it is not filed in accordance with § 12.309 of these rules;

(5) Strike any filing that does not meet the requirements of, or is not perfected in accordance with, these part 12 rules; and

(6) Enter any order that, in his judgment, will facilitate or expedite Commission review of an initial decision or other order disposing of the entire proceeding.

(b) Notwithstanding the provisions of paragraph (a) of this section, in any case in which he believes it appropriate, the General Counsel or his designee may submit the matter to the Commission for its consideration.

(c) Within seven (7) days after service of a ruling issued pursuant to this § 12.408, a party may file with the Commission a petition for reconsideration of the ruling. Unless the Commission orders otherwise, the filing of a petition for reconsideration shall not operate to stay the effective date of such ruling.

[49 FR 6621, Feb. 22, 1984; 49 FR 15070, Apr. 17, 1984; 49 FR 17750, Apr. 25, 1984, as amended at 57 FR 20638, May 14, 1992; 59 FR 9638, Mar. 1, 1994; 64 FR 43071, Aug. 9, 1999]

PART 13—PUBLIC RULEMAKING PROCEDURES

Sec.

13.1 Scope.

13.2 Petition for issuance, amendment, or repeal of a rule.