

(e) *Replacement or supplement of deposit.* If the depository possessing a deposit determines either that the sample viability is low or that the sample quantity is low, and if this finding is made during the pendency of an application or during the term of protection of the certificate, the Office shall notify the depositor of the need for making a replacement or supplemental deposit. Such deposits will be governed by the same considerations governing the need for making an original deposit under the provisions set forth in § 97.7(d). Notification to the Office concerning deposit of the replacement or supplemental sample shall contain a statement from a person in a position to corroborate the fact, stating that the replacement or supplemental deposit is of a biological material which is identical to that originally deposited.

(f) *Term of deposit.* A voucher specimen deposit made in support of an application for plant variety protection shall be made for a term of at least twenty (20) years. In any case, samples must be stored under agreements that would make them available to the Office during the enforceable life of the certificate for which the deposit was made.

(g) *Viability of deposit.* A deposit of biological material that is capable of self-replication either directly or indirectly must be viable at the time of deposit and during the term of deposit. Viability may be tested by the depository periodically. The test must conclude only that the deposited material is capable of reproduction. No evidence necessarily is required regarding the ability of the deposited material to perform any function described in the application. If a viability test indicates that the deposit is not viable upon receipt or that the quantity of material is insufficient, the examiner shall proceed as if no deposit was made. The examiner will accept the conclusion set forth in a viability statement issued by a depository recognized under paragraph 97.7(c).

(h) *Furnishing of samples.* A deposit must be made under conditions that assure that:

(1) Public access to the deposit will not be available during pendency of the

application or during the term of protection, and

(2) All restrictions on the availability to the public of the deposited material will be irrevocably removed upon the abandonment, cancellation, expiration, or withdrawal of the certificate.

(i) *Examination procedures.* The examiner shall determine, prior to issuance of the certificate, in each application if a voucher sample deposit actually made is acceptable for plant variety protection purposes.

[70 FR 54611, Sept. 16, 2005]

#### § 97.8 Specimen requirements.

(a) The applicant may be required by the examiner to furnish representative specimens of the variety, or its flower, fruit, or seeds, in a quantity and at a specified stage of growth, as may be necessary to verify the statements in the application. Such specimens shall be packed and forwarded in conformity with instructions furnished by the examiner. If the applicant requests the examiner to inspect plants in the field before a final decision is made, all such inspection costs shall be borne by the applicant by payment of fees sufficient to reimburse the Office for all costs, including travel, per diem or subsistence, and salary.

(b) Plant specimens submitted in support of an application shall not be removed from the Office except by an employee of the Office or other person authorized by the Secretary.

(c) Plant specimens submitted to the Office shall, except as provided below, and upon request, be returned to the applicant at his or her expense after the specimens have served their intended purpose. The Commissioner, upon a finding of good cause, may require that certain specimens be retained in the Office for indefinite periods of time. Specimens which are not returned or not retained as provided above shall be destroyed.

#### § 97.9 Drawings and photographs.

(a) Drawings or photographs submitted with an application shall disclose the distinctive characteristics of the variety.

(b) Drawings or photographs shall be in color when color is a distinguishing characteristic of the variety, and the

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color shall be described by use of Nickerson's or other recognized color chart.

(c) Drawings should be sent flat, or may be sent in a suitable mailing tube, in accordance with instructions furnished by the Commissioner.

(d) Drawings or photographs submitted with an application shall be retained by the Office as part of the application file.

### §97.10 Parts of an application to be filed together.

All parts of an application, including exhibits, should be submitted to the Office together, otherwise, each part shall be accurately and clearly referenced to the application.

### §97.11 Application accepted and filed when received.

(a) An application, if materially complete when initially submitted, shall be accepted and filed to await examination.

(b) If any part of an application is so incomplete, or so defective that it cannot be handled as a completed application for examination, as determined by the Commissioner, the applicant will be notified. The application will be held a maximum of 3 months for completion. Applications not completed at the end of the prescribed period will be considered abandoned. The application fee in such cases will not be refunded.

[58 FR 42435, Aug. 9, 1993, as amended at 60 FR 17189, Apr. 4, 1995]

### §97.12 Number and filing date of an application.

(a) Applications shall be numbered and dated in sequence in the order received in the Office. Applicants will be informed in writing as soon as practicable of the number and effective filing date of the application.

(b) An applicant may claim the benefit of the filing date of a prior foreign application in accordance with section 55 of the Act. A certified copy of the foreign application shall be filed upon request made by the examiner. If a foreign application is not in the English language, an English translation, certified as accurate by a sworn or official translator, shall be submitted with the application.

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### §97.13 When the owner is deceased or legally incapacitated.

In case of the death of the owner or if the owner is legally incapacitated, the legal representative (executor, administrator, or guardian) or heir or assignee of the deceased owner may sign as the applicant. If an applicant dies between the filing of his or her application and the granting of a certificate thereon, the certificate may be issued to the legal representative, heir, or assignee, upon proper intervention.

### §97.14 Joint applicants.

(a) Joint owners shall file a joint application by signing as joint applicants.

(b) If an application for certificate is made by two or more persons as joint owners, when they were not in fact joint owners, the application shall be amended prior to issuance of a certificate by filing a corrected application, together with a written explanation signed by the original applicants. Such statement shall also be signed by the assignee, if any.

(c) If an application has been made by less than all the actual joint owners, the application shall be amended by filing a corrected application, together with a written explanation, signed by all of the joint owners. Such statement shall also be signed by the assignee, if any.

(d) If a joint owner refuses to join in an application or cannot be found after diligent effort, the remaining owner may file an application on behalf of him or herself and the missing owner. Such application shall be accompanied by a written explanation and shall state the last known address of the missing owner. Notice of the filing of the application shall be forwarded by the Office to the missing owner at the last known address. If such notice is returned to the Office undelivered, or if the address of the missing owner is unknown, notice of the filing of the application shall be published once in the Official Journal. Prior to the issuance of the certificate, a missing owner may join in an application by filing a written explanation. A certificate obtained by less than all of the joint owners under this paragraph conveys the same rights and privileges to said owners as