

(c) *Broker's responsibility for payment.* In the absence of a specific agreement, a broker is not responsible for payment to the seller by the buyer. Agreement to collect from the buyer and remit to the seller is not a guarantee by the broker that the buyer will pay for the produce purchased, unless there is a specific agreement by the broker that he will pay if the buyer does not pay. A broker who agrees to collect funds from the buyer for his principal shall render an itemized accounting to the principal promptly on receipt of payment showing the true gross selling price, all brokerage fees deducted and all expenses including auction charges, incurred in connection with the sale of the shipment. The failure to account truly and correctly and make full payment promptly is a violation of the Act. While the broker is not obliged to furnish his principal information regarding the financial condition of the buyer, if the broker furnishes such information, he must truthfully report the information available to him, and any false or misleading statements for a fraudulent purpose to the principal to encourage the sale will be a violation of the Act. A buying broker who negotiates a purchase in his own name under an agreement with his principal, is responsible for payment of the purchase price to the seller. A broker has no authority to grant allowances or adjust the seller's invoice price to the buyer without the specific prior approval of his principal.

(d) *Purchases and sales by brokers.* A person who operates in a dual capacity, both as a broker and a dealer, shall clearly disclose his status in each transaction to all parties with whom he is dealing. If such a person misrepresents himself as a broker to the buyer or the seller when he is acting as a dealer purchasing produce or selling produce he has purchased, he shall be considered to have violated the Act. When a person purchases or sells produce as a dealer, he shall not request or receive a brokerage fee from the buyer or the seller. A broker shall not negotiate a transaction where the broker is subject to the direct or indirect control of any party to the transaction other than his principal, or where the other party is subject to the

direct or indirect control of the broker without fully disclosing the circumstances to his principal and obtaining his specific prior approval.

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

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

RECEIVING MARKET COMMISSION MERCHANTS AND JOINT ACCOUNT PARTNERS

§ 46.29 Duties.

(a) *General.* All licensees who accept produce for sale on consignment or on joint account are required to exercise reasonable care and diligence in disposing of the produce promptly and in a fair and reasonable manner. A commission merchant engaged to sell consigned produce may not employ another person or firm, including auction

companies, to dispose of all or part of such produce without the specific prior authority of the consignor. A commission merchant is not authorized to sell consigned produce outside the market area where he is located without obtaining the permission of the consignor. Averaging or pooling of sales is not permissible unless the receiver obtains the specific written permission of the consignor prior to rendering the accounting. Complete and detailed records shall be prepared and maintained by all commission merchants and joint account partners covering produce received, sales, quantities lost, dates and cost of repacking or reconditioning, unloading, handling, freight, demurrage or auction charges, and any other expenses which are deducted on the accounting, in accordance with the provisions of §46.18 through §46.23. When rendering account sales for produce handled for or on behalf of another, an accurate and itemized report of sales and expenses charged against the shipment shall be made. It is a violation of section 2 of the Act to fail to render true and correct accountings in connection with consignments or produce handled on joint account. Charges which cannot be supported by proper evidence in the records of the commission merchant or joint account partner shall not be deducted. The commission merchant or joint account partner may be held liable for any financial loss and for other penalties provided by the Act, due to his negligence or failure to perform any specification or duty, express or implied, arising out of any transaction subject to the Act.

(b) *Commission charges.* Before accepting produce on consignment, the parties should reach a definite agreement on the amount of the commission and other charges which will be assessed by the commission merchant. In the absence of such an agreement, only the usual and customary commission and other charges shall be permitted. The receiver may not reconsign produce to another person or firm, including auction companies, and incur additional commissions, charges or expenses without the specific prior authority of the consignor. Unless otherwise agreed upon by the parties, joint account part-

ners shall not charge a commission fee or other selling charges against the joint account for disposing of the produce. When a portion of a consigned shipment is purchased by the commission merchant he shall not charge or receive a commission fee for such sales.

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

(d) *Filing carrier claims.* Without the prior consent of the owner of the produce, a commission merchant has no authority to file claims with carriers in his own name or any other name: *Provided*, That the commission merchant may file a claim for breakage where the owner has been paid for the full value of the produce without any deduction for damage. Commission merchants have no obligation to file carrier claims on shipments for the owners. However, when a commission merchant in a transaction receives information valuable to the consignor in connection with carrier claim rights, the commission merchant should promptly advise the consignor. Before a commission merchant files a carrier claim on a consigned shipment, a specific agreement shall be reached with the consignor. If a commission merchant is authorized and agrees to file the claim, he shall forward a copy of the claim filed with the carrier to the

consignor and shall exercise reasonable care to protect the interests of the consignor by filing the claim promptly and in the proper amount, supported by adequate evidence, and shall take the necessary action to bring the matter to a conclusion. When settlement of the claim is effected, he shall promptly remit the net amount due the consignor, after deducting the agreed handling charges. Full and complete information shall be furnished the consignor while the claim is being handled. If the consignor is to file the claim, the commission merchant shall exercise reasonable care to protect the claim rights of the consignor and shall promptly furnish all necessary information and evidence from his records to enable the consignor to file a proper claim. A joint account partner who files a carrier claim on behalf of the partnership shall forward a copy of the claim filed with the carrier to his partner, keep him advised of its status, and remit promptly his share of the net proceeds realized from such claim.

#### GROWERS' AGENTS AND SHIPPERS

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

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

(b) Growers' agents sell and distribute produce for or on behalf of growers and others and, in addition, may perform a wide variety of services, such as financing, planting, harvesting, grading, packing, furnishing labor, seed, containers, and other supplies or services. They usually distribute the produce in their own names and collect payment direct from the consignees. They render accountings to their principals, paying the net proceeds after deducting their expenses and fees. Some agents are limited by contract to making only sales and cannot joint or consign produce without obtaining the prior consent of the growers. Other

agents are granted blanket authority by the growers to market and distribute the produce, using their discretion as to the best methods, depending on market conditions and the quality of the produce available. They can sell, consign or ship on joint account, use the services of brokers or sell through terminal market auctions. They are authorized to grant credits, make adjustments in the invoice price, handle claims with the carriers, or even abandon shipments, when circumstances justify such action, without consulting the growers. Some agents have an agreement with the growers to pool the produce and render accountings on the basis of the average or prorated selling prices after deducting the prorated expenses incurred for the various operations performed and the agents' selling fees. Some agents's contracts require an accounting on the basis of actual selling prices after deducting the actual expenses incurred for services performed and the selling fees. Some agents' contracts specify a fixed charge for harvesting, grading, packing, furnishing the container or other services, plus a selling fee, and thereby substantially reduce the record requirements necessary to prove the cost of the various operations.

##### **§ 46.31 Duties of shippers.**

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

(b) *Receiving records.* Each shipper shall prepare and maintain a record of all produce handled including his own