

Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF AGRICULTURE

Office of the Secretary

7 CFR Parts 1 and 47

Rules of Practice

AGENCY: Office of the Secretary of Agriculture, USDA.

ACTION: Proposed rule.

SUMMARY: We are proposing to amend the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes and the Rules of Practice Under the Perishable Agricultural Commodities Act. The purpose of the proposal is to provide that the adjudication, under the Perishable Agricultural Commodities Act, of whether an individual is "responsibly connected" with a particular commission merchant, dealer, or broker will be joined with any related disciplinary proceedings against the same commission merchant, dealer, or broker; and to provide that any adjudications of such status be made by Administrative Law Judge of the Department of Agriculture.

DATES: Consideration will be given only to comments received on or before August 2, 1995.

ADDRESSES: Please send an original and three copies of your comments to Barbara S. Good, Trial Attorney, Office of the General Counsel, USDA, Room 2446, South Building, 14th Street and Independence Avenue, S.W., Washington, DC 20250-1400. Comments received may be inspected at USDA, Room 2446, South Building, 14th Street and Independence Avenue S.W., Washington, DC 20250-1400, between 9:00 a.m. and 5:30 p.m., Monday through Friday, except holidays. Persons wishing to inspect comments are encouraged to call (202) 720-7357 in advance to make arrangements.

FOR FURTHER INFORMATION CONTACT: Mary Hobbie, Assistant General Counsel, Trade Practices Division, Office of the General Counsel, USDA,

Room 2446 South Building, 14th Street and Independence Avenue, S.W., Washington, DC 20250-1400. (202) 720-5293.

SUPPLEMENTARY INFORMATION: Disciplinary Proceedings. Section 2 of the Perishable Agricultural Commodities Act (PACA), 7 U.S.C. 499b, proscribes as unfair various conduct on the part of commission merchants, dealers, or brokers. The PACA provides redress for such unlawful conduct in the form of suspension or revocation of required licenses, and to a limited extent, civil penalties. The Agricultural Marketing Service (AMS) of the U.S. Department of Agriculture (USDA) enforces § 2 of the PACA, in part, through administrative proceedings adjudicated by Administrative Law Judges.

While the PACA is the substantive law governing these administrative disciplinary proceedings, The Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (Rules of Practice), at 7 CFR 1.130 *et seq.*, provide their procedural framework.

Disciplinary proceedings are instituted by filling a formal complaint with the Hearing Clerk. The respondent is given the opportunity to file an answer to the complaint. An Administrative Law Judge determines the issues and makes a decision after opportunity for a full evidentiary hearing. Both parties may request testimonial and documentary subpoenas. Any decision of the Administrative Law Judge may be appealed to the Judicial Officer, acting for the Secretary. An appeal from a decision of the Judicial Officer may be taken to the appropriate U.S. Circuit Court of Appeals.

Proceedings to determine responsibly connected status. In addition to the proscription against unfair conduct embodied in § 2, § 8(b) of the PACA (7 U.S.C. 499h(b)) forbids a licensee from employing a person who is or has been "responsibly connected" with a firm or person whose license has been revoked or is under suspension by the Secretary, a person who has been found to have committed any flagrant or repeated violation of § 2, or against whom there is an unpaid reparation award. Such employment violations subject the employing firm or individual to license suspension or revocation.

The PACA, in § 1(9) (7 U.S.C. 499a), defines "responsibly connected" to mean "affiliated or connected with a commission merchant, dealer, or broker as (A) partner in a partnership, or (B) officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation or association."

Prior to 1975, the determination as to responsibly connected status was made without the benefit of an oral hearing. After the decision of the U.S. Court of Appeals for the District of Columbia in *Quinn v. Butz*, 510 F.2d 743 (D.C. Cir. 1975), USDA instituted a procedure governed by regulations published at 7 CFR 47.47 *et seq.* giving any person finally determined by the PACA Branch of AMS to have been responsibly connected to a firm subject to license revocation or suspension the opportunity for an oral hearing before a presiding officer appointed by AMS.

Currently, determinations as to whether an individual is responsibly connected to a particular commission merchant, dealer, or broker are made independently of any related disciplinary proceeding against the commission merchant, dealer, or broker. Although typically the two proceedings involve a common fact nucleus, currently no mechanism exists for joining the procedures to achieve a more efficient use of resources. In addition, in those cases where the individual requests oral hearing, responsibly connected proceedings frequently are not concluded until the sanction in the related disciplinary proceeding has been in effect for a year or more. Thus, although an offending entity's license may have been revoked for as much as a year, those individuals responsible for the violations may nevertheless continue to be employed in the industry pending a determination of responsibly connected status.

The rules currently governing determination of responsibly connected status are set out at 7 CFR 47.47 *et seq.* In brief, these rules provide for a preliminary determination by the Perishable Agricultural Commodities Branch (PACA Branch), AMS, as to the status of a person who is potentially responsibly connected, notification of the preliminary determination, and an opportunity to respond and furnish evidence to the Chief, PACA Branch. If the Chief, PACA Branch, sustains the preliminary determination that the

individual is responsibly connected, the individual is then entitled to file a petition with the Administrator of AMS for a review proceeding and final decision and to request an oral hearing. If an oral hearing is requested, it is held before a hearing officer appointed by the Administrator. Appeals of adverse decisions of the Administrator lie to the U.S. Circuit Courts of Appeal. In any event, no employment sanction begins to run until one of the following three conditions set forth in § 8(b) of the PACA exists: (1) the license of the firm with which the responsible connection exists has been suspended or revoked; (2) there is a finding that the firm has committed a flagrant or repeated violation of § 2 of the PACA; or (3) the firm has failed to pay a reparation award under § 7 of the PACA.

Proposed rules to combine disciplinary proceedings with determinations of responsibly connected status. We propose to modify the procedures for determining responsibly connected status to accomplish two objectives: (1) To consolidate, where the possibility exists, hearings in disciplinary cases and related determinations of responsibly connected status; and (2) to provide for review by an Administrative Law Judge of the final determination of the Chief, PACA Branch that an individual is responsibly connected. Because the issues in both types of proceedings are based upon identical or closely-related facts, and because the sanctions are related, such a procedure eliminates the need for duplicative litigation. It also offers the advantage of insuring that the sanctions against the licensee and the individuals responsibly connected with it will commence concurrently.

Instead of filing a petition for review with the Administrator of AMS, under the proposed procedures, the individual contesting the final determination by the Chief, PACA Branch, that he or she is responsibly connected will file a petition for review with the Office of the Hearing Clerk, and the petition will be decided by an Administrative Law Judge, after opportunity for oral hearing. Any hearing on a responsibly connected determination will be consolidated with the hearing, if any, on the disciplinary matters out of which the issue of responsibly connected status arose. Likewise, all responsibly connected hearings arising out of the relationship between more than one individual and one particular PACA licensee will be consolidated.

To illustrate by hypothetical, assume that PACA Branch, AMS, institutes a disciplinary proceeding against the Acme Produce Company, of which the

officers, directors, and shareholders of greater than 10 percent of the stock consist of Able, Jones, and Smith. Under the proposal, all issues arising out of the disciplinary infractions charged against Acme and all employment sanctions arising out of the relationships between Acme on the one hand and Able, Jones, and Smith on the other hand will be consolidated for hearing to the extent that the employment sanctions originate from Acme's alleged disciplinary violations. If for any reason there is no hearing on the issues involving Acme, but Able, Jones, and Smith file petitions for review of their status as responsibly connected individuals and request hearings, those hearings will be consolidated in one proceeding before an Administrative Law Judge.

To the extent that no disciplinary proceeding has been instituted against Acme and the proposed employment sanctions against Able, Jones and Smith arise under PACA § 8(B)(3) solely from Acme's failure to pay one or more reparation awards under PACA § 7, all hearings on petitions for review will be consolidated in one proceeding before an Administrative Law Judge. The vehicle used to achieve this consolidation will be a mandatory joinder under the Rules of Practice as amended.

USDA believes that the proposed procedures, by reducing the incidence of multiple hearings, will facilitate speedy enforcement of the PACA and will result in savings in employee time and travel expense. They will also abolish the need for AMS to employ individuals to act as presiding officers at responsibly connected proceedings. In 1994, presiding officers were paid \$26,866, a large portion of which would be saved under the proposed new regulation.

Executive Order 12866 and Regulatory Flexibility Act

The Secretary has determined that, if adopted, this proposed rule would not have a significant economic impact on a substantial number of small entities. While small entities will continue to be subject to identical substantive requirements under the revised procedures, the new procedures will not result in any new burdens. The new rule merely changes the form of the hearing utilized to determine responsibly connected status.

This proposed rule has been determined not significant for purpose of Executive Order 12866 and, therefore, has not been reviewed by the Office of Management and Budget.

Executive Order 12778

This proposed rule has been reviewed under Executive Order 12778, Civil Justice Reform. If this rule is adopted: (1) All State and local laws and regulations that are in conflict with this rule will be preempted; (2) no retroactive effect will be given to this rule; and (3) administrative proceedings will not be required before parties may file suit in court challenging this rule.

Paperwork Reduction Act

The Paperwork Reduction Act of 1980 does not apply to this proposed rule since the proposed rule does not seek answers to identical questions or impose reporting or recordkeeping requirements on 10 or more persons, and the information collected is not used for general statistical purposes.

List of Subjects

7 CFR Part 1

Administrative practice and procedure, Agriculture, Antitrust, Blind, Claims, Concessions, Cooperatives, Equal access to justice, Federal buildings and facilities, Freedom of information, Lawyers, Privacy.

7 CFR Part 47

Administrative practice and procedure, Agricultural commodities, Brokers.

For the reasons, set out in the preamble 7 CFR chapter I is proposed to be amended as follows:

PART 1—ADMINISTRATIVE REGULATIONS

1. The authority citation for part 1, subpart H, would continue to read as follows:

Authority: 5 U.S.C. 301; 7 U.S.C. 61, 87e, 149, 150gg, 162, 163, 164, 228, 268, 490o, 608c(14), 1592, 1624(b), 2151, 2621, 2714, 2908, 3812, 4610, 4815, 4910; 15 U.S.C. 1828; 16 U.S.C. 620d, 1540(f), 3373; 21 U.S.C. 104, 111, 117, 120, 122, 127, 134e, 134f, 1135a, 154, 463(b), 621, 1043; 43 U.S.C. 1740; 7 CFR 2.35, 2.41.

§ 1.131 [Amended]

2. Section 1.131 would be amended as follows:

a. In paragraph (a), by adding "1(9)," immediately after "Perishable Agricultural Commodities Act, 1930, sections" and immediately before "3(c)".

3. Section 1.133 would be amended as follows:

a. In paragraph (b), by adding after "Filing of complaint" the words "or petition for review".

b. In paragraph (b), by redesignating paragraph (b)(2) as paragraph (b)(3), and

by adding the following new paragraph (b)(2):

§ 1.133 Institution of proceedings.

* * * * *

(b) * * *

(2) Any person determined by the Chief, PACA Branch, pursuant to 7 CFR 47.47 et seq. to have been responsibly connected within the meaning of 7 U.S.C. 499a(9) to a licensee who is subject or potentially subject to license suspension or revocation as the result of an alleged violation of 7 U.S.C. 499b or as provided in 7 U.S.C. 499g(d) shall be entitled to institute a proceeding under this section by filing with the Hearing Clerk a petition for review of such determination

* * * * *

4. Section 1.135 would be amended as follows:

a. In the section heading, by adding the words "or petition for review" after the word "complaint" and before the period.

b. By designating the text of current § 1.135 as paragraph (a), and by adding the paragraph heading "Complaint." immediately after the designation of paragraph (a).

c. By adding the follow paragraph (b):

§ 1.135 Contents of complaint.

* * * * *

(b) Petition for Review. The Petition for Review of responsibly connected status shall describe briefly and clearly the determination sought to be reviewed and shall include a brief statement of the factual and legal matters that the petitioner believes warrant the reversal of the determination

§ 1.136 [Amended]

5. Section 1.136 would be amended as follows:

In paragraph (a), by adding after the last sentence the words "As response to a petition for review of responsibly connected status, the Chief, PACA Branch, shall within ten days after service by the Hearing Clerk of a petition for review, file with the Hearing Clerk a certified copy of the agency record upon which the Chief, PACA Branch, made the determination that the individual was responsibly connected to a licensee under the perishable Agricultural Commodities Act, 7 U.S.C. 499a et seq., and such agency record shall become part of the record in the review proceeding."

6. Section 1.137 would be revised to read as follows:

§ 1.137. Amendment of complaint, petition for review, or answer; joinder of related matters.

(a) Amendment. At any time prior to the filing of a motion for hearing, the complaint, petition for review, answer, or response to petition for review may be amended. Thereafter, such an amendment may be made with consent of the parties, or as authorized by the Judge upon a showing of good cause.

(b) Joinder. Upon application of the Administrator made at any time, the judge shall consolidate for hearing with any proceeding brought to suspend or revoke a license granted under the Perishable Agricultural Commodities Act, 7 U.S.C. 499a et seq., any petitions for review of determination of status by the Chief, PACA Branch, that individuals are responsibly connected, within the meaning of 7 U.S.C. 499a(9), to the licensee during the period of the alleged violations. In any case in which there is no pending proceeding to suspend or revoke the license of a licensee issued under the Perishable Agricultural Commodities Act, 7 U.S.C. 499a et seq., but there have been filed more than one petition for review of determination of responsible connection to the same licensee, such petitions for review shall be consolidated for hearing upon motion by the Administrator.

7. Section 1.141 would be amended as follows:

a. By adding after the first sentence of paragraph (a) the following additional sentence: "A petition for review shall be deemed a request for a hearing."

b. By designating the text of current paragraph (e) as paragraph (e)(1), and by adding the following new paragraph (e)(2):

§ 1.141 Procedure for hearing.

* * * * *

(e) * * *

(2) If the petitioner in the case of a Petition for Review of a determination of responsibly connected status within the meaning of 7 U.S.C. 499a(9), having been duly notified, fails to appear at the hearing without good cause, such petitioner shall be deemed to have waived his right to a hearing and to have voluntary withdrawn his petition for review.

* * * * *

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

8. The authority citation for part 47 would continue to read follows:

Authority: 7 U.S.C. 499o; 7 CFR 2.17(a)(8)(xiii), 2.50 (a)(8)(xiii).

9. Section 47.47 would be revised to read as follows:

§ 47.47 Additional definitions.

The following definitions, which are in addition to those in 7 CFR 47.2 (a) through (h), shall be applicable to proceedings under 7 CFR 47.47 through 47.49.

(a) Chief means the Chief of the PACA Branch, or any officer or employee to whom authority has heretofore lawfully been delegated or to whom authority may hereafter lawfully be delegated by the Chief, to act in such capacity.

(b) PACA Branch means the PACA Branch of the Division.

(c) Petition for review means the document filed requesting review by an Administrative Law Judge of the Chief's determination.

§ 47.49 [Amended]

10. Section 47.49 would be amended as follows:

a. The words "Regulatory Branch" would be removed each time they occur and the words "PACA Branch" would be added in their place.

b. Paragraph (d) of § 47.49 would be amended by removing all words appearing after "may file" and adding in their place the words "with the Hearing Clerk, pursuant to § 1.130 et seq. of this chapter, a petition for review of the determination."

c. Paragraphs (e) and (f) would be removed.

§ 47.50 through 47.68 [Removed]

11. Sections 47.50 through 47.68 would be removed.

Done in Washington, D.C. this 20th day of June, 1995.

Dan Glickman,

Secretary of Agriculture.

[FR Doc. 95-15817 Filed 6-30-95; 8:45 am]

BILLING CODE 3410-01-M

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

12 CFR Part 21

[Docket No. 95-14]

RIN 1557-AB19

Minimum Security Devices and Procedures, Reports of Crimes and Suspected Crimes, and Bank Secrecy Act Compliance

AGENCY: Office of the Comptroller of the Currency, Treasury.

ACTION: Notice of proposed rulemaking.