

Rules and Regulations

Federal Register

Vol. 64, No. 135

Thursday, July 15, 1999

This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each week.

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 47

[Docket Number FV98-358]

Amendments to Rules of Practice Under the Perishable Agricultural Commodities Act (PACA)

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: The Department of Agriculture (USDA) is amending the Rules of Practice under the Perishable Agricultural Commodities Act (other than formal disciplinary proceedings). In addition to bringing several sections of the Rules of Practice into compliance with the PACA Amendments of 1995, USDA is making other changes to enhance customer service.

EFFECTIVE DATE: August 16, 1999.

FOR FURTHER INFORMATION CONTACT: Charles W. Parrott, Assistant Chief, PACA Branch, Room 2095-So. Bldg., Fruit and Vegetable Division, AMS, USDA, Washington, D.C. 20250, Phone (202) 720-4180, Email—charles.parrott@usda.gov.

SUPPLEMENTARY INFORMATION:

Background

The Perishable Agricultural Commodities Act (PACA or Act) establishes a code of fair trading practices for the marketing of fresh and frozen fruits and vegetables in interstate and foreign commerce. The Act requires that parties fulfill their contractual obligations, and provides a forum where firms that buy and sell fruits and vegetables can settle commercial disputes outside of the civil court system. Under the PACA, these disputes, or reparation complaints, are handled first on an informal basis in an attempt to achieve an amicable

settlement between the disputing parties. About 75 percent of all reparation complaints are resolved informally, generally within eight weeks. However, if an informal settlement is not reached, there is a formal complaint procedure available under which USDA's Judicial Officer issues a binding decision in the case. The Rules of Practice applicable to reparation proceedings inform the industry of USDA's procedures and requirements for the handling of informal and formal complaints under the PACA.

A proposed rule to amend the regulations was published in the **Federal Register** on January 28, 1999 (64 FR 4342). The proposal amended several sections of the Rules of Practice to comply with the PACA Amendments of 1995, and made numerous other changes to enhance customer service. Comments on the proposed rule were to be submitted by March 1, 1999. The Agricultural Marketing Service (AMS) received two comments.

We received comments from JSG Trading Corp. (JSG), Tinton Falls, New Jersey and McCarron & Associates (McCarron), Washington, D.C. JSG objected to the Department of Agriculture's (USDA) handling of reparation cases in general. McCarron suggested some additional revisions to further enhance customer service.

In its comment, JSG objected to the preparation of draft reparation decisions by PACA Branch personnel (§ 47.2(i)). The commentator questioned whether PACA personnel could be impartial in the preparation of such drafts. We believe that the commentator's concern is misplaced because the knowledge and expertise of PACA personnel have always been utilized in resolving disputes involving perishable agricultural commodities. These services are routinely sought by the parties involved. USDA, of course, has no vested interest in the outcome of any complaints. PACA Branch personnel have a widely recognized history of professional impartiality. Moreover, we believe that the commentator's concern is more than adequately addressed by the provision which requires that all draft decisions prepared by PACA Branch personnel be reviewed by an attorney employed by the Office of the General Counsel. Therefore, AMS is making no change based on this comment.

McCarron's comments touched on several points. With regard to § 47.6(a), he suggested that the appropriate period of time to elapse before a file is permanently closed be left to the judgment of the Deputy Administrator, and that it not exceed 20 days. The proposed amendment to § 47.6(a) allowed a complainant nine months to file a formal complaint after informal handling had been completed. After further consideration, we agree that a 9-month period allows more time than is needed for a complainant to decide to proceed with a formal complaint. However, the suggested 20-day period is considered too short. Therefore, the final rule provides a complainant with 90 days to file a formal complaint after the informal handling by the PACA Branch has been completed. McCarron further suggested that the wording of this section clarify that the waiver of further proceedings applies only to actions before the Secretary of Agriculture. The Rules of Practice under the Perishable Agricultural Commodities Act (other than formal disciplinary proceedings) apply, however, only to reparation proceedings filed before the Secretary of Agriculture. Therefore, with the exception of the change discussed above, § 47.6(a) will remain as proposed.

With regard to § 47.9, McCarron addressed the proposed requirement that complainant in a reparation complaint respond to a counterclaim or be held to have admitted the respondent's allegations contained in the counterclaim. McCarron stated that this alteration is overly legalistic, adds nothing to assist the decision-maker, and unduly delays resolution of the matter. We are making no change to the rule based on this comment because a counterclaim has the same weight in the formal complaint process as does a complaint, and it is a matter of equity that both parties be treated equally and be required to answer any positive charges against them. No changes to the final rule are necessary.

With regard to §§ 47.15(a)(1) and 47.16(a), McCarron stated that it is not clear that the examiner who may grant a hearing or authorize taking depositions in connection with an oral hearing, is the presiding officer or an agency employee. This was addressed in the change to § 47.2(i), where it is made clear that agency employees are to act as

examiners solely in cases handled through the documentary procedure. No change in the final rule is necessary.

With regard to § 47.20, McCarron suggested the addition of language to clarify that the \$30,000 figure for determining whether a complaint may be handled through oral hearing, should be the principal amount of the claim only, and should not include interests and/or costs associated with the claim. We agree with his suggestion. Therefore, we have changed the final rule to reflect that the \$30,000 threshold amount for an oral hearing not include accrued interest.

Finally, McCarron suggested that a time limit be placed on USDA for the resolution of informal complaints and for the issuance of decision and orders, from the time the case is ready for decision. Such restricted deadlines could, however, run afoul of conditions outside the control of the agency. In fact, most informal complaints are at present being resolved within 90 days of their opening, and the great majority of documentary procedure decisions are being issued within 90 days from the time the case is ready for decision.

Agricultural Marketing Service (AMS) believes that the amendments to the Rules of Practice will enhance customer service by allowing certain documents in formal PACA reparation proceedings to be served via private or commercial mail delivery, in addition to service by certified or registered mail.

The amendments clarify certain regulations and definitions. Throughout the Rules of Practice, the term "shortened procedure" was replaced with "documentary procedure" to reflect more accurately a formal reparation process that does not involve an oral hearing.

Due to the reorganization of AMS, the definition of the "Fruit and Vegetable Programs" was substituted for the definition of "Division," the definition of "Associate Administrator" was substituted for the definition of "Deputy Administrator," and the definition of "Deputy Administrator" was substituted for the definition of "Director." Additionally, the words "Program" and "Deputy Administrator" were substituted for "Division" and "Director" respectively, wherever they appeared in Part 47. The term "examiner", § 47.2(i)(1) was expanded to indicate that senior marketing specialists may also prepare decisions in shortened or "documentary procedure" cases subject the review of USDA's Office of the General Counsel (OGC). The definition of "examiner's report" in § 47.2(j) was shortened to eliminate the references to

Administrative Law Judges because they do not participate in reparation cases and do not write examiner's reports. The definitions of "mail" and "re-mail" were expanded to allow for additional methods of service to include commercial or private mail delivery services. The section regarding informal complaints, § 47.3, was revised to require that the complaint be in writing and allow for the filing of an informal complaint by facsimile transmission. In addition, the information required in an informal complaint was revised for clarification purposes. The revision changed "car initial and number, if carlot;" to read "carrier identification;" and corrected a typographical error in § 47.3(a) (2) (vii) by inserting the word "and" between the words "gross net." A statement regarding the required filing fee of \$60.00 was added to the text. Additionally, paragraph (c) of that section regarding the "Status of person filing informal complaint" was eliminated because it is not pertinent to these regulations.

Section 47.4, which addresses service matters, was revised to permit the commercial or the private delivery of certain documents and now describes when service is perfected under the various mailing options. Additionally, the reference to the service of the Chief's determination that a person was responsibly connected with a licensee was deleted from paragraph (b)(1) because this issue is addressed in § 47.49 of the regulations (7 CFR 47.49).

The section that delineates formal complaints in the Rules of Practice was changed to include the requirement that a formal complaint be filed within ninety days of notification that complainant may proceed formally, or the complainant loses the opportunity to proceed with a formal complaint. Additionally, the rules were revised to require that a \$300.00 handling fee must accompany the filing of a formal complaint or counterclaim before AMS will serve the complaint on the respondent(s). The handling fee for formal complaints was included in the Rules of Practice to conform with the PACA Amendments of 1995.

Significant changes were made to § 47.9, which addresses the reply to a counterclaim or set-off. The counterclaim or set-off will now be treated as a formal complaint filed by the respondent, and therefore, failure to reply will be a default on complainant's part as to the counterclaim or the set-off. In the previous rules, a failure to file a reply was treated as a denial of the allegations of the counterclaim or set-off, whereas the revised rules have created a parallel between the filing of

a complaint and the filing of a counterclaim or set-off.

With the new expanded definition of examiner in § 47.2(i), § 47.11 was amended to clarify that only OGC attorneys, and not other USDA employees, are granted certain powers under this section of the regulations because only OGC attorneys conduct oral hearings. The examiner's powers now include the ability to require parties to provide copies of exhibits prior to hearings and depositions in any type of hearing.

The Rules of Practice were amended to comply with the 1995 PACA Amendments which raised the minimum claim for damages required for an oral hearing from \$15,000 to \$30,000. Sections 47.11 and 47.16 were amended to clarify that subpoenas or orders for depositions are made over the facsimile signature of the Secretary. In addition, the regulations regarding oral hearings no longer permit a complainant to submit evidence in the form of depositions in lieu of appearing in person or by counsel. Instead, all parties are now required to appear in person or through a representative at oral hearings.

The section which discusses the deposition process was expanded to include references to the possibility of depositions in a case that is converted from an oral hearing case to a documentary procedure case.

In order to ensure sufficient opportunity for review by the examiner and sufficient notice to the individual who is subpoenaed, § 47.17 was amended to require that applications for subpoena be received at least thirty days prior to the hearing or deposition date, and that the subpoena be issued at least twenty days before the date of appearance. An exception may be made for good cause shown.

All filings with regard to claims for fees and expenses in oral hearing cases and the resultant objections will now be filed with the Hearing Clerk instead of the examiner in order to ensure that the documents are properly filed into the official record kept by the Hearing Clerk. The Hearing Clerk's Office is now the appropriate place to file petitions for rehearing, reargument, reconsideration of orders, reopening of hearings and reopening after a default. The regulations were revised by replacing the words "hearing clerk" with the words "Hearing Clerk".

As previously stated, the term "shortened procedure" was changed to "documentary procedure". In the documentary procedure section, the rule regarding verification of pleadings or statements was expanded to note that

certification by a notary public alone is not sufficient; rather, a signed verifying statement must be appended to the document.

Procedures for requesting a reopening after a default were removed from the provision that covers filing, extensions of time, effective date of filing, computations of time, and official notice and were moved to the more appropriate section that deals with rehearing, reargument, reconsideration of orders, and reopening of hearings. In addition, the provision for reopening after a default was revised to permit a petition to reopen the proceedings to be filed before the expiration of 30 days from the date of issuance of the default order. This revision eliminates any confusion that existed in the previous regulation because it did not provide a time certain for filing. The amendment clarified that the filing must be made before the Default Order becomes final. For all filings, the provision for computation of time was revised to include Saturdays as well as Sundays and holidays.

Executive Orders 12866 and 12988

This final rule, issued under the Perishable Agricultural Commodities Act (7 U.S.C. 499 *et seq.*), as amended, has been determined to be not significant for the purposes of Executive Order 12866, and therefore, has not been reviewed by the Office of Management and Budget (OMB).

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform, and is not intended to have retroactive effect. This final rule will not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule. There are no administrative procedures which must be exhausted prior to any judicial challenge to the provisions of this rule.

Effects on Small Businesses

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), USDA has considered the economic impact of this final rule on small entities. The purpose of the RFA is to fit regulatory actions to the scale of businesses subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Small agricultural service firms have been defined by the Small Business Administration (13 CFR part 121) as those whose with less than 500 employees. The PACA requires all businesses that operate subject to its provisions maintain a license issued by USDA. There are approximately 15,700

PACA licensees, a majority of which may be classified as small entities.

The revisions to the PACA Rules of Practice streamline USDA procedures and requirements for handling of informal and formal complaints under the PACA. In Fiscal Year 1998, there were 2198 informal reparation claims, 21 counterclaims, and 563 formal reparation cases filed with USDA under the PACA. The revisions to the reparation Rules of Practice apply only to firms that utilize USDA's service for resolving commercial disputes under the PACA. AMS believes that these revisions to the Rules of Practice will enhance customer service to the industry by expediting the handling of documents in PACA reparation proceedings. Most of the revisions provide notice to claimants of the procedure that AMS will now follow in adjudicating claims. For example, the proposed revision that provides for additional methods of service of formal documents by AMS will not produce any economic effect on licensees initially. But, if the use of commercial and/or express delivery services take the place of certified mail, licensees may be required to absorb the additional costs through marginally higher user fees.

There are some revisions, however, that will affect the rights and obligations of claimants. For example, claimants must be certain to adhere to the filing requirements for both informal and formal complaints, which require the payment of statutorily mandated filing and handling fees, respectively. If the required fees do not accompany a filing, a claimant may lose access to the reparation forum. These revisions, and others, may affect a claimant's due process rights, which are difficult to quantify. However, since the reparation forum is but one available means to resolve contract disputes concerning perishable agricultural products in interstate commerce, AMS has determined that the provisions of this final rule will not have a significant economic impact on a substantial number of small entities.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 does not apply to this final rule since it does not seek answers to identical questions or reporting or recordkeeping requirements imposed on ten or more persons, and the information collected is not used for general statistical purposes.

List of Subjects in 7 CFR Part 47

Administrative practice and procedure, Agricultural commodities, Brokers.

For the reasons set forth in the preamble, 7 CFR part 47 is amended as follows:

PART 47—[AMENDED]

1. The authority citation for part 47 is revised to read as follows:

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

2. Section 47.2 is amended by removing paragraph (j)(2) and redesignating paragraph (j)(1) as paragraph (j) and revising paragraphs (e), (g), (h), (i), (s), and (t) to read as follows:

§ 47.2 Definitions.

* * * * *

(e) *Associate Administrator* means the Associate Administrator of the Service, or any officer or employee of the Service to whom authority has heretofore lawfully been delegated, or to whom authority may hereafter lawfully be delegated, to act in his or her stead.

* * * * *

(g) *Fruit and Vegetable Programs* means the Fruit and Vegetable Programs of the Agricultural Marketing Service.

(h) *Deputy Administrator* means the Deputy Administrator of the Fruit and Vegetable Programs or any officer or employee of the Fruit and Vegetable Programs to whom authority has heretofore lawfully been delegated, or to whom authority may hereafter lawfully be delegated by the Deputy Administrator, to act in his stead.

(i) *Examiner*. In connection with reparation proceedings, the term "examiner" is synonymous with "presiding officer" and means any attorney employed in the Office of the General Counsel of the Department, or in connection with reparation proceedings conducted pursuant to the documentary procedure in § 47.20, the term "examiner" may mean any other employee of the PACA Branch whose work is reviewed by an attorney employed in the Office of the General Counsel of the Department.

* * * * *

(s) *Mail* means to deposit an item in the United States Mail with postage affixed and addressed as necessary to cause it to be delivered to the address shown by ordinary mail, or by certified mail or registered mail if specified, or to cause a properly addressed item to be delivered by a commercial or private mail delivery service to the address shown.

(t) *Re-mail* means to mail by ordinary mail to an address an item that has been returned after being sent to the same address by certified or registered mail or

by a commercial or private mail delivery service.

5. In § 47.3, the first sentence in paragraph (a)(2) and paragraph (a)(2)(iv) are revised, in paragraph (a)(2)(vii) the word "and" is added between the words "gross" and "net", paragraph (c) is removed, and a new paragraph (a)(4) is added to read as follows:

§ 47.3 Institution of proceedings.

(a) * * *
(1) * * *
(2) Informal complaints may be made in writing by telegram, by letter, or by facsimile transmission, setting forth the essential details of the transaction complained of. * * *

(iv) Carrier identification;
* * * * *

(4) The informal complaint shall be accompanied by a filing fee of \$60 as required by the Act.
* * * * *

7. Section 47.4 is amended by revising the section heading and paragraphs (b)(1), (b)(3), (c)(1), and (d)(1) to read as follows:

§ 47.4 Service and proof of service.

(b) Service on Party. (1) Any complaint or other document initially served on a person to make that person a party respondent in a proceeding, a final order, or other document specifically ordered by the presiding officer or Judicial Officer to be served by certified or registered mail, or commercial or private mail delivery service, shall be deemed to be received by any party to a proceeding on the date of delivery by certified or registered mail, or commercial or private mail delivery service to the last known principal place of business of such party, last known principal place of business of the attorney or representative of record of such party, last known residence of such party if an individual: Provided, That, if any such document or paper is sent by certified, registered, commercial, or private mail, but is returned, it shall be deemed to be received by such party on the date of the re-mailing by ordinary mail to the same address.

(3) Any document or paper served other than by certified, registered, commercial, or private mail on any party to a proceeding shall be deemed to be received by such party on the date of:
* * * * *

(c) * * *
(1) Delivery by certified, registered, commercial, private or mail to the last

known principal address of such person, last know principal place of business of the attorney or representative of record of such person, or last known residence of such person if an individual;

* * * * *

(d) * * *

(1) A certified or registered mail receipt returned by the postal service with a signature, or a signed receipt returned by a private or commercial mail delivery service;

* * * * *

8. In § 47.6, paragraphs (a) and (c) are revised to read as follows:

§ 47.6 Formal complaints.

(a) Filing; contents; number of copies. (1) If the procedure provided in § 47.3(b) fails to effect an amicable or informal settlement, the person who filed the informal complaint may, if further proceedings are desired, file a formal complaint with the Fruit and Vegetable Programs. The formal complaint shall be filed within ninety days of notification of the opportunity to proceed formally. Failure to file a formal reparation complaint within the time prescribed shall result in the waiver of further proceedings on the claim alleged in the informal complaint.

(2) The formal complaint shall set forth the information and be accompanied by the papers indicated in § 47.3(a)(2) and (3), including a statement of the amount of damages claimed, with the basis therefor, and the method of determination. The original and three copies shall be furnished for filing, and service on the respondent. If there is more than one respondent, a further copy shall be furnished for each additional respondent.

(c) Service upon respondent; proof of service. Upon receipt by the Fruit and Vegetable Programs of the formal complaint, the accompanying papers and the \$300 handling fee required by the Act, a copy thereof shall be served by the Fruit and Vegetable Programs upon the respondent in accordance with § 47.4. If the complaint is not in the proper form, the Fruit and Vegetable Programs shall return it and inform the complainant of the deficiencies therein.

9. In § 47.8, paragraph (a) is amended by adding a sentence at the end of the section to read as follows:

§ 47.8 The answer.

(a) * * * If the answer includes a counterclaim, the answer shall be accompanied by the \$300 handling fee

required by the Act for formal complaints.

* * * * *

10. In § 47.9, paragraphs (b) and (c) are revised to read as follows:

§ 47.9 The reply.

* * * * *

(b) Contents. The reply shall be confined strictly to the matters alleged in the counterclaim or set-off in the answer. It shall contain a precise statement of the facts which constitute the grounds of defense to the counterclaim or set-off, and shall specifically admit, deny, or explain each of the allegations of the counterclaim or set-off, unless the complainant is without knowledge, in which case the reply shall so state; or a statement that the complainant admits all of the allegations of the counterclaim or set-off; or a statement containing an admission of liability in an amount less than that alleged in the counterclaim or set-off and a denial of liability for the remaining amount.

(c) Failure to file reply. Failure to file a reply shall be deemed a waiver of hearing on the counterclaim or set-off and an admission of the allegations contained in the counterclaim or set-off. If no reply is filed, the allegations of the counterclaim or set-off shall be deemed admitted.

11. In § 47.11, the introductory text of paragraph (c), and paragraphs (c)(4), (c)(9), (c)(10) and (c)(13) are revised to read as follows:

§ 47.11 Examiners.

* * * * *

(c) Powers. Subject to review by the Secretary, as provided in this Part, the examiner who is an attorney employed in the Office of the General Counsel of the Department, in any proceeding assigned to him or her, shall have power to:

* * * * *

(4) Issue subpoenas over the facsimile signature of the Secretary requiring the attendance and testimony of witnesses and the production of books, contracts, papers, and other documentary evidence;

* * * * *

(9) Require each party, prior to any hearing, to provide all other parties and the examiner with a copy of any exhibit that the party intends to introduce into evidence;

(10) Require each party, prior to any deposition, to provide all other parties and the examiner with a copy of any document that the party intends to use to examine a deponent;

* * * * *

(13) Do all acts and take all measures necessary for the maintenance of order and for the efficient conduct of the proceeding.

* * * * *

12. In § 47.12, the introductory text is revised to read as follows:

§ 47.12 Intervention.

At any time after the institution of a proceeding and before it has been submitted to the Secretary for final consideration, the Secretary or the examiner as defined in § 47.2(i)(1) may, upon petition in writing and for good cause show, permit any person to intervene therein. The petition shall state with preciseness and particularity:

* * * * *

13. In § 47.15, paragraphs (a)(1), (a)(2), (b) and (d)(1) are revised to read as follows:

§ 47.15 Oral hearing before the examiner.

(a) *When permissible.* (1) Where the amount of the damages claimed, either in the complaint or in the counterclaim, does not exceed \$30,000 (excluding interest), an oral hearing shall not be held, unless deemed necessary or desirable by the Fruit and Vegetable Programs or unless granted by the examiner as defined in § 47.2(i)(1), upon application of complainant or respondent setting forth the peculiar circumstances making an oral hearing necessary for a proper presentation of the case.

(2) Where the amount of damages claimed, either in the complaint or in the counterclaim, is in excess of \$30,000 (excluding interest), the procedure provided in this section (except as provided in § 47.20(b)(2)) shall be applicable.

(b) *Request for hearing.* Any party may request an oral hearing on the facts by including such request in the complaint. Failure to request an oral hearing within the time allowed for filing of the reply, or within 10 days after the expiration of the time allowed for filing an answer, shall constitute a waiver of such hearing, and any party so failing to request an oral hearing will be deemed to have agreed that the proceeding may be decided upon a record formed under the documentary procedure provided in § 47.20.

* * * * *

(d) *Appearances—(1) Representation.* In any proceeding under the Act, the parties may appear in person or by counsel or other representative.

* * * * *

14. In § 47.16, the introductory text of paragraph (a), and paragraph (b)(1) are revised to read as follows:

§ 47.16 Depositions:

(a) *Application for taking deposition.* Upon the application of a party to the proceeding, the examiner as defined in § 47.2(i)(1) may, except as provided in paragraph (b) of this section, at any time after the filing of the moving papers, order, over the facsimile signature of the Secretary, the taking of testimony by deposition. The application shall be in writing, shall be filed with the Hearing Clerk, and shall set forth:

* * * * *

(b) *Examiner's order for taking deposition.* (1) If, after examination of the application, the examiner is of the opinion that the deposition should be taken, or if the parties are using depositions in lieu of affidavits pursuant to § 47.20(b)(2), the examiner shall order the taking of the deposition. In no case, except for good cause shown, may the examiner order the taking of a deposition less than 10 days prior to the designated date of deposition. The order shall be filed with the Hearing Clerk upon the parties in accordance with § 47.4.

* * * * *

15. In § 47.17, a sentence is added at the end of paragraph (a) to read as follows:

§ 47.17 Subpoenas.

(a) *Issuance of subpoenas.* * * * Except for good cause shown, applications for subpoenas shall be filed with the Hearing Clerk at least 30 days prior to the designated date of hearing or deposition. Except for good cause shown, the examiner shall not issue subpoenas less than 20 days prior to the designated date of hearing or deposition.

* * * * *

16. In § 47.19, paragraphs (d)(1), (d)(4), (d)(5) and (d)(6) are revised to read as follows:

§ 47.19 Post-hearing procedure before the examiner.

* * * * *

(d) *Claim for award of fees and expenses—(1) Filing.* Prior to the close of the hearing, or within 20 days thereafter, each party may file with the Hearing Clerk a claim for the award of the fees and expenses which he incurred in connection with the oral hearing. No award of fees and expenses to the prevailing party and against the losing party shall be made unless a claim therefor has been filed, and failure to file a claim within the time allowed shall constitute a waiver thereof.

* * * * *

(4) *Service of claim.* A copy of each such claim filed shall be served by the

Hearing Clerk on the other party or parties to the proceeding.

(5) *Objections to claim.* Within 20 days after being served with a copy of a claim for fees and expenses, the party so served may file with the Hearing Clerk written objections to the allowance of any or all of the items claimed. If evidence is offered in support of an objection, it must be in affidavit form. A copy of any such objections shall be served by the Hearing Clerk on the other party or parties.

(6) *Reply to objections to claim.* A claimant who is served with a copy of objections to his or her claim may, within 20 days after such service, file with the Hearing Clerk a reply to such objection. If evidence is offered in support of a reply, it must be in affidavit form. A copy of any such reply shall be served by the Hearing Clerk on the other party or parties.

* * * * *

17. In § 47.20, the section heading, the first sentence in paragraph (a), paragraphs (b)(1), (b)(2), and the introductory text of paragraph (h) are revised to read as follows:

§ 47.20 Documentary procedure.

(a) *In general.* The documentary procedure described in this section shall, whenever it is applicable as provided in paragraph (b) of this section, take the place and serve in lieu of the oral hearing procedure hereinbefore provided. Under the documentary procedure, the pleadings of the parties, if verified in accordance with paragraph (h) of this section, and any report of investigation filed with the hearing clerk pursuant to § 47.7 will be considered as evidence in the proceeding. * * *

(b) *When applicable—(1) Where damages claimed do not exceed \$30,000.* The documentary procedure provided for in this section shall (except as provided in § 47.15(a)) be used in all reparation proceedings in which the amount of damages claimed, either in the complaint or in the counterclaim, does not exceed \$30,000 (excluding interest).

(2) *Where damages claimed exceed \$30,000.* In any proceeding in which the amount of damages claimed, either in the complaint or in the counterclaim, is greater than \$30,000 (excluding interest), the examiner, whenever he or she is of the opinion that proof may be fairly and adequately presented by use of the documentary procedure provided for in this section, shall suggest to the parties that they consent to the use of such procedure. Parties are free to consent to such procedure if they

choose, and declination of consent will not affect or prejudice the rights or interests of any party. A party, if he or she has not waived oral hearing, may consent to the use of the documentary procedure on the condition that depositions rather than affidavits be used. In such case, if the other party agrees, depositions shall be required to be filed in lieu of verified statements. If any party who has not waived oral hearing does not consent to the use of the documentary procedure, the proceeding will be set for oral hearing. The suggestion that the documentary procedure be used need not originate with the examiner. Any party may address a request to the examiner asking that the documentary procedure be used.

* * * * *

(h) *Verification.* Verification shall be made under oath of any facts set forth in the pleading or statement, by the person who signs the pleading or statement. Certification by a notary public is insufficient. The form of verification may be as follows:

* * * * *

18. Section 47.21 is revised to read as follows:

§ 47.21 Transmittal of record.

The Hearing Clerk, immediately after the filing of the examiners' report, shall transmit to the Secretary the record of the proceeding. Such record shall include: The pleadings; motions and requests filed, and rulings thereon; the report of investigation conducted by the Fruit and Vegetable Programs; the transcript or record of the testimony taken at the hearing, together with the exhibits filed therein; any statements or stipulations filed under the documentary procedure; any documents or papers filed in connection with conferences; such proposed findings of fact, conclusions, and orders and briefs as may have been permitted to be filed in connection with the hearing as provided in § 47.19(b) and (c); such statements of objections, and briefs in support thereof, as may have been filed in the proceeding; and the examiner's report.

* * * * *

19. In § 47.24, the section heading and paragraph (a) are revised and a new paragraph (d) is added to read as follows:

§ 47.24 Rehearing, reargument, reconsideration of orders, reopening of hearings, reopening after default.

(a) *Petitions to rehear, reargue, and reconsider.* A petition for rehearing or reargument of the proceeding, or for reconsideration of the order, shall be

made by petition to the Secretary filed with the Hearing Clerk within 20 days after the date of service of the order. Every such petition shall state specifically the matters claimed to have been erroneously decided and the alleged errors. If the Secretary concludes that the questions raised by the petition have been sufficiently considered in the issuance of the order, the Secretary shall dismiss the petition without service on the other party. Otherwise, the Secretary shall direct that a copy of the petition be served upon such party by the Hearing Clerk. The filing of a petition to rehear or reargue a proceeding, or to reconsider an order, shall automatically operate to set aside the order pending final action on the petition. Only one petition to rehear, reargue, or reconsider will be accepted from each party, except when a mathematical or typographical error appears in either the original decision and order or in the decision on reconsideration.

* * * * *

(d) *Reopening after default.* The party in default in the filing of an answer or reply required or authorized under this part may petition to reopen the proceeding at any time prior to the expiration of 30 days from the date of service of the default order. If, in the judgment of the examiner, after notice to and consideration of the views of the other party(ies), there is good reason for granting such relief, the party in default will be allowed 20 days from the date of the order reopening the proceeding to file an answer.

20. In § 47.25, the section heading and paragraph (d) are revised, paragraph (e) is removed and paragraph (f) is redesignated as paragraph (e) to read as follows:

§ 47.25 Filing; extensions of time; effective date of filing; computations of time; official notice.

* * * * *

(d) *Computations of time.* Saturdays, Sundays and holidays shall be included in computing the time allowed for the filing of any document or paper: Provided, That, when such time expires on a Saturday, Sunday or Federal holiday, such period shall be extended to include the next following business day.

* * * * *

21. Part 47 is amended by removing the words "hearing clerk" and adding in their place the words "Hearing Clerk", everywhere they appear.

22. Part 47 is amended by removing the word "Division" and adding in its place the words "Fruit and Vegetable Programs", everywhere they appear.

23. Part 47 is amended by removing the words "Director" and "Director's", and adding in their place the words "Deputy Administrator" and "Deputy Administrator's" respectively, everywhere they appear.

Dated: July 12, 1999.
Robert C. Keeney,
Deputy Administrator, Fruit and Vegetable Programs.
[FR Doc. 99-18047 Filed 7-14-99; 8:45 am]
BILLING CODE 3410-02-P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

7 CFR Part 319

[Docket No. 98-021-2]

Cut Flowers

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Final rule.

SUMMARY: We are amending the cut flowers regulations to provide that APHIS inspectors will issue a written notice when pests are detected and action on the part of the importer is required. We are also amending the regulations to make it clear that the importer of cut flowers is responsible for all costs of destroying or otherwise disposing of pest-infested cut flowers should the importer choose not to treat or reexport them. These changes will help reduce the risk of cut flowers introducing plant pests into the United States by ensuring that any necessary treatment or other required actions are completed.

EFFECTIVE DATE: August 16, 1999.

FOR FURTHER INFORMATION CONTACT: Mr. Ronald Campbell, Import Specialist, Phytosanitary Issues Management Team, PPQ, APHIS, 4700 River Road Unit 140, Riverdale, MD 20737-1231; (301) 734-6799; or e-mail: Ronald.C.Campbell@usda.gov.

SUPPLEMENTARY INFORMATION:

Background

The regulations in 7 CFR part 319 prohibit or restrict the importation of plants, plant parts, and related materials to prevent the introduction of foreign plant pests into the United States. The regulations in §§ 319.74 through 319.74-4 (referred to below as the regulations) govern the importation of cut flowers into the United States and require, among other things, that all cut flowers be inspected for injurious insects and plant diseases at the port of entry.