

# Proposed Rules

Federal Register

Vol. 60, No. 127

Monday, July 3, 1995

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 filing 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