§ 11.6 Director review of agency determination of appealability and right of participants to Division hearing.

USDA has revised the format of this section so that it follows the logical progression from a Director determination of appealability, where made necessary because of an agency determination that an adverse decision is not appealable, to the appeal itself.

Section 11.6(a) (§ 11.6(b) in the proposed rule) provides the rules for requesting Director review of the determination of appealability. Two commenters suggested that the proposed language that the Director use ''any information he determines necessary'' in making a determination was too broad. These commenters felt the information to be considered should be defined, and that the allowance of any information the Director deemed necessary made the process appear secretive if the *ex parte* prohibition did not apply to this stage of the appeal process.

USDA has revised this subsection to reflect the language of the statute and not specify anything regarding what information the Director may or may not use.

Two commenters desired changes in the references to Deputy and Associate Directors to reflect titles currently used in the NAD internal structure. USDA has substituted ''subordinate official other than a Hearing Officer'' in the place of Deputy and Associate Directors to preserve the flexibility of the Director to organize NAD internally without reference to regulatorily defined titles. This change also responds to a comment that requests that the Director be allowed to delegate this responsibility as far down as possible to accomplish such a mission efficiently. Hearing Officers were excluded from such delegation because the delegation of such authority down to Hearing Officers facially contradicted the statute and could represent a potential conflict of interest for Hearing Officers who must justify resource requirements based on the burden of their caseload.

USDA rejected comments suggesting that this delegation is improper under the statute, or that participants should be given the right to challenge the credentials of the subordinate reviewing official. Nothing in the statute requires that the Director personally must review every request for a determination of appealability that may be filed. The Director, as in the case of any agency official, remains ultimately responsible for any decision undertaken by a subordinate. Therefore, USDA sees no reason why this statute should be read any differently than any other statute where, absent a specific statutory prohibition, USDA and other executive branch agencies have allowed for delegation of decision-making authority by officials whose qualifications have been set by statute.

With respect to this subsection as proposed, two commenters also expressed concern that it did not specify the timing for filing an appeal once the Director reversed an agency determination that an adverse decision was not appealable. USDA added language in what is now subsection (b) to specify that the 30 days for appeal of adverse decisions shall run from the date the participant receives notice of the adverse decision or receives notice of the Director's determination that an adverse decision is appealable.

Subsection (b) (§ 11.6(c) in the proposed rule) provides rules for appealing adverse decisions to NAD. In addition to the change noted above, two additional changes were made to this section. First, seven commenters suggested that it is inappropriate in any circumstances to apply a ''should have known'' standard as a deadline for appeals in cases of agency inaction. They argued that this shifted the burden from the agency to the participant for policing the agency's failure to follow its own regulations; one commenter argued that the agency remained in continuing violation for failure to act within its own deadlines.

USDA disagrees with these commenters. A failure to act by the agency at some point becomes ripe for appeal and the statute clearly also provides that at a point past 30 days from an adverse decision an appellant loses the right of appeal. USDA finds no intention on the part of Congress to extend a participant's right of appeal indefinitely, particularly when agency regulations define a specified period in which a decision is to be made. However, to add flexibility to the ''should have known'' standard in the latter situation, USDA has changed the regulation to require that a participant must request a hearing within 30 days after the participant ''reasonably'' should have known that the agency had not acted within the timeframes specified by program regulations.

The second change made to the proposed rule regarding the request for a hearing is to require a participant to send a copy of the request for a hearing to the agency, and allow a participant the option to send a copy of the adverse decision being appealed to the agency as well. In either case, failure of the participant to send such copies to the agency is not jurisdictional and therefore will not be grounds for dismissal of an appeal.

Agency officials often make many decisions a year with respect to some individual participants. In such cases, it is not always immediately apparent which decision a participant has appealed at a given time. USDA adds this provision to promote efficiency in the appeals process by encouraging full airings of appeals before the Hearing Officer. Sending the agency a copy of the decision will discourage agency requests for Director review because the agency did not have adequate notice of the appeal or the decision that was being appealed.

With respect to the language in the proposed § 11.9(c), several other comments were rejected. Two commenters suggested that, since the ''should have known'' standard is being used, participants should not be required to exhaust administrative remedies prior to judicial review when appeals are taken from cases where agencies have failed to act. The statement added to § 11.2 and discussed above makes clear that USDA considers exhaustion of an appeal to the Hearing Officer mandatory prior to seeking judicial review, regardless of the basis for the appeal.

One commenter suggested that the regulation should state clearly that a decision becomes final after the 30-day time period for requesting a hearing is missed and that this timeframe may not be waived. USDA believes such a provision unnecessary; if a participant does not request the hearing within 30 days, the participant will not be allowed to have a hearing. USDA considers the 30-day requirement for filing an appeal to be jurisdictional in nature; thus, NAD has no authority under the Act to hear an appeal unless filed within the 30-day time period as required.

On the other hand, USDA does not view the requirements of section 274 of the Act to be jurisdictional for NAD. That section requires an agency to provide participants with written notice of the adverse decision and appeal rights within 10 working days of the adverse decision. One commenter suggested that the proposed rule be revised to state that the 30-day timeframe for requesting a hearing does not begin to run until the participant receives complete appeal rights, presumably as provided for in section 274. While section 274 of the Act places a requirement on agencies, it has no bearing on the authority of NAD to hear an appeal by a participant. To read section 274 literally as suggested also would mean conversely that a participant achieves no standing to