

Sunshine Act Meetings

Federal Register

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Wednesday, February 22, 1984

This section of the FEDERAL REGISTER contains notices of meetings published under the "Government in the Sunshine Act" (Pub. L. 94-409) 5 U.S.C. 552b(e)(3).

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1

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

February 15, 1984.

TIME AND DATE: 10:00 a.m., Thursday, February 23, 1984.

PLACE: Room 600, 1730 K Street, NW., Washington, D.C.

STATUS: Open.

MATTERS TO BE CONSIDERED: The Commission will consider and act upon the following:

1. Monterey Coal Company, Docket No. HOPE 79-323-P; Petitions for Interlocutory Review. (Issues include whether the Commission's Administrative Law Judge erred in granting the Secretary of Labor's motion to join an independent contractors as a party respondent in the proceeding.)
2. Secretary of Labor on behalf of John Cooley v. Ottawa Silica Co., Docket No. LAKE 81-163-DM. (Issues include whether the judge erred in concluding that the operators discharge of the miner violated the Mine Act and whether the judge granted appropriate remedial relief.)

CONTACT PERSON FOR MORE

INFORMATION: Jean Ellen, (202) 653-5632.

Jean Ellen,
Agenda Clerk.

[FR Doc. 84-4695 Filed 2-16-84; 4:41 pm]

BILLING CODE 6735-01-M

2

FEDERAL RESERVE SYSTEM

TIME AND DATE: 10:00 a.m. Monday, February 27, 1984.

PLACE: 20th Street and Constitution Avenue, NW., Washington, D.C. 20551.

STATUS: Closed.

MATTERS TO BE CONSIDERED:

1. Proposed purchase of computers within

the Federal Reserve System and establishment of emergency computer backup.

2. Issues relating to Federal Reserve notes. (This item originally announced for a closed meeting on February 2, 1984.)

3. Personnel actions (appointments, promotions, assignments, reassignments, and salary actions) involving individual Federal Reserve System employees.

4. Any item carried forward from a previously announced meeting.

CONTACT PERSON FOR MORE

INFORMATION: Mr. Joseph R. Coyne, Assistant to the Board; (202) 452-3204.

Dated: February 17, 1984.

James McAfee,

Associate Secretary of the Board.

[FR Doc. 84-4756 Filed 2-17-84; 2:20 pm]

BILLING CODE 6210-01-M

3

INTERNATIONAL TRADE COMMISSION

[USITC SE-84-11]

TIME AND DATE: 2:30 p.m. Monday, February 27, 1984.

PLACE: Room 117, 701 E Street, NW., Washington, D.C. 20436.

STATUS: Open to the public.

MATTERS TO BE CONSIDERED:

1. Agenda.
2. Minutes.
3. Ratifications.
4. Petitions and complaints:
 - a. Rotary wheel printers (Docket No. 1025).
 - b. Tennis rackets (Docket No. 1021).
5. Any items left over from previous agenda.

CONTACT PERSON FOR MORE

INFORMATION: Kenneth R. Mason, Secretary, (202) 523-0161.

Kenneth R. Mason,
Secretary.

[FR Doc. 84-4793 Filed 2-17-84; 3:38 pm]

BILLING CODE 7020-02-M

4

INTERNATIONAL TRADE COMMISSION

[USITC SE-84-12]

TIME AND DATE: 3:00 p.m., Tuesday, February 28, 1984.

PLACE: Room 117, 701 E Street, NW., Washington, D.C. 20436.

STATUS: Open to the public.

MATTERS TO BE CONSIDERED:

1. Investigation 731-TA-123 [Final] (Carbon

Steel Products from Brazil)—briefing and vote.

2. Investigation 337-TA-140 (Personal Computers)—briefing and vote.

CONTACT PERSON FOR MORE

INFORMATION: Kenneth R. Mason, Secretary, (202) 523-0161.

Kenneth R. Mason,
Secretary.

[FR Doc. 84-4794 Filed 2-17-84; 3:38 pm]

BILLING CODE 7020-02-M

5

INTERNATIONAL TRADE COMMISSION, EXECUTIVE RESOURCES BOARD (ERB)

[USITC ERB-84-2]

TIME AND DATE: 11:00 a.m., Wednesday, February 29, 1984.

PLACE: Room 117, 701 E Street, NW., Washington, D.C. 20436.

STATUS: Open to the public.

MATTERS TO BE CONSIDERED:

Issues:

1. Executive Development Program Individual Development Plans.
2. Executive Development Program Evaluation.

CONTACT PERSON FOR MORE

INFORMATION: Kenneth R. Mason, Secretary, (202) 523-0161.

Kenneth R. Mason,
Secretary.

[FR Doc. 84-4792 Filed 2-17-84; 3:38 pm]

BILLING CODE 7020-02-M

6

INTERNATIONAL TRADE COMMISSION

[USITC SE-84-13]

TIME AND DATE: 11:00 a.m., Thursday, March 1, 1984.

PLACE: Room 117, 701 E Street, NW., Washington, D.C. 20436.

STATUS: Open to the public.

MATTERS TO BE CONSIDERED:

1. Petitions and complaints:
 - a. Glass construction blocks (Docket No. 1027).
2. Investigation 731-TA-165 [Preliminary] (Valves, Nozzles, and Connectors of Brass from Italy)—briefing and vote.
3. Investigation 337-TA-133 (Certain Vertical Milling Machines and Parts, Attachments and Accessories Thereto)—briefing and vote.

CONTACT PERSON FOR MORE

INFORMATION: Kenneth R. Mason,
Secretary, (202) 523-0161.
Kenneth R. Mason,
Secretary.

[FR Doc. 84-4795 Filed 2-17-84; 3:38 pm]

BILLING CODE 7020-02-M

7

INTERNATIONAL TRADE COMMISSION

[USITC SE-84-14]

TIME AND DATE: 9:30 a.m., Tuesday,
March 6, 1984.

PLACE: Room 117, 701 E Street, NW.,
Washington, D.C. 20436.

STATUS: Open to the public.

MATTERS TO BE CONSIDERED:

1. Agenda.
2. Minutes.
3. Ratifications.
4. Petitions and complaints, if necessary.
5. Investigations 701-TA-210 and -211 and 731-TA-167 and -168 [Preliminary] (Table Wine from France and Italy)—briefing and vote.
6. Investigation 731-TA-130 [Final] (Chloropicrin from the People's Republic of China)—briefing and vote.
7. Any items left over from previous agenda.

CONTACT PERSON FOR MORE

INFORMATION: Kenneth R. Mason,
Secretary, (202) 523-0161.
Kenneth R. Mason,
Secretary.

[FR Doc. 84-4796 Filed 2-17-84; 3:38 pm]

BILLING CODE 7020-02-M

8

MERIT SYSTEMS PROTECTION BOARD

TIME AND DATE: 10:30 a.m., Wednesday,
February 29, 1984.

PLACE: Eighth Floor, 1120 Vermont
Avenue, NW., Washington, D.C. 20419.

STATUS: Closed.

MATTERS TO BE CONSIDERED:

1. *James Johnson v. Department of Health and Human Services*, MSPB Docket No. PH07528110407.
2. *James Abrams v. Department of the Navy*, MSPB Docket No. PH07528110312.
3. *Benjamin Harrison v. Department of the Treasury*, MSPB Docket No. DC07528110622.
4. *James Honeycutt v. Department of Labor, Mine Safety and Health*

Administration, MSPB Docket No. AT07528210386.

5. *Louis Hoffer v. Department of Commerce*, MSPB Docket No. SE03518210043.

6. *Neda Taylor v. Department of Transportation*, MSPB Docket No. DC03518180788.

7. *Special Counsel v. Guadalupe Saldana*, MSPB Docket No. HQ12068210023.

8. *Mabel P. Gibson v. Department of the Navy*, MSPB Docket No. AT07528211006.

9. *David Kulling v. Department of Transportation*, MSPB Docket No. CH07528210378.

CONTACT PERSON FOR ADDITIONAL

INFORMATION: Robert E. Taylor,
Secretary, (202) 653-7200.

For the Board:

Dated: February 16, 1984, Washington, D.C.

Robert E. Taylor,
Secretary.

[FR Doc. 84-4699 Filed 2-17-84; 9:46 am]

BILLING CODE 7400-01-M

9

OVERSEAS PRIVATE INVESTMENT CORPORATION

Meeting of the Board of Directors.

TIME AND DATE: 9:00 a.m. (closed portion), 10:00 a.m. (open portion)
Tuesday, February 28, 1984.

PLACE: Offices of the Corporation, seventh floor Board room, 1129 20th Street NW., Washington, D.C.

STATUS: The first part of the meeting from 9:00 a.m. to 10:00 a.m. will be closed to the public. The open portion of the meeting will start at 10:00 a.m.

MATTERS TO BE CONSIDERED: (Closed to the public 9:00 a.m. to 10:00 a.m.).

1. Insurance Project in African country.
2. Insurance Project in Caribbean country.
3. Insurance Project in East Asian country.
4. Claims Report.
5. Information Report: Finance.
6. Information Reports: General.
7. Information Report: China Projects.

FOR FURTHER MATTERS TO BE

CONSIDERED: (Open to the public 10:00 a.m.).

8. Approval of the Minutes of the Previous Board meeting.
9. Approval of proposed Regular Meetings of the Board.
10. Insurance: Increased Coverage for Existing Insureds.
11. Personnel Actions.
12. Treasurer's Financial Statements.

13. Increase of Direct Investment Fund for FY 1984.

14. Information Reports.

CONTACT PERSON FOR INFORMATION:

Information with regard to the meeting may be obtained from the Secretary of the Corporation at (202) 654-2953.

Elizabeth A. Burton,
Corporate Secretary.

February 16, 1984.

[FR Doc. 84-4700 Filed 2-17-84; 10:20 am]

BILLING CODE 3210-01-M

10

PAROLE COMMISSION

Pursuant To The Government In The Sunshine Act—Pub. L. 94-409 (5 U.S.C. 552b).

TIME AND DATE: 1:00 p.m., Friday,
February 24, 1984.

PLACE: Room 420-F, One North Park Building, 5550 Friendship Boulevard, Chevy Chase, Maryland 20815, and over a conference telephone circuit.

STATUS: Open.

MATTERS: The following changes are proposed in the guidelines (28 CFR 2.20) to increase the sanctions for large scale cocaine offenses.

- (a) 15 kg. or more of 100% purity, or equivalent—Category 8.
- (b) 5-14 kg. of 100% purity or equivalent—Category 7.
- (c) If peripheral role under (a) and (b)—Category 6.
- (d) More than 1-4 kg. of 100% purity or equivalent—Category 6.
- (e) If peripheral role under (d)—Category 5.

The street value chart is to be changed to \$800,000 per kg. of 100% purity or equivalent. Changes in narrative labels and in language in other parts of the guidelines will be made to conform to the above.

CONTACT PERSON FOR MORE

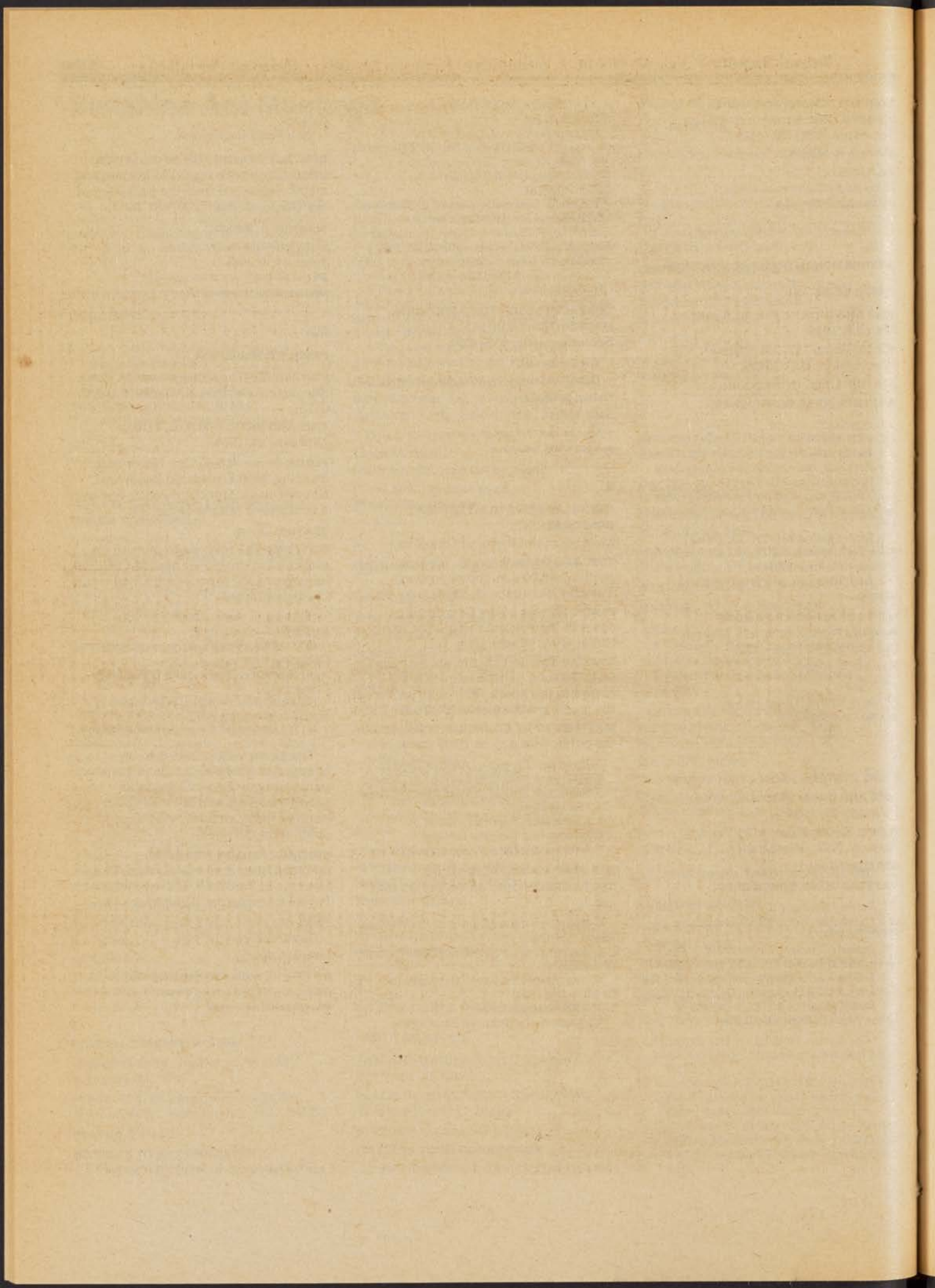
INFORMATION: James Beck, Assistant Director of Research, United States Parole Commission, Telephone: 492-5980.

Dated: February 16, 1984.

Joseph A. Barry,
General Counsel, Parole Commission.

[FR Doc. 84-4757 Filed 2-17-84; 2:28 pm]

BILLING CODE 4410-01-M



Registered Federal Reporter

Wednesday
February 22, 1984

Part II

Commodity Futures Trading Commission

17 CFR Part 12

Final Rules Relating to Reparations

COMMODITY FUTURES TRADING COMMISSION

17 CFR Part 12

Final Rules Relating to Reparations

AGENCY: Commodity Futures Trading Commission.

ACTION: Final rules.

SUMMARY: On January 11, 1983, Section 14(b) of the Commodity Exchange Act, 7 U.S.C. 18(b), was amended to authorize the Commodity Futures Trading Commission to promulgate rules, regulations, and orders as it deems necessary or appropriate for the efficient and expeditious administration of its reparations program. Pursuant to Section 14(b)'s grant of authority, the Commission is adopting final rules which effect changes to its existing reparation procedures in order to streamline and simplify the entire reparation process.

DATES: Effective April 23, 1984. This Part shall apply in its entirety to all reparation complaints, and all matters relating thereto, filed on and after April 23, 1984. Sections 12.14, 12.21, 12.22, 12.23, 12.24 and 12.408 of this Part shall apply to all reparation matters, including those pending on April 23, 1984, regardless of when the reparation complaint was filed. Subpart F of this Part shall apply to all proceedings in which initial decisions, or similar dispositive orders, are served on and after April 23, 1984. Except as indicated above, this Part shall not apply to reparation complaints filed before April 23, 1984, except that parties to a formal adjudicatory proceeding commenced pursuant to any such complaint may, at any time before the initial decision is rendered, by written stipulation executed by all parties, elect to have the case heard pursuant to Subpart C of this Part. To the extent that this Part does not apply to any matter on the Commission's reparations docket pending on April 23, 1984, 17 CFR Part 12 (1983) shall apply.

FOR FURTHER INFORMATION CONTACT: Edward S. Geldermann, Attorney, Office of General Counsel, Commodity Futures Trading Commission, 2033 K Street, NW., Washington, D.C. 20581. Telephone: (202) 254-9880.

SUPPLEMENTARY INFORMATION:

I. Background

On January 11, 1983, Section 14(b) of the Commodity Exchange Act, 7 U.S.C.

18(b) was amended, effective May 11, 1983,¹ to authorize the Commission to: promulgate such rules, regulations, and orders as it deems necessary or appropriate for the efficient and expeditious administration of this section. Notwithstanding any other provision of law, such rules, regulations, and orders may prescribe, or otherwise condition, without limitation, the form, filing, and service of pleadings or orders, the nature and scope of discovery, counterclaims, motion practice (including the grounds for dismissal of any claim or counterclaim), hearings (including the waiver thereof, which may relate to the amount in controversy), rights of appeal, if any, and all other matters governing proceedings before the Commission under this section.

Futures Trading Act of 1982, Pub. L. No. 97-444, section 231, 96 Stat. 2294, 2319, 7 U.S.C. 18(b) (1982).²

Pursuant to Section 14(b)'s authorization, the Commission on February 15, 1983, published an advance notice of proposed rulemaking, indicating that it was considering making the following major changes to its reparation procedure: Instituting a voluntary decisional procedure, analogous to commercial arbitration, that would result in an expeditious, final, and unappealable decision; raising to \$10,000 the monetary ceiling for damage claims that could be heard pursuant to the Commission's summary procedure; creating the position of "Proceedings Officer," an employee of the Commission who would assist the discovery functions of Administrative Law Judges; and dismissing reparation proceedings or respondents because of the pendency of related civil litigation, arbitration, receivership or bankruptcy proceedings.

After analyzing comments received concerning the advance notice, the Commission on May 24, 1983, adopted proposed Reparation Rules which incorporated essentially all of the concepts featured in its advance notice. On June 6, 1983, the Commission published in the *Federal Register* a notice of the availability of these proposed rules in which it invited public comment on the rules as proposed and suggestions for any other changes that would improve and expedite the reparation procedure. 48 FR 25218

¹ Futures Trading Act of 1982, Pub. L. No. 97-444, section 239, 96 Stat. 2294, 2327 (1983).

² Section 14(a) of the Act was also amended to repeal the Commission's jurisdiction over those persons who, although not registered under the Act, had engaged in activities requiring them to be registered. Amended Section 14(a) of the Act, 7 U.S.C. § 18(a), authorizes the filing of reparation complaints only for violations of the Commodity Exchange Act, or of any regulation or order issued thereunder, committed by any person registered under the Act.

(1983). In response to this invitation for public comment, the Commission received letters of comment from Robert K. Wilmoth, on behalf of the National Futures Association ("NFA"); John W. Damgard, on behalf of the Futures Industry Association; William J. Nissen, on behalf of Heinold Commodities, Inc.; Eric G. Lipoff, on behalf of Monex International Ltd.; William E. McDonnell, on behalf of Drexel Burnham Lambert, Inc.; Michael J. Hogan, on behalf of Shearson/American Express, Inc.; M. Van Smith; H. Richard Mayberry, Jr.; William O. Hoar; Leslie A. Blau, on behalf of Maduff & Sons, Inc.; and James L. Fox.

The Commission has since considered the comments in these letters as well as other suggestions for improvements in the reparations process, and has determined to adopt final rules which amend, in their entirety, the formerly existing Part 12 Reparation Rules.

II. Summary of Changes to Proposed Rules Adopted In Final Reparation Rules

In its final rules the Commission has adopted numerous changes to its proposed rules which incorporate comments received from the public as well as other suggestions for improving or expediting the reparations process. Concerning practice in the reparations forum, the Commission has amended its proposed rules to allow parties five days, instead of three as proposed, to respond to a document served upon them when service is effected by mail. The Commission has also increased the time allowed for responding to motions to amend or supplement the pleadings and for filing an application for interlocutory review, from five to ten days, and for filing an answering brief on appeal, from twenty to thirty days.

In the final rules, the Commission has reduced, from seven to five, the number of days in advance of the expiration of a time limit within which a party must file a motion for extension of the time limit. The Commission has also reduced, from two to one, the number of copies of a filed document that must be served on other parties. Finally, the Commission has modified its proposed rule which required documents, in order to be considered timely filed, to be received by the Proceedings Clerk within the time prescribed for filing. Instead, when the filing is effected by mail, a document need only be deposited in the mail within the time prescribed for filing, to be considered timely filed.

Concerning the content requirements for pleadings, the Commission has determined not to adopt its proposed

rules which would have required parties at the time of filing their initial pleadings to attach copies of all documentary proof and affidavits of witnesses which the parties intended to rely upon in establishing their claims or defenses. The content requirements for a complaint, answer and reply, as adopted in the final rules, are now similar to those in effect under the Commissioner's former reparation rules. The Commission has also reduced, from \$250 to \$200, the non-refundable filing fee that must be paid for the formal decisional procedure.

In its final rules, the Commission has also adopted substantial modifications to its proposed rules concerning discovery. Under the proposed discovery procedure, parties seeking discovery could only apply to the decisionmaker (or, if the formal decisional procedure had been elected, a proceedings officer) for an order compelling other persons to produce documents, affidavits, responses to interrogatories, which the applying party could suggest to the decisionmaker. The decisionmaker would have the authority to accept or reject, in whole or in part, any such application for a discovery order. In the final rules, the Commission adopted a discovery procedure which allows parties, without leave of a decisionmaker, to conduct limited discovery within sixty days after a reparation proceeding had commenced. The methods and procedure would be virtually the same as utilized under the Commission's former reparation rules, except that, in a formal decisional proceeding, discovery-related motions would be decided by a Proceedings Officer. Any discovery-related ruling by a Proceedings Officer would be appealable to an Administrative Law Judge. Costs would be awardable as sanctions for an abuse of discovery.

In the Commission's final rules applicable to voluntary decisional proceedings, the Commission has determined not to adopt its proposed rules which would have granted a Judgment Officer the authority to conduct pre-decision conferences, to conduct discovery on his own motion, and to conduct oral examination of parties and their witnesses. All proof in a voluntary decisional proceeding would be required to be submitted in documentary form. The Commission has also adopted a rule which provides that a finding that a respondent violated the Act in a final decision rendered pursuant to the voluntary decisional procedure shall not be deemed a finding of the Commission for the purposes of

Section 8a of the Commodity Exchange Act.

The proposed rules concerning the summary decisional procedure would have permitted a Judgment Officer to conduct oral examination of the parties and their witnesses in Washington, D.C., or by telephone, only if issues of critical importance existed which required for their resolution credibility determinations to be made. Examination by a party or his counsel would have been prohibited. In the final rules, a Judgment Officer has been afforded somewhat broader discretion to permit oral examination of parties and to allow such oral examination, including cross examination, to be conducted by the parties. The Commission has also determined not to allow parties to file proposed findings of fact and conclusions of law memoranda in a summary decisional proceeding.

In cases involving the formal decisional procedure, the Commission proposed to allow a Proceedings Officer, before a proceeding had commenced, to conduct discovery on his own motion, to conduct pre-decision conferences, to rule on motions for dismissal, and to make recommendations to an Administrative Law Judge concerning the need for an oral hearing to resolve issues of credibility, and, if no oral hearing was determined to be necessary, to make recommendations to the Administrative Law Judge concerning findings of fact and conclusions of law. In its final rules, the Commission has determined not to vest the Proceedings Officer with any of the foregoing authorities other than the authority to conduct pre-decision conferences. The final rules also vest a Proceedings Officer with authority, unless otherwise directed by the Administrative Law Judge assigned to decide the case, to rule upon discovery-related motions filed within sixty days after the proceeding commenced.

Also in its final rules applicable to formal decisional proceedings, the Commission has enlarged, from twelve to twenty, the number of cities in which oral hearings may be held. The final rules also make oral hearings, including oral direct examination, generally available to parties without requiring an Administrative Law Judge to first find that important issues of credibility exist.

In its final rules applicable to appeals, the Commission has eliminated its proposal to require parties to file an appeal bond if they were ordered to do so in the initial decision. The final rules require appealing parties to pay a \$50 appellate filing fee at time of filing a notice of appeal, rather than at the time

of filing an appeal brief as proposed, and eliminate the proposed reconsideration procedure which would have followed the Commission's issuance of a final reparation decision. Finally, the Commission in its final rules has delegated authority to the Chief of its Opinions Section to: Rule upon miscellaneous procedural motions after an initial decision has been filed; to remand proceedings where a motion to vacate a default judgment has been filed, where the initial decision is in need of clarification, and where a ministerial act necessary for the proper conduct of the proceeding has not been performed; to deny applications for interlocutory review and to dismiss appeals under strictly limited circumstances; and to strike any filing that does not meet the requirements of the reparations rules. Any action by the Chief pursuant to this rule would be subject to reconsideration by the Commission upon motion by a party filed within 7 days after service of notice of such action.

III. The Commission's Final Reparation Rules

A. Definitions

The final reparation rules feature three distinct decisional procedures, each of which varies from one another in terms of probable length of time necessary to reach a decision. The most expeditious of these procedures is a low-cost, entirely new "voluntary decisional procedure," defined in § 12.2(1), and is a procedure which the complainant and the respondent have chosen voluntarily to submit their claims and counterclaims in documentary or tangible form for an expeditious resolution by a Commission decisionmaker. By electing the voluntary decisional procedure, parties agree to waive whatever right they might otherwise have had to a decision accompanied by findings of fact and conclusions of law, and agree that the decision rendered shall be final without right of Commission review and judicial review. The filing fee for the procedure is \$25. A decision pursuant to the voluntary procedure can be expected within six months after the complaint is filed.

An alternative to the voluntary procedure is the summary decisional procedure, defined in § 12.2(k), which is available to parties where the amount of damages claimed or counterclaimed does not exceed \$10,000 and one of the parties does not elect the voluntary procedure. The filing fee for the summary decisional procedure is \$100.

The rules governing the summary decisional procedure parallel to some degree the Commission's former summary proceedings rules, except insofar as they vest the decisionmaker with discretion to permit limited oral cross examination. An initial decision rendered pursuant to the summary decisional procedure will contain a brief statement of findings and conclusions, and is appealable to the Commission, whose decision is thereafter subject to judicial review pursuant to Section 14(e) of the Act. Because of the additional time needed to prepare a decision with findings and conclusions, an initial decision pursuant to the summary decisional procedure can be expected within nine months after the complaint is filed.

As a separate alternative to the voluntary decisional procedure, the formal decisional procedure (defined in § 12.2(j)) is available to parties only where the amount of damages claimed or counterclaimed exceeds \$10,000, at least one of the parties does not elect the voluntary procedure, and a filing fee of \$200 is paid. A formal decisional proceeding, if commenced, affords parties the opportunity for a more traditional administrative trial-type procedure, *i.e.*, an oral hearing before an Administrative Law Judge, an opportunity to orally cross examine other parties and witnesses, an initial decision by an Administrative Law Judge containing findings and conclusions, and the right to appeal the initial decision to the Commission, whose decision may subsequently be appealed to a United States Court of Appeals. Because of the greater amount of time needed to conduct an oral hearing, an initial decision pursuant to the formal decisional procedure can be expected within one year after the complaint is filed. The Commission has received numerous comments from the public concerning the features of the voluntary, summary, and formal decisional procedures, and these comments will be addressed at length, *infra*, where the specific rules applicable to each of the decisional procedures are discussed in more detail.

In its new rules, the Commission has consolidated its organizational units responsible for administering various procedures under the former reparation rules by creating a new "Office of Proceedings." Defined in § 12.2(p) of the rules, the Office of Proceedings is an office charged with the responsibility for generally administering all of the reparation rules, except those concerning direct review by the Commission. Thus, the functions

previously performed by the Complaints Section, the Hearing Clerk's office, and by the Commission's Office of the Administrative Law Judges under the Commission's former reparation procedures are now centralized in one office. The newly adopted rules also include definitions of the "Director of the Office of Proceedings," "Judgment Officer," "Proceedings Officer," and the "Proceedings Clerk," which describe positions to be occupied by employees of the Commission who are assigned responsibilities which are key to the efficient administration of several facets of the new reparation procedure.

In creating the position of "Director of the Office of Proceedings," the Commission has determined to designate one of its staff members to serve as the administrative head of that office with supervisory authority over all personnel in the office other than the Administrative Law Judges and their personally assigned law clerk. In addition to the specific functions assigned to the Director by the rules, which relate to the preliminary consideration of the pleadings and the approval of travel itineraries for the Administrative Law Judges, the Director through § 12.2(h) of the rules is vested with plenary administrative authority and responsibility to assure that the reparation rules are administered in an efficient and expeditious manner. To that end, the Director has been granted authority to assign cases and to assign, and, if necessary or appropriate, reassign the duties of, and to establish reasonable standards of performance for, all personnel in the Office of Proceedings other than the Administrative Law Judges and their personally assigned law clerk. The Director also is authorized to convene, and preside over, meetings of all personnel in the Office of Proceedings.

Concerning this proposed authority to be vested in the Director of the Office of Proceedings, several commentators indicated that any such position should be vested with far greater authority over the Administrative Law Judges, including the authority to assign and schedule cases, the authority to set deadlines for the issuance of initial decisions and rulings on motions, and the authority to require the judges to submit regular reports to the Director concerning their progress in conforming to specific performance standards established by the Director. The Commission does not believe that the Director should have the authority to establish performance standards for Administrative Law Judges, to schedule

their cases, or to set deadlines for initial decisions and other rulings.³

The definition of "Judgment Officer" in § 12.2(o) contemplates a Commission employee conducting the proceeding and rendering a decision pursuant to the voluntary decisional procedure and the summary decisional procedure.⁴ The concept of utilizing a Commission employee to hear and decide certain kinds of cases is not new to the Commission's reparation program.⁵ The Commission believes that utilizing Judgment Officers, coupled with instituting the voluntary decisional procedure and raising the monetary ceiling for claims that can be heard pursuant to the summary decisional procedure, will increase the likelihood of more expeditious disposition rates and the overall efficiency of the reparations program, as it will ultimately reduce the number of backlogged reparation cases assigned to Administrative Law Judges, who must hear and decide enforcement cases in addition to reparation cases.

To further relieve the burdens on Administrative Law Judges and to expedite discovery in cases conducted pursuant to the formal decisional procedure, the Commission has created the position of "Proceedings Officer," defined in § 12.2(w), to be occupied by an employee of the Commission, who will have the initial responsibility for deciding discovery-related disputes that may arise between parties to a formal decisional proceeding, and who will be assigned default cases.⁶ The "Proceedings Clerk," defined in § 12.2(x), is an employee who, acting under the supervision of the Director, is responsible for maintaining the official

³ We also appreciate that there may be due process notions implicit in the degree of independence from agency control that Administrative Law Judges are afforded by Section 3105 of Title 5, United States Code. We do regard the Director's supervisory authority, however, to include inherently the authority to require the Administrative Law Judges to submit regular reports concerning their dispositions of reparation cases.

⁴ Section 12.2(o) also acknowledges that an Administrative Law Judge may, in appropriate cases, be called upon to perform these same duties. In such a situation, the Administrative Law Judge would continue to exercise the degree of independence from agency control that is afforded by 5 U.S.C. 3105.

⁵ Under the Commission's former reparation procedures, proceedings in which the amount of damages claimed did not exceed \$5,000 (\$2,500 before October 1, 1978) could be heard and decided by a Presiding Officer who could be, *inter alia*, a Commission employee. See, e.g., 17 CFR 12.3(o) (1983).

⁶ Many comments were received concerning the advisability of creating this position and those comments are addressed, *infra*, where the specific rules pertaining to the Proceedings Officer are discussed in greater detail.

docket in reparation cases, acting as custodian of the records in reparation matters, and assigning reparation cases to a decisionmaking official. In addition, the Proceedings Clerk is responsible for notifying one or more of the parties of any action taken by the Director pursuant to §§ 12.15, 12.24, 12.26, and 12.27 of the rules, or of any order entered in a reparation matter. The Proceedings Clerk is also responsible for issuing orders, to accompany notification of the commencement of a reparation proceeding, requiring parties to complete discovery within sixty days thereafter.

The terms "complaint" and "counterclaim" are defined in § 12.2 (f) and (g), respectively. Section 12.2(f) makes clear that any filing which fairly constitutes an application for a reparation award may be treated as a complaint, even though the document is not denominated as such. The Commission received several comments recommending that the scope of terms "complaint" and "counterclaim" be expanded to include third-party claims such as impleader and cross claims. While the Commission believes that it has the authority to permit third party practice in the reparations forum, at least where a third party respondent is a registrant, it nevertheless believes that the adoption of third party practice at this time would frustrate Congress' goal of making reparations a more simplified and expeditious procedure.

The allowance of third party claims would cause delay to recovery by complainants in several ways. The filing of a third party claim by a respondent will in the vast majority of cases coincide with the filing of an answer, which pursuant to Section 12.16 of the rules may be filed as late as 45 days after the complaint is forwarded. This, in turn, would require additional time by the Office of Proceedings to review the third party claim to determine whether it is properly the subject of a reparations complaint (and, if the claim is impleaded, more time would be needed by that office to accomplish service). Thereafter, a new 45 day period would run for the third party respondent to settle or file an answer. There would be obvious additional delays if the third party respondent's answer contained counterclaims. From the decisionmaking perspective, the allowance of third party claims would delay recovery to complainants unnecessarily in cases where the issue of the liability of at least one of the respondents to the complainant could be resolved simply and readily, but the added question of liability as between co-respondents

involves complicated factual or legal issues requiring a much greater commitment of time for resolution.

The Commission is cognizant that the reparations program was created by Congress primarily as a forum for aggrieved customers seeking redress for losses caused by violations of the Act committed by commodity professionals. See, e.g., H.R. Rep. No. 975, at 22, 93d Cong., 2d Sess. (1974). For this reason, and because Congress by vesting the Commission with plenary authority to refashion its reparation procedures intended the Commission to eliminate unnecessary delays to recovery by commodity customers,⁷ the Commission has determined not to adopt third party practice for its reparation procedures. The definitions of "complainant" and of "counterclaim" in § 12.2 (e) and (g) therefore make it clear that third party impleader or cross claims are not cognizable in reparations.

The term "registrant" is defined in § 12.2(y) and enumerates only those classes of individuals or entities which are amenable to suit in reparations. Consistent with an extant Commission interpretation of Section 14(a) of the Act,⁸ § 12.2(y) defines "registrant," *inter alia*, as an individual or entity registered under the Act at the time of the alleged violation. Section 12.2(y) also acknowledges as another class of "registrant" persons who, regardless of their registered status under the Commodity Exchange Act, have been specifically made subject to reparations by Section 4m of the Act. Finally, § 12.2(y) recognizes that there may be other classes of persons who, although not registered under the Act, are subject to reparation proceedings and these classes would fall within the "otherwise subject to reparation proceedings" language of § 12.2(y).⁹

Finally, the term "proceeding" is defined in § 12.2(v) as "a case in which the pleadings have been forwarded, and in which a procedure has been commenced pursuant to § 12.26(a), (b), or (c)." This definition is intended to make clear that a complainant and a respondent are not participants in a reparation proceeding unless and until the Director of the Office of Proceedings takes action pursuant to § 12.26 of the rules. Until such action is taken, the pleadings are regarded as merely under consideration by the Office of

Proceedings, and, among other things, the prohibitions of § 12.7 against *ex parte* communications, the discovery rules of Subpart B, and the right to have a case heard pursuant to an elected decisional procedure do not apply. The appealability of reparation orders also depends, *inter alia*, upon whether a "proceeding" has commenced pursuant to § 12.22 or § 12.26 (a), (b), or (c).¹⁰ Thus, a determination made by the Director of the Office of Proceedings not to forward the complaint pursuant to § 12.15 or not to take action pursuant to § 12.26, which would necessarily precede the commencement of a "proceeding," is not appealable to the Commission or, in the Commission's view, to a U.S. Court of Appeals pursuant to Section 14(e) of the Act.

B. Practice in the Reparations Forum

The new rules contain some significant modifications to the Commission's former rules relating to the time allowed for responding to specific motions, motions for extension of time, service, filing of documents with the Proceedings Clerk, withdrawal of representation by counsel, and the prohibitions against *ex parte* communications. In the final rules, the Commission has enlarged, from five to ten days, the time allowed for parties to respond to motions to amend or supplement the pleadings, to apply for interlocutory review, and, from twenty to thirty days, to file an answering brief in an appeal to the Commission.

In its proposed rules, the Commission proposed to require parties who needed an extension of a time limit on action to be taken concerning any matter to file a motion therefor at least seven days prior to the expiration of the time limit. Comments received concerning this proposed rule indicated that very often the parties cannot foresee that they will need an extension of time until immediately prior to the expiration of the time limit, and therefore, the final rules should not require any advance filing of motions for extension of time. Given that, in most instances, parties have a ten day time limit within which to take action in a reparation proceeding, and because the Commission, based on its experience, believes that a party will generally be able to foresee the need for an extension at least five days prior to the deadline of the time limit, the Commission has determined to adopt § 12.6(b) which

⁷ See H.R. Rep. No. 565, Pt. 1, at 56; H.R. Rep. No. 565, Pt. II, at 32, 97th Cong., 2d Sess. (1982); S. Rep. No. 364, at 48, 97th Cong., 2d Sess. (1982).

⁸ See 48 FR 21923 (1983).

⁹ For instance, those who have willfully aided and abetted a registrant's violation may be subject to reparation proceedings. See S. Rep. No. 384, at 48, 97-98, 97th Cong., 2d Sess. (1982).

¹⁰ There may be situations in which, even though a proceeding had commenced pursuant to § 12.26 (a), (b), or (c), an order terminating the proceeding would not be appealable to the Commission. See § 12.24 of the Rules.

requires the filing of motions for extension five days in advance of the expiration of the time limit absent extraordinary circumstances. Truly unforeseeable and pressing conditions would likely constitute extraordinary circumstances which would relieve the moving party from the five day advance filing requirement of § 12.6(b).

The Commission's proposed rules provided that two copies of all motions and other memoranda, other than a complaint, made in the course of a proceeding shall be served on other parties. Service could be effected by making personal delivery or by first-class mail. Under the proposed rules, when service of any document was effected by first-class mail, the time within which the person served could respond thereto would be increased by three days. The proposed rules also required all documents served to be filed concurrently with the Proceedings Clerk. Under the proposed rules, to be timely filed a document was required to be received within the time prescribed for filing.

Concerning the proposed rule requirement that two copies of all documents be served on other parties, several commentors expressed a view that there was no need for two copies of each document to be served, and that the rule would add an unwarranted expense to a reparation proceeding. While the proposed two copies service requirement was originally intended to supply a served party's counsel with a copy in addition to a copy for the represented party, the Commission has reconsidered this rule and has decided that the party making service should not have to bear the cost of providing an additional copy for this purpose. Accordingly, the proposed requirement of two copies has been abandoned, and § 12.10(a)(1) of the reparation rules now requires only one copy of documents to be served.

Although no comments were received concerning the Commission's proposal to allow three additional days to the time required for a response to a document that has been served by mail, the Commission reconsidered whether the three day period accurately reflects the average time that it takes the United States Postal Service to transmit a piece of mail first-class from point of origin to destination. Recognizing that in some instances the delivery of first-class mail may take longer than three days, the Commission in adopting § 12.10(b) has determined to enlarge to five days the time for responding to a document that has been served by mail.

The Commission also received comments indicating that it should not

adopt the proposed rule which required a document, in order to be considered timely filed, to be received within the time prescribed for filing. These commentors indicated that no one can control when a document is received by the Proceeding Clerk, citing the unreliability of the mails as a potential problem in this regard. The Commission agrees that it is beyond the parties' control to assure that a document that has been deposited in the mail is received by the Proceedings Clerk within the time prescribed for filing. Therefore, in accordance with these commentors' suggestions, the Commission has adopted § 12.10(a)(2) which provides, *inter alia*, that to be timely filed a document must be mailed by first-class mail, within the time prescribed for filing.¹¹

The proposed rules also imposed restrictions on the withdrawal from representation by counsel to a party to a reparation proceeding. The Commission has experienced problems in the past in cases where a party's attorney has withdrawn from representation without providing adequate notice to the party that he is thereafter expected to act *pro se* in the reparation proceeding, and without making adequate provision thereafter for documents to be served directly on the party rather than on the counsel who has withdrawn. To remedy this problem, the Commission has adopted § 12.9(c) which provides that withdrawal for representation of a party shall be only by leave of the official (or the Commission) before whom the matter is then pending. Section 12.9(c) further provides that leave to withdraw may be conditioned on the withdrawing counsel's submission of an affidavit stating that the represented party has actual knowledge of the withdrawal, and either (1) that the party has determined to proceed *pro se*, in which case the party's address for service shall be provided, or (2) that a successor counsel has been retained, in which case that counsel's name and address for service shall be provided.

Although Section 14(b) of the Act has exempted the Commission from the adjudicatory procedural constraints of the Administrative Procedure Act, 5 U.S.C. 554, 556 and 557, in fashioning its reparation procedures, the Commission nevertheless has determined to retain its prohibitions against *ex parte*

communications to insure fairness to the parties. Section 12.7, which contains the general prohibitions, does not apply to all *ex parte* communications. Rather, they apply to only those communications that are relevant to the merits of a proceeding. Furthermore, § 12.2(i) excludes from the definition of "ex parte communication": (1) a discussion, after consent has been obtained from all parties, between a party and the decisionmaker, or a staff member thereof, pertaining solely to the possibility of settling the case; (2) requests for status reports and service- or registration-related questions; and (3) requests for interpretations of the reparation rules. Finally, as discussed earlier, the *ex parte* communication rule does not apply unless and until a "proceeding" has commenced pursuant to Section 12.26 of the rules. Therefore, until the Director of the Office of Proceedings takes action pursuant to § 12.26, no discussion or written communication between a potential participant to a reparation proceeding and a staff member of the Office of Proceedings, or any other Commission employee, shall be deemed a prohibited *ex parte* communication.

C. Content Requirements and Preliminary Consideration of the Pleadings

In its proposed rules, the Commission prescribed content requirements that would have imposed upon complainants a duty to provide more information in, or accompanying, their complaints than was required by the former reparation rules, so that a more complete factual records would be made at a very early stage of the proceeding. Thus, the Commission proposed a rule which would have required a complainant, at the time of filing a complaint, to attach copies of all documentation in the complainant's possession upon which he or she intends to rely to establish the alleged violations, and, in any case where the complainant intends to rely on the testimony of third parties, to attach copies of such affidavits. See Proposed Rule 12.13. If such affidavits were not available, the complainant was required by this rule to submit an explanation of why they were not obtainable and a statement of what the complainant believed would be stated in the affidavits. Another rule prescribing the content requirements of an answer would have imposed similar duties upon respondents. See proposed rule § 12.18.

The Commission received numerous comments concerning the proposed requirements of attaching affidavits and documentary evidence to the complaint

¹¹ The Commission also received recommendations from a number of commentors suggesting that the Commission change its proposed rules to require the complaint to be served on the respondents named therein at the time it is filed. This matter is addressed, *infra*, where the content requirements for, and the preliminary consideration of, pleadings are discussed in detail.

and answer at the time of filing, all of which urged the Commission not to adopt such requirements. One commentator believed that a requirement that parties obtain verified statements from third party witnesses would be unduly burdensome, time-consuming, and would likely precipitate successive requests for extension of time. Another commentator indicated that requiring a complainant to attach affidavits and documentary proof when filing the complaint would be unworkable because complainants in most cases will not know what key items of proof they intend to rely on prior to discovery. Other comments also indicated that the parties frequently change the character of their cases and the number and identities of witnesses throughout the course of a proceeding.

The Commission has considered these comments, and, in light of its determination, discussed *infra*, to permit the parties to conduct their own discovery, it believes that it is not necessary to require parties to attach affidavits and documentary proof to their pleadings at the time of filing. Under the discovery rules of Subpart B, parties are required to complete discovery within sixty days after a proceeding is commenced pursuant to § 12.26. The elimination of the requirement of attaching affidavits and other proof to the pleadings and the adoption of a sixty day discovery procedure would effectively postpone the parties' obligation to perform discovery-related duties from the pleadings stage of a case until the Director of the Office of Proceedings determines that a reparation proceeding should be instituted. The Commission does not believe that such a postponement will result in any significant delay.

The proposed rules prescribed other content requirements for a complaint, answer and reply. Under these proposed requirements, complainants were required to include, *inter alia*, the name and address of each respondent; if known, the specific provisions of the Act violated; a complete description of the facts relevant to complainant's case; the amount of damages claimed and the method by which such were computed; a statement indicating whether there are pending any factually-related arbitration or civil court proceedings, and whether any respondent is subject to receivership or bankruptcy proceedings; and an election of either the voluntary decisional procedure or, depending upon whether the amount of damages claimed exceeds \$10,000, the summary or formal decisional procedures. These

requirements are similar to those in effect under the Commission's former reparation rules.

The Commission received several comments recommending that these content requirements be strictly enforced against complainants. A number of commentators suggested that the proposed rules be amended to require complainants to cite specifically the provisions of the Act or Commission's regulations alleged to have been violated by a respondent. Another commentator indicated that allegations of fraud should be required to be pleaded with particularity. According to these commentators, any failure to comply with these strict pleading requirements should result in a dismissal of the complaint with prejudice.

The Commission appreciates that a complainant's failure adequately to describe the factual bases for his claims against a respondent can make it virtually impossible for the respondent to submit a responsive answer to the complaint. The Commission believes that it is critical to the efficient operation of its reparation program that a complaint include an intelligible description of the conduct which the complainant alleges to be in violation of the Act. Therefore, the Commission, in § 12.13(b)(1)(iv)(A), has adopted the provisions of proposed rule § 12.13 which require a complainant to include in his complaint "[a] description of all relevant facts concerning each and every act or omission which it is claimed constitutes a violation of the Act," as well as "all facts which show or tend to show the manner in which it is claimed that the complainant was injured by the alleged violations." In adopting this rule, the Commission expects that a complaint will not be forwarded to a respondent unless it affords a respondent intelligible notice of the nature of the claims brought against him.

Concerning comments seeking a requirement that a complainant cite the specific provision of the Act violated, the Commission has determined not to adopt such a rule. From its experience in administering the reparation program, the Commission has observed that some attorneys for complainants, and, more frequently, complainants acting *pro se*, tend to be less experienced in legal matters arising under the Commodity Exchange Act than their counterparts associated with the commodities industry. Moreover, the development of a body of decisional precedent, at least at the Commission and judicial levels, concerning issues arising under the

Commodity Exchange Act is still in an early stage. For these reasons, complainants in some cases should not be expected to know the specific provision of the Act violated in alleging they were injured as a result of specific conduct by a respondent.

The Commission therefore has adopted a rule requiring a complainant to cite a specific provision of the Act alleged to have been violated only if this provision of law is known. The Commission does not believe that a recitation of a particular law violated is critical to a respondent's defense against a claim, as the description in the complaint of the course of conduct complained of should provide respondents with enough information to determine whether that conduct, even if admitted, is unlawful.¹²

Section 12.13 of the rules also requires a complainant, at the time of filing the complaint, to tender a filing fee the amount of which varies depending upon which decisional procedure is elected in the complaint. Section 12.13(b)(4) restates the requirement of Section 14(c) of the Commodity Exchange Act that a complainant who is a non-resident of the United States shall, before any formal action is taken on his complaint, first furnish a bond in double the amount of damages claimed, provided that the requirement of filing a bond may be waived if the complainant is a resident of a country that permits the filing of a complaint by a resident of the United States without the furnishing of a bond.

While the Commission does not consider the timely payment of a filing fee in connection with the filing of a complaint to be "jurisdictional," e.g., for statute of limitations purposes,¹³ the double bond requirement of § 12.13(b)(4) is imposed by Section 14(c) of the Act, and therefore, not subject to waiver by

¹² The Commission also received a comment suggesting that the Commission provide potential complainants with a form complaint that would instruct them to include all of the specific information called for by § 12.13(b) of the rules. The Commission believes that the use of a form complaint and answer by a complainant and respondent would simplify the task of complying with the content requirements of § 12.13 and 12.18 of the rules, respectively, and the Commission intends to prepare a form complaint and answer for these purposes. These forms will also be accompanied by a package of explanatory materials discussing the alternative decisional procedures that may be elected in reparations, as well as the availability of alternative forums for resolution of the parties' dispute such as NFA arbitration and civil court litigation.

¹³ The Commission does not expect to waive its rules requiring the timely payment of filing fees (e.g., to accompany the initial pleadings or a notice of appeal) in the absence of extraordinary circumstances.

the Commission unless the "reciprocity" exception of Section 14(c) applies. Accordingly, to the extent that Section 14(c) requires the filing of a bond in a given reparation case, the Commission regards a non-resident complainant's compliance with such a requirement to be "jurisdictional."¹⁴

Proposed rule § 12.13(b)(3) prescribed the time and place for filing a complaint and provided that "the complaint need not be served on any person or party named therein." The Commission received several comments suggesting that this proposed rule be changed to require complainants, at the time of filing the complaint with the Commission, to serve a copy thereof upon the respondents named therein without awaiting a determination by the Director of the Office of Proceedings to forward the complaint for an answer. According to these commentors, the adoption of such a requirement would effect earlier notification to respondents about a potential reparation proceeding, allowing them to assure that relevant evidence is preserved, and may also encourage early settlement discussions.

The Commission has determined not to require the complainant to serve a copy of the complaint on a respondent at the time of its filing because the Commission believes that such a practice would complicate, rather than simplify, the reparation procedure by inviting respondents to become involved, *i.e.*, through the filing of motions to dismiss, to strike, for a more definite statement, and other preliminary motions, in a matter in which the Commission has not yet found it necessary for the respondent to participate. Under the Commission's final rules, when a complaint is filed, it is first reviewed by the Office of Proceedings for patent and superficial defects, *e.g.*, the statute of limitations has clearly expired on a claim, the complaint names unregistered respondents who are not subject to reparations, or the subject matter of the complaint is otherwise clearly beyond the Commission's reparations jurisdiction.

If the Office of Proceedings determines that the matters alleged in the complaint are not suitable for a reparation proceeding, consideration of the complaint will be terminated without any need for action on the part of a respondent named therein. Thus, service of a complaint upon a respondent at the time of its filing would be premature and unnecessary. Requiring a complaint to be served at

the time of its filing may also be confusing to complainant because it may cause them to believe wrongly that upon effecting service they have become parties to a reparation proceeding entitling them to engage in discovery and motions practice when such is not the case. In light of its new procedures, the Commission does not believe that the relatively short period of time that it is expected to take for the Office of Proceedings to complete its initial review of the complaint (*e.g.* two to four weeks after the complaint is filed) will be a significant delay that will prejudice a respondent's ability to preserve evidence.¹⁵ Accordingly, the Commission has determined to adopt its proposed rule which does not require service of the complaint at the time of its filing.¹⁶

As indicated earlier, once a complaint is filed, the Director of the Office of Proceedings conducts a brief review of its contents to determine whether it is clearly not suitable for a reparation proceeding. Unless the Director finds the complaint is clearly unsuitable for reparations, he is required to forward the complaint to one or more of the named respondents for satisfaction of the complaint. Pursuant to § 12.17, unless the respondent satisfies the complaint within forty-five days thereafter by paying the complainant the amount of damages claimed and submitting a notice of satisfaction duly executed by both parties, he is required to file an answer within the same period of time.

If a respondent elects to file an answer, the proposed rules, in addition to prescribing content requirements, permitted a respondent to include in the answer a motion to dismiss.¹⁷ Proposed rule § 12.18(b) also provided that the inclusion in an answer of a motion to dismiss did not require a formal response by the Office of Proceedings, meaning that if the Director determined

that, notwithstanding the motion to dismiss, the facts alleged in the complaint and answer warranted commencing a reparation proceeding, the Director could take such action pursuant to what is now § 12.26 without formally denying the motion.

Concerning this proposed preliminary motion to dismiss procedure, commentors favored an amendment to this procedure which would allow respondents to file a motion to dismiss in lieu of an answer, and would require the Director of the Office of Proceedings to rule upon such a motion before an answer would be required to be filed. The Commission believes that the adoption of this type of procedure would unduly delay the reparations process, as it would postpone a respondent's duty to file an answer (for which a respondent is already afforded a 45 day period under the rules) and may require the Director of the Office of Proceedings to resolve potentially subtle and complex questions relating to whether the complainant has adequately stated a claim arising under the Commodity Exchange Act.

It was not the Commission's intention in proposing new rules to involve the Director of the Office of Proceedings in a difficult and probing review of issues relating to sufficiency of allegations in a complaint. Rather, the Commission contemplated that the Director would conduct only a superficial review of the complaint before determining whether to forward the complaint pursuant to § 12.15. Because it would make reparations less expeditious, the Commission does not believe that a separate motion to dismiss procedure should precede respondent's duty to file an answer, or that the inclusion in an answer of a motion to dismiss should create an additional time-consuming process for the Director requiring him to issue a formal ruling on the motion.

In adopting a procedure similar to the motion to dismiss procedure contemplated by proposed rule § 12.18, the Commission nevertheless has recognized that a motion by a respondent included in his answer which petitions the Director to consider patent defects in the complaint should not be denominated a "motion to dismiss," because that terminology may wrongly imply that a proceeding has been instituted and that a grant of such a motion would result in dismissal of the proceeding. In actuality, however, at the point in the process when the motion is appropriate, *i.e.*, when the respondent is required to file an answer, no proceeding has yet commenced, and the Director has only made an initial

¹⁴ Cf. *Kessenich v. Commodity Futures Trading Commission*, 684 F.2d 88, 93 (D.C. Cir. 1982).

¹⁵ The Commission appreciates that the problem of delay and the difficulty with preserving evidence in some cases may have been serious under the Commission's former reparation procedures. However, the Commission is now no longer statutorily required to investigate a complaint, and the potential for delay arising out of such investigations has been eliminated under the new rules.

¹⁶ The Commission also does not find it necessary, as one commentor suggested, to adopt a rule requiring the respondent to be notified when the Director determines pursuant to § 12.15 not to forward the complaint to a respondent for a response.

¹⁷ This proposed procedure would have codified a procedure in effect under the Commission's former reparation procedures, and acknowledged in an adjudicatory proceeding. *Roberson v. Rosenthal & Company*, [1977-1980 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶20,748 (January 24, 1979).

cursory review of the complaint and a determination that it should be forwarded for a response by the respondent. To more accurately characterize the nature of this motion, the Commission in § 12.18 of its final rules has determined to redesignate the motion to dismiss prescribed in proposed rule § 12.18 a "motion for reconsideration of the determination to forward the complaint."

As indicated earlier, whenever a motion for reconsideration of the determination to forward the complaint is included in an answer, the Director will be expected to consider the arguments made in the motion only superficially. If the contents of the motion call to his attention any clear and unmistakable justification for declining to institute a proceeding, the Director may grant the motion, without a formal ruling, by terminating consideration of the pleadings pursuant to § 12.27. If the matters raised in the motion and the other contents of the answer do not point out to the Director any readily identifiable bases for a determination not to institute a proceeding, the Director may deny the motion, without a formal ruling, by determining to forward the pleadings for a proceeding pursuant to § 12.26. Such a denial, of course, would not be prejudicial to the respondent's right to reassert the matters cited in his motion for reconsideration in a later motion for dismissal filed after the proceeding commenced.

Section 12.18(a)(6) also authorizes a respondent to include in his answer a counterclaim which, to be capable of being heard in reparations, must either allege facts which would independently be the proper subject of a reparation complaint under § 12.13, or arise out of the same transactions or occurrences set forth in the complaint.¹⁸ Section 12.18

also requires a respondent in his answer to elect between two of the three decisional procedures, and, if appropriate, to pay a filing fee, if the procedure elected has a more costly filing fee than the procedure elected by the complainant.

Under the proposed rules, if the amount of damages claimed does not exceed \$10,000, the complainant was authorized to elect in his complaint either the voluntary decisional procedure or the summary decisional procedure, but not the formal procedure. Conversely, if the damages claimed exceeded \$10,000, the complainant could elect the voluntary decisional procedure or the formal decisional procedure, but not the summary procedure. Depending upon whether the complainant elected the voluntary, summary or formal decisional procedure, under the proposed rules he would have been required to pay a filing fee in the amount of \$25, \$100, or \$250, respectively, at the time of filing the complaint.

If the complainant elected the voluntary procedure and paid the \$25 filing fee, the respondent, depending upon whether the amount of damages claimed or counterclaimed exceeded \$10,000, could elect either the summary or formal decisional procedures in his answer, and the proceeding, if commenced pursuant to § 12.26, would be conducted pursuant to the respondent's election. If the respondent made such an election of a different, more costly decisional procedure, the respondent in the proposed rules would have been required to pay a filing fee of \$75 or \$225, respectively, depending upon whether the amount in controversy permitted him to elect the summary or formal decisional procedure. A respondent would not have been required to pay any filing fee if he, like the complainant, also elected the voluntary procedure.¹⁹

The Commission received numerous comments about the proposed fees required for each of the decisional procedures, and the proposed rule which required respondents to pay a portion of the filing fee in the manner outlined above. Concerning the proposed fee structure—requiring a \$250 fee for the formal decisional procedure, a \$100 fee for the summary decisional procedure, and a \$25 fee for the voluntary decisional procedure—some

commentors believed that it is designed to make the reparations process too expensive for customers so that they will be forced to use broker-sponsored arbitration. Another commentor complained that the \$250 filing fee proposed for the formal decisional procedure had no rational basis, and therefore is arbitrary. Other commentors were opposed to a respondent being required to bear any portion of the filing fee unless the respondent filed a counterclaim.

The Commission does not believe that the filing fees proposed for any of the three decisional procedures were too high or that they lacked a rational basis. The actual cost to the Commission, in terms of staff personnel hours alone, of administering a reparation proceeding pursuant to the voluntary, summary, or formal decisional procedures, will be considerably higher than the \$250 fee proposed for the Commission's most expensive procedure. Even so, administering the voluntary decisional procedure is expected to cost less than the two other procedures because the decisionmaker will not hear oral testimony or prepare a decision that must be accompanied by written findings of fact. The summary decisional procedure is expected to cost the Commission more than the voluntary procedure because of a possibility that the decisionmaker may hear oral testimony in Washington, D.C., or by telephone, and because he is required to prepare an initial decision containing findings and conclusions. The formal decisional procedure is expected to be most costly to the Commission because it may necessitate travel by an Administrative Law Judge to distant locations in the United States, it may involve a full trial-type hearing (with reporting and transcription costs), and because it requires an Administrative Law Judge to prepare an initial decision accompanied by findings and conclusions. These differences provide a rational justification for establishing a fee structure which makes the voluntary procedure the least expensive to elect, and the formal procedure the most expensive.

The Commission does not believe that its proposed fee structure was designed to inhibit customers from utilizing the reparations procedure. The \$250 filing fee proposed for the formal decisional procedure would have been comparable to the fee required in many arbitration forums where the amount in controversy exceeds \$10,000. In addition, the Commission believes that reparations will remain a desirable alternative to federal court litigation, which has a

the claims in the complaint are cognizable in reparations.

¹⁹ Similarly, the respondent would not have been required to pay any fee if the complainant elected the summary or formal decisional procedure, and a proceeding was commenced pursuant to the complainant's elected procedure. See, however, note 20, *infra*.

¹⁸ Commentors recommended that even if the Commission finds a complaint to be defective, and therefore, not the proper subject of a proceeding, or subject to dismissal, after a proceeding has been instituted, the Commission should permit a proceeding to go forward as to counterclaims which satisfy the requirements of § 12.19 of the rules. As we recognized *supra*, Congress' overriding purpose in creating reparations was to provide a forum for aggrieved customers seeking redress for losses sustained as a result of violations of the Act committed by commodity professionals registered under the act. See H.R. Rep. No. 975, at 22, 93d Cong., 2d Sess. (1974). If a commodity customer's claims are not forwarded for a proceeding, or are dismissed without prejudice, because they are not cognizable in reparations, the Commission does not believe that Congress intended the Commission to devote its scarce resources to adjudicating only claims by registrants against customers. Accordingly, §§ 12.21, 12.27, 12.205, and 12.308 of the newly adopted rules only authorize either the termination of consideration of all of the pleadings or the dismissal of the entire proceeding, if none of

lower filing fee, because in most cases overall legal expenses incurred in connection with a reparation proceeding can be expected to be less than for a case brought in federal district court.

Even though a party has elected the formal decisional procedure and paid the filing fee, he would nevertheless not be entitled to a proceeding if the Director determined not to forward the complaint pursuant to § 12.15, or not to take action pursuant to § 12.26. And none of the filing fees, as proposed, were refundable if the Director failed to take action pursuant to § 12.26. Because the administrative cost to the Commission of implementing a refund procedure for this possibility would be prohibitive in terms of meeting its reparations budget, the filing fees, once paid, are not refundable to parties. However, to alleviate some of the expense to parties who have to pay the filing fee but nonetheless do not become participants in a formal decisional proceeding, the Commission has determined to reduce its non-refundable filing fee for the formal decisional procedure from \$250, as proposed, to \$200.

In the event that a complainant elects the voluntary decisional procedure and pays the \$25 filing fee therefor, the amount of filing fee that a respondent would have to pay for the summary decisional procedure is \$75. The amount that the respondent would have to pay for the formal decisional procedure has been reduced from \$225 to \$175.²⁰ The Commission believes that there is a strong justification for imposing upon a respondent the burden of bearing a portion of the filing fee when he elects a decisional procedure that is more costly than a procedure elected by the complainant. A respondent will be called upon to pay part of the fee in cases in which the complainant has elected the voluntary decisional procedure, and in which the respondent does not wish to participate in the voluntary procedure. Since the respondent would then be the only party interested in the more costly procedure, he should be required to bear most of the expense for the procedure. If the

complainant's claims ultimately prove to be groundless, the respondent may be able to recover his portion of the fee as costs. The Commission also believes that a requirement that a respondent bear part of the filing fee when he elects a decisional procedure more expensive than the voluntary procedure will provide an incentive to respondents to consider seriously the advisability of participating in a voluntary decisional proceeding whenever a complainant elects such a procedure.

As indicated earlier, once a respondent files an answer, with or without a motion for reconsideration contained therein, the Director of the Office of Proceedings will review all the matters stated therein, and, if appropriate, re-review the matters stated in the complaint. After making this review, the Director, in his opinion the facts warrant taking such action, is required by § 12.26 to forward the pleadings and all other materials of record for an elected decisional proceeding. A reparation proceeding commences upon service of a notification to the parties that the Director has taken such action.

A number of commentators suggested that the Commission adopt express standards for determining whether the facts warrant the Director taking action pursuant to § 12.26, *i.e.*, forwarding the pleadings for a reparation proceeding. In the Commission's view, the Director is required to institute a proceeding on a complaint pursuant to § 12.26, unless from his review of the pleadings he finds that the matters stated in the complaint are not cognizable in reparations.

While standards for determining whether matters stated in the complaint are not cognizable in reparations cannot be articulated in their entirety, the following are typical examples of grounds for which the Director could decline to institute a reparation proceeding: (1) The statute of limitations applicable to the claims alleged in the complaint has expired; (2) the complaint names respondents who were not registered at the time of the alleged violation and who are not otherwise subject to reparations; (3) the complaint, because of a complainant's mistake in identifying a respondent, names the wrong respondent in his complaint; (4) there is a parallel proceeding pending, *e.g.*, an arbitration, civil court proceeding, or receivership or bankruptcy proceeding involving one or more of the claims and/or the respondents named in the complaint; and (5) the Director, after conducting a initial review of the complaint and answer, recognizes clearly that the

matters stated in the complaint do not form the basis for a claim in reparations, *e.g.*, it is clear from the facts alleged in the complaint that the complainant has not suffered actual damages proximately caused by a respondent's alleged violation, or the complaint concerns only a transaction such as a cash market or a cash forward contract that is not subject to the provisions of the Act. The foregoing list of matters that are not cognizable in reparations are intended merely to be illustrative not exhaustive.

A determination by the Director of the Office of Proceedings to take action pursuant to § 12.26 resulting in the commencement of a reparation proceeding is not appealable to the Commission on an interlocutory basis. If a respondent in a summary or a formal decisional proceeding believes that the Director has erred in making such a determination, the respondent may file a motion for dismissal after the proceeding has commenced, and, as indicated earlier, if his answer included a motion for reconsideration of the Director's determination to forward the complaint, the respondent's motion for dismissal may be based on the same matters cited in the motion for reconsideration.²¹

D. Discovery

In its proposed rules, the Commission would have modified the method by which parties could obtain discovery. The proposed method would have permitted the parties to apply to the decisionmaker (or, if the formal decisional procedure had been elected, the Proceedings Officer) for an order compelling other parties and non-parties to produce documents and tangible items, affidavits, and verified written responses to interrogatories which the applying party could suggest to the decisionmaker. The decisionmaker would have the authority to accept or reject, in whole or in part, any such application for a discovery order. The proposed rules also permitted the decisionmaker, acting on his own motion, to issue orders for the production of documents, affidavits, and for responses to written interrogatories, and, thus, to conduct his own discovery.

The Commission received numerous comments about the proposed new method of discovery. Some commentators indicated that the proposed discovery procedure would be less efficient and expeditious than the discovery rules in

²⁰ Although § 12.25 is silent on this matter, the Commission interprets this rule as requiring a respondent who has filed a counterclaim in excess of \$10,000 to pay the difference of \$100 for a formal decisional proceeding, if the complainant elected the summary decisional procedure and paid the \$100 fee therefor because his claims did not exceed \$10,000.

In any case where a respondent is required to pay a portion of the filing fee, the respondent is required to submit the fee at the time the answer is filed. A failure by a respondent to timely submit the required fee will result in the commencement of a default proceeding against him pursuant to § 12.22.

²¹ And, as also indicated earlier, a determination by the Director not to institute a proceeding pursuant to § 12.26, by virtue of § 12.27, would not be subject to appeal to the Commission.

effect under the former reparation procedure (which allowed discovery by the parties without leave of a decisionmaker), insofar as it would require each discovery request to be the subject of a motion and a ruling by the decisionmaker. According to these commentators, this process would entail a needless expenditure of Commission resources in terms of time and cost in that a decisionmaker would be required to consider the validity of each discovery request before issuing an order for discovery. Other commentators expressed concern that the proposed new discovery method would be much more time-consuming and burdensome for the parties because of the requirement that they prepare an application for a discovery request in addition to the discovery request itself. Another commentator complained that the proposed discovery rules would grant too much authority to the official administering discovery, and that if parties believed that discovery was unjustly limited, many interlocutory appeals could be expected. Many commentators indicated that the Commission's former discovery rules provided an efficient means for discovery and that they should be retained.

The Commission believes that there is considerable merit in these comments and has determined not to adopt its proposed discovery rules insofar as they would have precluded discovery by the parties except upon application to the decisionmaker. In lieu of the proposed discovery rules, the Commission has determined to adopt rules permitting parties to conduct their own discovery in substantially the same manner as they were authorized to under the Commission's former reparation rules,²² with some important modifications.

Under the final rules, the Proceedings Clerk, at the time that he serves notification to the parties that a proceeding has been commenced pursuant to § 12.26, is required to issue an order accompanying the notification directing the parties to complete discovery within sixty days thereafter. As was the case under the Commission's former reparation rules, parties under §§ 12.31, 12.32, and 12.33, are entitled to obtain production of documents, depositions on written interrogatories from parties and non-parties, and admissions from parties, without leave of a decisionmaker or discovery official.

Some new restrictions in the final rules have been imposed on the parties' right to obtain these forms of discovery

without an order from a presiding official. In the case of a request for the production of documents, parties are not entitled to obtain the personal tax returns and bank account records of any other party or person, absent the granting of a motion made therefor which shows the need for disclosure of information contained therein, and which further shows that the same information could not be obtained through other means. In the case of depositions on written interrogatories, parties are entitled to obtain responses to not more than thirty interrogatories. Leave to grant additional interrogatories will not be granted in the absence of extraordinary circumstances. Furthermore, "form interrogatories," *i.e.*, general purpose interrogatories not specifically tailored for discovery in the particular reparations proceeding, will be disfavored. Protective orders and awards of costs for the abuse of discovery can be expected to be granted readily when such interrogatories are used.

The final discovery rules also employ the protective order procedure that was in effect under the Commission's former reparation rules,²³ as well as a new procedure permitting motions to compel discovery. Whenever a discovery-related dispute culminates in a motion for a protective order or an order compelling discovery, § 12.30(c) of the new rules provides that costs (including attorney's fees) may be awarded as a sanction against the party whose conduct necessitated the motion, if the motion is granted, unless it is found that opposition to the motion was substantially justified, or against the party who filed the motion, if the motion is denied, unless it is found that the filing of the motion was substantially justified. Section 12.30(d) makes clear that the parties' right to serve a discovery notice or request expires on the fortieth day after service of the notification that the proceeding has commenced, unless an additional thirty day period is granted upon a showing of good cause.

The Commission, in § 12.34, has determined to adopt for utilization in the summary and formal decisional procedures its proposed rules permitting the decisionmaker to conduct discovery on his own motion.²⁴ The Commission believes that a decisionmaker's ability to make a fair decision will be enhanced, especially in close cases in which parties have failed to construct an adequate record through discovery, if he is granted the authority on his own

motion to order parties and non-parties to submit documents, affidavits, and verified written responses to interrogatories formulated by the decisionmaker. This authority would not apply in voluntary decisional proceedings²⁵ where the Commission believes that it is incumbent upon the parties, through discovery or otherwise, to assure as complete a record as is possible.

E. The Voluntary Decisional Procedure

As indicated earlier, the Commission has determined to adopt the voluntary decisional procedure, which affords parties regardless of the amount of damages claimed or counterclaimed a low-cost, very expeditious procedure, analogous to commercial arbitration, which will result in a final, unappealable decision, with or without a reparation award. Concerning its proposal to adopt this procedure, the Commission received comments indicating that a voluntary decisional procedure, because of its similarity to commercial arbitration, is unnecessary in that it would duplicate the arbitration program established by the National Futures Association. Moreover, commentators predicted that few respondents would agree to participate in this procedure because respondents would rather have disputes decided in a broker-sponsored or other non-government arbitration forum.

The Commission does not believe that the voluntary decisional procedure will be wholly duplicative of the arbitration program offered by the National Futures Association. For example, NFA's arbitration program will not decide disputes between parties to leverage transactions, and does not mandate the arbitration of claims against floor brokers. Conversely, the Commission's voluntary procedure will not be available to a customer who, although possessing claims based on state law, has not alleged a violation of the Commodity Exchange Act, or the Commission's regulations, committed by his broker. Moreover, NFA arbitration is still in the early stages of its development, and, at this juncture, it would be premature to determine whether the existence of NFA arbitration renders unnecessary the voluntary decisional procedure. Congress created the reparations remedy and empowered the Commission to promulgate such rules as will make that remedy meaningful. For present

²² 17 CFR 12.62(b)(2) (1983).

²⁴ See, e.g., Proposed rules §§ 12.208, 12.209.

²⁵ The Commission's reasoning for not authorizing a Judgment Officer, acting on his motion, to conduct discovery in a voluntary decisional procedure is discussed *infra*.

²³ See 17 CFR 12.62-12.65 (1983).

purposes, the Commission believes that the establishment of a voluntary decisional procedure is a useful step toward that goal. The Commission intends to work with NFA to include a description of NFA's arbitration program as part of a description of available arbitration alternatives included within a packet of explanatory materials to be made available to parties. Although it has determined to establish the voluntary decisional procedure, the Commission will continue to evaluate NFA's arbitration program and reconsider at a later time whether its voluntary procedure remains necessary.

The Commission also received comments concerning the proposed rules applicable to voluntary decisional proceedings. Specifically, commentators objected to allowing Judgment Officers to conduct pre-decision conferences to encourage settlement by the parties or to facilitate amendments of the pleadings, and to vesting authority in Judgment Officers to conduct oral examination of these parties, without permitting parties to conduct their own direct and cross examination. Other commentators expressed the view that the Commission should not be permitted to review a final decision on its own motion.

Because there is no right to appeal a decision rendered pursuant to the voluntary decisional procedure, the Commission believes that the parties' right to a fair procedure must be given the maximum degree of protection. While the Commission originally proposed to permit the decisionmaker, a Judgment Officer, to hold pre-decision conferences and to conduct discovery and oral examination of parties and their witnesses, upon considering the comments discussed above, the Commission recognizes that the exercise of these authorities by a Judgment Officer would inject an unwanted measure of unpredictability into a voluntary decisional proceeding, because parties after completing discovery would lose control over the direction of the development of proof in the proceeding. This unpredictability may be, to any party concerned about the amount of discretion vested in a Judgment Officer, a powerful disincentive to participate in a voluntary decisional proceeding. Accordingly, the Commission has determined not to adopt its proposed rules²⁶ which would

have permitted a Judgment Officer to hold pre-decision conferences, to conduct discovery on his own motion, and to conduct oral examination of the parties and their witnesses. Therefore, pursuant to § 12.105, the Commission is requiring all proof in a voluntary decisional proceeding to be submitted only in documentary and tangible form.²⁷

Because the voluntary procedure results in a final decision, unaccompanied by findings of fact, which is not appealable to the Commission or a court, one commentator requested the Commission to clarify what collateral effect, if any, a final decision in a voluntary decisional proceeding would have upon a respondent who has been found therein to have violated the Act or the Commission's regulations. Section 8a(2)(E) of the Act provides that the registration of any person may be denied, conditioned, suspended, or restricted, "upon notice but without a hearing," and may be revoked with such hearing "as may be appropriate," if it is found by the Commission that such person violated the Act or a regulation issued thereunder where such violation involves, *inter alia*, fraud, misappropriation of funds, securities or property, and similar offenses. Section 8a(4) of the Act, incorporating by reference Section 8a(3)(A), further authorizes the Commission to revoke the registration of any person if it is found, after affording such person an opportunity for a hearing, that such person, *inter alia*, has been found by the Commission to have violated any provisions of the Commodity Exchange Act or the Commission's regulations which constituted an offense not specifically set forth in Section 8a(2).

If a Judgment Officer finds in a final decision rendered in a voluntary decisional proceeding that a respondent has violated the Act, the proposed rules were not clear as to whether such a finding would constitute a finding of the Commission which could serve as the basis for revocation of the respondent's registration pursuant to Section 8a(2) or 8a(4) of the Act. Because of the nature of the voluntary decisional procedure, the Commission has determined that a final decision rendered in a voluntary decisional proceeding shall have not any

effect for statutory disqualification purposes. Accordingly, the Commission does not regard a finding contained in a final decision to be a finding of the Commission for the purposes of Section 8a of the Commodity Exchange Act, and § 12.106(b) of the final rules contains a provision reflecting this view.²⁸ However, § 12.106(b) would not bar the Commission from instituting a proceeding pursuant to Section 6(b) of the Act based upon facts that were the subject of a voluntary decisional proceeding.

Section 12.403(b) of the new rules provides that "[i]f such action is necessary to prevent manifest injustice, the Commission may, upon its own motion, review a final decision filed pursuant to § 12.106 . . . within 30 days after service upon the parties of the final decision." The Commission interprets the term "manifest injustice" within the meaning of § 12.403(b) to extend, by analogy, only to those extraordinary conditions pertinent to reparations which would justify a federal court's decision to vacate an arbitration award pursuant to 9 U.S.C. 10,²⁹ or to modify an arbitration award pursuant to 9 U.S.C. 11.³⁰ As indicated earlier, one commentator indicated that the Commission should not reserve to itself the authority to review on its own motion a final decision rendered in a voluntary decisional proceeding. The Commission disagrees that it should not have the power to review and take corrective action when manifest injustice would result from its failure to do so. Given the narrow interpretation of its standards for what constitutes "manifest injustice," discussed in notes

²⁶ Although a final decision will not have any effect for the purposes of Section 8a of the Act, and is not considered a Commission order which is appealable pursuant to Section 14(e) of the Act, § 12.106(d) acknowledges that a final decision rendered in the course of a voluntary decisional proceeding is a final order of the Commission for all other purposes including the judicial enforcement pursuant to Section 14(d) of the Act of any award contained therein. The Commission believes that a final decision in a voluntary decisional proceeding should be accorded the same *res judicata* effect that any final reparation decision and order would be entitled to.

²⁷ Such grounds, by analogy to 9 U.S.C. 10, would include: evidence that a final decision was procured by corruption or extrinsic fraud; evident partiality or corruption on the part of the decisionmaker; unreasonably prejudicial misconduct on the part of the decisionmaker; and that the decisionmaker exceeded his authority under Subpart C of the rules in a manner that prejudiced a party.

²⁸ Such grounds, by analogy to 9 U.S.C. 11, would include facts which show that there had been an evident material miscalculation of the amount of damages in an award contained in a final decision, or that the final decision improperly contained findings of fact or was otherwise imperfect as a matter of form not affecting the merits.

²⁹ Proposed rules §§ 12.105, 12.106, 12.107, 12.109(b), and 12.110.

³⁰ While the allocation of the burden of proof in a reparation proceeding is not controlled by Section 7(c) of the Administrative Procedure Act, 5 U.S.C. 556(d), the Commission interprets its Part 12 reparation rules as imposing upon the proponent of an order awarding monetary relief, i.e., a complainant seeking a damage award on its claims, or a respondent seeking a counterclaim award, the burden of proof.

29 and 30, *supra*, the Commission expects to exercise its authority under § 12.403(b) only in rare instances.

The Commission appreciates that the success of the voluntary decisional procedure as an efficient and expeditious dispute resolution forum depends upon the willingness of respondents as well as complainants to choose this procedure. Accordingly, the Commission has tailored the rules in Subpart C to provide what may be regarded as incentives to respondents to consider seriously the advisability of electing this procedure. Among these incentives are: (1) A respondent is relieved of any duty to pay a filing fee; (2) because no oral testimony may be received in the voluntary procedure, a respondent should not have to incur legal expenses attributable to preparing for and presenting such testimony; (3) a respondent will not be liable for prejudgment interest in connection with a reparation award rendered against him; (4) if the respondent has a successful counterclaim against the complainant, he will most likely obtain an earlier award under the voluntary procedure; (5) awards may not exceed the amount of damages claimed or counterclaimed in the pleadings; and (6) as discussed above, if a respondent is found to have violated the Act, such a finding will not constitute a basis for, *inter alia*, revocation or suspension of his registration.

The Commission believes that a voluntary decisional procedure would be beneficial to parties who have selected reparations from the many alternative forums for resolution of their dispute, and who are in need of a speedy resolution of that dispute. Moreover, to the extent that parties avail themselves of the voluntary procedure in lieu of the more time-consuming summary or formal decisional procedures, the Commission's backlog of cases would be reduced, resulting in a faster determination of claims heard under the other decisional procedures. In addition, pursuant to Section 12.1(c), the voluntary decisional procedure is available to parties to cases pending on the effective date of these rules in which an initial decision has not been rendered.³¹

³¹ And, concerning cases processed entirely under the new rules, even if a summary decisional proceeding or a formal decisional proceeding has commenced, parties to such proceeding may elect to have the case heard pursuant to the voluntary decisional procedure at any time before an initial decision is rendered in the proceeding. See §§ 12.200 and 12.300 of the rules.

F. The Summary Decisional Procedure

In its proposed rules, the Commission proposed to establish a summary decisional procedure to replace the Commission's former summary proceedings rules. Under the former reparation rules, in cases in which the amount of damages claimed or counterclaimed did not exceed \$5,000, all proof would be submitted in documentary form. After proof was submitted in such cases, a presiding officer employed by the Commission would render an initial decision which could be appealed to the Commission pursuant to an application for review procedure. In proposing to adopt a summary decisional procedure, the Commission proposed two significant modifications to the former summary proceedings rules: (1) Increasing to \$10,000 the monetary ceiling on claims or counterclaims that could be heard pursuant to the summary procedure; and (2) authorizing the decisionmaker, in cases where issues of credibility are of critical importance, to conduct oral examination of the parties and their witnesses in Washington, D.C., or by telephone.

Because the summary decisional procedure, as finally adopted, does not afford parties full oral hearing privileges, or the opportunity to submit proposed findings of fact and conclusions of law memoranda,³² As does the formal decisional procedure, a summary proceeding is expected to be considerably more expeditious than a formal decisional proceeding. In order to increase the number of cases that would qualify for this more expeditious procedure, the Commission proposed to raise from \$5,000 to \$10,000 the monetary limit on claims or counterclaims that could be heard pursuant to the summary decisional procedure.

Commentors on this proposal believed that the summary decisional procedure violated parties' due process rights by denying them the opportunity to present oral testimony and conduct oral examination of other parties and witnesses. According to these commentors, by raising the monetary ceiling for claims that could be heard according to the summary procedure, the Commission would simply be increasing the number of cases in which these rights were violated. Commentors also indicated that parties to this procedure should be granted oral hearings if they so request. Another commentor argued that the

³² The Commission's basis for determining not to permit parties to file proposed findings of fact and conclusions of law is discussed *infra*.

Commission's determination to fix \$10,000 as the amount above which oral cross examination would be permitted had no rational basis.

The Commission's rationale creating a different procedure for cases involving claims for less than \$10,000 than for cases where there are claims exceeding \$10,000 is based on its belief that parties with smaller claims should be entitled to a less expensive, more expeditious procedure which offers a greater likelihood of an early damage award and recovery. In 1978, Congress by enacting what was then Section 14(b) of the Act, fixed \$5,000 as the amount which, if claimed as damages, would determine whether parties' claims would be heard pursuant to a summary procedure which afforded no opportunity for an oral hearing. This reflected a congressional judgment that, in 1978, claims which did not exceed \$5,000 were considered to be small claims entitled to a more expeditious, summary procedure.

The Commission cannot ignore the diminutive effect of continuous high rates of inflation in the years 1979 through 1982 on the value of the U.S. dollar as it existed in 1978. Considering this erosion of the value of the dollar over the past six years, the Commission believes that it is reasonable to establish \$10,000 as an amount above which a damage claim will not be considered small. Moreover, because the \$10,000 figure will likely serve as the designated amount for determining whether the summary or the formal procedure is available for several years in the future, it is likely to become an even less significant dollar amount as each year passes.

As indicated earlier, under the proposed rules a Judgment Officer was empowered to conduct oral examination of the parties and their witnesses in Washington, D.C., or by telephone, if he found that credibility issues of crucial importance existed in the proceeding. No oral examination by the parties, however, would have been permitted under such rules. In response to this proposal, two commentors indicated that a Judgment Officer should not be permitted to conduct oral examination of parties as this function should be reserved for Administrative Law Judges only. Some commentors also indicated that a Judgment Officer should not be vested with discretion to decide whether credibility issues are important enough to warrant oral examination of the parties.

In the final rules, the Commission has adopted a different procedure concerning oral examination from the

one it proposed. Under the newly adopted rules, a Judgment Officer, in addition to his authority to conduct oral examination of the parties, is authorized to permit parties to conduct oral direct and cross examination of other parties and witnesses in Washington, D.C. or by telephone.³³ The standard applicable to whether a Judgment Officer may conduct oral examination and permit oral testimony is also different. Section 12.208 authorizes a Judgment Officer, in his discretion, to conduct such examination and to permit such testimony "upon motion by a party, and where it is shown to be necessary or appropriate to resolve factual issues which are central to the proceeding."³⁴

Because of the potential for delay associated with travel by a decisionmaker, the Commission has determined in §12.209 of the rules to permit oral examination and testimony to be heard in the presence of the decisionmaker in only one location, Washington, D.C. Under §12.209, if at least one complainant and one respondent execute a signed agreement to attend an oral hearing in Washington, D.C., the Judgment Officer, assuming that he has exercised his discretion to permit oral examination and testimony, may conduct such a hearing in that location. Any other parties who do not agree in writing to appear at such a hearing in Washington, D.C., shall be deemed to have elected to present oral testimony by telephone. If at least one party from each opposing side does not agree in writing to appear in Washington, D.C., all oral testimony will be heard only by telephone. In any such hearing, whether in Washington, D.C., or by telephone, or by both means, the Judgment Officer is vested with broad discretion to control the length and sequence of the parties' testimony, which includes the authority to terminate, at any stage of the hearing, examination by a party's counsel, and to conduct such examination himself. Oral examination in a summary decisional proceeding is required to be recorded electronically.

³³ The Commission does not believe it necessary to address the argument made by several commentators that a party's due process rights are violated, regardless of the amount of damages claimed, whenever the party is denied oral hearing privileges, because the Commission has adopted § 12.209 of the rules which now afford parties a possibility of presenting oral testimony and conducting oral cross examination.

³⁴ Thus, a Judgment Officer is not required under the final rules to make a determination concerning whether credibility issues require for their resolution oral testimony to be heard, as he would have been required to do under proposed rule § 12.211(b).

Concerning the Commission's proposal to allow oral examination by telephone, one commentator indicated that permitting oral examination by telephone would be an improvement over the Commission's former summary proceedings rules, which permitted no oral testimony by any means. Another commentator also regarded telephonic hearings as an improvement but expressed concern that the telephone witnesses could be coached without any awareness on the part of the Judgment Officer. The Commissioner is confident that a Judgment Officer will be able to assess the demeanor of witnesses from listening to their voices. Because the Judgment Officer can be expected to hold doubts about the credibility of any telephone witness whose testimony does not sound genuine, because he has the authority to conduct his own examination of such witnesses to confirm or dispel those doubts, and because telephone assertions can be measured against the documentary evidence of record, the Commission does not believe that the potential for the coaching of witnesses will have any effect on the Judgment Officer's ability to discern the truth.

Concerning the comment that only Administrative Law Judges, and not Judgment Officers, should be able to conduct oral examination of parties and witnesses, the Commission believes that its Judgment Officers will possess the ability to comprehend the often complex factual contexts of commodity-related disputes, to recognize critical issues of fact and law in the proceeding, to evaluate oral testimony and to conduct oral examination, and to render a well-considered initial decision in the proceeding. Accordingly, the Commission believes that there is no basis for precluding Judgment Officers from exercising any functions performed by Administrative Law Judges.

Section 12.205(c) now authorizes a Judgment Officer in a summary decisional proceeding to consider, and, if appropriate, grant motions to dismiss the entire proceeding, or any claim or party therefrom.³⁵ Section 12.207 permits motions for summary disposition in proceedings where there is no genuine issue of material fact and the moving party believes that he is entitled to a decision as a matter of law. Section

³⁵ This represents a departure from the former reparation procedure which precluded decisionmakers from dismissing complaints for such defects as lack of subject matter jurisdiction and failure to state a claim which is justiciable in reparations. See *Antonioli v. Clayton Brokerage Co., Inc. of St. Louis* [1977-1980 Transfer Binder], Comm. Fut. L. Rep. [CCH] ¶ 20,546 [January 18, 1978].

12.205(a) provides that "motions for relief not otherwise specifically provided for in this Subpart D of these rules, other than discovery-related motions and motions for extension of time and similar procedural orders shall not be allowed. . . ."³⁶

Commentors indicated that all types of motions should be allowed, not just those specifically authorized by the rules applicable to summary decisional proceedings. The Commission proposed to limit the types of motions that could be filed in a summary proceeding because it believes that affording parties unlimited opportunities to engage in motions practice will permit delays in the proceeding and because, in view of the range of motions already permitted by these rules, it believes that any other types of motions would be unnecessary. In the interest of eliminating an unwanted potential for abuse and delay, the Commission has determined to adopt its proposal to limit the types of motions that could be filed in a summary decisional proceeding.

Although the proposed rules would have permitted parties to a summary decisional proceeding to file proposed findings of fact and conclusions of law memoranda, if so ordered by a Judgment Officer, the Commission believes that a review of the pleadings, discovery materials, the documentary proof, and, if applicable, oral submissions of proof by a Judgment Officer will be sufficient to enable him to identify the critical factual and legal issues in the proceeding. The Commission has reconsidered its proposal to allow parties to file proposed findings and conclusions memoranda, and does not believe that the value that such memoranda contribute to the factfinding and decisionmaking processes outweighs the amount of time that a Judgment Officer must afford the parties to prepare such memoranda. Accordingly, the Commission in Section 12.210 has determined not to allow the filing of proposed findings of fact and conclusions of law.

Section 12.210 provides that after the parties have concluded their submission of proof, the Judgment Officer will render an initial decision which differs from a final decision rendered in a voluntary decisional proceeding insofar as it must be accompanied by findings of fact, may include an award of costs (including, if appropriate, reasonable attorney's fees), and, if warranted, an

³⁶ Included in the class of prohibited motions are applications for interlocutory review, except those relating to debarment of counsel, or a decisionmaker's refusal to disqualify himself on grounds of bias, conflict of interest or similar bases.

award of prejudgment interest, and it may be appealed to the Commission. One commentator requested that the Commission set forth its standards for determining when it will award prejudgment interest in a reparation proceeding. In determining whether an award of prejudgment interest is appropriate in any given reparation case, the Commission intends to rely on the Seventh Circuit's decision in *Myron v. Chicoine*, 678 F.2d 727 (7th Cir. 1982),³⁷ and its own decision in *Ruddy v. First Commodity Corporation of Boston* [1980-1982 Transfer Binder], Comm. Fut. L. Rep. (CCH) ¶21,435 (March 31, 1981).³⁸

Section 12.210(c) of the rules authorizing, if appropriate, an award of reasonable attorney's fees as costs in a summary decisional proceeding does not represent any departure from the Commission's policy concerning attorney's fees that was in effect under the former reparation rules. In *Sherwood v. Madda Trading Company*, [1977-1980 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶20,728, the Commission announced that in determining whether an award of attorney's fees as costs is appropriate, it would follow the "American rule" which holds that an award of attorney's fees as costs to the prevailing party is not appropriate unless, *inter alia*, the losing party acts "in bad faith, vexatiously, wantonly, for oppressive reasons." *Sherwood*, *supra*, at n. 26. The Commission expects to apply the "American rule," as well as the reasoning set forth in *Sherwood*, in determining whether an award of attorney's fees is appropriate in a summary decisional proceeding.

G. The Formal Decisional Procedure

In its proposed rules, the Commission proposed to create the new position of "Proceedings Officer," who would be an employee of the Commission granted powers and duties analogous to those performed by United States Magistrates in preparing the record for a proceeding. See Proposed Rules 12.301-12.309. Under

the rules as proposed, where the parties had elected the formal decisional procedure, and the Director of the Office of Proceedings determined to forward the pleadings for the possibility of the commencement of a proceeding the pleadings and other materials of record would first be reviewed by the Proceedings Officer. At that stage, the Proceedings Officer was authorized to conduct his own discovery, to hold pre-decision conferences, to consider and rule upon motions for dismissal, and to discuss amendments or supplements to the pleadings. After these matters were concluded, the Proceedings Officer was required, if in his opinion the facts warranted taking such action, to forward the materials of record to the Proceedings Clerk for immediate assignment to an Administrative Law Judge. A formal decisional proceeding would have commenced only after the Proceedings Officer took such action.

In addition to the powers enumerated above, the Proceedings Officer under the proposal rules would have had the authority to issue orders of default, and to make recommendations to the Administrative Law Judge concerning the need for an oral hearing to resolve issues of credibility which were crucial to the outcome of the proceeding. If an oral hearing were determined to be unnecessary, the Proceedings Officer could make recommended findings of fact and conclusions of law. The Administrative Law Judge assigned to the case would be free to accept or reject, in whole or in part, all recommendations made by a Proceedings Officer.

The Commission received numerous comments concerning the utilization of a Proceedings Office for the purposes detailed above. Many commentators believed that the creation of a Proceedings Officer for those purposes would add an unnecessary extra layer of review of the case and produce an entirely new potential for delay of a proceeding. Other commentators believed that a Proceedings Officer should not be permitted to conduct discovery, either on his own motion or upon application by a party, to hold pre-decision conferences, or to make recommendations to Administrative Law Judges concerning the need for an oral hearing and concerning findings of fact and conclusions of law.

We have considered these comments, and we do not find it necessary to grant a Proceedings Officer the authority to rule upon motions for dismissal. Also, given our amendments to the proposed discovery rules (discussed *supra*) which allow parties to conduct their own

discovery in a formal decisional proceeding, we do not find it necessary to vest a Proceedings Officer with authority to conduct discovery on his own motion. Finally, given our determination (discussed *infra*) not to condition the parties' opportunity for an oral hearing upon the existence of factual issues which are crucial to the outcome of the proceeding and which require for their resolution credibility determinations to be made, it is unnecessary to vest a Proceedings Officer with authority to make recommendations concerning the need for an oral hearing or concerning findings of fact and conclusions of law.³⁹

The Commission does believe, however, that a Proceedings Officer should be able to perform discovery-related functions, *i.e.*, serving as the initial arbiter in discovery disputes, which will expedite a formal decisional proceeding without creating any potential for delay. It has been the Commission's experience under its former reparation procedure that, especially during periods when there was a significant backlog of cases, a substantial period of time could pass between the commencement of a proceeding and the assignment of a case to an Administrative Law Judge. It was not uncommon for parties in such cases to delay their efforts to obtain discovery until a judge was assigned to the matter. Thus, following a delay that would occur in assigning a particular case to an Administrative Law Judge, there would be yet another period of delay to allow parties sufficient time to complete discovery. Moreover, there were no time limits imposed on the parties' ability to obtain discovery under the former reparation rules.

While the final rules impose a duty on the Proceedings Clerk to assign the case to an Administrative Law Judge "as soon as practicable" after a formal decisional proceeding has been commenced pursuant to § 12.26(c), this rule recognizes that, in some instances, the Proceedings Clerk may be unable immediately to assign the case to a particular Administrative Law Judge.⁴⁰

³⁷ The Commission also agrees that unwanted delays could arise by establishing a review procedure by a Proceedings Officer requiring such an official to make a determination whether to institute a "proceeding." The Commission therefore has declined to adopt its proposed rule § 12.309 which would have required a Proceedings Officer to review and forward pleadings before a formal decisional proceeding could be commenced. See Proposed rule § 12.309.

³⁸ Even if a case were immediately assigned to an Administrative Law Judge, the judge may not be

Continued

³⁷ In *Chicoine*, the Seventh Circuit stated that "[g]iven the compensatory basis of awarding prejudgment interest and the remedial purposes of CFTC reparation proceedings, we have no doubt that the Commission may award such relief in appropriate cases. . . . [T]he decision to award prejudgment interest rests in the sound discretion of the adjudicatory tribunal and involves a balancing of the equities between the parties under the circumstances of the particular case." 678 F.2d, at 734 (citations omitted).

³⁸ In *Ruddy*, the Commission announced that "[w]here . . . [prejudgment interest] awards are clearly compensatory and, as here, involve the breach of a fiduciary duty, prejudgment interest, while a matter of discretion, should hereafter be the rule, rather than the exception," *id.*, at 26,086 n. 18, citing *Rolf v. Blyth, Eastman Dillon & Co., Inc.*, 637 F.2d 77, 86-87 (2d Cir. 1980).

In such cases there would be no assigned decisionmaker to preside over discovery-related disputes between parties who, pursuant to § 12.30(c) of the new rules, must complete discovery within sixty days after the proceeding has commenced.

To enable discovery to proceed efficiently and expeditiously during the sixty-day period allowed by § 12.30(c), the Commission, in adopting § 12.301, has determined to authorize a Proceedings Officer during the sixty-day period allowed for discovery by § 12.30(d) to rule upon motions to enlarge the time permitted for discovery for one additional period not to exceed thirty days, as well as motions for leave to serve written interrogatories of a number exceeding thirty. Concerning any discovery notice served within the sixty-day period,⁴¹ the Proceedings Officer is also authorized to rule upon motions for protective orders and motions for an order compelling discovery. The Proceedings Officer is also authorized during the sixty-day discovery period to hold pre-decision conferences in Washington, D.C. or by telephone, for the purposes of, *inter alia*, resolving discovery disputes, narrowing issues, obtaining stipulations and admissions of fact and of authenticity of documents, encouraging settlement of the entire case, and encouraging the early settlement of discovery-related disputes.

The Commission believes that utilizing a Proceedings Officer in the above manner will result in a substantial amount of case preparation being accomplished within the first two to three months following the commencement of a formal decisional proceeding, which would vastly improve and expedite its former reparation procedure. And because most of the Proceedings Officer's authority must be exercised, if at all, within the sixty days following the commencement of a proceeding, the Commission does not believe that the use of a Proceedings Officer for these purposes creates any new potential for delay.

Concerning the comment that the Proceedings Officer should not have any discovery-related authority, the

Commission has determined to adopt a procedure for parties who are aggrieved by a discovery-related order issued by a Proceedings Officer. Pursuant to § 12.302, any such party may appeal a discovery-related ruling issued by a Proceedings Officer by filing within five days after service upon him of such order a motion to vacate or modify such ruling, or any part thereof. Upon the timely filing of such a motion, the Proceedings Clerk is required to forward the motion immediately to the Administrative Law Judge assigned to the case⁴² who must rule on the motion within ten days thereafter, absent extraordinary circumstances. The Commission expects that the discovery ruling issued by the Proceedings Officer will be affirmed in the vast majority of cases. While this appeal procedure could result in delay if abused by parties who fail to honor any order issued by a Proceedings Officer, the Commission believes that the possibility of sanctions (e.g. being assessed costs, attorney's fees) for unjustified conduct during discovery, see § 12.30(c), will deter most parties from abusing this appeal procedure. In the event that any party fails to comply with a discovery-related order issued by a Proceedings Officer, the Proceedings Officer may make recommendations to the Administrative Law Judge as to what action should be taken (e.g., default, dismissal) as a result of such party's refusal to comply.

The proposed rules applicable to the formal decisional procedure also conditioned the parties' opportunity for an oral hearing before an Administrative Law Judge on the existence of factual issues which are crucial to the outcome of the proceeding and which require for their resolution credibility determinations to be made. And if the Administrative Law Judge determined to grant an oral hearing to resolve such issues, the parties would be permitted to conduct only oral cross, re-direct, and re-cross examination of other parties and witnesses at such hearing. The proposed rules required direct testimony to be submitted in documentary form only.

Commentors did not favor the proposal that would allow parties an opportunity for an oral hearing only if the Administrative Law Judge determined that major issues of

credibility made it necessary to conduct an oral hearing. Commentors indicated that authorizing an Administrative Law Judge to determine whether an oral hearing was necessary to resolve crucial issues of credibility would be entirely duplicative of the Commission's summary disposition procedure. And, if the summary disposition procedure were found to be inappropriate, these commentors indicated that parties' right to due process would be violated to the extent that an oral hearing was denied. Other commentors believed that the proposed standard applicable to whether an oral hearing may be granted was too nebulous and imprecise.

In cases where an Administrative Law Judge determined to grant an oral hearing, commentors indicated the Commission should not adopt a proposal which would not allow parties to present direct testimony orally. These commentors indicated that credibility determinations are based upon a party's or a witness' direct testimony just as frequently as they are based on cross examination. They also indicated that cross examination will be less effective when its scope is limited by documentary evidence. Another commentor indicated that requiring parties to present direct proof in documentary form would be unduly burdensome and costly because parties would be required to prepare additional paperwork. Finally, one commentor believed that the proposal to prohibit and direct examination at oral hearings would favor respondents which are brokerage firms because they generally have the resources to retain representation that is highly skilled at making written presentations.

The Commission agrees that parties to a formal decisional proceeding should be granted an opportunity for an oral hearing, in the discretion of the Administrative Law Judge, regardless of whether it is found that factual issues crucial to the outcome of the proceeding require for their resolution credibility determinations. Accordingly, the Commission has adopted § 12.312 making the opportunity for an oral hearing generally available to parties. Oral hearings should thus become the rule rather than the exception in formal decisional proceedings.⁴³

available to preside over discovery disputes in a timely manner, because, for instance, he may be traveling to or from an oral hearing, or otherwise involved in disposing of other cases on his docket.

⁴¹ Section 12.30(d) requires discovery by the parties to be completed within sixty days. Since parties from whom discovery is sought have twenty days to respond to discovery notices, enforceable discovery notices or requests must be served by the party seeking discovery within forty days after notification is served pursuant to § 12.26 (a), (b), or (c), unless that party is granted an extension of time.

⁴² Section 12.302 of the final rules also provides that if no Administrative Law Judge has been assigned to the case, or if the assigned judge is otherwise unavailable, at the time that a motion is filed pursuant to § 12.302, "the Chief Administrative Law Judge or such other Administrative Law Judge as the Chief Judge may designate" shall rule on the motion within ten days after it is forwarded by the Proceedings Clerk.

⁴³ Section 12.312 requires an Administrative Law Judge, if an oral hearing is ordered to be held, to issue an order requiring the parties in advance of the hearing to submit a memorandum setting forth a statement of all issues to be tried at the hearing, an identification of each witness expected to be called by that party, and a summary of the testimony each witness is expected to provide. After receiving such memoranda, the Judge may issue an order reflecting

The Commission, however, does not agree that a finding that the summary disposition procedure is inappropriate necessarily leads to a conclusion that the Administrative Law Judge cannot make fair credibility determinations based upon the documentary proof submitted by the parties.⁴⁴ The Commission believes that in some cases where genuine issues of material fact exist, the nature of the documentary proof submitted in the proceeding can be so convincing or persuasive as to permit fair credibility determinations to be made on some or all of the issues in the proceeding without the need for oral testimony. The Commission believes that the formal decisional procedure would be more efficient and expeditious if the Administrative Law Judge were authorized in such cases to order the parties to submit proof only in documentary form concerning such issues. Therefore it has determined to adopt new § 12.311 which authorizes an Administrative Law Judge to dispose of some or all of the issues in the proceeding without an oral hearing if he determines "that the documentary proof and other tangible forms of proof submitted by the parties are sufficient to permit resolution of some or all of the factual issues in the proceeding without the need for oral testimony."

The Commission also agrees with commentators that, where an oral hearing is held, an opportunity to assess the demeanor of witness while testifying during direct examination can assist the Administrative Law Judge in making a determination concerning the credibility of such a witness. The Commission believes that the value that oral direct testimony may hold for enabling the Administrative Law Judge to make complete appraisals of witnesses' credibility in some cases will outweigh the benefit of whatever time would be saved by requiring direct proof to be submitted only in documentary form. Accordingly, the Commission has adopted § 12.312 which, as the general rule, authorizes parties to present oral direct testimony, but which also authorizes the Administrative Law Judge, in his discretion and to expedite the hearing, to order that the direct testimony of the parties and their

witnesses be presented in documentary form only.⁴⁵

The Commission also proposed a rule which would have restricted the possible locations for oral hearings to "one of the twelve regional cities in which the United States Circuit Courts of Appeals are situated." Proposed rule § 12.318(b). The Commission in § 12.312(b) has adopted a rule which specifically enumerates twenty cities as possible locations for hearings.⁴⁶ Limiting the number of locations where oral hearings may be held is expected to increase the number of cases that, within a given period of time, will be heard in the same location. The restriction on the number of cities where oral hearings may be held will also minimize the different locations to which an Administrative Law Judge must travel, which, in turn, should minimize the amount of time a judge will have to devote to travel. The limitation of the location of possible hearing sites will also result in a significant savings to the Commission's reparations budget concerning money expended for travel by an Administrative Law Judge.

The Commission does not intend its restriction on the location of hearing sites to impose an unreasonable burden on the parties' ability to appear at an oral hearing.⁴⁷ Accordingly, in

⁴⁴ The Commission also proposed a rule that would have preserved the opportunity of any party who decided not to attend an oral hearing, and who filed a notice of appearance at least seven days prior to the date of the hearing, to propose findings of fact based on the record in the proceeding. See proposed rule § 12.318(c)(2). This proposed rule was very similar to a rule in effect under the Commission's former reparation rules. See 17 CFR 12.71(c)(2) (1983). One commentator indicated that a party who announced his intention not to attend an oral hearing should not be permitted to file a post hearing brief. The Commission agrees with this comment. Parties who decline to attend an oral hearing, and thereby fail to submit to cross examination, may deprive the factfinder of a valuable opportunity to determine the credibility of that party's testimony. The Commission does not believe that such a party should have an opportunity to propose findings and conclusions that are based on a testimonial record made without that party's participation. Accordingly, the Commission has not adopted any rule permitting parties who fail to appear at an oral hearing to file post hearing briefs.

⁴⁵ These twenty cities, some of which serve as alternative sites for United States Courts of Appeals, are: Albuquerque, N.M.; Atlanta, Ga.; Boston, Mass.; Chicago, Ill.; Cincinnati, Ohio; Columbia, S.C.; Denver, Colo.; Houston, Tex.; Kansas City, Mo.; Los Angeles, Cal.; Minneapolis, Minn.; New Orleans, La.; New York, N.Y.; Oklahoma City, Okla.; Phoenix, Ariz.; San Diego, Cal.; San Francisco, Cal.; Seattle, Wash.; St. Petersburg, Fla.; and Washington, D.C.

⁴⁷ The Commission also received a request from one commentator that the Commission set forth its view concerning the enforceability of a pre-dispute venue agreement between a customer and a registrant stipulating that if a dispute ever arises between them resulting in an oral hearing in reparations, the customer will appear at an oral

§ 12.312(b), the Commission has authorized an Administrative Law Judge, in any case where a party avers that none of the twenty cities specified in that rule is located within 300 miles of his principal residence, waive the rule, and, upon giving due regard for the convenience of all of the parties, order that the hearing be held in a more convenient location. Section 12.313(b) also authorizes the Director of the Office of Proceedings, for reasons of administrative economy or practical necessity, to direct that the oral hearing be held in a location other than twenty cities specified in § 12.312(b).

The final rules have also modified the proposed rules concerning interlocutory review. Pursuant to new § 12.310(a)(4), a party may file an application for interlocutory review, even though a judge has not certified the matter, if the ruling appealed from involves controlling questions of law or policy, an immediate appeal may materially advance the ultimate resolution of the issues in the proceeding, subsequent reversal of the ruling would cause unnecessary delay or expense to the parties, and, in addition extraordinary circumstances are shown to exist.

This new provision does not render the certification requirement of § 12.309(a)(3) superfluous. An uncertified application for interlocutory review can be denied by the Chief of the Opinions Section pursuant to delegated authority in § 12.408, discussed, *infra*, without the need for formal consideration by the Commission. Section 12.309(b) also prescribes new content requirements for applications for interlocutory review. New § 12.309(c) makes clear that the Commission denial of an application for interlocutory review will not preclude the filing party from reasserting any arguments made in the application in a subsequent appeal of the initial decision.

Pursuant to § 12.314 of the final rules, as soon as practicable after parties have concluded their submissions of proof (including an oral hearing, if one is

hearing held at a location designated in the agreement, and that the customer will be reimbursed for travel expenses only if the customer prevails in the reparation proceeding. The Commission does not believe that commodity customers should be permitted to waive, in an advance of a dispute with a registrant, the privilege of having a convenient venue for an oral hearing in a formal decisional proceeding. Therefore the Commission will not consider any such pre-dispute venue agreements to be binding upon the parties. On the other hand, if all parties to a formal decisional proceeding, after an answer is filed, execute an agreement that the venue of an oral hearing shall be one of the twenty cities specified in § 12.312(b), the Commission will regard such an agreement to be binding on the parties.

the contents of such memoranda and such order, unless modified, shall control the scope of the issues to be tried at the oral hearing.

⁴⁴ The standard for whether a grant of summary disposition is appropriate is whether there is no genuine issue as to any material fact and a party is entitled to a decision as a matter of law. See §§ 12.207, 12.310.

held), the Administrative Law Judge is required to issue an initial decision. Like an initial decision rendered in a summary decisional proceeding, an initial decision rendered in a formal decisional proceeding must be accompanied by a statement of findings of fact and conclusions of law, may include a reparation award and, if appropriate, an award of prejudgment interest and costs (including reasonable attorney's fees), and is appealable to the Commission.⁴⁸ Section 12.315 provides that any party who has claimed damages in excess of \$10,000 in order to gain access to the formal decisional procedure may be assessed the cost of the transcript of the oral hearing as well as the cost of instituting the proceeding (i.e., the \$200 filing fee), if that party is ultimately adjudged to be entitled to an award that does not exceed \$10,000.

H. Default Proceedings and Parallel Proceedings

Under the Commission's former reparation procedure, any party who failed to file an answer, or a reply to a counterclaim, or to appear at an oral hearing, could be adjudged to be in default. Under the former default procedure, a presiding officer could make findings and conclusions, and award damages, based on the record as it then existed. The Commission's former default procedure authorized the presiding officer to set aside his default order "at any time for good cause," and permitted defaulted parties to file a motion to set aside a default judgment within a reasonable time after the default order was issued. In its proposed rules, the Commission proposed a default procedure very similar to its former default procedure, except that it provided (1) that defaults would be handled by the Proceedings Officer, (2) that motions to set aside a default order could not be filed after the date on which the order would become the final decision and order of the Commission, and (3) that a Proceedings Officer, acting on his own motion, could set aside a default order only before it became final. The Commission received no comment on this rule other than objections to the use of a Proceedings Officer for default purposes.

The Commission has reconsidered its proposed default rule, and is concerned that the rule prescribes no standards for setting aside default orders that are not final, and makes no provision for the setting aside of default orders that,

although final, were entered without jurisdiction, by fraud or mistake, or as the result of a party's excusable neglect. Accordingly, the Commission has adopted new § 12.23 which prescribes the procedure for setting aside orders of default,⁴⁹ and which differentiates between final and nonfinal orders.

Under § 12.23, a motion to set aside a default order shall be made to the official who issued the order. If the order has not become final by the time the motion is filed, the moving party need only set forth in his motion the reasons why the act or omission for which he was defaulted was not willful, why there is a reasonable likelihood of success of his claim or defense if heard on the merits, and why no prejudice would be sustained by other parties if the default is set aside. If the order has already become final at the time the motion is filed, the order may not be set aside unless it is shown by the defaulted party that he should be relieved from the default order because of fraud perpetrated upon a decisionmaking official or the Commission, mistake, or excusable neglect, or because the order is void for want of jurisdiction. For any ground other than want of jurisdiction, a motion to set aside a final default order must be filed within one year after that order was issued.

The Commission also proposed a rule that would change its policy concerning reparation proceedings in which the claims made by reparation complainants are the subject of parallel proceedings before other tribunals, or in which one or more of the respondents have become involved in receivership or bankruptcy proceedings. The Commission's former policy was to stay such proceedings. See 41 FR 3994 (January 27, 1976). Under its proposed rule changing the policy, the Commission would dismiss without prejudice a reparation proceeding (or claim), once it is learned that, at the time when the reparation complaint was filed, the same claim alleging a violation of the Commodity Exchange Act or the Commission's regulations was the subject of a pending arbitration or civil court proceeding based on the same facts and against one or more of the same respondents. Proposed rule § 12.23. This rule would not affect a customer's rights under Commission regulation § 180.3(b)(3), 17 CFR 180.3(b)(3) (1983), so that a customer who is notified of his broker's intention to invoke arbitration under a pre-dispute agreement would still have forty-five

days in which to elect to proceed in reparations.

Where a receivership involving one or more respondents would result in the resolution of customer claims against the subjects of the receivership, the Commission proposed to dismiss without prejudice from the reparation proceeding those respondents who are the subject of the receivership. The Commission also proposed to dismiss without prejudice from a reparation proceeding any respondent who became a debtor in a bankruptcy proceeding, but would continue to stay reparation proceedings in which a respondent became a debtor in the case of an involuntary petition filed pursuant to the Bankruptcy Code, 11 U.S.C. 303, until the petition had been dismissed or an order for relief was issued. The proposed rule implementing this change of policy would apply only as to reparation claims or proceedings which have yet to result in an initial decision on the merits of the claims in the proceeding.

As proposed, a parallel proceeding would include, *inter alia*, an arbitration or civil court proceeding in which one or more claims alleging violations of the Commodity Exchange Act are at issue, which is pending at the time the reparation complaint is filed, and which is based on the same facts and against one or more of the same parties named as respondents in the reparation complaint. The Commission received one comment concerning this proposal that indicated that a parallel proceeding should include arbitration or civil court proceedings that meet the description above, except that they do not involve claims alleging violations of the Commodity Exchange Act.

The Commission is cognizant that concerning private claims accruing on and after January 11, 1983, those which arise under the Commodity Exchange Act may be pursued in only one judicial forum, U.S. district court. If the Commission were to adopt this commentator's suggestion, an action instituted by a respondent in a state court proceeding based on the same facts, e.g. for declaratory judgment or a debit balance claim, would operate to force would-be reparation complainants to pursue their Commodity Exchange Act-related claims in a more costly forum, U.S. district court. Because the Commission has never intended to divest a complainant in those circumstances of his right to pursue his Commodity Exchange Act-related claims in reparations, it has determined not to adopt the commentator's recommendation, at least where the complainant in reparations was not

⁴⁸ The factors that would warrant an award of prejudgment interest and of reasonable attorney's fees in a formal decisional proceeding are the same as the factors discussed in notes 37 and 38, *supra*, concerning summary decisional proceedings.

⁴⁹ All orders of default, i.e., those entered either before or after a proceeding had commenced pursuant to § 12.26 would be subject to this rule.

responsible for instituting the parallel proceeding in state court.

The Commission has adopted the commentator's suggestion where the complainant in reparations was responsible for instituting the parallel proceeding. Thus, if the complainant in reparations was responsible for instituting an arbitration or civil court proceeding that otherwise satisfies § 12.24(a)(1), dismissal under § 12.24 would be appropriate even though the complainant had not asserted his CEA-related claims in such a proceeding.⁵⁰

New § 12.24 also includes an additional new category of parallel proceeding which contemplates a parallel federal judicial proceeding that would be governed by Fed. R. Civ. P. 13(a) requiring the complainant in reparations to assert all of his CEA-based claims as counterclaims in that proceeding. Section 12.24(a)(1)(iii). If a compulsory counterclaim rule is operative in such a federal judicial proceeding, the Commission interprets new § 12.24(a)(iii) as authorizing dismissal of the reparation complaint or of the entire proceeding, without prejudice.

Concerning § 12.24 (a)(2) and (a)(3), these provisions are intended to permit expeditious resolutions of customer claims by dismissing from the reparation proceeding respondents who by their presence may create the necessity for a stay of the entire reparation proceeding, see 11 U.S.C. 362, and against whom the customer may pursue his claim in a more appropriate forum, *i.e.* in a judicial proceeding against the respondent in receivership or in bankruptcy. The Commission is aware that in certain situations dismissal of a debtor from a reparation proceeding may create undue prejudice to a particular customer or debtor; *e.g.*, a statute of limitations may preclude a complainant from filing his claims against the respondent in receivership, or in bankruptcy. Accordingly, § 12.24(e) affords any party an opportunity to seek a different result in a particular case at any time before a § 12.24 (c) or (d) order becomes effective.

The Commission does not believe that it is necessary to make the application of § 12.24(d), which authorizes dismissal from a reparation proceeding without prejudice a respondent who has become

subject to receivership or bankruptcy proceedings, contingent upon the issuance of a stay order as to that respondent in the receivership or the bankruptcy. The provisions of § 12.24(d) authorizing dismissal from reparations respondents in receivership would only apply where the order establishing the receivership contemplated the resolution of customer claims within the receivership.⁵¹ In a bankruptcy proceeding, a stay of all administrative (including reparation) proceedings would be automatic, 11 U.S.C. 362(a), and not dependent upon an affirmative order issued by the Bankruptcy Court. Should the Bankruptcy Court lift the automatic stay before a debtor-respondent is dismissed pursuant to the § 12.24(d), the Commission would allow the affected reparation proceeding to continue to a final resolution.

1. Commission Review of Decisions

In its proposed rules, the Commission proposed to modify its rules by which parties could obtain Commission review of initial decisions. Under the Commission's former reparation procedure, parties were able to seek Commission review of an initial decision by filing an application for review within fifteen days after being served with an initial decision. In the application, parties were required to specify issues presented for review and provide a summary of the facts and argument which demonstrate why Commission review was necessary. If the Commission determined that review was not necessary "to resolve an important issue of law or public policy," it could deny review by issuing an order to that effect. If none of the parties filed an application for review, the Commission could nevertheless take review of an initial decision on its own motion 30 days after service thereof.

The Commission proposed to change this procedure to afford aggrieved parties a right to appeal the initial decision by filing a notice of appeal within fifteen days after service of the initial decision. The notice of appeal would need only contain a very brief expression of the appealing party's intention to appeal the initial decision. After timely filing a notice of appeal, the appeal would not be perfected, and hence, subject to dismissal, unless within 30 days after filing a notice of appeal the appealing party filed an

appeal brief, paid an appellate filing fee in the amount of \$50, and complied with the appeal bond requirement, if any.⁵² If no party filed an appeal, the Commission would still be authorized to review an initial decision by taking review on its own motion within thirty days after the initial decision is served. Unless the Commission took review on its own motion, the proposed rules provided that the timely filing and perfecting of an appeal to the Commission would be mandatory prerequisite to judicial review of a final reparations decision of the Commission.

The proposed rules also authorized the Commission, upon its own motion or upon written application by a party, to reopen a hearing to receive additional evidence. At the conclusion of the Commission's consideration of the issues on appeal, the Commission could render an order of summary affirmance, or a more expansive opinion and order, either of which would constitute the final decision and order of the Commission effective upon service. The proposed rules also afforded parties, within seven days after service of a final decision, the opportunity to file a petition for Commission reconsideration of the final decision which was required to be confined to new questions raised by the final decision concerning which the petitioner had no prior opportunity to argue before the Commission.

Concerning these proposed rules, commentators indicated that the time allowed for filing a notice of appeal (*i.e.*, within fifteen days after service of the initial decision) and for filing an appeal brief (*i.e.*, within thirty days after the filing of a notice of appeal) should be enlarged. Citing a potential for delay, commentators indicated that the Commission should not adopt a rule affording parties an opportunity to seek leave to adduce additional evidence. Other commentators indicated that the time allowed for the filing of a petition for reconsideration should be enlarged to thirty days, that the time within which an award must be satisfied should be increased to thirty days, that the appellate filing fee should be raised in order to discourage the filing of frivolous appeals.

The Commission believes that its change of appellate review rules from an application for review procedure to an appeal procedure will be more efficient and expeditious because it will afford aggrieved parties the opportunity to

⁵⁰ The Commission also holds the view that an arbitration proceeding otherwise satisfying § 12.24(a)(1) commenced pursuant to an enforceable pre- or post-dispute agreement shall be deemed a parallel proceeding "commenced at the instance of the complainant in reparations" within the meaning of § 12.24(a)(1)(i), regardless of whether the complainant in reparations actually took the initiative in commencing the arbitration proceeding.

⁵¹ The Commission believes that the court, which appointed the receiver, and the receiver, as the person charged to marshal the assets and develop a plan of repayment to creditors and customers, are in a better position than the Commission to resolve customer claims against the subjects of the receivership.

⁵² Under the proposed rules, parties would be required to file an appeal bond if so ordered in the initial decision. See, *e.g.*, Proposed rules §§ 12.320(b)(6) and 12.401(b).

appeal as a matter of right, and will spare the Commission from having to consider the merits of an initial decision and an application for review separately before determining whether to review the issues on appeal and render its own decision in the case. The new appeal procedure would also relieve a burden imposed on parties by the Commission's former reparation rules that required parties to file a detailed and time-consuming application for review which often resembled a brief, followed by, if review was granted, a brief in support of the issues raised in the application for review. Under § 12.401 as adopted, parties would only have to file a single brief.

The Commission does not believe that the fifteen day period proposed for filing a notice of appeal needs to be enlarged because, as indicated earlier, a notice of appeal need only consist of a very brief expression of the appealing party's intent to appeal the initial decision, and therefore, requires very little effort on the part of such party to prepare. Because the Commission has rarely found an appendix to appellate briefs to be useful to its review, it has not adopted its proposed rule that would have required parties to an appeal to designate the contents of an appendix. Because of the much greater commitment of time needed to prepare a brief, the Commission has determined in § 12.401(c) to enlarge—from twenty to thirty days—the allowed time following the filing of an appeal brief within which a non-appealing party may file an answering brief.

The Commission believes that its proposed reconsideration procedure would create an unnecessary re-review procedure that would only delay the Commission's review of other cases on its appellate docket. Accordingly, the Commission has determined not to adopt its proposed rule allowing parties to file a petition for reconsideration of a Commission opinion and order, or a Commission order of summary affirmation.

The Commission, in § 12.405, has also determined to adopt its proposed rule authorizing the Commission to grant leave to adduce additional evidence. The Commission believes that the standards authorizing the Commission to grant such leave will be difficult for parties to satisfy,⁵³ and thus this rule

should not create a significant potential for delay. The Commission also does not believe that the time within which an award must be satisfied should be enlarged from the proposed fifteen days to thirty days. One of Congress' purposes in fashioning the 1982 amendments to Section 14 of the Act was to achieve more expeditious recoveries for reparation claims.⁵⁴ In view of that purpose, the Commission finds no justification for enlarging the time for satisfying a reparation award to thirty days.

The Commission also does not find it appropriate to raise its proposed filing fee of \$50 for appeals to the Commission in order to discourage parties from filing frivolous appeals. The Commission's purpose in proposing the appellate filing fee was to offset some of the Commission's costs associated with administering its appellate docket, not to discourage appeals. The Commission believes that a reasonable likelihood of a prejudgment interest award will adequately deter parties from filing frivolous appeals. Accordingly, the Commission in § 12.401(a) has adopted its proposed appellate filing fee of \$50.⁵⁵

The proposed rules would also have required an appealing party, in order to perfect his appeal, to file a bond if such party was so ordered in the initial decision. Proposed rule § 12.401(b). Although no comments were received concerning the appeal bond requirement of proposed rule § 12.401(b), the Commission has reconsidered the need for a rule requiring an appealing party to file a bond in the amount sufficient to cover award, interest, costs and attorney's fees. In proposing this bond requirement, the Commission was mainly concerned with respondents who would become insolvent before the Commission issued its decision on appeal. However, because the Commission expects appeals to be resolved more expeditiously under the final rules, and because non-registrants, a class of respondents most likely to become insolvent during an appeal, are no longer amenable to suit in reparations,⁵⁶ the Commission does not believe that its appeal bond requirement is necessary. Therefore, it has declined

to adopt any rule requiring appealing parties to file a bond.

The Commission, in § 12.408, has adopted a rule delegating to the Chief of the Opinions Section authority to issue orders which may dispose of or otherwise affect cases on the Commission's review docket. Section 12.408 authorizes the Chief of the Opinions Section or such other person under his direction as he may designate from time to time: to decide miscellaneous procedural motions directed to the Commission after an initial decision has been filed; to remand initial decisions, default or other dispositive orders, (1) where clarification or supplementation thereof is needed, (2) where a ministerial act necessary to the proper conduct of the proceeding has not been performed, and (3) where a motion to set aside a default order has been filed; to dismiss any appeal where it has not been filed or perfected in accordance with § 12.401; to strike any filing that does not meet the requirements of, or is not perfected in accordance with, the Part 12 Reparation Rules; and to enter orders that will facilitate or expedite Commission review of an initial decision or other dispositive order.

Concerning interlocutory matters, the Chief in § 12.408 has been delegated authority to deny applications for interlocutory review (not concerning the suspension of an attorney from participating in a reparation proceeding or the disqualification of a decisionmaker) where the ruling sought to be appealed has not been certified by the Administrative Law Judge, or the application has not been filed in accordance with § 12.309 of the rules. A party dissatisfied with any such ruling by the Chief of the Opinions Section is authorized by § 12.408(c) to file with the Commission a petition for reconsideration within seven days after service of the ruling.

Section 12.408 is expected to facilitate and expedite the Commission's administration of Subpart F of the rules, as well as of § 12.309, governing interlocutory review. Section 12.408 vests in the Chief of the Opinions Section the authority, without the need for separate formal consideration by the Commission, to dispose of petitions or filings which should be granted or denied for strictly technical or procedural reasons. Under the Commission's former reparation rules, the Commission formally considered many petitions for relief that were filed out of time, not authorized by the reparation rules, or otherwise flawed for

⁵³ See, e.g., H.R. Rep. No. 565, Pt. 2, at 32, 97th Cong., 2d Sess. (1982).

⁵⁴ So that aggrieved parties will give careful consideration, at the earliest possible date, to the advisability of appealing to the Commission an initial decision, the Commission in § 12.401(b) has determined to require an appealing party to file the \$50 appellate filing fee at the time he files a notice of appeal—not when he files an appeal brief as proposed.

⁵⁵ See note 2, *supra*.

⁵³ The Commission will not grant such leave unless the failure to adduce evidence at the hearing was attributable to excusable neglect, or to circumstances under which the applying party, after making reasonable efforts to do so, would not reasonably be expected to acquire such evidence in time for the hearing.

technical or procedural reasons (e.g., not accompanied by a certificate of service).

The Commission believes that by discontinuing its former practice of devoting formal attention to matters not properly on its appellate docket it will be able to attain earlier dispositions of its other appellate reparation cases. Under § 12.408, the Chief of the Opinions Section has been delegated authority to consider all filings directed to the Commission concerning a case in which an initial decision has been rendered, or in which interlocutory review is sought. If any such filing is itself defective, or points up a ministerial defect in an initial decision or similar dispositive order, the Chief pursuant to § 12.408 delegation may rule on the filing without formal consideration by the Commission. In any case in which he believes it appropriate, the Chief is authorized in § 12.408(b) to submit the matter to the Commission for its consideration.

J. Other Miscellaneous Matters

In proposed rule § 12.1(c), the Commission indicated that to the extent that its new rules have retained without substantive modification any of the Commission's former reparation rules, the new rules shall be interpreted consistently with prior Commission interpretations of their counterparts in the former rules. The Commission has reconsidered whether it should bind itself by a rule to follow prior Commission interpretations of its rules, especially when those rules now apply to different procedures. Because the Commission's interpretation of its former rules should not necessarily be applied mechanically to its new rules, the Commission has determined not to adopt § 12.1(c) as proposed. As a matter of policy, however, the Commission expects to interpret the new rules consistently with its interpretations of identical or substantially similar provisions of the obsolete rules in a given case so long as the purposes of Section 14(b) of the Act, i.e., the efficient and expeditious administration of reparation cases, would be served thereby.

The Commission has adopted a new § 12.1(c) which prescribes the effective date, April 23, 1984, for these rules, as well as the applicability of these rules to reparation cases that are pending on that date. Section 12.1(c) provides that these final rules will apply in all respects to all reparation complaints filed on and after the effective date. Section 12.1(c) also indicates that Subpart F of these rules will apply to initial decisions served on and after the effective date, regardless of when the

reparation complaint was filed. In addition, § 12.14, 12.21, 12.22, 12.23, 12.24 and 12.408 of these final rules apply to all reparation cases, including those pending on the effective date, regardless of when the complaint was filed. Except as otherwise provided above, § 12.1(c) provides that these rules will not apply to reparation complaints, and matters relating thereto, filed prior to the effective date, except that parties to a reparation case that was pending on that date may at any time before an initial decision is rendered, by written stipulation signed by all parties, elect to have the case heard pursuant to the voluntary decisional procedure. To the extent that these final rules do not apply to any aspect of a case that was pending on April 23, 1984, § 12.1(c) provides that the Commission's former reparation rules, 17 CFR Part 12 (1983), shall apply.

In order to simplify and make all-inclusive the body of rules applicable to an elected decisional procedure, the Commission has decided to repeat rules that are common to all three procedures in each set of rules, perhaps creating an appearance of length and complexity in the final rules viewed as a whole. However, parties who have elected one of the three procedures in most instances would have no need to refer to the rules applicable to the other two decisional procedures. Thus, the final rules should actually simplify the reparations procedure for the infrequent reparations litigant because such person would have less difficulty understanding and familiarizing himself with rules applicable to his elected procedure than he would under the Commission's former reparation rules.

III. The Regulatory Flexibility Act

In its preamble to the proposed rules, the Commission determined that insofar as the proposed Part 12 reparation rules related solely to agency organization, procedure and practice, they are not rules which are subject to the provisions of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* Nevertheless, because they do not impose regulatory obligations on commodity professionals and small commodity firms in addition to those required by Section 14(a) and other provisions of the Commodity Exchange Act prior to the 1982 amendments, and because they will only serve to streamline, simplify and expedite the Commission's former reparations process, the Commission does not expect its final rules to have a significant economic impact on a substantial number of small business entities.

This Part shall apply in its entirety to all reparation complaints, and all

matters relating thereto, filed on and after April 23, 1984. Sections 12.14, 12.21, 12.22, 12.23, 12.24 and 12.408 of this Part shall apply to all reparation matters, including those pending on April 23, 1984, regardless of when the reparation complaint was filed. Subpart F of this Part shall apply to all proceedings in which initial decisions, or similar dispositive orders, are served on and after April 23, 1984. Except as indicated above, this Part shall not apply to reparation complaints filed before April 23, 1984, except that parties to a formal adjudicatory proceeding commenced pursuant to any such complaint may, at any time before the initial decision is rendered, by written stipulation executed by all parties, elect to have the case heard pursuant to Subpart C of this Part. To the extent that this Part does not apply to any matter on the Commission's reparations docket pending on April 23, 1984, 17 CFR Part 12 (1983) shall apply.

List of Subjects in 17 CFR Part 12

Administrative practice and procedure, Commodity exchanges, Commodity futures, Reparations.

17 CFR Part 12 is revised to read as follows:

PART 12—RULES RELATING TO REPARATIONS

Subpart A—General Information and Preliminary Consideration of Pleadings

Sec.

- 12.1 Scope and applicability of rules of practice relating to reparations.
- 12.2 Definitions.
- 12.3 Business address; hours.
- 12.4 Suspension, amendment, revocation and waiver of rules.
- 12.5 Computation of time.
- 12.6 Extensions of time; adjournments; postponements.
- 12.7 Ex parte communications in reparation proceedings.
- 12.8 Separation of functions.
- 12.9 Practice before the commission.
- 12.10 Service.
- 12.11 Formalities of filing of documents with the proceedings clerk.
- 12.12 Signature.
- 12.13 Complaint; election of procedure.
- 12.14 Withdrawal of complaint.
- 12.15 Notification of complaint.
- 12.16 Response to complaint.
- 12.17 Satisfaction of complaint.
- 12.18 Answer; election of procedure.
- 12.19 Counterclaim.
- 12.20 Response to counterclaim; reply; election of procedure.
- 12.21 Voluntary dismissal.
- 12.22 Default proceedings.
- 12.23 Setting aside of default.
- 12.24 Parallel proceedings.
- 12.25 Filing fees.

- Sec.
12.26 Commencement of a reparation proceeding.
12.27 Termination of consideration of pleadings.

Subpart B—Discovery

- 12.30 Methods of discovery.
12.31 Production of documents and tangible items.
12.32 Depositions on written interrogatories.
12.33 Admissions.
12.34 Discovery by a decisionmaking official.
12.35 Consequences of a party's failure to comply with a discovery order.
12.36 Subpoenas to compel discovery.

Subpart C—Rules Applicable to Voluntary Decisional Proceedings

- 12.100 Scope and applicability of rules.
12.101 Functions and responsibilities of the Judgment Officer.
12.102 Disqualification of Judgment Officer.
12.103 Filing of documents; subscription; service.
12.104 Amendments to pleadings; motions.
12.105 Submission of proof only in documentary or tangible form.
12.106 Final decision and order.

Subpart D—Rules Applicable to Summary Decisional Proceedings

- 12.200 Scope and applicability of rules.
12.201 Functions and responsibilities of the Judgment Officer.
12.202 Disqualification of Judgment Officer.
12.203 Filing of documents; subscription; service.
12.204 Amended and supplemental pleadings.
12.205 Motions.
12.206 Pre-decision conferences.
12.207 Summary disposition.
12.208 Submissions of proof.
12.209 Oral testimony.
12.210 Initial decision.

Subpart E—Rules Applicable to Formal Decisional Proceedings

- 12.300 Scope and applicability of rules.
12.301 Functions and responsibilities of the Proceedings Officer.
12.302 Appeal of a discovery order issued by a Proceedings Officer.
12.303 Pre-decision conferences.
12.304 Functions and responsibilities of the Administrative Law Judge.
12.305 Disqualification of Administrative Law Judge.
12.306 Filing of documents; subscription; service.
12.307 Amended and supplemental pleadings.
12.308 Motions.
12.309 Interlocutory review by the Commission.
12.310 Summary disposition.
12.311 Disposition of proceeding or issues without oral hearing.
12.312 Oral hearing.
12.313 Subpoenas for attendance at an oral hearing.
12.314 Initial decision.
12.315 Consequences of overstating damages claims not in excess of \$10,000.

Subpart F—Commission Review of Decisions

- Sec.
12.400 Scope and applicability of rules.
12.401 Appeal to the Commission.
12.402 Appeal of disposition of less than all claims or parties in a proceeding.
12.403 Commission review on its own motion.
12.404 The record of proceedings.
12.405 Leave to adduce additional evidence.
12.406 Final decision of the Commission.
12.407 Satisfaction of reparation award; enforcement; sanctions.
12.408 Delegation of authority to Chief of the Opinions Section.

Authority: 7 U.S.C. 12a(5), 18(b) (1982).

Subpart A—General Information and Preliminary Consideration of Pleadings**§ 12.1 Scope and applicability of rules of Practice relating to reparations.**

(a) *Part 12 Reparation Rules.* These rules of practice are applicable to reparation applications filed pursuant to section 14 of the Commodity Exchange Act, as amended, 7 U.S.C. section 18. The rules in this Part shall be construed liberally so as to secure the just, speedy and inexpensive determination of the issues presented with full protection for the rights of all parties.

(b) *Other rules of practice.* Unless specifically made applicable, other Rules of Practice promulgated under the Commodity Exchange Act, as amended, shall not apply to reparation matters.

(c) *Applicability of these Part 12 Reparation Rules.* These rules shall apply in their entirety to all reparation complaints, and matters relating thereto, filed on and after April 23, 1984. Sections 12.14, 12.21, 12.22, 12.23, 12.24 and 12.408 of these rules shall apply to all reparation matters, including those pending on April 23, 1984 in the **Federal Register**, regardless of when the reparation complaint was filed. Subpart F of these Rules shall apply to all proceedings in which initial decisions, or similar dispositive orders, are served on and after April 23, 1984. Unless otherwise specifically provided in this rule, these Part 12 Reparation Rules shall not apply to reparation complaints filed before April 23, 1984, except that parties to a formal adjudicatory proceeding commenced pursuant to any such complaint may, at any time before the initial decision is rendered, by written stipulation executed by all parties, elect to have the case heard pursuant to Subpart C of these rules. To the extent that these Part 12 rules do not apply to any matter on the Commission's reparations docket pending on April 23, 1984, the Commission's former reparation rules, 17 CFR Part 12 (1983), shall apply.

§ 12.2 Definitions.

For purposes of this part:

(a) "Act" means the Commodity Exchange Act, as amended, 7 U.S.C. 1, *et seq.*

(b) "Administrative Law Judge" means an administrative law judge appointed pursuant to the provisions of 5 U.S.C. 3105;

(c) "Commission" means the Commodity Futures Trading Commission;

(d) "Commission decisional employee" means an employee or employees of the Commission who are or may reasonably be expected to be involved in the decisionmaking process any proceeding, including, but not limited to:

(1) A Judgement Officer and a Proceedings Officer;

(2) Members of the personal staffs of the Commissioners, but not the Commissioners themselves;

(3) Members of the staffs of the Administrative Law Judges, but not an Administrative Law Judge;

(4) Members of the staffs of the Proceedings Officers;

(5) Members of the staffs of the Judgment Officers;

(6) Members of the Opinions Section;

(7) Members of the staff of the Office of Proceedings; and

(8) Other Commission employees who may be assigned to hear or to participate in the decision of a particular matter.

(e) "Complainant" means a person who, individually or jointly with others, has applied to the Commission for a reparation award pursuant to Section 14 (a) of the Act, but shall not include a cross claimant or any other type of third party claimant. The term "complainant" under these rules applies equally to two or more persons who have applied jointly for a reparation award;

(f) "Complaint" means any document which constitutes an application for a reparation award pursuant to Section 14(a) of the Act, regardless of whether it is denominated as such;

(g) "Counterclaim" means an application for a reparation award by a respondent against a complainant which satisfies the requirements of § 12.19 of these rules. A counterclaim does not mean a cross claim or other type of third party claim;

(h) "Director of the Office of Proceedings" means an employee of the Commission who shall serve as the administrative head of that Office, with responsibility and authority to assure that the Part 12 Reparation Rules are administered in a manner that will effectuate the purposes of Section 14(b)

of the Act. The Director is authorized to convene meetings of all personnel in the Office of Proceedings, including Administrative Law Judges and their personally assigned law clerk. The Director shall have the authority to delegate his duties to administer §§ 12.15, 12.24, 12.26 and 12.27 of these rules, and, shall have the authority to assign and, if necessary, reassign the duties of, and set reasonable standards for performance for, all personnel in the Office, including the Proceedings Officer and Judgment Officers, but not including Administrative Law Judges and their personally assigned law clerk;

(i) "Ex parte communication" means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but does not include: (1) A discussion, after consent has been obtained from all of the named parties, between a party and a Judgment Officer, Proceedings Officer, or Administrative Law Judge, or the staffs of the foregoing, pertaining solely to the possibility of settling the case without the need for a decision; (2) requests for status reports, including questions relating to service of the complaint, and the registration status of any persons, on any matter or proceeding covered by these rules; or (3) requests made to the Office of Proceedings or the Opinions Section for interpretation of these rules;

(j) "Formal decisional procedure" means, where the amount of damage claimed exceeds \$10,000, exclusive of interest and costs, a procedure elected by the complainant or a respondent where the parties may be granted an oral hearing. A formal decisional proceeding is governed by Subpart E of these rules;

(k) "Summary decisional procedure" means, where the amount of damages claimed does not exceed \$10,000, exclusive of interest and costs, a procedure elected by the complainant or the respondent wherein an oral hearing need not be held and proof in support of each party's case may be supplied in the form and manner prescribed by § 12.208 of these rules. A summary decisional proceeding is governed by Subpart D of these rules;

(l) "Voluntary decisional procedure" means, regardless of the amount of damages claimed, a procedure which the complainant and the respondent have chosen voluntarily to submit their claims and counterclaims, allowable under these rules, for an expeditious resolution by a Judgment Officer. By electing the voluntary decisional procedure, parties agree that a decision issued by a Judgment Officer shall be without accompanying findings of fact and shall

be final without right of Commission review or judicial review. A voluntary decisional proceeding is governed by Subpart C of these rules;

(m) "Hearing" means that part of a proceeding which involves the submission of proof, either by oral presentation or written submission;

(n) "Interested person" means any party, and includes any person or agency permitted limited participation or to state views in a reparations proceeding, or other person who might be adversely affected or aggrieved by the outcome of a proceeding (including the officers, agents, employees, associates, affiliates, attorneys, accountants or other representatives of such persons), and any other person having a direct or indirect pecuniary or other interest in the outcome of a proceeding;

(o) "Judgment Officer" means an employee of the Commission who is authorized to conduct the proceeding and render a decision in a summary decisional proceeding or a voluntary decisional proceeding. In appropriate circumstances, the functions of a Judgment Officer may be performed by an Administrative Law Judge;

(p) "Office of Proceedings" means that office within the Commission comprised of the Administrative Law Judges, Proceedings Officer, Judgment Officers, the Director of that office, the Proceedings Clerk, and members of the staffs of the foregoing, which administers these Part 12 Reparation Rules, other than the rules authorizing direct review by the Commission;

(q) "Opinions Section" means the members of the Commission's staff who provide assistance to the Commission in its direct review of any proceeding conducted pursuant to these rules;

(r) "Order" means the whole or any part of a final procedural or substantive disposition of a reparation proceeding by the Commission, an Administrative Law Judge, a Judgment Officer, a Proceedings Officer, or the Proceedings Clerk;

(s) "Party" means a complainant, respondent or any other person or agency named or admitted as a party in a reparation matter;

(t) "Person" means any individual, association, partnership, corporation or trust;

(u) "Pleading" means the complaint, the answer to the complaint, any supplement or amendment thereto, and any reply to the foregoing;

(v) "Proceeding" means a case in which the pleadings have been forwarded, and in which a procedure has been commenced pursuant to § 12.26(a), (b), or (c);

(w) "Proceedings Officer" means an employee of the Commission who is authorized to administer the procedures prescribed under §§ 12.22, 12.301, and 12.303 of these rules. In appropriate circumstances, the functions of a Proceedings Officer may be performed by an Administrative Law Judge;

(x) "Proceedings Clerk" means that member of the Commission's staff in the Office of Proceedings who shall maintain the Commission's reparations docket, assign reparation cases to an appropriate decisionmaking official, and act as custodian of the records of proceedings;

(y) "Registrant" means any persons who (1) was registered under the Act at the time of the alleged violation; (2) is subject to reparation proceedings by virtue of Section 4m of the Commodity Exchange Act, regardless of whether such person was ever registered under the Act; or (3) is otherwise subject to reparation proceedings under the Act;

(z) "Respondent" means any person or persons against whom a complainant seeks a reparation award pursuant to Section 14(a) of the Act; and

(aa) "Reparation award" means the amount of monetary damages a party may be ordered to pay.

§ 12.3 Business address; hours.

The principal office of the Commission is located at 2033 K Street, NW., Washington, D.C. 20581. It is open each day, except Saturdays, Sundays, and legal public holidays, from 8:15 a.m. until at least 4:45 p.m., eastern standard time or eastern daylight savings time, whichever is currently in effect in Washington, D.C.

§ 12.4 Suspension, amendment, revocation and waiver of rules.

(a) *Suspension or change of rules.* These rules may, from time to time, be suspended, amended or revoked in whole or in part. Notice of such action will be published in the *Federal Register*.

(b) *Commission waiver of procedures.* In the interest of expediting decision or to prevent undue hardship on any party or for other good cause the Commission may order the adoption of expedited procedures, may waive any rule in this Part in a particular case, and may order proceedings in accordance with its direction upon a determination that no party will be prejudiced thereby, and that the ends of justice will be served. Reasonable notice shall be given to all parties of any action taken pursuant to this provision.

§ 12.5 Computation of time.

(a) *In general.* In computing any period of time prescribed by these rules or allowed by the Commission, the Director of the Office of Proceedings, a Judgment Officer, Proceedings Officer, or an Administrative Law Judge, the day of the act, event, or default from which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday or a legal holiday.

Intermediate Saturday, Sundays, and legal holidays shall be excluded from the computation only when the period of time prescribed or allowed is less than seven (7) days.

(b) *Date of service of orders.* In computing any period of time involving the date of service of an order, the date of service shall be the date the order is served by the Proceedings Clerk, which, unless otherwise indicated, shall be the date stamped on the order by the Proceedings Clerk.

§ 12.6 Extensions of Time; Adjournments; Postponements.

(a) *In general.* Except as otherwise provided by law or by these rules, for good cause shown, the Commission, or a Judgment Officer, Proceedings Officer, Administrative Law Judge, or the Director of the Office of Proceedings, before whom a matter is then pending, on their own motion or the motion of a party, may at any time extend or shorten the time limit prescribed by the rules for filing any document. In any instance in which a time limit is not prescribed for an action to be taken concerning any matter, the Commission or one of the other officials mentioned above may set a time limit for that action.

(b) *Motions for extension of time.* Absent extraordinary circumstances, in any instance in which a time limit that has been prescribed for an action to be taken concerning any matter exceeds seven days from the date of the order establishing the time limit, requests for extension of time shall be filed at least five (5) days prior to the expiration of time limit and shall explain why an extension of time is necessary.

§ 12.7 Ex Parte Communications in Reparation Proceedings.

(a) *Prohibitions against ex parte communications.* (1) No interested person outside the Commission shall make or knowingly cause to be made to any Commissioner, Administrative Law Judge, or Commission decisional

employee an *ex parte* communication relevant to the merits of a proceeding.

(2) No Commissioner, Administrative Law Judge, or Commission decisional employee shall make or knowingly cause to be made to any interested person outside the Commission an *ex parte* communication relevant to the merits of a proceeding.

(b) *Procedures for handling ex parte communications.* A Commissioner, Administrative Law Judge or Commission decisional employee who receives, or who makes or knowingly causes to be made, an *ex parte* communication prohibited by paragraph (b) of this section shall—

(1) Place on the public record of the proceeding—

(i) All such written communications; (ii) Memoranda stating the substance of all such oral communications; and (iii) All written responses, and memoranda stating the substance of all oral responses, to the materials described in paragraphs (b) (1)(i) and (1)(ii) of this section; and

(2) Promptly give written notice of such communication and responses thereto to all parties to the proceedings to which the communication or responses relate.

(c) *Sanctions.* (1) Upon receipt of an *ex parte* communication knowingly made or knowingly caused to be made by a party in violation of the prohibition contained in paragraph (a)(1) of this section, the Commission, Administrative Law Judge, or Judgment Officer may, to the extent consistent with the interests of justice and the policy of the Act, require the party to show cause why his claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation.

(2) Any attorney or accountant who knowingly makes or knowingly causes to be made, or who knowingly solicits or knowingly causes the solicitation of, an *ex parte* communication which violates the prohibitions contained in paragraph (a) of this section may be deemed to have engaged in unprofessional conduct of the type proscribed by 17 CFR 14.8(c).

(3) Any Commissioner, Administrative Law Judge, or Commission decisional employee who knowingly makes or knowingly causes to be made, or who knowingly solicits or knowingly causes the solicitation of, an *ex parte* communication which violates the prohibitions contained in paragraph (a) of this section may be deemed to have engaged in conduct of the type proscribed by 17 CFR 140.735-3(b)(3).

(d) *Applicability of prohibitions and sanctions against ex parte communications.* (1) The prohibitions of

this section against *ex parte* communications shall apply:

(i) To any person who has actual knowledge that a proceeding has been or will be commenced by order of the Commission; and

(ii) To all persons after public notice has been given that a proceeding has been or will be commenced by order of the Commission.

(2) The prohibitions of this section shall remain in effect until a final order has been entered in the proceeding which is no longer subject to review by the Commission or to appellate review by a court.

§ 12.8. Separation of functions.

(a) A Judgment Officer, Proceedings Officer, or Administrative Law Judge will not be responsible to or subject to the supervision or direction of any officer, employee, or agent of the Commission engaged in the performance of investigative or prosecutorial functions for the Commission.

(b) No officer, employee, or agent of the Federal Government engaged in the performance of investigative or prosecutorial functions in connection with any proceeding shall, in that proceeding or a factually related proceeding, participate or advise in the decision of a Judgment Officer, Proceedings Officer, or Administrative Law Judge, except as a witness in the proceeding, without the express written consent of the parties to the proceeding. This provision shall not apply to the Commissioners.

§ 12.9. Practice before the Commission.

(a) *Practice.*—(1) *By non-attorneys.* An individual may appear *pro se* (on his own behalf); a general partner may represent the partnership; a *bona fide* officer of a corporation, trust or association may represent the corporation, trust or association.

(2) *By attorneys.* An attorney-at-law who is admitted to practice before the highest Court in any State or territory, or of the District of Columbia, who has not been suspended or disbarred from appearance and practice before the Commission in accordance with provisions of Part 14 of this Chapter may represent parties as an attorney in proceedings before the Commission.

(b) *Debarment of counsel or representative during the course of a proceeding.* (1) Whenever, while a proceeding is pending before him, a Judgment Officer or an Administrative Law Judge finds that a person acting as counsel or representative for any party to the proceeding is guilty of contemptuous conduct, such official may

order that such person be precluded from further acting as counsel or representative in the proceeding. An immediate appeal to the Commission may be taken from any such order, pursuant to the provisions of § 12.309, but the proceeding shall not be delayed or suspended pending disposition of the appeal; Provided, that the official may suspend the proceedings for a reasonable time for the purpose of enabling the party to obtain other counsel or representative.

(2) Whenever the Judgment Officer or Administrative Law Judge has issued an order precluding a person from further acting as counsel or representative in a proceeding, such official, within a reasonable time thereafter, shall submit to the Commission a report of the facts and circumstances surrounding the issuance of the order and shall recommend what action the Commission should take respecting the appearance of such person as counsel or representative in other proceedings before the Commission.

(c) *Withdrawal of representation.* Withdrawal from representation of a party shall be only by leave of the decisionmaking official (or the Commission) before whom the proceeding is then pending. Such leave to withdraw may be conditioned on the attorney's (or representative's) submission of an affidavit averring that the party represented has actual knowledge of the withdrawal, and such affidavit shall include the name and address of a successor counsel (or representative) or a statement that the represented party has determined to proceed *pro se*, in which case, the statement shall include the address where that party can thereafter be served.

§ 12.10 Service.

(a) *General requirements.*—(1) *When service is required; number of copies.* One copy of all motions, petitions or applications made in the course of proceeding (unless made orally during a hearing), all proposed findings and conclusions (to the extent permitted by these rules), all notices of appeal, all briefs, and letters to the Commission, an employee thereof, or an Administrative Law Judge, shall be served by a party upon all other parties to the proceeding. This rule does not apply to a complaint filed pursuant to § 12.13 of these rules, which shall only be filed with the Commission.

(2) *Filing with the Proceedings Clerk; proof of service.* All documents which are required to be served upon a party shall be filed concurrently with the Proceedings Clerk, and shall meet the

requirements as to form prescribed by §§ 12.11 and 12.12 of these rules. Unless otherwise provided in these rules a document shall be filed by delivering it in person or by mailing it, by first-class mail, post-paid, addressed to: Proceedings Clerk, Office of Proceedings, Commodity Futures Trading Commission, 2033 K Street, N.W., Washington, D.C. 20581. To be timely filed a document must be delivered, or mailed, by first-class mail, to the Proceedings Clerk within the time prescribed for filing. Proof of service of a document shall be made by filing with the Proceedings Clerk, simultaneously with the filing of the required document, an affidavit of service executed by any person 18 years of age or older or a certificate of service executed by an attorney-at-law qualified to practice before the Commission. The proof of service shall identify the persons served, state that service has been made, set forth the date of service, and recite the manner of service.

(3) *Service of orders and decisions.* A copy of all notices, rulings, opinions, and orders of the Proceedings Clerk, the Director of the Office of Proceedings, a Judgment Officer, Proceedings Officer, Administrative Law Judge, the Chief of the Opinions Section or the Commission shall be served by the Proceedings Clerk on each of the parties.

(b) *How service is made.* Service shall be made either by personal service or by first-class mail. Service shall be complete at the time of personal service or upon deposit in the mails of a properly addressed and post-paid document. Where service is effected by mail, the time within which the person served may respond thereto shall be increased by five (5) days. For the purposes of this Rule, service of any document by the Proceedings Clerk upon the Commission shall be regarded as service by mail.

(c) *Designation of person to receive service.* The first document filed in a proceeding by or on behalf of any party shall state on the first page thereof the name and post office address of the person who is authorized to receive service for him of all documents filed in the proceeding. Thereafter, service of documents shall be made upon the person authorized unless service on a different authorized person or on the party himself is ordered by a Judgment Officer, Proceedings Officer, Administrative Law Judge or the Commission, or unless the person authorized is changed by the party upon due notice to all other parties. Parties shall file and serve notification of any changes in the information provided

pursuant to this subparagraph as soon as practicable after the change occurs.

§ 12.11 Formalities of filing of documents with the Proceedings Clerk.

(a) *Number of copies.* Unless otherwise specifically provided, an original and one conformed copy of all documents shall be filed with the Proceedings Clerk.

(b) *Title page.* All documents filed with the Proceedings Clerk must include at the head thereof, or on a title page, the name of the Commission, the title of the proceeding, the docket number (if one has yet been assigned by the Proceedings Clerk), the subject of the particular document and the name of the person on whose behalf the document is being filed. In the complaint the title of the proceeding shall include the names of all the complainants and respondents, but in documents subsequently filed it is sufficient to state the name of the first complainant and first respondent named in the complaint.

(c) *Paper, spacing, type.* All documents filed under the Reparation Rules shall be typewritten, mimeographed, printed, or, if a party is not represented by counsel, in plainly legible handwriting; shall be on one grade of good white paper no less than 8 or more than 8½ inches wide and no less than 10½ or more than 11½ inches long; and shall be bound on the top only. They shall be double-spaced, except for long quotations (3 or more lines) and footnotes which should be single-spaced.

(d) *Signature.* The original copy of all papers must be signed in ink by the person filing the same or by his duly authorized agent or attorney.

(e) *Length and form of briefs.* All briefs filed with the Proceedings Clerk containing more than 10 pages shall include an index and a table of cases and other authorities cited. The date of each brief shall appear on its front cover or title page and on its signature page. No brief shall exceed 35 pages in length, except with the permission of the Commission, or the Judgment Officer or Administrative Law Judge, before whom the matter is then pending.

§ 12.12 Signature.

(a) *By whom.* All documents filed with the Commission shall be signed personally:

(1) By the person or persons on whose behalf they are tendered for filing;

(2) By a general partner, officer or director of a partnership, corporation, association, or other legal entity; or

(3) By an attorney-at-law having authority with respect thereto.

The Proceedings Clerk may require appropriate evidence of the authority of a person subscribing a document on behalf of another person.

(b) *Effect.* The signature on any document of any person acting either for himself or as attorney or agent for another constitutes certification by him that:

(1) He has read the document subscribed and knows the contents thereof;

(2) If executed in any representative capacity, it was done with full power and authority to do so;

(3) To the best of his knowledge, information, and belief, every statement contained in the document is true and not misleading; and

(4) The document is not being interposed for delay.

§ 12.13 Complaint; Election of procedure.

(a) *In general.* Any person complaining of a violation of any provision of the Act or a rule, regulation or order of the Commission thereunder by any person who is a registrant (as defined in § 12.2(y)) may, at any time within two years after the cause of action accrues, apply to the Commission for a reparation award by filing a written complaint which satisfies the requirements of this rule.

(b) *Form of complaint.* The form of each complaint filed under paragraph (a) of this section shall meet the following requirements—

(i) The name, residence address, and telephone number (during business hours) of the complainant;

(ii) The name, address, and telephone number, if known, of each person alleged in the complaint to have violated the Act or any rule, regulation or order thereunder;

(iii) If known, the specific provisions of the Act, rule, regulation, or order claimed to have been violated;

(iv) A complete description of complainant's case, including, but not limited to:

(A) A description of all relevant facts concerning each and every act or omission which it is claimed constitutes a violation of the Act; and

(B) A description of all facts which show or tend to show the manner in which it is claimed that the complainant was injured by the alleged violations;

(v) The amount of damages the complainant claims to have suffered and the method by which those damages have been computed;

(vi) A statement indicating whether an arbitration proceeding or civil court litigation, based on the same set of facts set forth and involving any party named as a respondent in the complaint, has

been instituted, and whether such a proceeding has reached a final disposition or is presently pending;

(vii) A statement indicating whether any of the respondents is the subject of receivership or bankruptcy proceedings that are presently pending;

(viii) An election of a decisional procedure pursuant to Subpart C, D, or E of these rules. (A procedure pursuant to Subpart D may be elected only if the amount of damages claimed, exclusive of interest and costs, does not exceed \$10,000. A procedure pursuant to Subpart E may be elected only if the amount claimed as damages, exclusive of interest and costs, exceeds \$10,000); and

(ix) A filing fee in the amount prescribed by § 12.25 of these rules shall be submitted with the complaint at the time of its filing.

(2) *Subscription and verification of the complaint.* Each complaint shall be signed personally by an individual complainant or by a duly authorized officer or agent of a complainant who is not a natural person. His signature shall be given under oath or affirmation under penalty of law attesting either that he knows the facts set forth in the complaint to be true, or that he believes that facts set forth to be true, in which event the information upon which he formed that belief shall be set forth with particularity.

(3) *Time and place of filing of complaint.* A complaint shall be filed by delivering a copy thereof, in proper form, to the Commission at its principal offices in Washington, D.C., addressed to the Office of Proceedings, attention of the Proceedings Clerk. The complaint may be filed in person, during normal business hours, or by certified mail, or registered mail with return receipt requested. If filing is by mail, it shall be addressed to the Proceedings Clerk, Office of Proceedings, Commodity Futures Trading Commission, 2033 K Street, N.W., Washington, D.C. 20581. The complaint shall not be served on any person or party named therein. Upon the filing of the complaint and the appropriate filing fee, the Proceedings Clerk shall assign a docket number to the matter and shall maintain the official docket.

(4) *Bond required if complainant is non-resident.* If a complaint in reparations is filed by a non-resident of the United States, the complainant shall first file a bond in double the amount of the claim either with a surety company approved by the Treasury Department of the United States or two personal sureties, each of whom shall be a citizen of the United States and shall qualify as financially responsible for the entire

amount of the bond. The bond shall run to the respondent and be conditioned upon the payment of (1) costs, including reasonable attorney's fees, for the respondent if the respondent shall prevail; and (2) any reparation award that may be issued by the Commission against the complainant on any counterclaim asserted by respondent; Provided, that the furnishing of a bond may be waived if the complainant is a resident of a country which permits filing of a complaint by a resident of the United States against a citizen of that country without the furnishing of a bond.

§ 12.14 Withdrawal of complaint.

At any time prior to service of notification to the complainant pursuant to § 12.15(a) of the Director of the Office of Proceedings' determination to forward the complaint to a registrant, complainant may file a written notice of withdrawal of the complaint which shall terminate the Commission's consideration of the complaint without prejudice to complainant's right to re-file a reparations complaint based upon the same set of facts within two years after the cause of action accrues. If the complainant has previously filed a notice of withdrawal of a complaint based upon the same set of facts, the notice of withdrawal of complaint shall terminate the case with prejudice to complainant's rights to re-file a complaint in reparations based on the same set of facts, but such termination shall be regarded by the Commission as without prejudice to complainant's right to seek redress in such alternative forums as may be available for adjudication of his claims.

§ 12.15 Notification of complaint.

(a) *Forwarding of complaint to registrant.* If, in the opinion of the Director of the Office of Proceedings, the facts set forth in a complaint warrant such action as to any of the registrants, a copy of the complaint, together with any attachments thereto, shall be forwarded by serving by registered mail or certified mail and such registrant named therein at an address previously designated with the Commission by the registrant for receipt of reparation complaints, as provided in Commission Regulation § 3.30 17 CFR 3.30, or, if no such designation has been filed with the Commission, at such address as will accomplish actual notice to the respondent. Should the Director determine to forward the complaint, the complainant shall be notified of this determination at the time the complaint is forwarded.

(b) *Determination not to forward complaint.* The Director may, in his discretion, refuse to forward a complaint as to a particular respondent if it appears that the matters alleged therein are not cognizable in reparations, or that grounds exist pursuant to § 12.24 (c) or (d) for refusing to forward the complaint. If the Director of the Office of Proceedings should determine not to forward the complaint to all registrants named in the complaint in accordance with this Section, no proceeding shall be held thereon and the complainant shall be notified to that effect. If the Director determines to forward the complaint as to less than all of the registrants, the complainant shall be so notified. A termination of the complaint as to any registrant shall be regarded by the Commission as without prejudice to the right of the complainant to seek such alternative forms of relief as may be available.

§ 12.16 Response to complaint.

Within 45 days after the complaint has been served by the Office of Proceedings on the registrant, or within such additional time (not to exceed fifteen days absent extraordinary circumstances) as the Director of the Office of Proceedings, or his delegate, may, for good cause shown, grant, each registrant shall either (1) satisfy the complaint in accordance with § 12.17 of these rules; or (2) answer the complaint in the manner prescribed by § 12.18 of these rules.

§ 12.17 Satisfaction of complaint.

A respondent may satisfy the complaint (a) by paying to the complainant either the amount to which the complainant claims to be entitled as set forth in the complaint or such other amount as the complainant will accept in satisfaction of his claim; and (b) by submitting to the Commission notice of satisfaction and withdrawal of the complaint, duly executed by the complainant and the respondent.

§ 12.18 Answer; Election of procedure.

An answer filed pursuant to § 12.16 of these rules shall meet the following requirements—

(a) *Content*—Each answer shall contain—

(1) The full name, current address and telephone number (during business hours) of each respondent on whose behalf the answer is filed;

(2) A complete description of each registrant's case, including but not limited to, a precise and detailed statement of the facts which constitute each registrant's ground for defense;

(3) Admissions, if any, as to the registrant's liability for the amount (or any portion thereof) claimed as damages;

(4) A statement indicating whether the registrant is (and if the answer is filed on behalf of two or more registrants, which if any of them are) in receivership or subject to bankruptcy proceedings;

(5) A statement indicating whether an arbitration or civil court litigation, based on the same set of facts set forth in the complaint (involving any or all of the parties named therein), is pending;

(6) A counterclaim which the registrant wishes to pursue under § 12.19 of these rules;

(7) An election of an alternative decisional procedure pursuant to Subparts C, D or E of these rules. (A proceeding pursuant to Subpart D may be elected only if the amount of damages claimed in the complaint or as counterclaims, exclusive of interest and costs, does not exceed \$10,000. A procedure pursuant to Subpart E may be elected only if the amount of damages claimed in the complaint or as counterclaims, exclusive of interest and costs, exceeds \$10,000);

(8) If appropriate, a filing fee in the amount prescribed by § 12.25 shall be submitted with an answer at the time of its filing.

(b) *Motion for reconsideration of determination to forward the complaint.* An answer may include a motion for reconsideration of the determination to forward the complaint, specifying the grounds therefor, which the Director of the Office of Proceedings, in his discretion, may grant by terminating the case pursuant to § 12.27, or deny by forwarding the pleadings and matters of record for an elected decisional proceeding pursuant to § 12.26. The inclusion in an answer of a motion for reconsideration shall not preclude a respondent, if the motion is denied, from moving for dismissal at a later stage of the proceeding for the same reasons cited in a motion for reconsideration pursuant to this paragraph.

(c) *Subscription and verification of the answer.* An answer shall be signed personally by each registrant on behalf of whom it is filed or by a duly authorized officer or agent of any such registrant who is not a natural person. Each registrant's signature shall be given under oath, or by affirmation under penalty of law, attesting that he has read the answer; that to the best of his knowledge all of the statements in the answer, the counterclaim (if any), and the materials required by these rules to be appended thereto, are accurate and true, and that the answer

(and counterclaim, if any) has not been interposed for delay.

(d) *Affidavit of service.* The registrant shall file with his answer an affidavit showing that he has served a true copy of the answer upon the complainant, either personally or by first-class mail addressed to the complainant at the address set forth in the complaint.

(e) *Time and place of filing an answer.* An answer shall be filed by mailing or delivering a copy thereof, in proper form, to the Commission at its principal office in Washington, D.C., addressed to the Office of Proceedings, Attention of the Proceedings Clerk. The answer may be filed in person, during normal business hours, or by certified mail, or registered mail with return receipt requested. If filing is by mail, it shall be addressed to the Proceedings Clerk, Office of Proceedings, Commodity Futures Trading Commission, 2033 K Street NW., Washington, D.C. 20581.

§ 12.19 Counterclaim.

A registrant may, at the time of filing an answer to a complaint, set forth as a counterclaim: (a) Facts alleging a violation and a request for a reparation award that would be a proper subject for a complaint under § 12.13 of these rules; or (b) any claim which at the time the complaint is served the registrant has against the complainant if it arises out of the transaction or occurrence or series of transactions or occurrences set forth in the complaint.

§ 12.20 Response to counterclaim; reply; election of procedure.

(a) *Response to counterclaim.* If an answer asserts a counterclaim, the complainant shall, within thirty (30) days after service upon him of the answer by the respondent: (1) Satisfy the counterclaim as if it were a complaint, in the manner prescribed by § 12.17 of these rules; or (2) file a reply to the counterclaim with the Commission.

(b) *Form and content of reply.* Should the complainant, under this paragraph, elect to file a reply to a counterclaim, the reply shall be strictly confined to the matters alleged in the counterclaim and shall conform to the form and content and other requirements set forth in Section 12.18 of these rules.

(c) *Election of decisional procedure.* If neither the complainant nor the respondent, in the complaint or answer respectively, has previously made an election of the summary decisional procedure or the formal decisional procedure, the complainant may make such an election in his reply.

§ 12.21 Voluntary dismissal.

(a) At any time after the Director of the Office of Proceedings has served notification to the parties pursuant to § 12.15 of these rules of his determination to forward the complaint to the respondent for a response, either the complainant or the respondent may obtain dismissal of the complaint (or the proceeding, if one has commenced) by filing a stipulation of dismissal, duly executed by all of the complainants and each respondent against whom the complaint has been forwarded (or added as a party in the course of a proceeding); *provided however*, that if the stipulation is filed after any respondent has filed an answer, the terms of the stipulation shall include a dismissal of any counterclaims in the answer.

(b) A dismissal of a complaint pursuant to this paragraph shall be with prejudice to complainant's right to re-file a claim in reparations based upon the same set of facts as alleged in the dismissed complaint. Unless otherwise stated in the stipulation, a dismissal ordered pursuant to this paragraph shall be regarded by the Commission as without prejudice to the parties' right to seek redress in such alternative forums as may be available for adjudication of their claims.

(c) Upon receiving a written stipulation of dismissal which satisfies the requirements of this rule, the official before whom the matter or proceeding is pending shall issue an order of dismissal, and serve a copy thereof upon each of the parties.

(d) This rule shall be applicable at all stages of a reparation proceeding.

§ 12.22 Default proceedings.

(a) *Institution of a default proceeding.* Failure timely to respond to a complaint or a counterclaim, as required by §§ 12.16 and 12.20 of these rules, or, if applicable, to pay a filing fee required by § 12.25(b) or (c), shall be treated as an admission of the allegations of the complaint or counterclaim by the non-responding party, shall constitute a waiver by such party of any decisional procedure afforded by these Rules on the facts set forth in the complaint or counterclaim, and shall result in the institution of a default proceeding.

(b) *Default procedure.* Upon a party's failure to respond timely to a complaint or counterclaim as prescribed in §§ 12.16 and 12.20 of these rules, or timely to comply with § 12.25(b) or (c), the Director of the Office of Proceedings shall forward the pleadings, and other materials then of record, to a Proceedings Officer who may thereafter enter findings and conclusions concerning the questions of violations

and damages and, if warranted, enter a reparation award against the non-responding party. If the facts which are treated as admitted are considered insufficient to support a violation or the amount of reparations sought, the Proceedings Officer may order production of supplementary evidence from the party not in default and may enter a default order and an award based thereon.

(c) *Finality.* A default order issued pursuant to this rule, or pursuant to any other provisions of these Part 12 Reparation Rules, shall become the final decision and order of the Commission thirty (30) days after service thereof, unless the order is set aside pursuant to § 12.23(a) of these rules, or unless the Commission takes review of such order on its own motion on or before the thirtieth day.

§ 12.23 Setting aside of default.

(a) *Default order not final.* In order to prevent injustice or for good cause shown, and on such conditions as may be appropriate, a non-final default order (including any award therein) may be set aside by the official who issued the order.

(1) *Procedure for Setting Aside Non-Final Default Order.* Any party or person who is the subject of a default order issued pursuant to these rules may, at any time before the order becomes final pursuant to § 12.22(c), file and serve a motion to set aside the default, which shall set forth reasons why the act or omission for which the party was defaulted was not willful, why there is a reasonable likelihood of success for the party's claim or defense if heard on the merits, and why no prejudice will be sustained by other parties if the default is set aside. A motion to set aside a default order filed pursuant to this subparagraph shall be decided, in the first instance, by the official who issued the default order.

(2) *Review.* A denial of a motion to set aside a non-final default order by the official who issued the order shall be treated as an initial decision, which may be appealed to the Commission in accordance with the requirements of § 12.401 of these rules. A grant of a motion to set aside a non-final default order may be appealed only in accordance with the requirements of § 12.309 of these rules.

(b) *Default order final.* A default order that has become final pursuant to § 12.22(c) shall not be set aside except upon a motion filed and served by the defaulted party showing that he should be relieved from the default order because of fraud perpetrated on a decisionmaking official or the

Commission, mistake, excusable neglect, or because the order is void for want of jurisdiction. Such a motion shall also show that, if the default order were set aside, there would be a reasonable likelihood of success for his claim or defense on the merits and that no party would be prejudiced thereby. Motions to set aside a final default order for fraud, mistake, or excusable neglect shall be filed within one year after the order was issued. All motions to set aside default orders shall be decided, in the first instance, by the official who issued the order. A denial of a motion to set aside a default order that has become final shall be treated as an initial decision, which may be appealed to the Commission in accordance with the requirements of § 12.401 of these rules. A grant of a motion to set aside a final default order shall be treated as a non-final order which may be appealed only in accordance with the requirements of Section 12.309 of these rules.

§ 12.24 Parallel proceedings.

(a) *Definition.* For purposes of this section, a parallel proceeding shall include—

(1) An arbitration proceeding or civil court proceeding, involving one or more of the respondents as a party, which is pending at the time the reparation complaint is filed and involves claims or counterclaims that are based on the same set of facts which serve as a basis for all of the claims in the reparations complaint, and which either:

(i) Was commenced at the instance of the complainant in reparations; or

(ii) Involves counterclaims by the complainant in reparations alleging violations of the Commodity Exchange Act, or any regulation or order issued thereunder; or

(iii) Is governed by a compulsory counterclaim rule of federal court procedure which required the complainant in reparations to assert all of his claims (including those based on alleged violations of the Commodity Exchange Act, and any regulation or order issued thereunder) as counterclaims in that proceeding;

(2) The appointment by a court of a receivership over the assets, property or proceeds of a respondent named in a reparation complaint where the responsibility of the receivership includes the resolution of claims made by customers; or

(3) A petition filed under any chapter of the Bankruptcy Code, 11 U.S.C. 101 *et seq.*, as amended, commenced pursuant to 11 U.S.C. 301 or 302 by a respondent in a reparation proceeding, or the issuance by a bankruptcy court of an

order for relief after the filing against a respondent in a reparation proceeding of an involuntary petition in bankruptcy pursuant to 11 U.S.C. 303.

(b) *Notice:* At the time a complaint in reparations is filed pursuant to these rules, or at any time thereafter, any party, receiver or trustee, or counsel to any of the foregoing with knowledge of a parallel proceeding shall promptly notify the Commission, by first-class mail addressed to the Office of Proceedings, attention of the Proceedings Clerk, and serve notice on all other parties, including the receiver or trustee. The notice shall include the following information:

- (1) The caption of the parallel proceeding;
- (2) The name of the court or the arbitration tribunal (including address and phone number, if known);
- (3) The docket number or numbers;
- (4) The date the parallel proceeding was filed (and the current status if known); and
- (5) If a proceeding in bankruptcy or receivership is pending, the date of the appointment and name and address of the receiver or trustee.

A copy of any relevant complaint, petition or order shall be attached to the notice.

(c) *Effect of pending arbitration or civil court litigation.* (1) The Director of the Office of Proceedings shall refuse to institute an elected decisional procedure concerning a reparation complaint filed under this Part in which there is a parallel proceeding described in paragraph (a)(1) of this section and shall return the complaint to the complaining person. The effective date of the Director's termination of the complaint without prejudice shall be fifteen (15) days from the date of service of notice of the action taken pursuant to this subparagraph.

(2) If notice of a parallel proceeding described in paragraph (a)(1) of this section is received before the initial decision is filed (or before a final decision under § 12.106 of the rules is entered), a proceeding in which a decisional procedure has been commenced shall be dismissed, without prejudice. The effective date of the order of dismissal shall be fifteen (15) days from the date of service of the order by the Proceedings Clerk.

(d) *Effect of receivership or bankruptcy proceedings.* (1) The Director of the Office of Proceedings shall refuse to institute an elected decisional procedure as to a respondent in any reparation complaint filed pursuant to this part who is the subject of a parallel proceeding described in

paragraph (a)(2) or (a)(3) of this section, and shall notify all parties, including the receiver or trustee, that as to that respondent a reparation proceeding shall not be instituted. The effective date of the Director's action shall be fifteen (15) days from the date of service of the notice thereof.

(2) A proceeding in which an elected decisional procedure has been commenced shall be ordered dismissed, without prejudice, as to any respondent who becomes the subject of a parallel proceeding described in paragraph (1)(2) or (a)(3) of this section if notice pursuant to subsection (b) of this section is received before the filing of an initial decision (or before a final decision is issued pursuant to § 12.106) as to that respondent. The Proceedings Clerk shall notify all parties, including the receiver or trustee, of the order. The effective date of the order shall be fifteen (15) days from the date of the service of the order by the Proceedings Clerk.

(e) *Exceptions.* At the time notice of a parallel proceeding is filed pursuant to paragraph (b) of this section, or any time thereafter, any party, or the receiver or trustee, may file and serve upon other parties a statement in support of or in opposition to any action taken or to be taken pursuant to paragraph (c) or (d) of this section. This statement shall be addressed to the Office of Proceedings, attention of the Proceedings Clerk. Upon receipt of any such statement, the Proceedings Clerk shall immediately forward the statement to the official with responsibility over the case. The notice and the statements filed by the parties shall be reviewed by that official who, on or before the effective date of action taken pursuant to paragraphs (c)(1), (c)(2), (d)(1), and (d)(2), of this section, may take such actions as, in his opinion, are necessary to ensure that the parties to the matter or proceedings are not unduly prejudiced.

(f) *No right of appeal to the Commission.* Any action taken, or order issued, pursuant to paragraphs (c)(1), (c)(2), (d)(1), or (d)(2), of this section that has become effective shall be deemed a final order which is not subject to appeal pursuant to Subpart F of these rules.

§ 12.25 Filing fees.

(a) *Fees payable upon filing a complaint.* (1) A complainant who, in the complaint, has elected the voluntary decisional procedure shall, at the time of filing the complaint, pay a filing fee of \$25.00;

(2) A complainant who, in the complaint wherein the amount of damages claimed does not exceed \$10,000, exclusive of interest and costs,

has not elected the voluntary decisional procedure shall, at the time of filing the complaint, pay a filing fee of \$100.00.

(3) A complainant who, in the complaint wherein the amount of damages claimed exceeds \$10,000, exclusive of interest and costs, has not elected the voluntary decisional procedure shall, at the time of filing the complaint, pay a filing fee of \$200.00.

(b) *Fees payable upon filing an answer.* (1) If a complainant, in the complaint, has elected the voluntary decisional procedure, a respondent who, in his answer, elects the summary decisional procedure (available only where the amount of damages claimed in the complaint or as counterclaims does not exceed \$10,000) shall, at the time of filing the answer, pay a filing fee of \$75.00.

(2) If a complainant, in the complaint, has elected the voluntary decisional procedure, a respondent who, in his answer, elects the formal decisional procedure (available only where the amount of damages claimed in the complaint or as counterclaims exceeds \$10,000) shall, at the time of filing the answer, pay a filing fee of \$175.00.

(c) *Fees payable upon filing a reply.* In any case in which a counterclaim has been made, unless a complainant in the complaint, or the respondent in an answer, has elected the decisional procedure a complainant, who in his reply elects either of these procedures, shall, at the time of filing the reply, pay a filing fee of \$75.00 or \$175.00, respectively, depending whether the procedure elected by complainant is pursuant to Subparts D or E.

§ 12.26 Commencement of a reparation proceeding.

(a) *Commencement of voluntary decisional proceeding.* Where complainant and respondent in the complaint and answer have elected the voluntary decisional procedure pursuant to Subpart C of these Rules and the complainant has paid the filing fee required by § 12.25 of these rules, the Director of the Office of Proceedings shall, if in his opinion the facts warrant taking such action, forward the pleadings and all materials of record to the Proceedings Clerk for a proceeding to be conducted in accordance with Subpart C of these rules. The Proceedings Clerk shall forthwith notify the parties of such action. Such notification shall be accompanied by an order issued by the Proceedings Clerk requiring the parties to complete all discovery, as provided in Subpart B of these Rules, within 60 days thereafter. A voluntary decisional proceeding

commences upon service of such notification and order. As soon as practicable after service of such notification, the Proceedings Clerk shall assign the case to a Judgement Officer for a final decision.

(b) *Commencement of summary decisional proceeding.* Where the amount claimed as damages, exclusive of interest and costs, in the complaint or in counterclaim does not exceed \$10,000, and either a complainant or a respondent in the complaint, answer, or reply, has elected the summary decisional procedure pursuant to Subpart D of these rules, and has paid the filing fee required by § 12.25, the Director of the Office of Proceedings shall, if in his opinion the facts warrant taking such action, forward the pleadings and all materials of record to the Proceedings Clerk for a proceeding to be conducted in accordance with Subpart D of these rules. The Proceedings Clerk shall forthwith notify the parties of such action. Such notification shall be accompanied by an order issued by the Proceedings Clerk requiring the parties to complete all discovery, as provided in Subpart B of these rules, within 60 days thereafter. A summary decisional proceeding commences upon service of such notification. As soon as practicable after service of such notification, the Proceedings Clerk shall assign the case to a Judgement Officer for disposition.

(c) *Commencement of formal decisional proceeding.* Where the amount claimed as damages in the complaint or as counterclaims exceeds \$10,000, exclusive of interest and costs, and either a complainant or a respondent in the complaint, answer or reply, has elected the formal decisional procedure pursuant to Subpart E of these rules, and has paid the filing fee required by § 12.25, the Director of the Office of Proceedings shall, if in his opinion the facts warrant taking such action, forward the pleadings and the materials of record to the Proceedings Clerk for a proceeding to be conducted in accordance with Subpart E of these rules. The Proceedings Clerk shall forthwith notify the parties of such action. Such notification shall be accompanied by an order issued by the Proceedings Clerk requiring the parties to complete all discovery, as provided in Subpart B, within 60 days thereafter. A formal decisional proceeding commences upon service of such notification and order. As soon as practicable after service of such notification, the Proceedings Clerk shall forward the pleadings and materials of record to a Proceedings Officer for

discovery purposes, and assign the case to an Administrative Law Judge for disposition.

§ 12.27 Termination of consideration of pleadings.

If the Director of the Office of Proceedings should determine not to proceed in a manner set forth in §§ 12.26 (a), (b), or (c), consideration of the complaint and the answer (and reply, if any) shall terminate, and no proceeding shall be held on the allegations in any such pleadings. Such termination shall be regarded by the Commission as without prejudice to the right of the parties to seek such alternative forms of relief as may be available to them. If the consideration of the pleadings should be terminated, the Proceedings Clerk shall immediately notify the parties to that effect by registered or certified mail. A determination by the Director not to proceed in the manner set forth in §§ 12.26 (a), (b), or (c) of these rules is not subject to appeal pursuant to Subpart F of these rules.

Subpart B—Discovery

§ 12.30 Methods of discovery.

(a) *In general.* Parties may obtain discovery by the following methods in accordance with the procedures and limitations set forth in the section indicated—

(1) Production of documents or other items (§ 12.31);

(2) Deposition on written interrogatories (§ 12.32);

(3) Admissions (§ 12.33).

(b) *Scope of discovery.* The scope of discovery is as follows—

(1) *Relevancy.* Except as provided below, discovery may be obtained regarding any matter not privileged, which is relevant to the subject matter in the pending proceeding, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible items, and the identity and location of persons having knowledge of any discoverable matters. Tax returns and personal bank account records shall not be discoverable, except upon motion by the party seeking discovery showing the need for disclosure of information contained therein, and that the same information could not be obtained through other means.

(2) *Protective orders.* Upon motion by a party or the person from whom discovery is sought, filed within twenty days after the objectionable discovery notice or request is served, and for good cause shown, the official presiding over discovery may issue any order to protect a party or person from annoyance,

embarrassment, oppression, or undue burden or expense, or to prevent the raising of issues untimely or inappropriate to the proceeding, or the inappropriate disclosure of trade secrets or sensitive commercial or financial information. Relief through a protective order may include one or more of the following—

(i) That discovery not be had;

(ii) That discovery may be had only on specified terms and conditions;

(iii) That certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;

(iv) That a trade secret or other confidential commercial information not be disclosed or be disclosed only in a designated way; and

(v) That the parties simultaneously file specified documents or information in sealed envelopes to be opened only as directed by the decisionmaking official.

(3) *Motions for order compelling discovery.* It shall be the duty of a party to obtain an order compelling discovery from another party if the latter party fails to comply with a discovery notice, by filing a motion therefor within twenty days after the time allowed by these rules for compliance with the notice has expired.

(c) *Sanctions for abuse of discovery.* If an Administrative Law Judge or a Judgement Officer finds that any party, without substantial justification, has necessitated the filing of a motion for a protective order or for an order compelling discovery, or any other discovery-related motions, that party shall, if the motion is granted, be ordered to pay, at the termination of the proceeding, the reasonable expenses of the moving party incurred in filing the motion, unless the decisionmaking official finds that circumstances exist which would make an award of such expenses unjust. If a decisionmaking official finds that any party, without substantial justification, has filed a motion for a protective order or for an order compelling discovery, or any discovery-related motions, that party shall, if the motion is denied, be ordered to pay, at the termination of the proceeding, the reasonable expenses of an adverse party incurred in opposing the motion, unless the decisionmaker finds that circumstances exist which would make an award of such expenses unjust.

(d) *Time limit.* Absent an extension of time, all discovery notices or requests shall be served within forty (40) days (and all discovery shall be completed within sixty (60) days) after the notification and the order required by § 12.26 (a), (b), or (c) has been served on

the parties. Upon motion by a party and for good cause shown, the time allowed for discovery may be enlarged for one additional period not to exceed thirty (30) days. Motions for any additional periods of extension of time to conduct discovery shall be decided by the Chief Administrative Law Judge, or such Administrative Law Judge as he may designate, and may be granted only upon a showing of extraordinary circumstances.

§ 12.31 Production of documents and tangible items.

(a) *By a party.* Any party, within the time prescribed in § 12.30(d) and subject to the limitations in § 12.30(a), may serve on any other party, a notice to produce copies of specifically designated categories of documents, papers, books, accounts, letters, photographs, objects, or tangible things which are in the party's possession, custody or control. A copy of the notice shall be served on all other parties to the proceeding. All documents requested in the notice to produce shall be served on the party seeking the discovery within twenty (20) days after service of the notice to produce.

(b) *By a non-party.* Any party may, by filing an appropriate motion showing the need for the materials and an application for a subpoena in accordance with the procedure prescribed in § 12.313 and within the time prescribed by § 12.30(d) of these rules, seek leave to serve upon a non-party a notice to produce copies of any specifically designated categories of materials as are described in paragraph (a) of this section. After an appropriate order and subpoena has been issued, such party may serve upon a non-party a notice to produce such materials. All materials requested in the notice to produce, and, if applicable, a detailed explanation of why any of the specified materials cannot be produced, shall be served on the party seeking discovery within such time (not to exceed thirty (30) days) as the subpoena shall specify. Enforcement of the order and subpoena may be sought in accordance with § 12.313.

§ 12.32 Depositions on written interrogatories.

(a) *Notice.* Any party, within the time prescribed by § 12.30(d), may serve on any other party or any officer or agent of a party a notice of the taking of a deposition on written interrogatories.

(b) *Number.* The number of written interrogatories served upon any one party shall not exceed thirty. For the purpose of this rule, each sub-interrogatory or divisible part of an

interrogatory shall be regarded as one interrogatory. Leave to serve additional interrogatories shall not be granted absent extraordinary circumstances.

(c) *Reply.* (1) Each interrogatory served shall be answered by the party served or if the party is a corporation, partnership, association, or government agency, by any officer or agent thereof selected by the responding party.

(2) Each interrogatory shall be answered separately and fully in writing, unless objected to, in which event the reasons for objection shall be stated in lieu of an answer. For the purposes of this rule, an evasive or incomplete answer shall be treated as a failure to answer. The answers are to be signed and verified by the person making them. The person upon whom a notice to take a deposition on written interrogatories has been served shall serve a copy of the answers and objections within twenty (20) days after service of the interrogatories.

(d) *Deposition of a non-party.* The deposition on written interrogatories of a non-party may be taken only within the time prescribed by § 12.30(d), and only pursuant to an order entered and subpoena issued in accordance with the provisions of § 12.313 of these rules; provided however, that the deposition on written interrogatories of a Commission member or employee may only be taken upon a showing that the Commission member or employee has personal knowledge of the matters sought to be discovered (*i.e.*, not obtained pursuant to a Commission investigation), that the information sought to be discovered is material and that the information sought to be discovered is not available from other sources.

(e) *Filing of depositions on written interrogatories in a voluntary or summary decisional proceeding.* In proceedings commenced pursuant to Sections 12.26 (a) and (b) of these rules, copies of all depositions on written interrogatories shall be filed by the party on whose behalf the discovery was obtained.

§ 12.33 Admissions.

(a) *Request for admissions.* Any party may, within the time permitted by § 12.30(d) of these rules, serve upon any other party a written request for admissions of the truth of any matters set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any document described in the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for

inspection and copying. A copy of the request shall be filed with the Proceedings Clerk.

(b) *Reply.* Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless within twenty (20) days after service of the request, the party upon whom the request is directed files and serves upon the party requesting the admission a verified written answer or objection to the matter. If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission and when good faith requires that a party qualify his answer and deny only a part of the matter of which an admission is requested, he shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give a lack of information or knowledge as a reason for failure to admit or deny unless he states that he has made reasonable inquiry and that the information known or reasonably available to him is insufficient to enable him to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; he may deny the matter or set forth reasons why he cannot admit or deny it.

(c) *Determining sufficiency of answers or objections.* The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the objecting party sustains his burden of showing that the objection is justified, the official presiding over discovery shall order that an answer be served. If such official determines that an answer does not comply with the requirements of this rule, he may order either that the matter is admitted or that an amended answer be served.

(d) *Effect of admission.* Any matter admitted under this rule is conclusively established and may be used as proof against the party who made the admission. However, the discovery or decisionmaking official may permit withdrawal or amendment when the presentation of the merits of the proceeding will be served thereby and the party who obtains the admission fails to satisfy such official that withdrawal or amendments will prejudice him in maintaining his action or defense on the merits.

§ 12.34 Discovery by a decisionmaking official.

(a) *Applicability.* The provisions of this rule apply only to summary decisional proceedings and formal decisional proceedings commenced pursuant to § 12.26 (b) and (c). This rule does not apply to a voluntary decisional proceeding commenced pursuant to § 12.26(a). For the purposes of this rule, the term "decisionmaking official" shall mean a Judgment Officer or Administrative Law Judge assigned to render a decision in the proceeding.

(b) *Production of documents and tangible things.*—(1) *Order for production.* A decisionmaking official may, upon his own motion, order a party or non-party to produce copies of specifically designated documents, papers, books, accounts, or tangible things (or categories of any of the foregoing) which are in the possession, custody or control of the party, non-party or agent thereof, against whom the order is directed. Except as provided in paragraph (b)(2) of this section, a party or non-party ordered to produce documents or any of the above items under this rule shall file and serve the documents and items listed in the order within twenty (20) days from the date of service of the order, or within such period of time as the decisionmaking official may direct. The decisionmaking official may issue subpoenas to compel the production by parties or non-parties of such documents and tangible things as are described in this section.

(2) *Trade secrets, commercially sensitive or confidential information.* If any party or person against whom an order to produce has been directed acting in good faith has reason to believe that any documents or other tangible thing ordered to be produced contains a trade secret, or commercially sensitive or other confidential information, the party or person may, in lieu of serving any such document, in accordance with paragraph (b)(1) of this section, file and serve a written request for confidential treatment of such documents. Any such request for confidential treatment shall be accompanied by a verified statement identifying with particularity the information on those documents considered to be trade secrets, commercially sensitive or confidential information, with reasons therefor, and indicating which portions, if any, of those documents may be served on other parties without disclosure of such information. Upon considering a request for confidential treatment in accordance with this subsection, the decisionmaking official may, if he finds that the

information identified in the request warrants confidential treatment and is not probative of any material fact in controversy, make copies of the documents produced, delete such information from the copies, and serve the copies as modified upon the other parties, with or without an appropriate protective order limiting dissemination to the parties and their counsel, if any.

(3) *Inability to produce.* Any party or person who cannot produce documents or other tangible things called for in an order for production, because those documents or things are not in his possession, custody or control, shall file and serve within the time provided in paragraph (b)(1) of this section a verified statement identifying the documents which cannot be produced and setting forth with particularity the reasons for non-production.

(c) *Order for written testimony.* The decisionmaking official may, upon his own motion, order a party or non-party witness to submit verified statements or written responses to interrogatories, or both, as to all relevant matters within the party's personal knowledge which are required in response to the order. A party or person ordered to file affidavits and/or verified written responses to interrogatories shall file and serve the documents within such period of time as the decisionmaking official may direct. The official may issue subpoenas to compel the filing by parties or non-parties of such verified statements and written responses as are described in this subsection.

§ 12.35 Consequences of a party's failure to comply with a discovery order.

If a party fails to comply with an order compelling discovery, or an order issued pursuant to § 12.34, the official assigned to render the decision in the case may, upon motion by a party or on his own motion, take such action in regard thereto as is just, including but not limited to the following—

(a) Infer that the documents or things not produced would have been adverse to the party;

(b) Rule that for the purposes of the proceeding the information in or contents of the documents or things not produced be taken as established adversely to the party;

(c) Rule that the party may not be heard to object to introduction and use of secondary evidence to show what the withheld documents or other evidence would have shown;

(d) Rule that a pleading, or part of a pleading, or a motion or other submission by the party, to which the order for production related, be stricken;

(e) Dismiss the entire proceeding with prejudice to matters alleged in the complaint, but without prejudice to counterclaims; and

(f) Issue a default order and render a decision against the party, whose rights shall thereafter be determined by §§ 12.22 and 12.23 of these rules.

§ 12.36 Subpoenas to compel discovery.

An application for a subpoena requiring a party or non-party to comply with a discovery order issued pursuant to §§ 12.31 and 12.32, may be made, in writing, by any party without notice to other parties, and may be filed simultaneously with the motion for the discovery order. The standards for issuance or denial of such an application, the service requirement, and the method for enforcing such subpoenas shall be determined by the provisions of § 12.313 of these rules.

Subpart C—Rules Applicable to Voluntary Decisional Proceedings**§ 12.100 Scope and applicability of rules.**

(a) *In general.* The rules set forth in this subpart are applicable only to proceedings forwarded pursuant to § 12.26(a) of the Reparation Rules. The rules of Subpart B permitting discovery are applicable in a voluntary decisional proceeding. Unless specifically made applicable, the rules prescribed in Subparts D, E, and F shall not apply in a voluntary decisional proceeding.

(b) *Waiver by electing the voluntary decisional procedure.* By electing the voluntary decisional procedure, parties waive the opportunity for an oral hearing and whatever rights they may have otherwise had: to receive a written statement of the findings of fact upon which the final decision is based; to prejudgment interest in connection with a reparation award; to appeal to the Commission the final decision; and to appeal the final decision to a United States Court of Appeals pursuant to Section 14(e) of the Commodity Exchange Act, 7 U.S.C. 18(e).

§ 12.101 Functions and responsibilities of the judgment officer.

The Judgment Officer shall be responsible for the fair and orderly conduct of the proceeding and shall have the authority—

(a) To rule upon discovery-related motions, and to issue orders pertaining to discovery;

(b) To take such action pursuant to § 12.35 as is appropriate if a party fails to comply with a discovery order or notice;

(c) To issue subpoenas pursuant to § 12.36 of these rules;

(d) To issue orders of default for good cause shown against any party who fails to participate in the proceeding, or to comply with any provisions of these rules;

(e) To receive submissions of proof;

(f) Make the final decision in accordance with § 12.106 of these rules; and

(g) Issue such orders as are necessary and appropriate to effectuate the orderly conduct of the proceeding.

§ 12.102 Disqualification of judgment officer.

(a) *At his own request.* A Judgment Officer may withdraw from a voluntary decisional proceeding when he considers himself to be disqualified on the grounds of personal bias, conflict of interest, or similar bases. In such event he shall immediately notify the Commission and each of the parties of his withdrawal and of his basis for such action.

(b) *Upon the request of a party.* Any party may request a Judgment Officer to disqualify himself on the grounds of personal bias, conflict of interest, or similar bases. Interlocutory review of an adverse ruling by the Judgment Officer may be sought without certification of the matter by the Judgment Officer only in accordance with the procedures set forth in § 12.309 of the Reparation Rules.

§ 12.103 Filing of documents; subscription; service.

Except as otherwise specifically provided in these rules, all documents filed in a voluntary decisional proceeding, including (but not limited to) amended or supplemental pleadings, motions, discovery requests and responses thereto, and submissions of proof, shall meet the requirements of §§ 12.11 and 12.12 of the Reparation Rules as to form, and shall be filed and served in accordance with § 12.10 of the Reparation Rules.

§ 12.104 Amendments to pleadings; motions.

(a) *Amendments and supplemental pleadings.* At any time prior to the issuance of the final decision, the parties may, by unanimous express written consent, amend or supplement the pleadings. Supplemental pleadings may set forth transactions or occurrences or events which have happened since the date of the pleadings to be amended or supplemented, and which are relevant to any of the issues involved.

(b) *Motions.* Except as specifically permitted by rule in this Subpart, motions, other than discovery-related motions and motions relating to procedural orders, shall be prohibited. Motions for procedural orders, including

motions for extension of time, may be acted upon at any time.

§ 12.105 Submission of proof only in documentary or tangible form.

Proof in support of the complaint and in support of the respondent's answer (including counterclaims, if any), and any reply thereto, may be found in those verified documents, in verified statements of non-party witnesses, in other verified statements of fact, and in other documents and tangible evidence. No oral testimony by, or examination of, the parties or their witnesses shall be permitted.

§ 12.106 Final decision and order.

(a) *When a final decision is required.* After all submissions of proof have been received, the Judgment Officer shall make the final decision. Upon its issuance, the final decision shall forthwith be filed with the Proceedings Clerk, and immediately served on the parties. The Proceedings Clerk shall also serve a notice, to accompany the final decision, of the effect of a failure by a party ordered to pay a reparation award to file the documents required by § 12.407(c) of these rules.

(b) *Content of final decision.* The final decision shall contain—

(1) A briefly stated conclusion, not accompanied by findings of fact, as to whether the respondent violated any provision of the Act, Commission's regulations or orders, resulting in damages to the complainant; and

(2) If one or more counterclaims have been permitted in the proceeding, a brief conclusion, not accompanied by findings of fact, as to whether the complainant is liable to the respondent for such counterclaims; and

(3) A determination of the amount of damages, if any, sustained by complainant or respondent in connection with reparation claims or counterclaims, and an order against a party found liable for damages directing that party to pay an award. An award in favor of the complainant shall not exceed the amount of damages in the complaint (including any amendment thereto), and an award in favor of a respondent shall not exceed the amount of damages claimed in a counterclaim (including any amendment thereto). A conclusion made pursuant to paragraph (b)(1) of this section shall not be deemed a finding of the Commission for the purposes of Section 8a of the Commodity Exchange Act.

(c) *No assessment of prejudgment interest or costs.* A party found liable for damages in a voluntary decisional proceeding shall not be assessed prejudgment interest, attorney's fees, or

costs (other than costs assessed as a sanction for abuse of discovery).

(d) *Effect of final decision and order: No appeal.* A party may not appeal to the Commission a final decision issued pursuant to Subpart C of these rules. In accordance with the election and waivers described in Section 12.100(b), a final decision may not be appealed to a United States Court of Appeals pursuant to Section 14(e) of the Commodity Exchange Act, but a final decision shall be recognized as a final order of the Commission for all other purposes including the judicial enforcement of an award made in connection with the final decision pursuant to Section 14(d) of the Commodity Exchange Act.

(e) *Effective date of final decision.* A final decision and order shall become effective thirty (30) days after service, unless the Commission pursuant to Section 12.403 takes review of the decision on its own motion on or before the thirtieth day. Any reparation award ordered in a final decision pursuant to this rule shall be satisfied in full within forty-five (45) days after service thereof, unless the Commission pursuant to § 12.403(b) stays the duty of satisfaction. Any party who fails timely to satisfy such an award is subject to the automatic suspension provisions of § 12.407(c).

Subpart D—Rules Applicable to Summary Decisional Proceedings

§ 12.200 Scope and applicability of rules.

The rules set forth in this subpart are applicable only to proceedings forwarded pursuant to § 12.26(b) of the Reparation Rules. The rules in Subpart B permitting discovery are applicable in a summary decisional proceeding. Unless specifically made applicable, the rules prescribed in Subparts C and E shall not apply to such proceedings. Parties to a proceeding forwarded pursuant to § 12.26(b) may, by signed agreement filed at any time prior to the issuance of the initial decision, or of any other order disposing of all issues in the proceeding, elect to have all of the issues in the proceeding decided pursuant to the voluntary decisional procedure. Upon receiving a timely filed stipulation signed by all parties evidencing such an election, the Judgment Officer shall conduct the proceeding and render a decision pursuant to Subpart C of these rules.

§ 12.201 Functions and responsibilities of the Judgment Officer.

The Judgment Officer shall be responsible for the fair and orderly

conduct of the proceeding and shall have the authority—

(a) In his discretion, to conduct pre-decision conferences in accordance with § 12.206 of these rules;

(b) To rule upon all discovery-related motions, and to take such action pursuant to § 12.35 as is appropriate if a party fails to comply with a discovery order or request;

(c) To issue orders for the production of documents and tangible things and orders for written testimony, as provided in § 12.34 of these rules;

(d) To take such action as is appropriate under § 12.35 of these rules, if a party fails to comply with an order issued by the Judgment Officer pursuant to § 12.34;

(e) To rule on all motions permitted pursuant to § 12.205;

(f) To issue default orders for good cause against parties who fail to participate in the proceeding or to comply with these rules;

(g) To receive submissions of proof (which includes the authority to regulate the sequence of the submissions and to permit oral testimony and examination by the parties in accordance with § 12.209 of these rules);

(h) To issue subpoenas in accordance with the provisions of §§ 12.34, 12.36 and 12.209 of these rules;

(i) To make the initial decision in accordance with § 12.210 of these rules; and

(j) To issue such orders as are necessary and appropriate to effectuate the orderly conduct of the proceeding.

§ 12.202 Disqualification of Judgment Officer.

(a) *At his own request.* A Judgment Officer may withdraw from a summary decisional proceeding when he considers himself to be disqualified on the grounds of personal bias, conflict of interest, or similar bases. In such event, he shall immediately notify the Commission and each of the parties of his withdrawal and of his basis for such action.

(b) *Upon the request of a party.* Any party may request a Judgment Officer to disqualify himself on the grounds of personal bias, conflict of interest, or similar bases. Interlocutory review of an order denying such a request may be sought without certification of the matter by the Judgment Officer only in accordance with the procedures set forth in § 12.309 of the Reparation Rules.

§ 12.203 Filing of documents; subscription; service.

Except as otherwise specifically provided in these rules, all documents filed in a summary decisional

proceeding, including (but not limited to) amended or supplemental pleadings, motions, discovery notices and responses thereto, documents produced or filed pursuant to § 12.34 of these rules, and submissions of proof, shall meet the requirements of §§ 12.11 and 12.12 of these rules as to form, and shall be filed and served in accordance with § 12.10 of the Reparation Rules.

§ 12.204 Amended and supplemental pleadings.

(a) *Amendments to pleadings.* At any time before the parties have concluded their submission of proof, the Judgment Officer may allow amendments of the pleadings either upon written consent of the parties, or for good cause shown, provided however, that any pleading as amended shall not contain an allegation of damages in excess of \$10,000. Any party may file a response to a motion to amend the pleadings within ten (10) days after the date of service upon him of the motion;

(b) *Supplemental pleadings.* At any time before the parties have concluded their submissions of proof, and upon such terms as are just, the Judgment Officer may, upon motion by a party, permit a party to serve a supplemental pleading setting forth transactions, occurrences or events which have happened since the date of the pleadings sought to be supplemented and which are relevant to any of the issues in the proceeding. Provided however, that any pleading as supplemented may not contain an allegation of damages in excess of \$10,000. Any party may file a response to a motion to supplement the pleadings within ten (10) days after the date of service upon him of the motion.

(c) *Pleadings to conform to the evidence.* When issues not raised by the pleadings but reasonably within the scope of a summary decisional proceeding are tried with the express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.

§ 12.205 Motions.

(a) *In general.* Motions for relief not otherwise specifically provided for in Subpart D of these rules, other than discovery-related motions and motions for extensions of time and similar procedural orders, shall not be allowed. Except as otherwise specifically provided in these rules, all motions permitted under these rules shall be directed to the Judgment Officer prior to the filing of the initial decision, and to the Commission after the initial decision has been filed. Motions for extensions of time and similar procedural orders may be acted upon at any time, without

awaiting a response thereto. Any party adversely affected by such action may request reconsideration, vacation or modification of such action.

(b) *Answer to motions.* Any party may serve and file a written response to a motion within ten (10) days after service of the motion upon him, or within such longer or shorter period as is established by these rules, or as the Judgment Officer or the Commission may direct.

(c) *Dismissal.*—(1) *By the Judgment Officer.* A Judgment Officer, acting upon his own motion, may

(i) Dismiss the entire proceeding without prejudice to counterclaims, if he finds that the matters alleged in the complaint fail to state a claim cognizable in reparations; or

(ii) Order dismissal of any claim, counterclaim, or party from the proceeding if he finds, after review of the record, that such claim or counterclaim (by itself or as applied to any party) is not cognizable in reparations.

(2) *Motion for dismissal by a party.* Any party who believes that grounds exist for dismissal of the entire complaint, or of any claim therein, or of any counterclaim or party from the proceeding, may file a motion for dismissal specifying the claims or parties to be dismissed and the reasons therefor. Upon consideration of the whole record, the Judgment Officer may grant or deny such motion, in whole or in part.

(3) *Content and effect of order of dismissal.* Any order of dismissal entered pursuant to this rule shall contain a brief statement of the findings and conclusions which serve as the basis for the order. An order of dismissal of the entire proceeding pursuant to this rule shall have the effect of an initial decision (see § 12.213(d)), and may be appealed to the Commission in accordance with the requirements of § 12.401 of these rules.

§ 12.206 Pre-decision conferences.

At any time after a summary decisional proceeding has been commenced pursuant to § 12.26(b), the Judgment Officer may, in his discretion, conduct one or more pre-decision conferences to be held in Washington, D.C. or by telephone, with all parties, for the purposes of—

(a) Discussing the advisability of electing the voluntary decisional procedure;

(b) Encouraging settlement of the entire case, or any part thereof, (such discussions may be *ex parte* with the consent of all parties);

(c) Simplifying or clarifying issues;

(d) Obtaining stipulations, admissions of fact and of authenticity of documents; (e) Discussing amendments or supplements to the pleadings;

(f) Encouraging an early settlement of disputes relating to discovery; and

(g) Discussing any matters of relevance in the proceeding.

At or following the conclusion of such a conference, the Judgment Officer may serve a pre-decision memorandum and order setting forth the agreements, if any, reached by the parties, any procedural determinations made by him, and the issues for resolution not disposed of by the admissions or agreements by the parties. Such order, when issued, shall control the subsequent course of the proceeding unless modified to prevent injustice.

§ 12.207 Summary disposition.

(a) *Filing of motions, answers.* Any party who believes that there is no genuine issue of material fact to be determined and that he is entitled to a decision as a matter of law concerning all issues of liability in the proceeding may file a motion for summary disposition at any time until the parties have concluded their submissions of proof. Any adverse party, within ten (10) days after service of the motion, may file and serve opposing papers or may countermove for summary disposition.

(b) *Supporting papers.* A motion for summary disposition shall include a statement of the material facts as to which the moving party contends there is no genuine issue, supported by the pleadings, and by affidavits, other verified statements, admissions, stipulations, and interrogatories. The motion may also be supported by briefs containing points and authorities in support of the contention of the party making the motion. When a motion is made and supported as provided in this section, unless otherwise ordered by the Judgment Officer, an adverse party may not rest upon the mere allegations, but shall serve and file in response a statement setting forth those material facts as to which he contends a genuine issue exists, supported by affidavits and other verified material. He may also submit a brief of points and authorities.

(c) *Summary disposition upon motion of the Judgment Officer.* If the Judgment Officer believes that there may be no genuine issue of material fact to be determined and that one of the parties may be entitled to a decision as a matter of law, he may direct the parties to submit papers in support of and in opposition to summary disposition, substantially as provided in paragraphs (a) and (b) of this section.

(d) *Ruling on summary disposition.* The Judgment Officer may grant summary disposition if the undisputed pleaded facts, affidavits, other verified statements, admissions, stipulations, and matters of official notice show that (1) there is no genuine issue as to any material fact; (2) there is no necessity that further facts be developed in the record; and (3) a party is entitled to a decision in his favor as a matter of law.

(e) *Review of ruling; appeal.* An application for interlocutory review of an order denying a motion for summary disposition shall not be allowed. An order granting summary disposition as to all of the issues and all of the parties in the proceeding shall have the same effect as an initial decision (see § 12.210(d)), and may be appealed to the Commission, in accordance with § 12.401 of these rules.

§ 12.208 Submissions of proof.

(a) *Documentary evidence.* Each party may file and serve verified statements of fact and affidavits of non-party witnesses with personal knowledge of the facts which they aver to be true. Proof in support of the complaint and in support of the respondent's answer may be found in those verified documents, in affidavits of non-party witnesses, in other verified statements of fact, and in other documents and tangible exhibits.

(b) *Oral testimony and examination.* Upon motion by a party, and where it is shown to be necessary or appropriate to resolve factual issues which are central to the proceeding, the Judgment Officer may, in his discretion, permit the parties to testify orally and to conduct examination of parties and their witnesses in Washington, D.C. or by telephonic hearing. Such testimony and examination shall be conducted in accordance with § 12.209 of these rules. If the Judgment Officer determines to permit oral testimony and examination by the parties, notification thereof shall immediately be served on the parties by the Proceedings Clerk. Absent extraordinary circumstances, such oral testimony and examination shall be completed within sixty days after such notification.

§ 12.209 Oral testimony.

(a) *Oral hearing in Washington, D.C.* Where a Judgment Officer, pursuant to § 12.208(b), has determined to permit oral testimony by the parties and their witnesses, and at least one complainant and one respondent execute an agreement in writing to appear at a hearing to be held in Washington, D.C., which has been filed, the parties may present such oral testimony in that location, in the presence of the Judgment

Officer. Any party who does not agree to appear at an oral hearing in Washington, D.C., will be deemed to have elected to testify and conduct examination orally by telephone in accordance with the procedure prescribed in paragraph (b) of this section. In the event of an oral hearing in Washington, D.C., the hearing shall be transcribed in the manner prescribed in § 12.313(f) of these rules. The testimony of non-parties may be adduced by their appearance at the hearing in Washington, D.C., or by telephone. Oral examination and testimony may be limited to such issues as the Judgment Officer may direct. Subject to the provisions of § 12.208(b), the date and time for an oral hearing in Washington, D.C. shall be subject to approval by the Judgment Officer who, by appropriate order, shall notify the parties of the date, place and time of the hearing. If any party, after executing a written agreement to do so, fails to appear at such a hearing, he shall be deemed to have waived the opportunity to testify orally, and to conduct oral examination of other parties and witnesses. For just cause, the Judgment Officer may take such action as is appropriate pursuant to § 12.35 against such a party for his failure to appear. In such an event, any party who does appear may present his evidence orally in the presence of the Judgment Officer.

(b) *Telephonic hearings.*—(1) *In general.* Where a Judgment Officer pursuant to § 12.208(b) has determined to permit oral examination of parties and their witnesses, and any party elects to participate by telephone, the Judgment Officer shall, by appropriate order, notify all parties of the date and time of the telephonic hearing and indicate that each party will be telephoned at the number provided in their pleadings, unless a party, prior to such hearing, files and serves notice that a different telephone number is appropriate. The Judgment Officer, in his discretion, may regulate the course and sequences of oral testimony and examination of the parties, which shall include the authority to restrict examination by a party's counsel, as the Judgment Officer deems appropriate. All telephonic discussion during a hearing shall be recorded electronically, and shall be transcribed in the event of Commission review, or judicial review pursuant to Section 14(e) of the Act.

(2) *Effect of a party's failure to participate in a telephonic hearing.* If any party who has elected to participate orally by telephone fails to participate in the telephonic hearing on the scheduled date and at the specified time, he shall

be deemed to have waived the opportunity to testify orally and to conduct oral examination of other parties and witnesses. For just cause, the Judgment Officer may take such action as is appropriate pursuant to § 12.35 against any such party who fails to participate. In the event that a party who has elected to participate by telephone is in telephonic contact with the Judgment Officer at the scheduled time, and no party for the opposing side is available for participation, the party who is in contact may present his evidence orally.

(c) *Compulsory process for the participation of parties and non-parties.* An application for a subpoena requiring a party or non-party to appear at an oral hearing in Washington, D.C., pursuant to paragraph (b)(1) of this section, or to participate by telephone pursuant to paragraphs (b)(1) and (b)(2) of this section, may be made, in writing, by any party to the Judgment Officer, without notice to other parties. The standards for issuance or denial of an application for a subpoena pursuant to this Section, the service and travel fee requirements, and the method for enforcing such subpoenas shall be determined by the provisions of § 12.313 of these rules.

§ 12.210 Initial decision.

(a) *In general.* Proposed findings of fact and conclusions of law briefs shall not be allowed. As soon as practicable after all submissions of proof have been received, the Judgment Officer shall make the initial decision, which he shall forthwith file with the Proceedings Clerk. Upon filing of an initial decision, the Proceedings Clerk shall immediately serve upon the parties a copy of the initial decision and a notification of the effect of a party's failure timely to appeal the initial decision to the Commission, as provided in paragraphs (d) and (e) of this section, as well as the effect of a failure by a party who has been ordered to pay reparation award timely to file the documents required by § 12.407(c).

(b) *Content of initial decision.* In the initial decision in a summary decisional proceeding, the Judgment Officer shall—

- (1) Include a brief statement of his findings as to the facts, with references to those portions of the record which support his findings;
- (2) Make a determination whether or not the respondent has violated any provision of the Commodity Exchange Act, or rule, regulation or order thereunder;
- (3) Make a determination whether the complainant is liable to any respondent who has made a counterclaim in the proceeding;

(4) Determine the amount of damages, if any, that the complainant has sustained as a result of respondent's violations, which shall not exceed \$10,000, exclusive of interest and costs; and the amount, if any, for which complainant is liable to respondents based on counterclaims, which, in aggregate, shall not exceed \$10,000, exclusive of interest and costs; and

(5) Include an order directing either the respondent or the complainant, depending upon whose liability is greater, to pay an amount based on the difference in the amounts determined pursuant to paragraph (b)(4) of this section, on or before a date fixed in the order.

(c) *Costs; prejudgment interest.* The Judgment Officer may, in the initial decision, award costs (including the costs of instituting the proceeding, and if appropriate, reasonable attorneys' fees) and, if warranted as a matter of law under the circumstances of the particular case, prejudgment interest to the party in whose favor a judgment is entered.

(d) *Effect of initial decision.* The initial decision shall become the final decision and order of the Commission thirty (30) days after service thereof, except—

(1) The initial decision shall not become the final decision as to a party who shall have timely filed and perfected an appeal thereof to the Commission in accordance with § 12.401 of these rules; and

(2) The initial decision shall not become final as to any party to the proceeding if, within thirty (30) days after service of the initial decision, the Commission itself shall have placed the case on its own docket for review or stayed the effective date of the initial decision.

(e) *Effect of failure to file and perfect an appeal to the Commission.* Unless the Commission takes review on its own motion, the timely filing and perfection of an appeal to the Commission of the initial decision is mandatory as a prerequisite to appellate judicial review of a final decision and order entered pursuant to these rules.

Subpart E—Rules Applicable to Formal Decisional Proceedings

§ 12.300 Scope and applicability of rules.

The rules set forth in this Subpart are applicable to proceedings forwarded pursuant to § 12.26(c) of the Reparation Rules. The rules in Subpart B permitting discovery are applicable in a formal decisional proceeding, as supplemented by § 12.301. Unless specifically made applicable, the rules prescribed in

Subparts C and D shall not apply to formal decisional proceedings. Parties to a proceeding forwarded pursuant to § 12.26(c) may, by written agreement filed at any time prior to the issuance of an initial decision, or of any other order disposing of all issues in the proceeding, elect to have all issues in the proceeding decided pursuant to the voluntary decisional procedure. Upon receiving a timely filed stipulation signed by all parties evidencing such an election, the Administrative Law Judge shall conduct the proceeding and render a decision pursuant to Subpart C of these rules.

§ 12.301 Functions and responsibilities of the proceedings officer.

It shall be the responsibility of the Proceedings Officer to assist parties to a formal decisional proceeding in completing discovery as soon as practicable. In this regard, the Proceedings Officer, except as otherwise directed by the Administrative Law Judge who has been assigned to decide the case, shall have the authority:

(a) Concerning any discovery notice served within the time permitted for discovery pursuant to § 12.30(d), to rule upon—

(1) Motions for protective orders pursuant to § 12.30(b)(2); and

(2) Motions for an order compelling discovery pursuant to § 12.30(b)(3); and

(b) During the time period permitted for discovery pursuant to § 12.30(d), and thereafter if so directed by the Administrative Law Judge assigned to decide the case—

(1) To rule upon—

(i) Motions for leave to serve written interrogatories in excess of the number permitted by § 12.32; and

(ii) Motions to enlarge the time permitted for discovery under § 12.30(d) for one additional period not to exceed thirty days; and

(iii) Procedural motions; and

(2) To issue, if warranted, orders and subpoenas pursuant to § 12.36 directing non-parties to comply with a discovery notice; and

(3) To hold pre-decision conferences in the manner prescribed by § 12.303; and

(c) To make recommendations to the Administrative Law Judge assigned to the case as to what action should be taken pursuant to § 12.9(b), 12.30(c), or 12.35, if counsel for a party engages in abusive conduct, or if a party fails to comply with a discovery notice or request, an order compelling discovery, or otherwise abuses the discovery procedure prescribed in these rules.

§ 12.302 Appeal of a discovery order issued by a proceedings officer.

Any party aggrieved by a discovery-related order issued by a Proceedings Officer may appeal such order by filing, within five (5) days after service upon him of the discovery order, a motion to vacate or modify such order, or any part thereof, setting forth the grounds therefor, and specifying whatever other relief that the moving party may seek. Upon the timely filing of such a motion, the Proceedings Clerk immediately shall forward the motion and any other relevant materials of record to the Administrative Law Judge assigned to the proceeding, or, if no Administrative Law Judge has yet been assigned to the case, or if the assigned judge is unavailable, to the Chief Administrative Law Judge or such other Administrative Law Judge as the Chief Judge may designate, who shall, by appropriate order and within ten days after the motion is forwarded, absent extraordinary circumstances, grant or deny in whole or in part the motion and the other relief sought. A ruling on a motion to vacate or modify a discovery order issued by a Proceedings Officer shall not limit or affect the authority of an Administrative Law Judge to issue orders pursuant to § 12.34 for the production of documents and tangible evidence, and the submission of written testimony.

§ 12.303 Pre-decision conferences.

Subject to § 12.301, during the time period permitted for discovery pursuant to § 12.30(d), and thereafter if so directed by the Administrative Law Judge assigned to decide the case, the Proceedings Officer may, in his discretion, conduct one or more pre-decision conferences to be held in Washington, D.C. or by telephone, with all parties, for the purposes of—

- (a) Discussing the advisability of electing the voluntary decisional procedure;
- (b) Encouraging a settlement of the entire case, or any part thereof (such discussions may be *ex parte* with the consent of all parties);
- (c) Simplifying or clarifying issues;
- (d) Obtaining stipulations, admissions of fact and of authenticity of documents;
- (e) Discussing amendments or supplements to the pleadings;
- (f) Encouraging an early settlement of disputes relating to discovery; and
- (g) Discussing any matters of relevance in the proceeding.

At or following the conclusion of a pre-decision conference, the Proceedings Officer may serve a pre-decision memorandum and order setting forth the agreements reached by the parties, any

procedural determinations made by him, and the issues for resolution not disposed of by admissions or agreements by the parties. If the Administrative Law Judge assigned to decide the case so directs, such an order shall control the subsequent course of the proceeding unless modified to prevent injustice.

§ 12.304 Functions and responsibilities of the Administrative Law Judge.

Once he has been assigned the case, the Administrative Law Judge shall be responsible for the fair and orderly conduct of a formal decisional proceeding and shall have the authority—

- (a) To issue such orders as are described in § 12.34 of these rules;
- (b) To issue subpoenas pursuant to §§ 12.34, 12.36, and 12.313 of these rules;
- (c) To take such action as is appropriate pursuant to § 12.35 if a party fails to comply with a discovery order or request, or an order issued pursuant to § 12.34 of these rules;
- (d) Except as provided in §§ 12.201 and 12.302 to consider and rule upon all motions;
- (e) In his discretion, to conduct pre-decision conferences, for the purposes prescribed in § 12.303, at any time after a proceeding has commenced pursuant to § 12.26(c);
- (f) To issue pre-hearing orders as required by § 12.312(a);
- (g) To certify interlocutory matters to the Commission for its determination in accordance with § 12.309;
- (h) To issue orders of dismissal pursuant to § 12.308;
- (i) To issue default orders for good cause against parties who fail to participate in the proceeding, or to comply with these rules;
- (j) If appropriate, to issue orders for summary disposition in the manner prescribed by § 12.310;
- (k) If an oral hearing is ordered, to preside at the oral hearing, which shall include the authority to receive relevant evidence, to administer oaths and affirmations, to examine witnesses, and to rule on offers of proof;
- (l) To make the initial decision; and
- (m) To issue such orders, and take any other actions as are required to give effect to these rules.

§ 12.305 Disqualification of Administrative Law Judge.

(a) *At his own request.* An Administrative Law Judge may withdraw from a formal decisional proceeding when he considers himself to be disqualified on the grounds of personal bias, conflict of interest, or similar bases. In such event, he shall

immediately notify the Commission and each of the parties of his withdrawal and of his basis for such action.

(b) *Upon the request of a party.* Any party may request an Administrative Law Judge to disqualify himself on the grounds of personal bias, conflict of interest, or similar bases. Interlocutory review of an order denying such a request may be sought without certification of the matter by an Administrative Law Judge, only in accordance with the procedures set forth in § 12.309 of these rules.

§ 12.306 Filing of documents; subscription; service.

Except as otherwise specifically provided in these rules, all documents filed in a formal decisional proceeding including, but not limited to, amended or supplemental pleadings, motions, discovery notices or requests, and responses thereto, documents filed or produced pursuant to § 12.34 of these rules, and submissions of proof, shall meet the requirements of §§ 12.11 and 12.12 of the rules as to form, and shall be filed and served in accordance with § 12.10 of the Reparation Rules.

§ 12.307 Amended and supplemental pleadings.

(a) *Amendments to pleadings.* At any time before the parties have concluded their submissions of proof, the Administrative Law Judge may allow amendments of the pleadings either upon written consent of the parties or for good cause shown. Any party may file a response to a motion to amend the pleadings within ten (10) days after the date of service upon him of the motion.

(b) *Supplemental pleadings.* At any time before the parties have concluded their submissions of proof, and upon such terms as are just, an Administrative Law Judge may, upon motion by a party, permit a party to serve a supplemental pleading setting forth transactions, occurrences or events which have happened since the date of the pleadings sought to be supplemented and which are relevant to the issues in the proceeding. Any party may file a response to a motion to supplement the pleadings with ten (10) days after the date of service upon him of the motion.

(c) *Pleadings to conform to the evidence.* When issues not raised by the pleadings but reasonably within the scope of a formal decisional proceeding are tried with the express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.

§ 12.308 Motions.

(a) *In general.* An application for a form of relief not otherwise specifically provided for in this Subpart E shall be made by a motion, which shall be in writing (unless made on the record during an oral hearing). The motion shall state the relief sought and the basis for the relief and may set forth the authority relied upon. All motions, unless otherwise provided in these rules, shall be directed to the Administrative Law Judge before the initial decision is filed, and to the Commission after the initial decision is filed.

(b) *Answer to motions.* Any party may serve and file a written response to a motion within ten (10) days after service of the motion upon him, or within such longer or shorter period as established by these rules, or as the Administrative Law Judge or the Commission may direct.

(c) *Dismissal.*—(1) *By the Administrative Law Judge.* The Administrative Law Judge, acting on his own motion, may, at any time after he has been assigned the case:

(i) Dismiss the entire proceeding, without prejudice to counterclaims, if he finds that none of the matters alleged in the complaint state a claim that is cognizable in reparations; or

(ii) Order dismissal of any claim, counterclaim, or party from the proceeding if he finds that such claim or counterclaim (by itself, or as applied to a party) is not cognizable in reparations.

(2) *Motion for dismissal by a party.* Any party who believes that grounds exist for dismissal of the entire complaint, of any claim therein, of any counterclaim, or of a party from the proceeding, may file a motion for dismissal specifying the claims, counterclaims, or parties to be dismissed and the reasons therefor.

Upon consideration of the whole record, the Administrative Law Judge may grant or deny such motion, in whole or in part.

(3) *Content and effect of order of dismissal.* Any order of dismissal entered pursuant to this rule shall contain a brief statement of the findings and conclusions which serve as the basis for the order. An order of dismissal of the entire proceeding pursuant to this rule shall have the effect of an initial decision which may be appealed to the Commission in accordance with the requirements set forth in § 12.401 of these rules.

(d) *Motions for procedural orders.* Motions for procedural orders, including motions for extensions of time, may be acted on at any time, without awaiting a response thereto. Any party adversely affected by such action may request

reconsideration, vacation or modification of such action.

(e) *Dilatory motions.* Repetitive or numerous motions dealing with the same subject matter shall not be permitted.

§ 12.309 Interlocutory review by the commission.

Interlocutory review by the Commission of a ruling on a motion by an Administrative Law Judge may be sought only as prescribed in this rule—

(a) *When interlocutory appeal may be taken.* An interlocutory appeal may be permitted, in the discretion of the Commission, under the following circumstances:

(1) The appeal is from a ruling pursuant to §§ 12.102, 12.202, or 12.305 refusing to grant a motion to disqualify a Judgment Officer or Administrative Law Judge;

(2) The appeal is from a ruling pursuant to § 12.9 suspending an attorney from participation in a reparation proceeding;

(3) Upon a determination by the Administrative Law Judge certified to the Commission either in writing or on the record, that (i) a ruling sought to be appealed involves a controlling question of law or policy; (ii) an immediate appeal may materially advance the ultimate resolution of the issues in the proceeding; and (iii) subsequent reversal of the ruling would cause unnecessary delay or expense to the parties; or

(4) The appeal is from a ruling which satisfies the conditions of paragraphs (a)(3)(i)(ii)(iii) of this section, despite the absence of certification, and extraordinary circumstances are shown to exist.

(b) *Procedure to obtain interlocutory review.* An application for interlocutory review may be served and filed within ten (10) days after service of a ruling described in paragraphs (a)(1), (a)(2), and (a)(4) of this section or of notice that a determination has been made pursuant to paragraph (a)(3) of this section. The application for interlocutory review shall contain—

(1) A statement of the facts necessary to an understanding of the controlling questions determined by the Administrative Law Judge, and to an understanding of the extraordinary circumstances warranting interlocutory review by the Commission;

(2) A statement of the question or issue involved in the ruling upon which the application for review is based;

(3) A statement of the reasons why, in the opinion of the party requesting review, the ruling was erroneous and should be reversed or modified; and

(4) A copy of all papers filed by the parties that relate to the subject matter of the ruling at issue, including the order containing the ruling.

Within seven (7) days after service of the application for interlocutory review, any party may file a response in opposition to the application.

(c) *Standard for review.* In the absence of extraordinary circumstances, the Commission will not review a ruling of an Administrative Law Judge prior to the Commission's consideration of the proceeding pursuant to Subpart F of these rules. A Commission denial of an application for interlocutory review shall be without prejudice to the applying party's right to raise any argument made in the application as an issue in an appeal taken pursuant to Subpart F of these rules.

(d) *Proceedings not stayed.* The filing of an application for interlocutory review and a grant of review shall not stay proceedings before an Administrative Law Judge (or a Judgment Officer, if applicable) unless that official or the Commission shall so order. The Commission will not consider a motion for a stay unless the motion shall have first been made to the Administrative Law Judge (or, if applicable, the Judgment Officer) and denied.

(e) *Interlocutory review by the Commission on its own motion.* Nothing in this rule should be construed as restricting the Commission from acting on its own motion to review on an interlocutory basis any ruling of an Administrative Law Judge, Proceedings Officer or a Judgment Officer in any proceeding commenced pursuant to § 12.26 of these rules.

§ 12.310 Summary disposition.

(a) *Filing of motions, answers.* Any party who believes that there is no genuine issue of material fact to be determined and that he is entitled to a decision as a matter of law concerning all issues of liability in the proceeding may file a motion for summary disposition at any time before a determination is made by the Administrative Law Judge to order an oral hearing in the proceeding. Any adverse party, within ten (10) days after service of the motion, may file and serve opposing papers or may countermove for summary disposition.

(b) *Supporting papers.* A motion for summary disposition shall include a statement of all material facts as to which the moving party contends that there is no genuine issue, supported by the pleadings, and by affidavits, other verified statements, admissions,

stipulations, and interrogatories. The motion may also be supported by briefs containing points and authorities in support of the contention of the party making the motion. When a motion is made and supported as provided in this Section, unless otherwise ordered by the Administrative Law Judge, an adverse party may not rest upon the mere allegations, but shall serve and file in response a statement setting forth those material facts as to which he contends a genuine issue exists, supported by affidavits and other verified material. He may also submit a brief of points and authorities.

(c) *Oral argument.* Oral argument may be heard at the discretion of the Administrative Law Judge and shall be heard in Washington, D.C., or by telephonic conference call. Such argument shall be recorded, and written transcripts shall be made in the event that a grant or denial of summary disposition is reviewed by the Commission.

(d) *Summary disposition upon motion of the Administrative Law Judge.* If the Administrative Law Judge believes that there may be no genuine issue of material fact to be determined and that one of the parties may be entitled to a decision as a matter of law, he may direct the parties to submit papers in support of and in opposition to summary disposition, and may hear oral argument, substantially as provided in paragraphs (a), (b) and (c) of the section.

(e) *Ruling on summary disposition.* The Administrative Law Judge shall grant summary disposition if the undisputed pleaded facts, affidavits, other verified statements, admissions, stipulations, and matters of official notice, show that (1) there is no genuine issue as to any material fact; (2) there is no necessity that further facts be developed in the record; and (3) a party is entitled to a decision as a matter of law.

(f) *Review of ruling; appeal.* An application for interlocutory review of an order denying a motion for summary disposition shall not be allowed. Interlocutory review of an order granting summary disposition which disposes of less than all of the issues in the proceeding may be sought only in accordance with § 12.309 of these rules. An order granting summary disposition which is dispositive of all issues, and as to all parties, in the proceeding may be appealed to the Commission in accordance with the requirements set forth in § 12.401 of these rules.

§ 12.311 Disposition of proceeding or issues without oral hearing.

If the Administrative Law Judge determines that the documentary proof and other tangible forms of proof submitted by the parties are sufficient to permit resolution of some or all of the factual issues in the proceeding without the need for oral testimony, he may order that all proof relating to such issues be submitted in documentary and tangible form, and dispose of such issues without an oral hearing. In such an event, proof in support of the complaint, answer, and reply, may be found in those verified documents, in depositions on written interrogatories, in admissible documents obtained through discovery, in other verified statements of fact, documents and tangible evidence.

§ 12.312 Oral hearing.

(a) *Notification; prehearing order.* If and when the proceeding has reached the stage of an oral hearing, the Administrative Law Judge, giving due regard for the convenience of the parties, shall set a time for hearing, as well as a location prescribed by paragraph (b) of this section, and shall file with the Proceedings Clerk, for immediate service upon the parties—

(1) An order requiring the parties to file and serve, within fifteen days after service of the order, a prehearing memorandum setting forth briefly—

(i) A statement of all issues to be tried at the hearing;

(ii) An identification of each witness expected to be called by that party;

(iii) A summary of the testimony each witness is expected to provide; and

(2) A notice stating the time and location of the hearing.

Prior to the hearing, the Administrative Law Judge may issue an order based on the contents of the parties' memoranda filed pursuant to paragraph (a)(1) of this section, which, unless modified to prevent injustice, shall control the scope of matters to be tried at the oral hearing. If any change in the time or place of the hearing becomes necessary, it shall be made by the Administrative Law Judge, who, in such event, shall file with the Proceedings Clerk a notice of the change. Such notice shall be served upon the parties, unless it is made during the course of an oral hearing and made a part of the transcript. Hearings shall proceed expeditiously and, absent extraordinary circumstances, shall be held in one location and shall continue, without suspension, until concluded.

(b) *Location of hearing.* Unless the Director of the Office of Proceedings for reasons of administrative economy or

practical necessity determines otherwise, and except as provided in this subparagraph, the location of an oral hearing shall be in one of the following cities: Albuquerque, N.M.; Atlanta, Ga.; Boston, Mass.; Chicago, Ill.; Cincinnati, Ohio; Columbia, S.C.; Denver, Colo.; Houston, Tex.; Kansas City, Mo.; Los Angeles, Cal.; Minneapolis, Minn.; New Orleans, La.; New York, N.Y.; Oklahoma City, Okla.; Phoenix, Ariz.; San Diego, Cal.; San Francisco, Cal.; Seattle, Wash.; St. Petersburg, Fla.; and Washington, D.C. The Administrative Law Judge may, in any case where a party avers, in an affidavit, that none of the foregoing cities is located within 300 miles of his principal residence, waive this subparagraph and, upon giving due regard for the convenience of all of the parties, order that the hearing be held in a more convenient locale.

(1) *Who may appear.* The parties may appear in person, by counsel, or by other representatives of their choosing, subject to the provisions of § 12.9 of these rules concerning practice before the Commission.

(2) *Effect of failure to appear.* If any party to the proceeding fails to appear at the hearing, or at any part thereof, he shall to that extent be deemed to have waived the opportunity for an oral hearing in the proceeding. The Administrative Law Judge, for just cause, may take such action as is appropriate pursuant to § 12.35 of these rules against a party who fails to appear at the hearing. In the event that a party appears at the hearing and no party appears for the opposing side, the party who is present may present his evidence, in whole or in part, in the form of affidavits or by oral testimony, before the Administrative Law Judge.

(c) *Public hearings.* All oral hearings shall be public except that upon application of a party or affected witness the Administrative Law Judge may direct that specific documents or testimony be received and retained non-publicly in order to prevent unwarranted disclosure of trade secrets or sensitive commercial or financial information or an unwarranted invasion of personal privacy.

(d) *Conduct of the hearing.* Subject to paragraph (f) of this section, and except as otherwise provided, at an oral hearing every party shall be entitled to—

(1) *Conduct direct and cross-examination of parties and witnesses.* All witnesses at a hearing for the purpose of taking evidence shall testify under oath or affirmation, which shall be administered by the Administrative

Law Judge. Unless otherwise ordered by the Administrative Law Judge, parties shall be entitled to present oral direct testimony and other documentary proof, and to conduct direct examination and cross examine adverse parties and witnesses. To expedite the hearing, the Administrative Law Judge may, in his discretion, order that the direct testimony of the parties and their witnesses be presented in documentary form, by affidavit, interrogatory, and other documents. In any event, the Administrative Law Judge, in his discretion, may permit cross examination, without regard to the scope of direct testimony, as to any matter which is relevant to the issues in the proceeding;

(2) *Introduce exhibits.* The original of each exhibit introduced in evidence or marked for identification shall be filed unless the Administrative Law Judge permits the substitution of copies for the original documents. A copy of each exhibit introduced by a party or marked for identification at his request shall be supplied by him to the Administrative Law Judge and to each other party to the proceeding. Exhibits shall be maintained by the reporter who shall serve as custodian of the exhibits until they are transmitted to the Proceedings Clerk pursuant to paragraph (f) of this section;

(3) *Make objections.* A party shall timely and briefly state the grounds relied upon for any objection made to the introduction of evidence. Formal exception to an adverse ruling shall not be required; and

(4) *Make offers of proof.* When an objection to a question propounded to a witness is sustained, the examiner may make a specific offer of what he expects to prove by the answer of the witness. Rejected exhibits, adequately marked for identification, shall be retained in the record so as to be available for consideration by any reviewing authority.

(e) *Admissibility of evidence.* Relevant, material and reliable evidence shall be admitted. Irrelevant, immaterial, unreliable and unduly repetitious evidence shall be excluded.

(f) *Record of an oral hearing.* Oral hearings for the purpose of taking evidence shall be recorded and shall be transcribed in written form under the supervision of the Administrative Law Judge by a reporter employed by the Commission for that purpose. The original transcript shall be a part of the record and shall be the sole official transcript. Copies of transcripts, except those portions granted non-public treatment, shall be available from the reporter at rates not to exceed the maximum rates fixed by the contract

between the Commission and the reporter. As soon as practicable after the close of the hearing, the reporter shall transmit to the Proceedings Clerk the transcript of the testimony and the exhibits introduced in evidence at the hearing, except such portions of the transcript and exhibits as shall have already been delivered to the Administrative Law Judge.

(g) *Proposed findings of fact and conclusions of law; briefs.* An Administrative Law Judge, upon his own motion or upon motion of a party, may permit the filing of post-hearing proposed findings of fact and conclusions of law. Absent an order permitting such findings and conclusions, none shall be allowed. Unless otherwise ordered by the Administrative Law Judge and for good cause shown, the proposed findings and conclusions (including briefs in support thereof), shall not exceed twenty-five (25) pages and shall be filed not later than forty-five (45) days after the close of the oral hearing.

§ 12.313 Subpoenas for attendance at an oral hearing.

(a) *In general.*—(1) *Application for issuance of subpoenas.* An application for a subpoena requiring a party or other person to appear and testify at an oral hearing (subpoena *ad testificandum*) or to appear and testify and to produce specified documentary or tangible evidence at the hearing (subpoena *duces tecum*), shall (unless made orally at a hearing) be filed in writing and in duplicate, but need not be served upon other parties. The application shall be accompanied by the original and one copy of the subpoena.

(2) *Standards for issuance or denial of subpoenas.* The Administrative Law Judge considering any application for a subpoena shall issue the subpoena if he is satisfied the application complies with this rule and the request is not unreasonable, oppressive, excessive in scope or unduly burdensome. In the event the Administrative Law Judge determines that a requested subpoena or any of its terms are unreasonable, oppressive, excessive in scope, or unduly burdensome, he may refuse to issue the subpoena, or may issue it only upon such conditions as he determines fairness requires.

(b) *Special Requirements Relating to Application for an Issuance of Subpoenas for the Appearance of Commission Employees.*—(1) *Form.* An application for the issuance of a subpoena shall be made in the form of a written motion served upon all other parties, if the subpoena would require

the appearance of a Commissioner or an official or employee of the Commission.

(2) *Content.* The motion shall specifically describe the material to be produced, the information to be disclosed, or the testimony to be elicited from the witness, and shall show (i) the relevance of the material, information, or testimony to the matters at issue in the proceeding; (ii) the reasonableness of the scope of the proposed subpoena; and (iii) that such material, information, or testimony is not available from other sources.

(3) *Rulings.* The motion shall be decided by the Administrative Law Judge and his order shall provide such terms and conditions for the production of the material, the disclosure of the information, or the appearance of the witnesses as may appear necessary and appropriate for the protection of the public interest.

(c) *Service of subpoenas.*—(1) *How effected.* Service of a subpoena upon a party shall be made in accordance with § 12.10 of these rules. Service of a subpoena upon any other person shall be made by delivering a copy of the subpoena to him as provided in paragraph (c) (2) or (3) of this section, and by tendering to him the fees for one day's attendance and the mileage as specified in paragraph (e) of this section. When the subpoena is issued at the instance of any officer or agency of the United States, fees and mileage need not be tendered at the time of service.

(2) *Service upon a natural person.* Delivery of a copy of a subpoena and tender of fees and mileage to a natural person may be effected by (i) handing them to the person; (ii) leaving them at his office with the person in charge thereof or, if there is no one in charge, by leaving the subpoena in a conspicuous place therein; (iii) leaving them at his dwelling place or usual place of abode with some person of suitable age and discretion then residing therein; (iv) mailing them by registered or certified mail to him at his last known address; or (v) any other method whereby actual notice is given to him and the fees and mileage are timely made available.

(3) *Service upon other persons.* When the person to be served is not a natural person, delivery of a copy of the subpoena and tender of the fees and mileage may be effected by (i) handing them to a registered agent for service, or to any officer, director, or agent in charge of any office of such person; (ii) mailing them by registered or certified mail to any such representative at his last known address; or (iii) any other method whereby actual notice is given

to any such representative and the fees and mileage are timely made available.

(d) *Motion to quash subpoena.* At or any time before the time specified in the subpoena for compliance therewith, a person upon whom a subpoena has been served may file a motion to quash or modify the subpoena with the Administrative Law Judge who issued the subpoena, and serve a copy of the motion on the party who requested the subpoena. Such motion shall include a brief statement of the reasons therefor. After due notice to the person upon whose request the subpoena was issued, and an opportunity for that person to respond, the Administrative Law Judge may (1) quash or modify the subpoena, or (2) condition denial of the application to quash or modify the subpoena upon just and reasonable terms, including, on the case of a subpoena *duces tecum*, a requirement that the person on whose behalf the subpoena was issued shall advance the reasonable cost of producing documentary or other tangible evidence.

(e) *Attendance and mileage fees.* Persons summoned to testify at a hearing under requirement of subpoenas are entitled to the same fees and mileage as are paid to witnesses in the courts of the United States. Fees and mileage shall be paid by the party at whose instance the persons are subpoenaed or called.

(f) *Enforcement of subpoenas.* Upon failure of any person to comply with a subpoena issued at the request of a party, that party may petition the Commission, in its discretion, to institute an action in an appropriate United States District Court for enforcement of the subpoena.

§ 12.314 Initial decision.

(a) *In general.* The Administrative Law Judge as soon as practicable after the parties have completed their submissions of proof, or after the conclusion of an oral hearing if one is held, shall render the initial decision, which he shall forthwith file with the Proceedings Clerk, and a copy of which shall be served immediately by the Proceedings Clerk upon each of the parties. The Proceedings Clerk shall also serve a notice, to accompany the initial decision, of the effect of a party's failure timely to appeal to the Commission the initial decision, as provided in paragraphs (d) and (e) of this section, and the effect of a failure of a party who has been ordered to pay a reparation award timely to file the documents required by § 12.407(c).

(b) *Content of initial decision.* In the initial decision the Administrative Law Judge shall:

(1) Include a brief statement of his findings as to the facts, with references to those portions of the record which support his findings;

(2) Make a determination whether or not the respondent has violated any provision of the Commodity Exchange Act, or rule, regulation or order thereunder;

(3) Make a determination whether the complainant is liable to any respondent who has made a counterclaim in the proceeding;

(4) Determine the amount of damages, if any, that the complainant has sustained as a result of respondent's violations, and the amount, if any, for which complainant is liable to a respondent based on a counterclaim; and

(5) Include an order directing either the respondent or the complainant, depending upon whose liability is greater, to pay an amount based on the difference in the amounts determined pursuant to paragraph (b)(4) of this section, on or before a date fixed in the order.

(c) *Costs.* Except as provided in §§ 12.30(c) and 12.315 of these rules, the Administrative Law Judge may, in the initial decision, award costs (including the cost of instituting the proceeding and, if appropriate, reasonable attorney's fees) to the party in whose favor a judgment is entered.

(d) *Effect of initial decision.* The initial decision and order shall become the final decision and order of the Commission, without further order by the Commission, thirty (30) days after service thereof, except that—

(1) The initial decision shall not become the final decision as to a party who shall have timely filed and perfected an appeal thereof to the Commission, in accordance with § 12.401 of these rules; and

(2) The initial decision shall not become final as to any party to the proceeding if, within thirty (30) days after service of the initial decision, the Commission itself shall have placed the case on its own docket for review or stayed the effective date of the initial decision.

(e) *Effect of failure to file and perfect an appeal to the Commission.* Unless the Commission takes review of an initial decision on its own motion, the timely filing and perfection of an appeal to the Commission of the initial decision is mandatory as a prerequisite to appellate judicial review of a final decision and order entered pursuant to these rules.

§ 12.315 Consequences of overstating damages claims not in excess of \$10,000

If a party, who has claimed damages in excess of \$10,000, is adjudged to be entitled to recover less than the sum or value of \$10,000, computed without regard to a damage award to which an opposing party may be adjudged to be entitled, and exclusive of interest and costs, the Administrative Law Judge may assess such party the cost of the transcript of an oral hearing, if such a hearing is held, and, depending upon whether such party paid any part of the filing fee for the proceeding, deny the party such costs or impose such costs on that party.

Subpart F—Commission Review of Decisions

§ 12.400 Scope and applicability of rules.

The rules set forth in this subpart are applicable to proceedings forwarded pursuant to Subparts D and E of these rules. Except as provided in §§ 12.106(e) and 12.403(b) of these rules, the rules set forth in this subpart are not applicable to proceedings forwarded pursuant to Subpart C of the Reparation Rules.

§ 12.401 Appeal to the Commission.

(a) *How effected.* Any aggrieved party to a proceeding forwarded pursuant to § 12.26 (b) or (c) of these rules may appeal to the Commission an initial decision or other disposition of the entire proceeding by complying with the requirements of this section. An appealing party shall serve upon all parties and file with the Proceedings Clerk a notice of appeal within fifteen (15) days after service of the initial decision or other order disposing of the entire proceeding. The notice need consist only of a brief statement indicating the filing party's intent to appeal the initial decision, and shall include the date upon which the initial decision was rendered, the names of all parties, and the docket number of the proceeding. An appellate filing fee in the amount of \$50 shall be paid at the time of filing a notice of appeal. The failure of a party timely to file and serve a notice of appeal, and to pay the appellate filing fee, in accordance with this paragraph, or to perfect the appeal in accordance with paragraph (b) of this section, shall constitute a voluntary waiver of any objection to the initial decision, or other order disposing of the proceeding, and of all further administrative or judicial review under these rules and the Commodity Exchange Act.

(b) *Perfecting the appeal; appeal brief.* An appeal shall be perfected by the appealing party by timely filing with the

Proceedings Clerk an appeal brief which meets the requirements of paragraphs (b) and (d) of this section. An original and one copy of the appeal brief shall be filed within thirty (30) days after filing of the notice of appeal. By motion of the appealing party, the Commission may, for good cause shown, extend the time for filing the appeal brief. If the appeal brief is not filed within the time prescribed in this subparagraph, the Commission may, upon its own motion or upon motion by a party, dismiss the appeal, in which event the initial decision shall become the final decision and order of the Commission, effective upon service of the order of dismissal.

(c) *Answering brief.* Any party upon whom the appealing party serves a brief may, within thirty (30) days after service of the appeal brief, file an original and one copy of an answering brief, and serve one copy thereof, unless the time limit is extended by the Commission upon motion of the party and for good cause shown.

(d) *Briefs.* Parties filing an appeal brief or answering brief pursuant to this § 12.401 shall meet the requirements of § 12.11 of these rules as to form. The content of briefs shall satisfy the requirements of § 10.102(d) of the Commission's Regulations, 17 CFR 10.102(d), except that any party, with leave of the Commission, may file an informal document in lieu of a brief. No brief shall exceed thirty-five (35) pages in length without leave of the Commission.

(e) *Oral argument.* Any party may request, in writing and within the time provided for filing the initial briefs, the opportunity to present oral argument before the Commission, which the Commission may, in its discretion, grant or deny. In the event the Commission affords the parties the opportunity to present oral argument before the Commission, the oral argument shall proceed in accordance with the provisions of § 10.103 of the Commission's Regulations, 17 CFR 10.103.

(f) *Scope of review.* On review, the Commission may, in its discretion, consider *sua sponte* any issues arising from the record and may base its determination thereon, or limit the issues to those presented in the statement of issues in the briefs, treating those issues not raised as waived.

§ 12.402 Appeal of disposition of less than all claims or parties in a proceeding.

(a) *In general.* Where two or more different claims for relief are presented, or where multiple parties are involved, in a proceeding forwarded pursuant to § 12.26 (b) or (c) of these rules, the

Judgment Officer or Administrative Law Judge, may upon his own motion or by motion of a party, direct that an initial decision or other order disposing of one or more, but fewer than all of the claims or parties, shall be final and immediately appealable to the Commission. Such a direction may be made only upon an express determination that there is no just reason for delay. When such a direction is made, a party may appeal the initial decision or order in accordance with the procedure prescribed by § 12.401 of these rules.

(b) *When decision is not appealable.* In the absence of such a direction by the Judgment Officer or an Administrative Law Judge, an initial decision or order disposing of fewer than all of the claims or all of the parties shall be subject to revision by the decisionmaker at any time before a disposition is made of all remaining claims or parties, and no appeal may be taken to the Commission pursuant to this rule.

§ 12.403 Commission review on its own motion.

(a) *In general.* The Commission may on its own motion, within 30 days after it has been served on all parties, determine to review an initial decision, or other order disposing of all issues in the proceeding as to all claims and all parties, in a proceeding forwarded pursuant to § 12.26 (b) and (c) of these rules. In such event, the Commission may determine the scope of the issues on review, and make provisions for the filing of briefs or, if deemed appropriate, such other means for the parties to present their views. The parties shall be duly notified thereof by the Proceedings Clerk.

(b) *Commission review of a final decision in a voluntary decisional proceeding.* If such action is necessary to prevent manifest injustice, the Commission may, upon its own motion, review a final decision issued pursuant to § 12.106 of these rules by appropriate order filed with the Proceedings Clerk within 30 days after service upon the parties of the final decision. In such event, the Commission may determine the scope of the issue on review, make provisions for the filing of briefs (or, if deemed appropriate, such other means for the parties to present their views). The parties shall be duly notified thereof by the Proceedings Clerk.

§ 12.404 The record of proceedings.

The record of proceeding on appeal of review before the Commission shall include: The pleadings; motions and requests filed, and rulings thereon; the transcript of the testimony taken at an

oral hearing, together with the exhibits filed therein; the transcript of testimony taken during an oral examination by telephone; any statements or stipulations filed in any proceeding; any documents or papers filed in connection with prehearing conferences; such proposed findings of fact, conclusions, and orders and briefs as may have been permitted to be filed in connection with an oral hearing; such statements of objections, and briefs in support thereof, as may have been filed in the proceedings; and the initial (or final) decision, or other order disposing of issues in the proceeding.

§ 12.405 Leave to adduce additional evidence.

Any time prior to issuance of its final decision pursuant to § 12.406, the Commission may, after notice to the parties and an opportunity for them to present their views, reopen the hearing to receive further evidence. The application shall show to the satisfaction of the Commission that the additional evidence is material, and that there were reasonable grounds for failure to adduce such evidence at the hearing. The Commission may receive the additional evidence or may remand the proceeding to the Judgment Officer or Administrative Law Judge to receive the additional evidence.

§ 12.406 Final decision of the Commission.

(a) *Opinion and order.* Unless the Commission, in accordance with paragraph (b) of this section, orders summary affirmance of the initial decision, the Commission's opinion and order in a proceeding appealed pursuant to § 12.401 of these rules shall constitute the Commission's final decision, effective upon service. On review, the Commission may affirm, reverse, modify, set aside or remand for further proceedings, in whole or in part, the initial decision and make any findings or conclusions which in its judgment are warranted based on the record in the proceeding.

(b) *Order on summary affirmance.* If the Commission, in its opinion, finds that the result reached in the initial decision is substantially correct and that none of the arguments on appeal made by the appealing party raise any important question of law or policy, the Commission may, by appropriate order, summarily affirm the initial decision and order without opinion, which shall constitute the Commission's final decision, effective upon service. Unless the Commission expressly indicates otherwise in its order, an order of summary affirmance does not reflect a

Commission determination to adopt the initial decision, including any rationale contained therein, as its opinion and order, and neither initial decision nor the Commission's order of summary affirmance shall serve as a Commission precedent in other proceedings.

(c) *Filing and service of final decision.* The Commission shall, upon issuance of a final decision pursuant to this § 12.406, file the final decision with the Proceeding's Clerk, who shall forthwith serve upon each of the parties a copy of the final decision as well as notice of the effect of a party's failure to pay a reparation award as provided in § 12.407 of these rules, and of an aggrieved party's right to obtain judicial review of the final decision pursuant to Section 14(e) of the Act, 7 U.S.C. 18(e).

§ 12.407 Satisfaction of reparation award; enforcement; sanctions.

(a) *Satisfaction of reparation award.*—(1) *Where initial decision has become the final decision.* Any reparation award ordered in an initial decision, or similar dispositive order (but not a final decision issued pursuant to § 12.106 of these rules), shall be satisfied in full within forty-five (45) days after service of the initial decision, unless a timely appeal thereof has been perfected pursuant to § 12.401, or unless the Commission, pursuant to § 12.403(a), has stayed the effective date of the initial decision.

(2) *Final decision pursuant to § 12.406.* Any reparation award ordered in a final decision of the Commission issued pursuant to § 12.406 of these rules shall be satisfied in full within fifteen (15) days after service of the final decision, or such other longer period of time as may be specified in the final decision, unless a petition for review is filed in accordance with section 14(e) of the Act, 7 U.S.C. 18(e).

(b) *Enforcement of reparation award.* If any person against whom a reparation award has been made does not timely comply with paragraph (a) of this section, the party in whose favor the award is made is entitled to seek enforcement of award in accordance with the procedure prescribed in section 14(d) of the Commodity Exchange Act, 7 U.S.C. 18(d).

(c) *Automatic suspension.* A person required to pay a reparation award shall be prohibited from trading on all contract markets and if such person is registered, his registration shall be suspended automatically, without further notice, unless such person shall, within fifteen (15) days after the time limit for satisfaction of an award (as prescribed in paragraph (a) of this section) expires, file with the

Proceedings Clerk and serve on the other parties—

(1) A copy of a certified check or the equivalent showing satisfaction of the award; or

(2) A sworn release executed by each recipient of a reparation award, which has not been satisfied by payment with a certified check or the equivalent; or

(3) A verified statement that a judicial appeal has been filed and perfected in accordance with section 14(e) of the Act, 7 U.S.C. 18(e). (This subsection is applicable only in proceedings commenced pursuant to § 12.26 (b) or (c), and only if the person has timely filed and perfected an appeal to the Commission as prescribed in § 12.401.)

(d) *Reinstatement.* The sanctions imposed in accordance with paragraph (c) of this section shall remain in effect until the person required to pay the reparation award demonstrates to the satisfaction of the Commission that he has paid the amount required in full with interest at the prevailing rate computed in accordance with section 6621 of the Internal Revenue Code from the date directed in the final order to the date of payment.

(e) *Automatic suspension after appeal.* If on appeal to the United States Court of Appeals the appellee prevails, or if the appeal is dismissed, the automatic prohibition against trading and suspension of registration shall become effective at the expiration of thirty (30) days from the date of judgment on the appeal, but if the judgment is stayed by a court of competent jurisdiction, the suspension shall become effective ten (10) days after the expiration of such stay, unless prior thereto the judgment of the court or the final order of the Commission has been satisfied.

§ 12.408 Delegation of authority to Chief of the Opinions Section.

Pursuant to the authority granted under Section 2(a)(4) and 2(a)(11) of the Commodity Exchange Act, as amended, 7 U.S.C. 4a(c) and 4a(j), the Commission hereby delegates, until such time as it orders otherwise, the following functions to the Chief of the Opinions Section, to be performed by him or by such person or persons under his direction as he may designate from time to time:

(a) With respect to reparation proceedings conducted pursuant to Section 14 of the Commodity Exchange Act, as amended, 7 U.S.C. 18, and subject to the Commission's Reparation Rules as set forth in Part 12 of this Chapter, to:

(1) Consider and decide miscellaneous procedural motions that may be directed

to the Commission pursuant to Part 12 of these rules after the initial decision or other order disposing of the entire proceeding has been filed;

(2) Remand, with or without specific instructions, initial decisions or other orders disposing of the entire proceeding to the appropriate officer (Director of the Office of Proceedings, Judgment Officer, Proceedings Officer or Administrative Law Judge) in the following situations—

(i) Where a default order or award has been made pursuant to Part 12 of these rules and a motion to vacate the default or an equivalent request has been made; or

(ii) Where, in his judgment, clarification or supplementation of an initial decision or other order disposing of the entire proceeding prior to Commission review is appropriate; and

(iii) Where, in his judgment, a ministerial act necessary to the proper conduct of the proceeding has not been performed.

(3) Deny applications for interlocutory review by the Commission of a ruling of an Administrative Law Judge in cases in which the Administrative Law Judge has not certified the ruling to the Commission in the manner prescribed by § 12.309 of these rules, and the ruling does not concern the disqualification of, or a motion to disqualify, an Administrative Law Judge, Proceedings Officer, or Judgment Officer, or the suspension of, or failure to suspend, an attorney from participating in reparation proceedings;

(4) Dismiss any appeal from an initial decision or other disposition of the entire proceeding by an Administrative Law Judge (or Judgment Officer), in a proceeding where such appeal is not filed or perfected in accordance with § 12.401, and deny any application for interlocutory review if it is not filed in accordance with § 12.309 of these rules;

(5) Strike any filing that does not meet the requirements of, or is not perfected in accordance with, Part 12 of these rules; and

(6) Enter any order that, in his judgment, will facilitate or expedite Commission review of an initial decision or other order disposing of the entire proceeding.

(b) Notwithstanding the provisions of paragraph (a) of this section, in any case in which he believes it appropriate, the Chief of the Opinions Section may submit the matter to the Commission for its consideration.

(c) Within seven (7) days after service of a ruling issued pursuant to this § 12.408, a party may file with the Commission a petition for reconsideration of the ruling. Unless the

Commission orders otherwise, the filing of a petition for reconsideration shall not operate to stay the effective date of such ruling.

Issued in Washington, D.C., on February 15, 1984.

Jane K. Stuckey,

Secretary of the Commission.

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