

All of the commenters generally opposed the proposed rule. However, many of these commenters supported some aspects of the proposal. Seven of the commenters stated that the Department should experiment with adjudicatory proceedings conducted by telecommunication, two commenters praised the Department's effort to save money expended on adjudicatory proceedings, and two of the commenters supported the elimination of gender specific references.

The comments and our responses to those comments are as follows.

### 1. Constitutional Due Process

Ten commenters stated that a hearing conducted by telecommunication would violate the constitutional right to due process.

We disagree with these comments. Prior to drafting the proposed rule, we carefully examined whether hearings conducted by telecommunication provide a full and fair evidentiary hearing that comports with due process. We concluded that the due process clause does not preclude the use of telecommunication in adjudicatory proceedings.

The memorandum containing our analysis and findings was placed in the rulemaking record upon publication of the proposed rule. As we stated in that memorandum, due process is flexible and calls for such procedural protections as the particular situation demands. *Morrissey v. Brewer*, 408 U.S. 471 (1972). The courts have applied a balancing test that examines: (1) The private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Mathews v. Eldridge*, 424 U.S. 319 (1976).

The question of what process is due requires flexibility rather than an either/or analysis which assumes that either face-to-face oral hearings are always required or that face-to-face oral hearings are never required. The proposed rule provides such flexibility. Hearings would be conducted by telephone, audio-visual telecommunication, or by the personal attendance of any individual who is expected to participate in the hearing. Under the proposal, the person conducting the proceeding would determine which method of conducting the hearing is to be used in a particular

instance based, in part, on the need to conduct the hearing in a manner that would not prejudice any of the parties to the proceeding. (See proposed 7 CFR 1.141(b) (3) and (4), 1.168(b) (3) and (4), 47.15(c) (3) and (4), and 47.49(f) (2) and (3) and 9 CFR 202.112(a) (3) and (4).)

Despite our view that the proposal provides the person conducting the proceeding with sufficient flexibility to tailor the manner in which a hearing is conducted so that due process is provided, we have made changes that address the due process concerns raised by the commenters.

Specifically, the final rule provides that the hearings held under the Uniform Rules, the Capper-Volstead Rules, the PACA Reparation Rules, the PACA Responsibly Connected Rules, and the P&S Reparation Rules shall be conducted by audio-visual telecommunication unless the person conducting the proceeding determines that conducting the hearing by personal attendance of any individual who is expected to participate in the hearing: (1) Is necessary to prevent prejudice to a party; (2) is necessary because of a disability of any individual expected to participate in the hearing; or (3) would cost less than conducting the hearing by audio-visual telecommunication.

The person conducting the proceeding may, in his or her sole discretion or in response to a motion by a party to the proceeding, conduct the hearing by telephone only if the person conducting the proceeding finds that a hearing conducted by telephone: (1) Would provide a full and fair evidentiary hearing; (2) would not prejudice any party; and (3) would cost less than conducting the hearing by audio-visual telecommunication or personal attendance of any individual who is expected to participate in the hearing. (See 7 CFR 1.141(b) (3) and (4), 1.168(b) (3) and (4), 47.15(c) (3) and (4), and 47.49(f) (2) and (3) and 9 CFR 202.112(a) (3) and (4) in this final rule.)

### 2. Compliance with the Administrative Procedure Act

Four commenters stated that a hearing conducted by telecommunication would violate the Administrative Procedure Act. All four commenters stated that a hearing conducted by telecommunication would deprive the parties of their right to cross-examine witnesses in violation of 5 U.S.C. 556(d). Two commenters stated that a hearing conducted by telecommunication would deprive the judge of the ability to control the proceeding to ensure that only reliable evidence is received. One commenter stated that a hearing conducted by

telecommunication would deprive the parties of the right to participate in the hearing in violation of 5 U.S.C. 554(c) and the right to present oral or documentary evidence in violation of 5 U.S.C. 556(d).

We disagree with these comments. Prior to drafting the proposed rule, we carefully examined whether hearings conducted by telecommunication would violate the Administrative Procedure Act. We concluded that the Administrative Procedure Act does not preclude the use of telecommunication in adjudicatory proceedings. The memorandum containing our analysis and findings was placed in the rulemaking record upon publication of the proposed rule.

There is no provision in the Administrative Procedure Act that explicitly requires face-to-face adjudicatory hearings and we found nothing to indicate that Congress intended to exclude the use of telecommunication in adjudicatory proceedings conducted pursuant to the Administrative Procedure Act. As previously discussed in this rulemaking document, this final rule amends the Uniform Rules, the Capper-Volstead Rules, the PACA Reparation Rules, the PACA Responsibly Connected Rules, and the P&S Reparation Rules to provide that the hearings shall be conducted by audio-visual telecommunication unless the person conducting the proceeding determines that conducting the hearing by personal attendance of any individual who is expected to participate in the hearing: (1) Is necessary to prevent prejudice to a party; (2) is necessary because of a disability of any individual expected to participate in the hearing; or (3) would cost less than conducting the hearing by audio-visual telecommunication. A hearing conducted by audio-visual telecommunication allows full cross-examination with an ability to observe the demeanor of the witness; provides an opportunity to transmit and receive documents by the use of facsimile; provides for a prior exchange of exhibits; and allows the person conducting the proceeding full control of the course of the hearing. If a hearing conducted by telecommunication would not constitute a full and fair hearing, the person conducting the hearing may require a face-to-face hearing.

Further, the final rule provides that the person conducting the proceeding may, in his or her sole discretion or in response to a motion by a party to the proceeding, conduct the hearing by telephone only if the person conducting the proceeding finds that a hearing conducted by telephone: (1) Would