DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

12 CFR Parts 3, 4, 6, 19, 108, 109, 112, 150, and 165

[Docket ID OCC-2021-0007]

RIN 1557-AE33

FEDERAL RESERVE SYSTEM

12 CFR Parts 238 and 263

[Docket No. R-1766]

RIN 7100-AG26

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 308

RIN 3064-AF10

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Part 747

[NCUA 2021-0079]

RIN 3133-AF37

Rules of Practice and Procedure

AGENCY: Office of the Comptroller of the Currency, Treasury; Board of Governors of the Federal Reserve System; Federal Deposit Insurance Corporation; National Credit Union Administration.

ACTION: Final rule.

SUMMARY: The Comptroller of the Currency (OCC), Board of Governors of the Federal Reserve System (Board), Federal Deposit Insurance Corporation (FDIC), and the National Credit Union Administration (NCUA) (collectively, the Agencies) are adopting final changes to the Uniform Rules of Practice and Procedure (Uniform Rules) to recognize the use of electronic communications in all aspects of administrative hearings and to otherwise increase the efficiency and fairness of administrative adjudications. The OCC, Board, and FDIC are also modifying their agency-specific rules of administrative practice and procedure (Local Rules). The OCC also is integrating its Uniform Rules and Local Rules so that one set of rules applies to both national banks and Federal savings associations and amending its rules on organization and functions to address service of process.

DATES: The rule is effective on January 1, 2024.

FOR FURTHER INFORMATION CONTACT: *OCC*: MaryAnn Nash, Counsel, and Heidi Thomas, Special Counsel, Chief Counsel's Office, (202) 649-5490. *If you are deaf, hard of hearing, or have a speech disability, please dial 7-1-1 to access telecommunications relay services. Board*: David Williams, Associate General Counsel, david.williams@frb.gov, (202) 452-3973, and Héctor G. Bladuell, Senior Counsel, Legal Division, hector.g.bladuell@frb.gov, (202) 452-2491. *FDIC*: Heather M. Walters, Counsel, Legal Division, hewalters@fdic.gov, (202) 898-6729 and Michael P. Farrell, Counsel, Legal Division, mfarrell@fdic.gov, (703) 340-9201. For users of Telecommunications Device for the Deaf (TDD) only, contact (202) 263-4869. *NCUA*: Damon P. Frank, Senior Trial Attorney, and John H. Brolin, Senior Staff Attorney, Office of General Counsel, at (703) 518-6540.

SUPPLEMENTARY INFORMATION:

I. Background

Section 916 of the Financial Institutions Reform, Recovery and Enforcement Act of 1989, Pub. L. 101-73, 103 Stat. 183 (1989), required the Agencies, together with the Office of Thrift Supervision (OTS), to develop uniform rules and procedures for administrative hearings. In August 1991, the Agencies and OTS each adopted final Uniform Rules as well as Local Rules specific to each agency.[1] Based on the experience gained in administrative hearings, the Agencies, together with OTS, modified the Uniform Rules and Local Rules in 1996.[2]

The Uniform Rules and Local Rules have remained largely unchanged since the 1996 amendments, while the practice of administrative hearings has changed fundamentally with the introduction of electronic communication and transmission. The current Uniform Rules were promulgated at a time when the Agencies accepted only paper pleadings. However, beginning in 2005, the Office of Financial Institution Adjudication (OFIA) established a dedicated electronic mailbox to accept electronic pleadings and service and, by 2006, paper pleadings were virtually eliminated in administrative hearings. Without rules in place to address electronic pleadings, the

[1] The Agencies, together with the OTS, issued a joint notice of proposed rulemaking on June 17, 1991 (56 FR 27790). Each agency issued a final rule on the following dates: OCC on August 9, 1991 (56 FR 38024); Board on August 9, 1991 (56 FR 38052); FDIC on August 9, 1991 (56 FR 37968); and NCUA on August 8, 1991 (56 FR 37767). The OTS, whose rules and procedures were transferred to the OCC, the Board, and the FDIC in 2011, published its rules on August 12, 1991 (56 FR 38317). The Agencies' rules are codified at 12 CFR part 19, subpart A (OCC); 12 CFR part 263, subpart A (Board); 12 CFR part 308, subpart A (FDIC); and 12 CFR part 747, subpart A (NCUA).

[2] 61 FR 20330, May 6, 1996.

Administrative Law Judges (ALJs) opted to dictate procedures pertaining to electronic filing and other items on an ad hoc basis in their scheduling orders.

The Agencies issued a proposed rule on April 13, 2022, to update and modernize the Uniform Rules as well as the Local Rules of the OCC, FDIC, NCUA, and the Board. The Agencies did not receive any substantive comments on the Uniform Rules or the Agencies' Local Rules. Therefore, for the reasons stated in the preamble to the proposed rule, the Agencies are publishing the Uniform and Local Rules without substantive change.[3]

In this final rule,

- The Agencies are amending the Uniform Rules to recognize electronic pleadings and communications in administrative hearings and to reflect the experience of the Agencies in administrative litigation.
- The OCC and the NCUA are also removing from the Uniform Rules the remaining references to the OTS, which was abolished in 2011.[4]
- The OCC, Board, and FDIC are each amending certain sections of their Local Rules that they believe should be updated, improved, or clarified.
- The OCC is consolidating its Uniform and Local Rules by applying part 19 to both national bank- and Federal savings association-related proceedings and investigations; removing its separate enforcement-related

[3] Although the proposed rule provided common rule text for the Uniform Rules and line amendments to the Local Rules, this final rule publishes each agency's rule as amended in full.

[4] The FDIC removed references to the OTS and updated its rules to include State savings associations by Final Rule on January 30, 2015 (80 FR 5009). The Board similarly removed references to the OTS from its definitions and updated its rules to include savings and loan holding companies on September 13, 2011 (76 FR 56603).

rules for Federal savings associations, 12 CFR parts 108, 109, 112, and 165; and making corresponding technical changes to parts 3, 6, and 150.

- The OCC is amending 12 CFR part 4, subpart A, Organization and Functions, to add a new § 4.8 that addresses service of process.

II. Applicability Date

As indicated in the proposed rule, the amendments made by this final rule to the Uniform Rules as well as to certain provisions of the Agencies' Local Rules will apply to adjudicatory proceedings initiated on or after the effective date of this final rule, January 1, 2024. The Agencies' rules that were in effect prior to January 1, 2024, will continue to apply to adjudicatory proceedings initiated before January 1, 2024. This timing ensures that parties to Agency adjudicatory proceedings have adequate notice of the rules governing those proceedings.

For the OCC, § 19.0 provides that the rules of practice and procedure set forth in subparts A through D and H, I, J, L, M, N, P, and Q apply to adjudicatory proceedings initiated on or after the effective date of this final rule, January 1, 2024. Rules applicable to national banks, Federal savings associations, or Federal branches and agencies that were in effect prior to January 1, 2024, continue to apply to adjudicatory proceedings initiated before January 1, 2024, unless otherwise stipulated by the parties.

The OCC has made a few technical changes to its proposed transition provision. First, the OCC has moved this provision from proposed subpart R in part 19 to new § 19.0 so that information about applicability of the revised rules for practice and procedure is more prominently placed. Second, the OCC has changed the title of the provision from "effective date" to "applicability date" for accuracy. Third, the OCC has made some

minor wording changes for internal consistency. Fourth, the OCC has included the text of part 19 as in effect the day before the final rule's effective date, January 1, 2024, as appendix A to part 19 so that parties may reference the rules that apply to proceedings initiated before January 1, 2024. Lastly, the OCC has amended the transition provision to permit parties to proceedings initiated before January 1, 2024, to stipulate that the revised rules apply to such proceedings so that they are able to take advantage of the updated provisions.

For the Board, the revised Uniform Rules and Local Rules in subpart B of part 263 apply only to adjudicatory proceedings initiated on or after the effective date of this final rule, January 1, 2024. The previous version of these rules, which are included in appendix A to part 263 of this final rule, are applicable to all adjudicatory proceedings initiated before January 1, 2024.

The FDIC included a new § 308.0 as a technical change to clarify the applicability date of the revised Uniform Rules set forth in subpart A. The newly revised Uniform Rules only apply to adjudicatory proceedings initiated on or after the effective date of this final rule, January 1, 2024. Any adjudicatory proceedings initiated before January 1, 2024, continue to be governed by the previous version of the Uniform Rules, which are included in appendix A to part 308 of this final rule.

The NCUA has added to its existing § 747.0, as a technical change, to make clear that the revised Uniform Rules apply to adjudicatory proceedings initiated on or after the effective date of this final rule, January 1, 2024.

III. Section-by-Section Discussion of Amendments to the Uniform Rules

Although the discussion of these amendments is arranged as for a common rule, the Agencies are adopting the amendments individually. The Agencies have codified the Uniform Rules as follows: 12 CFR part 19, subpart A (OCC); 12 CFR part 263, subpart A (Board); 12 CFR part 308, subpart A (FDIC); and 12 CFR part 747, subpart A (NCUA).

General Comments

The final rule replaces gender references such as "him or her," "his or her," and "himself or herself" with gender-neutral terminology, where appropriate. Consistent with *Federal Register* drafting guidelines,[5] the Agencies have replaced the word "shall" throughout the final rule with the terms "must," "will," or other appropriate language. Finally, the Agencies have replaced the term "administrative law judge" with the abbreviation "ALJ" for "administrative law judge," as this abbreviation is commonly used and understood. These changes appear throughout the Uniform Rules and will not be discussed further in the individual sections.

Section __.1 Scope

Section __.1 lists the types of adjudicatory proceeding to which the Uniform Rules apply. The final rule updates the list of civil money penalty proceedings covered by the Uniform Rules described in §__.1(e) to include section 5, section 9, and section 10 of the Home Owners' Loan Act (HOLA).[6] These sections of the HOLA are applicable to Federal savings associations now supervised by the OCC, State-chartered savings associations now supervised by the FDIC, and savings and loan holding companies

[5] National Archives, Federal Register Writing Resources for Federal Agencies: Drafting Legal Documents, https://www.archives.gov/federal-register/write/legal-docs/clear-writing.html.

[6] The Board made these updates on September 13, 2011 (76 FR 56603).

supervised by the Board. The final rule also adds a reference to "the former Office of Thrift Supervision" in the OCC's § 19.1(e)(10) to clarify that the Uniform Rules will apply to civil money proceedings for violations of orders issued, written agreements executed, and conditions imposed in writing by OTS.

Section ___.2 Rules of Construction

Section __.2 of the Uniform Rules sets forth the rules of construction for the Uniform Rules. The final rule amends this section to eliminate §__.2(b), which provides that any use of masculine, feminine, or neuter gender encompasses all three, if such use would be appropriate. The final rule replaces all gender references such as "him or her," "his or her," and "himself or herself" with gender-neutral terminology; thus, this provision is no longer necessary.

Section ___.3 Definitions

Section __.3 of the Uniform Rules includes definitions applicable to the Uniform Rules and, unless otherwise specified, the Local Rules. The final rule now defines the term "electronic signature" because §__.7 of the final rule provides that electronic signatures may be used to satisfy the good faith certification requirement. In their respective final rules, the Agencies have replaced the definition of violation in §__.3 with a cross-reference to the identical definition in section 3(v) of the Federal Deposit Insurance Act (FDIA), 12 U.S.C. 1813(v).[7] The final rule also eliminates legacy references to the Office of Thrift Supervision in the definition of "OFIA" and the definition of "Uniform Rules."

[7] The NCUA included this updated definition of violation in the proposed rule and is adopting the same wording in the final rule. The discussion in the preamble to the proposed rule inadvertently omitted reference to the NCUA making this change along with the OCC, Board, and FDIC.

The definition of "institution" in the OCC's final rule now includes the term "Federal savings association" in order to make the Uniform Rules and the OCC's Local Rules in part 19 of title 12 applicable to Federal savings associations, which have been regulated by the OCC since 2011.[8]

The Board's final rule adds "nonbank financial companies" and "financial market utilities" designated by the Financial Stability Oversight Council to its definition of "institution" to clarify that the Uniform Rules are applicable to these entities, which are supervised by the Board pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act).[9] In addition, the Board's final rule clarifies that organizations operating under section 25A of the Federal Reserve Act, Federal and State "branches," as well as "agencies" as defined in section 1(b) of the International Banking Act, and "any other entity subject to the supervision of the Board," are included in its definition of "institution." Finally, the Board's final rule replaces the word "savings association" with "depository institution" in 12 CFR 263(f)(6) to conform this language to the language in 12 U.S.C. 1818(b)(3).

Section __.5 Authority of the administrative law judge (ALJ)

Section __.5 of the Uniform Rules addresses the authority of the ALJ. The final rule amends §__.5(b)(2) to add the term "other orders" to the list of specific orders an ALJ is authorized to issue, quash, or modify. This change clarifies that the authority of the ALJ to issue orders is not limited to subpoenas, subpoenas *duces tecum*, and protective orders and may include other types of orders that are not enumerated in this

[8] As described elsewhere in this *Supplementary Information*, the OCC is removing its Uniform Rules and Local Rules applicable to Federal savings associations, parts 108, 109, 112, and 165 of title 12.

[9] Pub. L. 111-203, 124 Stat. 1376 (2010).

section. The final rule also amends §__.5(b)(11) to change the term "presiding officer" to "ALJ" to avoid confusion and clarify that the ALJ has the powers necessary and appropriate to discharge the duties of this role.

Section __.6 Appearance and practice in adjudicatory proceedings

Section __.6 of the Uniform Rules addresses appearance and practice in adjudicatory proceedings. The final rule amends § __.6(a)(2) to state simply that an individual may appear on their own behalf. This change eliminates language that is duplicative and unnecessary to the meaning of the provision. The final rule also amends §__.6(a)(3) to include a requirement that a notice of appearance include a written acknowledgment that the individual has reviewed and will comply with the Uniform Rules and Local Rules. This requirement ensures that representatives appearing in the proceeding are informed of the rules that govern the proceedings.

Section __.7 Good faith certification

Section __.7 of the Uniform Rules addresses the requirement for good faith certification for every filing or submission of record following the issuance of a notice. The final rule amends §__.7(a) to require that the counsel of record, including an individual who acts as their own counsel, include a mailing address, an electronic mail address, and a telephone number with every certification. The final rule also amends this section to permit electronic signatures to satisfy the signature requirements of the certification. These changes conform the rules to the current practice of electronic filing.

Section __.9 Ex parte communications

Section __.9 of the Uniform Rules addresses *ex parte* communications in administrative proceedings. The final rule amends §__.9(c) to clarify that upon the

occurrence of *ex parte* communication, the ALJ or the Agency Head must determine whether any action in the form of sanctions should be taken concerning the *ex parte* communication. The final rule amends §___.9(e)(1) to better align it with section 5 of the Administrative Procedure Act, 5 U.S.C. 554(d). Specifically, the final rule adds language stating that the ALJ may not consult with a person or party on a fact in issue without giving all parties notice and an opportunity to participate and may not be responsible to or subject to the supervision or direction of an employee agent engaged in the performance of investigative or prosecuting functions for any of the Agencies. Finally, the final rule amends §___.9(e)(2) to refer to administrative or judicial proceedings rather than public proceedings to better describe the type of proceedings subject to the rule.

Section __.10 Filing of papers

Section __.10 of the Uniform Rules addresses the requirements for the filing of papers. The final rule amends and renumbers §__.10(b) to remove an outdated section on rules governing transmission by electronic media and replace it with a section stating that filing may be accomplished by electronic mail or other electronic means designated by the Agency Head or the ALJ. The final rule amends §___.10(b) to eliminate references to specific carriers and names of mail delivery services and instead refer generally to same day courier services and overnight delivery services. The final rule amends §__.10(c), which addresses the formal requirements as to papers filed, to require papers to include the mailing address, electronic mail address, and telephone number of the counsel or party making the filing. Finally, the final rule eliminates §__.10(c)(4), which required the filing of an original and one copy of each filing and is no longer necessary, given that the vast majority of papers are filed electronically, consistent with current adjudicatory

practice. The final rule retains the existing methods of filing by paper, such as personal service, same day courier, overnight delivery, and mail, with appropriate modifications of the descriptions of those methods to conform to current terminology and standards for delivery.

Section __.11 Service of papers

Section __.11 of the Uniform Rules addresses the requirements for service of papers. The modifications to §__.11 provide for electronic filing, where appropriate, and simplify and update the descriptions for other, non-electronic, means of filing. The final rule amends §__.11(b) to add service by electronic mail or other electronic means as a method for serving papers, consistent with current practice. The final rule retains the existing methods of service by paper, such as personal service, same day courier, overnight delivery, and mail, and replaces references to specific carriers and delivery services with general references to same day courier service and overnight delivery service. The final rule also amends §__.11(c)(1) to require that all papers required to be served by the Agency Head or the ALJ upon a party that has appeared in the proceeding will be served by electronic mail or other electronic means designated by the Agency Head or the ALJ. For parties that have not appeared in the proceeding in accordance with §__.6, the final rule preserves the option for non-electronic methods of service and modifies the descriptions of some of those methods to conform to current terminology and standards for delivery. Finally, in §__.11(d), the final rule generally retains the existing methods for the service of subpoenas with appropriate modifications to the descriptions of the methods to conform to current terminology and standards for delivery.

Section __.12 Construction of time limits

Section __.12 of the Uniform Rules addresses the construction of time limits. The final rule amends §__.12(b), which addresses when papers are deemed to be filed or served, to provide that in the case of transmission by electronic mail or other electronic means, filing and service are deemed to be effective upon transmittal by the serving party. The final rule retains the existing times for non-electronic methods of filing and service and updates the descriptions of these methods to make them consistent with the updated descriptions in §§__.10 and __.11. The final rule amends §__.12(c), which addresses the calculation of time for service and filing of responsive papers, to provide that in the case of service by electronic mail or other electronic means, the time limits are calculated by adding one calendar day to the prescribed period. Finally, the final rule provides for the addition of two calendar days, rather than one, in the case of service by overnight delivery service and retains the language providing for the addition of three calendar days for service made by mail.

Section __.14 Witness fees and expenses

Section __.14 of the Uniform Rules addresses witness fees and expenses in administrative proceedings. The final rule amends §__.14 to clarify the general rule, in §__.14(a), that all witnesses, including an expert witness who testifies at a deposition or hearing, will be paid the same fees for attendance and mileage as are paid in the United States district courts in proceedings in which the United States is a party. The final rule also adds language in §__.14(b) to clarify that the Agencies are not required to pay witness fees and mileage for testimony by a party. The final rule retains the current language governing the timing of witness payments in a new §__.14(c).

Section __.15 Opportunity for informal settlement

Section __.15 of the Uniform Rules addresses the rules and process for informal settlement once a proceeding has been initiated. The final rule revises this section to more plainly express the existing rule that an offer or proposal for informal settlement may only be made to Enforcement Counsel.

Section __.18 Commencement of proceeding and contents of notice

Section __.18(a) of the Uniform Rules governs the commencement of administrative proceedings. The final rule amends §__.18(a)(1)(ii) to provide that Enforcement Counsel serves the notice upon the respondent to begin proceedings.[10] The final rule also amends this section to provide that Enforcement Counsel may serve the notice upon counsel for the respondent, rather than the respondent, provided that counsel for the respondent has confirmed that counsel represents the respondent in the matter and will accept service of the notice on behalf of the respondent. By requiring counsel to confirm representation of a respondent, the Agencies hope to clarify when it is appropriate to serve notice on an individual who purports to represent the respondent. Finally, the final rule amends §__.18(a)(1)(iii) to make it clear that Enforcement Counsel files the notice with OFIA.[11]

Section __.18(b) of the Uniform Rules addresses the contents of the notice in administrative proceedings. The final rule amends §__.18(b) to provide that notice pleading applies in administrative proceedings, meaning that a notice need only provide a short and plain statement of the claim(s) showing that the agency is entitled to relief. The

[10] The FDIC has already made this change in its version of the Uniform Rules in connection with amendments that became effective on January 12, 2021.

[11] The NCUA is deleting from part 747 the reference to change-in-control proceedings under 12 U.S.C. 1817(j), which does not apply to credit unions or the NCUA. The NCUA is making the same deletion in §__.33.

final rule also makes a technical change to §__.18(b)(2) to change the description from "a statement of the matters of fact or law showing the [Agency] is entitled to relief" to simply "matters of fact or law showing that the [Agency] is entitled to relief." The Agencies believe the reference to "a statement" in this section has no substantive meaning and, thus, have removed it.

Section __.19 Answer

Section __.19 of the Uniform Rules sets out the requirements for an answer in an administrative proceeding. The final rule amends §__.19(c)(2) to provide that if a respondent fails to request a hearing as required by law within the applicable time frame, the notice of assessment constitutes a final and unappealable order, in accordance with 12 U.S.C. 1818(i)(2)(E)(ii) and 12 U.S.C. 1786(k)(2)(E)(ii), without further action by the ALJ. In the past, there has been confusion about whether any additional action on the part of the ALJ is required in this situation, and this language clarifies that no further action is necessary.

Section __.24 Scope of document discovery

Section __.24 of the Uniform Rules addresses the scope of discovery in an administrative proceeding and §__.24(a) addresses limitations on discovery. The final rule updates the definition of the term "documents" in §__.24(a)(1) to include not only writings, drawings, graphs, charts, photographs, and recordings, but electronically stored information and data or data compilations stored in any medium from which information can be obtained. This expanded definition of the term "document" is necessary to account for the range of digital information now available. The final rule amends §__.24(a)(3) to clarify that discovery by the use of either interrogatories or requests for admission is not

permitted. The final rule moves the paragraph on relevance currently in §__.24(b) to a new §__.24(a)(4) because that provision functions as a limitation on discovery. The final rule amends §__.24(c) to clarify the list of privileges applicable to otherwise discoverable documents. In addition to the attorney-client privilege and the work-product doctrine, the proposed language would also specifically identify the bank examination privilege and the law enforcement privilege and exclude those privileged documents from discovery. Finally, the final rule adds language to §__.24(d) to provide that document discovery, including all responses to discovery requests, must be completed by the date set by the ALJ and no later than 30 days prior to the date scheduled for the commencement of the hearing. This language recognizes the role of the ALJ in establishing a schedule for discovery while also providing for discovery to be completed earlier in the hearing process.

Section __.25 Request for document discovery from parties

Section __.25 of the Uniform Rules addresses requests for document discovery from parties in administrative proceedings. The final rule replaces the heading "General rule" with "Document requests" in §__.25(a) to better identify the subject matter of the section. The final rule amends §__.25(a) to add a paragraph (a)(1) stating that a party may serve on another party a request not only to produce discoverable documents but to permit the requesting party or its representative to inspect or copy discoverable documents that are in the possession, custody, or control of the party upon whom the request is served. It has been the practice of parties in administrative proceedings to permit the inspection and copying of discoverable documents, and this language formalizes that practice. The final rule includes language to provide that a party

responding to a request for inspection may produce copies of documents or electronically stored information instead of permitting inspection. In many cases, providing documents or electronically stored information directly is more efficient than permitting inspection, and this amendment preserves the right of a responding party to make that choice. The final rule includes a new paragraph (a)(2) to simplify the language that previously appeared in §__.25(b) regarding the identification of documents to be produced and require that any request describe with reasonable particularity each item or category of items to be inspected and specify a reasonable time, place, and manner for the inspection or production.

The final rule amends the rules governing production or copying, as set out in a new §__.25(b)(1), to require that, unless a particular form is specified by the ALJ or agreed upon by the parties, the producing party must produce copies of documents as they are kept in the usual course of business or organized to correspond to the categories of the request, and produce electronically stored information in a form in which it is ordinarily maintained or in a reasonably usable form. The Agencies recognize that the ways in which electronically stored information may be stored and transmitted may change over time and are adopting the reasonably usable standard for electronically stored information to provide flexibility.

The final rule simplifies the rules associated with the costs of document production in a new §__.25(b)(2), which requires the producing party to pay its own costs to respond to a discovery request unless otherwise agreed by the parties. This language eliminates the earlier requirement that a requesting party prepay the producing party for

certain costs while also allowing the parties to agree to share costs, as appropriate in a particular case.

The final rule modifies the time limits for motions to limit discovery in §__.25(d). In §__.25(d)(1), the final rule extends the time limit for a party to object to a discovery request from within ten to within 20 days of being served with such a request. In §__.25(d)(2), the final rule extends the time limit for a party to file a written response from within five to within ten days of service of the motion. Additional time allows the parties to digest such requests and engage with each other to narrow the scope of the request before having to file a motion with the ALJ. The Agencies believe that parties making motions to limit discovery and responding to motions to limit discovery will benefit from additional time to review and respond to such requests.

Finally, the final rule amends §__.25(e) to specify the available privileges that may be asserted in connection with a request for production. The section now includes attorney-client privilege, attorney work-product doctrine, bank examination privilege, law enforcement privilege, any government deliberative process privilege, other privileges of the Constitution, any applicable act of Congress, and other principles of common law as grounds for withholding documents.

Section __.26 Document subpoenas to nonparties

Section __.26 of the Uniform Rules addresses document subpoenas to third parties in administrative proceedings. The final rule amends §__.26(b)(1) to provide that a person to whom a document subpoena is directed may file a motion to quash or modify such subpoena with the ALJ. This amendment clarifies to whom the motion to quash should be directed.

Section __.27 Deposition of witness unavailable for hearing

Section __.27 of the Uniform Rules addresses the deposition of witnesses unavailable for an administrative hearing. The final rule amends §__.27(a)(2) to require that the application for a subpoena state the manner in which the deposition is to be taken, in addition to the time and place, and provide explicitly that a deposition may be taken by remote means. These changes modernize the rules and conform the rules to existing practice. The final rule simplifies §__.27(a)(4) by eliminating unnecessary language related to where subpoenas may be served. In order to further provide for remote depositions, the final rule amends §__. 27(c)(1) to provide that a court reporter or other person authorized to administer an oath may administer the oath remotely without being in the physical presence of the deponent, by stipulation of the parties or order by the ALJ. The final rule amends §__.27(d) to clarify that if a subpoenaed person fails to comply with any subpoena issued pursuant to this section the aggrieved party may apply to the appropriate United States district court for an order requiring compliance with the portions of the subpoena with which the subpoenaed party has not complied. Finally, the final rule replaces an inaccurate cross-reference to paragraph (c)(3) with a correct reference to paragraph (c)(2).

Section __.29 Summary disposition

Section __.29 of the Uniform Rules addresses summary disposition. The final rule modifies §__.29(c) to provide that a request for a hearing on a motion must be made in writing. The new language formalizes the process of requesting a hearing and increases the clarity of the process.

Section __.31 Scheduling and prehearing conferences

Section __.31 of the Uniform Rules addresses scheduling and prehearing conferences. The final rule amends §__.31(a) to clarify that the prehearing conference must be set within 30 days of service of the notice or an order commencing a proceeding and eliminate the option in the current rule for the parties to agree on another time. The final rule also adds language to clarify that it is a schedule for discovery, and not actual discovery, that the parties may determine at the scheduling conference. Finally, the final rule eliminates references to "telephone" conferences in order to make the provision more technologically neutral.

Section __.32 Prehearing submissions

Section __.32 of the Uniform Rules addresses prehearing submissions. The final rule amends §__.32(a) to extend the time for a party to file prehearing submissions with the ALJ from 14 days to 20 days before the start of the hearing. This change will give the parties more flexibility in completing their filings. The final rule further amends §__.32 to update the required prehearing submissions and §__.32(a)(1) to require the submission of a prehearing statement that states the party's position with respect to the legal issues presented, the statutory and case law upon which the party relies, and the facts the party expects to prove at the hearing. The final rule amends §__.32(a)(2) to require that the final list of witnesses include the name, mailing address, and electronic mail address for each witness and to clarify that the list of witnesses need not identify the exhibits to be relied upon by each witness at the hearing and that the list of exhibits should be a list of exhibits expected to be introduced at the hearing.

Section __.35 Conduct of hearings

Section __.35 of the Uniform Rules addresses the conduct of administrative hearings. The final rule adds a new §__.35(c) to provide rules governing electronic presentations in a hearing. The new language provides that the ALJ may direct the use of, or any party may use, an electronic presentation during the hearing. If an ALJ requires an electronic presentation, each party will be responsible for their own presentation or related costs unless the parties agree to another manner in which to allocate responsibilities and costs. This new language accounts for electronic presentations that are not addressed in the existing rules but are used routinely in hearings.

Section __.36 Evidence

Section __.36 of the Uniform Rules sets forth the rules governing evidence in an adjudicatory proceeding. The final rule amends §__.36(d)(2) to refer to "direct questioning" rather than "direct interrogation" of witnesses in order to clarify, in plain language, the meaning of this section.

IV. Section-by-Section Discussion of Amendments to the Local Rules of Each Agency

A. *Amendments to OCC Local Rules*

Part 19, subparts B through P, address local rules of practice and procedure specific to OCC investigations, hearings before the OCC, and other OCC-related proceedings involving national banks. The corresponding rules for Federal savings association-related proceedings and investigations, transferred from the former OTS to the OCC by the Dodd-Frank Act, are set forth at 12 CFR parts 108, 109, 112, and 165. Many of the national bank and Federal savings association-related provisions are similar, but in some cases no corresponding rule exists or one set of rules provides more

specificity than the other. The final rule consolidates these rules by applying part 19 to both national bank- and Federal savings association-related proceedings and investigations and removes parts 108, 109, 112, and 165. The final rule also amends the Local Rules to add certain provisions of the Federal savings association rules that are not currently included in part 19 but that the OCC believes should apply to both Federal savings associations and national banks. In addition, the final rule reorganizes certain rules in part 19, including subparts D, E, F, and G relating to actions under the Federal securities laws; adds new provisions addressing the Equal Access to Justice Act (EAJA); and adds a new subpart Q addressing the forfeiture of a national bank, Federal savings association, or Federal branch and agency charter or franchise for certain money laundering or cash transaction offenses.

The amendments to the OCC's Local Rules are discussed below.

Subpart B—Procedural Rules for OCC Adjudications

19.100 -- Filing documents

Current §§ 19.100 and 109.104(g) require that all filings with or referred to the Comptroller or ALJ in any proceeding under parts 19 or 109, respectively, be filed with the OCC Hearing Clerk. The two provisions are substantively the same except that § 19.100 provides a more detailed description of the types of filings to which the regulation applies. As a result of the final rule's application of part 19 to Federal savings associations and removal of part 109, § 19.100 applies to filings in Federal savings association-related proceedings as of the final rule's effective date, January 1, 2024. Furthermore, the final rule amends § 19.100 to remove the OCC filing street address and to require the filing to be made in a manner prescribed by § 19.10(b) and (c). Sections

19.10(b) and (c) prescribe the permissible filing methods and list form and content requirements for filing papers with the OCC. As amended by this final rule, filings are permitted by electronic mail or other electronic means designated by the Comptroller or the ALJ as of the final rule's effective date, January 1, 2024. Lastly, the final rule amends the current provision to clarify that the materials filed include any attachments or exhibits to the listed documents.

19.101 Delegation to OFIA

Both current §§ 19.101 and 109.101 provide that an ALJ at the Office of Financial Institution Adjudication (OFIA) will conduct actions brought under the respective subpart A rules. As a result of the final rule's application of part 19 to Federal savings associations, § 19.101 applies to adjudicatory actions brought against either national banks or Federal savings associations as of the final rule's effective date, January 1, 2024. The final rule makes one stylistic revision to § 19.101 to remove the passive sentence structure.

19.102 Civil money penalties

The final rule adds a new § 19.102 that incorporates parts of § 109.103(b), which provides rules for the payment of civil money penalties. The national bank rules currently do not address this topic with specificity, and the OCC has determined that these provisions, which clarify when parties must pay civil money payments, should apply to both national banks and Federal savings associations. As a result of this amendment, respondents are required to pay civil money penalties assessed pursuant to subpart A of part 19 within 60 days after the issuance of the notice of assessment, unless the OCC requires a different time for payment. If a respondent has made a timely request for a

hearing to challenge the assessment of the penalty, the respondent is not required to pay the penalty until the OCC has issued a final order of assessment. In such instances, the respondent is required to pay the penalty within 60 days of service of the final order unless the OCC requires a different time for payment.

Subpart C—Removals, Suspensions, and Prohibitions When a Crime Is Charged or a Conviction is Obtained

Current subpart C of part 19 includes the rules applicable in hearings brought against any institution-affiliated party[12] who the OCC has suspended or removed from office or prohibited from further participation in the affairs of a depository institution pursuant to section 8(g) of the FDIA (12 U.S.C. 1818(g)). Part 108 applies similar rules to officers, directors, or other persons participating in the conduct of the affairs of a Federal savings association, Federal savings association subsidiary, or affiliate service corporation, although part 108 differs slightly on certain procedural issues. As described below, the final rule amends subpart C to incorporate certain provisions of part 108 that are helpful to the OCC in these adjudicatory actions, specifically to apply amended subpart C to both national banks and Federal savings associations and remove part 108. Although part 108 does not use the term "institution-affiliated party," the OCC believes

[12] "Institution-affiliated party," as defined in current § 19.3 and in this final rule by reference to section 3(u) of the FDIA (12 U.S.C. 1813(u)), means: (1) any director, officer, employee, or controlling stockholder (other than a bank holding company or savings and loan holding company) of, or agent for, an insured depository institution; (2) any other person who has filed or is required to file a change-in-control notice with the appropriate Federal banking agency under 12 U.S.C. 1817(j); (3) any shareholder (other than a bank holding company or savings and loan holding company), consultant, joint venture partner, and any other person as determined by the appropriate Federal banking agency who participates in the conduct of the affairs of an insured depository institution; and (4) any independent contractor (including any attorney, appraiser, or accountant) who knowingly or recklessly participates in any violation of any law or regulation, any breach of fiduciary duty, or any unsafe or unsound practice which caused or is likely to cause more than a minimal financial loss to, or a significant adverse effect on, the insured depository institution.

that the scope of part 108 is similar in substance to this term as defined in § 19.3 by reference to the FDIA.

19.110 Scope

The final rule amends § 19.110 to include a definitions section for subpart C similar to the one for Federal savings associations in § 108.2 to enhance the understanding and application of the regulation and simplify the regulatory text. New § 19.110(b) defines "petitioner" to mean an individual who has filed a petition for informal hearing under subpart C; "depository institution" to mean any national bank, Federal savings association, or Federal branch of a foreign bank; and "OCC Supervisory Office" to mean the Senior Deputy Comptroller or Deputy Comptroller of the OCC department or office responsible for supervision of the depository institution, or, in the case of an individual no longer affiliated with a particular depository institution, the Deputy Comptroller for Special Supervision. Furthermore, the final rule labels the existing paragraph in § 19.110 as § 19.110(a), Scope, and retitles the section heading to account for the addition of definitions.

19.111 Suspension, removal, or prohibition

The final rule reorganizes § 19.111 into paragraphs; retitles the section heading, as well as the subpart, to clarify that it applies to institution-affiliated parties; and removes passive sentence structure. In newly designated § 19.111(a), the final rule corrects an omission in current § 19.111, which provides that the Comptroller may serve a notice of suspension or order of removal or prohibition pursuant to 12 U.S.C. 1818(g) on an institution-affiliated party and must serve a copy of this notice or order on the appropriate depository institution. Because 12 U.S.C. 1818(g) also provides for a notice

of prohibition, the final rule adds a reference to this notice of prohibition to this paragraph. In addition, as in § 108.4, newly designated § 19.111(a) specifies the manner of service by the Comptroller, providing that the Comptroller serve the notice or order in the manner set forth in § 19.11, Service of papers. The final rule also moves the information regarding a request for a hearing by the institution-affiliated party to a separate § 19.111(b); adds the ability to send the hearing request by same day courier service or overnight delivery service, in addition to by certified mail or by personal service with a signed receipt as provided under the current rule; and adds the caveat that this submission rule applies unless instructed otherwise by the Comptroller. This revision also utilizes the newly defined term "OCC Supervisory Office."

In addition, the final rule includes in § 19.111(b)(2) a provision similar to § 108.5(b) that requires an institution-affiliated party in a request for a hearing to admit or deny each allegation, or state that they lack sufficient information to admit or deny each allegation, which has the effect of a denial. Section 19.111(b)(2) also provides that denials must fairly meet the substance of each allegation denied and that general denials are not permitted; when the institution-affiliated party denies part of an allegation, that part must be denied and the remainder specifically admitted; and any allegation in the notice or order which is not denied is deemed admitted for purposes of the proceeding. Furthermore, similar to § 108.5(c), § 19.111(b)(2) provides that the request must state with particularity how the institution-affiliated party intends to show that its continued service to or participation in the affairs of the institution would not pose a threat to the interests of the institution's depositors or impair public confidence in any institution. The OCC believes that adopting these provisions from the Federal savings association

regulation will help narrow the issues to be contested and make § 19.111 more consistent with the adjudicatory rule in § 19.19.

Furthermore, the final rule adds the default provision included in § 108.8 to § 19.111, as new paragraph (c). Under this new paragraph, if the institution-affiliated party fails to timely file a petition for a hearing pursuant to § 19.111(b), fails to appear at a hearing either in person or by attorney, or fails to submit a written argument where oral argument has been waived pursuant to § 19.112(c), the notice of suspension or prohibition will remain in effect until the information, indictment, or complaint is finally disposed of and the order of removal or prohibition will remain in effect until terminated by the OCC. The OCC believes the application of this provision to national banks will clarify that there are consequences if a petitioner fails to appear or fails to answer.

19.112 Informal hearing

The final rule makes a number of changes to § 19.112, which provides the procedures for informal suspension or removal hearings before the OCC involving an institution-affiliated party. In § 19.112(a), the final rule updates the name of the OCC's Enforcement and Compliance Division to OCC Enforcement. The final rule also removes the requirement in this paragraph that the OCC Supervisory Office notify the appropriate OCC District Counsel of the hearing, as this is an unnecessary step.

In § 19.112(c)(2), the final rule adds language to clarify that, when responding to a petitioner's submissions, the OCC serves other parties in the manner set forth in § 19.11(c).

In § 19.112(d), the final rule amends paragraph (d)(2), which provides that the informal hearing is not governed by formal rules of evidence, to clarify that these

inapplicable formal rules of evidence include the Federal Rules of Evidence, as provided in § 19.36. The final rule also clarifies paragraph (d)(3)(i) by breaking up the first sentence into two sentences. As revised, paragraph (d)(3)(ii) provides that the presiding officer may require, instead of permit as in the current paragraph, a shorter time period in which the parties may request oral testimony or witnesses at a hearing, which is the more accurate action for a presiding officer. As in § 19.27(c), the final rule also amends § 19.112(d)(3)(ii) to provide that, by stipulation of the parties or by order of the presiding officer, a court reporter or other authorized person may administer the required oath to a witness remotely without being in the physical presence of the witness. This amendment updates the current oath requirement for witnesses to account for remote proceedings and conforms this provision to § 19.112(d)(4), which permits electronic presentations at the hearing. In § 19.112(d)(3)(iii), the final rule makes technical changes to the different actions a presiding officer may take related to a suspension or prohibition based on an indictment, information, or complaint and a removal or prohibition with respect to a conviction or pre-trial diversion program to better reflect 12 U.S.C. 1818(g). Throughout paragraph (d) the final rule makes technical corrections by replacing "appointed OCC attorney" with "OCC."

The final rule also adds a new paragraph (d)(4) to § 19.112 to provide rules governing electronic presentations in the course of a hearing. As in § 19.35(c), this provision provides that, based on the circumstances of each hearing, the presiding officer may direct the use of, or any party may elect to use, an electronic presentation during the hearing. If the presiding officer requires an electronic presentation, each party will be responsible for its own presentation or related costs unless the parties agree to allocate

presentation responsibilities and costs differently. This new language is necessary to account for the routine use of electronic presentations in hearings that existing rules do not address.

Throughout § 19.112, the final rule utilizes the newly defined term "OCC Supervisory Office" and removes passive sentence structure.

19.113 Recommended and final decisions

The final rule makes a number of changes to § 19.113, which provides the procedures for decisions by the presiding officer and the OCC. The final rule updates § 19.113(c) to permit the Comptroller to notify the petitioner of a decision by electronic mail or other electronic means, if the petitioner consents, instead of by registered mail. The final rule also makes technical changes to paragraph (c) by replacing "when" with "if" in describing whether the petitioner has waived an oral hearing, replacing the "must" with "will" in describing the Comptroller's notification of the decision, and replacing the "and" with "or" in describing the actions that the Comptroller may affirm, terminate, or modify in its final decision. In § 19.113(d), the final rule clarifies that there could be more than one charge against an institution-affiliated party. In § 19.113(f), the final rule removes the passive sentence structure. Lastly, the final rule adds headings to each paragraph.

Subparts D through G – Actions under the Federal Securities Laws

Subparts D, E, F, and G of current part 19 set forth the procedures applicable to actions taken by the OCC with respect to banks pursuant to various provisions of the Federal securities laws, including the Securities Exchange Act of 1934 (Exchange Act). Specifically, subpart D addresses exemption hearings under section 12(h) of the

Exchange Act, subpart E addresses disciplinary proceedings, subpart F addresses civil money penalties, and subpart G addresses cease and desist authority. Although these Federal securities laws also apply to Federal savings associations, there are no comparable provisions in OCC regulations for Federal savings associations. Instead, the former OTS relied on the authority granted under the Exchange Act for these actions rather than incorporating the authority into its rules and specified in § 109.100(c) that the Uniform Rules of Practice and Procedure in subpart A of part 109 applied to proceedings under the Exchange Act.

In the final rule, the OCC streamlines the regulation by combining subparts D, E, F, and G into one subpart D entitled "Actions under the Federal Securities Laws" and reserves subparts E, F, and G. The OCC also applies this revised subpart D to Federal savings associations, removes § 109.100(c), and makes other changes as described below.

19.120 Exemption Hearings Under Section 12(h) of the Securities Exchange Act of 1934

The final rule moves the provisions in current subpart D of part 19 to a new § 19.120. Current subpart D governs informal hearings by the Comptroller to determine, pursuant to authority in sections 12(h) and (i) of the Exchange Act (15 U.S.C. 78*l*(h) and (i)), whether to exempt an issuer or a class of issuers from the provisions of sections 12(g), 13, or 14 of the Exchange Act (15 U.S.C. 78*l*(g), 78m, or 78n) or whether to exempt any officer, director, or beneficial owner of securities of an issuer from section 16 of the Exchange Act (15 U.S.C. 78p). This subpart currently covers issuers that are banks whose securities are registered pursuant to section 12(g) of the Exchange Act (15 U.S.C.

78*l*(g)). In addition to applying this provision to issuers that are Federal savings associations, the OCC is making a number of other changes:

Specifically, the final rule clarifies that § 19.120(a) applies to national bank and Federal savings association issued securities that may be subject to registration in addition to those securities already registered. This change permits a national bank or Federal savings association to obtain an exemption from the OCC in advance of registering.

The final rule also provides that when an applicant provides a copy of its newspaper notice of an exemption hearing to its shareholders pursuant to § 19.120(c) it must do so in the same manner as is customary for shareholder communications, which could be through electronic means. This change will make it easier and less burdensome to comply with this notice requirement.

In addition, as in §§ 19.35(c) and 19.112(d)(4), the final rule adds § 19.120(d)(8), governing electronic presentations in the course of an Exchange Act-related hearing. This provision provides that, based on the circumstances of each hearing, the presiding officer may direct the use of, or any party may elect to use, an electronic presentation during the hearing. If the presiding officer requires an electronic presentation during the hearing, each party will be responsible for its own presentation and related costs unless the parties agree to another manner by which to allocate presentation responsibilities and costs. As indicated above, this new language is necessary to account for the routine use of electronic presentations in hearings that the existing rule does not currently address. The final rule makes a conforming change in §19.120(d)(6) to allow, by stipulation of the parties or by order of the presiding officer, a court reporter or other authorized person to

administer the required oath to a witness remotely without being in the physical presence of the witness. Furthermore, the final rule clarifies in § 19.120(d)(9) that a transcript of the hearing may be provided by electronic means.

Lastly, the OCC is making technical changes to § 19.120. The final rule makes minor, non-substantive changes in provisions redesignated as paragraphs (b) and (c); removes passive sentence structure in text redesignated as paragraph (d)(9); allows for more than one applicant in provisions redesignated as paragraphs (d)(4) and (5) and (e); and changes references in this section to the "Securities and Corporate Practices Division" to "Bank Advisory" to reflect the reorganization of the OCC's Law Department.

19.121 Disciplinary proceedings involving the Federal securities laws

The final rule moves the provisions in current subpart E of part 19 to a new § 19.121. Current subpart E governs proceedings by the Comptroller to determine whether to take disciplinary actions against banks that are transfer agents, municipal securities dealers, government securities brokers, government securities dealers, or persons associated with or seeking to become associated with these institutions.[13] The final rule applies this section to Federal savings associations by defining "bank" to mean a national bank or Federal savings association, and, when referring to a government securities broker or government securities dealer, a Federal branch or agency of a foreign bank. In addition, the final rule defines "transfer agent," "municipal securities dealer," "government securities broker," "government securities dealer," and person associated

[13] Pursuant to sections 3(a)(34)(G)(i) and 15C(c)(2)(A) of the Exchange Act (15 U.S.C. 78c(a)(34)(G)(i) and 78o–5(c)(2)(A)), the OCC also may take disciplinary actions against Federal branches and agencies of foreign banks that are government securities brokers or government securities dealers or persons associated with or seeking to become associated with these entities.

with a person engaged in these activities or with a bank engaged in these activities by cross-referencing to definitions in the Exchange Act. The final rule also makes technical changes to terms used in this section to correlate them more closely with terms used in the Exchange Act, including the addition to the scope of § 19.121 of any person seeking to become associated with a government securities broker or government securities dealer.

Furthermore, the final rule removes the reference to the Comptroller's delegate in redesignated paragraph (a)(2). The definition of "Comptroller" in § 19.3, which applies to § 19.121, includes a person delegated to perform the functions of the Comptroller of the Currency. Therefore, this reference is unnecessary.

Lastly, the final rule replaces the term "party" with the more accurate term "respondent" in redesignated paragraphs (b)(1) and (c)(2).

19.122 Civil money penalty authority under Federal securities laws

The final rule moves the provisions in current subpart F of part 19 to a new § 19.122. Current subpart F governs proceedings by the Comptroller to determine whether to impose a civil money penalty against banks that are transfer agents, municipal securities dealers, government securities brokers, government securities dealers, or persons associated with or seeking to become associated with these institutions.[14] The final rule applies this provision to Federal savings associations by defining "bank" to mean a national bank or Federal savings association and, when referring to a government securities broker or government securities dealer, a Federal branch or agency of a foreign bank. The final rule also defines "transfer agent," "municipal securities dealer,"

[14] *Id*.

"government securities broker," "government securities dealer," and person engaged in these activities or person associated with a bank engaged in these activities by cross-referencing to definitions in the Exchange Act. Lastly, as with § 19.121, the final rule makes other technical changes to terms used in this section to correlate them more closely with terms used in the Exchange Act, including the addition of persons seeking to become associated with a government securities broker or government securities dealer to the scope of this section.

19.123 Cease and desist authority

The final rule moves the provisions in current subpart G of part 19 to a new § 19.123 and applies these provisions to both national banks and Federal savings associations. Current subpart G governs proceedings by the Comptroller to determine whether to initiate cease-and-desist proceedings against a national bank for violations of sections 12, 13, 14(a), 14(c), 14(d), 14(f), and 16 of the Exchange Act (15 U.S.C. 78*l*, 78m, 78n(a), 78n(c), 78n(d), 78n(f), and 78p) or implementing regulations. The final rule also updates these provisions by adding violations enacted by, or rules or regulations enacted thereunder, the Sarbanes-Oxley Act in 2002, as amended,[15] specifically, sections 301[16] (audit committees), 302 (corporate responsibility for financial reports), 303 (improper influence on conduct of audits), 304 (forfeiture of certain bonuses and profits), 306 (insider trades during pension fund blackout periods), 401(b) (accuracy of financial reports), 404 (management assessment of internal controls), 406 (code of ethics for senior

[15] Pub. L. 107–204, 116 Stat. 745 (2002).
[16] Adding section 10A(m) to the Exchange Act.

financial officers), and 407 (disclosure of audit committee financial expert)[17] (15 U.S.C. 78j-1(m), 7241, 7242, 7243, 7244, 7261, 7262, 7264, and 7265).

Subpart H—Change in Bank Control

The Change in Bank Control Act (CBCA), which added section 7(j) to the FDIA (12 U.S.C. 1817(j)) and which the OCC has implemented at 12 CFR 5.50, provides that no person may acquire control of an insured depository institution unless the appropriate Federal bank regulatory agency has been given prior written notice of the proposed acquisition. If, after investigating and soliciting comment on the proposed acquisition, the agency disapproves the acquisition, the agency must mail a written notification to the filer within three days of the decision. The filer may then request an agency hearing on the proposed acquisition within 10 days of receipt of the disapproval notice. The Uniform Rules in part 19, subpart A, and part 109, subpart A, apply to hearings for filers whose proposed acquisition of a national bank or Federal savings association, respectively, under the CBCA has been disapproved by the OCC. Current subpart H of part 19 provides additional hearing procedures for insured national banks. Section 5.50, which applies to both national banks and Federal savings associations, directs filers who wish to pursue a hearing for a disapproval decision to part 19, subpart H. However, subpart H refers only to national banks.

Because 12 CFR 5.50 applies to both national banks and Federal savings associations, the final rule amends subpart H by adding language that makes the subpart specifically applicable to Federal savings associations in addition to national banks. Furthermore, because 12 CFR 5.50 applies to both *insured and uninsured* institutions and

[17] 15 U.S.C. 78j-1(m), 7241, 7242, 7243, 7244, 7261, 7262, 7264, and 7265.

refers all filers who have been disapproved under § 5.50 to the part 19 procedures, the final rule amends subpart H to make it also applicable to uninsured institutions. In addition, the final rule streamlines subpart H by removing a description of the CBCA disapproval process and instead cross-referencing to 12 CFR 5.50 in the scope of § 19.160 and removing current paragraph (a) in § 19.161, which contains provisions relating to disapproval notification that are duplicative of 12 CFR 5.50(f). The final rule also adds section headings to § 19.160 and revises the section heading in § 19.161.

Subpart I—Discovery Depositions and Subpoenas

Current subpart I of part 19 and § 109.102 address the rules applicable to discovery depositions and subpoenas relating to national banks and Federal savings associations, respectively. These provisions are substantively similar but have slightly different wording. The final rule applies part 19, subpart I, to Federal savings associations and removes § 109.102. The final rule also revises the phrase "direct knowledge of matters that are non-privileged, relevant, and material to the proceeding" to "direct knowledge of matters that are non-privileged and of material relevance to the proceeding." This change clarifies that persons being deposed have information of material relevance to the proceeding and is consistent with the requirements for document discovery in current and revised § 19.24(b). Furthermore, the final rule amends paragraph (a) to specify that a party also may take a deposition of a hybrid fact-expert witness in addition to an expert and a person, including another party, who has direct knowledge of matters that meet the standards of the paragraph, labeled as a "fact witness" by this amendment. This amendment defines a hybrid fact-expert witness as a fact witness who

also will provide relevant expert opinion testimony based on the witness' training and experience.

The final rule also adds paragraph (a)(1) to § 19.170 to require a party to produce an expert report for any testifying expert or hybrid fact-expert witness before the witness' deposition and that, unless otherwise provided by the ALJ, the party must produce such report at least 20 days prior to the deposition. This new provision ensures that a deposing party has the benefit of the expert report prior to the deposition of an expert or hybrid fact-expert witness and that the deposing party has sufficient time to review the report prior to the deposition. Furthermore, paragraph (a)(2) of § 19.170 provides that respondents, collectively, are limited to a combined total of five depositions from all fact witnesses and hybrid fact-expert witnesses. This paragraph also provides that Enforcement Counsel has the same deposition limit. This limit in the number of depositions adds efficiencies to the discovery process and prevents deposition requests from delaying the completion of the proceeding. Lastly, § 19.170(a)(2) provides that a party is entitled to take a deposition of each expert witness designated by an opposing party, codifying the right of a party to depose the opposing party's designated expert witness.

The final rule amends § 19.170(b) to require that a deposition notice provide the manner for taking the deposition in addition to the time and place. The final rule also adds language to § 19.170(b) to indicate that a deposition notice may require the witness to be deposed at any place within a State, territory, or possession of the United States or the District of Columbia in which that witness resides or has a regular place of employment or such other convenient place as agreed by the noticing party and the

witness. Paragraph (b) also permits the parties to stipulate, or the ALJ to order, that a deposition be taken by telephone or other remote means. The OCC believes these changes make it easier and perhaps less costly for parties to obtain, and witnesses to provide, depositions, thereby improving the fact-finding process.

In § 19.170(c), the final rule provides that a party may take depositions no later than 20 days before the scheduled hearing date, instead of 10 days as in the current rule, except with permission of the ALJ for good cause shown. Increasing this time before a hearing will allow all parties more time to prepare for the hearing.

As elsewhere in this rulemaking, the final rule amends § 19.170(d), Conduct of a deposition, to provide that, by stipulation of the parties or by order of the ALJ, a court reporter or other authorized person may administer the required oath to a deponent remotely without being in the physical presence of the deponent. This amendment updates the current oath requirement for witnesses to account for remote proceedings and conform this provision to § 19.170(b)(2), which allows depositions to be taken by telephone or other remote means.

The final rule updates § 19.170(e)(1)(i) to allow for the witness' testimony to be recorded by electronic means such as by a video recording device. The current rule only allows for recording by a stenotype machine and electronic sound recording device. This change reflects new technology and adds flexibility to the testimony process.

Lastly, the final rule makes a non-substantive change to the heading in paragraph § 19.170(a) and changes the heading of paragraph (g) from “Fees” to “Expenses” to describe more accurately the subject of the paragraph.

With respect to § 19.171, the final rule amends paragraph (a) to correct a cross-reference and conform the reference to a place located in the United States to that used elsewhere in part 19. The final rule also amends paragraph (b)(2), which requires the party serving a subpoena to file proof of service with the ALJ, to provide that this proof of service is not required if so ordered by the ALJ. The OCC is making this change because, in some OCC proceedings, the ALJ has indicated they did not wish to receive this proof of service. Finally, the final rule amends paragraph (c) to provide that any party, in addition to a person named in a subpoena, may file a motion to quash or modify the subpoena. This amendment ensures that a party has the right to seek to quash or modify a third-party deposition subpoena.

Subpart J—Formal Investigations

Current subpart J of part 19 and part 112 address formal investigations against national banks and Federal savings associations, respectively. The final rule amends subpart J to make it applicable to both national banks and Federal savings associations and removes part 112. Unlike the Federal savings association rule at § 112.7(b), subpart J does not include a provision specifically providing for motions to quash subpoenas. The OCC has determined that it is neither necessary nor appropriate to include this provision in subpart J because the recipient may challenge investigative subpoenas in Federal court. However, the final rule adds a new paragraph (c) to § 19.184 of subpart J that is similar to the Federal savings association rule at § 112.7(c). This new paragraph permits subpoenas that require the attendance and testimony of witnesses or the production of documents, including electronically stored information, to be served on any person or entity within any State, territory, or possession of the United States or the District of Columbia or as

otherwise provided by law. This provision also subjects foreign nationals to subpoenas if service is made upon a duly authorized agent located in the United States or in accordance with international requirements for service of subpoenas. The existing rule for national banks is not clear on service of foreign nationals, and the adoption of specific language from the Federal savings association rule will eliminate the disputes that previously have arisen on this issue. Furthermore, the addition of language regarding international subpoena requirements codifies existing OCC practice.

The final rule makes further changes to subpart J. First, the final rule amends § 19.181, Confidentiality of formal investigations. Currently, this provision provides that information or documents obtained in the course of a formal investigation are confidential and may be disclosed only in accordance with the provisions of 12 CFR part 4. The final rule describes in more detail the information or documents that are confidential to better ensure the confidentiality of formal investigations. Specifically, amended § 19.181 states that the entire record of any formal investigative proceeding, including the resolution or order of the Comptroller authorizing or terminating the proceeding; all subpoenas issued by the OCC during the investigation; and all information, documents, and transcripts obtained by the OCC in the course of a formal investigation, are confidential and may be disclosed only in accordance with the provisions of part 4. The final rule also adds that this information may be disclosed pursuant to the OCC discovery obligations under subpart A of part 19.

Second, the final rule amends § 19.182, Order to conduct a formal investigation, to clarify the list of actions persons authorized to conduct an investigation may take. Currently, this section provides that these persons may, among other things, issue

subpoenas *duces tecum*, administer oaths, and receive affirmations as to any matter under investigation by the Comptroller. The final rule adds that these authorized persons also may take or cause to be taken testimony under oath, issue subpoenas other than subpoenas *duces tecum,* and modify subpoenas. This amendment makes § 19.182 more consistent with the powers enumerated in the relevant underlying statutes, including 12 U.S.C. 1818(n) and 1820(c). The final rule also makes a technical correction to indicate that authorized persons may administer affirmations rather than receive affirmations. Section 19.182 also currently provides that, upon application and for good cause, the Comptroller may limit, modify, or withdraw the order at any stage of the proceedings. The final rule clarifies that the Comptroller may also terminate the order. Finally, the final rule amends § 19.182 to specifically indicate that the persons conducting the investigation are empowered by the Comptroller to do so.

Third, the final rule amends § 19.183, Rights of witnesses. Current paragraph (a) provides that any person who is compelled or requested to furnish testimony, documentary evidence, or other information with respect to any matter under formal investigation must, on request, be shown the order initiating the investigation. The final rule amends this provision to provide that such persons may not retain copies of the order without first receiving written approval of the OCC. This amendment ensures the confidentiality of the order.

Current § 19.183(b) provides that a person testifying in a formal investigation may be accompanied, represented, and advised by counsel, and indicates that this right to counsel means that the attorney may be present at all times while the person is testifying and that the attorney may, among other things, question the person briefly at the

conclusion of the testimony to clarify answers and make summary notes during the testimony solely for use of the person testifying. The final rule amends this description of permissible attorney activities to provide that the attorney's questioning of the person may be on the record. This ensures a more complete formal record of the proceeding. In addition, the final rule provides that the notes taken by the attorney during testimony may be used solely in representing the person. This change allows the attorney to use these notes and not restrict use of the notes to the person testifying, thereby enabling the attorney to better represent their client.

Section 19.183(c) provides that any person who has given or will give testimony and counsel representing the person may be excluded from the proceedings during the taking of testimony of any other witness. The final rule amends this provision to specify that such person and counsel may be excluded during the testimony of any other person at the discretion of the OCC or the OCC's designated representative. Furthermore, the final rule provides that neither attorney(s) for the institution(s) affiliated with the testifying person nor attorneys for any other interested persons have any right to be present during the testimony of any person not personally represented by such attorney. These changes ensure the confidentiality and integrity of the proceeding by mitigating conflicts of interest and clarify that it is the OCC or OCC's designated representative who makes the decision on exclusion.

Current § 19.183(d) provides that any person who is compelled to give testimony is entitled to inspect any transcript that has been made of the testimony but may not obtain a copy if the Comptroller's representatives conducting the proceedings have cause to believe that the contents should not be disclosed pending completion of the

investigation. The final rule removes the burden of proving "cause" included in this provision, as the OCC finds this unnecessary. The final rule also eliminates the language that limits the release of the transcript pending completion of the investigation because the reasons for not disclosing the transcript may persist beyond the conclusion of any pending investigation.

Current § 19.183(e) provides that any designated representative conducting an investigative proceeding must report to the Comptroller any instances where a person has been guilty of dilatory, obstructionist, or insubordinate conduct during the course of the proceeding or any other instance involving a violation of this part. As this paragraph does not pertain to rights of witnesses, and to make clear that this provision applies to all formal investigations covered by subpart J, the final rule redesignates this paragraph as a new § 19.185. The final rule also replaces the phrase "has been guilty of" with "has engaged in" in the redesignated paragraph because the phrase "has been guilty of" is unclear in the context of this provision. Furthermore, the OCC does not believe it is appropriate for a person to be found guilty of this behavior before the designated representative reports this person to the OCC. With this change, the OCC may investigate or take other action with respect to this individual to ensure the fairness and accuracy of the proceeding in a more timely manner. This change also conforms the scope of this provision with the scope of a similar provision, § 19.197, which involves the reporting of certain conduct of an individual practicing before the OCC.

Fourth, the final rule amends § 19.184, Service of subpoena and payment of witness expenses, by removing the specific language in paragraph (b) regarding the

payment of witnesses and instead cross-referencing to the more detailed rule for witness payments contained in revised § 19.14, discussed previously.

Lastly, the final rule makes a number of technical changes to subpart J. Specifically, the final rule replaces references to "the Comptroller" with "the OCC" in § 19.183(b) and (d) and in redesignated § 19.185 and replaces the term "representatives" with "designated representatives" in § 19.183(d)" to align the provisions more closely with the statute. The final rule also removes the references to the "Comptroller's delegate" in §§ 19.180 and 19.182 as the definition of "Comptroller" in § 19.3, which applies to subpart J, includes a person delegated to perform the functions of the Comptroller of the Currency. In addition, the final rule adds a reference to Federal branches and agencies in § 19.180 to more completely describe those entities that are subject to the OCC's examination authority. Finally, the final rule adds section headings to § 19.183.

Subpart K—Parties and Representational Practice Before the OCC; Standards of Conduct

Current subpart K of part 19 contains rules relating to parties and representational practice before the OCC. The final rule makes mostly technical changes to this subpart.

First, in § 19.190, Scope, the final rule makes a confirming change to a cross-reference to reflect this rulemaking's amendments to subpart D.

Second, the final rule amends the definition of "practice before the OCC" in § 19.191, Definitions. Currently, the OCC defines the term to include any matters connected with presentations to the OCC or any of its officers or employees relating to a client's rights, privileges, or liabilities under laws or regulations administered by the

OCC. The final rule clarifies this statement so that it applies to both written and oral presentations. Section 19.191 also provides that the term "practice before the OCC" does not include work prepared for a bank solely at its request for use in the ordinary course of its business. The final rule amends this statement so that it also includes work prepared for a Federal savings association and a Federal branch or agency of a foreign bank, and changes "bank" to "national bank." These changes are part of the OCC's application of part 19 to Federal savings associations and the OCC's specific inclusion of Federal branches and agencies in part 19 to clarify the application of part 19 to all entities supervised by the OCC.

Third, the final rule amends § 19.194, Eligibility of attorneys and accountants to practice, by removing the phrase "who is qualified to practice as an attorney" in paragraph (a) and the phrase "who is qualified to practice as a certified public accountant or public accountant" in paragraph (b). Section 19.191 defines the terms "attorney" and "accountant" and these definitions reference qualification requirements. Therefore, these phrases are superfluous.

Fourth, the final rule amends § 19.196, Disreputable conduct, which provides a nonexclusive list of disreputable conduct for which an individual may be censured, debarred, or suspended from practice before the OCC. Paragraph (d) of this section includes on this list disbarment or suspension from practice as an attorney or as a certified public accountant or public accountant by any duly constituted authority of any State, possession, or commonwealth of the United States or the District of Columbia for the conviction of a felony or misdemeanor involving moral turpitude in matters relating to the supervisory responsibilities of the OCC, where the conviction has not been

reversed on appeal. The final rule deletes the phrase "in matters relating to the supervisory responsibilities of the OCC" so as not to limit the felony or misdemeanor conviction to only OCC-related matters. The OCC believes that an individual engaged in any of the conduct listed in this section, whether or not related to OCC supervisory matters, should not practice before the OCC.

Fifth, the final rule replaces the reference to the OTS in § 19.196(g) with "the former OTS," as the OTS no longer exists.

Sixth, the final rule amends § 19.197, which provides the standards and rules for initiating disciplinary proceedings. Paragraph (a) of this section provides that an individual, including any employee of the OCC, who has reason to believe that an individual practicing before the OCC in a representative capacity has engaged in any conduct that would serve as a basis for censure, suspension, or debarment under § 19.192 (such as contemptuous conduct, materially injuring or prejudicing another party, violating a law or order, or unduly delaying proceedings) may report this conduct to the OCC or a person delegated to receive this information by the Comptroller. The final rule broadens the application of this paragraph to conduct under all of subpart K, which includes incompetence (§ 19.195) and disreputable conduct (§ 19.196), instead of conduct only under § 19.192. The OCC believes that an individual found to be incompetent or to have engaged in disreputable conduct also should be subject to a disciplinary proceeding under this section.

Seventh, the final rule amends § 19.198, Conferences, to add the terms "censure" in paragraph (a) and "debarment" in paragraph (b) to correct missing references. The final rule also changes the heading on § 19.198(b) from "Resignation or voluntary

suspension" to "Voluntary suspension or debarment" so that it more accurately reflects the subject of the paragraph.

Eighth, the final rule amends § 19.200(a), which provides that if the final order against the respondent is for debarment the individual may not practice before the OCC unless otherwise permitted to do so by the Comptroller, by clarifying that the Comptroller's permission to permit such practice is pursuant to § 19.201. Section 19.201 provides that the Comptroller may entertain a petition for reinstatement after the expiration of the time period designated in the order of debarment and that the Comptroller may grant reinstatement only if satisfied that the petitioner is likely to act in accordance with part 19 and if granting reinstatement would not be contrary to the public interest. Section 19.201 further provides that any request for reinstatement is limited to written submissions unless the Comptroller, in their discretion, affords the petitioner a hearing. The amendment merely confirms that a debarred respondent only may be reinstated pursuant to the process set forth in § 19.201. It makes no substantive change. The final rule also revises the heading of § 19.200 to reflect the order of topics covered by the section.

Ninth, the final rule removes the references to the "Comptroller's delegate" in §§ 19.197(b) and (c), 19.199, and 19.200(d) as the definition of "Comptroller" in § 19.3, which applies to subpart K, includes a person delegated to perform the functions of the Comptroller of the Currency.

Finally, the final rule makes several minor, nonsubstantive wording changes throughout subpart K. In § 19.192(c), the NPR instruction stated that the OCC would

replace the phrase "administrative law judge" with "ALJ" in one instance. The final rule replaces that phrase each time it appears in that section.

Subpart L—Equal Access to Justice Act

In general, EAJA,[18] codified at 5 U.S.C. 504, authorizes the payment of attorney's fees and other expenses to eligible parties who prevail over the United States in certain adversary adjudications, absent a showing by the government that its position was substantially justified or that special circumstances make an EAJA award unjust. EAJA requires each agency to issue rules that establish uniform procedures for the submission and consideration of applications for an EAJA award.[19] The OCC currently meets this requirement in subpart L of part 19, which provides that EAJA implementing regulations promulgated by the U.S. Department of the Treasury (Treasury), set forth at 31 CFR part 6, are applicable to formal adjudicatory proceedings under part 19. The final rule deletes the cross-reference to the Treasury regulation and amends subpart L to set forth EAJA regulations specifically applicable to certain OCC adversary adjudications conducted under part 19.

The OCC has based subpart L on the revised model rule implementing EAJA published in 2019 by the Administrative Conference of the United States (ACUS) (ACUS Model Rule).[20] As discussed below, the OCC has customized subpart L in certain places

[18] Pub. L. 96–481, title II, sec. 203(a)(1), (c) (1980), revived and amended Pub. L. 99–80, sec. 1, 6 (1985).

[19] 5 U.S.C. 504(c)(1). EAJA also requires that each agency issue its EAJA rule after consultation with the Chairman of ACUS. 5 U.S.C. 504(c)(1). Pursuant to instructions provided by ACUS in the preamble to the ACUS Model Rule, *see* 84 FR 38934, the OCC notified the Office of the Chairman of ACUS of the proposed rule. ACUS did not suggest any changes to the OCC's proposal.

[20] 84 FR 38934 (Aug. 18, 2019). ACUS originally issued an EAJA model rule in 1981 (46 FR 32900 (June 25, 1981)) and previously revised its model rule in 1986 (51 FR 16659 (May 6, 1986) (previously codified at 1 CFR part 315)). ACUS issued its model rule to assist agencies when adopting

to reflect the OCC's procedures in adversary adjudications, reorganized a few provisions included in the ACUS Model Rule, made other changes based on the Treasury EAJA rule as well as the EAJA rules of the Board and FDIC,[21] and made non-substantive grammatical or stylistic changes. Although the Treasury, Board, and FDIC EAJA rules are based on earlier versions of the ACUS Model Rule, the OCC believes that these provisions remain useful and clarify the application of EAJA to OCC adversary proceedings.

Authority and scope; waiver

Section 19.205 describes the general purpose and scope of EAJA. Specifically, an eligible party may receive an award of attorney fees and other expenses when it prevails over an agency in certain administrative proceedings (adversary adjudications) unless the agency's position was substantially justified or special circumstances make an award unjust. Furthermore, as provided in the Treasury regulations, and as determined by EAJA caselaw, this provision provides that no presumption under this subpart arises that the agency's position was not substantially justified because the agency did not prevail.[22]

The final rule does not contain the provision in the ACUS Model Rule that permits an eligible party, even if not a prevailing party, to receive an award under EAJA when it successfully defends against an excessive demand made by the agency. Although EAJA permits excessive demand awards, EAJA specifically provides that excessive demand awards be paid "only as a consequence of appropriations provided in advance."[23]

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their EAJA rules and encourages agencies to set out and implement this model rule as part of their own EAJA rules. *Id*. The Treasury EAJA rule is based on the 1981 EAJA model rule.

[21] 12 CFR part 263, subpart G (Board) and 12 CFR part 308, subpart P (FDIC). Both the Board and FDIC EAJA rules are based on the earlier versions of the ACUS model rule.

[22] *See* 31 CFR 6.5. *See also, e.g.*, *Pierce v. Underwood*, 487 U.S. 552 (1988); *Miles v. Bowen*, 632 F. Supp. 282 (M.D. Ala. 1986).

[23] 5 U.S.C. 504(a)(4).

Because the OCC is not an appropriated agency and instead receives its funding through assessments on the institutions it regulates, the OCC believes that this EAJA excessive demand provision does not apply to the OCC. Consequently, the final rule does not include provisions in the ACUS Model Rule specifically related to excessive demand awards.

As provided in § 19.205(b), the OCC has determined that proceedings listed in §§ 19.1, 19.110, 19.120, 19.190, 19.230, and 19.241 meet EAJA's definition of "adjudicatory adjudications" and are covered by subpart L.

Section 19.205(c) provides that after reasonable notice to the parties, the presiding officer or the OCC may waive, for good cause shown, any provision contained in subpart L as long as the waiver is consistent with the terms and purpose of EAJA. Although this provision is not included in the ACUS Model Rule, the OCC finds that this provision provides useful discretion to the presiding officer and the OCC, as relevant, during the EAJA process and provides for the smoother conduct of EAJA proceedings should Congress subsequently amend EAJA and the OCC has not yet updated its corresponding EAJA implementing regulations.

Definitions

Section 19.206 sets forth definitions of terms used in this subpart. Unless otherwise noted, these definitions are substantively identical to the definitions in the ACUS Model Rule and based on the definitions in EAJA.

Section 19.206(a) defines "adversary adjudication" to mean an adjudication under 5 U.S.C. 554 in which the position of the OCC is represented by Enforcement Counsel.[24]

[24] *See* 5 U.S.C. 504(b)(1)(C) and § 2.01(b) of the ACUS Model Rule.

With certain exceptions, section 554 applies to adjudications required by statute to be determined on the record after opportunity for an agency hearing.[25] Unlike EAJA and the ACUS Model Rule, the final rule does not specifically exclude from this definition adjudications related to setting rates, licensing decisions, contract appeals, and the Religious Freedom Restoration Act of 1993.[26] These categories of adjudications are not covered by part 19 and therefore a specific exclusion in the OCC rule is not necessary.

Section 19.206(b) defines "final disposition" as the date on which a decision or order disposing of the merits of the proceeding, or any other complete resolution of the proceeding such as a settlement or voluntary dismissal becomes final and unappealable, both within the OCC and to the courts.[27]

Section 19.206(c) defines "party" to mean a party, defined in 5 U.S.C. 551(3),[28] that is (1) an individual whose net worth did not exceed $2,000,000 at the time that the adversary adjudication was initiated; or (2) any owner of an unincorporated businesses, or any partnership, corporation, unit of local government or organization with a net worth not exceeding $7,000,000 and no more than 500 employees at the time that the adversary adjudication was initiated, except that the net worth limitation does not apply to certain

[25] Section 554 of title 5 does not apply to: (1) a matter subject to a subsequent trial of the law and the facts de novo in a court; (2) the selection or tenure of an employee, except a [sic] administrative law judge appointed under section 3105 of this title; (3) proceedings in which decisions rest solely on inspections, tests, or elections; (4) the conduct of military or foreign affairs functions; (5) cases in which an agency is acting as an agent for a court; or (6) the certification of worker representatives. 5 U.S.C. 554(a).

[26] EAJA and the ACUS Model Rule specifically exclude: (1) an adjudication for the purpose of establishing or fixing a rate or for the purpose of granting or renewing a license; (2) any appeal of a decision made pursuant to section 7103 of title 41 before an agency board of contract appeals as provided in section 7105 of title 41; (3) any hearing conducted under chapter 38 of title 31; and (4) the Religious Freedom Restoration Act of 1993.

[27] *See* § 2.01(e) of the ACUS Model Rule.

[28] Section 551(3) defines "party" to include a person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in an agency proceeding, and a person or agency admitted by an agency as a party for limited purposes.

tax-exempt organizations described in section 501(c)(3) of the Internal Revenue Code of 1986 or a cooperative association as defined in section 15(a) of the Agricultural Marketing Act.[29] This definition also provides that the net worth and number of employees of the applicant and, where appropriate, any of its affiliates must be aggregated when determining the applicability of this definition. The OCC is including this aggregation provision, which is not included in the ACUS Model Rule, because, as discussed below, the final rule requires information on affiliates for certain parties.

Section 19.206(d) defines "position of the OCC" to mean the OCC's position in an adversary adjudication as well as the action or failure to act by the OCC upon which the adversary adjudication is based. This paragraph also provides that fees and other expenses may not be awarded to a party for any portion of the adversary adjudication if the party has unreasonably drawn out the proceeding.[30]

Section 19.206(e) defines "presiding officer" as an official, whether an ALJ or otherwise, that presided over the adversary adjudication or the official presiding over an EAJA proceeding.[31] As noted below in § 19.207, upon receipt of an EAJA application, the OCC will, to the extent feasible, refer the matter to the official who heard the underlying adversary adjudication.

Application requirements

Section 19.207 sets out application requirements for a party seeking an award under EAJA. This section requires a party to file an application with the OCC within 30

[29] *See* 5 U.S.C. 504(b)(1)(B) and § 2.01(f) of the ACUS Model Rule.
[30] *See* 5 U.S.C. 504(b)(1)(E) and § 2.01(g) of the ACUS Model Rule.
[31] *See* the definition of "adjudicative officer" in 5 U.S.C. 504(b)(1)(D) and § 2.01(a) of the ACUS Model Rule. The OCC has chosen to use the term "presiding officer" instead of "adjudicative officer" as that is the term used elsewhere in part 19.

days after the OCC's final disposition of the adversary adjudication. It also requires the application to include (1) the identity of the applicant and the adjudicatory proceeding for which an award is sought; (2) a showing that the applicant has prevailed and identification of the OCC position that the applicant alleges was not substantially justified; (3) the basis for the applicant's belief that the position was not substantially justified; (4) unless the applicant is an individual, the number of employees of the applicant and a brief description of the type and purpose of the organization or business; (5) a showing of how the applicant meets the definition of "party" under § 19.206(c), including documentation of net worth pursuant to § 19.208; (6) documentation of the fees and expenses sought per § 19.209; (7) signature by the applicant or the applicant's authorized officer or attorney; (8) any other matter the applicant wishes the OCC to consider in determining whether and in what amount an award should be made; and (9) written verification under penalty of perjury that the information contained in the information provided is true and correct. These application requirements are based on § 3.01 of the ACUS Model Rule,[32] except for the provision, taken from the Treasury rule,[33] providing that the applicant may include other matters for the OCC to consider. The OCC believes that this further information could assist the presiding officer when reviewing the EAJA claim and, by including this information at the application stage, may make the EAJA process more efficient.

Although not included in EAJA or the ACUS Model Rule, § 19.207(c) provides that, upon receipt of an EAJA application, the OCC will to the extent feasible refer the matter to the official who heard the underlying adversary adjudication. The OCC believes

[32] *See also* 5 U.S.C. 504(a)(2).
[33] 31 CFR 6.8(d).

that the official presiding over the adversary proceeding subject to the EAJA application is in the best position to review the EAJA application.

Net worth exhibit

Section 19.208 requires specific net worth documentation to accompany certain EAJA applications. This documentation is necessary to determine whether the applicant meets the definition of "party" under § 19.206(c) and therefore may be eligible for an EAJA award. Paragraph (a) requires an applicant, other than an applicant that is a non-profit or a cooperative association, to provide with its EAJA application a detailed exhibit of the applicant's, and where applicable, any of its affiliates', net worth at the time the adversary adjudication was initiated. Unless otherwise required, this paragraph permits this exhibit to be in any form convenient to the applicant that provides full disclosure of the applicant's and affiliates' assets and liabilities sufficient to determine whether the applicant qualifies under the standards of this subpart. Furthermore, this paragraph permits a presiding officer to require an applicant to file additional information to determine its eligibility for an award. These net worth exhibit requirements are taken from § 3.02 of the ACUS Model Rule, except that the final rule requires the net worth information from affiliates, where appropriate. Because of the structure and interrelatedness of many financial institutions, the OCC believes that affiliate net worth will often prove relevant when determining eligibility for an EAJA award. The OCC notes that the EAJA rules issued by Treasury, the Board, and the FDIC require net worth information from affiliates to determine eligibility under EAJA.[34]

[34] *See* 31 CFR 6.4(f) (Treasury); 12 CFR 263.105 (Board); and 12 CFR 308.177 (FDIC).

Section 19.208 also includes further provisions included in the Board's and the FDIC's EAJA regulations but not included in the ACUS Model Rule.[35] These provisions provide more detailed information as to what the OCC will accept in satisfaction of the net worth exhibit requirement or pertain specifically to national banks and Federal savings associations. Specifically, paragraph (a)(1) permits the use of unaudited financial statements for individual applicants as well as certain financial statements or reports submitted to a Federal or State agency for determining individual net worth, unless the presiding officer or the OCC otherwise requires. For applicants or affiliates that are not banks or savings associations, paragraph (a)(2) provides that net worth will be considered to be the excess of total assets over total liabilities as of the date the underlying proceeding was initiated. For banks and savings associations, paragraph (a)(3) requires the submission of a Consolidated Report of Condition and Income (Call Report) and provides that net worth is the total equity capital as reported in the Call Report filed for the last reporting date before the initiation of the proceeding.

Similar to § 3.02 of the ACUS Model Rule, paragraph (b) provides that the net worth exhibit will be included in the public record of the proceeding unless an applicant believes that there are legal grounds for withholding it from disclosure and requests that the documents be filed under seal or otherwise treated as confidential.

Documentation of fees and expenses

As provided in § 3.03 of the ACUS Model Rule, § 19.209 requires applications to be accompanied by adequate documentation of the fees and other expenses incurred after initiation of the adversary adjudication. This information is necessary to determine any

[35] *Id*.

EAJA award. Specifically, this section requires a separate itemized statement for each professional firm or individual whose services are covered by the application showing the hours spent in connection with the proceeding by each individual, a description of the specific services provided, the rate at which each fee has been computed, any expenses for which reimbursement is sought, the total amount claimed, and the total amount paid or payable by the applicant or by any other person or entity for the services provided. This section also authorizes a presiding officer to require an applicant to provide vouchers, receipts, or other substantiation for any fees or expenses claimed.

Unlike the ACUS Model Rule, this provision also provides that an application seeking an increase in fees to account for inflation pursuant to § 19.215(d)(1)(i), discussed below, also must include adequate documentation of the change in the consumer price index for the attorney or agent's locality.

Filing and service of documents

As in § 4.01 of the ACUS Model Rule, § 19.210 requires applications for an award, or any accompanying documentation related to an application, to be filed and served on all parties to the proceeding in accordance with § 19.11, Service of papers, except for confidential information pursuant to § 19.208(b).

Answer to application

As provided in § 4.02 of the ACUS Model Rule, § 19.211 provides that Enforcement Counsel may file an answer to an EAJA application within 30 days after service of the application except in cases involving settlement negotiations under § 19.213. This section provides that failure to file an answer within 30 days may be treated as consent to the award requested unless Enforcement Counsel requests an

extension of time for filing or files a statement of intent to negotiate a settlement under § 19.213. This section requires the answer to explain in detail any objections to the award requested and identify the facts supporting Enforcement Counsel's position. For any facts not already in the record of the proceeding, this section requires Enforcement Counsel to provide supporting affidavits or a request for further proceedings under § 19.214 with the answer. Unlike the ACUS Model Rule, § 19.211 does not include information related to settlement negotiations and instead cross-references to § 19.213, which discusses settlement of an EAJA award. The OCC believes that, for ease of use, all settlement provisions should be included in the same section of the regulation.

Reply

As in § 4.03 of the ACUS Model Rule, § 19.212 permits an applicant to reply within 15 days after service of an answer. For facts not already in the record, the applicant is required to provide supporting affidavits or a request for further proceedings pursuant to § 19.214 with the answer.

Settlement

As in § 4.04 of the ACUS Model Rule, § 19.213 provides that the applicant and Enforcement Counsel may agree to a proposed settlement before final action on the application, either in connection with a settlement of the underlying proceeding or after conclusion of an underlying proceeding, in accordance with the OCC's standard settlement procedure pursuant to § 19.15, Opportunity for informal settlement. In a case where a prevailing party and Enforcement Counsel agree on a proposed settlement of an award before an EAJA application has been filed, this section requires the application to be filed with the proposed settlement. Section 19.213 also clarifies that, if a proposed

settlement of an underlying proceeding provides for each side to pay its own expenses and the settlement is accepted, no application under this subpart may be filed. However, this section differs from § 4.04 of the ACUS Model Rule by including a provision the ACUS Model Rule includes in its section relating to an answer to an application, § 4.02. Specifically, § 19.213 specifies that, if after an application is submitted, Enforcement Counsel and the applicant believe that they can reach a settlement, they may file a joint statement of their intent to negotiate a settlement. Filing this statement will extend the time for filing an answer under § 19.211 for an additional 30 days. Further extensions could be granted by the presiding officer at the joint request of the applicant and Enforcement Counsel. As with § 19.211, the OCC believes that this provision is better placed in § 19.213 so that all settlement information is included in the same section of the regulation.

Further Proceedings

Ordinarily, the determination of an EAJA award would be made on the basis of the written record. However, § 19.214(a) permits an applicant or Enforcement Counsel to request the filing of additional written submissions, an informal conference, oral argument, discovery, or an evidentiary hearing with respect to issues other than whether the OCC's position was substantially justified, such as issues involving the applicant's eligibility or substantiation of fees or expenses. The presiding officer may permit these further proceedings if necessary for a full and fair decision on the application. The presiding officer also may order these additional proceedings on its own initiative. In addition, paragraph (a) requires that further proceedings be held as promptly as possible so as not to delay resolution of the EAJA application. The final rule lists applicant

eligibility or substantiation of fees and expenses as examples of permissible issues for further proceedings. Paragraph (a) is based on § 4.05 of the ACUS Model Rule. However, § 19.214 does not contain the ACUS Model Rule's statement regarding the basis for a decision on whether the OCC's position was substantially justified. The OCC believes it is more appropriate to include this statement in § 19.215, Decision. In addition, to compile a more complete list of all available further proceedings, the final rule also permits the applicant or Enforcement Counsel to request an informal conference, which is not listed in the ACUS Model Rule.

As in § 4.05 of the ACUS Model Rule, § 19.214(b) requires that any request for further proceedings specifically identify the information sought or any disputed issues and explain why additional proceedings are necessary to resolve the issues.

Decision

The final rule's section on EAJA decisions, § 19.215, is based on 5 U.S.C. 504(a)(3) and in part on § 4.06 of the ACUS Model Rule. Section 19.215(a) provides that a presiding officer must base its decision on whether the position of the OCC was substantially justified on the administrative record as a whole of the adversary adjudication for which fees and other expenses are sought. The ACUS Model Rule includes this provision in its section on further proceedings, § 19.214. However, the OCC believes this requirement better belongs in the section of the regulation outlining EAJA decisions because it provides parameters for the presiding officer's decision.

As in § 4.06 of the ACUS Model Rule, § 19.215(b) mandates the timing of the presiding officer's decision. It requires the presiding officer to issue a recommended

decision in writing on an EAJA application within 90 days after the time for filing a reply or within 90 days of the completion of further proceedings held pursuant to § 19.214.[36]

Also, as in § 4.06 of the ACUS Model Rule, paragraph (c) of § 19.215 provides that a decision must include written findings and conclusions on an applicant's eligibility and status as a prevailing party. The decision also must include, if applicable, an explanation of the reasons for any difference between the amount requested and the amount awarded, findings on whether the Enforcement Counsel's or OCC's position was substantially justified, whether the applicant unduly and unreasonably protracted the proceedings, or whether special circumstances make an award unjust. Paragraph (c) differs from § 4.06 of the ACUS Model Rule in that it includes language taken from § 4.05 of the ACUS Model Rule. Specifically, paragraph (c) provides that the presiding officer must determine whether or not the position of the OCC was substantially justified on the basis of the administrative record as a whole of the adversary adjudication for which fees and other expenses are sought. The OCC believes this provision is a better fit in the section of the regulation outlining EAJA decisions.

Section 19.215(d) provides the requirements for EAJA decisions. Paragraphs (d)(1), (2) and (3) of § 19.215 are not included in the ACUS Model Rule but are based on the EAJA statute, provisions included in the FDIC and Board EAJA rules,[37] and provisions included in the prior ACUS Model Rule that ACUS determined were largely substantive matters beyond the Conference's statutory charge.[38] The OCC believes that

[36] The ACUS Model Rule provides that an agency may determine the specific time period for this section.

[37] 12 CFR 263.106, 308.175.

[38] *See* 84 FR 38934.

these provisions provide important details on the basis for EAJA award amounts that should apply to all EAJA applications and be included in its EAJA regulation.

Specifically, § 19.215(d)(1) provides that EAJA awards may include the reasonable expenses of expert witnesses; the reasonable cost of any study, analysis, report, test, or project; and reasonable attorney or agent fees incurred after initiation of the adversary adjudication subject to the EAJA application. This paragraph also provides that the presiding officer will base awards on prevailing market rates for the kind and quality of the services furnished, even if the services were provided without charge or at reduced rate to the applicant. However, no award for the fee of an attorney or agent under this subpart may exceed the hourly rate specified in EAJA (5 U.S.C. 504(b)(1)(A)) except, as permitted by EAJA, to account for inflation as requested by the applicant and documented in the EAJA application or if a special factor, such as the limited availability of qualified attorneys or agents for the proceedings involved, justifies a higher fee.[39] Pursuant to EAJA, this paragraph also prohibits an award for expert witness fees that exceed the highest rate paid for expert witnesses by the OCC.[40]

Section 19.215(d)(2) provides factors the presiding officer should consider in determining the reasonableness of the attorney, agent, or expert witness fees. These factors are: (1) if in private practice, the attorney's, agent's, or witness' customary fee for similar services; (2) if an employee of the applicant, the fully allocated cost of the attorney's, agent's, or witness' services; (3) the prevailing rate for similar services in the community in which the attorney, agent, or witness ordinarily perform services; (4) the time actually spent in the representation of the applicant; (5) the time reasonably spent in

[39] 5 U.S.C. 504(b)(1)(A).
[40] *Id*.

light of the difficulty or complexity of the issues in the proceeding; and (6) any other factors as may bear on the value of the services provided.

Section 19.215(d)(3) provides parameters for the award of costs for any study, analysis, report, test, project, or similar matter. Specifically, the presiding officer may award the reasonable cost of these services prepared on behalf of the applicant to the extent that the charge for the service does not exceed the prevailing rate for similar services and the presiding officer finds that the service was necessary for preparation of the applicant's case.

As in § 4.06 of the ACUS Model Rule, § 19.215(d)(4) permits a presiding officer to reduce the amount to be awarded or deny an award to the extent that the party during the proceedings engaged in conduct that unduly and unreasonably protracted final resolution of the matter in controversy. Unlike § 4.06 of the ACUS Model Rule, paragraph (d)(4) also permits the presiding officer to reduce or deny the award if special circumstances make the award sought unjust. This provision is included in 5 U.S.C. 504(a)(1) and in the Treasury rule[41] and is noted in the authority and scope section of subpart L, § 19.205(a). The OCC believes it is helpful to include it in § 19.215 as this section is specifically related to the decision making of the presiding officer.

Finally, § 19.215(e) provides that the Comptroller will issue a final decision on the EAJA application or remand the application to the presiding officer for further proceedings in accordance with § 19.40, Review by the Comptroller. This provision is not included in the ACUS Model Rule. However, the OCC believes that for clarity and

[41] *See* 31 CFR 6.14.

completeness its EAJA rule should specify the final agency action on the EAJA application, as delineated in part 19.

Agency review

As in § 4.07 of the ACUS Model Rule, § 19.216 allows an applicant or Enforcement Counsel to seek review of the presiding officer's decision on the EAJA application, in accordance with § 19.39, Exceptions to recommended decision. However, § 19.216 does not include the provision in the ACUS Model Rule that permits the agency to review the decision on its own initiative. The OCC does not believe that this provision is necessary because the regulation includes a separate provision in § 19.215(e), not included in the Model rule, that provides for a final decision on the EAJA application by the Comptroller or the Comptroller's remand of the application to the presiding officer for further proceedings.

Judicial review

As provided by 5 U.S.C. 504(c)(2) and in § 4.08 of the ACUS Model Rule, § 19.217 provides for judicial review of final OCC decisions on awards in accordance with 5 U.S.C. 504(c)(2).

Stay of decision concerning award

As in § 4.09 of the ACUS Model Rule, § 19.218 provides for an automatic stay of an EAJA proceeding until the OCC's final disposition of the decision on which the application is based and either the time period for judicial review has expired, or if judicial review is sought, final disposition is made by a court and no further judicial review is available.

Payment of award

As in § 4.10 of the ACUS Model Rule, § 19.219 provides that an applicant seeking payment of an award must submit to the OCC's Litigation Group a copy of the final decision granting the award accompanied by a certification that the applicant will not seek review of the decision in the United States courts. This section also provides that the OCC pay any amount owed to an applicant within 90 days.

Subpart M—Procedures for Reclassifying an Insured Depository Institution Based on Criteria Other Than Capital

Current subpart M of part 19 and 12 CFR 165.8 set out procedures for reclassifying a national bank or Federal savings association, respectively, to a lower capital category based on criteria other than capital, pursuant to section 38 of the FDIA (12 U.S.C. 1831o) and the prompt corrective action rule, 12 CFR part 6. These procedures are substantively the same, and the final rule amends subpart M to include Federal savings associations in addition to national banks and removes § 165.8. As this subpart currently also applies to insured Federal branches of foreign banks, the final rule specifically includes insured Federal branches in the scope section.

Specifically, the final rule replaces the term "bank" each time it appears in subpart M with the term "insured depository institution," and defines this term to mean an insured national bank, an insured Federal savings association, an insured Federal savings bank, or an insured Federal branch of a foreign bank. The final rule also replaces the incorrect reference to subpart M with a reference to part 6 in § 19.220. In addition, the final rule makes a conforming change to § 19.221(b)(3) to replace the phrase "a written appeal of the proposed classification" with "a written response to the proposed reclassification," which is the terminology used elsewhere in this section. Furthermore, as

in §§ 19.35, 19.112, and 19.120, the final rule adds paragraph (g)(3) to § 19.221 to provide rules governing electronic presentations in the course of a hearing. Specifically, this provision provides that, based on the circumstances of each hearing, the presiding officer may direct the use of, or any party may elect to use, an electronic presentation during the hearing. If required by the presiding officer, each party will be responsible for its own presentation and related costs unless the parties agree otherwise. As indicated previously, this new language is necessary to account for the routine use of electronic presentations that current part 19 does not address. The final rule also makes a conforming change in paragraph (g)(2) that allows, by stipulation of the parties or by order of the presiding officer, a court reporter or other authorized person to administer the required oath to a witness remotely without being in the physical presence of the witness. Additionally, the final rule revises the heading to subpart M to include insured depository institutions and to describe the subject of the subpart more accurately. Lastly, the final rule makes technical changes to 12 CFR 6.3, 6.4, 6.5, and 6.6 to remove the separate references to § 165.8 with respect to savings associations.

Subpart N—Order to Dismiss a Director or Senior Executive Officer

Current subpart N of part 19 and 12 CFR 165.9 set out procedures associated with an order to dismiss a director or senior executive officer of a national bank or Federal savings association, respectively, pursuant to an order issued under section 38 of the FDIA (12 U.S.C. 1831o) and, with respect to national banks, the prompt corrective action rule, 12 CFR part 6. Subpart N and § 165.9 are substantively the same, and the final rule applies subpart N to Federal savings associations in addition to national banks and removes § 165.9. The final rule also replaces the term “bank” each time it appears in

§ 19.230 with the term "insured depository institution" and defines the term based on section 3 of the FDIA (12 U.S.C. 1813(c)(2)) to mean an insured national bank, an insured Federal savings association, an insured Federal savings bank, or an insured Federal branch of a foreign bank.

The final rule also amends § 19.231(b). This paragraph currently provides that a director or senior executive officer who has been served with a directive for dismissal has 10 calendar days to file a written request for reinstatement, unless the OCC allows further time as requested of the Respondent. The final rule provides that failure by the Respondent to file this request within the specified time period will constitute a waiver of the opportunity to respond and consent to the dismissal. The OCC is adding this statement to the regulation to clarify the result of a failure to request reinstatement. The final rule also makes a stylistic revision to § 19.231(b) to remove passive sentence structure.

In addition, the final rule amends § 19.231(c), which currently requires that the OCC issue an order directing an informal hearing to commence no later than 30 days after receipt of the request for a hearing unless the respondent requests a later date. The final rule amends this provision to provide that a later hearing date may occur only if permitted by the OCC, and, therefore, the request for an extension will not be automatically approved. This change allows the OCC some discretion as to how far into the future a hearing may take place.

The final rule amends § 19.231(d) to provide rules governing electronic presentations in the course of a hearing. Specifically, the amendment provides that, based on the circumstances of each hearing, the presiding officer may direct the use of, or any

party may elect to use, an electronic presentation during the hearing. If required by the presiding officer, each party will be responsible for its own presentation and related costs unless the parties agree otherwise. This new language is necessary to account for the routine use of electronic presentations that current part 19 does not address. The final rule also makes a conforming change in § 19.231(d)(5) to allow, by stipulation of the parties or by order of the presiding officer, a court reporter or other authorized person to administer the required oath to a witness remotely without being in the physical presence of the witness. The final rule also makes a clarifying change in paragraph (d)(1), Hearing procedures. Among other things, this paragraph currently provides that a Respondent has the right to introduce relevant written materials and to present oral argument. The final rule clarifies that these written materials and oral arguments may be made at the hearing. This clarification ensures that the Respondent is aware that this right is provided during the hearing and not outside of the hearing context. The final rule also moves the sentence regarding oral testimony and witnesses in paragraph (d)(1) to paragraph (d)(5) to better organize paragraph (d) and adds paragraph headings.

Furthermore, the final rule revises the heading of subpart N to describe the subject of the subpart more accurately.

Lastly, the final rule makes technical changes to 12 CFR 6.6 to remove the separate reference to § 165.9 with respect to Federal savings associations.

Because §§ 165.8 and 165.9 are the only sections in current part 165, the final rule removes part 165 in its entirety.

Subpart O—Civil Money Penalty Inflation Adjustments

Current part 19, subpart O, and § 109.103 provide the statutorily required formula to calculate inflation adjustments for civil money penalties assessed against national banks and Federal savings associations, respectively. These sections also indicate that the OCC will publish, on or before January 15 of each calendar year, an annual notice in the *Federal Register* of the maximum penalties the OCC may assess. The final rule retains subpart O and removes § 109.103. No amendments are necessary to apply subpart O to Federal savings associations. The final rule amends the section heading to be more descriptive and makes a stylistic revision in paragraph (a) to remove passive sentence structure.

Subpart Q – Forfeiture of Franchise for Money Laundering or Cash Transaction Reporting Offenses

Twelve U.S.C. 93(d)(1) provides that the Comptroller will, after receiving notification from the U.S. Attorney General of a conviction of a criminal offense under section 1956 or 1957 of title 18 (18 U.S.C. 1956, 1957) or may, after receiving notification for the U.S. Attorney General of a conviction of a criminal offense under section 5322 or 5324 of title 31 (31 U.S.C. 5322, 5324), issue to the convicted national bank or Federal branch or agency of foreign bank a notice of the Comptroller's intent to terminate all rights, privileges and franchises of the bank or Federal branch or agency and to schedule a pretermination hearing. The offenses include financial crimes, including money laundering (18 U.S.C. 1956), engaging in monetary transactions in criminally derived property (18 U.S.C. 1957), and structuring transactions to evade reporting requirements (31 U.S.C. 5324). Twelve U.S.C. 1464(w) imposes the same requirement with respect to convicted Federal savings associations.

Part 19 currently does not include specific procedures for a charter pretermination hearing. The final rule adds a new subpart Q that sets forth Administrative Procedure Act (APA) compliant procedures for pretermination hearings, which will be conducted before a presiding officer appointed by the Comptroller. These procedures are largely analogous to the deposit insurance termination hearing procedures instituted by the FDIC and NCUA for insured State depository institutions and federally insured credit unions, respectively, that are convicted of the same offenses.

Specifically, § 19.250 makes subpart A applicable, except as provided in new subpart Q, to proceedings by the Comptroller to determine whether, pursuant to 12 U.S.C. 93(d) or 12 U.S.C. 1464(w), as applicable, to terminate all rights, privileges, and franchises of a national bank, Federal savings association, or Federal branch or agency convicted of a criminal offense under 18 U.S.C. 1956 or 1957 or 31 U.S.C. 5322 or 5324.

Section 19.251(a) provides that, after receiving written notification from the U.S. Attorney General of a conviction of a criminal offense under sections 18 U.S.C. 1956 or 1957 or 31 U.S.C. 5322 or 5324, the Comptroller will issue a written notice of intent to terminate all rights, privileges and franchises to the convicted national bank, Federal savings association, or Federal branch or agency and schedule a pretermination hearing. Section 19.251(b) details the requisite contents of the notice and § 19.251(c) provides that failure to answer the notice will be deemed consent to the termination and that the Comptroller may order the termination. This notice of intent to terminate is similar to the notice in § 19.18 except that the subpart Q notice of intent lists the basis of termination pursuant to factors listed in § 19.253 instead of the statement of matters of fact or law; the

time within which to file an answer in response to the notice of intent will be established by the presiding officer instead of by law or regulation; and the answer must be filed with the OCC instead of with OFIA. Section 19.251(d) provides that the OCC will serve the notice upon the national bank, Federal savings association, or Federal branch or agency in the manner set forth in § 19.11(c).

Section 19.252 provides that the Comptroller will designate a presiding officer to conduct the pretermination hearing. The presiding officer has the same powers set forth in § 19.5, including the discretion necessary to conduct the pretermination hearing in a manner that avoids unnecessary delay. Section 19.252 also provides that the presiding officer may limit the use of discovery and limit opportunities to file written memoranda, briefs, affidavits, or other materials or documents to avoid relitigating facts already stipulated to by the parties, conceded to by the institution, or otherwise already firmly established by the underlying criminal conviction.

Section 19.253 provides the factors the Comptroller will take into account when determining whether or not to terminate a franchise as set forth in 12 U.S.C. 93(d) and 1464(w). The factors are: (1) the extent to which directors or senior executive officials knew of or were involved in the criminal offense, (2) the extent to which the offense occurred despite the existence of policies and procedures within the institution designed to prevent the occurrence of the offense, (3) the extent to which the institution fully cooperated with law enforcement authorities regarding the investigation of the offense, (4) the extent to which the institution has implemented additional internal controls since the commission of the offense to prevent a reoccurrence, and (5) the extent to which the

interest of the local community in having adequate deposit and credit services available would be threatened by the forfeiture of the franchise.

Lastly, § 19.254 delineates the right of judicial review under 12 U.S.C. 1818(h) of a termination order as required by 12 U.S.C. 93(d)(1)(C) and 1464(w)(1)(C).

Technical changes

In addition to the technical changes discussed elsewhere in this **SUPPLEMENTARY INFORMATION**, the final rule makes technical changes throughout parts B through P by: (1) replacing the word "shall" with "must," "will," or other appropriate language, which is the more current rule writing convention for imposing an obligation and is the recommended drafting style of the *Federal Register*; (2) conforming citation styles and providing more detailed references to the cited statutes; (3) conforming abbreviations, including replacing the use of the term "administrative law judge" with "ALJ; (4) replacing gender references such as "him," "his" or "her" with gender-neutral terminology; and (5) making other non-substantive grammatical, clarifying, organizational, and stylistic changes. The final rule also makes a technical change to 12 CFR 3.405, which references cease and desist proceedings with respect to minimum capital ratios, to remove the reference to part 109 for savings associations and replace it with part 19 because this final rule removes part 109 and applies part 19 to Federal savings associations. Similarly, this final rule makes a new technical change to § 150.570, which sets forth the rules governing the conduct of a hearing required under 12 U.S.C. 1464(n)(10)(B) for revocation of fiduciary powers, to replace the reference to part 109 with a reference to part 19.

B. Amendments to the Board's Local Rules – Final Rules

The Board is adopting a final rule to amend subpart B of part 263 – the Board Local Rules Supplementing the Uniform Rules – and to create a new subpart K (§§ 263.450 through 263.457) establishing new rules governing all Board formal investigations. The new subpart K replaces subpart L of Regulation LL (12 CFR part 238), which is eliminated. The Board did not receive any comments on its proposed changes to the Local Rules and is adopting the proposed amendments.

The revised Local Rules in subpart B apply only to adjudicatory proceedings initiated on or after the effective date of this final rule, January 1, 2024. The previous version of the Local Rules in subpart B, which are included in appendix A to part 263 of this final rule, are applicable to all adjudicatory proceedings initiated before, January 1, 2024.

The Board revised its Local Rules to conform them to the changes in the Uniform Rules and to facilitate the use of electronic communications and technology in Board proceedings. In addition, to promote transparency and fairness, the Board added the new subpart K establishing rules governing all Board formal investigations and a new section in subpart B (§ 263.57) establishing rules for the imposition of sanctions in administrative proceedings. Because these new sections are modeled on the rules already adopted by other banking regulators, they promote uniformity in the rules of banking regulators. Subparts C through J of part 263 have not been amended and remain in effect.

Subpart B - Board Local Rules Supplementing the Uniform Rules

Section 263.52 Address for filing

Section 263.52 provides an electronic mail address for papers to be filed electronically with the Secretary of the Board.

Section 263.53 Discovery depositions

Section 263.53 requires parties to state in the application for a discovery deposition the manner (*e.g.*, remote means, in person) of the deposition, to note that the ALJ can consider the manner of the deposition in determining whether to grant or modify it, and to clarify that depositions can be conducted by remote means and witnesses can be sworn remotely.

Section 263.55 Board as Presiding Officer

Section 263.55 clarifies that when the Board designates itself, one of its members, or an authorized officer, to serve as presiding officer in a formal hearing, the authority of the Board or its designee will include all the authority provided to an ALJ under the rules governing formal hearings.

Section 263.57 Sanctions related to conduct in adjudicatory proceedings

Section 263.57 is a new section that establishes the rules governing the imposition of sanctions against parties or persons participating in administrative adjudicatory proceedings. The new section: (a) explicitly authorizes the ALJ to impose sanctions against parties or persons; (b) describes the sanctions the ALJ may impose; (c) describes procedures for imposing sanctions; and (d) establishes that the ALJ or the Board may impose other sanctions authorized by applicable statute or regulation.

Subpart K – Formal Investigative Proceedings

Subpart K is a new subpart that establishes a single set of rules governing formal investigations for all Board-regulated organizations and any other entity or individual that the Board has authority to investigate or bring an enforcement action against. Subpart K, which is modeled on the investigative procedures of other Federal financial industry

enforcement agencies, defines a formal investigative proceeding by the Board and its scope; delineates some of the powers of the Board's designated representatives conducting formal investigative proceedings; requires the confidentiality of formal investigative proceedings; provides for certain rights of witnesses in formal investigative proceedings; and establishes investigative subpoena procedures. Subpart K governs only the conduct of formal investigations; administrative adjudicatory proceedings continue to be governed by the Board's Uniform Rules and Local Rules (12 CFR part 263, subparts A and B).

C. Amendments to the FDIC's Local Rules – Final Rules

The FDIC is adopting a final rule to amend its Local Rules set forth at 12 CFR part 308, subpart B, General Rules of Procedure, which supplement the Uniform Rules set forth in 12 CFR part 308, subpart A. The FDIC did not receive any comments to the Local Rules and for the reasons stated herein and in the proposed rule, the FDIC is adopting the amendments as proposed.

The FDIC included a new § 308.100 as a technical change to clarify the applicability date of the revised Local Rules set forth in subpart B of this part. The newly revised rules only apply to adjudicatory proceedings initiated on or after the effective date of this final rule, January 1, 2024. Any adjudicatory proceedings initiated before January 1, 2024, continue to be governed by the previous version of the Local Rules included in appendix A in part 308 of this final rule.

The FDIC revised its Local Rules to reflect the current processes and procedures routinely ordered by the administrative law judges (ALJs) that mirror procedures followed in the Federal court system. The FDIC also added new provisions regarding modern

discovery practices, depositions, and disclosure of expert witness testimony to promote cooperation, fairness, and transparency. Similar to the changes in the Uniform Rules, the FDIC updated the language throughout its Local Rules to reflect the modernized language used in rulemaking.

Section 308.100 Applicability date

Section 308.100 was a technical change created to explain the applicability date of its revised Local Rules.

Section 308.102 Authority of Board of Directors and Administrative Officer

Section 308.102 was updated to reflect the current internal organization of the FDIC.

Section 308.103 Assignment to Administrative Law Judge (ALJ)

Section 308.103 was renamed to better reflect additional changes to how matters are assigned to an ALJ.

Section 308.104 Filings with the Board of Directors

Section 308.104 provides an electronic mail address for the FDIC's Administrative Officer, who is the official custodian of the record for administrative proceedings, and with whom all parties must file an electronic copy of all pleadings.

Section 308.107 Supplemental Discovery Rules

Section 308.107 was renamed to reflect the updates to the FDIC's discovery processes to include modern discovery practices and procedural orders issued by the ALJs and to allow for limited depositions.

Section 308.107(a) Scope of Discovery

Section 308.107(a) describes the permitted scope of discovery. The FDIC adopted

the concept of "proportionality" in discovery production and set forth limits on electronically-stored information (ESI).

Section 308.107(b) Joint Discovery Plan

Section 308.107(b) adds a Joint Discovery Plan to the discovery process.

Section 308.107(c) Document and Electronically Stored Information (ESI) Discovery

Section 308.107(c) integrates the Local Rules with the Uniform Rules.

Section 308.107(d) Expert Witness Disclosures

Section 308.107(d) describes the required disclosures for expert witness testimony. Section 308.107(d)(2)(i) applies to professional experts who generally do not work for a party but are specifically engaged for the purpose of providing expert testimony. Section 308.107(d)(2)(ii) applies to those individuals whose expertise comes from the person's regular course of business such as, a commissioned bank examiner or bank personnel, who will be offered as an expert witness at the hearing.

Section 308.107(e) Depositions

Section 308.107(e) allows parties to pursue limited discovery depositions of individuals with direct knowledge of facts relevant to the proceeding and individuals designated as expert witnesses. Section 308.107(e)(1) authorizes deposition discovery only to the extent that it is proportional to the needs of the case and the information sought from the depositions cannot be obtained from another source that is more convenient, less burdensome, or less expensive. In the absence of extraordinary circumstances, depositions are limited to individuals expected to testify at the hearing.

Section 308.107(f) Discovery Motions

Section 308.107(f) clarifies certain matters related to discovery motions. Section 308.107(f)(1) clarifies that the ALJ must limit inappropriate discovery either on motion, or on their own initiative. Section 308.107(f)(2) provides that parties may move to terminate depositions that are being conducted in bad faith or an inappropriate manner. Section 308.107(f)(3) clarifies that the provisions of § 308.25(f), governing motions to compel document discovery, apply equally to all motions to compel discovery.

V. Discussion of OCC Changes to Part 4, Service of Process

The final rule amends subpart A of 12 CFR part 4, Organization and Functions, to add a new § 4.8 that addresses service of process. This new provision puts private parties on notice of the established process they should use in serving the OCC, Comptroller, or officers or employees of the OCC in a private action. The OCC is codifying this process in the final rule to help avoid possible confusion as to where and how private parties serve the OCC, Comptroller, or officers or employees of the OCC and to ensure that the OCC has adequate notice to respond to a complaint or other filing. The final rule provides that "officers" are officials who are not employees of the OCC, such as an ALJ.

Specifically, § 4.8(a) provides that § 4.8(b), (c), and (d) apply to service of process upon the OCC, the Comptroller acting in their official capacity, officers or employees of the OCC who are sued in their official capacity, and officers or employees of the OCC who are sued in an individual capacity for an act or omission occurring in connection with duties performed on the behalf of the OCC. Section 4.8(b) provides that service of process for actions in Federal courts should be made upon the OCC, the Comptroller, or officers or employees of the OCC by serving the United States under the procedures set forth in the Federal Rules of Civil Procedure governing the service of

process upon the United States and its agencies, corporations, officers, or employees.[42] Section 4.8(c) provides that service of process for actions brought in State courts should be made upon the OCC, the Comptroller, or officers or employees of the OCC by sending copies of the summons and complaint by registered or certified mail to the Chief Counsel, Office of the Comptroller of the Currency, Washington, DC 20219. Section 4.8(c) also encourages parties to provide copies of the summons and complaint to the appropriate United States Attorney in accordance with the procedures set forth in the Federal Rules of Civil Procedure governing the service of process upon the United States and its agencies, corporations, officers, or employees.[43] Section 4.8(d) provides that only the Washington, DC headquarters office of the OCC is authorized to accept service of a summons or complaint and that the OCC, the Comptroller, or officers or employees of the OCC should be served with a copy of the summons or complaint at the Washington, DC headquarters office in accordance with § 4.8(b) or (c). This provision clarifies that a summons or complaint should not be sent to another office of the OCC.

Finally, § 4.8(e) provides that the OCC is not an agent for service of process upon a national bank, Federal savings association, or Federal branch or agency of a foreign bank. Instead, it directs parties to serve a summons or complaint upon the institution in accordance with the laws and procedures for the court in which the action has been filed. The OCC intends this provision to prevent further instances of parties attempting to serve a national bank through the OCC.

As indicated above, the OCC did not receive any comments on the proposed amendments to part 4 and is adopting them as proposed with one technical correction.

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[42] *See* Rule 4(i) of the Federal Rules of Civil Procedure.
[43] *Id.*

The proposed rule set forth the incorrect authority section for part 4. The final rule includes the correct authority section, which is unchanged from the current rule.

VI. Regulatory Analysis

A. Regulatory Flexibility Act

OCC: The Regulatory Flexibility Act (RFA)[44] requires an agency, in connection with a rule, to prepare a Final Regulatory Flexibility Analysis (FRFA) describing the impact of the rule on small entities (defined by the Small Business Administration (SBA) for purposes of the RFA to include commercial banks and savings institutions with total assets of $850 million or less and trust companies with total assets of $47 million or less)[45] or to certify that the final rule would not have a significant economic impact on a substantial number of small entities.

The OCC currently supervises approximately 1,070 institutions (commercial banks, trust companies, Federal savings associations, and branches or agencies of foreign banks, collectively banks), of which 661 are small entities.[46] The final rule could impact any OCC-supervised institution, including any of these small entities. However, it is unlikely that the rule would impact more than a *de minimis* number of OCC-supervised institutions in any given year.[47] Furthermore, the rule would facilitate the orderly determination of administrative proceedings and its proposed changes are primarily

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[44] 5 U.S.C. 601 *et seq*.

[45] *See* the SBA's size thresholds for commercial banks and savings institutions, and trust companies, 13 CFR 121.201.

[46] Consistent with the General Principles of Affiliation 13 CFR 121.103(a), the OCC counts the assets of affiliated financial institutions when determining if it should classify an institution as a small entity. The OCC used December 31, 2022, to determine size because a "financial institution's assets are determined by averaging the assets reported on its four quarterly financial statements for the preceding year." *See* footnote 8 of the SBA's *Table of Size Standards*.

[47] Based on activity during the past five years, approximately 23 banks (an average of less than 5 per year) would be impacted by the proposed changes to part 19, subparts A, B, C, I, L, and M. Furthermore, during the past five years the OCC has not received any Equal Access to Justice Act (EAJA) applications from a bank for the payment of attorney's fees.

updates and clarifications of administrative procedure and in general reflect current practices. Therefore, the OCC concludes that the final rule would not impose more than minimal costs on institutions that may be impacted. Because the OCC estimates that expenditures, if any, associated with the final rule would be *de minimis,* the OCC certifies that the final rule does not have a significant economic impact on a substantial number of small entities supervised by the OCC. Accordingly, an FRFA is not required.

Board: In accordance with the Regulatory Flexibility Act (RFA),[48] the Board published an initial regulatory flexibility analysis in the notice of proposed rulemaking. The Board did not receive any comments on its initial regulatory flexibility analysis. The RFA also requires an agency to prepare a final regulatory flexibility analysis generally describing the impact of the rule on small entities, unless the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.[49] Under regulations issued by the Small Business Administration, a small entity includes a bank, bank holding company, or savings and loan holding company with assets of $850 million or less and trust companies with annual receipts of $47 million or less.[50]

Consistent with the analysis included in the initial regulatory flexibility analysis, the Board certifies that the final rule will not have a significant economic impact on a substantial number of small entities. As explained above, the Agencies are amending the Uniform Rules and their local rules to recognize the use of electronic communications in all aspects of administrative hearings and to otherwise increase the efficiency and fairness

[48] 5 U.S.C. 601 *et seq.*
[49] 5 U.S.C. 604; 605(b).
[50] 13 CFR 121.201.

of administrative adjudications. In addition, the Board is establishing a single set of rules governing all formal investigations. These rules only establish procedures governing Board formal investigations and adjudicatory proceedings. The rules do not impose any requirement on regulated entities, and regulated entities would not need to take any action in response to the proposed rules. The rules will only apply to regulated entities if they become parties to administrative adjudications or are subject to formal investigations, which is unusual. Therefore, the rules will not have a significant economic impact on a substantial number of small entities.

FDIC: The RFA requires that, in connection with a final rule, an agency prepare and make available for public comment a final regulatory flexibility analysis that describes the impact of the final rule on small entities.[51] However, a regulatory flexibility analysis is not required if the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities, and publishes its certification and a short explanatory statement in the *Federal Register* together with the rule. The SBA has defined "small entities" to include banking organizations with total assets of less than or equal to $850 million.[52] Generally, the FDIC considers a significant effect to be a quantified effect in excess of 5 percent of total annual salaries and benefits per institution, or 2.5 percent of total noninterest expenses. The FDIC believes that effects in excess of one or more of these thresholds typically represent significant effects for FDIC-

[51] 5 U.S.C. 601 *et seq.*

[52] The SBA defines a small banking organization as having $850 million or less in assets, where "a financial institution's assets are determined by averaging the assets reported on its four quarterly financial statements for the preceding year." See 13 CFR 121.201 (as amended by 87 FR 69118, effective December 19, 2022). "SBA counts the receipts, employees, or other measure of size of the concern whose size is at issue and all of its domestic and foreign affiliates." See 13 CFR 121.103. Following these regulations, the FDIC uses a covered entity's affiliated and acquired assets, averaged over the preceding four quarters, to determine whether the FDIC-supervised institution is "small" for the purposes of RFA.

supervised institutions.

As of the quarter ending December 30, 2022, the FDIC supervised 3,038 depository institutions,[53] of which 2,325 were considered small for the purposes of the RFA.[54]

As previously discussed, the Agencies are amending the Uniform Rules to recognize the use of electronic communications in all aspects of administrative hearings and to otherwise increase the efficiency and fairness of administrative adjudications. The FDIC is also modifying the Local Rules of administrative practice and procedure. The amendments apply to administrative proceedings held by the FDIC and impose no significant additional burdens on small entities. Further, the FDIC typically brings less than five formal administrative proceedings annually. Therefore, the FDIC concludes that the final rule will not have a significant impact on a substantial number of small entities. For the reasons described above and pursuant to 5 U.S.C. 605(b), the FDIC certifies that the final rule will not have a significant economic impact on a substantial number of small entities.

NCUA: The RFA generally requires that, in connection with a rulemaking, an agency prepare and make available for public comment regulatory flexibility analysis that describes the impact of a proposed rule on small entities. A regulatory flexibility analysis is not required, however, if the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities (defined for purposes of the RFA to include federally insured credit unions with assets less than $100 million) and publishes its certification and a short, explanatory statement in the *Federal Register*

[53] FDIC-supervised institutions are set forth in 12 U.S.C. 1813(q)(2).
[54] FDIC Call Report data, December 31, 2022.

together with the rule. The final rule amends the Uniform Rules to recognize the use of electronic communications in all aspects of administrative hearings and to otherwise increase the efficiency and fairness of administrative adjudications. The changes consist of updates and clarifications of administrative procedure and impose no significant new burdens on credit unions, parties to administrative actions, or counsel. Also, only a small number of federally insured credit unions and institution-affiliated parties are subject to actions that the final rule will govern, as the NCUA currently has only one pending proceeding and generally files a small number of cases. Accordingly, the NCUA certifies that the final rule will not have a significant economic impact on a substantial number of small credit unions.

B. Paperwork Reduction Act

The Paperwork Reduction Act of 1995[55] (PRA) states that no agency may conduct or sponsor, nor is the respondent required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number. The Agencies have reviewed this final rule and determined that it does not create any information collection or revise any existing collection of information. Accordingly, no PRA submissions will be made to the OMB with respect to this final rule. The Board reviewed the rule under the authority delegated to the Board by the OMB.

C. OCC Unfunded Mandates Reform Act of 1995

The OCC analyzed the rule under the factors set forth in the Unfunded Mandates Reform Act of 1995 (UMRA).[56] Under this analysis, the OCC considered whether the final rule includes a Federal mandate that may result in the expenditure by State, local,

[55] 44 U.S.C. 3501–3521.
[56] 2 U.S.C. 1532.

and Tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year ($182 million as adjusted for inflation). The UMRA does not apply to regulations that incorporate requirements specifically set forth in law.

As discussed above, the OCC estimates that expenditures, if any, associated with the final rule would be *de minimis*. Therefore, the OCC concludes that the proposed rule would not result in an expenditure of $182 million or more annually by State, local, and Tribal governments, or by the private sector. Because the final rule does not trigger the UMRA cost threshold, the OCC has not prepared the written statement described in section 202 of the UMRA.

D. Riegle Community Development and Regulatory Improvement Act

Pursuant to section 302(a) of the Riegle Community Development and Regulatory Improvement Act (RCDRIA),[57] in determining the effective date and administrative compliance requirements for new regulations that impose additional reporting, disclosure, or other requirements on insured depository institutions (IDIs), the OCC, Board, and FDIC[58] must consider, consistent with principles of safety and soundness and the public interest: (1) any administrative burdens that such regulations would place on depository institutions, including small depository institutions, and customers of depository institutions; and (2) the benefits of such regulations. In addition, section 302(b) of RCDRIA requires new regulations and amendments to regulations that impose additional reporting, disclosures, or other new requirements on IDIs generally to take effect on the first day of a calendar quarter that begins on or after the date on which the regulations are

[57] 12 U.S.C. 4802(a).
[58] RCDRIA does not apply to the NCUA.

published in final form.[59]

With respect to administrative compliance requirements, the OCC, Board, and FDIC have considered the administrative burdens and the benefits of this final rule and believes that any burdens are necessary for proper OCC, Board, and FDIC supervision and also to update and conform the OCC's, Board's and FDIC's rules to current practices. As examples, the final rule allows for electronic filing of documents and expands the definition of the term "document" in discovery to account for the range of digital information now available. The final rule's benefits include clarifying existing requirements, codifying existing practice, removing unnecessary provisions, and updating and modernizing certain provisions. Further discussion of the consideration by the OCC, Board, and FDIC of these administrative compliance requirements is found in other sections of the final rule's **SUPPLEMENTARY INFORMATION** section.

Because this final rule is published on [INSERT DATE OF PUBLICATON IN THE FEDERAL REGISTER], the January 1, 2024, effective date complies with the RCDRIA requirement that a rule take effect on the first day of a calendar quarter that begins on or after the date on which the regulations are published in final form.

E. Plain Language

Section 722 of the Gramm-Leach-Bliley Act[60] requires the OCC, Board, and FDIC[61] to use plain language in all proposed and final rules published after January 1, 2000. The Agencies have sought to present the final rule in a simple and straightforward

[59] 12 U.S.C. 4802.
[60] Pub. L. 106-102, section 722, 113 Stat. 1338, 1471 (1999), 12 U.S.C. 4809.
[61] This requirement does not apply to the NCUA.

manner. The Agencies received no comments on the use of plain language in the proposed rule.

F. NCUA Executive Order 13132

Executive Order 13132 encourages independent regulatory agencies to consider the impact of their actions on State and local interests. In adherence to fundamental federalism principles, the NCUA, an independent regulatory agency as defined in 44 U.S.C. 3502(5), voluntarily complies with the principles of the Executive Order. This rulemaking will not have a substantial direct effect on the states, on the connection between the National Government and the states, or on the distribution of power and responsibilities among the various levels of government. The final rule amends the Uniform Rules to recognize the use of electronic communications in all aspects of administrative hearings and to otherwise increase the efficiency and fairness of administrative adjudications. The NCUA does not believe these changes will affect or alter the NCUA's relationship with State agencies or bodies that supervise federally insured, State-chartered credit unions or the division of supervisory responsibilities between the NCUA and these agencies or bodies. For example, the final rule does not affect the NCUA's requirement to provide notice to the commission, board, or authority having supervision of a State-chartered credit union of the NCUA's intent to institute certain enforcement actions and the grounds for them.[62] The NCUA has determined that this final rule does not constitute a policy that has federalism implications for purposes of the Executive Order.

G. NCUA Assessment of Federal Regulations and Policies on Families

[62] *See, e.g.*, 12 U.S.C. 1786(o).

The NCUA has determined that this final rule will not affect family well-being within the meaning of section 654 of the Treasury and General Government Appropriations Act, 1999.[63] As discussed in the preceding regulatory procedure paragraphs, the final rule makes changes to procedural rules that apply to federally insured credit unions and institution-affiliated parties. These rules have no direct connection to families and their well-being, and the NCUA historically has brought only a small number of cases under these rules.

H. The Congressional Review Act

For purposes of the Congressional Review Act,[64] the Office of Management and Budget (OMB) makes a determination as to whether a final rule constitutes a ''major'' rule. If a rule is deemed a ''major rule'' by the OMB, the Congressional Review Act generally provides that the rule may not take effect until at least 60 days following its publication.[65] The Congressional Review Act defines a ''major rule'' as any rule that the Administrator of the Office of Information and Regulatory Affairs of the OMB finds has resulted in or is likely to result in (1) an annual effect on the economy of $100,000,000 or more; (2) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies or geographic regions; or (3) a significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign based enterprises in domestic and export markets.[66] OMB has determined that this final rule is not a major

[63] Pub. L. 105–277, 112 Stat. 2681 (1998).
[64] 5 U.S.C. 801 *et seq.*
[65] 5 U.S.C. 801(a)(3).
[66] 5 U.S.C. 804(2)

rule under the Congressional Review Act. As required by the Congressional Review Act, the Agencies will submit the final rule and other appropriate reports to Congress and the Government Accountability Office for review.

I. Effective Date

The Administrative Procedure Act[67] requires that a substantive rule must be published not less than 30 days before its effective date, except for: (1) substantive rules which grant or recognize an exemption or relieve a restriction; (2) interpretative rules and statements of policy; or (3) as otherwise provided by the agency for good cause.[68] As stated above, section 302(b) of RCDRIA requires that regulations or amendments issued by the OCC, Board, and FDIC that impose additional reporting, disclosure, or other requirements on IDIs generally take effect on the first day of a calendar quarter that begins on or after the date of publication of the final rule, unless, among other things, the agency determines for good cause that the regulations should become effective before such time.[69] The final rule is effective January 1, 2024, which is more than 30 days after its publication date of [INSERT DATE OF PUBLICATION IN FEDERAL REGISTER] and on the first date of a calendar quarter following publication.

List of Subjects

12 CFR Part 3

[67] Codified at 5 U.S.C. 551 *et seq.*
[68] 5 U.S.C. 553(d).
[69] 12 U.S.C. 4802(b).

Administrative practice and procedure, Banks, banking, Federal Reserve System, Investments, National banks, Reporting and recordkeeping requirements, Savings associations.

12 CFR Part 4

Administrative practice and procedure, Freedom of information, Individuals with disabilities, Minority businesses, Organization and functions (Government agencies), Reporting and recordkeeping requirements, Service of process, Women.

12 CFR Part 6

Federal Reserve System, Federal savings associations, National banks, Penalties.

12 CFR Part 19

Administrative practice and procedure, Crime, Equal access to justice, Federal savings associations, Investigations, National banks, Penalties, Securities.

12 CFR Part 108

Administrative practice and procedure, Crime, Savings associations.

12 CFR Part 109

Administrative practice and procedure, Penalties.

12 CFR Part 112

Administrative practice and procedure.

12 CFR Part 150

Administrative practice and procedure, Reporting and recordkeeping requirements, Savings associations, Trusts and trustees.

12 CFR Part 165

Administrative practice and procedure, Savings associations.

12 CFR Part 238

Administrative practice and procedure, Banks, Banking, Federal Reserve System, Holding companies, Investigations, Reporting and recordkeeping requirements, , Savings and loan holding companies, Securities.

12 CFR Part 263

Administrative practice and procedure, Federal Reserve System, Investigations.

12 CFR Part 308

Administrative practice and procedure, Bank deposit insurance, Banks, banking, Claims, Crime, Equal access to justice, Fraud, Investigations, Lawyers, Penalties, Savings associations.

12 CFR Part 747

Administrative practice and procedure, Claims, Credit unions, Crime, Equal access to justice, Investigations, Lawyers, Penalties, Share insurance.

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

For the reasons set out in the preamble, and under the authority of 12 U.S.C. 93a, the OCC amends 12 CFR chapter I as follows:

PART 3 —CAPITAL ADEQUACY STANDARDS

1. The authority citation for part 3 continues to read as follows:

Authority: 12 U.S.C. 93a, 161, 1462, 1462a, 1463, 1464, 1818, 1828(n), 1828 note, 1831n note, 1835, 3907, 3909, 5412(b)(2)(B), and Pub. L. 116-136, 134 Stat. 281.

§ 3.405 [Amended]

2. Section 3.405 is amended by removing the phrase "(12 CFR 19.0 through 19.21 for national banks and 12 CFR part 109 for Federal savings associations)" and adding in its place the phrase "(12 CFR part 19)".

PART 4— ORGANIZATION AND FUNCTIONS, AVAILABILITY AND RELEASE OF INFORMATION, CONTRACTING OUTREACH PROGRAM, POST-EMPLOYMENT RESTRICTIONS FOR SENIOR EXAMINERS

3. The authority citation for part 4 continues to read as follows:

Authority: 5 U.S.C. 301, 552; 12 U.S.C. 1, 93a, 161, 481, 482, 484(a), 1442, 1462a, 1463, 1464 1817(a), 1818, 1820, 1821, 1831m, 1831p-1, 1831o, 1833e, 1867, 1951 *et seq.,* 2601 *et seq.,* 2801 *et seq.,* 2901 *et seq.,* 3101 *et seq.,* 3401 *et seq.,* 5321, 5412, 5414; 15 U.S.C. 77uu(b), 78q(c)(3); 18 U.S.C. 641, 1905, 1906; 29 U.S.C. 1204; 31 U.S.C. 5318(g)(2), 9701; 42 U.S.C. 3601; 44 U.S.C. 3506, 3510; E.O. 12600 (3 CFR, 1987 Comp., p. 235).

4. Add § 4.8 to subpart A to read as follows:

§ 4.8 Service of process upon the OCC or the Comptroller.

(a) *Scope*. Paragraphs (b) through (d) of this section apply to service of process upon the OCC, the Comptroller acting in their official capacity, officers (officials who are not employees of the OCC, such as an administrative law judge (ALJ) or employees of the OCC who are sued in their official capacity), and officers or employees of the OCC who are sued in an individual capacity for an act or omission occurring in connection with duties performed on the behalf of the OCC.

(b) *Actions in Federal courts*. Service of process for actions in Federal courts should be made upon the OCC, the Comptroller, or officers or employees of the OCC under the procedures set forth in the Federal Rules of Civil Procedure governing the service of process upon the United States and its agencies, corporations, officers, or employees.

(c) *Actions in State courts*. Service of process for actions in State courts should be made upon the OCC, the Comptroller, or officers or employees of the OCC by sending copies of the summons and complaint by registered or certified mail, same day courier service, or overnight delivery service to the Chief Counsel, Office of the Comptroller of the Currency, Washington, DC 20219. In these actions, parties also are encouraged to provide copies of the summons and complaint to the appropriate United States Attorney in accordance with the procedures set forth in Rule 4(i) of the Federal Rules of Civil Procedure.

(d) *Receipt of summons or complaint*. Only the Washington, DC headquarters office of the OCC is authorized to accept service of a summons or complaint. The OCC, the Comptroller, and officers or employees of the OCC must be served with a copy of the summons or complaint at the Washington, DC headquarters office in accordance with paragraphs (b) or (c) of this section.

(e) *Service of process upon a national bank, Federal savings association, or Federal branch or agency of a foreign bank*. The OCC is not an agent for service of process upon a national bank, Federal savings association, or Federal branch or agency of a foreign bank. Parties seeking to serve a national bank, Federal savings association, or Federal branch or agency of a foreign bank must serve the summons or complaint upon the institution in accordance with the laws and procedures for the court in which the action has been filed.

PART 6—PROMPT CORRECTIVE ACTION

5. The authority citation for part 6 continues to read as follows:

Authority: 12 U.S.C. 93a, 1831o, 5412(b)(2)(B).

§ 6.3 [Amended]

6. Section 6.3 is amended in paragraph (b)(3) by removing the phrase "and with respect to national banks, subpart M of part 19 of this chapter, and with respect to Federal savings associations § 165.8 of this chapter" and adding in its place the phrase "and subpart M of part 19 of this chapter".

§ 6.4 [Amended]

7. Section 6.4 is amended in paragraphs (d)(1) and (2) by removing the phrase "with respect to national banks and § 165.8 of this chapter with respect to Federal savings associations" each time it appears.

§ 6.5 [Amended]

8. Section 6.5 is amended by:

a. In paragraphs (a)(1) and (b), removing the phrase "with respect to national banks, and §§ 6.4 and 165.8 of this chapter with respect to Federal savings associations," each time it appears.

b. In paragraph (a)(2), removing the phrase "with respect to national banks and §§ 6.4 and 165.8 of this chapter with respect to Federal savings associations,".

§ 6.6 [Amended]

9. Section 6.6 is amended in paragraph (b) by removing the phrase "with respect to national banks and subpart B of this part and § 165.9 of this chapter with respect to Federal savings associations".

10. Part 19 is revised to read as follows:

PART 19—RULES OF PRACTICE AND PROCEDURE

Sec.
19.0 Applicability date.

Subpart A – Uniform Rules of Practice and Procedure

Sec.

19.1 Scope.
19.2 Rules of construction.
19.3 Definitions.
19.4 Authority of the Comptroller.
19.5 Authority of the administrative law judge (ALJ).
19.6 Appearance and practice in adjudicatory proceedings.
19.7 Good faith certification.
19.8 Conflicts of interest.
19.9 *Ex parte* communications.
19.10 Filing of papers.
19.11 Service of papers.
19.12 Construction of time limits.
19.13 Change of time limits.
19.14 Witness fees and expenses.
19.15 Opportunity for informal settlement.
19.16 OCC's right to conduct examination.
19.17 Collateral attacks on adjudicatory proceeding.
19.18 Commencement of proceeding and contents of notice.
19.19 Answer.
19.20 Amended pleadings.
19.21 Failure to appear.
19.22 Consolidation and severance of actions.
19.23 Motions.
19.24 Scope of document discovery.
19.25 Request for document discovery from parties.
19.26 Document subpoenas to nonparties.
19.27 Deposition of witness unavailable for hearing.
19.28 Interlocutory review.
19.29 Summary disposition.
19.30 Partial summary disposition.
19.31 Scheduling and prehearing conferences.
19.32 Prehearing submissions.
19.33 Public hearings.
19.34 Hearing subpoenas.
19.35 Conduct of hearings.
19.36 Evidence.
19.37 Post-hearing filings.
19.38 Recommended decision and filing of record.
19.39 Exceptions to recommended decision.
19.40 Review by the Comptroller.
19.41 Stays pending judicial review.

Subpart B—Procedural Rules for OCC Adjudications

19.100 Filing documents.
19.101 Delegation to OFIA.
19.102 Civil money penalties.

Subpart C—Removals, Suspensions, and Prohibitions of an Institution-Affiliated Party When a Crime Is Charged or a Conviction Is Obtained

19.110 Scope and definitions.
19.111 Suspension, removal, or prohibition of institution-affiliated party.
19.112 Informal hearing.
19.113 Recommended and final decisions.

Subpart D—Actions Under the Federal Securities Laws

19.120 Exemption hearings under section 12(h) of the Securities Exchange Act of 1934.
19.121 Disciplinary proceedings.
19.122 Civil money penalty authority under Federal securities laws.
19.123 Cease-and-desist authority.

Subpart E through G — Reserved

Subpart H—Change in Bank Control

19.160 Scope.
19.161 Hearing process.

Subpart I—Discovery Depositions and Subpoenas

19.170 Discovery depositions.
19.171 Deposition subpoenas.

Subpart J—Formal Investigations

19.180 Scope.
19.181 Confidentiality of formal investigations.
19.182 Order to conduct a formal investigation.
19.183 Rights of witnesses.
19.184 Service of subpoena and payment of witness expenses.
19.185 Dilatory, obstructionist, or insubordinate conduct.

Subpart K—Parties and Representational Practice Before the OCC; Standards of Conduct

19.190 Scope.
19.191 Definitions.
19.192 Sanctions relating to conduct in an adjudicatory proceeding.
19.193 Censure, suspension, or debarment.
19.194 Eligibility of attorneys and accountants to practice.
19.195 Incompetence.
19.196 Disreputable conduct.
19.197 Initiation of disciplinary proceeding.
19.198 Conferences.
19.199 Proceedings under this subpart.
19.200 Effect of debarment, suspension, or censure.
19.201 Petition for reinstatement.

Subpart L—Equal Access to Justice Act

19.205 Authority and scope; waiver.
19.206 Definitions.
19.207 Application requirements.
19.208 Net worth exhibit.
19.209 Documentation of fees and expenses.
19.210 Filing and service of documents.
19.211 Answer to application.
19.212 Reply.
19.213 Settlement.
19.214 Further proceedings.
19.215 Decision.
19.216 Agency review.
19.217 Judicial review.
19.218 Stay of decision concerning award.
19.219 Payment of award.

Subpart M—Procedures for Reclassifying an Insured Depository Institution Based on Criteria Other Than Capital Under Prompt Corrective Action

19.220 Scope.
19.221 Reclassification of an insured depository institution based on unsafe or unsound condition or practice.
19.222 Request for rescission of reclassification.

Subpart N—Order To Dismiss a Director or Senior Executive Officer Under Prompt Corrective Action

19.230 Scope.
19.231 Order to dismiss a director or senior executive officer.

Subpart O—Civil Money Penalty Inflation Adjustments

19.240 Inflation adjustments.

Subpart P—Removal, Suspension, and Debarment of Accountants From Performing Audit Services

19.241 Scope.
19.242 Definitions.
19.243 Removal, suspension, or debarment.
19.244 Automatic removal, suspension, or debarment.
19.245 Notice of removal, suspension, or debarment.
19.246 Petition for reinstatement.

Subpart Q – Forfeiture of Franchise for Money Laundering or Cash Transaction Reporting Offenses

19.250 Scope.
19.251 Notice and hearing.
19.252 Presiding officer.
19.253 Grounds for termination.
19.254 Judicial review.

APPENDIX A TO PART 19—RULES OF PRACTICE AND PROCEDURE

Authority: 5 U.S.C. 504, 554-557; 12 U.S.C. 93, 93a, 161, 164, 481, 504, 1462a, 1463(a), 1464; 1467(d), 1467a(r), 1817(j), 1818, 1820, 1831m, 1831o, 1832, 1884, 1972, 3102, 3108, 3110, 3349, 3909, 4717, and 5412(b)(2)(B); 15 U.S.C. 78*l*, 78o-4, 78o-5, 78q-1, 78s, 78u, 78u-2, 78u-3, 78w, and 1639e; 28 U.S.C. 2461; 31 U.S.C. 330 and 5321; and 42 U.S.C. 4012a.

§ 19.0 Applicability date.

Subparts A through D and H, I, J, L, M, N, P, and Q of this part apply to adjudicatory proceedings initiated on or after January 1, 2024. The Rules of Practice and Procedure for national banks, Federal savings associations, and Federal branches and agencies that were in effect prior to January 1, 2024, set forth in appendix A to this part, continue to apply to adjudicatory proceedings initiated before January 1, 2024, unless the parties otherwise stipulate that the rules in this part, effective January 1, 2024, apply.

Subpart A – Uniform Rules of Practice and Procedure

§ 19.1 Scope.

This subpart prescribes Uniform Rules of practice and procedure applicable to adjudicatory proceedings required to be conducted on the record after opportunity for a hearing under the following statutory provisions:

(a) Cease-and-desist proceedings under section 8(b) of the Federal Deposit Insurance Act ("FDIA") (12 U.S.C. 1818(b));

(b) Removal and prohibition proceedings under section 8(e) of the FDIA (12 U.S.C. 1818(e));

(c) Change-in-control proceedings under section 7(j)(4) of the FDIA (12 U.S.C. 1817(j)(4)) to determine whether the Office of the Comptroller of the Currency ("OCC") should issue an order to approve or disapprove a person's proposed acquisition of an institution;

(d) Proceedings under section 15C(c)(2) of the Securities Exchange Act of 1934 ("Exchange Act") (15 U.S.C. 78o-5), to impose sanctions upon any government securities broker or dealer or upon any person associated or seeking to become associated with a government securities broker or dealer for which the OCC is the appropriate agency;

(e) Assessment of civil money penalties by the OCC against institutions, institution-affiliated parties, and certain other persons for which it is the appropriate agency for any violation of:

(1) Any provision of law referenced in 12 U.S.C. 93, or any regulation issued thereunder, and certain unsafe or unsound practices and breaches of fiduciary duty, pursuant to 12 U.S.C. 93;

(2) Sections 22 and 23 of the Federal Reserve Act ("FRA"), or any regulation issued thereunder, and certain unsafe or unsound practices and breaches of fiduciary duty, pursuant to 12 U.S.C. 504 and 505;

(3) Section 106(b) of the Bank Holding Company Amendments of 1970, pursuant to 12 U.S.C. 1972(2)(F);

(4) Any provision of the Change in Bank Control Act of 1978 or any regulation or order issued thereunder, and certain unsafe or unsound practices and breaches of fiduciary duty, pursuant to 12 U.S.C. 1817(j)(16);

(5) Any provision of the International Lending Supervision Act of 1983 ("ILSA"), or any rule, regulation or order issued thereunder, pursuant to 12 U.S.C. 3909;

(6) Any provision of the International Banking Act of 1978 ("IBA"), or any rule, regulation or order issued thereunder, pursuant to 12 U.S.C. 3108;

(7) Section 5211 of the Revised Statutes (12 U.S.C. 161), pursuant to 12 U.S.C. 164;

(8) Certain provisions of the Exchange Act, pursuant to section 21B of the Exchange Act (15 U.S.C. 78u-2);

(9) Section 1120 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA") (12 U.S.C. 3349), or any order or regulation issued thereunder;

(10) The terms of any final or temporary order issued under section 8 of the FDIA or any written agreement executed by the OCC or the former Office of Thrift Supervision

(OTS), the terms of any condition imposed in writing by the OCC or the former OTS in connection with the grant of an application or request, certain unsafe or unsound practices, breaches of fiduciary duty, or any law or regulation not otherwise provided in this section, pursuant to 12 U.S.C. 1818(i)(2);

(11) Any provision of law referenced in section 102(f) of the Flood Disaster Protection Act of 1973 (42 U.S.C. 4012a(f)) or any order or regulation issued thereunder;

(12) Any provision of law referenced in 31 U.S.C. 5321 or any order or regulation issued thereunder;

(13) Section 5 of the Home Owners' Loan Act (HOLA) or any regulation or order issued thereunder, pursuant to 12 U.S.C. 1464(d), (s), and (v);

(14) Section 9 of the HOLA or any regulation or order issued thereunder, pursuant to 12 U.S.C. 1467(d); and

(15) Section 10 of the HOLA, pursuant to 12 U.S.C. 1467a(r);

(f) Remedial action under section 102(g) of the Flood Disaster Protection Act of 1973 (42 U.S.C. 4012a(g));

(g) Removal, prohibition, and civil monetary penalty proceedings under section 10(k) of the FDIA (12 U.S.C. 1820(k)) for violations of the post-employment restrictions imposed by section 10(k); and

(h) This subpart also applies to all other adjudications required by statute to be determined on the record after opportunity for an agency hearing, unless otherwise specifically provided for in the Local Rules (see § 19.3(j)).

§ 19.2 Rules of construction.

For purposes of this part:

(a) Any term in the singular includes the plural, and the plural includes the singular, if such use would be appropriate;

(b) The term *counsel* includes a non-attorney representative; and

(c) Unless the context requires otherwise, a party's counsel of record, if any, may, on behalf of that party, take any action required to be taken by the party.

§ 19.3 Definitions.

For purposes of this part, unless explicitly stated to the contrary:

(a) *Administrative law judge (ALJ)* means one who presides at an administrative hearing under authority set forth at 5 U.S.C. 556.

(b) *Adjudicatory proceeding* means a proceeding conducted pursuant to these rules and leading to the formulation of a final order other than a regulation.

(c) *Comptroller* means the Comptroller of the Currency or a person delegated to perform the functions of the Comptroller of the Currency.

(d) *Decisional employee* means any member of the Comptroller's or ALJ's staff who has not engaged in an investigative or prosecutorial role in a proceeding and who may assist the Comptroller or the ALJ, respectively, in preparing orders, recommended decisions, decisions, and other documents under the Uniform Rules.

(e) *Electronic signature* means electronically affixing the equivalent of a signature to an electronic document filed or transmitted electronically.

(f) *Enforcement Counsel* means any individual who files a notice of appearance as counsel on behalf of the OCC in an adjudicatory proceeding.

(g) *Final order* means an order issued by the Comptroller with or without the consent of the affected institution or the institution-affiliated party, that has become final, without regard to the pendency of any petition for reconsideration or review.

(h) *Institution* includes any national bank, Federal savings association, or Federal branch or agency of a foreign bank.

(i) *Institution-affiliated party* means any institution- affiliated party as that term is defined in section 3(u) of the FDIA (12 U.S.C. 1813(u)).

(j) *Local Rules* means those rules promulgated by the OCC in the subparts of this part excluding this subpart.

(k) *OCC* means the Office of the Comptroller of the Currency.

(l) *OFIA* means the Office of Financial Institution Adjudication, the executive body charged with overseeing the administration of administrative enforcement proceedings for the OCC, the Board of Governors of the Federal Reserve System ("Board of Governors"), the Federal Deposit Insurance Corporation ("FDIC"), and the National Credit Union Administration ("NCUA").

(m) *Party* means the OCC and any person named as a party in any notice.

(n) *Person* means an individual, sole proprietor, partnership, corporation, unincorporated association, trust, joint venture, pool, syndicate, agency, or other entity or organization, including an institution as defined in paragraph (h) this section.

(o) *Respondent* means any party other than the OCC.

(p) *Uniform Rules* means those rules in this subpart that are common to the OCC, the Board of Governors, the FDIC, and the NCUA.

(q) *Violation* means any violation as that term is defined in section 3(v) of the FDIA (12 U.S.C. 1813(v)).

§ 19.4 Authority of the Comptroller.

The Comptroller may, at any time during the pendency of a proceeding, perform, direct the performance of, or waive performance of, any act which could be done or ordered by the ALJ.

§ 19.5 Authority of the administrative law judge (ALJ).

(a) *General rule*. All proceedings governed by this part must be conducted in accordance with the provisions of 5 U.S.C. chapter 5. The ALJ has all powers necessary to conduct a proceeding in a fair and impartial manner and to avoid unnecessary delay.

(b) *Powers*. The ALJ has all powers necessary to conduct the proceeding in accordance with paragraph (a) of this section, including the following powers:

(1) To administer oaths and affirmations;

(2) To issue subpoenas, subpoenas *duces tecum*, protective orders, and other orders, as authorized by this part, and to quash or modify any such subpoenas and orders;

(3) To receive relevant evidence and to rule upon the admission of evidence and offers of proof;

(4) To take or cause depositions to be taken as authorized by this subpart;

(5) To regulate the course of the hearing and the conduct of the parties and their counsel;

(6) To hold scheduling and/or pre-hearing conferences as set forth in § 19.31;

(7) To consider and rule upon all procedural and other motions appropriate in an adjudicatory proceeding, provided that only the Comptroller has the power to grant any

motion to dismiss the proceeding or to decide any other motion that results in a final determination of the merits of the proceeding;

(8) To prepare and present to the Comptroller a recommended decision as provided in this part;

(9) To recuse oneself by motion made by a party or on the ALJ's own motion;

(10) To establish time, place and manner limitations on the attendance of the public and the media for any public hearing; and

(11) To do all other things necessary and appropriate to discharge the duties of an ALJ.

§ 19.6 Appearance and practice in adjudicatory proceedings.

(a) *Appearance before the OCC or an ALJ*—(1) *By attorneys*. Any member in good standing of the bar of the highest court of any state, commonwealth, possession, territory of the United States, or the District of Columbia may represent others before the OCC if such attorney is not currently suspended or debarred from practice before the OCC.

(2) *By non-attorneys*. An individual may appear on the individual's own behalf.

(3) *Notice of appearance.*—(i) Any individual acting on the individual's own behalf or as counsel on behalf of a party, including the OCC, must file a notice of appearance with OFIA at or before the time that the individual submits papers or otherwise appears on behalf of a party in the adjudicatory proceeding. The notice of appearance must include:

(A) A written declaration that the individual is currently qualified as provided in paragraphs (a)(1) or (2) of this section and is authorized to represent the particular party; and

(B) A written acknowledgement that the individual has reviewed and will comply with the Uniform Rules and Local Rules in subpart B of this part.

(ii) By filing a notice of appearance on behalf of a party in an adjudicatory proceeding, the counsel agrees and represents that the counsel is authorized to accept service on behalf of the represented party and that, in the event of withdrawal from representation, the counsel will, if required by the ALJ, continue to accept service until new counsel has filed a notice of appearance or until the represented party indicates that the party will proceed on a *pro se* basis.

(b) *Sanctions*. Dilatory, obstructionist, egregious, contemptuous, or contumacious conduct at any phase of any adjudicatory proceeding may be grounds for exclusion or suspension of counsel from the proceeding.

§ 19.7 Good faith certification.

(a) *General requirement*. Every filing or submission of record following the issuance of a notice must be signed by at least one counsel of record in the counsel's individual name and must state that counsel's mailing address, electronic mail address, and telephone number. A party who acts as the party's own counsel must sign that person's individual name and state that person's mailing address, electronic mail address, and telephone number on every filing or submission of record. Electronic signatures may be used to satisfy the signature requirements of this section.

(b) *Effect of signature.*—(1) The signature of counsel or a party will constitute a certification that: the counsel or party has read the filing or submission of record; to the best of the counsel's or party's knowledge, information, and belief formed after reasonable inquiry, the filing or submission of record is well-grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and the filing or submission of record is not made for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

(2) If a filing or submission of record is not signed, the ALJ will strike the filing or submission of record, unless it is signed promptly after the omission is called to the attention of the pleader or movant.

(c) *Effect of making oral motion or argument*. The act of making any oral motion or oral argument by any counsel or party constitutes a certification that to the best of the counsel's or party's knowledge, information, and belief formed after reasonable inquiry, the counsel's or party's statements are well-grounded in fact and are warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and are not made for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

§ 19.8 Conflicts of interest.

(a) *Conflict of interest in representation*. No person may appear as counsel for another person in an adjudicatory proceeding if it reasonably appears that such representation may be materially limited by that counsel's responsibilities to a third person or by the counsel's own interests. The ALJ may take corrective measures at any

stage of a proceeding to cure a conflict of interest in representation, including the issuance of an order limiting the scope of representation or disqualifying an individual from appearing in a representative capacity for the duration of the proceeding.

(b) *Certification and waiver*. If any person appearing as counsel represents two or more parties to an adjudicatory proceeding or also represents a non-party on a matter relevant to an issue in the proceeding, counsel must certify in writing at the time of filing the notice of appearance required by § 19.6(a):

(1) That the counsel has personally and fully discussed the possibility of conflicts of interest with each such party and non-party; and

(2) That each such party and non-party waives any right it might otherwise have had to assert any known conflicts of interest or to assert any non-material conflicts of interest during the course of the proceeding.

§ 19.9 *Ex parte* communications.

(a) *Definition*—(1) *Ex parte communication. Ex parte communication* means any material oral or written communication relevant to the merits of an adjudicatory proceeding that was neither on the record nor on reasonable prior notice to all parties that takes place between:

(i) An interested person outside the OCC (including such person's counsel); and

(ii) The ALJ handling that proceeding, the Comptroller, or a decisional employee.

(2) *Exception*. A request for status of the proceeding does not constitute an *ex parte* communication.

(b) *Prohibition of ex parte communications*. From the time the notice is issued by the Comptroller until the date that the Comptroller issues a final decision pursuant to § 19.40(c):

(1) An interested person outside the OCC must not make or knowingly cause to be made an *ex parte* communication to the Comptroller, the ALJ, or a decisional employee; and

(2) The Comptroller, ALJ, or decisional employee may not make or knowingly cause to be made to any interested person outside the OCC any *ex parte* communication.

(c) *Procedure upon occurrence of ex parte communication*. If an *ex parte* communication is received by the ALJ, the Comptroller, or any other person identified in paragraph (a) of this section, that person will cause all such written communications (or, if the communication is oral, a memorandum stating the substance of the communication) to be placed on the record of the proceeding and served on all parties. All other parties to the proceeding may, within ten days of service of the *ex parte* communication, file responses thereto and to recommend any sanctions that they believe to be appropriate under the circumstances. The ALJ or the Comptroller then determines whether any action should be taken concerning the *ex parte* communication in accordance with paragraph (d) of this section.

(d) *Sanctions*. Any party or counsel to a party who makes a prohibited *ex parte* communication, or who encourages or solicits another to make any such communication, may be subject to any appropriate sanction or sanctions imposed by the Comptroller or the ALJ including, but not limited to, exclusion from the proceedings and an adverse ruling on the issue which is the subject of the prohibited communication.

(e) *Separation of functions*—(1) *In general*. Except to the extent required for the disposition of *ex parte* matters as authorized by law, the ALJ may not:

(i) Consult a person or party on a fact in issue unless on notice and opportunity for all parties to participate; or

(ii) Be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for the OCC.

(2) *Decision process*. An employee or agent engaged in the performance of investigative or prosecuting functions for the OCC in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review of the recommended decision under § 19.40, except as witness or counsel in administrative or judicial proceedings.

§ 19.10 Filing of papers.

(a) *Filing*. Any papers required to be filed, excluding documents produced in response to a discovery request pursuant to §§ 19.25 and 19.26, must be filed with OFIA, except as otherwise provided.

(b) *Manner of filing*. Unless otherwise specified by the Comptroller or the ALJ, filing may be accomplished by:

(1) Electronic mail or other electronic means designated by the Comptroller or the ALJ;

(2) Personal service;

(3) Delivering the papers to a same day courier service or overnight delivery service; or

(4) Mailing the papers by first class, registered, or certified mail.

(c) *Formal requirements as to papers filed*—(1) *Form*. All papers filed must set forth the name, mailing address, electronic mail address, and telephone number of the counsel or party making the filing and must be accompanied by a certification setting forth when and how service has been made on all other parties. All papers filed must be double-spaced and printed or typewritten on an 8 1/2×11 inch page and must be clear and legible.

(2) *Signature*. All papers must be dated and signed as provided in § 19.7.

(3) *Caption*. All papers filed must include at the head thereof, or on a title page, the name of the OCC and of the filing party, the title and docket number of the proceeding, and the subject of the particular paper.

§ 19.11 Service of papers.

(a) *By the parties*. Except as otherwise provided, a party filing papers must serve a copy upon the counsel of record for all other parties to the proceeding so represented, and upon any party not so represented.

(b) *Method of service*. Except as provided in paragraphs (c)(2) and (d) of this section, a serving party must use one of the following methods of service:

(1) Electronic mail or other electronic means;

(2) Personal service;

(3) Delivering the papers by same day courier service or overnight delivery service; or

(4) Mailing the papers by first class, registered, or certified mail.

(c) *By the Comptroller or the ALJ.*—(1) All papers required to be served by the Comptroller or the ALJ upon a party who has appeared in the proceeding in accordance

with § 19.6 will be served by electronic mail or other electronic means designated by the Comptroller or ALJ.

(2) If a respondent has not appeared in the proceeding in accordance with § 19.6, the Comptroller or the ALJ will serve the respondent by any of the following methods:

(i) By personal service;

(ii) If the person to be served is an individual, by delivery to a person of suitable age and discretion at the physical location where the individual resides or works;

(iii) If the person to be served is a corporation or other association, by delivery to an officer, managing or general agent, or to any other agent authorized by appointment or by law to receive service and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the respondent;

(iv) By registered or certified mail, delivery by a same day courier service, or by an overnight delivery service to the respondent's last known mailing address; or

(v) By any other method reasonably calculated to give actual notice.

(d) *Subpoenas*. Service of a subpoena may be made:

(1) By personal service;

(2) If the person to be served is an individual, by delivery to a person of suitable age and discretion at the physical location where the individual resides or works;

(3) If the person to be served is a corporation or other association, by delivery to an officer, managing or general agent, or to any other agent authorized by appointment or by law to receive service and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the party;

(4) By registered or certified mail, delivery by a same day courier service, or by an overnight delivery service to the person's last known mailing address; or

(5) By any other method reasonably calculated to give actual notice.

(e) *Area of service*. Service in any state, territory, possession of the United States, or the District of Columbia, on any person or company doing business in any state, territory, possession of the United States, or the District of Columbia, or on any person as otherwise provided by law, is effective without regard to the place where the hearing is held, provided that if service is made on a foreign bank in connection with an action or proceeding involving one or more of its branches or agencies located in any state, territory, possession of the United States, or the District of Columbia, service must be made on at least one branch or agency so involved.

§ 19.12 Construction of time limits.

(a) *General rule*. In computing any period of time prescribed by this subpart, the date of the act or event that commences the designated period of time is not included. The last day so computed is included unless it is a Saturday, Sunday, or Federal holiday. When the last day is a Saturday, Sunday, or Federal holiday, the period runs until the end of the next day that is not a Saturday, Sunday, or Federal holiday. Intermediate Saturdays, Sundays, and Federal holidays are included in the computation of time. However, when the time period within which an act is to be performed is ten days or less, not including any additional time allowed for in paragraph (c) of this section, intermediate Saturdays, Sundays, and Federal holidays are not included.

(b) *When papers are deemed to be filed or served.*—(1) Filing and service are deemed to be effective:

(i) In the case of transmission by electronic mail or other electronic means, upon transmittal by the serving party;

(ii) In the case of overnight delivery service or first class, registered, or certified mail, upon deposit in or delivery to an appropriate point of collection; or

(iii) In the case of personal service or same day courier delivery, upon actual service.

(2) The effective filing and service dates specified in paragraph (b)(1) of this section may be modified by the Comptroller or ALJ in the case of filing or by agreement of the parties in the case of service.

(c) *Calculation of time for service and filing of responsive papers*. Whenever a time limit is measured by a prescribed period from the service of any notice or paper, the applicable time limits are calculated as follows:

(1) If service is made by electronic mail or other electronic means or by same day courier delivery, add one calendar day to the prescribed period;

(2) If service is made by overnight delivery service, add two calendar days to the prescribed period; or

(3) If service is made by first class, registered, or certified mail, add three calendar days to the prescribed period.

§ 19.13 Change of time limits.

Except as otherwise provided by law, the ALJ may, for good cause shown, extend the time limits prescribed by the Uniform Rules or by any notice or order issued in the proceedings. After the referral of the case to the Comptroller pursuant to § 19.38, the Comptroller may grant extensions of the time limits for good cause shown. Extensions

may be granted at the motion of a party after notice and opportunity to respond is afforded all non-moving parties or on the Comptroller's or the ALJ's own motion.

§ 19.14 Witness fees and expenses.

(a) *In general*. A witness, including an expert witness, who testifies at a deposition or hearing will be paid the same fees for attendance and mileage as are paid in the United States district courts in proceedings in which the United States is a party, except as provided in paragraph (b) of this section and unless otherwise waived.

(b) *Exception for testimony by a party*. In the case of testimony by a party, no witness fees or mileage need to be paid. The OCC will not be required to pay any fees to, or expenses of, any witness not subpoenaed by the OCC.

(c) *Timing of payment*. Fees and mileage in accordance with this paragraph (c) must be paid in advance by the party requesting the subpoena, except that fees and mileage need not be tendered in advance where the OCC is the party requesting the subpoena.

§ 19.15 Opportunity for informal settlement.

Any respondent may, at any time in the proceeding, unilaterally submit to Enforcement Counsel written offers or proposals for settlement of a proceeding, without prejudice to the rights of any of the parties. Any such offer or proposal may only be made to Enforcement Counsel. Submission of a written settlement offer does not provide a basis for adjourning or otherwise delaying all or any portion of a proceeding under this part. No settlement offer or proposal, or any subsequent negotiation or resolution, is admissible as evidence in any proceeding.

§ 19.16 OCC's right to conduct examination.

Nothing contained in this subpart limits in any manner the right of the OCC to conduct any examination, inspection, or visitation of any institution or institution-affiliated party, or the right of the OCC to conduct or continue any form of investigation authorized by law.

§ 19.17 Collateral attacks on adjudicatory proceeding.

If an interlocutory appeal or collateral attack is brought in any court concerning all or any part of an adjudicatory proceeding, the challenged adjudicatory proceeding will continue without regard to the pendency of that court proceeding. No default or other failure to act as directed in the adjudicatory proceeding within the times prescribed in this subpart will be excused based on the pendency before any court of any interlocutory appeal or collateral attack.

§ 19.18 Commencement of proceeding and contents of notice.

(a) *Commencement of proceeding.*—(1)(i) Except for change-in-control proceedings under section 7(j)(4) of the FDIA, 12 U.S.C. 1817(j)(4), a proceeding governed by this subpart is commenced by issuance of a notice by the Comptroller

(ii) The notice must be served by Enforcement Counsel upon the respondent and given to any other appropriate financial institution supervisory authority where required by law. Enforcement Counsel may serve the notice upon counsel for the respondent, provided that Enforcement Counsel has confirmed that counsel represents the respondent in the matter and will accept service of the notice on behalf of the respondent.

(iii) Enforcement Counsel must file the notice with OFIA.

(2) Change-in control proceedings under section 7(j)(4) of the FDIA (12 U.S.C. 1817(j)(4)) commence with the issuance of an order by the Comptroller

(b) *Contents of notice*. Notice pleading applies. The notice must provide:

(1) The legal authority for the proceeding and for the OCC's jurisdiction over the proceeding;

(2) Matters of fact or law showing that the OCC is entitled to relief;

(3) A proposed order or prayer for an order granting the requested relief;

(4) The time, place, and nature of the hearing as required by law or regulation;

(5) The time within which to file an answer as required by law or regulation;

(6) The time within which to request a hearing as required by law or regulation; and

(7) That the answer and/or request for a hearing must be filed with OFIA.

§ 19.19 Answer.

(a) *When*. Within 20 days of service of the notice, respondent must file an answer as designated in the notice. In a civil money penalty proceeding, respondent must also file a request for a hearing within 20 days of service of the notice.

(b) *Content of answer*. An answer must specifically respond to each paragraph or allegation of fact contained in the notice and must admit, deny, or state that the respondent lacks sufficient information to admit or deny each allegation of fact. A statement of lack of information has the effect of a denial. Denials must fairly meet the substance of each allegation of fact denied; general denials are not permitted. When a respondent denies part of an allegation, that part must be denied and the remainder specifically admitted. Any allegation of fact in the notice which is not denied in the answer is deemed admitted for purposes of the proceeding. A respondent is not required

to respond to the portion of a notice that constitutes the prayer for relief or proposed order. The answer must set forth affirmative defenses, if any, asserted by the respondent.

(c) *Default*—(1) *Effect of failure to answer*. Failure of a respondent to file an answer required by this section within the time provided constitutes a waiver of the respondent's right to appear and contest the allegations in the notice. If no timely answer is filed, Enforcement Counsel may file a motion for entry of an order of default. Upon a finding that no good cause has been shown for the failure to file a timely answer, the ALJ will file with the Comptroller a recommended decision containing the findings and the relief sought in the notice. Any final order issued by the Comptroller based upon a respondent's failure to answer is deemed to be an order issued upon consent.

(2) *Effect of failure to request a hearing in civil money penalty proceedings*. If respondent fails to request a hearing as required by law within the time provided, the notice of assessment constitutes a final and unappealable order of the Comptroller without further action by the ALJ.

§ 19.20 Amended pleadings.

(a) *Amendments*. The notice or answer may be amended or supplemented at any stage of the proceeding. The respondent must answer an amended notice within the time remaining for the respondent's answer to the original notice, or within ten days after service of the amended notice, whichever period is longer, unless the Comptroller or ALJ orders otherwise for good cause.

(b) *Amendments to conform to the evidence*. When issues not raised in the notice or answer are tried at the hearing by express or implied consent of the parties, they will be treated in all respects as if they had been raised in the notice or answer, and no formal

amendments are required. If evidence is objected to at the hearing on the ground that it is not within the issues raised by the notice or answer, the ALJ may admit the evidence when admission is likely to assist in adjudicating the merits of the action and the objecting party fails to satisfy the ALJ that the admission of such evidence would unfairly prejudice that party's action or defense upon the merits. The ALJ may grant a continuance to enable the objecting party to meet such evidence.

§ 19.21 Failure to appear.

Failure of a respondent to appear in person at the hearing or by a duly authorized counsel constitutes a waiver of respondent's right to a hearing and is deemed an admission of the facts as alleged and consent to the relief sought in the notice. Without further proceedings or notice to the respondent, the ALJ will file with the Comptroller a recommended decision containing the findings and the relief sought in the notice.

§ 19.22 Consolidation and severance of actions.

(a) *Consolidation.*—(1) On the motion of any party, or on the ALJ's own motion, the ALJ may consolidate, for some or all purposes, any two or more proceedings, if each such proceeding involves or arises out of the same transaction, occurrence, or series of transactions or occurrences, or involves at least one common respondent or a material common question of law or fact, unless such consolidation would cause unreasonable delay or injustice.

(2) In the event of consolidation under paragraph (a)(1) of this section, appropriate adjustment to the prehearing schedule must be made to avoid unnecessary expense, inconvenience, or delay.

(b) *Severance*. The ALJ may, upon the motion of any party, sever the proceeding for separate resolution of the matter as to any respondent only if the ALJ finds:

(1) Undue prejudice or injustice to the moving party would result from not severing the proceeding; and

(2) Such undue prejudice or injustice would outweigh the interests of judicial economy and expedition in the complete and final resolution of the proceeding.

§ 19.23 Motions.

(a) *In writing.*—(1) Except as otherwise provided in this section, an application or request for an order or ruling must be made by written motion.

(2) All written motions must state with particularity the relief sought and must be accompanied by a proposed order.

(3) No oral argument may be held on written motions except as otherwise directed by the ALJ. Written memoranda, briefs, affidavits, or other relevant material or documents may be filed in support of or in opposition to a motion.

(b) *Oral motions*. A motion may be made orally on the record unless the ALJ directs that such motion be reduced to writing.

(c) *Filing of motions*. Motions must be filed with the ALJ, except that following the filing of the recommended decision, motions must be filed with the Comptroller.

(d) *Responses.*—(1) Except as otherwise provided in this section, within ten days after service of any written motion, or within such other period of time as may be established by the ALJ or the Comptroller, any party may file a written response to a motion. The ALJ will not rule on any oral or written motion before each party has had an opportunity to file a response.

(2) The failure of a party to oppose a written motion or an oral motion made on the record is deemed a consent by that party to the entry of an order substantially in the form of the order accompanying the motion.

(e) *Dilatory motions*. Frivolous, dilatory or repetitive motions are prohibited. The filing of such motions may form the basis for sanctions.

(f) *Dispositive motions*. Dispositive motions are governed by §§ 19.29 and 19.30.

§ 19.24 Scope of document discovery.

(a) *Limits on discovery*—(1) Subject to the limitations set out in paragraphs (b) through (d) of this section, a party to a proceeding under this subpart may obtain document discovery by serving a written request to produce documents. For purposes of a request to produce documents, the term *documents* includes writings, drawings, graphs, charts, photographs, recordings, electronically stored information, and other data or data compilations stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party, into a reasonably usable form.

(2) Discovery by use of deposition is governed by subpart I of this part.

(3) Discovery by use of either interrogatories or requests for admission is not permitted.

(4) Any request to produce documents that calls for irrelevant material; or that is unreasonable, oppressive, excessive in scope, unduly burdensome, or repetitive of previous requests, or that seeks to obtain privileged documents will be denied or modified. A request is unreasonable, oppressive, excessive in scope, or unduly burdensome if, among other things, it fails to include justifiable limitations on the time

period covered and the geographic locations to be searched, or the time provided to respond in the request is inadequate.

(b) *Relevance*. A party may obtain document discovery regarding any non-privileged matter that has material relevance to the merits of the pending action.

(c) *Privileged matter*. Privileged documents are not discoverable. Privileges include the attorney-client privilege, attorney work-product doctrine, bank examination privilege, law enforcement privilege, any government's or government agency's deliberative process privilege, and any other privileges the Constitution, any applicable act of Congress, or the principles of common law provide.

(d) *Time limits*. All document discovery, including all responses to discovery requests, must be completed by the date set by the ALJ and no later than 30 days prior to the date scheduled for the commencement of the hearing, except as provided in the Local Rules. No exceptions to this time limit are permitted, unless the ALJ finds on the record that good cause exists for waiving the requirements of paragraph (d).

§ 19.25 Request for document discovery from parties.

(a) *Document requests.*—(1) Any party may serve on any other party a request to produce and permit the requesting party or its representative to inspect or copy any discoverable documents that are in the possession, custody, or control of the party upon whom the request is served. In the case of a request for inspection, the responding party may produce copies of documents or of electronically stored information instead of permitting inspection.

(2) The request:

(i) Must describe with reasonable particularity each item or category of items to be inspected or produced; and

(ii) Must specify a reasonable time, place, and manner for the inspection or production.

(b) *Production or copying*—(1) *General*. Unless otherwise specified by the ALJ or agreed upon by the parties, the producing party must produce copies of documents as they are kept in the usual course of business or organized to correspond to the categories of the request, and electronically stored information must be produced in a form in which it is ordinarily maintained or in a reasonably usable form.

(2) *Costs*. The producing party must pay its own costs to respond to a discovery request, unless otherwise agreed by the parties.

(c) *Obligation to update responses*. A party who has responded to a discovery request with a response that was complete when made is not required to supplement the response to include documents thereafter acquired, unless the responding party learns:

(1) The response was materially incorrect when made; or

(2) The response, though correct when made, is no longer true and a failure to amend the response is, in substance, a knowing concealment.

(d) *Motions to limit discovery.*—(1) Any party that objects to a discovery request may, within 20 days of being served with such request, file a motion in accordance with the provisions of § 19.23 to strike or otherwise limit the request. If an objection is made to only a portion of an item or category in a request, the portion objected to must be specified. Any objections not made in accordance with paragraph (d)(1) and § 19.23 are waived.

(2) The party who served the request that is the subject of a motion to strike or limit may file a written response within ten days of service of the motion. No other party may file a response.

(e) *Privilege*. At the time other documents are produced, the producing party must reasonably identify all documents withheld on the grounds of privilege and must produce a statement of the basis for the assertion of privilege. When similar documents that are protected by attorney-client privilege, attorney work-product doctrine, bank examination privilege, law enforcement privilege, any government's or government agency's deliberative process privilege, or any other privileges of the Constitution, any applicable act of Congress, or the principles of common law, or are voluminous, these documents may be identified by category instead of by individual document. The ALJ retains discretion to determine when the identification by category is insufficient.

(f) *Motions to compel production.*—(1) If a party withholds any documents as privileged or fails to comply fully with a discovery request, the requesting party may, within ten days of the assertion of privilege or of the time the failure to comply becomes known to the requesting party, file a motion in accordance with the provisions of § 19.23 for the issuance of a subpoena compelling production.

(2) The party who asserted the privilege or failed to comply with the document request may file a written response to a motion to compel within ten days of service of the motion. No other party may file a response.

(g) *Ruling on motions*. After the time for filing responses pursuant to this section has expired, the ALJ will rule promptly on all motions filed pursuant to this section. If the ALJ determines that a discovery request, or any of its terms, calls for irrelevant material,

is unreasonable, oppressive, excessive in scope, unduly burdensome, or repetitive of previous requests, or seeks to obtain privileged documents, the ALJ may deny or modify the request, and may issue appropriate protective orders, upon such conditions as justice may require. The pendency of a motion to strike or limit discovery or to compel production is not a basis for staying or continuing the proceeding, unless otherwise ordered by the ALJ. Notwithstanding any other provision in this part, the ALJ may not release, or order a party to produce, documents withheld on grounds of privilege if the party has stated to the ALJ its intention to file a timely motion for interlocutory review of the ALJ's order to produce the documents, and until the motion for interlocutory review has been decided.

(h) *Enforcing discovery subpoenas*. If the ALJ issues a subpoena compelling production of documents by a party, the subpoenaing party may, in the event of noncompliance and to the extent authorized by applicable law, apply to any appropriate United States district court for an order requiring compliance with the subpoena. A party's right to seek court enforcement of a subpoena will not in any manner limit the sanctions that may be imposed by the ALJ against a party who fails to produce subpoenaed documents.

§ 19.26 Document subpoenas to nonparties.

(a) *General rules.*—(1) Any party may apply to the ALJ for the issuance of a document discovery subpoena addressed to any person who is not a party to the proceeding. The application must contain a proposed document subpoena and a brief statement showing the general relevance and reasonableness of the scope of documents

sought. The subpoenaing party must specify a reasonable time, place, and manner for making production in response to the document subpoena.

(2) A party may apply for a document subpoena under this section only within the time period during which such party could serve a discovery request under § 19.24(d). The party obtaining the document subpoena is responsible for serving it on the subpoenaed person and for serving copies on all parties. Document subpoenas may be served in any state, territory, or possession of the United States, the District of Columbia, or as otherwise provided by law.

(3) The ALJ will promptly issue any document subpoena requested pursuant to this section. If the ALJ determines that the application does not set forth a valid basis for the issuance of the subpoena, or that any of its terms are unreasonable, oppressive, excessive in scope, or unduly burdensome, the ALJ may refuse to issue the subpoena or may issue it in a modified form upon such conditions as may be consistent with the Uniform Rules.

(b) *Motion to quash or modify.*—(1) Any person to whom a document subpoena is directed may file a motion to quash or modify such subpoena with the ALJ. The motion must be accompanied by a statement of the basis for quashing or modifying the subpoena. The movant must serve the motion on all parties, and any party may respond to such motion within ten days of service of the motion.

(2) Any motion to quash or modify a document subpoena must be filed on the same basis, including the assertion of privilege, upon which a party could object to a discovery request under § 19.25(d), and during the same time limits during which such an objection could be filed.

(c) *Enforcing document subpoenas*. If a subpoenaed person fails to comply with any subpoena issued pursuant to this section or any order of the ALJ, which directs compliance with all or any portion of a document subpoena, the subpoenaing party or any other aggrieved party may, to the extent authorized by applicable law, apply to an appropriate United States district court for an order requiring compliance with so much of the document subpoena as the ALJ has not quashed or modified. A party's right to seek court enforcement of a document subpoena will in no way limit the sanctions that may be imposed by the ALJ on a party who induces a failure to comply with subpoenas issued under this section.

§ 19.27 Deposition of witness unavailable for hearing.

(a) *General rules.*—(1) If a witness will not be available for the hearing, a party desiring to preserve that witness' testimony for the record may apply in accordance with the procedures set forth in paragraph (a)(2) of this section, to the ALJ for the issuance of a subpoena, including a subpoena *duces tecum*, requiring the attendance of the witness at a deposition. The ALJ may issue a deposition subpoena under this section upon showing:

(i) The witness will be unable to attend or may be prevented from attending the hearing because of age, sickness or infirmity, or will otherwise be unavailable;

(ii) The witness' unavailability was not procured or caused by the subpoenaing party;

(iii) The testimony is reasonably expected to be material; and

(iv) Taking the deposition will not result in any undue burden to any other party and will not cause undue delay of the proceeding.

(2) The application must contain a proposed deposition subpoena and a brief statement of the reasons for the issuance of the subpoena. The subpoena must name the witness whose deposition is to be taken and specify the time, manner, and place for taking the deposition. A deposition subpoena may require the witness to be deposed at any place within the country in which that witness resides or has a regular place of employment, by remote means, or such other convenient place or manner, as the ALJ fixes.

(3) Any requested subpoena that sets forth a valid basis for its issuance must be promptly issued, unless the ALJ requires a written response or requires attendance at a conference concerning whether the requested subpoena should be issued.

(4) The party obtaining a deposition subpoena is responsible for serving it on the witness and for serving copies on all parties. Unless the ALJ orders otherwise, no deposition under this section may be taken on fewer than ten days' notice to the witness and all parties.

(b) *Objections to deposition subpoenas.*—(1) The witness and any party who has not had an opportunity to oppose a deposition subpoena issued under this section may file a motion with the ALJ to quash or modify the subpoena prior to the time for compliance specified in the subpoena, but not more than ten days after service of the subpoena.

(2) A statement of the basis for the motion to quash or modify a subpoena issued under this section must accompany the motion. The motion must be served on all parties.

(c) *Procedure upon deposition.*—(1) Each witness testifying pursuant to a deposition subpoena must be duly sworn. By stipulation of the parties or by order of the ALJ, a court reporter or other person authorized to administer an oath may administer the

oath remotely without being in the physical presence of the deponent. Each party must have the right to examine the witness. Objections to questions or documents must be in short form, stating the grounds for the objection. Failure to object to questions or documents is not deemed a waiver except where the ground for the objection might have been avoided if the objection had been timely presented. All questions, answers, and objections must be recorded.

(2) Any party may move before the ALJ for an order compelling the witness to answer any questions the witness has refused to answer or submit any evidence the witness has refused to submit during the deposition.

(3) The deposition must be subscribed by the witness, unless the parties and the witness, by stipulation, have waived the signing, or the witness is ill, cannot be found, or has refused to sign. If the deposition is not subscribed by the witness, the court reporter taking the deposition must certify that the transcript is a true and complete transcript of the deposition.

(d) *Enforcing subpoenas*. If a subpoenaed person fails to comply with any subpoena issued pursuant to this section, or fails to comply with any order of the ALJ, which directs compliance with all or any portion of a deposition subpoena under paragraphs (b) or (c)(2) of this section, the subpoenaing party or other aggrieved party may, to the extent authorized by applicable law, apply to an appropriate United States district court for an order requiring compliance with the portions of the subpoena with which the subpoenaed party has not complied. A party's right to seek court enforcement of a deposition subpoena in no way limits the sanctions that may be imposed by the ALJ

on a party who fails to comply with, or procures a failure to comply with, a subpoena issued under this section.

§ 19.28 Interlocutory review.

(a) *General rule*. The Comptroller may review a ruling of the ALJ prior to the certification of the record to the Comptroller only in accordance with the procedures set forth in this section and § 19.23.

(b) *Scope of review*. The Comptroller may exercise interlocutory review of a ruling of the ALJ if the Comptroller finds:

(1) The ruling involves a controlling question of law or policy as to which substantial grounds exist for a difference of opinion;

(2) Immediate review of the ruling may materially advance the ultimate termination of the proceeding;

(3) Subsequent modification of the ruling at the conclusion of the proceeding would be an inadequate remedy; or

(4) Subsequent modification of the ruling would cause unusual delay or expense.

(c) *Procedure*. Any request for interlocutory review must be filed by a party with the ALJ within ten days of the ruling and must otherwise comply with § 19.23. Any party may file a response to a request for interlocutory review in accordance with § 19.23(d). Upon the expiration of the time for filing all responses, the ALJ will refer the matter to the Comptroller for final disposition.

(d) *Suspension of proceeding*. Neither a request for interlocutory review nor any disposition of such a request by the Comptroller under this section suspends or stays the proceeding unless otherwise ordered by the ALJ or the Comptroller.

§ 19.29 Summary disposition.

(a) *In general*. The ALJ will recommend that the Comptroller issue a final order granting a motion for summary disposition if the undisputed pleaded facts, admissions, affidavits, stipulations, documentary evidence, matters as to which official notice may be taken, and any other evidentiary materials properly submitted in connection with a motion for summary disposition show:

(1) There is no genuine issue as to any material fact; and

(2) The moving party is entitled to a decision in its favor as a matter of law.

(b) *Filing of motions and responses.*—(1) Any party who believes there is no genuine issue of material fact to be determined and that the party is entitled to a decision as a matter of law may move at any time for summary disposition in its favor of all or any part of the proceeding. Any party, within 20 days after service of such a motion, or within such time period as allowed by the ALJ, may file a response to such motion.

(2) A motion for summary disposition must be accompanied by a statement of the material facts as to which the moving party contends there is no genuine issue. Such motion must be supported by documentary evidence, which may take the form of admissions in pleadings, stipulations, depositions, investigatory depositions, transcripts, affidavits, and any other evidentiary materials that the moving party contends supports the moving party's position. The motion must also be accompanied by a brief containing the points and authorities in support of the contention of the moving party. Any party opposing a motion for summary disposition must file a statement setting forth those material facts as to which the opposing party contends a genuine dispute exists. Such opposition must be supported by evidence of the same type as that submitted with the

motion for summary disposition and a brief containing the points and authorities in support of the contention that summary disposition would be inappropriate.

(c) *Hearing on motion*. At the written request of any party or on the ALJ's own motion, the ALJ may hear oral argument on the motion for summary disposition.

(d) *Decision on motion*. Following receipt of a motion for summary disposition and all responses thereto, the ALJ will determine whether the moving party is entitled to summary disposition. If the ALJ determines that summary disposition is warranted, the ALJ will submit a recommended decision to that effect to the Comptroller. If the ALJ finds that no party is entitled to summary disposition, the ALJ will make a ruling denying the motion.

§ 19.30 Partial summary disposition.

If the ALJ determines that a party is entitled to summary disposition as to certain claims only, the ALJ will defer submitting a recommended decision as to those claims. A hearing on the remaining issues must be ordered. Those claims for which the ALJ has determined that summary disposition is warranted will be addressed in the recommended decision filed at the conclusion of the hearing.

§ 19.31 Scheduling and prehearing conferences.

(a) *Scheduling conference*. Within 30 days of service of the notice or order commencing a proceeding, the ALJ will direct counsel for all parties to meet with the ALJ at a specified time and manner prior to the hearing for the purpose of scheduling the course and conduct of the proceeding. This meeting is called a "scheduling conference." The schedule for the identification of potential witnesses, the time for and manner of discovery, and the exchange of any prehearing materials including witness lists,

statements of issues, stipulations, exhibits, and any other materials may also be determined at the scheduling conference.

(b) *Prehearing conferences*. The ALJ may, in addition to the scheduling conference, on the ALJ's own motion or at the request of any party, direct counsel for the parties to confer with the ALJ at a prehearing conference to address any or all of the following:

(1) Simplification and clarification of the issues;

(2) Stipulations, admissions of fact, and the contents, authenticity and admissibility into evidence of documents;

(3) Matters of which official notice may be taken;

(4) Limitation of the number of witnesses;

(5) Summary disposition of any or all issues;

(6) Resolution of discovery issues or disputes;

(7) Amendments to pleadings; and

(8) Such other matters as may aid in the orderly disposition of the proceeding.

(c) *Transcript*. The ALJ may require that a scheduling or prehearing conference be recorded by a court reporter. A transcript of the conference and any materials filed, including orders, becomes part of the record of the proceeding. A party may obtain a copy of the transcript at the party's expense.

(d) *Scheduling or prehearing orders*. At or within a reasonable time following the conclusion of the scheduling conference or any prehearing conference, the ALJ will serve on each party an order setting forth any agreements reached and any procedural determinations made.

§ 19.32 Prehearing submissions.

(a) *Party prehearing submissions*. Within the time set by the ALJ, but in no case later than 20 days before the start of the hearing, each party must file with the ALJ and serve on every other party:

(1) A prehearing statement that states:

(i) The party's position with respect to the legal issues presented;

(ii) The statutory and case law upon which the party relies; and

(iii) The facts that the party expects to prove at the hearing;

(2) A final list of witnesses to be called to testify at the hearing, including the name, mailing address, and electronic mail address of each witness and a short summary of the expected testimony of each witness, which need not identify the exhibits to be relied upon by each witness at the hearing;

(3) A list of the exhibits expected to be introduced at the hearing along with a copy of each exhibit; and

(4) Stipulations of fact, if any.

(b) *Effect of failure to comply.* No witness may testify and no exhibits may be introduced at the hearing if such witness or exhibit is not listed in the prehearing submissions pursuant to paragraph (a) of this section, except for good cause shown.

§ 19.33 Public hearings.

(a) *General rule*. All hearings must be open to the public, unless the Comptroller in their discretion, determines that holding an open hearing would be contrary to the public interest. Within 20 days of service of the notice or, in the case of change-in-control proceedings under section 7(j)(4) of the FDIA (12 U.S.C. 1817(j)(4)), within 20 days

from service of the hearing order, any respondent may file with the Comptroller a request for a private hearing, and any party may file a reply to such a request. A party must serve on the ALJ a copy of any request or reply the party files with the Comptroller. The form of, and procedure for, these requests and replies are governed by § 19.23. A party's failure to file a request or a reply constitutes a waiver of any objections regarding whether the hearing will be public or private.

(b) *Filing document under seal*. Enforcement Counsel, in Enforcement Counsel's discretion, may file any document or part of a document under seal if disclosure of the document would be contrary to the public interest. The ALJ will take all appropriate steps to preserve the confidentiality of such documents or parts thereof, including closing portions of the hearing to the public.

§ 19.34 Hearing subpoenas.

(a) *Issuance.*—(1) Upon application of a party showing general relevance and reasonableness of scope of the testimony or other evidence sought, the ALJ may issue a subpoena or a subpoena *duces tecum* requiring the attendance of a witness at the hearing or the production of documentary or physical evidence at the hearing. The application for a hearing subpoena must also contain a proposed subpoena specifying the attendance of a witness or the production of evidence from any state, territory, or possession of the United States, the District of Columbia, or as otherwise provided by law at any designated place where the hearing is being conducted. The party making the application must serve a copy of the application and the proposed subpoena on every other party.

(2) A party may apply for a hearing subpoena at any time before the commencement of a hearing. During a hearing, a party may make an application for a subpoena orally on the record before the ALJ.

(3) The ALJ will promptly issue any hearing subpoena requested pursuant to this section. If the ALJ determines that the application does not set forth a valid basis for the issuance of the subpoena, or that any of its terms are unreasonable, oppressive, excessive in scope, or unduly burdensome, the ALJ may refuse to issue the subpoena or may issue it in a modified form upon any conditions consistent with this subpart. Upon issuance by the ALJ, the party making the application must serve the subpoena on the person named in the subpoena and on each party.

(b) *Motion to quash or modify.*—(1) Any person to whom a hearing subpoena is directed or any party may file a motion to quash or modify the subpoena, accompanied by a statement of the basis for quashing or modifying the subpoena. The movant must serve the motion on each party and on the person named in the subpoena. Any party may respond to the motion within ten days of service of the motion.

(2) Any motion to quash or modify a hearing subpoena must be filed prior to the time specified in the subpoena for compliance but not more than ten days after the date of service of the subpoena upon the movant.

(c) *Enforcing subpoenas*. If a subpoenaed person fails to comply with any subpoena issued pursuant to this section or any order of the ALJ which directs compliance with all or any portion of a document subpoena, the subpoenaing party or any other aggrieved party may seek enforcement of the subpoena pursuant to § 19.26(c).

§ 19.35 Conduct of hearings.

(a) General rules—(1) Conduct of hearings. Hearings must be conducted so as to provide a fair and expeditious presentation of the relevant disputed issues. Each party has the right to present its case or defense by oral and documentary evidence and to conduct such cross examination as may be required for full disclosure of the facts.

(2) *Order of hearing*. Enforcement Counsel will present its case-in-chief first, unless otherwise ordered by the ALJ, or unless otherwise expressly specified by law or regulation. Enforcement Counsel will be the first party to present an opening statement and a closing statement and may make a rebuttal statement after the respondent's closing statement. If there are multiple respondents, respondents may agree among themselves as to their order of presentation of their cases, but if they do not agree, the ALJ will fix the order.

(3) *Examination of witnesses*. Only one counsel for each party may conduct an examination of a witness, except that in the case of extensive direct examination, the ALJ may permit more than one counsel for the party presenting the witness to conduct the examination. A party may have one counsel conduct the direct examination and another counsel conduct re-direct examination of a witness, or may have one counsel conduct the cross examination of a witness and another counsel conduct the re-cross examination of a witness.

(4) *Stipulations*. Unless the ALJ directs otherwise, all stipulations of fact and law previously agreed upon by the parties, and all documents, the admissibility of which have been previously stipulated, will be admitted into evidence upon commencement of the hearing.

(b) *Transcript*. The hearing must be recorded and transcribed. The reporter will make the transcript available to any party upon payment by that party to the reporter of the cost of the transcript. The ALJ may order the record corrected, either upon motion to correct, upon stipulation of the parties, or following notice to the parties upon the ALJ's own motion.

(c) *Electronic presentation*. Based on the circumstances of each hearing, the ALJ may direct the use of, or any party may use, an electronic presentation during the hearing. If the ALJ requires an electronic presentation during the hearing, each party will be responsible for their own presentation and related costs, unless the parties agree to another manner in which to allocate presentation responsibilities and costs.

§ 19.36 Evidence.

(a) *Admissibility.*—(1) Except as is otherwise set forth in this section, relevant, material, and reliable evidence that is not unduly repetitive is admissible to the fullest extent authorized by the Administrative Procedure Act and other applicable law.

(2) Evidence that would be admissible under the Federal Rules of Evidence is admissible in a proceeding conducted pursuant to this subpart.

(3) Evidence that would be inadmissible under the Federal Rules of Evidence may not be deemed or ruled to be inadmissible in a proceeding conducted pursuant to this subpart if such evidence is relevant, material, reliable and not unduly repetitive.

(b) *Official notice.*—(1) Official notice may be taken of any material fact which may be judicially noticed by a United States district court and any material information in the official public records of any Federal or State government agency.

(2) All matters officially noticed by the ALJ or the Comptroller must appear on the record.

(3) If official notice is requested or taken of any material fact, the parties, upon timely request, must be afforded an opportunity to object.

(c) *Documents.*—(1) A duplicate copy of a document is admissible to the same extent as the original, unless a genuine issue is raised as to whether the copy is in some material respect not a true and legible copy of the original.

(2) Subject to the requirements of paragraph (a) of this section, any document, including a report of examination, supervisory activity, inspection, or visitation, prepared by an appropriate Federal financial institutions regulatory agency or by a State regulatory agency, is admissible either with or without a sponsoring witness.

(3) Witnesses may use existing or newly created charts, exhibits, calendars, calculations, outlines, or other graphic material to summarize, illustrate, or simplify the presentation of testimony. Such materials may, subject to the ALJ's discretion, be used with or without being admitted into evidence.

(d) *Objections.*—(1) Objections to the admissibility of evidence must be timely made and rulings on all objections must appear on the record.

(2) When an objection to a question or line of questioning propounded to a witness is sustained, the examining counsel may make a specific proffer on the record of what the examining counsel expected to prove by the expected testimony of the witness either by representation of counsel or by direct questioning of the witness.

(3) The ALJ will retain rejected exhibits, adequately marked for identification, for the record, and transmit such exhibits to the Comptroller.

(4) Failure to object to admission of evidence or to any ruling constitutes a waiver of the objection.

(e) *Stipulations*. The parties may stipulate as to any relevant matters of fact or the authentication of any relevant documents. Such stipulations must be received in evidence at a hearing and are binding on the parties with respect to the matters therein stipulated.

(f) *Depositions of unavailable witnesses.*—(1) If a witness is unavailable to testify at a hearing, and that witness has testified in a deposition to which all parties in a proceeding had notice and an opportunity to participate, a party may offer as evidence all or any part of the transcript of the deposition, including deposition exhibits, if any.

(2) Such deposition transcript is admissible to the same extent that testimony would have been admissible had that person testified at the hearing, provided that if a witness refused to answer proper questions during the depositions, the ALJ may, on that basis, limit the admissibility of the deposition in any manner that justice requires.

(3) Only those portions of a deposition received in evidence at the hearing constitute a part of the record.

§ 19.37 Post-hearing filings.

(a) *Proposed findings and conclusions and supporting briefs.*—(1) Using the same method of service for each party, the ALJ will serve notice upon each party that the certified transcript, together with all hearing exhibits and exhibits introduced but not admitted into evidence at the hearing, has been filed. Any party may file with the ALJ proposed findings of fact, proposed conclusions of law, and a proposed order within 30 days following service of this notice by the ALJ or within such longer period as may be ordered by the ALJ.

(2) Proposed findings and conclusions must be supported by citation to any relevant authorities and by page references to any relevant portions of the record. A post-hearing brief may be filed in support of proposed findings and conclusions, either as part of the same document or in a separate document. Any party who fails to file timely with the ALJ any proposed finding or conclusion is deemed to have waived the right to raise in any subsequent filing or submission any issue not addressed in such party's proposed finding or conclusion.

(b) *Reply briefs*. Reply briefs may be filed within 15 days after the date on which the parties' proposed findings, conclusions, and order are due. Reply briefs must be strictly limited to responding to new matters, issues, or arguments raised in another party's papers. A party who has not filed proposed findings of fact and conclusions of law or a post-hearing brief may not file a reply brief.

(c) *Simultaneous filing required*. The ALJ will not order the filing by any party of any brief or reply brief in advance of the other party's filing of its brief.

§ 19.38 Recommended decision and filing of record.

(a) *Filing of recommended decision and record*. Within 45 days after expiration of the time allowed for filing reply briefs under § 19.37(b), the ALJ will file with and certify to the Comptroller, for decision, the record of the proceeding. The record must include the ALJ's recommended decision, recommended findings of fact, recommended conclusions of law, and proposed order; all prehearing and hearing transcripts, exhibits, and rulings; and the motions, briefs, memoranda, and other supporting papers filed in connection with the hearing. The ALJ will serve upon each party the recommended decision, findings, conclusions, and proposed order.

(b) *Filing of index*. At the same time the ALJ files with and certifies to the Comptroller for final determination the record of the proceeding, the ALJ will furnish to the Comptroller a certified index of the entire record of the proceeding. The certified index must include, at a minimum, an entry for each paper, document, or motion filed with the ALJ in the proceeding, the date of the filing, and the identity of the filer. The certified index must also include an exhibit index containing, at a minimum, an entry consisting of exhibit number and title or description for: each exhibit introduced and admitted into evidence at the hearing; each exhibit introduced but not admitted into evidence at the hearing; each exhibit introduced and admitted into evidence after the completion of the hearing; and each exhibit introduced but not admitted into evidence after the completion of the hearing.

§ 19.39 Exceptions to recommended decision.

(a) *Filing exceptions*. Within 30 days after service of the recommended decision, findings, conclusions, and proposed order under § 19.38, a party may file with the Comptroller written exceptions to the ALJ's recommended decision, findings, conclusions, or proposed order, to the admission or exclusion of evidence, or to the failure of the ALJ to make a ruling proposed by a party. A supporting brief may be filed at the time the exceptions are filed, either as part of the same document or in a separate document.

(b) *Effect of failure to file or raise exceptions.*—(1) Failure of a party to file exceptions to those matters specified in paragraph (a) of this section within the time prescribed is deemed a waiver of objection thereto.

(2) No exception need be considered by the Comptroller if the party taking exception had an opportunity to raise the same objection, issue, or argument before the ALJ and failed to do so.

(c) *Contents.*—(1) All exceptions and briefs in support of such exceptions must be confined to the particular matters in, or omissions from, the ALJ's recommendations to which that party takes exception.

(2) All exceptions and briefs in support of exceptions must set forth page or paragraph references to the specific parts of the ALJ's recommendations to which exception is taken, the page or paragraph references to those portions of the record relied upon to support each exception, and the legal authority relied upon to support each exception.

§ 19.40 Review by the Comptroller.

(a) *Notice of submission to the Comptroller*. When the Comptroller determines that the record in the proceeding is complete, the Comptroller will serve notice upon the parties that the proceeding has been submitted to the Comptroller for final decision.

(b) *Oral argument before the Comptroller*. Upon the initiative of the Comptroller or on the written request of any party filed with the Comptroller within the time for filing exceptions, the Comptroller may order and hear oral argument on the recommended findings, conclusions, decision, and order of the ALJ. A written request by a party must show good cause for oral argument and state reasons why arguments cannot be presented adequately in writing. A denial of a request for oral argument may be set forth in the Comptroller's final decision. Oral argument before the Comptroller must be on the record.

(c) *Comptroller's final decision.*—(1) Decisional employees may advise and assist the Comptroller in the consideration and disposition of the case. The final decision of the Comptroller will be based upon review of the entire record of the proceeding, except that the Comptroller may limit the issues to be reviewed to those findings and conclusions to which opposing arguments or exceptions have been filed by the parties.

(2) The Comptroller will render a final decision within 90 days after notification of the parties that the case has been submitted for final decision, or 90 days after oral argument, whichever is later, unless the Comptroller orders that the action or any aspect thereof be remanded to the ALJ for further proceedings. Copies of the final decision and order of the Comptroller will be served upon each party to the proceeding, upon other persons required by statute, and, if directed by the Comptroller or required by statute, upon any appropriate State or Federal supervisory authority.

§ 19.41 Stays pending judicial review.

The commencement of proceedings for judicial review of a final decision and order of the Comptroller may not, unless specifically ordered by the Comptroller or a reviewing court, operate as a stay of any order issued by the Comptroller. The Comptroller may, in its discretion, and on such terms as the Comptroller finds just, stay the effectiveness of all or any part of an order pending a final decision on a petition for review of that order.

Subpart B—Procedural Rules for OCC Adjudications

§ 19.100 Filing documents.

All materials required to be filed with or referred to the Comptroller or the ALJ in any proceeding under this part must be filed with the OCC Hearing Clerk in a manner

prescribed by § 19.10(b) and (c). Filings to be made with the Hearing Clerk include the notice and answer; motions and responses to motions; briefs; the record filed by the ALJ after the issuance of a recommended decision; the recommended decision filed by the ALJ following a motion for summary disposition; referrals by the ALJ of motions for interlocutory review; exceptions and requests for oral argument; any other papers required to be filed with the Comptroller or the ALJ under this part; and any attachments or exhibits to such documents.

§ 19.101 Delegation to OFIA.

Unless otherwise ordered by the Comptroller, an ALJ assigned to OFIA conducts administrative adjudications subject to subpart A of this part.

§ 19.102 Civil money penalties.

A respondent must pay civil money penalties assessed pursuant to subpart A of this part within 60 days after the issuance of the notice of assessment unless the OCC requires a different time for payment. A respondent that has made a timely request for a hearing to challenge the assessment of the penalty is not required to pay the penalty until the OCC has issued a final order of assessment. In these instances, the respondent must pay the penalty within 60 days of service of the order unless the OCC requires a different time for payment.

Subpart C—Removals, Suspensions, and Prohibitions of an Institution-Affiliated Party When a Crime Is Charged or a Conviction Is Obtained

§ 19.110 Scope and definitions.

(a) *Scope*. This subpart applies to informal hearings afforded to any institution-affiliated party who has been suspended or removed from office or prohibited from

further participation in the affairs of any depository institution pursuant to section 8(g) of the FDIA (12 U.S.C. 1818(g)) by a notice or order issued by the Comptroller.

(b) *Definitions*. As used in this subpart –

(1) The term *petitioner* means an individual who has filed a petition for an informal hearing under this subpart.

(2) The term *depository institution* means any national bank, Federal savings association, or Federal branch or agency of a foreign bank.

(3) The term *OCC Supervisory Office* means the Senior Deputy Comptroller or Deputy Comptroller of the OCC department or office responsible for supervision of the depository institution or, in the case of an individual no longer affiliated with a particular depository institution, the Deputy Comptroller for Special Supervision.

§ 19.111 Suspension, removal, or prohibition of institution-affiliated party.

(a) *Issuance of notice or order*. The Comptroller may serve a notice of suspension or prohibition or order of removal or prohibition pursuant to section 8(g) of the FDIA (12 U.S.C. 1818(g)) on an institution-affiliated party. The Comptroller will serve a copy of this notice or order on any depository institution that the subject of the notice or order is affiliated with at the time the OCC issues the notice or order. After service of the notice or order, the institution-affiliated party must immediately cease service to, or participation in the affairs of, that depository institution and, if so determined by the OCC, any other depository institution. The notice or order will indicate the basis for suspension, removal, or prohibition and will inform the institution-affiliated party of the right to request in writing, within 30 days from the date that the institution-affiliated party was served, an opportunity to show at an informal hearing that continued service to or

participation in the conduct of the affairs of any depository institution has not posed, does not pose, or is not likely to pose a threat to the interests of the depositors of, or has not threatened, does not threaten, or is not likely to threaten to impair public confidence in, any relevant depository institution. The Comptroller will serve the notice or order upon the institution-affiliated party and the related institution in the manner set forth in § 19.11(c).

(b) *Request for hearing*—(1) *Submission*. Unless instructed otherwise in writing by the Comptroller, an institution-affiliated party must send the written request for an informal hearing referenced in paragraph (a) of this section to the OCC Supervisory Office by certified mail, a same day courier service, an overnight delivery service, or by personal service with a signed receipt.

(2) *Content of request for a hearing*. The request filed under this section must state specifically the relief desired and the grounds on which that relief is based and must admit, deny, or state that the institution-affiliated party lacks sufficient information to admit or deny each allegation in the notice or order. A statement of lack of information has the effect of a denial. Denials must fairly meet the substance of each allegation denied; general denials are not permitted. When the institution-affiliated party denies part of an allegation, that part must be denied and the remainder specifically admitted. Any allegation in the notice or order which is not denied is deemed admitted for purposes of the proceeding. The request must state with particularity how the institution-affiliated party intends to show that its continued service to or participation in the affairs of the institution would not pose a threat to the interests of the institution's depositors or impair public confidence in any institution.

(c) *Default*. If the institution-affiliated party fails to timely file a petition for a hearing pursuant to paragraph (b) of this section, or fails to appear at a hearing, either in person or by counsel, or fails to submit a written argument where oral argument has been waived pursuant to § 19.112(c), the notice will remain in effect until the information, indictment, or complaint is finally disposed of and the order will remain in effect until terminated by the OCC.

§ 19.112 Informal hearing.

(a) *Issuance of hearing order*. After receipt of a request for hearing, the OCC Supervisory Office must notify the petitioner requesting the hearing and OCC Enforcement of the date, time, and place fixed for the hearing. The OCC will hold the hearing no later than 30 days from the date when the OCC receives the request for a hearing, unless the time is extended in response to a written request of the petitioner. The OCC Supervisory Office may extend the hearing date only for a specific period of time and must take appropriate action to ensure that the hearing is not unduly delayed.

(b) *Appointment of presiding officer*. The OCC Supervisory Office must appoint one or more OCC employees as the presiding officer to conduct the hearing. The presiding officer(s) may not have been involved in a prosecutorial or investigative role in the proceeding, a factually related proceeding, or the underlying enforcement action.

(c) *Waiver of oral hearing*—(1) *Petitioner*. When the petitioner requests a hearing, the petitioner may elect to have the matter determined by the presiding officer solely on the basis of written submissions by serving on the OCC Supervisory Office and all parties a signed document waiving the statutory right to appear and make oral argument. The petitioner must present the written submissions to the presiding officer

and serve the other parties not later than ten days prior to the date fixed for the hearing or within a shorter time period as the presiding officer may permit.

(2) *OCC*. The OCC may respond to the petitioner's submissions by presenting the presiding officer with a written response and by serving the other parties in the manner prescribed by § 19.11(c) not later than the date fixed for the hearing or within such other time period as the presiding officer may require.

(d) *Hearing procedures*—(1) *Conduct of hearing*. Hearings under this subpart are not subject to the provisions of subpart A of this part or the adjudicative provisions of the Administrative Procedure Act (5 U.S.C. 554–557).

(2) *Powers of the presiding officer*. The presiding officer must determine all procedural issues that are governed by this subpart. The presiding officer also may permit witnesses, limit the number of witnesses, and impose time limitations as they deem reasonable. The informal hearing will not be governed by formal rules of evidence, including the Federal Rules of Evidence. The presiding officer must consider all oral presentations, when permitted, and all documents the presiding officer deems to be relevant and material to the proceeding and not unduly repetitious. The presiding officer may ask questions of any person participating in the hearing and may make any rulings reasonably necessary to facilitate the effective and efficient operation of the hearing.

(3) *Presentation*. (i) The OCC and the petitioner may present relevant written materials and oral argument at the hearing. The petitioner may appear at the hearing personally or through counsel. Except as permitted in paragraph (c) of this section, each party, including the OCC, must file a copy of any affidavit, memorandum, or other written material to be presented at the hearing with the presiding officer and must serve

the other parties not later than ten days prior to the hearing or within such shorter time period as permitted by the presiding officer.

(ii) If the petitioner or the OCC desires to present oral testimony or witnesses at the hearing, they must file a written request with the presiding officer not later than ten days prior to the hearing, or within a shorter time period as required by the presiding officer. The written request must include the names of proposed witnesses, along with the general nature of the expected testimony, and the reasons why oral testimony is necessary. The presiding officer generally will not admit oral testimony or witnesses unless a specific and compelling need is demonstrated. Witnesses, if admitted, must be sworn. By stipulation of the parties or by order of the presiding officer, a court reporter or other person authorized to administer an oath may administer the oath remotely without being in the physical presence of the witness.

(iii) In deciding on any suspension or prohibition based on an indictment, information, or complaint, the presiding officer may not consider the ultimate question of the guilt or innocence of the individual with respect to the criminal charges that are outstanding. In deciding on any removal or prohibition with respect to a conviction or pre-trial diversion program, the presiding officer may not consider challenges to or efforts to impeach the validity of the conviction or the agreement to enter a pre-trial diversion program or other similar program. The presiding officer may consider facts in either situation, however, that show the nature of the events on which the criminal charges, conviction, or agreement to enter a pre-trial diversion program or other similar program was based.

(4) *Electronic presentation*. Based on the circumstances of each hearing, the presiding officer may direct the use of, or any party may elect to use, an electronic presentation during the hearing. If the presiding officer requires an electronic presentation during the hearing, each party will be responsible for their own presentation and related costs unless the parties agree to another manner by which to allocate presentation responsibilities and costs.

(5) *Record*. A transcript of the proceedings may be taken if the petitioner requests a transcript and agrees to pay all expenses or if the presiding officer determines that the nature of the case warrants a transcript. The presiding officer may order the record to be kept open for a reasonable period following the hearing, not to exceed five business days, to permit the petitioner or the OCC to submit additional documents for the record. Thereafter, no further submissions may be accepted except for good cause shown.

§ 19.113 Recommended and final decisions.

(a) *Issuance of recommended decision*. The presiding officer must issue a recommended decision to the Comptroller within 20 days of the conclusion of the hearing or, when the petitioner has waived an oral hearing, within 20 days of the date fixed for the hearing. The presiding officer must serve promptly a copy of the recommended decision on the parties to the proceeding. The decision must include a summary of the facts and arguments of the parties.

(b) *Comments*. Each party may, within ten days of being served with the presiding officer's recommended decision, submit to the Comptroller comments on the recommended decision.

(c) *Issuance of final decision*. Within 60 days of the conclusion of the hearing or, if the petitioner has waived an oral hearing, within 60 days from the date fixed for the hearing, the Comptroller will notify the petitioner by registered mail, or electronic mail or other electronic means if the petitioner consents, whether the suspension or removal from office or prohibition from participation in any manner in the affairs of any depository institution will be affirmed, terminated, or modified. The Comptroller's decision must include a statement of reasons supporting the decision. The Comptroller's decision is a final and unappealable order.

(d) *Other actions*. A finding of not guilty or other disposition of the charge or charges on which a notice of suspension was based does not preclude the Comptroller from thereafter instituting removal proceedings pursuant to section 8(e) of the FDIA (12 U.S.C. 1818(e)) and subpart A of this part.

(e) *Expiration of order*. A removal or prohibition by order remains in effect until terminated by the Comptroller. A suspension or prohibition by notice remains in effect until the criminal charge is disposed of or until terminated by the Comptroller.

(f) *Petition for reconsideration.* A suspended or removed individual may petition the Comptroller to reconsider the decision any time after the expiration of a 12-month period from the date of the decision, but no petition for reconsideration may be made within 12 months of a previous petition. The petition must state specifically the relief sought and the grounds therefor, and may be accompanied by a supporting memorandum and any other documentation the petitioner wishes to have considered. The Comptroller is not required to grant a hearing on the petition for reconsideration.

Subpart D—Actions under the Federal Securities Laws

§ 19.120 Exemption hearings under section 12(h) of the Securities Exchange Act of 1934.

(a) *Scope*. The rules in this section apply to informal hearings that may be held by the Comptroller to determine whether, pursuant to authority in sections 12(h) and (i) of the Securities Exchange Act of 1934 (Exchange Act) (15 U.S.C. 78*l*(h) and (i)), to exempt in whole or in part an issuer or a class of issuers from the provisions of section 12(g), or from section 13 or 14 of the Exchange Act (15 U.S.C. 78*l*(g), 78m or 78n), or whether to exempt from section 16 of the Exchange Act (15 U.S.C. 78p) any officer, director, or beneficial owner of securities of an issuer. The only issuers covered by this section are national banks and Federal savings associations whose securities are registered, or which may be subject to registration, pursuant to section 12(g) of the Exchange Act (15 U.S.C. 78*l*(g)). The Comptroller may deny an application for exemption without a hearing.

(b) *Application for exemption*. An issuer or an individual (officer, director, or shareholder) may submit a written application for an exemption order to Bank Advisory, Office of the Comptroller of the Currency, Washington, DC 20219. The application must specify the type of exemption sought and the reasons for the exemption, including an explanation of why an exemption would not be inconsistent with the public interest or the protection of investors. Bank Advisory will inform the applicant in writing whether a hearing will be held to consider the matter.

(c) *Newspaper notice*. Upon being informed that an application will be considered at a hearing, the applicant must publish a notice one time in a newspaper of general circulation in the community where the issuer's main office is located. The notice must

state: The name and title of any individual applicants; the type of exemption sought; the fact that a hearing will be held; and a statement that interested persons may submit to Bank Advisory, Office of the Comptroller of the Currency, Washington, DC 20219 within 30 days from the date of the newspaper notice, written comments concerning the application and a written request for an opportunity to be heard. The applicant must promptly provide a copy of the notice to Bank Advisory and to the national bank's or Federal savings association's shareholders in the same manner as is customary for shareholder communications.

(d) *Informal hearing*—(1) *Conduct of proceeding*. The adjudicative provisions of the Administrative Procedure Act, formal rules of evidence, and subpart A of this part do not apply to hearings conducted under this section, except as provided in § 19.100.

(2) *Notice of hearing*. Following the comment period, the Comptroller will send a notice that fixes a date, time, and place for hearing to each applicant and to any person who has requested an opportunity to be heard.

(3) *Presiding officer*. The Comptroller will designate a presiding officer to conduct the hearing. The presiding officer must determine all procedural questions not governed by this section and may limit the number of witnesses and impose time and presentation limitations as are deemed reasonable. At the conclusion of the informal hearing, the presiding officer must issue a recommended decision to the Comptroller as to whether the exemption should be issued. The decision must include a summary of the facts and arguments of the parties.

(4) *Attendance*. Each applicant and any person who has requested an opportunity to be heard may attend the hearing with or without counsel. The hearing will be open to

the public. In addition, each applicant and any other hearing participant may introduce oral testimony through such witnesses as the presiding officer may permit.

(5) *Order of presentation*. (i) Each applicant may present an opening statement of a length decided by the presiding officer. Each of the hearing participants, or one among them selected with the approval of the presiding officer, may then present an opening statement. The opening statement should summarize concisely what each applicant and participant intends to show.

(ii) Each applicant will have an opportunity to make an oral presentation of facts and materials or submit written materials for the record. One or more of the hearing participants may make an oral presentation or a written submission.

(iii) After the above presentations, each applicant, followed by one or more of the hearing participants, may make concise summary statements reviewing their position.

(6) *Witnesses*. The obtaining and use of witnesses is the responsibility of the parties afforded the hearing. All witnesses must be present on their own volition, but any person appearing as a witness may be questioned by each applicant, any hearing participant, and the presiding officer. Witnesses must be sworn unless otherwise directed by the presiding officer. By stipulation of the parties or by order of the presiding officer, a court reporter or other person authorized to administer an oath may administer the oath remotely without being in the physical presence of the witness.

(7) *Evidence*. The presiding officer may exclude data or materials deemed to be improper or irrelevant. Formal rules of evidence do not apply. Documentary material must be of a size consistent with ease of handling and filing. The presiding officer may determine the number of copies that must be furnished for purposes of the hearing.

(8) *Electronic presentation*. Based on the circumstances of each hearing, the presiding officer may direct the use of, or any party may elect to use, an electronic presentation during the hearing. If the presiding officer requires an electronic presentation during the hearing, each party will be responsible for their own presentation and related costs unless the parties agree to another manner in which to allocate presentation responsibilities and costs.

(9) *Transcript*. The OCC will arrange a transcript of each proceeding with all expenses, including the furnishing of a copy to the presiding officer by electronic means or otherwise, paid by the applicant or applicants.

(e) *Decision of the Comptroller*. Following the conclusion of the hearing and the submission of the record and the presiding officer's recommended decision to the Comptroller for decision, the Comptroller will notify each applicant and all persons who have so requested in writing of the final disposition of the application. Exemptions granted must be in the form of an order that specifies the type of exemption granted and its terms and conditions.

§ 19.121 Disciplinary proceedings.

(a) *Scope*—(1) *In general*. Except as provided in this section, subpart A of this part applies to proceedings by the Comptroller to determine whether, pursuant to authority contained in sections 15B(c)(5), 15C(c)(2)(A), 17A(c)(3), and 17A(c)(4)(C) of the Exchange Act (15 U.S.C. 78o–4(c)(5), 78o–5(c)(2)(A), 78q–1(c)(3)(A), and 78q–1(c)(4)(C)), to take disciplinary action against the following:

(i) A bank that is a municipal securities dealer, any person associated with a bank that is a municipal securities dealer, or any person seeking to become associated with a bank that is a municipal securities dealer;

(ii) A bank that is a government securities broker or government securities dealer, any person associated with a bank that is a government securities broker or government securities dealer, or any person seeking to become associated with a government securities broker or government securities dealer; or

(iii) A bank that is a transfer agent, any person associated with a bank that is a transfer agent, or any person seeking to become associated with a bank that is a transfer agent.

(2) *Other actions*. In addition to the issuance of disciplinary orders after opportunity for hearing, the Comptroller may issue and serve any notices and temporary or permanent cease-and-desist orders and take any actions that are authorized by section 8 of the FDIA (12 U.S.C. 1818); sections 15B(c)(5), 15C(c)(2)(B), and 17A(d)(2) of the Exchange Act (15 U.S.C. 78o–4(c)(5), 78o–5(c)(2)(B), and 78q–1(d)(2)); and other sections of this part against the following:

(i) The parties listed in paragraph (a)(1) of this section; and

(ii) A bank that is a clearing agency.

(3) *Definitions*. As used in this section:

(i) The term *bank* means a national bank or Federal savings association, and, when referring to a government securities broker or government securities dealer, a Federal branch or agency of a foreign bank;

(ii) The terms *transfer agent, municipal securities dealer*, *government securities broker*, and *government securities dealer* have the same meaning as the terms in sections 3(a)(25), 3(a)(30), 3(a)(43), and 3(a)(44) of the Exchange Act (15 U.S.C. 78c(a)(25), 78c(a)(30), 78c(a)(43), and 78c(a)(44)), respectively;

(iii) The terms *person associated with a bank that is a municipal securities dealer* and *person associated with a municipal securities dealer* have the same meaning as *person associated with a municipal securities dealer* in section 3(a)(32) of the Exchange Act (15 U.S.C. 78c(a)(32));

(iv) The terms *person associated with a bank that is a government securities broker or government securities dealer* and *person associated with a government securities broker or government securities dealer* have the same meaning as *person associated with a government securities broker or government securities dealer* in section 3(a)(45) of the Exchange Act (15 U.S.C. 78c(a)(45)); and

(v) The terms *person associated with a bank that is a transfer agent* and *person associated with a transfer agent* have the same meaning as *person associated with a transfer agent* in section 3(a)(49) of the Exchange Act (15 U.S.C. 78c(a)(49)).

(4) *Preservation of authority*. Nothing in this section impairs the powers conferred on the Comptroller by other provisions of law.

(b) *Notice of charges and answer*—(1) *In general*. Proceedings are commenced when the Comptroller serves a notice of charges on a bank or associated person. The notice must indicate the type of disciplinary action being contemplated and the grounds therefor and fix a date, time, and place for hearing. The hearing must be set for a date at least 30 days after service of the notice. A respondent served with a notice of charges

may file an answer as prescribed in § 19.19. Any respondent who fails to appear at a hearing personally or by a duly authorized representative is deemed to have consented to the issuance of a disciplinary order.

(2) *Public basis of proceedings; private hearings*. All proceedings under this section must be commenced, and the notice of charges must be filed, on a public basis unless otherwise ordered by the Comptroller. Pursuant to § 19.33(a), a request for a private hearing may be filed within 20 days of service of the notice.

(c) *Disciplinary orders*—(1) *Service of order; content*. In the event of consent, or if on the record filed by the ALJ, the Comptroller finds that any act or omission or violation specified in the notice of charges has been established, the Comptroller may serve on the bank or persons concerned a disciplinary order, as provided in the Exchange Act. The order may:

(i) Censure; limit the activities, functions, or operations of; or suspend or revoke the registration of a bank that is a municipal securities dealer;

(ii) Censure, suspend, or bar any person associated with a municipal securities dealer or seeking to become a person associated with a municipal securities dealer;

(iii) Censure; limit the activities, functions, or operations of; or suspend or bar a bank that is a government securities broker or government securities dealer;

(iv) Censure; limit the activities, functions, or operations of; or suspend or bar any person associated with or seeking to become a person associated with a government securities broker or government securities dealer;

(v) Deny registration to; limit the activities, functions, or operations of; or suspend or revoke the registration of a bank that is a transfer agent; or

(vi) Censure, limit the activities or functions of, or suspend or bar any person associated with a transfer agent or seeking to become a person associated with a transfer agent.

(2) *Effective date of order*. A disciplinary order is effective when served on the respondent or respondents involved and remains effective and enforceable until it is stayed, modified, terminated, or set aside by action of the Comptroller or a reviewing court.

(d) *Applications for stay or review of disciplinary actions imposed by registered clearing agencies*—(1) *Stays*. The rules adopted by the Securities and Exchange Commission (SEC) pursuant to section 19 of the Exchange Act (15 U.S.C. 78s) regarding applications by persons for whom the SEC is the appropriate regulatory agency for stays of disciplinary sanctions or summary suspensions imposed by registered clearing agencies (17 CFR 240.19d–2) apply to applications by banks. References to the "Commission" are deemed to refer to the "OCC."

(2) *Reviews*. The regulations adopted by the SEC pursuant to section 19 of the Exchange Act (15 U.S.C. 78s) regarding applications by persons for whom the SEC is the appropriate regulatory agency for reviews of final disciplinary sanctions, denials of participation, or prohibitions or limitations of access to services imposed by registered clearing agencies (17 CFR 240.19d–3(a) through (f)) apply to applications by banks. References to the "Commission" are deemed to refer to the "OCC."

§ 19.122 Civil money penalty authority under Federal securities laws.

(a) *Scope*. Except as provided in this section, subpart A of this part applies to proceedings by the Comptroller to determine whether, pursuant to authority contained in

section 21B of the Exchange Act (15 U.S.C. 78u–2), in proceedings commenced pursuant to sections 15B, 15C, and 17A of the Exchange Act (15 U.S.C. 78o–4, 78o–5, or 78q–1) for which the OCC is the appropriate regulatory agency under section 3(a)(34) of the Exchange Act (15 U.S.C. 78c(a)(34)), the Comptroller may impose a civil money penalty against the following:

(1) A bank that is a municipal securities dealer, any person associated with a bank that is a municipal securities dealer, or any person seeking to become associated with a bank that is a municipal securities dealer;

(2) A bank that is a government securities broker or government securities dealer, any person associated with a bank that is a government securities broker or government securities dealer, or any person seeking to become associated with a government securities broker or government securities dealer; or

(3) A bank that is a transfer agent, any person associated with a bank that is a transfer agent, or any person seeking to become associated with a bank that is a transfer agent.

(b) *Definitions*. As used in this section:

(1) The term *bank* means a national bank or Federal savings association, and, when referring to a government securities broker or government securities dealer, a Federal branch or agency of a foreign bank;

(2) The terms *transfer agent, municipal securities dealer*, *government securities broker*, and *government securities dealer* have the same meaning as such terms in sections 3(a)(25), 3(a)(30), 3(a)(43), and 3(a)(44) of the Exchange Act (15 U.S.C. 78c(a)(25), 78c(a)(30), 78c(a)(43), and 78c(a)(44)), respectively;

(3) The term *person associated with a bank that is a municipal securities dealer* has the same meaning as *person associated with a municipal securities dealer* in section 3(a)(32) of the Exchange Act (15 U.S.C. 78c(a)(32));

(4) The term *person associated with a bank that is a government securities broker or government securities dealer* has the same meaning as *person associated with a government securities broker or government securities dealer* in section 3(a)(45) of the Exchange Act (15 U.S.C. 78c(a)(45)); and

(5) The term *person associated with a bank that is a transfer agent* has the same meaning as *person associated with a transfer agent* in section 3(a)(49) of the Exchange Act (15 U.S.C. 78c(a)(49)).

(c) *Public basis of proceedings; private hearings*. All proceedings under this section must be commenced, and the notice of assessment must be filed, on a public basis, unless otherwise ordered by the Comptroller. Pursuant to § 19.33(a), any request for a private hearing may be filed within 20 days of service of the notice.

§ 19.123 Cease-and-desist authority.

(a) *Scope*. Except as provided in this section, subpart A of this part applies to proceedings by the Comptroller to determine whether, pursuant to authority contained in sections 12(i) and 21C of the Exchange Act (15 U.S.C. 78*l*(i) and 78u–3), the Comptroller may initiate cease-and-desist proceedings against a national bank or Federal savings association for violations of sections 10A(m), 12, 13, 14(a), 14(c), 14(d), 14(f), and 16 of the Exchange Act (15 U.S.C. 78j-1(m), 78*l*, 78m, 78n(a), 78n(c), 78n(d), 78n(f), and 78p); sections 302, 303, 304, 306, 401(b), 404, 406, and 407 of the Sarbanes-

Oxley Act of 2002 as amended (15 U.S.C. 7241, 7242, 7243, 7244, 7261, 7262, 7264, and 7265); or regulations or rules issued thereunder.

(b) *Public basis of proceedings; private hearings*. All proceedings under this section must be commenced, and the notice of charges must be filed, on a public basis, unless otherwise ordered by the Comptroller. Pursuant to § 19.33(a), any request for a private hearing may be filed within 20 days of service of the notice.

Subparts E through G— Reserved

Subpart H – Change in Bank Control.

§ 19.160 Scope.

(a) *Scope*. This subpart governs the procedures for a hearing requested by a person who has filed a notice that has been disapproved by the OCC for a change in control of:

(1) An insured national bank or Federal savings association pursuant to section 7(j) of the FDIA (12 U.S.C. 1817(j)) and 12 CFR 5.50; or

(2) An uninsured national bank pursuant to 12 CFR 5.50.

(b) *Applicability of subpart A of this part*. Unless otherwise provided in this subpart, the rules in subpart A set forth the procedures applicable to requests for OCC hearings under this subpart.

§ 19.161 Hearing process.

(a) *Hearing request*. Pursuant to 12 CFR 5.50(f)(6), following receipt of a notice of disapproval of a proposed acquisition of control of a national bank or Federal savings association, a filer may request a hearing by the OCC on the proposed acquisition. A hearing request must:

(1) Be in writing; and

(2) Be filed with the Hearing Clerk of the OCC within ten days after service on the filer of the notice of disapproval. If a filer fails to request a hearing with a timely written request, the notice of disapproval constitutes a final and unappealable order.

(b) *Hearing order.* Following receipt of a hearing request, the Comptroller will issue, within 20 days, an order that sets forth:

(1) The legal authority for the proceeding and for the OCC's jurisdiction over the proceeding;

(2) The matters of fact or law upon which the disapproval is based; and

(3) The requirement for filing an answer to the hearing order with OFIA within 20 days after service of the hearing order.

(c) *Answer.* An answer to a hearing order must specifically deny those portions of the order that are disputed. Those portions of the order that the filer does not specifically deny are deemed admitted by the filer. Any hearing under this subpart is limited to those portions of the order that are specifically denied.

(d) *Effect of failure to answer.* Failure of a filer to file an answer within 20 days after service of the hearing order constitutes a waiver of the filer's right to appear and contest the allegations in the hearing order. If a filer does not file a timely answer, Enforcement Counsel may file a motion for entry of an order of default. Upon a finding that no good cause has been shown for the failure to file a timely answer, the ALJ will file with the Comptroller a recommended decision containing the findings and the relief sought in the hearing order. Any final order issued by the Comptroller based upon a

filer's failure to answer is deemed to be an order issued upon consent and is a final and unappealable order.

Subpart I – Discovery Depositions and Subpoenas

§ 19.170 Discovery depositions.

(a) *In general*. In any proceeding instituted under or subject to the provisions of subpart A of this part, a party may take the deposition of a fact witness, an expert, or a hybrid fact-expert where there is need for the deposition. A fact witness is a person, including another party, who has direct knowledge of matters that are non-privileged and of material relevance to the proceeding. A hybrid fact-expert witness is a fact witness who will also provide relevant expert opinion testimony based on the witness' training and experience. The deposition of experts is limited to those experts who are expected to testify at the hearing.

(1) *Report*. A party must produce an expert report for any testifying expert or hybrid fact-expert witness before the witness' deposition. Unless otherwise provided by the ALJ, the party must produce this report at least 20 days prior to any deposition of the expert or hybrid fact-expert witness.

(2) *Limits on depositions*. Respondents, collectively, are limited to a combined total of five depositions from fact witnesses and hybrid fact-expert witnesses. Enforcement Counsel are limited to a combined total of five depositions from fact witnesses and hybrid fact-expert witnesses. A party is entitled to take a deposition of each expert witness designated by an opposing party.

(b) *Notice*. A party desiring to take a deposition must give reasonable notice in writing to the deponent and to every other party to the proceeding. The notice must state

the time, manner, and place for taking the deposition, and the name and address of the person to be deposed.

(1) *Location*. A deposition notice may require the witness to be deposed at any place within a State, territory, or possession of the United States or the District of Columbia in which that witness resides or has a regular place of employment, or such other convenient place as agreed by the noticing party and the witness.

(2) *Remote participation*. The parties may stipulate, or the ALJ may order, that a deposition be taken by telephone or other remote means.

(c) *Time limits.* A party may take depositions at any time after the commencement of the proceeding, but no later than 20 days before the scheduled hearing date, except with permission of the ALJ for good cause shown.

(d) *Conduct of the deposition.* The witness must be duly sworn. By stipulation of the parties or by order of the ALJ, a court reporter or other person authorized to administer an oath may administer the oath remotely without being in the physical presence of the deponent. Each party will have the right to examine the witness with respect to all matters that are non-privileged and of material relevance to the proceeding and of which the witness has factual, direct, and personal knowledge. Objections to questions or exhibits must be in short form and must state the grounds for the objection. Failure to object to questions or exhibits is not a waiver except where the grounds for the objection might have been avoided if the objection had been timely presented.

(e) *Recording the testimony*—(1) *Generally.* The party taking the deposition must have a certified court reporter record the witness' testimony:

(i) By stenotype machine or electronic means, such as by sound or video recording device;

(ii) Upon agreement of the parties, by any other method; or

(iii) For good cause and with leave of the ALJ, by any other method.

(2) *Cost.* The party taking the deposition must bear the cost of recording and transcribing the witness' testimony.

(3) *Transcript.* Unless the parties agree that a transcription is not necessary, the court reporter must provide a transcript of the witness' testimony to the party taking the deposition and must make a copy of the transcript available to each party upon payment by that party of the cost of the copy.

(f) *Protective orders.* At any time after notice of a deposition has been given, a party may file a motion for the issuance of a protective order. Such protective order may prohibit, terminate, or limit the scope or manner of the taking of a deposition. The ALJ may grant a protective order upon a showing of sufficient grounds, including that the deposition:

(1) Is unreasonable, oppressive, excessive in scope, or unduly burdensome;

(2) Involves privileged, irrelevant, or immaterial matters;

(3) Involves unwarranted attempts to pry into a party's preparation for trial; or

(4) Is being conducted in bad faith or in such manner as to unreasonably annoy, embarrass, or oppress the witness.

(g) *Expenses*. Deposition witnesses, including expert witnesses, must be paid the same expenses in the same manner as are paid witnesses in the district courts of the United States in proceedings in which the United States is a party. Expenses in

accordance with this paragraph (g) must be paid by the party seeking to take the deposition.

§ 19.171 Deposition subpoenas.

(a) *Issuance.* At the request of a party, the ALJ may issue a subpoena requiring the attendance of a witness at a discovery deposition under § 19.170. The attendance of a witness may be required from any place in any State, territory, or possession of the United States or the District of Columbia or as otherwise permitted by law.

(b) *Service*—(1) *Methods of service.* The party requesting the subpoena must serve it on the person named therein, or on that person's counsel, by any of the methods identified in § 19.11(d).

(2) *Proof of service.* The party serving the subpoena must file proof of service with the ALJ, unless the ALJ issues an order indicating the filing of proof of service is not required.

(c) *Motion to quash.* A person named in a subpoena, or any party, may file a motion to quash or modify the subpoena. A statement of the reasons for the motion must accompany it and a copy of the motion must be served on the party that requested the subpoena. The motion must be made prior to the time for compliance specified in the subpoena and not more than ten days after the date of service of the subpoena, or if the subpoena is served within 15 days of the hearing, within five days after the date of service.

(d) *Enforcement of deposition subpoena.* Enforcement of a deposition subpoena must be in accordance with the procedures of § 19.27(d).

Subpart J – Formal Investigations

§ 19.180 Scope.

This subpart and § 19.8 apply to formal investigations initiated by order of the Comptroller and pertain to the exercise of powers specified in section 5240 of the Revised Statutes of the United States (12 U.S.C. 481); section 5(d)(1)(B) of the Home Owners' Loan Act (12 U.S.C. 1464(d)(1)(B)); sections 7(j)(15), 8(n), and 10(c) of the FDIA (12 U.S.C. 1817(j)(15), 1818(n), and 1820(c)); sections 4(b) and 13(a) and (b) of the International Banking Act of 1978 (12 U.S.C. 3102(b) and 3108(a) and (b)); and section 21 of the Exchange Act (15 U.S.C. 78u). This subpart does not restrict or in any way affect the authority of the Comptroller to conduct examinations into the affairs or ownership of national banks, Federal savings associations, Federal branches and agencies, and their affiliates.

§ 19.181 Confidentiality of formal investigations.

The entire record of any formal investigative proceeding, including the resolution or order of the Comptroller authorizing or terminating the proceeding; all subpoenas issued by the OCC during the investigation; and all information, documents, and transcripts obtained by the OCC in the course of a formal investigation, are confidential and may be disclosed only in accordance with the provisions of part 4 of this chapter or pursuant to OCC discovery obligations under subpart A of this part.

§ 19.182 Order to conduct a formal investigation.

A formal investigation begins with the issuance of an order signed by the Comptroller. The order must designate the person or persons empowered by the Comptroller to conduct the investigation. These persons are authorized, among other things, to administer oaths and affirmations, to take or cause to be taken testimony under

oath, and to issue or modify subpoenas, including subpoenas *duces tecum*, as to any matter under investigation by the Comptroller. Upon application and for good cause shown, the Comptroller may limit, modify, withdraw, or terminate the order at any stage of the proceedings.

§ 19.183 Rights of witnesses.

(a) *Right to be shown order*. Any person who is compelled or requested to furnish testimony, documentary evidence, or other information with respect to any matter under formal investigation must, on request, be shown the order initiating the investigation. These persons may not retain copies of the order without first receiving written approval of the OCC.

(b) *Right to counsel*. Any person who, in a formal investigation, is compelled to appear and testify, or who appears and testifies by request or permission of the OCC, may be accompanied, represented, and advised by counsel. The right to be accompanied, represented, and advised by counsel means the right of a person testifying to have an attorney present at all times while testifying and to have the attorney:

(1) Advise the person before, during, and after the conclusion of testimony;

(2) Question the person, on the record, briefly at the conclusion of testimony for the purpose of clarifying any of the answers given; and

(3) Make summary notes during the testimony solely for use in representing the person.

(c) *Exclusion from proceedings*. Any person who has given or will give testimony and counsel representing the person may be excluded from the proceedings during the taking of testimony of any other person at the discretion of the OCC or the OCC's

designated representatives. Neither attorney(s) for the institution(s) affiliated with the testifying person nor attorneys for any other interested persons have any right to be present during the testimony of any person not personally represented by such attorney.

(d) *Right to inspect testimony transcript*. Any person who is compelled to give testimony is entitled to inspect any transcript that has been made of the testimony but may not obtain a copy if the OCC or the OCC's designated representatives conducting the proceedings determine that the contents should not be disclosed.

§ 19.184 Service of subpoena and payment of witness expenses.

(a) *Methods of service.* Service of a subpoena may be made by any of the methods identified in § 19.11(d).

(b) *Expenses*. The fees and expenses specified in § 19.14 apply to a witness who is subpoenaed to testify pursuant to this subpart.

(c) *Area of service*. Subpoenas issued in connection with a formal investigation proceeding that require the attendance and testimony of witnesses or the production of documents, including electronically stored information, may be served on any person or entity within any State, territory, or possession of the United States or the District of Columbia, or as otherwise provided by law. Foreign nationals are subject to such subpoenas if service is made upon a duly authorized agent located in the United States or in accordance with international requirements for service of subpoenas.

§ 19.185 Dilatory, obstructionist, or insubordinate conduct.

Any OCC designated representative conducting an investigative proceeding will report to the Comptroller any instances where any person has engaged in dilatory, obstructionist, or insubordinate conduct during the course of the proceeding or any other

instance involving a violation of this part. The Comptroller may take such action as the circumstances warrant, including exclusion of the offending individual or individuals from participation in the proceedings.

Subpart K – Parties and Representational Practice Before the OCC; Standards of Conduct

§ 19.190 Scope.

This subpart contains rules relating to parties and representational practice before the OCC. This subpart includes the imposition of sanctions by the ALJ, any other presiding officer appointed pursuant to subpart C of this part and § 19.120, or the Comptroller against parties or their counsel in an adjudicatory proceeding under this part. This subpart also covers other disciplinary sanctions - censure, suspension, or debarment - against individuals who appear before the OCC in a representational capacity either in an adjudicatory proceeding under this part or in any other matters connected with presentations to the OCC relating to a client's rights, privileges, or liabilities. This representation includes, but is not limited to, the practice of attorneys and accountants. Employees of the OCC are not subject to disciplinary proceedings under this subpart.

§ 19.191 Definitions.

As used in §§ 19.190 through 19.201, the following terms have the meaning given in this section unless the context otherwise requires:

(a) *Accountant* means any individual who is duly qualified to practice as a certified public accountant or a public accountant in any state, possession, territory, or commonwealth of the United States or the District of Columbia.

(b) *Attorney* means any individual who is a member in good standing of the bar of the highest court of any state, possession, territory, or commonwealth of the United States or the District of Columbia.

(c) *Practice before the OCC* includes any matters connected with written or oral presentations to the OCC or any of its officers or employees relating to a client's rights, privileges, or liabilities under laws or regulations administered by the OCC. Such matters include, but are not limited to, representation of a client in an adjudicatory proceeding under this part; the preparation of any statement, opinion or other paper or document by an attorney, accountant, or other licensed professional that is filed with, or submitted to, the OCC, on behalf of another person in, or in connection with, any application, notification, report or document; the representation of a person at conferences, hearings and meetings; and the transaction of other business before the OCC on behalf of another person. The term *practice before the OCC* does not include work prepared for a national bank, Federal savings association, or Federal branch or agency of a foreign bank solely at its request for use in the ordinary course of its business.

§ 19.192 Sanctions relating to conduct in an adjudicatory proceeding.

(a) *In general.* Appropriate sanctions may be imposed when any party or person representing a party in an adjudicatory proceeding under this part has failed to comply with an applicable statute, regulation, or order, and that failure to comply:

(1) Constitutes contemptuous conduct;

(2) Materially injures or prejudices another party in terms of substantive injury, incurring additional expenses including attorney's fees, prejudicial delay, or otherwise;

(3) Is a clear and unexcused violation of an applicable statute, regulation, or order; or

(4) Unduly delays the proceeding.

(b) *Sanctions.* Sanctions which may be imposed include any one or more of the following:

(1) Issuing an order against the party;

(2) Rejecting or striking any testimony or documentary evidence offered, or other papers filed, by the party;

(3) Precluding the party from contesting specific issues or findings;

(4) Precluding the party from offering certain evidence or from challenging or contesting certain evidence offered by another party;

(5) Precluding the party from making a late filing or conditioning a late filing on any terms that are just; and

(6) Assessing reasonable expenses, including attorney's fees, incurred by any other party as a result of the improper action or failure to act.

(c) *Procedure for imposition of sanctions.* (1) Upon the motion of any party, or on their own motion, the ALJ or other presiding officer may impose sanctions in accordance with this section. The ALJ or other presiding officer will submit to the Comptroller for final ruling any sanction entering a final order that determines the case on the merits.

(2) No sanction authorized by this section, other than refusal to accept late filings, will be imposed without prior notice to all parties and an opportunity for any party against whom sanctions would be imposed to be heard. Such opportunity to be heard may be on such notice, and the response may be in such form as the ALJ or other presiding

officer directs. The ALJ or other presiding officer may limit the opportunity to be heard to an opportunity of a party or a party's representative to respond orally immediately after the act or inaction covered by this section is noted by the ALJ or other presiding officer.

(3) Requests for the imposition of sanctions by any party, and the imposition of sanctions, are subject to interlocutory review pursuant to § 19.25 in the same manner as any other ruling.

(d) *Section not exclusive.* This section does not preclude the ALJ or other presiding officer or the Comptroller from taking any other action, or imposing any restriction or sanction, authorized by applicable statute or regulation.

§ 19.193 Censure, suspension, or debarment.

The Comptroller may censure an individual or suspend or debar an individual from practice before the OCC if the individual is incompetent in representing a client's rights or interest in a significant matter before the OCC; or engages, or has engaged, in disreputable conduct; or refuses to comply with the rules and regulations in this part; or with intent to defraud in any manner, willfully and knowingly deceives, misleads, or threatens any client or prospective client. The suspension or debarment of an individual may be initiated only upon a finding by the Comptroller that the basis for the disciplinary action is sufficiently egregious.

§ 19.194 Eligibility of attorneys and accountants to practice.

(a) *Attorneys.* Any attorney not currently under suspension or debarment pursuant to this subpart may practice before the OCC.

(b) *Accountants.* Any accountant not currently under suspension or debarment by the OCC may practice before the OCC.

§ 19.195 Incompetence.

Incompetence in the representation of a client's rights and interests in a significant matter before the OCC is grounds for suspension or debarment. The term "incompetence" encompasses conduct that reflects a lack of the knowledge, judgment, and skill that a professional would ordinarily and reasonably be expected to exercise in adequately representing the rights and interests of a client. Such conduct includes, but is not limited to:

(a) Handling a matter that the individual knows or should know that they are not competent to handle, without associating with a professional who is competent to handle such matter;

(b) Handling a matter without adequate preparation under the circumstances; or

(c) Neglect in a matter entrusted to him or her.

§ 19.196 Disreputable conduct.

Disreputable conduct for which an individual may be censured, debarred, or suspended from practice before the OCC includes:

(a) Willfully or recklessly violating or willfully or recklessly aiding and abetting the violation of any provision of the Federal banking or applicable securities laws or the rules and regulations thereunder or conviction of any offense involving dishonesty or breach of trust;

(b) Knowingly or recklessly giving false or misleading information, or participating in any way in the giving of false information to the OCC or any officer or employee thereof, or to any tribunal authorized to pass upon matters administered by the OCC in connection with any matter pending or likely to be pending before it. The term

"information" includes facts or other statements contained in testimony, financial statements, applications for enrollment, affidavits, declarations, or any other document or written or oral statement;

(c) Directly or indirectly attempting to influence, or offering or agreeing to attempt to influence, the official action of any officer or employee of the OCC by the use of threats, false accusations, duress, or coercion; by the offer of any special inducement or promise of advantage; or by the bestowing of any gift, favor, or thing of value;

(d) Disbarment or suspension from practice as an attorney, or debarment or suspension from practice as a certified public accountant or public accountant, by any duly constituted authority of any state, possession, or commonwealth of the United States or the District of Columbia for the conviction of a felony or misdemeanor involving moral turpitude, where the conviction has not been reversed on appeal;

(e) Knowingly aiding or abetting another individual to practice before the OCC during that individual's period of suspension, debarment, or ineligibility;

(f) Contemptuous conduct in connection with practice before the OCC, and knowingly making false accusations and statements, or circulating or publishing malicious or libelous matter;

(g) Suspension, debarment, or removal from practice before the Board of Governors, the FDIC, the former OTS, the Securities and Exchange Commission, the Commodity Futures Trading Commission, or any other Federal or state agency; and

(h) Willfully violating any of the regulations contained in this part.

§ 19.197 Initiation of disciplinary proceeding.

(a) *Receipt of information.* An individual, including any employee of the OCC, who has reason to believe that an individual practicing before the OCC in a representative capacity has engaged in any conduct that would serve as a basis for censure, suspension, or debarment under this subpart, may make a report thereof and forward it to the OCC or to such person as may be delegated responsibility for such matters by the Comptroller.

(b) *Censure without formal proceeding.* Upon receipt of information regarding an individual's qualification to practice before the OCC, the Comptroller may, after giving the individual notice and opportunity to respond, censure such individual.

(c) *Institution of formal disciplinary proceeding.* When the Comptroller has reason to believe that any individual who practices before the OCC in a representative capacity has engaged in conduct that would serve as a basis for censure, suspension, or debarment under § 19.192, the Comptroller may, after giving the individual notice and opportunity to respond, institute a formal disciplinary proceeding against such individual. The proceeding will be conducted pursuant to § 19.199 and initiated by a complaint that names the individual as a respondent and is signed by the Comptroller. Except in cases of willfulness, or when time, the nature of the proceeding, or the public interest do not permit, a proceeding under this section may not be commenced until the respondent has been informed, in writing, of the facts or conduct that warrant institution of a proceeding and the respondent has been accorded the opportunity to comply with all lawful requirements or take whatever action may be necessary to remedy the conduct that is the basis for the commencement of the proceeding.

§ 19.198 Conferences.

(a) *General.* The Comptroller may confer with a proposed respondent concerning allegations of misconduct or other grounds for censure, debarment, or suspension, regardless of whether a proceeding for censure, debarment, or suspension has been commenced. If a conference results in a stipulation in connection with a proceeding in which the individual is the respondent, the stipulation may be entered in the record at the request of either party to the proceeding.

(b) *Voluntary suspension or debarment.* In order to avoid the institution of, or a decision in, a debarment or suspension proceeding, a person who practices before the OCC may consent to suspension or debarment from practice. At the discretion of the Comptroller, the individual may be suspended or debarred in accordance with the consent offered.

§ 19.199 Proceedings under this subpart.

Any hearing held under this subpart is held before an ALJ pursuant to procedures set forth in subpart A of this part. The Comptroller will appoint a person to represent the OCC in the hearing. Any person having prior involvement in the matter that is the basis for the suspension or debarment proceeding is disqualified from representing the OCC in the hearing. The hearing will be closed to the public unless the Comptroller, on the Comptroller's initiative or on the request of a party, otherwise directs. The ALJ will issue a recommended decision to the Comptroller, who will issue the final decision and order. The Comptroller may censure, debar, or suspend an individual, or take such other disciplinary action as the Comptroller deems appropriate.

§ 19.200 Effect of debarment, suspension, or censure.

(a) *Debarment.* If the final order against the respondent is for debarment, the individual may not practice before the OCC unless otherwise permitted to do so by the Comptroller pursuant to § 19.201.

(b) S*uspension.* If the final order against the respondent is for suspension, the individual may not practice before the OCC during the period of suspension.

(c) *Censure.* If the final order against the respondent is for censure, the individual may be permitted to practice before the OCC, but such individual's future representations may be subject to conditions designed to promote high standards of conduct. If a written letter of censure is issued, a copy will be maintained in the OCC's files.

(d) *Notice of debarment or suspension.* Upon the issuance of a final order for suspension or debarment, the Comptroller will give notice of the order to appropriate officers and employees of the OCC and to interested departments and agencies of the Federal government. The Comptroller will also give notice to the appropriate authorities of the state in which any debarred or suspended individual is or was licensed to practice.

§ 19.201 Petition for reinstatement.

At the expiration of the period of time designated in the order of debarment, the Comptroller may entertain a petition for reinstatement from any person debarred from practice before the OCC. The Comptroller may grant reinstatement only if satisfied that the petitioner is likely to act in accordance with the regulations in this part, and that granting reinstatement would not be contrary to the public interest. Any request for reinstatement is limited to written submissions unless the Comptroller, at the Comptroller's discretion, affords the petitioner a hearing.

Subpart L—Equal Access to Justice Act

§ 19.205 Authority and scope; waiver.

(a) *In general*. This subpart implements section 203 of the Equal Access to Justice Act (EAJA) (5 U.S.C. 504). EAJA provides for the award of attorney fees and other expenses to eligible individuals and entities that are parties in certain administrative proceedings (adversary adjudications) before agencies of the Government of the United States. An eligible party may receive an award when it prevails over an agency unless the agency's position was substantially justified or special circumstances make an award unjust. However, no presumption under this subpart arises that the agency's position was not substantially justified because the agency did not prevail.

(b) *Scope*. The types of adversary adjudications covered by this subpart are those proceedings listed in §§ 19.1, 19.110, 19.120, 19.190, 19.230, and 19.241.

(c) *Waiver*. After reasonable notice to the parties, the presiding officer or the OCC may waive, for good cause shown, any provision contained in this subpart as long as the waiver is consistent with the terms and purpose of EAJA.

§ 19.206 Definitions.

For purposes of this subpart:

(a) *Adversary adjudication* means an adjudication under 5 U.S.C. 554 in which the position of the OCC is represented by Enforcement Counsel.

(b) *Final disposition* means the date on which a decision or order disposing of the merits of a proceeding or any other complete resolution of the proceeding, such as a settlement or voluntary dismissal, becomes final and unappealable both within the OCC and to the courts.

(c) *Party* means a party, as defined in 5 U.S.C. 551(3), that is:

(1) An individual whose net worth did not exceed $2,000,000 at the time the adversary adjudication was initiated; or

(2) Any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization, the net worth of which did not exceed $7,000,000 at the time the adversary adjudication was initiated, and which had not more than 500 employees at the time the adversary adjudication was initiated; except that an organization described in section 501(c)(3) of the Internal Revenue Code of 1986 (the Code) exempt from taxation under section 501(a) of the Code, or a cooperative association as defined in section 15(a) of the Agricultural Marketing Act, may be a party regardless of the net worth of the organization or cooperative association. The net worth and number of employees of the applicant and any of its affiliates must be aggregated when determining the applicability of this paragraph (c).

(d) *Position of the OCC* means, in addition to the position taken by the OCC in the adversary adjudication, the action or failure to act by the OCC upon which the adversary adjudication is based, except that fees and other expenses may not be awarded to a party for any portion of the adversary adjudication in which the party has unreasonably protracted the proceedings.

(e) *Presiding officer* means the official, whether the official is designated as an ALJ or otherwise, that presided over the adversary adjudication or the official that presides over an EAJA proceeding.

§ 19.207 Application requirements.

(a) *Timing of application*. A party seeking an award under this subpart must file an application with the OCC within 30 days after the OCC's final disposition of the adversary adjudication.

(b) *Contents of application*. An application for an award of fees and expenses under this section must:

(1) Identify the applicant and the proceeding for which an award is sought;

(2) Show that the applicant has prevailed and identify the position of the OCC that the applicant alleges was not substantially justified;

(3) State the basis for the applicant's belief that the OCC position was not substantially justified;

(4) Unless the applicant is an individual, state the number of employees of the applicant and describe briefly the type and purpose of its organization or business;

(5) Show that the applicant meets the definition of "party" in § 19.206(c), including documentation of its net worth pursuant to § 19.208, if applicable;

(6) State the amount of fees and expenses for which an award is sought, as documented pursuant to § 19.209;

(7) Be signed by the applicant if the applicant is an individual or by an authorized officer or attorney of the applicant;

(8) Any other matter the applicant wishes the OCC to consider in determining whether and in what amount an award should be made; and

(9) Contain or be accompanied by a written verification under penalty of perjury that the information provided in the application is true and correct.

(c) *Referral of application*. Upon receipt of an EAJA application, the OCC will, if feasible, refer the matter to the official who heard the underlying adversary adjudication.

§ 19.208 Net worth exhibit.

(a) *Required information*. Each applicant, except a qualified tax-exempt organization or cooperative association, must provide with its application a detailed exhibit showing the net worth of the applicant and, where appropriate, any of its affiliates at the time the adversary adjudication was initiated. Except as otherwise provided in this section, this exhibit may be in any form convenient to the applicant that provides full disclosure of the applicant's and its affiliates' assets and liabilities and is sufficient to determine whether the applicant qualifies under the standards in this subpart. A presiding officer may require an applicant to file additional information to determine its eligibility for an award.

(1) An unaudited financial statement is acceptable for individual applicants as long as the statement provides a reliable basis for evaluation, unless the presiding officer or the OCC otherwise requires. Financial statements or reports filed with or reported to a Federal or State agency before the initiation of the adversary adjudication for other purposes and accurate as of a date not more than three months prior to the initiation of the proceeding are acceptable in establishing net worth as of the time of the initiation of the proceeding, unless the presiding officer or the OCC otherwise requires.

(2) In the case of applicants or affiliates that are not banks or savings associations, net worth will be considered for the purposes of this subpart to be the excess of total assets over total liabilities as of the date the underlying proceeding was initiated.

(3) If the applicant or any of its affiliates is a bank or a savings association, the portion of the statement of net worth that relates to the bank or the savings association must consist of a copy of the bank's or savings association's last Consolidated Report of Condition and Income filed before the initiation of the adversary adjudication. Net worth will be considered for the purposes of this subpart to be the total equity capital as reported, in conformity with applicable instructions and guidelines, on the bank's or the savings association's Consolidated Report of Condition and Income filed for the last reporting date before the initiation of the proceeding.

(b) *Confidentiality of net worth submissions*. Ordinarily, the net worth exhibit will be included in the public record of the proceeding. However, an applicant that objects to public disclosure of information in any portion of the exhibit and believes there are legal grounds for withholding it from disclosure may request that the documents be filed under seal or otherwise be treated as confidential.

§ 19.209 Documentation of fees and expenses.

The application must be accompanied by adequate documentation of the fees and expenses incurred after initiation of the adversary adjudication, including the cost of any study, analysis, report, test, or project. An application seeking an increase in fees to account for inflation pursuant to § 19.215(d)(1)(i) also must include adequate documentation of the change in the consumer price index for the attorney or agent's locality. The applicant must submit a separate itemized statement for each professional firm or individual whose services are covered by the application showing the hours spent in connection with the proceeding by each individual, a description of the specific services performed, the rate at which each fee has been computed, any expenses for

which reimbursement is sought, the total amount claimed, and the total amount paid or payable by the applicant or by any other person or entity for the services provided. The presiding officer may require the applicant to provide vouchers, receipts, or other substantiation for any fees or expenses claimed.

§ 19.210 Filing and service of documents.

Any application for an award, or any accompanying documentation related to an application, must be filed and served on all parties to the proceeding in accordance with § 19.11, except as provided in § 19.208(b) for confidential financial information.

§ 19.211 Answer to application.

(a) *Filing of answer*. Except as provided in § 19.213, Enforcement Counsel may file an answer to an application within 30 days after service of the application. Unless Enforcement Counsel requests an extension of time for filing or files a statement of intent to negotiate a settlement under § 19.213, failure to file an answer within the 30-day period may be treated as a consent to the award requested.

(b) *Content of answer*. The answer must explain in detail any objections to the award requested and identify the facts relied on in support of the Enforcement Counsel's position. If the answer is based on any alleged facts not already in the record of the proceeding, Enforcement Counsel must include with the answer either supporting affidavits or a request for further proceedings under § 19.214.

§ 19.212 Reply.

Within 15 days after service of an answer, the applicant may file a reply. If the reply is based on any alleged facts not already in the record of the proceeding, the

applicant must include with the reply either supporting affidavits or a request for further proceedings under § 19.214.

§ 19.213 Settlement.

The applicant and Enforcement Counsel may agree on a proposed settlement of the award before final action on the application, either in connection with a settlement of the underlying proceeding or after the underlying proceeding has been concluded, in accordance with § 19.15. If a prevailing party and Enforcement Counsel agree on a proposed settlement of an award before an application has been filed, the application must be filed with the proposed settlement. If a proposed settlement of an underlying proceeding provides that each side must bear its own expenses and the settlement is accepted, no application may be filed. If, after an application is filed, Enforcement Counsel and the applicant believe that the issues in the application can be settled, they may jointly file a statement of their intent to negotiate a settlement. The filing of this statement will extend, under § 19.211, the time for filing an answer for an additional 30 days, and further extensions may be granted by the presiding officer upon request by Enforcement Counsel and the applicant.

§ 19.214 Further proceedings.

(a) *Process for requesting further proceedings or additional information*. At the request of either the applicant or Enforcement Counsel, or on the presiding officer's own initiative, the presiding officer may, if necessary for a full and fair decision on the application, order the filing of additional written submissions; hold an informal conference or oral argument; or allow for discovery or hold an evidentiary hearing with respect to issues other than whether the OCC's position was substantially justified (such

as those involving the applicant's eligibility or substantiation of fees or expenses). Any written submissions must be made, oral argument held, discovery conducted, and evidentiary hearing held as promptly as possible so as not to delay a decision on the application for fees.

(b) *Requirement to identify additional information sought and reason for requesting additional proceedings*. A request for further proceedings under this section must specifically identify the information sought or the disputed issues and must explain why the additional proceedings are necessary to resolve the issues.

§ 19.215 Decision.

(a) *Basis for decision*. The presiding officer must determine whether the position of the OCC was substantially justified on the basis of the administrative record as a whole of the adversary adjudication for which fees and other expenses are sought.

(b) *Timing of decision*. The presiding officer in a proceeding under this subpart will issue a recommended decision, in writing, on the application within 90 days after the time for filing a reply or, when further proceedings are held, within 90 days after completion of proceedings.

(c) *Contents of decision*. The decision on the application must include written findings and conclusions on the applicant's eligibility and status as a prevailing party, and, if applicable, an explanation of the reasons for any difference between the amount requested and the amount awarded. The decision also must include, if applicable, findings on whether Enforcement Counsel's or the OCC's position was substantially justified, whether the applicant unduly and unreasonably protracted the adversary adjudication, or whether special circumstances make an award unjust.

(d) *Awards.*—(1) *In general*. Awards under this subpart may include the reasonable expenses of expert witnesses; the reasonable cost of any study, analysis, report, test, or project; and reasonable attorney or agent fees. The applicant must have incurred these expenses, costs, and fees after initiation of the adversary adjudication subject to the EAJA application. The presiding officer will base awards on prevailing market rates for the kind and quality of the services furnished, even if the services were provided without charge or at reduced rate to the applicant, except that:

(i) No award for the fee of an attorney or agent under this subpart may exceed the hourly rate specified in 5 U.S.C. 504(b)(1)(A) except to account for inflation since the last update of the statute's maximum award upon the request of the applicant as documented in the application pursuant to § 19.209 or if a special factor, such as the limited availability of qualified attorneys or agents for the proceedings involved, justifies a higher fee; and

(ii) No award to compensate an expert witness may exceed the highest rate at which the OCC pays expert witnesses.

(2) *Award for fees of an attorney, agent, or expert witness*. In determining the reasonableness of the fee sought for an attorney, agent, or expert witness the presiding officer should consider:

(i) If in private practice, the attorney's, agent's, or witness' customary fee for similar services;

(ii) If an employee of the applicant, the fully allocated cost of the attorney's, agent's, or witness' services;

(iii) The prevailing rate for similar services in the community in which the attorney, agent, or witness ordinarily perform services;

(iv) The time actually spent in the representation of the applicant;

(v) The time reasonably spent in light of the difficulty or complexity of the issues in the proceeding; and

(vi) Any other factors that may bear on the value of the services provided.

(3) *Awards for costs of a study, analysis, report, test, project, or similar matter*. The presiding officer may award the reasonable cost of any study, analysis, report, test, project, or similar matter prepared on behalf of the applicant to the extent that the charge for the service does not exceed the prevailing rate for similar services and the presiding officer finds that the study or other matter was necessary for preparation of the applicant's case.

(4) *Reduction or denial of an award*. A presiding officer may reduce the amount to be awarded, or deny any award, to the extent that the party during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy or if special circumstances make the award sought unjust.

(e) *Final agency decision*. The Comptroller will issue a final decision on the application or remand the application to the presiding officer for further proceedings in accordance with § 19.40.

§ 19.216 Agency review.

Either the applicant or Enforcement Counsel may seek review of the presiding officer's decision on the fee application, in accordance with § 19.39.

§ 19.217 Judicial review.

An applicant may seek judicial review of final agency decisions on awards made under this section as provided in 5 U.S.C. 504(c)(2).

§ 19.218 Stay of decision concerning award.

Any proceedings on an application for fees under this subpart will be automatically stayed until the OCC's final disposition of the decision on which the application is based and either the time period for seeking judicial review expires, or if review has been sought, until final disposition is made by a court and no further judicial review is available.

§ 19.219 Payment of award.

(a) *Requirement to submit final decision*. An applicant seeking payment of an award must submit to the OCC's Litigation Group a copy of the OCC's final decision granting the award, accompanied by a certification that the applicant will not seek review of the decision in the United States courts. Applicants should send the submissions to: Office of the Comptroller of the Currency, Washington, DC 20219, Attention: Director, Litigation Group.

(b) *Time frame for award payment*. The OCC will pay the amount awarded to the applicant within 90 days.

Subpart M—Procedures for Reclassifying an Insured Depository Institution Based on Criteria Other Than Capital Under Prompt Corrective Action

§ 19.220 Scope.

This subpart applies to the procedures afforded to any insured depository institution that has been reclassified to a lower capital category by a notice or order

issued by the OCC pursuant to section 38 of the FDIA (12 U.S.C. 1831o) and 12 CFR part 6 (prompt corrective action). For purposes of this subpart, *insured depository institution* means an insured national bank, an insured Federal savings association, an insured Federal savings bank, or an insured Federal branch of a foreign bank.

§ 19.221 Reclassification of an insured depository institution based on unsafe or unsound condition or practice.

(a) *Issuance of notice of proposed reclassification*—(1) *Grounds for reclassification*. (i) Pursuant to § 6.4 of this chapter, the OCC may reclassify a well capitalized insured depository institution as adequately capitalized or subject an adequately capitalized or undercapitalized insured depository institution to the supervisory actions applicable to the next lower capital category if:

(A) The OCC determines that the insured depository institution is in an unsafe or unsound condition; or

(B) The OCC deems the insured depository institution to be engaging in an unsafe or unsound practice and not to have corrected the deficiency.

(ii) Any action pursuant to this paragraph (a)(1) is referred to in this subpart as "reclassification."

(2) *Prior notice to institution*. Prior to taking action pursuant to § 6.4 of this chapter, the OCC will issue and serve on the insured depository institution a written notice of the OCC's intention to reclassify the insured depository institution.

(b) *Contents of notice*. A notice of intention to reclassify an insured depository institution based on unsafe or unsound condition will include:

(1) A statement of the insured depository institution's capital measures and capital levels and the category to which the insured depository institution would be reclassified;

(2) The reasons for reclassification of the insured depository institution; and

(3) The date by which the insured depository institution subject to the notice of reclassification may file with the OCC a written response to the proposed reclassification and a request for a hearing, which must be at least 14 calendar days from the date of service of the notice unless the OCC determines that a shorter period is appropriate in light of the financial condition of the insured depository institution or other relevant circumstances.

(c) *Response to notice of proposed reclassification*. An insured depository institution may file a written response to a notice of proposed reclassification within the time period set by the OCC. The response should include:

(1) An explanation of why the insured depository institution is not in unsafe or unsound condition or otherwise should not be reclassified; and

(2) Any other relevant information, mitigating circumstances, documentation, or other evidence in support of the position of the insured depository institution or company regarding the reclassification.

(d) *Failure to file response*. Failure by an insured depository institution to file, within the specified time period, a written response with the OCC to a notice of proposed reclassification will constitute a waiver of the opportunity to respond and will constitute consent to the reclassification.

(e) *Request for hearing and presentation of oral testimony or witnesses*. The response may include a request for an informal hearing before the OCC under this

section. If the insured depository institution desires to present oral testimony or witnesses at the hearing, the insured depository institution must include a request to do so with the request for an informal hearing. A request to present oral testimony or witnesses must specify the names of the witnesses and the general nature of their expected testimony. Failure to request a hearing will constitute a waiver of any right to a hearing, and failure to request the opportunity to present oral testimony or witnesses will constitute a waiver of any right to present oral testimony or witnesses.

(f) *Order for informal hearing*. Upon receipt of a timely written request that includes a request for a hearing, the OCC will issue an order directing an informal hearing to commence no later than 30 days after receipt of the request, unless the OCC allows further time at the request of the insured depository institution. The hearing will be held in Washington, DC or at such other place as may be designated by the OCC before a presiding officer(s) designated by the OCC to conduct the hearing.

(g) *Hearing procedures*. (1) The insured depository institution has the right to introduce relevant written materials and to present oral argument at the hearing. The insured depository institution may introduce oral testimony and present witnesses only if expressly authorized by the OCC or the presiding officer(s). Neither the provisions of the Administrative Procedure Act (5 U.S.C. 554–557) governing adjudications required by statute to be determined on the record nor the Uniform Rules apply to an informal hearing under this section unless the OCC orders that such procedures will apply.

(2) The informal hearing will be recorded and a transcript furnished to the insured depository institution upon request and payment of the cost thereof. Witnesses need not be sworn unless specifically requested by a party or the presiding officer(s). If so

requested, and by stipulation of the parties or by order of the presiding officer, a court reporter or other person authorized to administer an oath may administer the oath remotely without being in the physical presence of the witness. The presiding officer(s) may ask questions of any witness.

(3) Based on the circumstances of each hearing, the presiding officer may direct the use of, or any party may elect to use, an electronic presentation during the hearing. If the presiding officer requires an electronic presentation during the hearing, each party will be responsible for its own presentation and related costs unless the parties agree to another manner by which to allocate presentation responsibilities and costs.

(4) The presiding officer(s) may order that the hearing be continued for a reasonable period (normally five business days) following completion of oral testimony or argument to allow additional written submissions to the hearing record.

(h) *Recommendation of presiding officer(s)*. Within 20 calendar days following the date the hearing and the record on the proceeding are closed, the presiding officer(s) will make a recommendation to the OCC on the reclassification.

(i) *Time for decision*. Not later than 60 calendar days after the date the record is closed or the date of the response in a case where no hearing was requested, the OCC will decide whether to reclassify the insured depository institution and notify the insured depository institution of the OCC's decision.

§ 19.222 Request for rescission of reclassification.

Any insured depository institution that has been reclassified under part 6 of this chapter and this subpart, may, upon a change in circumstances, request in writing that the OCC reconsider the reclassification, and may propose that the reclassification be

rescinded and that any directives issued in connection with the reclassification be modified, rescinded, or removed. Unless otherwise ordered by the OCC, the insured depository institution will remain subject to the reclassification and to any directives issued in connection with that reclassification while such request is pending before the OCC.

Subpart N—Order to Dismiss a Director or Senior Executive Officer Under Prompt Corrective Action

§ 19.230 Scope.

This subpart applies to informal hearings afforded to any director or senior executive officer dismissed pursuant to an order issued under section 38 of the FDIA (12 U.S.C. 1831o) and 12 CFR part 6 (prompt corrective action). For purposes of this subpart, *insured depository institution* means an insured national bank, an insured Federal savings association, an insured Federal savings bank, or an insured Federal branch of a foreign bank.

§ 19.231 Order to dismiss a director or senior executive officer.

(a) *Service of notice*. When the OCC issues and serves a directive on an insured depository institution pursuant to subpart B of 12 CFR part 6 requiring the insured depository institution to dismiss from office any director or senior executive officer under section 38(f)(2)(F)(ii) of the FDIA, the OCC will also serve a copy of the directive, or the relevant portions of the directive where appropriate, upon the person to be dismissed.

(b) *Response to directive*—(1) *Request for reinstatement*. A director or senior executive officer who has been served with a directive under paragraph (a) of this section (Respondent) may file a written request for reinstatement. The Respondent must file this

request for reinstatement within 10 calendar days of the receipt of the OCC directive, unless further time is allowed by the OCC at the request of the Respondent. Failure by the Respondent to file a written request for reinstatement with the OCC within the specified time period will constitute a waiver of the opportunity to respond and will constitute consent to the dismissal.

(2) *Contents of request; informal hearing*. The request for reinstatement must include reasons why the Respondent should be reinstated and may include a request for an informal hearing before the OCC or its designee under this section. If the Respondent desires to present oral testimony or witnesses at the hearing, the Respondent must include a request to do so with the request for an informal hearing. The request to present oral testimony or witnesses must specify the names of the witnesses and the general nature of their expected testimony. Failure to request a hearing will constitute a waiver of any right to a hearing, and failure to request the opportunity to present oral testimony or witnesses will constitute a waiver of any right or opportunity to present oral testimony or witnesses.

(3) *Effective date*. Unless otherwise ordered by the OCC, the dismissal will remain in effect while a request for reinstatement is pending.

(c) *Order for informal hearing*. Upon receipt of a timely written request from a Respondent for an informal hearing on the portion of a directive requiring an insured depository institution to dismiss from office any director or senior executive officer, the OCC will issue an order directing an informal hearing to commence no later than 30 days after receipt of the request, unless the OCC allows further time at the request of the Respondent. The hearing will be held in Washington, DC, or at such other place as may

be designated by the OCC, before a presiding officer(s) designated by the OCC to conduct the hearing.

(d) *Hearing procedures*—(1) *Role of respondent*. A Respondent may appear at the hearing personally or through counsel. A Respondent has the right to introduce relevant written materials and to present oral argument at the hearing.

(2) *Application of Administrative Procedure Act and Uniform Rules*. Neither the provisions of the Administrative Procedure Act (5 U.S.C. 554–557) governing adjudications required by statute to be determined on the record nor the Uniform Rules apply to an informal hearing under this section unless the OCC orders that such procedures will apply.

(3) *Electronic presentation*. Based on the circumstances of each hearing, the presiding officer may direct the use of, or any party may elect to use, an electronic presentation during the hearing. If the presiding officer requires an electronic presentation during the hearing, each party will be responsible for its own presentation and related costs unless the parties agree to another manner in which to allocate presentation responsibilities and costs.

(4) *Recordings; transcript*. The informal hearing will be recorded and a transcript furnished to the Respondent upon request and payment of the cost thereof.

(5) *Witnesses*. A Respondent may introduce oral testimony and present witnesses only if expressly authorized by the OCC or the presiding officer(s). Witnesses need not be sworn, unless specifically requested by a party or the presiding officer(s). If so requested, and by stipulation of the parties or by order of the presiding officer, a court reporter or other person authorized to administer an oath may administer the oath

remotely without being in the physical presence of the witness. The presiding officer(s) may ask questions of any witness.

(6) *Continuance*. The presiding officer(s) may order that the hearing be continued for a reasonable period (normally five business days) following completion of oral testimony or argument to allow additional written submissions to the hearing record.

(e) *Standard for review*. A Respondent bears the burden of demonstrating that their continued employment by or service with the insured depository institution would materially strengthen the insured depository institution's ability:

(1) To become adequately capitalized, to the extent that the directive was issued as a result of the insured depository institution's capital level or failure to submit or implement a capital restoration plan; and

(2) To correct the unsafe or unsound condition or unsafe or unsound practice, to the extent that the directive was issued as a result of classification of the insured depository institution based on supervisory criteria other than capital, pursuant to section 38(g) of the FDIA.

(f) *Recommendation of presiding officer*. Within 20 calendar days following the date the hearing and the record on the proceeding are closed, the presiding officer(s) will make a recommendation to the OCC concerning the Respondent's request for reinstatement with the insured depository institution.

(g) *Time for decision*. Not later than 60 calendar days after the date the record is closed or the date of the response in a case where no hearing was requested, the OCC will grant or deny the request for reinstatement and notify the Respondent of the OCC's

decision. If the OCC denies the request for reinstatement, the OCC will set forth in the notification the reasons for the OCC's action.

Subpart O—Civil Money Penalty Inflation Adjustments

§ 19.240 Inflation adjustments.

(a) *Statutory formula to calculate inflation adjustments.* The OCC is required by statute to annually adjust for inflation the maximum amount of each civil money penalty within its jurisdiction to administer. The OCC calculates the inflation adjustment by multiplying the maximum dollar amount of the civil money penalty for the previous calendar year by the cost-of-living inflation adjustment multiplier provided annually by the Office of Management and Budget and rounding the total to the nearest dollar.

(b) *Notice of inflation adjustments.* The OCC will publish notice in the *Federal Register* of the maximum penalties which may be assessed on an annual basis on or before January 15 of each calendar year based on the formula in paragraph (a) of this section, for penalties assessed on, or after, the date of publication of the most recent notice related to conduct occurring on, or after, November 2, 2015.

Subpart P - Removal, Suspension, and Debarment of Accountants From Performing Audit Services

§ 19.241 Scope.

This subpart, which implements section 36(g)(4) of the FDIA (12 U.S.C. 1831m(g)(4)), provides rules and procedures for the removal, suspension, or debarment of independent public accountants and their accounting firms from performing independent audit and attestation services required by section 36 of the FDIA (12 U.S.C.

1831m) for insured national banks, insured Federal savings associations, and insured Federal branches of foreign banks.

§ 19.242 Definitions.

As used in this subpart, the following terms have the meaning given below unless the context requires otherwise:

(a) *Accounting firm* means a corporation, proprietorship, partnership, or other business firm providing audit services.

(b) *Audit services* means any service required to be performed by an independent public accountant by section 36 of the FDIA (12 U.S.C. 1831m) and 12 CFR part 363, including attestation services.

(c) *Independent public accountant (accountant)* means any individual who performs or participates in providing audit services.

§ 19.243 Removal, suspension, or debarment.

(a) *Good cause for removal, suspension, or debarment—*

(1) *Individuals.* The Comptroller may remove, suspend, or debar an independent public accountant from performing audit services for insured national banks, insured Federal savings associations, or insured Federal branches of foreign banks that are subject to section 36 of the FDIA (12 U.S.C. 1831m) if, after service of a notice of intention and opportunity for hearing in the matter, the Comptroller finds that the accountant:

(i) Lacks the requisite qualifications to perform audit services;

(ii) Has knowingly or recklessly engaged in conduct that results in a violation of applicable professional standards, including those standards and conflicts of interest

provisions applicable to accountants through the Sarbanes-Oxley Act of 2002, Pub. L. 107-204, 116 Stat. 745 (2002) (Sarbanes-Oxley Act), and developed by the Public Company Accounting Oversight Board and the Securities and Exchange Commission;

(iii) Has engaged in negligent conduct in the form of:

(A) A single instance of highly unreasonable conduct that results in a violation of applicable professional standards in circumstances in which an accountant knows, or should know, that heightened scrutiny is warranted; or

(B) Repeated instances of unreasonable conduct, each resulting in a violation of applicable professional standards, that indicate a lack of competence to perform audit services;

(iv) Has knowingly or recklessly given false or misleading information, or knowingly or recklessly participated in any way in the giving of false or misleading information, to the OCC or any officer or employee of the OCC;

(v) Has engaged in, or aided and abetted, a material and knowing or reckless violation of any provision of the Federal banking or securities laws or the rules and regulations thereunder, or any other law;

(vi) Has been removed, suspended, or debarred from practice before any Federal or State agency regulating the banking, insurance, or securities industries, other than by an action listed in § 19.244, on grounds relevant to the provision of audit services; or

(vii) Is suspended or debarred for cause from practice as an accountant by any duly constituted licensing authority of any State, possession, commonwealth, or the District of Columbia.

(2) *Accounting firms.* If the Comptroller determines that there is good cause for the removal, suspension, or debarment of a member or employee of an accounting firm under paragraph (a)(1) of this section, the Comptroller also may remove, suspend, or debar such firm or one or more offices of such firm. In considering whether to remove, suspend, or debar a firm or an office thereof, and the term of any sanction against a firm under this section, the Comptroller may consider, for example:

(i) The gravity, scope, or repetition of the act or failure to act that constitutes good cause for the removal, suspension, or debarment;

(ii) The adequacy of, and adherence to, applicable policies, practices, or procedures for the accounting firm's conduct of its business and the performance of audit services;

(iii) The selection, training, supervision, and conduct of members or employees of the accounting firm involved in the performance of audit services;

(iv) The extent to which managing partners or senior officers of the accounting firm have participated, directly, or indirectly through oversight or review, in the act or failure to act; and

(v) The extent to which the accounting firm has, since the occurrence of the act or failure to act, implemented corrective internal controls to prevent its recurrence.

(3) *Limited scope orders.* An order of removal, suspension (including an immediate suspension), or debarment may, at the discretion of the Comptroller, be made applicable to a particular insured national bank, insured Federal savings association, or insured Federal branch of a foreign bank or class of insured national banks, insured Federal savings associations, or insured Federal branches of foreign banks.

(4) *Remedies not exclusive.* The remedies provided in this subpart are in addition to any other remedies the OCC may have under any other applicable provisions of law, rule, or regulation.

(b) *Proceedings to remove, suspend, or debar—*

(1) *Initiation of formal removal, suspension, or debarment proceedings.* The Comptroller may initiate a proceeding to remove, suspend, or debar an accountant or accounting firm from performing audit services by issuing a written notice of intention to take such action that names the individual or firm as a respondent and describes the nature of the conduct that constitutes good cause for such action.

(2) *Hearings under paragraph (b) of this section.* An accountant or firm named as a respondent in the notice issued under paragraph (b)(1) of this section may request a hearing on the allegations in the notice. Hearings conducted under this paragraph (b)(2) will be conducted in the same manner as other hearings under the Uniform Rules of Practice and Procedure in subpart A of this part, subject to the limitations in paragraph (c)(4) of this section.

(c) *Immediate suspension from performing audit services—*

(1) *In general.* If the Comptroller serves a written notice of intention to remove, suspend, or debar an accountant or accounting firm from performing audit services, the Comptroller may, with due regard for the public interest and without a preliminary hearing, immediately suspend such accountant or firm from performing audit services for insured national banks, insured Federal savings associations, or insured Federal branches of foreign banks, if the Comptroller:

(i) Has a reasonable basis to believe that the accountant or firm has engaged in conduct (specified in the notice served on the accountant or firm under paragraph (b) of this section) that would constitute grounds for removal, suspension, or debarment under paragraph (a) of this section;

(ii) Determines that immediate suspension is necessary to avoid immediate harm to an insured depository institution or its depositors or to the depository system as a whole; and

(iii) Serves such respondent with written notice of the immediate suspension.

(2) *Procedures.* An immediate suspension notice issued under this paragraph (c)(2) will become effective upon service. Such suspension will remain in effect until the date the Comptroller dismisses the charges contained in the notice of intention, or the effective date of a final order of removal, suspension, or debarment issued by the Comptroller to the respondent.

(3) *Petition for stay.* Any accountant or firm immediately suspended from performing audit services in accordance with paragraph (c)(1) of this section may, within 10 calendar days after service of the notice of immediate suspension, file with the Office of the Comptroller of the Currency, Washington, DC 20219 for a stay of such immediate suspension. If no petition is filed within 10 calendar days, the right to a petition is waived and the immediate suspension remains in effect pursuant to paragraph (c)(2) of this section.

(4) *Hearing on petition.* Upon receipt of a stay petition, the Comptroller will designate a presiding officer who will fix a place and time (not more than 10 calendar days after receipt of the petition, unless further time is allowed by the presiding officer at

the request of petitioner) at which the immediately suspended party may appear, personally or through counsel, to submit written materials and oral argument. Any OCC employee engaged in investigative or prosecuting functions for the OCC in a case may not, in that or a factually related case, serve as a presiding officer or participate or advise in the decision of the presiding officer or of the OCC, except as witness or counsel in the proceeding. In the sole discretion of the presiding officer, upon a specific showing of compelling need, oral testimony of witnesses may also be presented. In hearings held pursuant to this paragraph (c)(4) there will be no discovery and the provisions of §§ 19.6 through 19.12, 19.16, and 19.21 apply.

(5) *Decision on petition.* Within 30 calendar days after the hearing, the presiding officer will issue a decision. The presiding officer will grant a stay upon a demonstration that a substantial likelihood exists of the respondent's success on the issues raised by the notice of intention and that, absent such relief, the respondent will suffer immediate and irreparable injury, loss, or damage. In the absence of such a demonstration, the presiding officer will notify the parties that the immediate suspension will be continued pending the completion of the administrative proceedings pursuant to the notice.

(6) *Review of presiding officer's decision.* The parties may seek review of the presiding officer's decision by filing a petition for review with the presiding officer within 10 calendar days after service of the decision. Replies must be filed within 10 calendar days after the petition filing date. Upon receipt of a petition for review and any reply, the presiding officer will promptly certify the entire record to the Comptroller. Within 60 calendar days of the presiding officer's certification, the Comptroller will issue

an order notifying the affected party whether or not the immediate suspension should be continued or reinstated. The order will state the basis of the Comptroller's decision.

§ 19.244 Automatic removal, suspension, or debarment.

(a) An independent public accountant or accounting firm may not perform audit services for insured national banks, insured Federal savings associations, or insured Federal branches of foreign banks if the accountant or firm:

(1) Is subject to a final order of removal, suspension, or debarment (other than a limited scope order) issued by the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, or the former Office of Thrift Supervision under section 36 of the FDIA (12 U.S.C. 1831m);

(2) Is subject to a temporary suspension or permanent revocation of registration or a temporary or permanent suspension or bar from further association with any registered public accounting firm issued by the Public Company Accounting Oversight Board or the Securities and Exchange Commission under sections 105(c)(4)(A) or (B) of the Sarbanes-Oxley Act (15 U.S.C. 7215(c)(4)(A) or (B)); or

(3) Is subject to an order of suspension or denial of the privilege of appearing or practicing before the Securities and Exchange Commission.

(b) Upon written request, the Comptroller, for good cause shown, may grant written permission to such accountant or firm to perform audit services for insured national banks, insured Federal savings associations, or insured Federal branches of foreign banks. The request must contain a concise statement of the action requested. The Comptroller may require the applicant to submit additional information.

§ 19.245 Notice of removal, suspension, or debarment.

(a) *Notice to the public.* Upon the issuance of a final order for removal, suspension, or debarment of an independent public accountant or accounting firm from providing audit services, the Comptroller will make the order publicly available and provide notice of the order to the other Federal banking agencies.

(b) *Notice to the Comptroller by accountants and firms.* An accountant or accounting firm that provides audit services to an insured national bank, insured Federal savings association, or insured Federal branch of a foreign bank must provide the Comptroller with written notice of:

(1) Any currently effective order or other action described in § 19.243(a)(1)(vi) through (vii) or § 19.244(a)(2) and (3); and

(2) Any currently effective action by the Public Company Accounting Oversight Board under sections 105(c)(4)(C) or (G) of the Sarbanes-Oxley Act (15 U.S.C. 7215(c)(4)(C) or (G)).

(c) *Timing of notice.* Written notice required by this paragraph (c) must be given no later than 15 calendar days following the effective date of an order or action, or 15 calendar days before an accountant or firm accepts an engagement to provide audit services, whichever date is earlier.

§ 19.246 Petition for reinstatement.

(a) *Form of petition.* Unless otherwise ordered by the Comptroller, a petition for reinstatement by an independent public accountant, an accounting firm, or an office of a firm that was removed, suspended, or debarred under § 19.243 may be made in writing at any time. The request must contain a concise statement of the action requested. The Comptroller may require the applicant to submit additional information.

(b) *Procedure.* A petitioner for reinstatement under this section may, in the sole discretion of the Comptroller, be afforded a hearing. The accountant or firm bears the burden of going forward with a petition and proving the grounds asserted in support of the petition. In reinstatement proceedings, the person seeking reinstatement bears the burden of going forward with an application and proving the grounds asserted in support of the application. The Comptroller may, in his sole discretion, direct that any reinstatement proceeding be limited to written submissions. The removal, suspension, or debarment will continue until the Comptroller, for good cause shown, has reinstated the petitioner or until the suspension period has expired. The filing of a petition for reinstatement will not stay the effectiveness of the removal, suspension, or debarment of an accountant or firm.

Subpart Q—Forfeiture of Franchise for Money Laundering or Cash Transaction Reporting Offenses

§ 19.250 Scope.

Except as provided in this subpart, subpart A of this part applies to proceedings by the Comptroller to determine whether, pursuant to 12 U.S.C. 93(d) or 12 U.S.C. 1464(w), as applicable, to terminate all rights, privileges, and franchises of a national bank, Federal savings association, or Federal branch or agency convicted of a criminal offense under 18 U.S.C. 1956 or 1957 or 31 U.S.C. 5322 or 5324.

§ 19.251 Notice and hearing.

(a) *In general*. After receiving written notification from the Attorney General of the United States of a conviction of a criminal offense under 18 U.S.C. 1956 or 1957, the Comptroller will, or under 31 U.S.C. 5322 or 5324, the Comptroller may:

(1) Issue to the national bank, Federal savings association, or Federal branch or agency a written notice of the Comptroller's intention to terminate all rights, privileges, and franchises of the national bank, Federal savings association, or Federal branch or agency pursuant to 12 U.S.C. 93(d) or 12 U.S.C. 1464(w); and

(2) Schedule a pretermination hearing.

(b) *Contents of notice*. The notice issued pursuant to paragraph (a)(1) of this section must set forth:

(1) The legal authority for the proceeding and for the OCC's jurisdiction over the proceeding;

(2) The basis of termination pursuant to the factors listed in § 19.253;

(3) A proposed order or prayer for an order of termination;

(4) The time, place, and nature of the hearing as required by law or regulation;

(5) The time within which to file an answer as established by the presiding officer; and

(6) That the answer must be filed with the OCC.

(c) *Failure to file an answer*. Unless the national bank, Federal savings association, or Federal branch or agency files an answer within the time specified in the notice, it will be deemed to have consented to termination of its rights, privileges and franchises and the Comptroller may order the termination of such rights, privileges, and franchises.

(d) *Service*. The OCC will serve the notice upon the national bank, Federal savings association, or Federal branch or agency in the manner set forth in § 19.11(c).

§ 19.252 Presiding officer.

(a) *Appointment*. The Comptroller will designate a presiding officer to conduct the pretermination hearing under this subpart.

(b) *Powers*. The presiding officer has the same powers set forth in § 19.5, including the discretion necessary to conduct the pretermination hearing in a manner that avoids unnecessary delay. In addition, the presiding officer may limit the use of discovery and limit opportunities to file written memoranda, briefs, affidavits, or other materials or documents to avoid relitigation of facts already stipulated to by the parties; conceded to by the national bank, Federal savings association, or Federal branch or Federal agency; or otherwise already firmly established by the underlying criminal conviction.

§ 19.253 Grounds for termination.

In determining whether to terminate a franchise, the Comptroller will take into account the following factors:

(a) The extent to which directors or senior executive officers of the national bank, Federal savings association, or Federal branch or agency knew of, or were involved in, the commission of the money laundering offense of which the national bank, Federal savings association, or Federal branch or agency was found guilty;

(b) The extent to which the offense occurred despite the existence of policies and procedures within the national bank, Federal savings association, or Federal branch or Federal agency which were designed to prevent the occurrence of the offense;

(c) The extent to which the national bank, Federal savings association, or Federal branch or agency has fully cooperated with law enforcement authorities with respect to

the investigation of the money laundering offense of which the national bank, Federal savings association, or Federal branch or agency was found guilty;

(d) The extent to which the national bank, Federal savings association, or Federal branch or agency has implemented additional internal controls (since the commission of the offense of which the national bank, Federal savings association, or Federal branch or agency was found guilty) to prevent the occurrence of any money laundering offense; and

(e) The extent to which the interest of the local community in having adequate deposit and credit services available would be threatened by the forfeiture of the franchise.

§ 19.254 Judicial review.

Any national bank, Federal savings association, or Federal branch or agency of a foreign bank whose rights, privileges and franchises have been terminated by order of the Comptroller under this part has the right of judicial review of such order pursuant to 12 U.S.C. 1818(h).

APPENDIX A TO PART 19—RULES OF PRACTICE AND PROCEDURE

Note: The content of this appendix reproduces 12 CFR parts 19, 108, 109, 112, and 165 as of October 1, 2023, which, pursuant to § 19.0, are applicable to adjudicatory actions initiated before January 1, 2024, unless the parties otherwise stipulate that the rules in this part in effect after January 1, 2024 apply. Cross-references to parts 19, 108, 109, and 112 (as well as to included

sections) in this appendix are to those provisions as contained within this appendix.

PART 19 - RULES OF PRACTICE AND PROCEDURE

Authority: 5 U.S.C. 504, 554-557; 12 U.S.C. 93(b), 93a, 164, 481, 504, 1817, 1818, 1820, 1831m, 1831o, 1832, 1884, 1972, 3102, 3108(a), 3110, 3909, and 4717; 15 U.S.C. 78(h) and (i), 78o-4(c), 78o-5, 78q-1, 78s, 78u, 78u-2, 78u-3, 78w, and 1639e; 28 U.S.C. 2461 note; 31 U.S.C. 330 and 5321; and 42 U.S.C. 4012a.

Subpart A - Uniform Rules of Practice and Procedure

§ 19.1 Scope.

This subpart prescribes Uniform Rules of practice and procedure applicable to adjudicatory proceedings required to be conducted on the record after opportunity for a hearing under the following statutory provisions:

(a) Cease-and-desist proceedings under section 8(b) of the Federal Deposit Insurance Act ("FDIA") (12 U.S.C. 1818(b));

(b) Removal and prohibition proceedings under section 8(e) of the FDIA (12 U.S.C. 1818(e));

(c) Change-in-control proceedings under section 7(j)(4) of the FDIA (12 U.S.C. 1817(j)(4)) to determine whether the Office of the Comptroller of the Currency ("OCC") should issue an order to approve or disapprove a person's proposed acquisition of an institution;

(d) Proceedings under section 15C(c)(2) of the Securities Exchange Act of 1934 ("Exchange Act") (15 U.S.C. 78o-5), to impose sanctions upon any government securities broker or dealer or upon any person associated or seeking to become associated with a government securities broker or dealer for which the OCC is the appropriate agency;

(e) Assessment of civil money penalties by the OCC against institutions, institution-affiliated parties, and certain other persons for which it is the appropriate agency for any violation of:

(1) Any provision of law referenced in 12 U.S.C. 93, or any regulation issued thereunder, and certain unsafe or unsound practices and breaches of fiduciary duty, pursuant to 12 U.S.C. 93;

(2) Sections 22 and 23 of the Federal Reserve Act ("FRA"), or any regulation issued thereunder, and certain unsafe or unsound practices and breaches of fiduciary duty, pursuant to 12 U.S.C. 504 and 505;

(3) Section 106(b) of the Bank Holding Company Amendments of 1970, pursuant to 12 U.S.C. 1972(2)(F);

(4) Any provision of the Change in Bank Control Act of 1978 or any regulation or order issued thereunder, and certain unsafe or unsound practices and breaches of fiduciary duty, pursuant to 12 U.S.C. 1817(j)(16);

(5) Any provision of the International Lending Supervision Act of 1983 ("ILSA"), or any rule, regulation or order issued thereunder, pursuant to 12 U.S.C. 3909;

(6) Any provision of the International Banking Act of 1978 ("IBA"), or any rule, regulation or order issued thereunder, pursuant to 12 U.S.C. 3108;

(7) Section 5211 of the Revised Statutes (12 U.S.C. 161), pursuant to 12 U.S.C. 164;

(8) Certain provisions of the Exchange Act, pursuant to section 21B of the Exchange Act (15 U.S.C. 78u-2);

(9) Section 1120 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA") (12 U.S.C. 3349), or any order or regulation issued thereunder;

(10) The terms of any final or temporary order issued under section 8 of the FDIA or any written agreement executed by the OCC, the terms of any condition imposed in

writing by the OCC in connection with the grant of an application or request, certain unsafe or unsound practices, breaches of fiduciary duty, or any law or regulation not otherwise provided herein, pursuant to 12 U.S.C. 1818(i)(2);

(11) Any provision of law referenced in section 102(f) of the Flood Disaster Protection Act of 1973 (42 U.S.C. 4012a(f)) or any order or regulation issued thereunder; and

(12) Any provision of law referenced in 31 U.S.C. 5321 or any order or regulation issued thereunder;

(f) Remedial action under section 102(g) of the Flood Disaster Protection Act of 1973 (42 U.S.C. 4012a(g));

(g) Removal, prohibition, and civil monetary penalty proceedings under section 10(k) of the FDI Act (12 U.S.C. 1820(k)) for violations of the post-employment restrictions imposed by that section; and

(h) This subpart also applies to all other adjudications required by statute to be determined on the record after opportunity for an agency hearing, unless otherwise specifically provided for in the Local Rules.

§ 19.2 Rules of construction.

For purposes of this part:

(a) Any term in the singular includes the plural, and the plural includes the singular, if such use would be appropriate;

(b) Any use of a masculine, feminine, or neuter gender encompasses all three, if such use would be appropriate;

(c) The term *counsel* includes a non-attorney representative; and

(d) Unless the context requires otherwise, a party's counsel of record, if any, may, on behalf of that party, take any action required to be taken by the party.

§ 19.3 Definitions.

For purposes of this part, unless explicitly stated to the contrary:

(a) *Administrative law judge* means one who presides at an administrative hearing under authority set forth at 5 U.S.C. 556.

(b) *Adjudicatory proceeding* means a proceeding conducted pursuant to these rules and leading to the formulation of a final order other than a regulation.

(c) *Comptroller* means the Comptroller of the Currency or a person delegated to perform the functions of the Comptroller of the Currency under this part.

(d) *Decisional employee* means any member of the Comptroller's or administrative law judge's staff who has not engaged in an investigative or prosecutorial role in a proceeding and who may assist the Comptroller or the administrative law judge, respectively, in preparing orders, recommended decisions, decisions, and other documents under the Uniform Rules.

(e) *Enforcement Counsel* means any individual who files a notice of appearance as counsel on behalf of the OCC in an adjudicatory proceeding.

(f) *Final order* means an order issued by the Comptroller with or without the consent of the affected institution or the institution-affiliated party, that has become final, without regard to the pendency of any petition for reconsideration or review.

(g) *Institution* includes any national bank or Federal branch or agency of a foreign bank.

(h) *Institution-affiliated party* means any institution- affiliated party as that term is defined in section 3(u) of the FDIA (12 U.S.C. 1813(u)).

(i) *Local Rules* means those rules promulgated by the OCC in the subparts of this part excluding subpart A.

(j) *OCC* means the Office of the Comptroller of the Currency.

(k) *OFIA* means the Office of Financial Institution Adjudication, the executive body charged with overseeing the administration of administrative enforcement proceedings for the OCC, the Board of Governors of the Federal Reserve System ("Board of Governors"), the Federal Deposit Insurance Corporation ("FDIC"), the Office of Thrift Supervision ("OTS"), and the National Credit Union Administration ("NCUA").

(l) *Party* means the OCC and any person named as a party in any notice.

(m) *Person* means an individual, sole proprietor, partnership, corporation, unincorporated association, trust, joint venture, pool, syndicate, agency or other entity or organization, including an institution as defined in paragraph (g) of this section.

(n) *Respondent* means any party other than the OCC.

(o) *Uniform Rules* means those rules in subpart A of this part that are common to the OCC, the Board of Governors, the FDIC, the OTS, and the NCUA.

(p) *Violation* includes any action (alone or with another or others) for or toward causing, bringing about, participating in, counseling, or aiding or abetting a violation.

§ 19.4 Authority of the Comptroller.

The Comptroller may, at any time during the pendency of a proceeding, perform, direct the performance of, or waive performance of, any act which could be done or ordered by the administrative law judge.

§ 19.5 Authority of the administrative law judge.

(a) *General rule.* All proceedings governed by this part shall be conducted in accordance with the provisions of chapter 5 of title 5 of the United States Code. The administrative law judge shall have all powers necessary to conduct a proceeding in a fair and impartial manner and to avoid unnecessary delay.

(b) *Powers.* The administrative law judge shall have all powers necessary to conduct the proceeding in accordance with paragraph (a) of this section, including the following powers:

(1) To administer oaths and affirmations;

(2) To issue subpoenas, subpoenas duces tecum, and protective orders, as authorized by this part, and to quash or modify any such subpoenas and orders;

(3) To receive relevant evidence and to rule upon the admission of evidence and offers of proof;

(4) To take or cause depositions to be taken as authorized by this subpart;

(5) To regulate the course of the hearing and the conduct of the parties and their counsel;

(6) To hold scheduling and/or pre-hearing conferences as set forth in § 19.31;

(7) To consider and rule upon all procedural and other motions appropriate in an adjudicatory proceeding, provided that only the Comptroller shall have the power to grant any motion to dismiss the proceeding or to decide any other motion that results in a final determination of the merits of the proceeding;

(8) To prepare and present to the Comptroller a recommended decision as provided herein;

(9) To recuse himself or herself by motion made by a party or on his or her own motion;

(10) To establish time, place and manner limitations on the attendance of the public and the media for any public hearing; and

(11) To do all other things necessary and appropriate to discharge the duties of a presiding officer.

§ 19.6 Appearance and practice in adjudicatory proceedings.

(a) *Appearance before the OCC or an administrative law judge* - (1) *By attorneys.* Any member in good standing of the bar of the highest court of any state, commonwealth, possession, territory of the United States, or the District of Columbia may represent others before the OCC if such attorney is not currently suspended or debarred from practice before the OCC.

(2) *By non-attorneys.* An individual may appear on his or her own behalf; a member of a partnership may represent the partnership; a duly authorized officer, director, or employee of any government unit, agency, institution, corporation or authority may represent that unit, agency, institution, corporation or authority if such officer, director, or employee is not currently suspended or debarred from practice before the OCC.

(3) *Notice of appearance.* Any individual acting as counsel on behalf of a party, including the Comptroller, shall file a notice of appearance with OFIA at or before the time that the individual submits papers or otherwise appears on behalf of a party in the adjudicatory proceeding. The notice of appearance must include a written declaration that the individual is currently qualified as provided in paragraph (a)(1) or (a)(2) of this

section and is authorized to represent the particular party. By filing a notice of appearance on behalf of a party in an adjudicatory proceeding, the counsel agrees and represents that he or she is authorized to accept service on behalf of the represented party and that, in the event of withdrawal from representation, he or she will, if required by the administrative law judge, continue to accept service until new counsel has filed a notice of appearance or until the represented party indicates that he or she will proceed on a *pro se* basis.

(b) *Sanctions.* Dilatory, obstructionist, egregious, contemptuous or contumacious conduct at any phase of any adjudicatory proceeding may be grounds for exclusion or suspension of counsel from the proceeding.

§ 19.7 Good faith certification.

(a) *General requirement.* Every filing or submission of record following the issuance of a notice shall be signed by at least one counsel of record in his or her individual name and shall state that counsel's address and telephone number. A party who acts as his or her own counsel shall sign his or her individual name and state his or her address and telephone number on every filing or submission of record.

(b) *Effect of signature.* (1) The signature of counsel or a party shall constitute a certification that: the counsel or party has read the filing or submission of record; to the best of his or her knowledge, information, and belief formed after reasonable inquiry, the filing or submission of record is well-grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and the filing or submission of record is not made for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

(2) If a filing or submission of record is not signed, the administrative law judge shall strike the filing or submission of record, unless it is signed promptly after the omission is called to the attention of the pleader or movant.

(c) *Effect of making oral motion or argument.* The act of making any oral motion or oral argument by any counsel or party constitutes a certification that to the best of his or her knowledge, information, and belief formed after reasonable inquiry, his or her statements are well-grounded in fact and are warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and are not made for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

§ 19.8 Conflicts of interest.

(a) *Conflict of interest in representation.* No person shall appear as counsel for another person in an adjudicatory proceeding if it reasonably appears that such representation may be materially limited by that counsel's responsibilities to a third person or by the counsel's own interests. The administrative law judge may take corrective measures at any stage of a proceeding to cure a conflict of interest in representation, including the issuance of an order limiting the scope of representation or disqualifying an individual from appearing in a representative capacity for the duration of the proceeding.

(b) *Certification and waiver.* If any person appearing as counsel represents two or more parties to an adjudicatory proceeding or also represents a non-party on a matter relevant to an issue in the proceeding, counsel must certify in writing at the time of filing the notice of appearance required by § 19.6(a):

(1) That the counsel has personally and fully discussed the possibility of conflicts of interest with each such party and non-party; and

(2) That each such party and non-party waives any right it might otherwise have had to assert any known conflicts of interest or to assert any non-material conflicts of interest during the course of the proceeding.

§ 19.9 Ex parte communications.

(a) *Definition* - (1) *Ex parte communication* means any material oral or written communication relevant to the merits of an adjudicatory proceeding that was neither on the record nor on reasonable prior notice to all parties that takes place between:

(i) An interested person outside the OCC (including such person's counsel); and

(ii) The administrative law judge handling that proceeding, the Comptroller, or a decisional employee.

(2) *Exception.* A request for status of the proceeding does not constitute an ex parte communication.

(b) *Prohibition of ex parte communications.* From the time the notice is issued by the Comptroller until the date that the Comptroller issues his or her final decision pursuant to § 19.40(c):

(1) No interested person outside the OCC shall make or knowingly cause to be made an ex parte communication to the Comptroller, the administrative law judge, or a decisional employee; and

(2) The Comptroller, administrative law judge, or decisional employee shall not make or knowingly cause to be made to any interested person outside the OCC any ex parte communication.

(c) *Procedure upon occurrence of ex parte communication.* If an ex parte communication is received by the administrative law judge, the Comptroller or any other person identified in paragraph (a) of this section, that person shall cause all such written communications (or, if the communication is oral, a memorandum stating the substance of the communication) to be placed on the record of the proceeding and served on all parties. All other parties to the proceeding shall have an opportunity, within ten days of receipt of service of the ex parte communication, to file responses thereto and to recommend any sanctions, in accordance with paragraph (d) of this section, that they believe to be appropriate under the circumstances.

(d) *Sanctions.* Any party or his or her counsel who makes a prohibited ex parte communication, or who encourages or solicits another to make any such communication, may be subject to any appropriate sanction or sanctions imposed by the Comptroller or the administrative law judge including, but not limited to, exclusion from the proceedings and an adverse ruling on the issue which is the subject of the prohibited communication.

(e) *Separation of functions.* Except to the extent required for the disposition of ex parte matters as authorized by law, the administrative law judge may not consult a person or party on any matter relevant to the merits of the adjudication, unless on notice and opportunity for all parties to participate. An employee or agent engaged in the performance of investigative or prosecuting functions for the OCC in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review of the recommended decision under § 19.40, except as witness or counsel in public proceedings.

§ 19.10 Filing of papers.

(a) *Filing.* Any papers required to be filed, excluding documents produced in response to a discovery request pursuant to §§ 19.25 and 19.26, shall be filed with OFIA, except as otherwise provided.

(b) *Manner of filing.* Unless otherwise specified by the Comptroller or the administrative law judge, filing may be accomplished by:

(1) Personal service;

(2) Delivering the papers to a reliable commercial courier service, overnight delivery service, or to the U.S. Post Office for Express Mail delivery;

(3) Mailing the papers by first class, registered, or certified mail; or

(4) Transmission by electronic media, only if expressly authorized, and upon any conditions specified, by the Comptroller or the administrative law judge. All papers filed by electronic media shall also concurrently be filed in accordance with paragraph (c) of this section.

(c) *Formal requirements as to papers filed* - (1) *Form.* All papers filed must set forth the name, address, and telephone number of the counsel or party making the filing and must be accompanied by a certification setting forth when and how service has been made on all other parties. All papers filed must be double-spaced and printed or typewritten on 8 1⁄2 × 11 inch paper, and must be clear and legible.

(2) *Signature.* All papers must be dated and signed as provided in § 19.7.

(3) *Caption.* All papers filed must include at the head thereof, or on a title page, the name of the OCC and of the filing party, the title and docket number of the proceeding, and the subject of the particular paper.

(4) *Number of copies.* Unless otherwise specified by the Comptroller or the administrative law judge, an original and one copy of all documents and papers shall be filed, except that only one copy of transcripts of testimony and exhibits shall be filed.

§ 19.11 Service of papers.

(a) *By the parties.* Except as otherwise provided, a party filing papers shall serve a copy upon the counsel of record for all other parties to the proceeding so represented, and upon any party not so represented.

(b) *Method of service.* Except as provided in paragraphs (c)(2) and (d) of this section, a serving party shall use one or more of the following methods of service:

(1) Personal service;

(2) Delivering the papers to a reliable commercial courier service, overnight delivery service, or to the U.S. Post Office for Express Mail delivery;

(3) Mailing the papers by first class, registered, or certified mail; or

(4) Transmission by electronic media, only if the parties mutually agree. Any papers served by electronic media shall also concurrently be served in accordance with the requirements of § 19.10(c).

(c) *By the Comptroller or the administrative law judge.* (1) All papers required to be served by the Comptroller or the administrative law judge upon a party who has appeared in the proceeding in accordance with § 19.6 shall be served by any means specified in paragraph (b) of this section.

(2) If a party has not appeared in the proceeding in accordance with § 19.6, the Comptroller or the administrative law judge shall make service by any of the following methods:

(i) By personal service;

(ii) If the person to be served is an individual, by delivery to a person of suitable age and discretion at the physical location where the individual resides or works;

(iii) If the person to be served is a corporation or other association, by delivery to an officer, managing or general agent, or to any other agent authorized by appointment or by law to receive service and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the party;

(iv) By registered or certified mail addressed to the person's last known address; or

(v) By any other method reasonably calculated to give actual notice.

(d) *Subpoenas.* Service of a subpoena may be made:

(1) By personal service;

(2) If the person to be served is an individual, by delivery to a person of suitable age and discretion at the physical location where the individual resides or works;

(3) By delivery to an agent, which, in the case of a corporation or other association, is delivery to an officer, managing or general agent, or to any other agent authorized by appointment or by law to receive service and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the party;

(4) By registered or certified mail addressed to the person's last known address; or

(5) By any other method reasonably calculated to give actual notice.

(e) *Area of service.* Service in any state, territory, possession of the United States, or the District of Columbia, on any person or company doing business in any state,

territory, possession of the United States, or the District of Columbia, or on any person as otherwise provided by law, is effective without regard to the place where the hearing is held, provided that if service is made on a foreign bank in connection with an action or proceeding involving one or more of its branches or agencies located in any state, territory, possession of the United States, or the District of Columbia, service shall be made on at least one branch or agency so involved.

§ 19.12 Construction of time limits.

(a) *General rule.* In computing any period of time prescribed by this subpart, the date of the act or event that commences the designated period of time is not included. The last day so computed is included unless it is a Saturday, Sunday, or Federal holiday. When the last day is a Saturday, Sunday, or Federal holiday, the period runs until the end of the next day that is not a Saturday, Sunday, or Federal holiday. Intermediate Saturdays, Sundays, and Federal holidays are included in the computation of time. However, when the time period within which an act is to be performed is ten days or less, not including any additional time allowed for in paragraph (c) of this section, intermediate Saturdays, Sundays, and Federal holidays are not included.

(b) *When papers are deemed to be filed or served.* (1) Filing and service are deemed to be effective:

(i) In the case of personal service or same day commercial courier delivery, upon actual service;

(ii) In the case of overnight commercial delivery service, U.S. Express Mail delivery, or first class, registered, or certified mail, upon deposit in or delivery to an appropriate point of collection;

(iii) In the case of transmission by electronic media, as specified by the authority receiving the filing, in the case of filing, and as agreed among the parties, in the case of service.

(2) The effective filing and service dates specified in paragraph (b)(1) of this section may be modified by the Comptroller or administrative law judge in the case of filing or by agreement of the parties in the case of service.

(c) *Calculation of time for service and filing of responsive papers.* Whenever a time limit is measured by a prescribed period from the service of any notice or paper, the applicable time limits are calculated as follows:

(1) If service is made by first class, registered, or certified mail, add three calendar days to the prescribed period;

(2) If service is made by express mail or overnight delivery service, add one calendar day to the prescribed period; or

(3) If service is made by electronic media transmission, add one calendar day to the prescribed period, unless otherwise determined by the Comptroller or the administrative law judge in the case of filing, or by agreement among the parties in the case of service.

§ 19.13 Change of time limits.

Except as otherwise provided by law, the administrative law judge may, for good cause shown, extend the time limits prescribed by the Uniform Rules or by any notice or order issued in the proceedings. After the referral of the case to the Comptroller pursuant to § 19.38, the Comptroller may grant extensions of the time limits for good cause shown. Extensions may be granted at the motion of a party after notice and opportunity to

respond is afforded all non-moving parties or on the Comptroller's or the administrative law judge's own motion.

§ 19.14 Witness fees and expenses.

Witnesses subpoenaed for testimony or depositions shall be paid the same fees for attendance and mileage as are paid in the United States district courts in proceedings in which the United States is a party, provided that, in the case of a discovery subpoena addressed to a party, no witness fees or mileage need be paid. Fees for witnesses shall be tendered in advance by the party requesting the subpoena, except that fees and mileage need not be tendered in advance where the OCC is the party requesting the subpoena. The OCC shall not be required to pay any fees to, or expenses of, any witness not subpoenaed by the OCC.

§ 19.15 Opportunity for informal settlement.

Any respondent may, at any time in the proceeding, unilaterally submit to Enforcement Counsel written offers or proposals for settlement of a proceeding, without prejudice to the rights of any of the parties. No such offer or proposal shall be made to any OCC representative other than Enforcement Counsel. Submission of a written settlement offer does not provide a basis for adjourning or otherwise delaying all or any portion of a proceeding under this part. No settlement offer or proposal, or any subsequent negotiation or resolution, is admissible as evidence in any proceeding.

§ 19.16 OCC's right to conduct examination.

Nothing contained in this subpart limits in any manner the right of the OCC to conduct any examination, inspection, or visitation of any institution or institution-

affiliated party, or the right of the OCC to conduct or continue any form of investigation authorized by law.

§ 19.17 Collateral attacks on adjudicatory proceeding.

If an interlocutory appeal or collateral attack is brought in any court concerning all or any part of an adjudicatory proceeding, the challenged adjudicatory proceeding shall continue without regard to the pendency of that court proceeding. No default or other failure to act as directed in the adjudicatory proceeding within the times prescribed in this subpart shall be excused based on the pendency before any court of any interlocutory appeal or collateral attack.

§ 19.18 Commencement of proceeding and contents of notice.

(a) *Commencement of proceeding.* (1)(i) Except for change-in-control proceedings under section 7(j)(4) of the FDIA, 12 U.S.C. 1817(j)(4), a proceeding governed by this subpart is commenced by issuance of a notice by the Comptroller.

(ii) The notice must be served by the Comptroller upon the respondent and given to any other appropriate financial institution supervisory authority where required by law.

(iii) The notice must be filed with OFIA.

(2) Change-in control proceedings under section 7(j)(4) of the FDIA (12 U.S.C. 1817(j)(4)) commence with the issuance of an order by the Comptroller.

(b) *Contents of notice.* The notice must set forth:

(1) The legal authority for the proceeding and for the OCC's jurisdiction over the proceeding;

(2) A statement of the matters of fact or law showing that the OCC is entitled to relief;

(3) A proposed order or prayer for an order granting the requested relief;

(4) The time, place, and nature of the hearing as required by law or regulation;

(5) The time within which to file an answer as required by law or regulation;

(6) The time within which to request a hearing as required by law or regulation; and

(7) That the answer and/or request for a hearing shall be filed with OFIA.

§ 19.19 Answer.

(a) *When.* Within 20 days of service of the notice, respondent shall file an answer as designated in the notice. In a civil money penalty proceeding, respondent shall also file a request for a hearing within 20 days of service of the notice.

(b) *Content of answer.* An answer must specifically respond to each paragraph or allegation of fact contained in the notice and must admit, deny, or state that the party lacks sufficient information to admit or deny each allegation of fact. A statement of lack of information has the effect of a denial. Denials must fairly meet the substance of each allegation of fact denied; general denials are not permitted. When a respondent denies part of an allegation, that part must be denied and the remainder specifically admitted. Any allegation of fact in the notice which is not denied in the answer must be deemed admitted for purposes of the proceeding. A respondent is not required to respond to the portion of a notice that constitutes the prayer for relief or proposed order. The answer must set forth affirmative defenses, if any, asserted by the respondent.

(c) *Default* - (1) *Effect of failure to answer.* Failure of a respondent to file an answer required by this section within the time provided constitutes a waiver of his or her right to appear and contest the allegations in the notice. If no timely answer is filed,

Enforcement Counsel may file a motion for entry of an order of default. Upon a finding that no good cause has been shown for the failure to file a timely answer, the administrative law judge shall file with the Comptroller a recommended decision containing the findings and the relief sought in the notice. Any final order issued by the Comptroller based upon a respondent's failure to answer is deemed to be an order issued upon consent.

(2) *Effect of failure to request a hearing in civil money penalty proceedings.* If respondent fails to request a hearing as required by law within the time provided, the notice of assessment constitutes a final and unappealable order.

§ 19.20 Amended pleadings.

(a) *Amendments.* The notice or answer may be amended or supplemented at any stage of the proceeding. The respondent must answer an amended notice within the time remaining for the respondent's answer to the original notice, or within ten days after service of the amended notice, whichever period is longer, unless the Comptroller or administrative law judge orders otherwise for good cause.

(b) *Amendments to conform to the evidence.* When issues not raised in the notice or answer are tried at the hearing by express or implied consent of the parties, they will be treated in all respects as if they had been raised in the notice or answer, and no formal amendments are required. If evidence is objected to at the hearing on the ground that it is not within the issues raised by the notice or answer, the administrative law judge may admit the evidence when admission is likely to assist in adjudicating the merits of the action and the objecting party fails to satisfy the administrative law judge that the admission of such evidence would unfairly prejudice that party's action or defense upon

the merits. The administrative law judge may grant a continuance to enable the objecting party to meet such evidence.

§ 19.21 Failure to appear.

Failure of a respondent to appear in person at the hearing or by a duly authorized counsel constitutes a waiver of respondent's right to a hearing and is deemed an admission of the facts as alleged and consent to the relief sought in the notice. Without further proceedings or notice to the respondent, the administrative law judge shall file with the Comptroller a recommended decision containing the findings and the relief sought in the notice.

§ 19.22 Consolidation and severance of actions.

(a) *Consolidation.* (1) On the motion of any party, or on the administrative law judge's own motion, the administrative law judge may consolidate, for some or all purposes, any two or more proceedings, if each such proceeding involves or arises out of the same transaction, occurrence or series of transactions or occurrences, or involves at least one common respondent or a material common question of law or fact, unless such consolidation would cause unreasonable delay or injustice.

(2) In the event of consolidation under paragraph (a)(1) of this section, appropriate adjustment to the prehearing schedule must be made to avoid unnecessary expense, inconvenience, or delay.

(b) *Severance.* The administrative law judge may, upon the motion of any party, sever the proceeding for separate resolution of the matter as to any respondent only if the administrative law judge finds that:

(1) Undue prejudice or injustice to the moving party would result from not severing the proceeding; and

(2) Such undue prejudice or injustice would outweigh the interests of judicial economy and expedition in the complete and final resolution of the proceeding.

§ 19.23 Motions.

(a) *In writing.* (1) Except as otherwise provided herein, an application or request for an order or ruling must be made by written motion.

(2) All written motions must state with particularity the relief sought and must be accompanied by a proposed order.

(3) No oral argument may be held on written motions except as otherwise directed by the administrative law judge. Written memoranda, briefs, affidavits or other relevant material or documents may be filed in support of or in opposition to a motion.

(b) *Oral motions.* A motion may be made orally on the record unless the administrative law judge directs that such motion be reduced to writing.

(c) *Filing of motions.* Motions must be filed with the administrative law judge, except that following the filing of the recommended decision, motions must be filed with the Comptroller.

(d) *Responses.* (1) Except as otherwise provided herein, within ten days after service of any written motion, or within such other period of time as may be established by the administrative law judge or the Comptroller, any party may file a written response to a motion. The administrative law judge shall not rule on any oral or written motion before each party has had an opportunity to file a response.

(2) The failure of a party to oppose a written motion or an oral motion made on the record is deemed a consent by that party to the entry of an order substantially in the form of the order accompanying the motion.

(e) *Dilatory motions.* Frivolous, dilatory or repetitive motions are prohibited. The filing of such motions may form the basis for sanctions.

(f) *Dispositive motions.* Dispositive motions are governed by §§ 19.29 and 19.30.

§ 19.24 Scope of document discovery.

(a) *Limits on discovery.* (1) Subject to the limitations set out in paragraphs (b), (c), and (d) of this section, a party to a proceeding under this subpart may obtain document discovery by serving a written request to produce documents. For purposes of a request to produce documents, the term "documents" may be defined to include drawings, graphs, charts, photographs, recordings, data stored in electronic form, and other data compilations from which information can be obtained, or translated, if necessary, by the parties through detection devices into reasonably usable form, as well as written material of all kinds.

(2) Discovery by use of deposition is governed by subpart I of this part.

(3) Discovery by use of interrogatories is not permitted.

(b) *Relevance.* A party may obtain document discovery regarding any matter, not privileged, that has material relevance to the merits of the pending action. Any request to produce documents that calls for irrelevant material, that is unreasonable, oppressive, excessive in scope, unduly burdensome, or repetitive of previous requests, or that seeks to obtain privileged documents will be denied or modified. A request is unreasonable, oppressive, excessive in scope, or unduly burdensome if, among other things, it fails to

include justifiable limitations on the time period covered and the geographic locations to be searched, the time provided to respond in the request is inadequate, or the request calls for copies of documents to be delivered to the requesting party and fails to include the requestor's written agreement to pay in advance for the copying, in accordance with § 19.25.

(c) *Privileged matter.* Privileged documents are not discoverable. Privileges include the attorney-client privilege, work-product privilege, any government's or government agency's deliberative process privilege, and any other privileges the Constitution, any applicable act of Congress, or the principles of common law provide.

(d) *Time limits.* All discovery, including all responses to discovery requests, shall be completed at least 20 days prior to the date scheduled for the commencement of the hearing, except as provided in the Local Rules. No exceptions to this time limit shall be permitted, unless the administrative law judge finds on the record that good cause exists for waiving the requirements of this paragraph.

§ 19.25 Request for document discovery from parties.

(a) *General rule.* Any party may serve on any other party a request to produce for inspection any discoverable documents that are in the possession, custody, or control of the party upon whom the request is served. The request must identify the documents to be produced either by individual item or by category, and must describe each item and category with reasonable particularity. Documents must be produced as they are kept in the usual course of business or must be organized to correspond with the categories in the request.

(b) *Production or copying.* The request must specify a reasonable time, place, and manner for production and performing any related acts. In lieu of inspecting the documents, the requesting party may specify that all or some of the responsive documents be copied and the copies delivered to the requesting party. If copying of fewer than 250 pages is requested, the party to whom the request is addressed shall bear the cost of copying and shipping charges. If a party requests 250 pages or more of copying, the requesting party shall pay for the copying and shipping charges. Copying charges are the current per-page copying rate imposed by 12 CFR part 4 implementing the Freedom of Information Act (5 U.S.C. 552). The party to whom the request is addressed may require payment in advance before producing the documents.

(c) *Obligation to update responses.* A party who has responded to a discovery request with a response that was complete when made is not required to supplement the response to include documents thereafter acquired, unless the responding party learns that:

(1) The response was materially incorrect when made; or

(2) The response, though correct when made, is no longer true and a failure to amend the response is, in substance, a knowing concealment.

(d) *Motions to limit discovery.* (1) Any party that objects to a discovery request may, within ten days of being served with such request, file a motion in accordance with the provisions of § 19.23 to strike or otherwise limit the request. If an objection is made to only a portion of an item or category in a request, the portion objected to shall be specified. Any objections not made in accordance with this paragraph and § 19.23 are waived.

(2) The party who served the request that is the subject of a motion to strike or limit may file a written response within five days of service of the motion. No other party may file a response.

(e) *Privilege.* At the time other documents are produced, the producing party must reasonably identify all documents withheld on the grounds of privilege and must produce a statement of the basis for the assertion of privilege. When similar documents that are protected by deliberative process, attorney work-product, or attorney-client privilege are voluminous, these documents may be identified by category instead of by individual document. The administrative law judge retains discretion to determine when the identification by category is insufficient.

(f) *Motions to compel production.* (1) If a party withholds any documents as privileged or fails to comply fully with a discovery request, the requesting party may, within ten days of the assertion of privilege or of the time the failure to comply becomes known to the requesting party, file a motion in accordance with the provisions of § 19.23 for the issuance of a subpoena compelling production.

(2) The party who asserted the privilege or failed to comply with the request may file a written response to a motion to compel within five days of service of the motion. No other party may file a response.

(g) *Ruling on motions.* After the time for filing responses pursuant to this section has expired, the administrative law judge shall rule promptly on all motions filed pursuant to this section. If the administrative law judge determines that a discovery request, or any of its terms, calls for irrelevant material, is unreasonable, oppressive, excessive in scope, unduly burdensome, or repetitive of previous requests, or seeks to

obtain privileged documents, he or she may deny or modify the request, and may issue appropriate protective orders, upon such conditions as justice may require. The pendency of a motion to strike or limit discovery or to compel production is not a basis for staying or continuing the proceeding, unless otherwise ordered by the administrative law judge. Notwithstanding any other provision in this part, the administrative law judge may not release, or order a party to produce, documents withheld on grounds of privilege if the party has stated to the administrative law judge its intention to file a timely motion for interlocutory review of the administrative law judge's order to produce the documents, and until the motion for interlocutory review has been decided.

(h) *Enforcing discovery subpoenas.* If the administrative law judge issues a subpoena compelling production of documents by a party, the subpoenaing party may, in the event of noncompliance and to the extent authorized by applicable law, apply to any appropriate United States district court for an order requiring compliance with the subpoena. A party's right to seek court enforcement of a subpoena shall not in any manner limit the sanctions that may be imposed by the administrative law judge against a party who fails to produce subpoenaed documents.

§ 19.26 Document subpoenas to nonparties.

(a) *General rules.* (1) Any party may apply to the administrative law judge for the issuance of a document discovery subpoena addressed to any person who is not a party to the proceeding. The application must contain a proposed document subpoena and a brief statement showing the general relevance and reasonableness of the scope of documents sought. The subpoenaing party shall specify a reasonable time, place, and manner for making production in response to the document subpoena.

(2) A party shall only apply for a document subpoena under this section within the time period during which such party could serve a discovery request under § 19.24(d). The party obtaining the document subpoena is responsible for serving it on the subpoenaed person and for serving copies on all parties. Document subpoenas may be served in any state, territory, or possession of the United States, the District of Columbia, or as otherwise provided by law.

(3) The administrative law judge shall promptly issue any document subpoena requested pursuant to this section. If the administrative law judge determines that the application does not set forth a valid basis for the issuance of the subpoena, or that any of its terms are unreasonable, oppressive, excessive in scope, or unduly burdensome, he or she may refuse to issue the subpoena or may issue it in a modified form upon such conditions as may be consistent with the Uniform Rules.

(b) *Motion to quash or modify.* (1) Any person to whom a document subpoena is directed may file a motion to quash or modify such subpoena, accompanied by a statement of the basis for quashing or modifying the subpoena. The movant shall serve the motion on all parties, and any party may respond to such motion within ten days of service of the motion.

(2) Any motion to quash or modify a document subpoena must be filed on the same basis, including the assertion of privilege, upon which a party could object to a discovery request under § 19.25(d), and during the same time limits during which such an objection could be filed.

(c) *Enforcing document subpoenas.* If a subpoenaed person fails to comply with any subpoena issued pursuant to this section or any order of the administrative law judge

which directs compliance with all or any portion of a document subpoena, the subpoenaing party or any other aggrieved party may, to the extent authorized by applicable law, apply to an appropriate United States district court for an order requiring compliance with so much of the document subpoena as the administrative law judge has not quashed or modified. A party's right to seek court enforcement of a document subpoena shall in no way limit the sanctions that may be imposed by the administrative law judge on a party who induces a failure to comply with subpoenas issued under this section.

§ 19.27 Deposition of witness unavailable for hearing.

(a) *General rules.* (1) If a witness will not be available for the hearing, a party desiring to preserve that witness' testimony for the record may apply in accordance with the procedures set forth in paragraph (a)(2) of this section, to the administrative law judge for the issuance of a subpoena, including a subpoena duces tecum, requiring the attendance of the witness at a deposition. The administrative law judge may issue a deposition subpoena under this section upon showing that:

(i) The witness will be unable to attend or may be prevented from attending the hearing because of age, sickness or infirmity, or will otherwise be unavailable;

(ii) The witness' unavailability was not procured or caused by the subpoenaing party;

(iii) The testimony is reasonably expected to be material; and

(iv) Taking the deposition will not result in any undue burden to any other party and will not cause undue delay of the proceeding.

(2) The application must contain a proposed deposition subpoena and a brief statement of the reasons for the issuance of the subpoena. The subpoena must name the witness whose deposition is to be taken and specify the time and place for taking the deposition. A deposition subpoena may require the witness to be deposed at any place within the country in which that witness resides or has a regular place of employment or such other convenient place as the administrative law judge shall fix.

(3) Any requested subpoena that sets forth a valid basis for its issuance must be promptly issued, unless the administrative law judge on his or her own motion, requires a written response or requires attendance at a conference concerning whether the requested subpoena should be issued.

(4) The party obtaining a deposition subpoena is responsible for serving it on the witness and for serving copies on all parties. Unless the administrative law judge orders otherwise, no deposition under this section shall be taken on fewer than ten days' notice to the witness and all parties. Deposition subpoenas may be served in any state, territory, possession of the United States, or the District of Columbia, on any person or company doing business in any state, territory, possession of the United States, or the District of Columbia, or as otherwise permitted by law.

(b) *Objections to deposition subpoenas.* (1) The witness and any party who has not had an opportunity to oppose a deposition subpoena issued under this section may file a motion with the administrative law judge to quash or modify the subpoena prior to the time for compliance specified in the subpoena, but not more than ten days after service of the subpoena.

(2) A statement of the basis for the motion to quash or modify a subpoena issued under this section must accompany the motion. The motion must be served on all parties.

(c) *Procedure upon deposition.* (1) Each witness testifying pursuant to a deposition subpoena must be duly sworn, and each party shall have the right to examine the witness. Objections to questions or documents must be in short form, stating the grounds for the objection. Failure to object to questions or documents is not deemed a waiver except where the ground for the objection might have been avoided if the objection had been timely presented. All questions, answers, and objections must be recorded.

(2) Any party may move before the administrative law judge for an order compelling the witness to answer any questions the witness has refused to answer or submit any evidence the witness has refused to submit during the deposition.

(3) The deposition must be subscribed by the witness, unless the parties and the witness, by stipulation, have waived the signing, or the witness is ill, cannot be found, or has refused to sign. If the deposition is not subscribed by the witness, the court reporter taking the deposition shall certify that the transcript is a true and complete transcript of the deposition.

(d) *Enforcing subpoenas.* If a subpoenaed person fails to comply with any order of the administrative law judge which directs compliance with all or any portion of a deposition subpoena under paragraph (b) or (c)(3) of this section, the subpoenaing party or other aggrieved party may, to the extent authorized by applicable law, apply to an appropriate United States district court for an order requiring compliance with the portions of the subpoena that the administrative law judge has ordered enforced. A party's

right to seek court enforcement of a deposition subpoena in no way limits the sanctions that may be imposed by the administrative law judge on a party who fails to comply with, or procures a failure to comply with, a subpoena issued under this section.

§ 19.28 Interlocutory review.

(a) *General rule.* The Comptroller may review a ruling of the administrative law judge prior to the certification of the record to the Comptroller only in accordance with the procedures set forth in this section and § 19.23.

(b) *Scope of review.* The Comptroller may exercise interlocutory review of a ruling of the administrative law judge if the Comptroller finds that:

(1) The ruling involves a controlling question of law or policy as to which substantial grounds exist for a difference of opinion;

(2) Immediate review of the ruling may materially advance the ultimate termination of the proceeding;

(3) Subsequent modification of the ruling at the conclusion of the proceeding would be an inadequate remedy; or

(4) Subsequent modification of the ruling would cause unusual delay or expense.

(c) *Procedure.* Any request for interlocutory review shall be filed by a party with the administrative law judge within ten days of his or her ruling and shall otherwise comply with § 19.23. Any party may file a response to a request for interlocutory review in accordance with § 19.23(d). Upon the expiration of the time for filing all responses, the administrative law judge shall refer the matter to the Comptroller for final disposition.

(d) *Suspension of proceeding.* Neither a request for interlocutory review nor any disposition of such a request by the Comptroller under this section suspends or stays the proceeding unless otherwise ordered by the administrative law judge or the Comptroller.

§ 19.29 Summary disposition.

(a) *In general.* The administrative law judge shall recommend that the Comptroller issue a final order granting a motion for summary disposition if the undisputed pleaded facts, admissions, affidavits, stipulations, documentary evidence, matters as to which official notice may be taken, and any other evidentiary materials properly submitted in connection with a motion for summary disposition show that:

(1) There is no genuine issue as to any material fact; and

(2) The moving party is entitled to a decision in its favor as a matter of law.

(b) *Filing of motions and responses.* (1) Any party who believes there is no genuine issue of material fact to be determined and that he or she is entitled to a decision as a matter of law may move at any time for summary disposition in its favor of all or any part of the proceeding. Any party, within 20 days after service of such a motion, or within such time period as allowed by the administrative law judge, may file a response to such motion.

(2) A motion for summary disposition must be accompanied by a statement of the material facts as to which the moving party contends there is no genuine issue. Such motion must be supported by documentary evidence, which may take the form of admissions in pleadings, stipulations, depositions, investigatory depositions, transcripts, affidavits and any other evidentiary materials that the moving party contends support his or her position. The motion must also be accompanied by a brief containing the points

and authorities in support of the contention of the moving party. Any party opposing a motion for summary disposition must file a statement setting forth those material facts as to which he or she contends a genuine dispute exists. Such opposition must be supported by evidence of the same type as that submitted with the motion for summary disposition and a brief containing the points and authorities in support of the contention that summary disposition would be inappropriate.

(c) *Hearing on motion.* At the request of any party or on his or her own motion, the administrative law judge may hear oral argument on the motion for summary disposition.

(d) *Decision on motion.* Following receipt of a motion for summary disposition and all responses thereto, the administrative law judge shall determine whether the moving party is entitled to summary disposition. If the administrative law judge determines that summary disposition is warranted, the administrative law judge shall submit a recommended decision to that effect to the Comptroller. If the administrative law judge finds that no party is entitled to summary disposition, he or she shall make a ruling denying the motion.

§ 19.30 Partial summary disposition.

If the administrative law judge determines that a party is entitled to summary disposition as to certain claims only, he or she shall defer submitting a recommended decision as to those claims. A hearing on the remaining issues must be ordered. Those claims for which the administrative law judge has determined that summary disposition is warranted will be addressed in the recommended decision filed at the conclusion of the hearing.

§ 19.31 Scheduling and prehearing conferences.

(a) *Scheduling conference.* Within 30 days of service of the notice or order commencing a proceeding or such other time as parties may agree, the administrative law judge shall direct counsel for all parties to meet with him or her in person at a specified time and place prior to the hearing or to confer by telephone for the purpose of scheduling the course and conduct of the proceeding. This meeting or telephone conference is called a "scheduling conference." The identification of potential witnesses, the time for and manner of discovery, and the exchange of any prehearing materials including witness lists, statements of issues, stipulations, exhibits and any other materials may also be determined at the scheduling conference.

(b) *Prehearing conferences.* The administrative law judge may, in addition to the scheduling conference, on his or her own motion or at the request of any party, direct counsel for the parties to meet with him or her (in person or by telephone) at a prehearing conference to address any or all of the following:

(1) Simplification and clarification of the issues;

(2) Stipulations, admissions of fact, and the contents, authenticity and admissibility into evidence of documents;

(3) Matters of which official notice may be taken;

(4) Limitation of the number of witnesses;

(5) Summary disposition of any or all issues;

(6) Resolution of discovery issues or disputes;

(7) Amendments to pleadings; and

(8) Such other matters as may aid in the orderly disposition of the proceeding.

(c) *Transcript.* The administrative law judge, in his or her discretion, may require that a scheduling or prehearing conference be recorded by a court reporter. A transcript of the conference and any materials filed, including orders, becomes part of the record of the proceeding. A party may obtain a copy of the transcript at his or her expense.

(d) *Scheduling or prehearing orders.* At or within a reasonable time following the conclusion of the scheduling conference or any prehearing conference, the administrative law judge shall serve on each party an order setting forth any agreements reached and any procedural determinations made.

§ 19.32 Prehearing submissions.

(a) Within the time set by the administrative law judge, but in no case later than 14 days before the start of the hearing, each party shall serve on every other party, his or her:

(1) Prehearing statement;

(2) Final list of witnesses to be called to testify at the hearing, including name and address of each witness and a short summary of the expected testimony of each witness;

(3) List of the exhibits to be introduced at the hearing along with a copy of each exhibit; and

(4) Stipulations of fact, if any.

(b) Effect of failure to comply. No witness may testify and no exhibits may be introduced at the hearing if such witness or exhibit is not listed in the prehearing submissions pursuant to paragraph (a) of this section, except for good cause shown.

§ 19.33 Public hearings.

(a) *General rule.* All hearings shall be open to the public, unless the Comptroller, in the Comptroller's discretion, determines that holding an open hearing would be contrary to the public interest. Within 20 days of service of the notice or, in the case of change-in-control proceedings under section 7(j)(4) of the FDIA (12 U.S.C. 1817(j)(4)), within 20 days from service of the hearing order, any respondent may file with the Comptroller a request for a private hearing, and any party may file a reply to such a request. A party must serve on the administrative law judge a copy of any request or reply the party files with the Comptroller. The form of, and procedure for, these requests and replies are governed by § 19.23. A party's failure to file a request or a reply constitutes a waiver of any objections regarding whether the hearing will be public or private.

(b) *Filing document under seal.* Enforcement Counsel, in his or her discretion, may file any document or part of a document under seal if disclosure of the document would be contrary to the public interest. The administrative law judge shall take all appropriate steps to preserve the confidentiality of such documents or parts thereof, including closing portions of the hearing to the public.

§ 19.34 Hearing subpoenas.

(a) *Issuance.* (1) Upon application of a party showing general relevance and reasonableness of scope of the testimony or other evidence sought, the administrative law judge may issue a subpoena or a subpoena *duces tecum* requiring the attendance of a witness at the hearing or the production of documentary or physical evidence at the hearing. The application for a hearing subpoena must also contain a proposed subpoena specifying the attendance of a witness or the production of evidence from any state,

territory, or possession of the United States, the District of Columbia, or as otherwise provided by law at any designated place where the hearing is being conducted. The party making the application shall serve a copy of the application and the proposed subpoena on every other party.

(2) A party may apply for a hearing subpoena at any time before the commencement of a hearing. During a hearing, a party may make an application for a subpoena orally on the record before the administrative law judge.

(3) The administrative law judge shall promptly issue any hearing subpoena requested pursuant to this section. If the administrative law judge determines that the application does not set forth a valid basis for the issuance of the subpoena, or that any of its terms are unreasonable, oppressive, excessive in scope, or unduly burdensome, he or she may refuse to issue the subpoena or may issue it in a modified form upon any conditions consistent with this subpart. Upon issuance by the administrative law judge, the party making the application shall serve the subpoena on the person named in the subpoena and on each party.

(b) *Motion to quash or modify.* (1) Any person to whom a hearing subpoena is directed or any party may file a motion to quash or modify the subpoena, accompanied by a statement of the basis for quashing or modifying the subpoena. The movant must serve the motion on each party and on the person named in the subpoena. Any party may respond to the motion within ten days of service of the motion.

(2) Any motion to quash or modify a hearing subpoena must be filed prior to the time specified in the subpoena for compliance but not more than ten days after the date of service of the subpoena upon the movant.

(c) *Enforcing subpoenas.* If a subpoenaed person fails to comply with any subpoena issued pursuant to this section or any order of the administrative law judge which directs compliance with all or any portion of a document subpoena, the subpoenaing party or any other aggrieved party may seek enforcement of the subpoena pursuant to § 19.26(c).

§ 19.35 Conduct of hearings.

(a) *General rules.* (1) Hearings shall be conducted so as to provide a fair and expeditious presentation of the relevant disputed issues. Each party has the right to present its case or defense by oral and documentary evidence and to conduct such cross examination as may be required for full disclosure of the facts.

(2) Order of hearing. Enforcement Counsel shall present its case-in-chief first, unless otherwise ordered by the administrative law judge, or unless otherwise expressly specified by law or regulation. Enforcement Counsel shall be the first party to present an opening statement and a closing statement, and may make a rebuttal statement after the respondent's closing statement. If there are multiple respondents, respondents may agree among themselves as to their order of presentation of their cases, but if they do not agree, the administrative law judge shall fix the order.

(3) Examination of witnesses. Only one counsel for each party may conduct an examination of a witness, except that in the case of extensive direct examination, the administrative law judge may permit more than one counsel for the party presenting the witness to conduct the examination. A party may have one counsel conduct the direct examination and another counsel conduct re-direct examination of a witness, or may have

one counsel conduct the cross examination of a witness and another counsel conduct the re-cross examination of a witness.

(4) Stipulations. Unless the administrative law judge directs otherwise, all stipulations of fact and law previously agreed upon by the parties, and all documents, the admissibility of which have been previously stipulated, will be admitted into evidence upon commencement of the hearing.

(b) *Transcript.* The hearing must be recorded and transcribed. The reporter will make the transcript available to any party upon payment by that party to the reporter of the cost of the transcript. The administrative law judge may order the record corrected, either upon motion to correct, upon stipulation of the parties, or following notice to the parties upon the administrative law judge's own motion.

§ 19.36 Evidence.

(a) *Admissibility.* (1) Except as is otherwise set forth in this section, relevant, material, and reliable evidence that is not unduly repetitive is admissible to the fullest extent authorized by the Administrative Procedure Act and other applicable law.

(2) Evidence that would be admissible under the Federal Rules of Evidence is admissible in a proceeding conducted pursuant to this subpart.

(3) Evidence that would be inadmissible under the Federal Rules of Evidence may not be deemed or ruled to be inadmissible in a proceeding conducted pursuant to this subpart if such evidence is relevant, material, reliable and not unduly repetitive.

(b) *Official notice.* (1) Official notice may be taken of any material fact which may be judicially noticed by a United States district court and any material information in the official public records of any Federal or state government agency.

(2) All matters officially noticed by the administrative law judge or the Comptroller shall appear on the record.

(3) If official notice is requested or taken of any material fact, the parties, upon timely request, shall be afforded an opportunity to object.

(c) *Documents.* (1) A duplicate copy of a document is admissible to the same extent as the original, unless a genuine issue is raised as to whether the copy is in some material respect not a true and legible copy of the original.

(2) Subject to the requirements of paragraph (a) of this section, any document, including a report of examination, supervisory activity, inspection or visitation, prepared by an appropriate Federal financial institutions regulatory agency or by a state regulatory agency, is admissible either with or without a sponsoring witness.

(3) Witnesses may use existing or newly created charts, exhibits, calendars, calculations, outlines or other graphic material to summarize, illustrate, or simplify the presentation of testimony. Such materials may, subject to the administrative law judge's discretion, be used with or without being admitted into evidence.

(d) *Objections.* (1) Objections to the admissibility of evidence must be timely made and rulings on all objections must appear on the record.

(2) When an objection to a question or line of questioning propounded to a witness is sustained, the examining counsel may make a specific proffer on the record of what he or she expected to prove by the expected testimony of the witness either by representation of counsel or by direct interrogation of the witness.

(3) The administrative law judge shall retain rejected exhibits, adequately marked for identification, for the record, and transmit such exhibits to the Comptroller.

(4) Failure to object to admission of evidence or to any ruling constitutes a waiver of the objection.

(e) *Stipulations.* The parties may stipulate as to any relevant matters of fact or the authentication of any relevant documents. Such stipulations must be received in evidence at a hearing and are binding on the parties with respect to the matters therein stipulated.

(f) *Depositions of unavailable witnesses.* (1) If a witness is unavailable to testify at a hearing, and that witness has testified in a deposition to which all parties in a proceeding had notice and an opportunity to participate, a party may offer as evidence all or any part of the transcript of the deposition, including deposition exhibits, if any.

(2) Such deposition transcript is admissible to the same extent that testimony would have been admissible had that person testified at the hearing, provided that if a witness refused to answer proper questions during the depositions, the administrative law judge may, on that basis, limit the admissibility of the deposition in any manner that justice requires.

(3) Only those portions of a deposition received in evidence at the hearing constitute a part of the record.

§ 19.37 Post-hearing filings.

(a) *Proposed findings and conclusions and supporting briefs.* (1) Using the same method of service for each party, the administrative law judge shall serve notice upon each party that the certified transcript, together with all hearing exhibits and exhibits introduced but not admitted into evidence at the hearing, has been filed. Any party may file with the administrative law judge proposed findings of fact, proposed conclusions of law, and a proposed order within 30 days following service of this notice by the

administrative law judge or within such longer period as may be ordered by the administrative law judge.

(2) Proposed findings and conclusions must be supported by citation to any relevant authorities and by page references to any relevant portions of the record. A post-hearing brief may be filed in support of proposed findings and conclusions, either as part of the same document or in a separate document. Any party who fails to file timely with the administrative law judge any proposed finding or conclusion is deemed to have waived the right to raise in any subsequent filing or submission any issue not addressed in such party's proposed finding or conclusion.

(b) *Reply briefs.* Reply briefs may be filed within 15 days after the date on which the parties' proposed findings, conclusions, and order are due. Reply briefs must be strictly limited to responding to new matters, issues, or arguments raised in another party's papers. A party who has not filed proposed findings of fact and conclusions of law or a post-hearing brief may not file a reply brief.

(c) *Simultaneous filing required.* The administrative law judge shall not order the filing by any party of any brief or reply brief in advance of the other party's filing of its brief.

§ 19.38 Recommended decision and filing of record.

(a) *Filing of recommended decision and record.* Within 45 days after expiration of the time allowed for filing reply briefs under § 19.37(b), the administrative law judge shall file with and certify to the Comptroller, for decision, the record of the proceeding. The record must include the administrative law judge's recommended decision, recommended findings of fact, recommended conclusions of law, and proposed order; all

prehearing and hearing transcripts, exhibits, and rulings; and the motions, briefs, memoranda, and other supporting papers filed in connection with the hearing. The administrative law judge shall serve upon each party the recommended decision, findings, conclusions, and proposed order.

(b) *Filing of index.* At the same time the administrative law judge files with and certifies to the Comptroller for final determination the record of the proceeding, the administrative law judge shall furnish to the Comptroller a certified index of the entire record of the proceeding. The certified index shall include, at a minimum, an entry for each paper, document or motion filed with the administrative law judge in the proceeding, the date of the filing, and the identity of the filer. The certified index shall also include an exhibit index containing, at a minimum, an entry consisting of exhibit number and title or description for: Each exhibit introduced and admitted into evidence at the hearing; each exhibit introduced but not admitted into evidence at the hearing; each exhibit introduced and admitted into evidence after the completion of the hearing; and each exhibit introduced but not admitted into evidence after the completion of the hearing.

§ 19.39 Exceptions to recommended decision.

(a) *Filing exceptions.* Within 30 days after service of the recommended decision, findings, conclusions, and proposed order under § 19.38, a party may file with the Comptroller written exceptions to the administrative law judge's recommended decision, findings, conclusions or proposed order, to the admission or exclusion of evidence, or to the failure of the administrative law judge to make a ruling proposed by a party. A

supporting brief may be filed at the time the exceptions are filed, either as part of the same document or in a separate document.

(b) *Effect of failure to file or raise exceptions.* (1) Failure of a party to file exceptions to those matters specified in paragraph (a) of this section within the time prescribed is deemed a waiver of objection thereto.

(2) No exception need be considered by the Comptroller if the party taking exception had an opportunity to raise the same objection, issue, or argument before the administrative law judge and failed to do so.

(c) *Contents.* (1) All exceptions and briefs in support of such exceptions must be confined to the particular matters in, or omissions from, the administrative law judge's recommendations to which that party takes exception.

(2) All exceptions and briefs in support of exceptions must set forth page or paragraph references to the specific parts of the administrative law judge's recommendations to which exception is taken, the page or paragraph references to those portions of the record relied upon to support each exception, and the legal authority relied upon to support each exception.

§ 19.40 Review by the Comptroller.

(a) *Notice of submission to the Comptroller.* When the Comptroller determines that the record in the proceeding is complete, the Comptroller shall serve notice upon the parties that the proceeding has been submitted to the Comptroller for final decision.

(b) *Oral argument before the Comptroller.* Upon the initiative of the Comptroller or on the written request of any party filed with the Comptroller within the time for filing exceptions, the Comptroller may order and hear oral argument on the recommended

findings, conclusions, decision, and order of the administrative law judge. A written request by a party must show good cause for oral argument and state reasons why arguments cannot be presented adequately in writing. A denial of a request for oral argument may be set forth in the Comptroller's final decision. Oral argument before the Comptroller must be on the record.

(c) *Comptroller's final decision.* (1) Decisional employees may advise and assist the Comptroller in the consideration and disposition of the case. The final decision of the Comptroller will be based upon review of the entire record of the proceeding, except that the Comptroller may limit the issues to be reviewed to those findings and conclusions to which opposing arguments or exceptions have been filed by the parties.

(2) The Comptroller shall render a final decision within 90 days after notification of the parties that the case has been submitted for final decision, or 90 days after oral argument, whichever is later, unless the Comptroller orders that the action or any aspect thereof be remanded to the administrative law judge for further proceedings. Copies of the final decision and order of the Comptroller shall be served upon each party to the proceeding, upon other persons required by statute, and, if directed by the Comptroller or required by statute, upon any appropriate state or Federal supervisory authority.

§ 19.41 Stays pending judicial review.

The commencement of proceedings for judicial review of a final decision and order of the Comptroller may not, unless specifically ordered by the Comptroller or a reviewing court, operate as a stay of any order issued by the Comptroller. The Comptroller may, in his or her discretion, and on such terms as he or she finds just, stay

the effectiveness of all or any part of an order pending a final decision on a petition for review of that order.

Subpart B - Procedural Rules for OCC Adjudications

§ 19.100 Filing documents.

All materials required to be filed with or referred to the Comptroller or the administrative law judge in any proceeding under this part must be filed with the Hearing Clerk, Office of the Comptroller of the Currency, Washington, DC 20219. Filings to be made with the Hearing Clerk include the notice and answer; motions and responses to motions; briefs; the record filed by the administrative law judge after the issuance of a recommended decision; the recommended decision filed by the administrative law judge following a motion for summary disposition; referrals by the administrative law judge of motions for interlocutory review; exceptions and requests for oral argument; and any other papers required to be filed with the Comptroller or the administrative law judge under this part.

§ 19.101 Delegation to OFIA.

Unless otherwise ordered by the Comptroller, administrative adjudications subject to subpart A of this part shall be conducted by an administrative law judge assigned to OFIA.

Subpart C - Removals, Suspensions, and Prohibitions When a Crime Is Charged or a Conviction is Obtained

§ 19.110 Scope.

This subpart applies to informal hearings afforded to any institution-affiliated party who has been suspended or removed from office or prohibited from further

participation in the affairs of any depository institution pursuant to 12 U.S.C. 1818(g) by a notice or order issued by the Comptroller.

§ 19.111 Suspension, removal, or prohibition.

The Comptroller may serve a notice of suspension or order of removal or prohibition pursuant to 12 U.S.C. 1818(g) on an institution-affiliated party. A copy of such notice or order will be served on any depository institution that the subject of the notice or order is affiliated with at the time the notice or order is issued, whereupon the institution-affiliated party involved must immediately cease service to, or participation in the affairs of, that depository institution and, if so determined by the OCC, any other depository institution. The notice or order will indicate the basis for suspension, removal or prohibition and will inform the institution-affiliated party of the right to request in writing, to be received by the OCC within 30 days from the date that the institution-affiliated party was served with such notice or order, an opportunity to show at an informal hearing that continued service to or participation in the conduct of the affairs of any depository institution has not posed, does not pose, or is not likely to pose a threat to the interests of the depositors of, or has not threatened, does not threaten, or is not likely to threaten to impair public confidence in, any relevant depository institution. The written request must be sent by certified mail to, or served personally with a signed receipt on, the District Deputy Comptroller in the OCC district in which the bank in question is located; if the bank is supervised by Large Bank Supervision, to the Senior Deputy Comptroller for Large Bank Supervision for the Office of the Comptroller of the Currency; if the bank is supervised by Mid-Size/Community Bank Supervision, to the Senior Deputy Comptroller for Mid-Size/Community Bank Supervision for the Office of

the Comptroller of the Currency; or if the institution-affiliated party is no longer affiliated with a particular national bank, to the Deputy Comptroller for Special Supervision, Washington, DC 20219. The request must state specifically the relief desired and the grounds on which that relief is based. For purposes of this section, the term *depository institution* means any depository institution of which the petitioner is or was an institution-affiliated party at the time at which the notice or order was issued by the Comptroller.

§ 19.112 Informal hearing.

(a) *Issuance of hearing order.* After receipt of a request for hearing, the District Deputy Comptroller, the Senior Deputy Comptroller for Large Bank Supervision, the Senior Deputy Comptroller for Mid-Size/Community Bank Supervision, or the Deputy Comptroller for Special Supervision, as appropriate, must notify the petitioner requesting the hearing, the OCC's Enforcement and Compliance Division, and the appropriate OCC District Counsel of the date, time, and place fixed for the hearing. The hearing must be scheduled to be held not later than 30 days from the date when a request for hearing is received unless the time is extended in response to a written request of the petitioner. The District Deputy Comptroller, the Senior Deputy Comptroller for Large Bank Supervision, the Senior Deputy Comptroller for Mid-Size/Community Bank Supervision, or the Deputy Comptroller for Special Supervision, as appropriate, may extend the hearing date only for a specific period of time and must take appropriate action to ensure that the hearing is not unduly delayed.

(b) *Appointment of presiding officer.* the District Deputy Comptroller, the Senior Deputy Comptroller for Large Bank Supervision, the Senior Deputy Comptroller for

Mid-Size/Community Bank Supervision, or the Deputy Comptroller for Special Supervision, as appropriate, must appoint one or more OCC employees as the presiding officer to conduct the hearing. The presiding officer(s) may not have been involved in the proceeding, a factually related proceeding, or the underlying enforcement action in a prosecutorial or investigative role.

(c) *Waiver of oral hearing* - (1) *Petitioner.* When the petitioner requests a hearing, the petitioner may elect to have the matter determined by the presiding officer solely on the basis of written submissions by serving on the District Deputy Comptroller, the Senior Deputy Comptroller for Large Bank Supervision, the Senior Deputy Comptroller for Mid-Size/Community Bank Supervision, or the Deputy Comptroller for Special Supervision, as appropriate, and all parties, a signed document waiving the statutory right to appear and make oral argument. The petitioner must present the written submissions to the presiding officer, and serve the other parties, not later than ten days prior to the date fixed for the hearing, or within such shorter time period as the presiding officer may permit.

(2) *OCC.* The OCC may respond to the petitioner's submissions by presenting the presiding officer with a written response, and by serving the other parties, not later than the date fixed for the hearing, or within such other time period as the presiding officer may require.

(d) *Hearing procedures* - (1) *Conduct of hearing.* Hearings under this subpart are not subject to the provisions of subpart A of this part or the adjudicative provisions of the Administrative Procedure Act (5 U.S.C. 554-557).

(2) *Powers of the presiding officer.* The presiding officer shall determine all procedural issues that are governed by this subpart. The presiding officer may also permit or limit the number of witnesses and impose time limitations as he or she deems reasonable. The informal hearing will not be governed by the formal rules of evidence. All oral presentations, when permitted, and documents deemed by the presiding officer to be relevant and material to the proceeding and not unduly repetitious will be considered. The presiding officer may ask questions of any person participating in the hearing and may make any rulings reasonably necessary to facilitate the effective and efficient operation of the hearing.

(3) *Presentation.* (i) The OCC may appear and the petitioner may appear personally or through counsel at the hearing to present relevant written materials and oral argument. Except as permitted in paragraph (c) of this section, each party, including the OCC, must file a copy of any affidavit, memorandum, or other written material to be presented at the hearing with the presiding officer and must serve the other parties not later than ten days prior to the hearing or within such shorter time period as permitted by the presiding officer.

(ii) If the petitioner or the appointed OCC attorney desires to present oral testimony or witnesses at the hearing, he or she must file a written request with the presiding officer not later than ten days prior to the hearing, or within a shorter time period as permitted by the presiding officer. The names of proposed witnesses should be included, along with the general nature of the expected testimony, and the reasons why oral testimony is necessary. The presiding officer generally will not admit oral testimony

or witnesses unless a specific and compelling need is demonstrated. Witnesses, if admitted, shall be sworn.

(iii) In deciding on any suspension, the presiding officer shall not consider the ultimate question of the guilt or innocence of the individual with respect to the criminal charges which are outstanding. In deciding on any removal, the presiding officer shall not consider challenges to or efforts to impeach the validity of the conviction. The presiding officer may consider facts in either situation, however, which show the nature of the events on which the indictment or conviction was based.

(4) *Record.* A transcript of the proceedings may be taken if the petitioner requests a transcript and agrees to pay all expenses or if the presiding officer determines that the nature of the case warrants a transcript. The presiding officer may order the record to be kept open for a reasonable period following the hearing, not to exceed five business days, to permit the petitioner or the appointed OCC attorney to submit additional documents for the record. Thereafter, no further submissions may be accepted except for good cause shown.

§ 19.113 Recommended and final decisions.

(a) The presiding officer must issue a recommended decision to the Comptroller within 20 days of the conclusion of the hearing or, when the petitioner has waived an oral hearing, within 20 days of the date fixed for the hearing. The presiding officer must serve promptly a copy of the recommended decision on the parties to the proceeding. The decision must include a summary of the facts and arguments of the parties.

(b) Each party may, within ten days of being served with the presiding officer's recommended decision, submit to the Comptroller comments on the recommended decision.

(c) Within 60 days of the conclusion of the hearing or, when the petitioner has waived an oral hearing, within 60 days from the date fixed for the hearing, the Comptroller must notify the petitioner by registered mail whether the suspension or removal from office, and prohibition from participation in any manner in the affairs of any depository institution, will be affirmed, terminated, or modified. The Comptroller's decision must include a statement of reasons supporting the decision. The Comptroller's decision is a final and unappealable order.

(d) A finding of not guilty or other disposition of the charge on which a notice of suspension was based does not preclude the Comptroller from thereafter instituting removal proceedings pursuant to section 8(e) of the FDIA (12 U.S.C. 1818(e)) and subpart: A of this part.

(e) A removal or prohibition by order remains in effect until terminated by the Comptroller. A suspension or prohibition by notice remains in effect until the criminal charge is disposed of or until terminated by the Comptroller.

(f) A suspended or removed individual may petition the Comptroller to reconsider the decision any time after the expiration of a 12-month period from the date of the decision, but no petition for reconsideration may be made within 12 months of a previous petition. The petition must state specifically the relief sought and the grounds therefor, and may be accompanied by a supporting memorandum and any other documentation the

petitioner wishes to have considered. No hearing need be granted on the petition for reconsideration.

Subpart D - Exemption Hearings Under Section 12(h) of the Securities Exchange Act of 1934

§ 19.120 Scope.

The rules in this subpart apply to informal hearings that may be held by the Comptroller to determine whether, pursuant to authority in sections 12 (h) and (i) of the Exchange Act (15 U.S.C. 78*l* (h) and (i)), to exempt in whole or in part an issuer or a class of issuers from the provisions of section 12(g), or from section 13 or 14 of the Exchange Act (15 U.S.C. 78*l*(g), 78m or 78n), or whether to exempt from section 16 of the Exchange Act (15 U.S.C. 78p) any officer, director, or beneficial owner of securities of an issuer. The only issuers covered by this subpart are banks whose securities are registered pursuant to section 12(g) of the Exchange Act (15 U.S.C. 78*l*(g)). The Comptroller may deny an application for exemption without a hearing.

§ 19.121 Application for exemption.

An issuer or an individual (officer, director or shareholder) may submit a written application for an exemption order to the Securities and Corporate Practices Division, Office of the Comptroller of the Currency, Washington, DC 20219. The application must specify the type of exemption sought and the reasons therefor, including an explanation of why an exemption would not be inconsistent with the public interest or the protection of investors. The Securities and Corporate Practices Division shall inform the applicant in writing whether a hearing will be held to consider the matter.

§ 19.122 Newspaper notice.

Upon being informed that an application will be considered at a hearing, the applicant shall publish a notice one time in a newspaper of general circulation in the community where the issuer's main office is located. The notice must state: the name and title of any individual applicants; the type of exemption sought; the fact that a hearing will be held; and a statement that interested persons may submit to the Securities and Corporate Practices Division, Office of the Comptroller of the Currency, Washington, DC 20219, within 30 days from the date of the newspaper notice, written comments concerning the application and a written request for an opportunity to be heard. The applicant shall promptly furnish a copy of the notice to the Securities and Corporate Practices Division, and to bank shareholders.

§ 19.123 Informal hearing.

(a) *Conduct of proceeding.* The adjudicative provisions of the Administrative Procedure Act, formal rules of evidence and subpart A of this part do not apply to hearings conducted under this subpart, except as provided in § 19.100(b).

(b) *Notice of hearing.* Following the comment period, the Comptroller shall send a notice which fixes a date, time and place for hearing to each applicant and to any person who has requested an opportunity to be heard.

(c) *Presiding officer.* The Comptroller shall designate a presiding officer to conduct the hearing. The presiding officer shall determine all procedural questions not governed by this subpart and may limit the number of witnesses and impose time and presentation limitations as are deemed reasonable. At the conclusion of the informal hearing, the presiding officer shall issue a recommended decision to the Comptroller as to

whether the exemption should issue. The decision shall include a summary of the facts and arguments of the parties.

(d) *Attendance.* The applicant and any person who has requested an opportunity to be heard may attend the hearing, with or without counsel. The hearing shall be open to the public. In addition, the applicant and any other hearing participant may introduce oral testimony through such witnesses as the presiding officer shall permit.

(e) *Order of presentation.* (1) The applicant may present an opening statement of a length decided by the presiding officer. Then each of the hearing participants, or one among them selected with the approval of the presiding officer, may present an opening statement. The opening statement should summarize concisely what the applicant and each participant intends to show.

(2) The applicant shall have an opportunity to make an oral presentation of facts and materials or submit written materials for the record. One or more of the hearing participants may make an oral presentation or a written submission.

(3) After the above presentations, the applicant, followed by one or more of the hearing participants, may make concise summary statements reviewing their position.

(f) *Witnesses.* The obtaining and use of witnesses is the responsibility of the parties afforded the hearing. All witnesses shall be present on their own volition, but any person appearing as a witness may be questioned by each applicant, any hearing participant, and the presiding officer. Witnesses shall be sworn unless otherwise directed by the presiding officer.

(g) *Evidence.* The presiding officer may exclude data or materials deemed to be improper or irrelevant. Formal rules of evidence do not apply. Documentary material

must be of a size consistent with ease of handling and filing. The presiding officer may determine the number of copies that must be furnished for purposes of the hearing.

(h) *Transcript.* A transcript of each proceeding will be arranged by the OCC, with all expenses, including the furnishing of a copy to the presiding officer, being borne by the applicant.

§ 19.124 Decision of the Comptroller.

Following the conclusion of the hearing and the submission of the record and the presiding officer's recommended decision to the Comptroller for decision, the Comptroller shall notify the applicant and all persons who have so requested in writing of the final disposition of the application. Exemptions granted must be in the form of an order which specifies the type of exemption granted and its terms and conditions.

Subpart E - Disciplinary Proceedings Involving the Federal Securities Laws

§ 19.130 Scope.

(a) Except as provided in this subpart, subpart A of this part applies to proceedings by the Comptroller to determine whether, pursuant to authority contained in sections 15B(c)(5), 15C(c)(2)(A), 17A(c)(3), and 17A(c)(4)(C) of the Exchange Act (15 U.S.C. 78o-4(c)(5), 78o-5(c)(2)(A), 78q-1(c)(3)(A), and 78q-1(c)(4)(C)), to take disciplinary action against the following:

(1) A bank which is a municipal securities dealer, or any person associated or seeking to become associated with such a municipal securities dealer;

(2) A bank which is a government securities broker or dealer, or any person associated with such government securities broker or dealer; or

(3) A bank which is a transfer agent, or any person associated or seeking to become associated with such transfer agent.

(b) In addition to the issuance of disciplinary orders after opportunity for hearing, the Comptroller or the Comptroller's delegate may issue and serve any notices and temporary or permanent cease-and-desist orders and take any actions that are authorized by section 8 of the FDIA (12 U.S.C. 1818), sections 15B(c)(5), 15C(c)(2)(B), and 17A(d)(2) of the Exchange Act, and other subparts of this part against the following:

(1) The parties listed in paragraph (a) of this section; and

(2) A bank which is a clearing agency.

(c) Nothing in this subpart impairs the powers conferred on the Comptroller by other provisions of law.

§ 19.131 Notice of charges and answer.

(a) Proceedings are commenced when the Comptroller serves a notice of charges on a bank or associated person. The notice must indicate the type of disciplinary action being contemplated and the grounds therefor, and fix a date, time and place for hearing. The hearing must be set for a date at least 30 days after service of the notice. A party served with a notice of charges may file an answer as prescribed in § 19.19. Any party who fails to appear at a hearing personally or by a duly authorized representative shall be deemed to have consented to the issuance of a disciplinary order.

(b) All proceedings under this subpart must be commenced, and the notice of charges must be filed, on a public basis, unless otherwise ordered by the Comptroller. Pursuant to § 19.33(a), a request for a private hearing may be filed within 20 days of service of the notice.

§ 19.132 Disciplinary orders.

(a) In the event of consent, or if on the record filed by the administrative law judge, the Comptroller finds that any act or omission or violation specified in the notice of charges has been established, the Comptroller may serve on the bank or persons concerned a disciplinary order, as provided in the Exchange Act. The order may:

(1) Censure, limit the activities, functions or operations, or suspend or revoke the registration of a bank which is a municipal securities dealer;

(2) Censure, suspend or bar any person associated or seeking to become associated with a municipal securities dealer;

(3) Censure, limit the activities, functions or operations, or suspend or bar a bank which is a government securities broker or dealer;

(4) Censure, limit the activities, functions or operations, or suspend or bar any person associated with a government securities broker or dealer;

(5) Deny registration to, limit the activities, functions, or operations or suspend or revoke the registration of a bank which is a transfer agent; or

(6) Censure or limit the activities or functions, or suspend or bar, any person associated or seeking to become associated with a transfer agent.

(b) A disciplinary order is effective when served on the party or parties involved and remains effective and enforceable until it is stayed, modified, terminated, or set aside by action of the Comptroller or a reviewing court.

§ 19.135 Applications for stay or review of disciplinary actions imposed by registered clearing agencies.

(a) *Stays.* The rules adopted by the Securities and Exchange Commission (SEC) pursuant to section 19 of the Securities Exchange Act of 1934 (15 U.S.C. 78s) regarding applications by persons for whom the SEC is the appropriate regulatory agency for stays of disciplinary sanctions or summary suspensions imposed by registered clearing agencies (17 CFR 240.19d-2) apply to applications by national banks. References to the "Commission" are deemed to refer to the "OCC."

(b) *Reviews.* The regulations adopted by the SEC pursuant to section 19 of the Securities Exchange Act of 1934 (15 U.S.C. 78s) regarding applications by persons for whom the SEC is the appropriate regulatory agency for reviews of final disciplinary sanctions, denials of participation, or prohibitions or limitations of access to services imposed by registered clearing agencies (17 CFR 240.19d-3(a)-(f)) apply to applications by national banks. References to the "Commission" are deemed to refer to the "OCC."

Subpart F - Civil Money Penalty Authority Under the Securities Laws

§ 19.140 Scope.

(a) Except as provided in this subpart, subpart A of this part applies to proceedings by the Comptroller to determine whether, pursuant to authority contained in section 21B of the Exchange Act (15 U.S.C. 78u-2), in proceedings commenced pursuant to sections 15B, 15C, and 17A of the Exchange Act (15 U.S.C. 78o-4, 78o-5, or 78q-1) for which the OCC is the appropriate regulatory agency under section 3(a)(34) of the Exchange Act (15 U.S.C. 78c(a)(34)), the Comptroller may impose a civil money penalty against the following:

(1) A bank which is a municipal securities dealer, or any person associated or seeking to become associated with such a municipal securities dealer;

(2) A bank which is a government securities broker or dealer, or any person associated with such government securities broker or dealer; or

(3) A bank which is a transfer agent, or any person associated or seeking to become associated with such transfer agent.

(b) All proceedings under this subpart must be commenced, and the notice of assessment must be filed, on a public basis, unless otherwise ordered by the Comptroller. Pursuant to § 19.33(a), any request for a private hearing must be filed within 20 days of service of the notice.

Subpart G - Cease-and-Desist Authority Under the Securities Laws

§ 19.150 Scope.

(a) Except as provided in this subpart, subpart A of this part applies to proceedings by the Comptroller to determine whether, pursuant to authority contained in sections 12(i) and 21C of the Exchange Act (15 U.S.C. 78*l*(i) and 78u-3), the Comptroller may initiate cease-and-desist proceedings against a national bank for violations of sections 12, 13, 14(a), 14(c), 14(d), 14(f), and 16 of the Exchange Act or regulations or rules issued thereunder (15 U.S.C. 78*l,* 78m, 78n(a), 78n(c), 78n(d), 78n(f), and 78p) .

(b) All proceedings under this subpart must be commenced, and the notice of charges must be filed, on a public basis, unless otherwise ordered by the Comptroller. Pursuant to § 19.33(a), any request for a private hearing must be filed within 20 days of service of the notice.

Subpart H - Change in Bank Control

§ 19.160 Scope.

(a) Section 7(j) of the FDIA (12 U.S.C. 1817(j)) provides that no person may acquire control of an insured depository institution unless the appropriate Federal bank regulatory agency has been given prior written notice of the proposed acquisition. If, after investigating and soliciting comment on the proposed acquisition, the agency decides that the acquisition should be disapproved, the agency shall mail a written notification to the proposed acquiring person in writing within three days of the decision. The party can then request an agency hearing on the proposed acquisition. The OCC's procedures for reviewing notices of proposed acquisitions in change-in-control proceedings are set forth in § 5.50 of this chapter.

(b) Unless otherwise provided in this subpart, the rules in subpart A of this part set forth the procedures applicable to requests for OCC hearings.

§ 19.161 Notice of disapproval and hearing initiation.

(a) *Notice of disapproval.* The OCC's written disapproval of a proposed acquisition of control of a national bank must:

(1) Contain a statement of the basis for the disapproval; and

(2) Indicate that the filer may request a hearing.

(b) *Hearing request.* Following receipt of a notice of disapproval, a filer may request a hearing on the proposed acquisition. A hearing request must:

(1) Be in writing; and

(2) Be filed with the Hearing Clerk of the OCC within ten days after service on the filer of the notice of disapproval. If a filer fails to request a hearing with a timely written request, the notice of disapproval constitutes a final and unappealable order.

(c) *Hearing order.* Following receipt of a hearing request, the Comptroller shall issue, within 20 days, an order that sets forth:

(1) The legal authority for the proceeding and for the OCC's jurisdiction over the proceeding;

(2) The matters of fact or law upon which the disapproval is based; and

(3) The requirement for filing an answer to the hearing order with OFIA within 20 days after service of the hearing order.

(d) *Answer.* An answer to a hearing order must specifically deny those portions of the order that are disputed. Those portions of the order that the filer does not specifically deny are deemed admitted by the filer. Any hearing under this subpart is limited to those portions of the order that are specifically denied.

(e) *Effect of failure to answer.* Failure of a filer to file an answer within 20 days after service of the hearing order constitutes a waiver of the filer's right to appear and contest the allegations in the hearing order. If a filer does not file a timely answer, enforcement counsel may file a motion for entry of an order of default. Upon a finding that no good cause has been shown for the failure to file a timely answer, the administrative law judge shall file with the Comptroller a recommended decision containing the findings and the relief sought in the hearing order. Any final order issued by the Comptroller based upon a filer's failure to answer is deemed to be an order issued upon consent and is a final and unappealable order.

Subpart I - Discovery Depositions and Subpoenas

§ 19.170 Discovery depositions.

(a) *General rule.* In any proceeding instituted under or subject to the provisions of subpart A of this part, a party may take the deposition of an expert, or of a person, including another party, who has direct knowledge of matters that are non-privileged, relevant, and material to the proceeding, and where there is need for the deposition. The deposition of experts shall be limited to those experts who are expected to testify at the hearing.

(b) *Notice.* A party desiring to take a deposition shall give reasonable notice in writing to the deponent and to every other party to the proceeding. The notice must state the time and place for taking the deposition, and the name and address of the person to be deposed.

(c) *Time limits.* A party may take depositions at any time after the commencement of the proceeding, but no later than ten days before the scheduled hearing date, except with permission of the administrative law judge for good cause shown.

(d) *Conduct of the deposition.* The witness must be duly sworn, and each party will have the right to examine the witness with respect to all non-privileged, relevant, and material matters of which the witness has factual, direct, and personal knowledge. Objections to questions or exhibits must be in short form and must state the grounds for the objection. Failure to object to questions or exhibits is not a waiver except where the grounds for the objection might have been avoided if the objection had been timely presented.

(e) *Recording the testimony* - (1) *Generally.* The party taking the deposition must have a certified court reporter record the witness's testimony:

(i) By stenotype machine or electronic sound recording device;

(ii) Upon agreement of the parties, by any other method; or

(iii) For good cause and with leave of the administrative law judge, by any other method.

(2) *Cost.* The party taking the deposition must bear the cost of the recording and transcribing the witness's testimony.

(3) *Transcript.* Unless the parties agree that a transcription is not necessary, the court reporter must provide a transcript of the witness's testimony to the party taking the deposition and must make a copy of the transcript available to each party upon payment by that party of the cost of the copy.

(f) *Protective orders.* At any time after notice of a deposition has been given, a party may file a motion for the issuance of a protective order. Such protective order may prohibit, terminate, or limit the scope or manner of the taking of a deposition. The administrative law judge shall grant such protective order upon a showing of sufficient grounds, including that the deposition:

(1) Is unreasonable, oppressive, excessive in scope, or unduly burdensome;

(2) Involves privileged, irrelevant, or immaterial matters;

(3) Involves unwarranted attempts to pry into a party's preparation for trial; or

(4) Is being conducted in bad faith or in such manner as to unreasonably annoy, embarrass, or oppress the witness.

(g) *Fees.* Deposition witnesses, including expert witnesses, shall be paid the same expenses in the same manner as are paid witnesses in the district courts of the United States in proceedings in which the United States is a party. Expenses in accordance with this paragraph shall be paid by the party seeking to take the deposition.

§ 19.171 Deposition subpoenas.

(a) *Issuance.* At the request of a party, the administrative law judge shall issue a subpoena requiring the attendance of a witness at a discovery deposition under paragraph (a) of this section. The attendance of a witness may be required from any place in any state or territory that is subject to the jurisdiction of the United States or as otherwise permitted by law.

(b) *Service* - (1) *Methods of service.* The party requesting the subpoena must serve it on the person named therein, or on that person's counsel, by any of the methods identified in § 19.11(d).

(2) *Proof of service.* The party serving the subpoena must file proof of service with the administrative law judge.

(c) *Motion to quash.* A person named in a subpoena may file a motion to quash or modify the subpoena. A statement of the reasons for the motion must accompany it and a copy of the motion must be served on the party which requested the subpoena. The motion must be made prior to the time for compliance specified in the subpoena and not more than ten days after the date of service of the subpoena, or if the subpoena is served within 15 days of the hearing, within five days after the date of service.

(d) *Enforcement of deposition subpoena.* Enforcement of a deposition subpoena shall be in accordance with the procedures of § 19.27(d).

Subpart J - Formal Investigations

§ 19.180 Scope.

This subpart and § 19.8 apply to formal investigations initiated by order of the Comptroller or the Comptroller's delegate and pertain to the exercise of powers specified

in 12 U.S.C. 481, 1818(n) and 1820(c), and section 21 of the Exchange Act (15 U.S.C. 78u). This subpart does not restrict or in any way affect the authority of the Comptroller to conduct examinations into the affairs or ownership of banks and their affiliates.

§ 19.181 Confidentiality of formal investigations.

Information or documents obtained in the course of a formal investigation are confidential and may be disclosed only in accordance with the provisions of part 4 of this chapter.

§ 19.182 Order to conduct a formal investigation.

A formal investigation begins with the issuance of an order signed by the Comptroller or the Comptroller's delegate. The order must designate the person or persons who will conduct the investigation. Such persons are authorized, among other things, to issue subpoenas duces tecum, to administer oaths, and receive affirmations as to any matter under investigation by the Comptroller. Upon application and for good cause shown, the Comptroller may limit, modify, or withdraw the order at any stage of the proceedings.

§ 19.183 Rights of witnesses.

(a) Any person who is compelled or requested to furnish testimony, documentary evidence, or other information with respect to any matter under formal investigation shall, on request, be shown the order initiating the investigation.

(b) Any person who, in a formal investigation, is compelled to appear and testify, or who appears and testifies by request or permission of the Comptroller, may be accompanied, represented, and advised by counsel. The right to be accompanied,

represented, and advised by counsel means the right of a person testifying to have an attorney present at all times while testifying and to have the attorney -

(1) Advise the person before, during and after the conclusion of testimony;

(2) Question the person briefly at the conclusion of testimony to clarify any of the answers given; and

(3) Make summary notes during the testimony solely for the use of the person.

(c) Any person who has given or will give testimony and counsel representing the person may be excluded from the proceedings during the taking of testimony of any other witness.

(d) Any person who is compelled to give testimony is entitled to inspect any transcript that has been made of the testimony but may not obtain a copy if the Comptroller's representatives conducting the proceedings have cause to believe that the contents should not be disclosed pending completion of the investigation.

(e) Any designated representative conducting an investigative proceeding shall report to the Comptroller any instances where a person has been guilty of dilatory, obstructionist or insubordinate conduct during the course of the proceeding or any other instance involving a violation of this part. The Comptroller may take such action as the circumstances warrant, including exclusion of the offending individual or individuals from participation in the proceedings.

§ 19.184 Service of subpoena and payment of witness expenses.

(a) *Methods of service.* Service of a subpoena may be made by any of the methods identified in § 19.11(d).

(b) *Expenses.* A witness who is subpoenaed will be paid the same expenses in the same manner as witnesses in the district courts of the United States. The expenses need not be tendered at the time a subpoena is served.

Subpart K - Parties and Representational Practice Before the OCC; Standards of Conduct

§ 19.190 Scope.

This subpart contains rules relating to parties and representational practice before the OCC. This subpart includes the imposition of sanctions by the administrative law judge, any other presiding officer appointed pursuant to subparts C and D of this part, or the Comptroller against parties or their counsel in an adjudicatory proceeding under this part. This subpart also covers other disciplinary sanctions - censure, suspension or debarment - against individuals who appear before the OCC in a representational capacity either in an adjudicatory proceeding under this part or in any other matters connected with presentations to the OCC relating to a client's rights, privileges, or liabilities. This representation includes, but is not limited to, the practice of attorneys and accountants. Employees of the OCC are not subject to disciplinary proceedings under this subpart.

§ 19.191 Definitions.

As used in §§ 19.190 through 19.201, the following terms shall have the meaning given in this section unless the context otherwise requires:

(a) *Practice before the OCC* includes any matters connected with presentations to the OCC or any of its officers or employees relating to a client's rights, privileges or liabilities under laws or regulations administered by the OCC. Such matters include, but are not limited to, representation of a client in an adjudicatory proceeding under this part;

the preparation of any statement, opinion or other paper or document by an attorney, accountant, or other licensed professional which is filed with, or submitted to, the OCC, on behalf of another person in, or in connection with, any application, notification, report or document; the representation of a person at conferences, hearings and meetings; and the transaction of other business before the OCC on behalf of another person. The term "practice before the OCC" does not include work prepared for a bank solely at its request for use in the ordinary course of its business.

(b) *Attorney* means any individual who is a member in good standing of the bar of the highest court of any state, possession, territory, commonwealth, of the United States or the District of Columbia.

(c) *Accountant* means any individual who is duly qualified to practice as a certified public accountant or a public accountant in any state, possession, territory, commonwealth of the United States, or the District of Columbia.

§ 19.192 Sanctions relating to conduct in an adjudicatory proceeding.

(a) *General rule.* Appropriate sanctions may be imposed when any party or person representing a party in an adjudicatory proceeding under this part has failed to comply with an applicable statute, regulation, or order, and that failure to comply:

(1) Constitutes contemptuous conduct;

(2) Materially injures or prejudices another party in terms of substantive injury, incurring additional expenses including attorney's fees, prejudicial delay, or otherwise;

(3) Is a clear and unexcused violation of an applicable statute, regulation, or order; or

(4) Unduly delays the proceeding.

(b) *Sanctions.* Sanctions which may be imposed include any one or more of the following:

(1) Issuing an order against the party;

(2) Rejecting or striking any testimony or documentary evidence offered, or other papers filed, by the party;

(3) Precluding the party from contesting specific issues or findings;

(4) Precluding the party from offering certain evidence or from challenging or contesting certain evidence offered by another party;

(5) Precluding the party from making a late filing or conditioning a late filing on any terms that are just; and

(6) Assessing reasonable expenses, including attorney's fees, incurred by any other party as a result of the improper action or failure to act.

(c) *Procedure for imposition of sanctions.* (1) Upon the motion of any party, or on his or her own motion, the administrative law judge or other presiding officer may impose sanctions in accordance with this section. The administrative law judge or other presiding officer shall submit to the Comptroller for final ruling any sanction entering a final order that determines the case on the merits.

(2) No sanction authorized by this section, other than refusal to accept late filings, shall be imposed without prior notice to all parties and an opportunity for any party against whom sanctions would be imposed to be heard. Such opportunity to be heard may be on such notice, and the response may be in such form as the administrative law judge or other presiding officer directs. The administrative law judge or other presiding officer may limit the opportunity to be heard to an opportunity of a party or a party's

representative to respond orally immediately after the act or inaction covered by this section is noted by the administrative law judge or other presiding officer.

(3) Requests for the imposition of sanctions by any party, and the imposition of sanctions, are subject to interlocutory review pursuant to § 19.25 in the same manner as any other ruling.

(d) *Section not exclusive.* Nothing in this section shall be read as precluding the administrative law judge or other presiding officer or the Comptroller from taking any other action, or imposing any restriction or sanction, authorized by applicable statute or regulation.

§ 19.193 Censure, suspension or debarment.

The Comptroller may censure an individual or suspend or debar such individual from practice before the OCC if he or she is incompetent in representing a client's rights or interest in a significant matter before the OCC; or engages, or has engaged, in disreputable conduct; or refuses to comply with the rules and regulations in this part; or with intent to defraud in any manner, willfully and knowingly deceives, misleads, or threatens any client or prospective client. The suspension or debarment of an individual may be initiated only upon a finding by the Comptroller that the basis for the disciplinary action is sufficiently egregious.

§ 19.194 Eligibility of attorneys and accountants to practice.

(a) *Attorneys.* Any attorney who is qualified to practice as an attorney and is not currently under suspension or debarment pursuant to this subpart may practice before the OCC.

(b) *Accountants.* Any accountant who is qualified to practice as a certified public accountant or public accountant and is not currently under suspension or debarment by the OCC may practice before the OCC.

§ 19.195 Incompetence.

Incompetence in the representation of a client's rights and interests in a significant matter before the OCC is grounds for suspension or debarment. The term “incompetence” encompasses conduct that reflects a lack of the knowledge, judgment and skill that a professional would ordinarily and reasonably be expected to exercise in adequately representing the rights and interests of a client. Such conduct includes, but is not limited to:

(a) Handling a matter which the individual knows or should know that he or she is not competent to handle, without associating with a professional who is competent to handle such matter.

(b) Handling a matter without adequate preparation under the circumstances.

(c) Neglect in a matter entrusted to him or her.

§ 19.196 Disreputable conduct.

Disreputable conduct for which an individual may be censured, debarred, or suspended from practice before the OCC includes:

(a) Willfully or recklessly violating or willfully or recklessly aiding and abetting the violation of any provision of the Federal banking or applicable securities laws or the rules and regulations thereunder or conviction of any offense involving dishonesty or breach of trust;

(b) Knowingly or recklessly giving false or misleading information, or participating in any way in the giving of false information to the OCC or any officer or employee thereof, or to any tribunal authorized to pass upon matters administered by the OCC in connection with any matter pending or likely to be pending before it. The term "information" includes facts or other statements contained in testimony, financial statements, applications for enrollment, affidavits, declarations, or any other document or written or oral statement;

(c) Directly or indirectly attempting to influence, or offering or agreeing to attempt to influence, the official action of any officer or employee of the OCC by the use of threats, false accusations, duress or coercion, by the offer of any special inducement or promise of advantage or by the bestowing of any gift, favor, or thing of value.

(d) Disbarment or suspension from practice as an attorney, or debarment or suspension from practice as a certified public accountant or public accountant, by any duly constituted authority of any state, possession, or commonwealth of the United States, or the District of Columbia for the conviction of a felony or misdemeanor involving moral turpitude in matters relating to the supervisory responsibilities of the OCC, where the conviction has not been reversed on appeal.

(e) Knowingly aiding or abetting another individual to practice before the OCC during that individual's period of suspension, debarment, or ineligibility.

(f) Contemptuous conduct in connection with practice before the OCC, and knowingly making false accusations and statements, or circulating or publishing malicious or libelous matter.

(g) Suspension, debarment or removal from practice before the Board of Governors, the FDIC, the OTS, the Securities and Exchange Commission, the Commodity Futures Trading Commission, or any other Federal or state agency; and

(h) Willful violation of any of the regulations contained in this part.

§ 19.197 Initiation of disciplinary proceeding.

(a) *Receipt of information.* An individual, including any employee of the OCC, who has reason to believe that an individual practicing before the OCC in a representative capacity has engaged in any conduct that would serve as a basis for censure, suspension or debarment under § 19.192, may make a report thereof and forward it to the OCC or to such person as may be delegated responsibility for such matters by the Comptroller.

(b) *Censure without formal proceeding.* Upon receipt of information regarding an individual's qualification to practice before the OCC, the Comptroller or the Comptroller's delegate may, after giving the individual notice and opportunity to respond, censure such individual.

(c) *Institution of formal disciplinary proceeding.* When the Comptroller has reason to believe that any individual who practices before the OCC in a representative capacity has engaged in conduct that would serve as a basis for censure, suspension or debarment under § 19.192, the Comptroller may, after giving the individual notice and opportunity to respond, institute a formal disciplinary proceeding against such individual. The proceeding will be conducted pursuant to § 19.199 and initiated by a complaint which names the individual as a respondent and is signed by the Comptroller or the Comptroller's delegate. Except in cases of willfulness, or when time, the nature of the proceeding, or the public interest do not permit, a proceeding under this section may not

be commenced until the respondent has been informed, in writing, of the facts or conduct which warrant institution of a proceeding and the respondent has been accorded the opportunity to comply with all lawful requirements or take whatever action may be necessary to remedy the conduct that is the basis for the commencement of the proceeding.

§ 19.198 Conferences.

(a) *General.* The Comptroller may confer with a proposed respondent concerning allegations of misconduct or other grounds for censure, debarment or suspension, regardless of whether a proceeding for debarment or suspension has been commenced. If a conference results in a stipulation in connection with a proceeding in which the individual is the respondent, the stipulation may be entered in the record at the request of either party to the proceeding.

(b) *Resignation or voluntary suspension.* In order to avoid the institution of, or a decision in, a debarment or suspension proceeding, a person who practices before the OCC may consent to suspension from practice. At the discretion of the Comptroller, the individual may be suspended or debarred in accordance with the consent offered.

§ 19.199 Proceedings under this subpart.

Any hearing held under this subpart is held before an administrative law judge pursuant to procedures set forth in subpart A of this part. The Comptroller or the Comptroller's delegate shall appoint a person to represent the OCC in the hearing. Any person having prior involvement in the matter which is the basis for the suspension or debarment proceeding is disqualified from representing the OCC in the hearing. The hearing will be closed to the public unless the Comptroller on his or her own initiative, or

on the request of a party, otherwise directs. The administrative law judge shall issue a recommended decision to the Comptroller who shall issue the final decision and order. The Comptroller may censure, debar or suspend an individual, or take such other disciplinary action as the Comptroller deems appropriate.

§ 19.200 Effect of suspension, debarment or censure.

(a) *Debarment.* If the final order against the respondent is for debarment, the individual may not practice before the OCC unless otherwise permitted to do so by the Comptroller.

(b) S*uspension.* If the final order against the respondent is for suspension, the individual may not practice before the OCC during the period of suspension.

(c) *Censure.* If the final order against the respondent is for censure, the individual may be permitted to practice before the OCC, but such individual's future representations may be subject to conditions designed to promote high standards of conduct. If a written letter of censure is issued, a copy will be maintained in the OCC's files.

(d) *Notice of debarment or suspension.* Upon the issuance of a final order for suspension or debarment, the Comptroller shall give notice of the order to appropriate officers and employees of the OCC and to interested departments and agencies of the Federal government. The Comptroller or the Comptroller's delegate shall also give notice to the appropriate authorities of the state in which any debarred or suspended individual is or was licensed to practice.

§ 19.201 Petition for reinstatement.

At the expiration of the period of time designated in the order of debarment, the Comptroller may entertain a petition for reinstatement from any person debarred from

practice before the OCC. The Comptroller may grant reinstatement only if satisfied that the petitioner is likely to act in accordance with the regulations in this part, and that granting reinstatement would not be contrary to the public interest. Any request for reinstatement shall be limited to written submissions unless the Comptroller, in his or her discretion, affords the petitioner a hearing.

Subpart L - Equal Access to Justice Act

§ 19.210 Scope.

The Equal Access to Justice Act regulations applicable to formal OCC adjudicatory proceedings under this part are set forth at 31 CFR part 6.

Subpart M - Procedures for Reclassifying a Bank Based on Criteria Other Than Capital

§ 19.220 Scope.

This subpart applies to the procedures afforded to any bank that has been reclassified to a lower capital category by a notice or order issued by the OCC pursuant to section 38 of the Federal Deposit Insurance Act and this part.

§ 19.221 Reclassification of a bank based on unsafe or unsound condition or practice.

(a) *Issuance of notice of proposed reclassification* - (1) *Grounds for reclassification.* (i) Pursuant to § 6.4 of this chapter, the OCC may reclassify a well capitalized bank as adequately capitalized or subject an adequately capitalized bank or undercapitalized bank to the supervisory actions applicable to the next lower capital category if:

(A) The OCC determines that the bank is in an unsafe or unsound condition; or

(B) The OCC deems the bank to be engaging in an unsafe or unsound practice and not to have corrected the deficiency.

(ii) Any action pursuant to this paragraph (a)(1) shall hereinafter be referred to as "reclassification."

(2) *Prior notice to institution.* Prior to taking action pursuant to § 6.4 of this chapter, the OCC shall issue and serve on the bank a written notice of the OCC's intention to reclassify the bank.

(b) *Contents of notice.* A notice of intention to reclassify a bank based on unsafe or unsound condition will include:

(1) A statement of the bank's capital measures and capital levels and the category to which the bank would be reclassified;

(2) The reasons for reclassification of the bank;

(3) The date by which the bank subject to the notice of reclassification may file with the OCC a written appeal of the proposed reclassification and a request for a hearing, which shall be at least 14 calendar days from the date of service of the notice unless the OCC determines that a shorter period is appropriate in light of the financial condition of the bank or other relevant circumstances.

(c) *Response to notice of proposed reclassification.* A bank may file a written response to a notice of proposed reclassification within the time period set by the OCC. The response should include:

(1) An explanation of why the bank is not in unsafe or unsound condition or otherwise should not be reclassified;

(2) Any other relevant information, mitigating circumstances, documentation, or other evidence in support of the position of the bank or company regarding the reclassification.

(d) *Failure to file response.* Failure by a bank to file, within the specified time period, a written response with the OCC to a notice of proposed reclassification shall constitute a waiver of the opportunity to respond and shall constitute consent to the reclassification.

(e) *Request for hearing and presentation of oral testimony or witnesses.* The response may include a request for an informal hearing before the OCC under this section. If the bank desires to present oral testimony or witnesses at the hearing, the bank shall include a request to do so with the request for an informal hearing. A request to present oral testimony or witnesses shall specify the names of the witnesses and the general nature of their expected testimony. Failure to request a hearing shall constitute a waiver of any right to a hearing, and failure to request the opportunity to present oral testimony or witnesses shall constitute a waiver of any right to present oral testimony or witnesses.

(f) *Order for informal hearing.* Upon receipt of a timely written request that includes a request for a hearing, the OCC shall issue an order directing an informal hearing to commence no later than 30 days after receipt of the request, unless the OCC allows further time at the request of the bank. The hearing shall be held in Washington, DC or at such other place as may be designated by the OCC, before a presiding officer(s) designated by the OCC to conduct the hearing.

(g) *Hearing procedures.* (1) The bank shall have the right to introduce relevant written materials and to present oral argument at the hearing. The bank may introduce oral testimony and present witnesses only if expressly authorized by the OCC or the presiding officer(s). Neither the provisions of the Administrative Procedure Act (5 U.S.C. 554-557) governing adjudications required by statute to be determined on the record nor the Uniform Rules of Practice and Procedure in subpart A of this part apply to an informal hearing under this section unless the OCC orders that such procedures shall apply.

(2) The informal hearing shall be recorded, and a transcript furnished to the bank upon request and payment of the cost thereof. Witnesses need not be sworn, unless specifically requested by a party or the presiding officer(s). The presiding officer(s) may ask questions of any witness.

(3) The presiding officer(s) may order that the hearing be continued for a reasonable period (normally five business days) following completion of oral testimony or argument to allow additional written submissions to the hearing record.

(h) *Recommendation of presiding officer(s).* Within 20 calendar days following the date the hearing and the record on the proceeding are closed, the presiding officer(s) shall make a recommendation to the OCC on the reclassification.

(i) *Time for decision.* Not later than 60 calendar days after the date the record is closed or the date of the response in a case where no hearing was requested, the OCC will decide whether to reclassify the bank and notify the bank of the OCC's decision.

§ 19.222 Request for rescission of reclassification.

Any bank that has been reclassified under part 6 of this chapter and this subpart, may, upon a change in circumstances, request in writing that the OCC reconsider the reclassification, and may propose that the reclassification be rescinded and that any directives issued in connection with the reclassification be modified, rescinded, or removed. Unless otherwise ordered by the OCC, the bank shall remain subject to the reclassification and to any directives issued in connection with that reclassification while such request is pending before the OCC.

Subpart N - Order To Dismiss a Director or Senior Executive Officer

§ 19.230 Scope.

This subpart applies to informal hearings afforded to any director or senior executive officer dismissed pursuant to an order issued under 12 U.S.C. 1831o and part 6 of this chapter.

§ 19.231 Order to dismiss a director or senior executive officer.

(a) *Service of notice.* When the OCC issues and serves a directive on a bank pursuant to subpart B of part 6 of this chapter requiring the bank to dismiss from office any director or senior executive officer under section 38(f)(2)(F)(ii) of the FDI Act, the OCC shall also serve a copy of the directive, or the relevant portions of the directive where appropriate, upon the person to be dismissed.

(b) *Response to directive* - (1) *Request for reinstatement.* A director or senior executive officer who has been served with a directive under paragraph (a) of this section (Respondent) may file a written request for reinstatement. The request for reinstatement shall be filed within 10 calendar days of the receipt of the directive by the Respondent, unless further time is allowed by the OCC at the request of the Respondent.

(2) *Contents of request; informal hearing.* The request for reinstatement shall include reasons why the Respondent should be reinstated, and may include a request for an informal hearing before the OCC or its designee under this section. If the Respondent desires to present oral testimony or witnesses at the hearing, the Respondent shall include a request to do so with the request for an informal hearing. The request to present oral testimony or witnesses shall specify the names of the witnesses and the general nature of their expected testimony. Failure to request a hearing shall constitute a waiver of any right to a hearing and failure to request the opportunity to present oral testimony or witnesses shall constitute a waiver of any right or opportunity to present oral testimony or witnesses.

(3) *Effective date.* Unless otherwise ordered by the OCC, the dismissal shall remain in effect while a request for reinstatement is pending.

(c) *Order for informal hearing.* Upon receipt of a timely written request from a Respondent for an informal hearing on the portion of a directive requiring a bank to dismiss from office any director or senior executive officer, the OCC shall issue an order directing an informal hearing to commence no later than 30 days after receipt of the request, unless the Respondent requests a later date. The hearing shall be held in Washington, DC, or at such other place as may be designated by the OCC, before a presiding officer(s) designated by the OCC to conduct the hearing.

(d) *Hearing procedures.* (1) A Respondent may appear at the hearing personally or through counsel. A Respondent shall have the right to introduce relevant written materials and to present oral argument. A Respondent may introduce oral testimony and present witnesses only if expressly authorized by the OCC or the presiding officer(s).

Neither the provisions of the Administrative Procedure Act governing adjudications required by statute to be determined on the record nor the Uniform Rules of Practice and Procedure in subpart A of this part apply to an informal hearing under this section unless the OCC orders that such procedures shall apply.

(2) The informal hearing shall be recorded, and a transcript furnished to the Respondent upon request and payment of the cost thereof. Witnesses need not be sworn, unless specifically requested by a party or the presiding officer(s). The presiding officer(s) may ask questions of any witness.

(3) The presiding officer(s) may order that the hearing be continued for a reasonable period (normally five business days) following completion of oral testimony or argument to allow additional written submissions to the hearing record.

(e) *Standard for review.* A Respondent shall bear the burden of demonstrating that his or her continued employment by or service with the bank would materially strengthen the bank's ability:

(1) To become adequately capitalized, to the extent that the directive was issued as a result of the bank's capital level or failure to submit or implement a capital restoration plan; and

(2) To correct the unsafe or unsound condition or unsafe or unsound practice, to the extent that the directive was issued as a result of classification of the bank based on supervisory criteria other than capital, pursuant to section 38(g) of the FDI Act.

(f) *Recommendation of presiding officer.* Within 20 calendar days following the date the hearing and the record on the proceeding are closed, the presiding officer(s) shall

make a recommendation to the OCC concerning the Respondent's request for reinstatement with the bank.

(g) *Time for decision.* Not later than 60 calendar days after the date the record is closed or the date of the response in a case where no hearing was requested, the OCC shall grant or deny the request for reinstatement and notify the Respondent of the OCC's decision. If the OCC denies the request for reinstatement, the OCC shall set forth in the notification the reasons for the OCC's action.

Subpart O - Civil Money Penalty Adjustments

§ 19.240 Inflation adjustments.

(a) *Statutory formula to calculate inflation adjustments.* The OCC is required by statute to annually adjust for inflation the maximum amount of each civil money penalty within its jurisdiction to administer. The inflation adjustment is calculated by multiplying the maximum dollar amount of the civil money penalty for the previous calendar year by the cost-of-living inflation adjustment multiplier provided annually by the Office of Management and Budget and rounding the total to the nearest dollar.

(b) *Notice of inflation adjustments.* The OCC will publish notice in the *Federal Register* of the maximum penalties which may be assessed on an annual basis on or before January 15 of each calendar year based on the formula in paragraph (a) of this section, for penalties assessed on, or after, the date of publication of the most recent notice related to conduct occurring on, or after, November 2, 2015.

Subpart P - Removal, Suspension, and Debarment of Accountants From Performing Audit Services

§ 19.241 Scope.

This subpart, which implements section 36(g)(4) of the FDIA (12 U.S.C. 1831m(g)(4)), provides rules and procedures for the removal, suspension, or debarment of independent public accountants and their accounting firms from performing independent audit and attestation services required by section 36 of the FDIA (12 U.S.C. 1831m) for insured national banks, insured Federal savings associations, and insured Federal branches of foreign banks.

§ 19.242 Definitions.

As used in this subpart, the following terms have the meaning given below unless the context requires otherwise:

(a) *Accounting firm* means a corporation, proprietorship, partnership, or other business firm providing audit services.

(b) *Audit services* means any service required to be performed by an independent public accountant by section 36 of the FDIA (12 U.S.C. 1831m) and 12 CFR part 363, including attestation services.

(c) *Independent public accountant (accountant)* means any individual who performs or participates in providing audit services.

§ 19.243 Removal, suspension, or debarment.

(a) *Good cause for removal, suspension, or debarment* - (1) *Individuals.* The Comptroller may remove, suspend, or debar an independent public accountant from performing audit services for insured national banks, insured Federal savings associations, or insured Federal branches of foreign banks that are subject to section 36 of the FDIA (12 U.S.C. 1831m) if, after service of a notice of intention and opportunity for hearing in the matter, the Comptroller finds that the accountant:

(i) Lacks the requisite qualifications to perform audit services;

(ii) Has knowingly or recklessly engaged in conduct that results in a violation of applicable professional standards, including those standards and conflicts of interest provisions applicable to accountants through the Sarbanes-Oxley Act of 2002, Pub. L. 107-204, 116 Stat. 745 (2002) (Sarbanes-Oxley Act), and developed by the Public Company Accounting Oversight Board and the Securities and Exchange Commission;

(iii) Has engaged in negligent conduct in the form of:

(A) A single instance of highly unreasonable conduct that results in a violation of applicable professional standards in circumstances in which an accountant knows, or should know, that heightened scrutiny is warranted; or

(B) Repeated instances of unreasonable conduct, each resulting in a violation of applicable professional standards, that indicate a lack of competence to perform audit services;

(iv) Has knowingly or recklessly given false or misleading information, or knowingly or recklessly participated in any way in the giving of false or misleading information, to the OCC or any officer or employee of the OCC;

(v) Has engaged in, or aided and abetted, a material and knowing or reckless violation of any provision of the Federal banking or securities laws or the rules and regulations thereunder, or any other law;

(vi) Has been removed, suspended, or debarred from practice before any Federal or State agency regulating the banking, insurance, or securities industries, other than by an action listed in § 19.244, on grounds relevant to the provision of audit services; or

(vii) Is suspended or debarred for cause from practice as an accountant by any duly constituted licensing authority of any State, possession, commonwealth, or the District of Columbia.

(2) *Accounting firms.* If the Comptroller determines that there is good cause for the removal, suspension, or debarment of a member or employee of an accounting firm under paragraph (a)(1) of this section, the Comptroller also may remove, suspend, or debar such firm or one or more offices of such firm. In considering whether to remove, suspend, or debar a firm or an office thereof, and the term of any sanction against a firm under this section, the Comptroller may consider, for example:

(i) The gravity, scope, or repetition of the act or failure to act that constitutes good cause for the removal, suspension, or debarment;

(ii) The adequacy of, and adherence to, applicable policies, practices, or procedures for the accounting firm's conduct of its business and the performance of audit services;

(iii) The selection, training, supervision, and conduct of members or employees of the accounting firm involved in the performance of audit services;

(iv) The extent to which managing partners or senior officers of the accounting firm have participated, directly, or indirectly through oversight or review, in the act or failure to act; and

(v) The extent to which the accounting firm has, since the occurrence of the act or failure to act, implemented corrective internal controls to prevent its recurrence.

(3) *Limited scope orders.* An order of removal, suspension (including an immediate suspension), or debarment may, at the discretion of the Comptroller, be made

applicable to a particular insured national bank, insured Federal savings association, or insured Federal branch of a foreign bank or class of insured national banks, insured Federal savings associations, or insured Federal branches of foreign banks.

(4) *Remedies not exclusive.* The remedies provided in this subpart are in addition to any other remedies the OCC may have under any other applicable provisions of law, rule, or regulation.

(b) *Proceedings to remove, suspend, or debar* - (1) *Initiation of formal removal, suspension, or debarment proceedings.* The Comptroller may initiate a proceeding to remove, suspend, or debar an accountant or accounting firm from performing audit services by issuing a written notice of intention to take such action that names the individual or firm as a respondent and describes the nature of the conduct that constitutes good cause for such action.

(2) *Hearings under paragraph (b) of this section.* An accountant or firm named as a respondent in the notice issued under paragraph (b)(1) of this section may request a hearing on the allegations in the notice. Hearings conducted under this paragraph will be conducted in the same manner as other hearings under the Uniform Rules of Practice and Procedure (12 CFR part 19, subpart A), subject to the limitations in § 19.243(c)(4).

(c) *Immediate suspension from performing audit services* - (1) *In general.* If the Comptroller serves a written notice of intention to remove, suspend, or debar an accountant or accounting firm from performing audit services, the Comptroller may, with due regard for the public interest and without a preliminary hearing, immediately suspend such accountant or firm from performing audit services for insured national banks,

insured Federal savings associations, or insured Federal branches of foreign banks, if the Comptroller:

(i) Has a reasonable basis to believe that the accountant or firm has engaged in conduct (specified in the notice served on the accountant or firm under paragraph (b) of this section) that would constitute grounds for removal, suspension, or debarment under paragraph (a) of this section;

(ii) Determines that immediate suspension is necessary to avoid immediate harm to an insured depository institution or its depositors or to the depository system as a whole; and

(iii) Serves such respondent with written notice of the immediate suspension.

(2) *Procedures.* An immediate suspension notice issued under this paragraph will become effective upon service. Such suspension will remain in effect until the date the Comptroller dismisses the charges contained in the notice of intention, or the effective date of a final order of removal, suspension, or debarment issued by the Comptroller to the respondent.

(3) *Petition for stay.* Any accountant or firm immediately suspended from performing audit services in accordance with paragraph (c)(1) of this section may, within 10 calendar days after service of the notice of immediate suspension, file with the Office of the Comptroller of the Currency, Washington, DC 20219 for a stay of such immediate suspension. If no petition is filed within 10 calendar days, the right to a petition is waived and the immediate suspension remains in effect pursuant to paragraph (c)(2).

(4) *Hearing on petition.* Upon receipt of a stay petition, the Comptroller will designate a presiding officer who will fix a place and time (not more than 10 calendar

days after receipt of the petition, unless further time is allowed by the presiding officer at the request of petitioner) at which the immediately suspended party may appear, personally or through counsel, to submit written materials and oral argument. Any OCC employee engaged in investigative or prosecuting functions for the OCC in a case may not, in that or a factually related case, serve as a presiding officer or participate or advise in the decision of the presiding officer or of the OCC, except as witness or counsel in the proceeding. In the sole discretion of the presiding officer, upon a specific showing of compelling need, oral testimony of witnesses may also be presented. In hearings held pursuant to this paragraph there will be no discovery and the provisions of §§ 19.6 through 19.12, 19.16, and 19.21 of this part apply.

(5) *Decision on petition.* Within 30 calendar days after the hearing, the presiding officer will issue a decision. The presiding officer will grant a stay upon a demonstration that a substantial likelihood exists of the respondent's success on the issues raised by the notice of intention and that, absent such relief, the respondent will suffer immediate and irreparable injury, loss, or damage. In the absence of such a demonstration, the presiding officer will notify the parties that the immediate suspension will be continued pending the completion of the administrative proceedings pursuant to the notice.

(6) *Review of presiding officer's decision.* The parties may seek review of the presiding officer's decision by filing a petition for review with the presiding officer within 10 calendar days after service of the decision. Replies must be filed within 10 calendar days after the petition filing date. Upon receipt of a petition for review and any reply, the presiding officer will promptly certify the entire record to the Comptroller. Within 60 calendar days of the presiding officer's certification, the Comptroller will issue

an order notifying the affected party whether or not the immediate suspension should be continued or reinstated. The order will state the basis of the Comptroller's decision.

§ 19.244 Automatic removal, suspension, or debarment.

(a) An independent public accountant or accounting firm may not perform audit services for insured national banks, insured Federal savings associations, or insured Federal branches of foreign banks if the accountant or firm:

(1) Is subject to a final order of removal, suspension, or debarment (other than a limited scope order) issued by the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, or the former Office of Thrift Supervision under section 36 of the FDIA (12 U.S.C. 1831m).

(2) Is subject to a temporary suspension or permanent revocation of registration or a temporary or permanent suspension or bar from further association with any registered public accounting firm issued by the Public Company Accounting Oversight Board or the Securities and Exchange Commission under sections 105(c)(4)(A) or (B) of the Sarbanes-Oxley Act (15 U.S.C. 7215(c)(4)(A) or (B)); or

(3) Is subject to an order of suspension or denial of the privilege of appearing or practicing before the Securities and Exchange Commission.

(b) Upon written request, the Comptroller, for good cause shown, may grant written permission to such accountant or firm to perform audit services for insured national banks, insured Federal savings associations, or insured Federal branches of foreign banks. The request must contain a concise statement of the action requested. The Comptroller may require the applicant to submit additional information.

§ 19.245 Notice of removal, suspension, or debarment.

(a) *Notice to the public.* Upon the issuance of a final order for removal, suspension, or debarment of an independent public accountant or accounting firm from providing audit services, the Comptroller will make the order publicly available and provide notice of the order to the other Federal banking agencies.

(b) *Notice to the Comptroller by accountants and firms.* An accountant or accounting firm that provides audit services to a insured national bank, insured Federal savings association, or insured Federal branch of a foreign bank must provide the Comptroller with written notice of:

(1) Any currently effective order or other action described in § 19.243(a)(1)(vi) through (vii) or § 19.244(a)(2) and (3); and

(2) Any currently effective action by the Public Company Accounting Oversight Board under sections 105(c)(4)(C) or (G) of the Sarbanes-Oxley Act (15 U.S.C. 7215(c)(4)(C) or (G)).

(c) *Timing of notice.* Written notice required by this paragraph must be given no later than 15 calendar days following the effective date of an order or action, or 15 calendar days before an accountant or firm accepts an engagement to provide audit services, whichever date is earlier.

§ 19.246 Petition for reinstatement.

(a) *Form of petition.* Unless otherwise ordered by the Comptroller, a petition for reinstatement by an independent public accountant, an accounting firm, or an office of a firm that was removed, suspended, or debarred under § 19.243 may be made in writing at any time. The request must contain a concise statement of the action requested. The Comptroller may require the applicant to submit additional information.

(b) *Procedure.* A petitioner for reinstatement under this section may, in the sole discretion of the Comptroller, be afforded a hearing. The accountant or firm bears the burden of going forward with a petition and proving the grounds asserted in support of the petition. In reinstatement proceedings, the person seeking reinstatement bears the burden of going forward with an application and proving the grounds asserted in support of the application. The Comptroller may, in his sole discretion, direct that any reinstatement proceeding be limited to written submissions. The removal, suspension, or debarment will continue until the Comptroller, for good cause shown, has reinstated the petitioner or until the suspension period has expired. The filing of a petition for reinstatement will not stay the effectiveness of the removal, suspension, or debarment of an accountant or firm.

PART 108 - REMOVALS, SUSPENSIONS, AND PROHIBITIONS WHERE A CRIME IS CHARGED OR PROVEN

Authority: 12 U.S.C. 1464, 1818, 5412(b)(2)(B).

§ 108.1 Scope.

The rules in this part apply to hearings, which are exempt from the adjudicative provisions of the Administrative Procedure Act, afforded to any officer, director, or other person participating in the conduct of the affairs of a Federal savings association, Federal savings association subsidiary, or affiliate service corporation, where such person has been suspended or removed from office or prohibited from further participation in the conduct of the affairs of one of the aforementioned entities by a Notice or Order served by the OCC upon the grounds set forth in section 8(g) of the Federal Deposit Insurance Act, (12 U.S.C. 1818(g)).

§ 108.2 Definitions.

As used in this part -

(a) The term *OCC* means the Office of the Comptroller of the Currency.

(b) [Reserved]

(c) The term *Notice* means a Notice of Suspension or Notice of Prohibition issued by the OCC pursuant to section 8(g) of the Federal Deposit Insurance Act.

(d) The term *Order* means an Order of Removal or Order of Prohibition issued by the OCC pursuant to section 8(g) of the Federal Deposit Insurance Act.

(e) The term *association* means a Federal savings association within the meaning of section 2(5) of the Home Owners' Loan Act of 1933, as amended, 12 U.S.C. 1462(5) ("HOLA"), Federal savings association subsidiary and an affiliate service corporation within the meaning of section 8(b)(8) of the Federal Deposit Insurance Act, as amended, 12 U.S.C. 1818(b)(8) ("FDIA").

(f) The term *subject individual* means a person served with a Notice or Order.

(g) The term *petitioner* means a subject individual who has filed a petition for informal hearing under this part.

§ 108.3 Issuance of Notice or Order.

(a) The OCC may issue and serve a Notice upon an officer, director, or other person participating in the conduct of the affairs of an association, where the individual is charged in any information, indictment, or complaint with the commission of or participation in a crime involving dishonesty or breach of trust that is punishable by imprisonment for a term exceeding one year under state or Federal law, if the OCC, upon due deliberation, determines that continued service or participation by the individual may

pose a threat to the interests of the association's depositors or may threaten to impair public confidence in the association. The Notice shall remain in effect until the information, indictment, or complaint is finally disposed of or until terminated by the OCC.

(b) The OCC may issue and serve an Order upon a subject individual against whom a judgment of conviction, or an agreement to enter a pretrial diversion or other similar program has been rendered, where such judgment is not subject to further appellate review, and the OCC, upon the deliberation, has determined that continued service or participation by the subject individual may pose a threat to the interests of the association's depositors or may threaten to impair public confidence in the association.

§ 108.4 Contents and service of the Notice or Order.

(a) The Notice or Order shall set forth the basis and facts in support of the OCC's issuance of such Notice or Order, and shall inform the subject individual of his right to a hearing, in accordance with this part, for the purpose of determining whether the Notice or Order should be continued, terminated, or otherwise modified.

(b) The OCC shall serve a copy of the Notice or Order upon the subject individual and the related association in the manner set forth in § 109.11 of this chapter.

(c) Upon receipt of the Notice or Order, the subject individual shall immediately comply with the requirements thereof.

§ 108.5 Petition for hearing.

(a) To obtain a hearing, the subject individual must file two copies of a petition with the OCC within 30 days of being served with the Notice or Order.

(b) The petition filed under this section shall admit or deny specifically each allegation in the Notice or Order, unless the petitioner is without knowledge or information, in which case the petition shall so state and the statement shall have the effect of a denial. Any allegation not denied shall be deemed to be admitted. When a petitioner intends in good faith to deny only a part of or to qualify an allegation, he shall specify so much of it as is true and shall deny only the remainder.

(c) The petition shall state whether the petitioner is requesting termination or modification of the Notice or Order, and shall state with particularity how the petitioner intends to show that his continued service to or participation in the conduct of the affairs of the association would not, or is not likely to, pose a threat to the interests of the association's depositors or to impair public confidence in the association.

§ 108.6 Initiation of hearing.

(a) Within 10 days of the filing of a petition for hearing, the OCC shall notify the petitioner of the time and place fixed for hearing, and it shall designate one or more OCC employees to serve as presiding officer.

(b) The hearing shall be scheduled to be held no later than 30 days from the date the petition was filed, unless the time is extended at the request of the petitioner.

(c) A petitioner may appear personally or through counsel, but if represented by counsel, said counsel is required to comply with § 109.6 of this chapter.

(d) A representative(s) of the OCC's Enforcement Division also may attend the hearing and participate therein as a party.

§ 108.7 Conduct of hearings.

(a) Hearings provided by this section are not subject to the adjudicative provisions of the Administrative Procedure Act (5 U.S.C. 554-557). The presiding officer is, however, authorized to exercise all of the powers enumerated in § 109.5 of this chapter.

(b) Witnesses may be presented, within time limits specified by the presiding officer, provided that at least 10 days prior to the hearing date, the party presenting the witnesses furnishes the presiding officer and the opposing party with a list of such witnesses and a summary of the proposed testimony. However, the requirement for furnishing such a witness list and summary of testimony shall not apply to the presentation of rebuttal witnesses. The presiding officer may ask questions of any witness, and each party shall have an opportunity to cross-examine any witness presented by an opposing party.

(c) Upon the request of either the petitioner or a representative of the Enforcement Division, the record shall remain open for a period of 5 business days following the hearing, during which time the parties may make any additional submissions for the record. Thereafter, the record shall be closed.

(d) Following the introduction of all evidence, the petitioner and the representative of the Enforcement Division shall have an opportunity for oral argument; however, the parties may jointly waive the right to oral argument, and, in lieu thereof, elect to submit written argument.

(e) All oral testimony and oral argument shall be recorded, and transcripts made available to the petitioner upon payment of the cost thereof. A copy of the transcript shall be sent directly to the presiding officer, who shall have authority to correct the record *sua sponte* or upon the motion of any party.

(f) The parties may, in writing, jointly waive an oral hearing and instead elect a hearing upon a written record in which all evidence and argument would be submitted to the presiding officer in documentary form and statements of individuals would be made by affidavit.

§ 108.8 Default.

If the subject individual fails to file a petition for a hearing, or fails to appear at a hearing, either in person or by attorney, or fails to submit a written argument where oral argument has been waived pursuant to § 108.7(d) or (f) of this part, the Notice shall remain in effect until the information, indictment, or complaint is finally disposed of and the Order shall remain in effect until terminated by the OCC.

§ 108.9 Rules of evidence.

(a) Formal rules of evidence shall not apply to a hearing, but the presiding officer may limit the introduction of irrelevant, immaterial, or unduly repetitious evidence.

(b) All matters officially noticed by the presiding officer shall appear on the record.

§ 108.10 Burden of persuasion.

The petitioner has the burden of showing, by a preponderance of the evidence, that his or her continued service to or participation in the conduct of the affairs of the association does not, or is not likely to, pose a threat to the interests of the association's depositors or threaten to impair public confidence in the association.

§ 108.11 Relevant considerations.

(a) In determining whether the petitioner has shown that his or her continued service to or participation in the conduct of the affairs of the association would not, or is

not likely to, pose a threat to the interests of the association's depositors or threaten to impair public confidence in the association, in order to decide whether the Notice or Order should be continued, terminated, or otherwise modified, the OCC will consider:

(1) The nature and extent of the petitioner's participation in the affairs of the association;

(2) The nature of the offense with which the petitioner has been charged;

(3) The extent of the publicity accorded the indictment and trial; and

(4) Such other relevant factors as may be entered on the record.

(b) When considering a request for the termination or modification of a Notice, the OCC will not consider the ultimate guilt or innocence of the petitioner with respect to the criminal charge that is outstanding.

(c) When considering a request for the termination or modification of an Order which has been issued following a final judgment of conviction against a subject individual, the OCC will not collaterally review such final judgment of conviction.

§ 108.12 Proposed findings and conclusions and recommended decision.

(a) Within 30 days after completion of oral argument or the submission of written argument where oral argument has been waived, the presiding officer shall file with and certify to the OCC for decision the entire record of the hearing, which shall include a recommended decision, the Notice or Order, and all other documents filed in connection with the hearing.

(b) The recommended decision shall contain:

(1) A statement of the issue(s) presented,

(2) A statement of findings and conclusions, and the reasons or basis therefor, on all material issues of fact, law, or discretion presented on the record, and

(3) An appropriate recommendation as to whether the suspension, removal, or prohibition should be continued, modified, or terminated.

§ 108.13 Decision of the OCC.

(a) Within 30 days after the recommended decision has been certified to the OCC, the OCC shall issue a final decision.

(b) The OCC's final decision shall contain a statement of the basis therefor. The OCC may satisfy this requirement where it adopts the recommended decision of the presiding officer upon finding that the recommended decision satisfies the requirements of § 109.38 of this chapter.

(c) The OCC shall serve upon the petitioner and the representative of the Enforcement Division a copy of the OCC's final decision and the related recommended decision.

§ 108.14 Miscellaneous.

The provisions of §§ 109.10, 109.11, and 109.12 of this chapter shall apply to proceedings under this part.

PART 109 - RULES OF PRACTICE AND PROCEDURE IN ADJUDICATORY PROCEEDINGS

Authority: 5 U.S.C. 504, 554-557; 12 U.S.C. 1464, 1467, 1467a, 1468, 1817, 1818, 1820(k), 1829(e), 1832, 1884, 1972, 3349, 4717, 5412(b)(2)(B); 15 U.S.C. 78(l), 78o-5, 78u-2, 1639e; 28 U.S.C. 2461 note; 31 U.S.C. 5321; and 42 U.S.C. 4012a.

Subpart A - Uniform Rules of Practice and Procedure

§ 109.1 Scope.

This subpart prescribes Uniform Rules of practice and procedure with regard to Federal savings associations applicable to adjudicatory proceedings as to which hearings on the record are provided for by the following statutory provisions:

(a) Cease-and-desist proceedings under section 8(b) of the Federal Deposit Insurance Act (FDIA) (12 U.S.C. 1818(b));

(b) Removal and prohibition proceedings under section 8(e) of the FDIA (12 U.S.C. 1818(e));

(c) Change-in-control proceedings under section 7(j)(4) of the FDIA (12 U.S.C. 1817(j)(4)) to determine whether the OCC should issue an order to approve or disapprove a person's proposed acquisition of an institution;

(d) Proceedings under section 15C(c)(2) of the Securities Exchange Act of 1934 (Exchange Act) (15 U.S.C. 78o-5), to impose sanctions upon any government securities broker or dealer or upon any person associated or seeking to become associated with a government securities broker or dealer for which the OCC is the appropriate agency.

(e) Assessment of civil money penalties by the OCC against institutions, institution-affiliated parties, and certain other persons for which it is the appropriate agency for any violation of:

(1) Section 5 of the Home Owners' Loan Act (HOLA) or any regulation or order issued thereunder, pursuant to 12 U.S.C. 1464 (d), (s) and (v);

(2) Section 9 of the HOLA or any regulation or order issued thereunder, pursuant to 12 U.S.C. 1467(d);

(3) Section 10 of the HOLA, pursuant to 12 U.S.C. 1467a (i) and (r);

(4) Any provisions of the Change in Bank Control Act, any regulation or order issued thereunder or certain unsafe or unsound practices or breaches of fiduciary duty, pursuant to 12 U.S.C. 1817(j)(16);

(5) Sections 22(h) and 23 of the Federal Reserve Act, or any regulation issued thereunder or certain unsafe or unsound practices or breaches of fiduciary duty, pursuant to 12 U.S.C. 1468;

(6) Certain provisions of the Exchange Act, pursuant to section 21B of the Exchange Act (15 U.S.C. 78u-2);

(7) Section 1120 of Financial Institutions Reform, Recovery and Enforcement Act of 1989 (12 U.S.C. 3349), or any order or regulation issued thereunder;

(8) The terms of any final or temporary order issued or enforceable pursuant to section 8 of the FDIA or of any written agreement executed by the OCC, the terms of any conditions imposed in writing by the OCC in connection with the grant of an application or request, certain unsafe or unsound practices or breaches of fiduciary duty, or any law or regulation not otherwise provided herein pursuant to 12 U.S.C. 1818(i)(2);

(9) Any provision of law referenced in section 102 of the Flood Disaster Protection Act of 1973 (42 U.S.C. 4012a(f)) or any order or regulation issued thereunder; and

(10) Any provision of law referenced in 31 U.S.C. 5321 or any order or regulation issued thereunder;

(f) Remedial action under section 102 of the Flood Disaster Protection Act of 1973 (42 U.S.C. 4012a(g));

(g) Proceedings under section 10(k) of the FDIA (12 U.S.C. 1820(k)) to impose penalties on senior examiners for violation of post-employment prohibitions; and

(h) This subpart also applies to all other adjudications required by statute to be determined on the record after opportunity for an agency hearing, unless otherwise specifically provided for in the Local Rules.

§ 109.2 Rules of construction.

For purposes of this subpart:

(a) Any term in the singular includes the plural, and the plural includes the singular, if such use would be appropriate;

(b) The term *counsel* includes a non-attorney representative; and

(c) Unless the context requires otherwise, a party's counsel of record, if any, may, on behalf of that party, take any action required to be taken by the party.

§ 109.3 Definitions.

For purposes of this subpart, unless explicitly stated to the contrary:

(a) *Administrative law judge* means one who presides at an administrative hearing under authority set forth at 5 U.S.C. 556.

(b) *Adjudicatory proceeding* means a proceeding conducted pursuant to these rules and leading to the formulation of a final order other than a regulation.

(c) *Decisional employee* means any member of the OCC's or administrative law judge's staff who has not engaged in an investigative or prosecutorial role in a proceeding and who may assist the OCC or the administrative law judge, respectively, in preparing orders, recommended decisions, decisions, and other documents under the Uniform Rules.

(d) *Comptroller* means the Comptroller of the Currency or his or her designee.

(e) *Enforcement Counsel* means any individual who files a notice of appearance as counsel on behalf of the OCC in an adjudicatory proceeding.

(f) *Final order* means an order issued by the OCC with or without the consent of the affected institution or the institution-affiliated party that has become final, without regard to the pendency of any petition for reconsideration or review.

(g) *Institution* includes any Federal savings association as that term is defined in section 3(b) of the FDIA (12 U.S.C. 1813(b)).

(h) *Institution-affiliated party* means any institution-affiliated party as that term is defined in section 3(u) of the FDIA (12 U.S.C. 1813(u)).

(i) *Local Rules* means those rules found in subpart B of this part.

(j) *OCC* means the Office of the Comptroller of the Currency.

(k) *Office of Financial Institution Adjudication* (OFIA) means the executive body charged with overseeing the administration of administrative enforcement proceedings for the OCC, the Board of Governors of the Federal Reserve Board, the Federal Deposit Insurance Corporation, and the National Credit Union Administration.

(l) *Party* means the OCC and any person named as a party in any notice.

(m) *Person* means an individual, sole proprietor, partnership, corporation, unincorporated association, trust, joint venture, pool, syndicate, agency or other entity or organization, including an institution as defined in paragraph (g) of this section.

(n) *Respondent* means any party other than the OCC.

(o) *Uniform Rules* means those rules in subpart A of this part.

(p) *Violation* includes any action (alone or with another or others) for or toward causing, bringing about, participating in, counseling, or aiding or abetting a violation.

§ 109.4 Authority of the Comptroller.

The Comptroller may, at any time during the pendency of a proceeding perform, direct the performance of, or waive performance of, any act which could be done or ordered by the administrative law judge.

§ 109.5 Authority of the administrative law judge.

(a) *General rule.* All proceedings governed by this part shall be conducted in accordance with the provisions of chapter 5 of title 5 of the United States Code. The administrative law judge shall have all powers necessary to conduct a proceeding in a fair and impartial manner and to avoid unnecessary delay.

(b) *Powers.* The administrative law judge shall have all powers necessary to conduct the proceeding in accordance with paragraph (a) of this section, including the following powers:

(1) To administer oaths and affirmations;

(2) To issue subpoenas, subpoenas *duces tecum,* and protective orders, as authorized by this part, and to quash or modify any such subpoenas and orders;

(3) To receive relevant evidence and to rule upon the admission of evidence and offers of proof;

(4) To take or cause depositions to be taken as authorized by this subpart;

(5) To regulate the course of the hearing and the conduct of the parties and their counsel;

(6) To hold scheduling and/or pre-hearing conferences as set forth in § 109.31 of this subpart;

(7) To consider and rule upon all procedural and other motions appropriate in an adjudicatory proceeding, provided that only the Comptroller shall have the power to grant any motion to dismiss the proceeding or to decide any other motion that results in a final determination of the merits of the proceeding;

(8) To prepare and present to the Comptroller a recommended decision as provided herein;

(9) To recuse himself or herself by motion made by a party or on his or her own motion;

(10) To establish time, place and manner limitations on the attendance of the public and the media for any public hearing; and

(11) To do all other things necessary and appropriate to discharge the duties of a presiding officer.

§ 109.6 Appearance and practice in adjudicatory proceedings.

(a) *Appearance before the OCC or an administrative law judge* - (1) *By attorneys.* Any member in good standing of the bar of the highest court of any state, commonwealth, possession, territory of the United States, or the District of Columbia may represent others before the OCC if such attorney is not currently suspended or debarred from practice before the OCC.

(2) *By non-attorneys.* An individual may appear on his or her own behalf; a member of a partnership may represent the partnership; a duly authorized officer, director, or employee of any government unit, agency, institution, corporation or

authority may represent that unit, agency, institution, corporation or authority if such officer, director, or employee is not currently suspended or debarred from practice before the OCC.

(3) *Notice of appearance.* Any individual acting as counsel on behalf of a party, including the Comptroller, shall file a notice of appearance with OFIA at or before the time that individual submits papers or otherwise appears on behalf of a party in the adjudicatory proceeding. The notice of appearance must include a written declaration that the individual is currently qualified as provided in paragraph (a)(1) or (a)(2) of this section and is authorized to represent the particular party. By filing a notice of appearance on behalf of a party in an adjudicatory proceeding, the counsel agrees and represents that he or she is authorized to accept service on behalf of the represented party and that, in the event of withdrawal from representation, he or she will, if required by the administrative law judge, continue to accept service until new counsel has filed a notice of appearance or until the represented party indicates that he or she will proceed on a *pro se* basis.

(b) *Sanctions.* Dilatory, obstructionist, egregious, contemptuous or contumacious conduct at any phase of any adjudicatory proceeding may be grounds for exclusion or suspension of counsel from the proceeding.

§ 109.7 Good faith certification.

(a) *General requirement.* Every filing or submission of record following the issuance of a notice shall be signed by at least one counsel of record in his or her individual name and shall state that counsel's address and telephone number. A party who

acts as his or her own counsel shall sign his or her individual name and state his or her address and telephone number on every filing or submission of record.

(b) *Effect of signature.* (1) The signature of counsel or a party shall constitute a certification that: the counsel or party has read the filing or submission of record; to the best of his or her knowledge, information, and belief formed after reasonable inquiry, the filing or submission of record is well-grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and the filing or submission of record is not made for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

(2) If a filing or submission of record is not signed, the administrative law judge shall strike the filing or submission of record, unless it is signed promptly after the omission is called to the attention of the pleader or movant.

(c) *Effect of making oral motion or argument.* The act of making any oral motion or oral argument by any counsel or party constitutes a certification that to the best of his or her knowledge, information, and belief formed after reasonable inquiry, his or her statements are well-grounded in fact and are warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and are not made for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

§ 109.8 Conflicts of interest.

(a) *Conflict of interest in representation.* No person shall appear as counsel for another person in an adjudicatory proceeding if it reasonably appears that such representation may be materially limited by that counsel's responsibilities to a third

person or by the counsel's own interests. The administrative law judge may take corrective measures at any stage of a proceeding to cure a conflict of interest in representation, including the issuance of an order limiting the scope of representation or disqualifying an individual from appearing in a representative capacity for the duration of the proceeding.

(b) *Certification and waiver.* If any person appearing as counsel represents two or more parties to an adjudicatory proceeding or also represents a non-party on a matter relevant to an issue in the proceeding, counsel must certify in writing at the time of filing the notice of appearance required by § 109.6(a):

(1) That the counsel has personally and fully discussed the possibility of conflicts of interest with each such party and non-party; and

(2) That each such party and non-party waives any right it might otherwise have had to assert any known conflicts of interest or to assert any non-material conflicts of interest during the course of the proceeding.

§ 109.9 Ex parte communications.

(a) *Definition* - (1) *Ex parte communication* means any material oral or written communication relevant to the merits of an adjudicatory proceeding that was neither on the record nor on reasonable prior notice to all parties that takes place between:

(i) An interested person outside the OCC (including such person's counsel); and

(ii) The administrative law judge handling that proceeding, the Comptroller, or a decisional employee.

(2) *Exception.* A request for status of the proceeding does not constitute an *ex parte* communication.

(b) *Prohibition of ex parte communications.* From the time the notice is issued by the Comptroller until the date that the Comptroller issues the final decision pursuant to § 109.40(c) of this subpart:

(1) No interested person outside the OCC shall make or knowingly cause to be made an *ex parte* communication to the Comptroller, the administrative law judge, or a decisional employee; and

(2) The Comptroller, administrative law judge, or decisional employee shall not make or knowingly cause to be made to any interested person outside the OCC any *ex parte* communication.

(c) *Procedure upon occurrence of ex parte communication.* If an ex parte communication is received by the administrative law judge, the Comptroller or other person identified in paragraph (a) of this section, that person shall cause all such written communications (or, if the communication is oral, a memorandum stating the substance of the communication) to be placed on the record of the proceeding and served on all parties. All other parties to the proceeding shall have an opportunity, within ten days of receipt of service of the ex parte communication to file responses thereto and to recommend any sanctions, in accordance with paragraph (d) of this section, that they believe to be appropriate under the circumstances.

(d) *Sanctions.* Any party or his or her counsel who makes a prohibited *ex parte* communication, or who encourages or solicits another to make any such communication, may be subject to any appropriate sanction or sanctions imposed by the Comptroller or the administrative law judge including, but not limited to, exclusion from the proceedings and an adverse ruling on the issue which is the subject of the prohibited communication.

(e) *Separation-of-functions.* Except to the extent required for the disposition of *ex parte* matters as authorized by law, the administrative law judge may not consult a person or party on any matter relevant to the merits of the adjudication, unless on notice and opportunity for all parties to participate. An employee or agent engaged in the performance of investigative or prosecuting functions for the OCC in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review of the recommended decision under § 109.40 of this subpart, except as witness or counsel in public proceedings.

§ 109.10 Filing of papers.

(a) *Filing.* Any papers required to be filed, excluding documents produced in response to a discovery request pursuant to §§ 109.25 and 109.26 of this subpart, shall be filed with the OFIA, except as otherwise provided.

(b) *Manner of filing.* Unless otherwise specified by the Comptroller or the administrative law judge, filing may be accomplished by:

(1) Personal service;

(2) Delivering the papers to a reliable commercial courier service, overnight delivery service, or to the U.S. Post Office for Express Mail delivery;

(3) Mailing the papers by first class, registered, or certified mail; or

(4) Transmission by electronic media, only if expressly authorized, and upon any conditions specified, by the Comptroller or the administrative law judge. All papers filed by electronic media shall also concurrently be filed in accordance with paragraph (c) of this section as to form.

(c) *Formal requirements as to papers filed* - (1) *Form.* All papers filed must set forth the name, address, and telephone number of the counsel or party making the filing and must be accompanied by a certification setting forth when and how service has been made on all other parties. All papers filed must be double-spaced and printed or typewritten on 8 1⁄2 × 11 inch paper, and must be clear and legible.

(2) *Signature.* All papers must be dated and signed as provided in § 109.7 of this subpart.

(3) *Caption.* All papers filed must include at the head thereof, or on a title page, the name of the OCC and of the filing party, the title and docket number of the proceeding, and the subject of the particular paper.

(4) *Number of copies.* Unless otherwise specified by the Comptroller, or the administrative law judge, an original and one copy of all documents and papers shall be filed, except that only one copy of transcripts of testimony and exhibits shall be filed.

§ 109.11 Service of papers.

(a) *By the parties.* Except as otherwise provided, a party filing papers shall serve a copy upon the counsel of record for all other parties to the proceeding so represented, and upon any party not so represented.

(b) *Method of service.* Except as provided in paragraphs (c)(2) and (d) of this section, a serving party shall use one or more of the following methods of service:

(1) Personal service;

(2) Delivering the papers to a reliable commercial courier service, overnight delivery service, or to the U.S. Post Office for Express Mail delivery;

(3) Mailing the papers by first class, registered, or certified mail; or

(4) Transmission by electronic media, only if the parties mutually agree. Any papers served by electronic media shall also concurrently be served in accordance with the requirements of § 109.10(c) of this subpart as to form.

(c) *By the Comptroller or the administrative law judge.* (1) All papers required to be served by the Comptroller or the administrative law judge upon a party who has appeared in the proceeding through a counsel of record, shall be served by any means specified in paragraph (b) of this section.

(2) If a party has not appeared in the proceeding in accordance with § 109.6 of this subpart, the Comptroller or the administrative law judge shall make service by any of the following methods:

(i) By personal service;

(ii) If the person to be served is an individual, by delivery to a person of suitable age and discretion at the physical location where the individual resides or works;

(iii) If the person to be served is a corporation or other association, by delivery to an officer, managing or general agent, or to any other agent authorized by appointment or by law to receive service and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the party;

(iv) By registered or certified mail addressed to the person's last known address; or

(v) By any other method reasonably calculated to give actual notice.

(d) *Subpoenas.* Service of a subpoena may be made:

(1) By personal service;

(2) If the person to be served is an individual, by delivery to a person of suitable age and discretion at the physical location where the individual resides or works;

(3) By delivery to an agent, which in the case of a corporation or other association, is delivery to an officer, managing or general agent, or to any other agent authorized by appointment or by law to receive service and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the party;

(4) By registered or certified mail addressed to the person's last known address; or

(5) By any other method reasonably calculated to give actual notice.

(e) *Area of service.* Service in any state, territory, possession of the United States, or the District of Columbia, on any person or company doing business in any state, territory, possession of the United States, or the District of Columbia, or on any person as otherwise provided by law, is effective without regard to the place where the hearing is held, provided that if service is made on a foreign bank in connection with an action or proceeding involving one or more of its branches or agencies located in any state, territory, possession of the United States, or the District of Columbia, service shall be made on at least one branch or agency so involved.

§ 109.12 Construction of time limits.

(a) *General rule.* In computing any period of time prescribed by this subpart, the date of the act or event that commences the designated period of time is not included. The last day so computed is included unless it is a Saturday, Sunday, or Federal holiday. When the last day is a Saturday, Sunday, or Federal holiday, the period runs until the end of the next day that is not a Saturday, Sunday, or Federal holiday. Intermediate Saturdays,

Sundays, and Federal holidays are included in the computation of time. However, when the time period within which an act is to be performed is ten days or less, not including any additional time allowed for in paragraph (c) of this section, intermediate Saturdays, Sundays, and Federal holidays are not included.

(b) *When papers are deemed to be filed or served.* (1) Filing and service are deemed to be effective:

(i) In the case of personal service or same day commercial courier delivery, upon actual service;

(ii) In the case of overnight commercial delivery service, U.S. Express mail delivery, or first class, registered, or certified mail, upon deposit in or delivery to an appropriate point of collection; or

(iii) In the case of transmission by electronic media, as specified by the authority receiving the filing, in the case of filing, and as agreed among the parties, in the case of service.

(2) The effective filing and service dates specified in paragraph (b)(1) of this section may be modified by the Comptroller or administrative law judge in the case of filing or by agreement of the parties in the case of service.

(c) *Calculation of time for service and filing of responsive papers.* Whenever a time limit is measured by a prescribed period from the service of any notice or paper, the applicable time limits are calculated as follows:

(1) If service is made by first class, registered, or certified mail, add three calendar days to the prescribed period;

(2) If service is made by express mail or overnight delivery service, add one calendar day to the prescribed period; or

(3) If service is made by electronic media transmission, add one calendar day to the prescribed period, unless otherwise determined by the Comptroller or the administrative law judge in the case of filing, or by agreement among the parties in the case of service.

§ 109.13 Change of time limits.

Except as otherwise provided by law, the administrative law judge may, for good cause shown, extend the time limits prescribed by the Uniform Rules or any notice or order issued in the proceedings. After the referral of the case to the Comptroller pursuant to § 109.38 of this subpart, the Comptroller may grant extensions of the time limits for good cause shown. Extensions may be granted at the motion of a party or on the Comptroller's or the administrative law judge's own motion after notice and opportunity to respond is afforded all non-moving parties.

§ 109.14 Witness fees and expenses.

Witnesses subpoenaed for testimony or deposition shall be paid the same fees for attendance and mileage as are paid in the United States district courts in proceedings in which the United States is a party, provided that, in the case of a discovery subpoena addressed to a party, no witness fees or mileage need be paid. Fees for witnesses shall be tendered in advance by the party requesting the subpoena, except that fees and mileage need not be tendered in advance where the OCC is the party requesting the subpoena. The OCC shall not be required to pay any fees to, or expenses of, any witness not subpoenaed by the OCC.

§ 109.15 Opportunity for informal settlement.

Any respondent may, at any time in the proceeding, unilaterally submit to Enforcement Counsel written offers or proposals for settlement of a proceeding, without prejudice to the rights of any of the parties. No such offer or proposal shall be made to any OCC representative other than Enforcement Counsel. Submission of a written settlement offer does not provide a basis for adjourning or otherwise delaying all or any portion of a proceeding under this part. No settlement offer or proposal, or any subsequent negotiation or resolution, is admissible as evidence in any proceeding.

§ 109.16 OCC's right to conduct examination.

Nothing contained in this subpart limits in any manner the right of the OCC to conduct any examination, inspection, or visitation of any institution or institution-affiliated party, or the right of the OCC to conduct or continue any form of investigation authorized by law.

§ 109.17 Collateral attacks on adjudicatory proceeding.

If an interlocutory appeal or collateral attack is brought in any court concerning all or any part of an adjudicatory proceeding, the challenged adjudicatory proceeding shall continue without regard to the pendency of that court proceeding. No default or other failure to act as directed in the adjudicatory proceeding within the times prescribed in this subpart shall be excused based on the pendency before any court of any interlocutory appeal or collateral attack.

§ 109.18 Commencement of proceeding and contents of notice.

(a) *Commencement of proceeding.* (1)(i) Except for change-in-control proceedings under section 7(j)(4) of the FDIA (12 U.S.C. 1817(j)(4)), a proceeding governed by this subpart is commenced by issuance of a notice by the Comptroller.

(ii) The notice must be served by the Comptroller upon the respondent and given to any other appropriate financial institution supervisory authority where required by law.

(iii) The notice must be filed with the OFIA.

(2) Change-in control proceedings under section 7(j)(4) of the FDIA (12 U.S.C. 1817(j)(4)) commence with the issuance of an order by the Comptroller.

(b) *Contents of notice.* The notice must set forth:

(1) The legal authority for the proceeding and for the OCC's jurisdiction over the proceeding;

(2) A statement of the matters of fact or law showing that the OCC is entitled to relief;

(3) A proposed order or prayer for an order granting the requested relief;

(4) The time, place, and nature of the hearing as required by law or regulation;

(5) The time within which to file an answer as required by law or regulation;

(6) The time within which to request a hearing as required by law or regulation; and

(7) The answer and/or request for a hearing shall be filed with OFIA.

§ 109.19 Answer.

(a) *When.* Within 20 days of service of the notice, respondent shall file an answer as designated in the notice. In a civil money penalty proceeding, respondent shall also file a request for a hearing within 20 days of service of the notice.

(b) *Content of answer.* An answer must specifically respond to each paragraph or allegation of fact contained in the notice and must admit, deny, or state that the party lacks sufficient information to admit or deny each allegation of fact. A statement of lack of information has the effect of a denial. Denials must fairly meet the substance of each allegation of fact denied; general denials are not permitted. When a respondent denies part of an allegation, that part must be denied and the remainder specifically admitted. Any allegation of fact in the notice which is not denied in the answer must be deemed admitted for purposes of the proceeding. A respondent is not required to respond to the portion of a notice that constitutes the prayer for relief or proposed order. The answer must set forth affirmative defenses, if any, asserted by the respondent.

(c) *Default* - (1) *Effect of failure to answer.* Failure of a respondent to file an answer required by this section within the time provided constitutes a waiver of his or her right to appear and contest the allegations in the notice. If no timely answer is filed, Enforcement Counsel may file a motion for entry of an order of default. Upon a finding that no good cause has been shown for the failure to file a timely answer, the administrative law judge shall file with the Comptroller a recommended decision containing the findings and the relief sought in the notice. Any final order issued by the Comptroller based upon a respondent's failure to answer is deemed to be an order issued upon consent.

(2) *Effect of failure to request a hearing in civil money penalty proceedings.* If respondent fails to request a hearing as required by law within the time provided, the notice of assessment constitutes a final and unappealable order.

§ 109.20 Amended pleadings.

(a) *Amendments.* The notice or answer may be amended or supplemented at any stage of the proceeding. The respondent must answer an amended notice within the time remaining for the respondent's answer to the original notice, or within ten days after service of the amended notice, whichever period is longer, unless the Comptroller or administrative law judge orders otherwise for good cause.

(b) *Amendments to conform to the evidence.* When issues not raised in the notice or answer are tried at the hearing by express or implied consent of the parties, they will be treated in all respects as if they had been raised in the notice or answer, and no formal amendments are required. If evidence is objected to at the hearing on the ground that it is not within the issues raised by the notice or answer, the administrative law judge may admit the evidence when admission is likely to assist in adjudicating the merits of the action and the objecting party fails to satisfy the administrative law judge that the admission of such evidence would unfairly prejudice that party's action or defense upon the merits. The administrative law judge may grant a continuance to enable the objecting party to meet such evidence.

§ 109.21 Failure to appear.

Failure of a respondent to appear in person at the hearing or by a duly authorized counsel constitutes a waiver of respondent's right to a hearing and is deemed an admission of the facts as alleged and consent to the relief sought in the notice. Without further proceedings or notice to the respondent, the administrative law judge shall file with the Comptroller a recommended decision containing the findings and the relief sought in the notice.

§ 109.22 Consolidation and severance of actions.

(a) *Consolidation.* (1) On the motion of any party, or on the administrative law judge's own motion, the administrative law judge may consolidate, for some or all purposes, any two or more proceedings, if each such proceeding involves or arises out of the same transaction, occurrence or series of transactions or occurrences, or involves at least one common respondent or a material common question of law or fact, unless such consolidation would cause unreasonable delay or injustice.

(2) In the event of consolidation under paragraph (a)(1) of this section, appropriate adjustment to the prehearing schedule must be made to avoid unnecessary expense, inconvenience, or delay.

(b) *Severance.* The administrative law judge may, upon the motion of any party, sever the proceeding for separate resolution of the matter as to any respondent only if the administrative law judge finds that:

(1) Undue prejudice or injustice to the moving party would result from not severing the proceeding; and

(2) Such undue prejudice or injustice would outweigh the interests of judicial economy and expedition in the complete and final resolution of the proceeding.

§ 109.23 Motions.

(a) *In writing.* (1) Except as otherwise provided herein, an application or request for an order or ruling must be made by written motion.

(2) All written motions must state with particularity the relief sought and must be accompanied by a proposed order.

(3) No oral argument may be held on written motions except as otherwise directed by the administrative law judge. Written memoranda, briefs, affidavits or other relevant material or documents may be filed in support of or in opposition to a motion.

(b) *Oral motions.* A motion may be made orally on the record unless the administrative law judge directs that such motion be reduced to writing.

(c) *Filing of motions.* Motions must be filed with the administrative law judge, but upon the filing of the recommended decision, motions must be filed with the Comptroller.

(d) *Responses.* (1) Except as otherwise provided herein, within ten days after service of any written motion, or within such other period of time as may be established by the administrative law judge or the Comptroller, any party may file a written response to a motion. The administrative law judge shall not rule on any oral or written motion before each party has had an opportunity to file a response.

(2) The failure of a party to oppose a written motion or an oral motion made on the record is deemed a consent by that party to the entry of an order substantially in the form of the order accompanying the motion.

(e) *Dilatory motions.* Frivolous, dilatory or repetitive motions are prohibited. The filing of such motions may form the basis for sanctions.

(f) *Dispositive motions.* Dispositive motions are governed by §§ 109.29 and 109.30 of this subpart.

§ 109.24 Scope of document discovery.

(a) *Limits on discovery.* (1) Subject to the limitations set out in paragraphs (b), (c), and (d) of this section, a party to a proceeding under this subpart may obtain document

discovery by serving a written request to produce documents. For purposes of a request to produce documents, the term “documents” may be defined to include drawings, graphs, charts, photographs, recordings, data stored in electronic form, and other data compilations from which information can be obtained, or translated, if necessary, by the parties through detection devices into reasonably usable form, as well as written material of all kinds.

(2) Discovery by use of deposition is governed by § 109.102 of this part.

(3) Discovery by use of interrogatories is not permitted.

(b) *Relevance.* A party may obtain document discovery regarding any matter, not privileged, that has material relevance to the merits of the pending action. Any request to produce documents that calls for irrelevant material, that is unreasonable, oppressive, excessive in scope, unduly burdensome, or repetitive of previous requests, or that seeks to obtain privileged documents will be denied or modified. A request is unreasonable, oppressive, excessive in scope or unduly burdensome if, among other things, it fails to include justifiable limitations on the time period covered and the geographic locations to be searched, the time provided to respond in the request is inadequate, or the request calls for copies of documents to be delivered to the requesting party and fails to include the requestor's written agreement to pay in advance for the copying, in accordance with § 109.25 of this subpart.

(c) *Privileged matter.* Privileged documents are not discoverable. Privileges include the attorney-client privilege, work-product privilege, any government's or government agency's deliberative-process privilege, and any other privileges the Constitution, any applicable act of Congress, or the principles of common law provide.

(d) *Time limits.* All discovery, including all responses to discovery requests, shall be completed at least 20 days prior to the date scheduled for the commencement of the hearing, except as provided in the Local Rules. No exceptions to this time limit shall be permitted, unless the administrative law judge finds on the record that good cause exists for waiving the requirements of this paragraph.

§ 109.25 Request for document discovery from parties.

(a) *General rule.* Any party may serve on any other party a request to produce for inspection any discoverable documents that are in the possession, custody, or control of the party upon whom the request is served. The request must identify the documents to be produced either by individual item or by category, and must describe each item and category with reasonable particularity. Documents must be produced as they are kept in the usual course of business or must be organized to correspond with the categories in the request.

(b) *Production or copying.* The request must specify a reasonable time, place, and manner for production and performing any related acts. In lieu of inspecting the documents, the requesting party may specify that all or some of the responsive documents be copied and the copies delivered to the requesting party. If copying of fewer than 250 pages is requested, the party to whom the request is addressed shall bear the cost of copying and shipping charges. If a party requests 250 pages or more of copying, the requesting party shall pay for the copying and shipping charges. Copying charges are the current per-page copying rate imposed under 12 CFR 4.17 for requests under the Freedom of Information Act (5 U.S.C. 552). The party to whom the request is addressed may require payment in advance before producing the documents.

(c) *Obligation to update responses.* A party who has responded to a discovery request with a response that was complete when made is not required to supplement the response to include documents thereafter acquired, unless the responding party learns that:

(1) The response was materially incorrect when made; or

(2) The response, though correct when made, is no longer true and a failure to amend the response is, in substance, a knowing concealment.

(d) *Motions to limit discovery.* (1) Any party that objects to a discovery request may, within ten days of being served with such request, file a motion in accordance with the provisions of § 109.23 of this subpart to revoke or otherwise limit the request. If an objection is made to only a portion of an item or category in a request, the portion objected to shall be specified. Any objections not made in accordance with this paragraph and § 109.23 of this subpart are waived.

(2) The party who served the request that is the subject of a motion to revoke or limit may file a written response within five days of service of the motion. No other party may file a response.

(e) *Privilege.* At the time other documents are produced, the producing party must reasonably identify all documents withheld on the grounds of privilege and must produce a statement of the basis for the assertion of privilege. When similar documents that are protected by deliberative process, attorney-work-product, or attorney-client privilege are voluminous, these documents may be identified by category instead of by individual document. The administrative law judge retains discretion to determine when the identification by category is insufficient.

(f) *Motions to compel production.* (1) If a party withholds any documents as privileged or fails to comply fully with a discovery request, the requesting party may, within ten days of the assertion of privilege or of the time the failure to comply becomes known to the requesting party, file a motion in accordance with the provisions of § 109.23 of this subpart for the issuance of a subpoena compelling production.

(2) The party who asserted the privilege or failed to comply with the request may file a written response to a motion to compel within five days of service of the motion. No other party may file a response.

(g) *Ruling on motions.* After the time for filing responses pursuant to this section has expired, the administrative law judge shall rule promptly on all motions filed pursuant to this section. If the administrative law judge determines that a discovery request, or any of its terms, calls for irrelevant material, is unreasonable, oppressive, excessive in scope, unduly burdensome, or repetitive of previous requests, or seeks to obtain privileged documents, he or she may deny or modify the request, and may issue appropriate protective orders, upon such conditions as justice may require. The pendency of a motion to strike or limit discovery or to compel production is not a basis for staying or continuing the proceeding, unless otherwise ordered by the administrative law judge. Notwithstanding any other provision in this part, the administrative law judge may not release, or order a party to produce, documents withheld on grounds of privilege if the party has stated to the administrative law judge its intention to file a timely motion for interlocutory review of the administrative law judge's order to produce the documents, and until the motion for interlocutory review has been decided.

(h) *Enforcing discovery subpoenas.* If the administrative law judge issues a subpoena compelling production of documents by a party, the subpoenaing party may, in the event of noncompliance and to the extent authorized by applicable law, apply to any appropriate United States district court for an order requiring compliance with the subpoena. A party's right to seek court enforcement of a subpoena shall not in any manner limit the sanctions that may be imposed by the administrative law judge against a party who fails to produce subpoenaed documents.

§ 109.26 Document subpoenas to nonparties.

(a) *General rules.* (1) Any party may apply to the administrative law judge for the issuance of a document discovery subpoena addressed to any person who is not a party to the proceeding. The application must contain a proposed document subpoena and a brief statement showing the general relevance and reasonableness of the scope of documents sought. The subpoenaing party shall specify a reasonable time, place, and manner for making production in response to the document subpoena.

(2) A party shall only apply for a document subpoena under this section within the time period during which such party could serve a discovery request under § 109.24(d) of this subpart. The party obtaining the document subpoena is responsible for serving it on the subpoenaed person and for serving copies on all parties. Document subpoenas may be served in any state, territory, or possession of the United States, the District of Columbia, or as otherwise provided by law.

(3) The administrative law judge shall promptly issue any document subpoena requested pursuant to this section. If the administrative law judge determines that the application does not set forth a valid basis for the issuance of the subpoena, or that any of

its terms are unreasonable, oppressive, excessive in scope, or unduly burdensome, he or she may refuse to issue the subpoena or may issue it in a modified form upon such conditions as may be consistent with the Uniform Rules.

(b) *Motion to quash or modify.* (1) Any person to whom a document subpoena is directed may file a motion to quash or modify such subpoena, accompanied by a statement of the basis for quashing or modifying the subpoena. The movant shall serve the motion on all parties, and any party may respond to such motion within ten days of service of the motion.

(2) Any motion to quash or modify a document subpoena must be filed on the same basis, including the assertion of privilege, upon which a party could object to a discovery request under § 109.25(d) of this subpart, and during the same time limits during which such an objection could be filed.

(c) *Enforcing document subpoenas.* If a subpoenaed person fails to comply with any subpoena issued pursuant to this section or any order of the administrative law judge which directs compliance with all or any portion of a document subpoena, the subpoenaing party or any other aggrieved party may, to the extent authorized by applicable law, apply to an appropriate United States district court for an order requiring compliance with so much of the document subpoena as the administrative law judge has not quashed or modified. A party's right to seek court enforcement of a document subpoena shall in no way limit the sanctions that may be imposed by the administrative law judge on a party who induces a failure to comply with subpoenas issued under this section.

§ 109.27 Deposition of witness unavailable for hearing.

(a) *General rules.* (1) If a witness will not be available for the hearing, a party may apply in accordance with the procedures set forth in paragraph (a)(2) of this section, to the administrative law judge for the issuance of a subpoena, including a subpoena *duces tecum,* requiring the attendance of the witness at a deposition. The administrative law judge may issue a deposition subpoena under this section upon showing that:

(i) The witness will be unable to attend or may be prevented from attending the hearing because of age, sickness or infirmity, or will otherwise be unavailable;

(ii) The witness' unavailability was not procured or caused by the subpoenaing party;

(iii) The testimony is reasonably expected to be material; and

(iv) Taking the deposition will not result in any undue burden to any other party and will not cause undue delay of the proceeding.

(2) The application must contain a proposed deposition subpoena and a brief statement of the reasons for the issuance of the subpoena. The subpoena must name the witness whose deposition is to be taken and specify the time and place for taking the deposition. A deposition subpoena may require the witness to be deposed at any place within the country in which that witness resides or has a regular place of employment or such other convenient place as the administrative law judge shall fix.

(3) Any requested subpoena that sets forth a valid basis for its issuance must be promptly issued, unless the administrative law judge on his or her own motion, requires a written response or requires attendance at a conference concerning whether the requested subpoena should be issued.

(4) The party obtaining a deposition subpoena is responsible for serving it on the witness and for serving copies on all parties. Unless the administrative law judge orders otherwise, no deposition under this section shall be taken on fewer than ten days' notice to the witness and all parties. Deposition subpoenas may be served in any state, territory, possession of the United States, or the District of Columbia, on any person or company doing business in any state, territory, possession of the United States, or the District of Columbia, or as otherwise permitted by law.

(b) *Objections to deposition subpoenas.* (1) The witness and any party who has not had an opportunity to oppose a deposition subpoena issued under this section may file a motion with the administrative law judge to quash or modify the subpoena prior to the time for compliance specified in the subpoena, but not more than ten days after service of the subpoena.

(2) A statement of the basis for the motion to quash or modify a subpoena issued under this section must accompany the motion. The motion must be served on all parties.

(c) *Procedure upon deposition.* (1) Each witness testifying pursuant to a deposition subpoena must be duly sworn, and each party shall have the right to examine the witness. Objections to questions or documents must be in short form, stating the grounds for the objection. Failure to object to questions or documents is not deemed a waiver except where the ground for the objection might have been avoided if the objection had been timely presented. All questions, answers, and objections must be recorded.

(2) Any party may move before the administrative law judge for an order compelling the witness to answer any questions the witness has refused to answer or submit any evidence the witness has refused to submit during the deposition.

(3) The deposition must be subscribed by the witness, unless the parties and the witness, by stipulation, have waived the signing, or the witness is ill, cannot be found, or has refused to sign. If the deposition is not subscribed by the witness, the court reporter taking the deposition shall certify that the transcript is a true and complete transcript of the deposition.

(d) *Enforcing subpoenas.* If a subpoenaed person fails to comply with any order of the administrative law judge which directs compliance with all or any portion of a deposition subpoena under paragraph (b) or (c)(2) of this section, the subpoenaing party or other aggrieved party may, to the extent authorized by applicable law, apply to an appropriate United States district court for an order requiring compliance with the portions of the subpoena that the administrative law judge has ordered enforced. A party's right to seek court enforcement of a deposition subpoena in no way limits the sanctions that may be imposed by the administrative law judge on a party who fails to comply with or procures a failure to comply with, a subpoena issued under this section.

§ 109.28 Interlocutory review.

(a) *General rule.* The Comptroller may review a ruling of the administrative law judge prior to the certification of the record to the Comptroller only in accordance with the procedures set forth in this section and § 109.23 of this subpart.

(b) *Scope of review.* The Comptroller may exercise interlocutory review of a ruling of the administrative law judge if the Comptroller finds that:

(1) The ruling involves a controlling question of law or policy as to which substantial grounds exist for a difference of opinion;

(2) Immediate review of the ruling may materially advance the ultimate termination of the proceeding;

(3) Subsequent modification of the ruling at the conclusion of the proceeding would be an inadequate remedy; or

(4) Subsequent modification of the ruling would cause unusual delay or expense.

(c) *Procedure.* Any request for interlocutory review shall be filed by a party with the administrative law judge within ten days of his or her ruling and shall otherwise comply with § 109.23 of this subpart. Any party may file a response to a request for interlocutory review in accordance with § 109.23(d) of this subpart. Upon the expiration of the time for filing all responses, the administrative law judge shall refer the matter to the Comptroller for final disposition.

(d) *Suspension of proceeding.* Neither a request for interlocutory review nor any disposition of such a request by the Comptroller under this section suspends or stays the proceeding unless otherwise ordered by the administrative law judge or the Comptroller.

§ 109.29 Summary disposition.

(a) *In general.* The administrative law judge shall recommend that the Comptroller issue a final order granting a motion for summary disposition if the undisputed pleaded facts, admissions, affidavits, stipulations, documentary evidence, matters as to which official notice may be taken, and any other evidentiary materials properly submitted in connection with a motion for summary disposition show that:

(1) There is no genuine issue as to any material fact; and

(2) The moving party is entitled to a decision in its favor as a matter of law.

(b) *Filing of motions and responses.* (1) Any party who believes that there is no genuine issue of material fact to be determined and that he or she is entitled to a decision as a matter of law may move at any time for summary disposition in its favor of all or any part of the proceeding. Any party, within 20 days after service of such a motion, or within such time period as allowed by the administrative law judge, may file a response to such motion.

(2) A motion for summary disposition must be accompanied by a statement of the material facts as to which the moving party contends there is no genuine issue. Such motion must be supported by documentary evidence, which may take the form of admissions in pleadings, stipulations, depositions, investigatory depositions, transcripts, affidavits and any other evidentiary materials that the moving party contends support his or her position. The motion must also be accompanied by a brief containing the points and authorities in support of the contention of the moving party. Any party opposing a motion for summary disposition must file a statement setting forth those material facts as to which he or she contends a genuine dispute exists. Such opposition must be supported by evidence of the same type as that submitted with the motion for summary disposition and a brief containing the points and authorities in support of the contention that summary disposition would be inappropriate.

(c) *Hearing on motion.* At the request of any party or on his or her own motion, the administrative law judge may hear oral argument on the motion for summary disposition.

(d) *Decision on motion.* Following receipt of a motion for summary disposition and all responses thereto, the administrative law judge shall determine whether the moving party is entitled to summary disposition. If the administrative law judge determines that summary disposition is warranted, the administrative law judge shall submit a recommended decision to that effect to the Comptroller. If the administrative law judge finds that no party is entitled to summary disposition, he or she shall make a ruling denying the motion.

§ 109.30 Partial summary disposition.

If the administrative law judge determines that a party is entitled to summary disposition as to certain claims only, he or she shall defer submitting a recommended decision as to those claims. A hearing on the remaining issues must be ordered. Those claims for which the administrative law judge has determined that summary disposition is warranted will be addressed in the recommended decision filed at the conclusion of the hearing.

§ 109.31 Scheduling and prehearing conferences.

(a) *Scheduling conference.* Within 30 days of service of the notice or order commencing a proceeding or such other time as parties may agree, the administrative law judge shall direct counsel for all parties to meet with him or her in person at a specified time and place prior to the hearing or to confer by telephone for the purpose of scheduling the course and conduct of the proceeding. This meeting or telephone conference is called a "scheduling conference." The identification of potential witnesses, the time for and manner of discovery, and the exchange of any prehearing materials

including witness lists, statements of issues, stipulations, exhibits and any other materials may also be determined at the scheduling conference.

(b) *Prehearing conferences.* The administrative law judge may, in addition to the scheduling conference, on his or her own motion or at the request of any party, direct counsel for the parties to meet with him or her (in person or by telephone) at a prehearing conference to address any or all of the following:

(1) Simplification and clarification of the issues;

(2) Stipulations, admissions of fact, and the contents, authenticity and admissibility into evidence of documents;

(3) Matters of which official notice may be taken;

(4) Limitation of the number of witnesses;

(5) Summary disposition of any or all issues;

(6) Resolution of discovery issues or disputes;

(7) Amendments to pleadings; and

(8) Such other matters as may aid in the orderly disposition of the proceeding.

(c) *Transcript.* The administrative law judge, in his or her discretion, may require that a scheduling or prehearing conference be recorded by a court reporter. A transcript of the conference and any materials filed, including orders, becomes part of the record of the proceeding. A party may obtain a copy of the transcript at its expense.

(d) *Scheduling or prehearing orders.* At or within a reasonable time following the conclusion of the scheduling conference or any prehearing conference, the administrative law judge shall serve on each party an order setting forth any agreements reached and any procedural determinations made.

§ 109.32 Prehearing submissions.

(a) Within the time set by the administrative law judge, but in no case later than 14 days before the start of the hearing, each party shall serve on every other party, his or her:

(1) Prehearing statement;

(2) Final list of witnesses to be called to testify at the hearing, including name and address of each witness and a short summary of the expected testimony of each witness;

(3) List of the exhibits to be introduced at the hearing along with a copy of each exhibit; and

(4) Stipulations of fact, if any.

(b) *Effect of failure to comply.* No witness may testify and no exhibits may be introduced at the hearing if such witness or exhibit is not listed in the prehearing submissions pursuant to paragraph (a) of this section, except for good cause shown.

§ 109.33 Public hearings.

(a) *General rule.* All hearings shall be open to the public, unless the Comptroller, in the Comptroller's discretion, determines that holding an open hearing would be contrary to the public interest. Within 20 days of service of the notice or, in the case of change-in-control proceedings under section 7(j)(4) of the FDIA (12 U.S.C. 1817(j)(4)), within 20 days from service of the hearing order, any respondent may file with the Comptroller a request for a private hearing, and any party may file a reply to such a request. A party must serve on the administrative law judge a copy of any request or reply the party files with the Comptroller. The form of, and procedure for, these requests and replies are governed by § 109.23 of this subpart. A party's failure to file a request or a

reply constitutes a waiver of any objections regarding whether the hearing will be public or private.

(b) *Filing document under seal.* Enforcement Counsel, in his or her discretion, may file any document or part of a document under seal if disclosure of the document would be contrary to the public interest. The administrative law judge shall take all appropriate steps to preserve the confidentiality of such documents or parts thereof, including closing portions of the hearing to the public.

§ 109.34 Hearing subpoenas.

(a) *Issuance.* (1) Upon application of a party showing general relevance and reasonableness of scope of the testimony or other evidence sought, the administrative law judge may issue a subpoena or a subpoena duces tecum requiring the attendance of a witness at the hearing or the production of documentary or physical evidence at the hearing. The application for a hearing subpoena must also contain a proposed subpoena specifying the attendance of a witness or the production of evidence from any state, territory, or possession of the United States, the District of Columbia, or as otherwise provided by law at any designated place where the hearing is being conducted. The party making the application shall serve a copy of the application and the proposed subpoena on every other party.

(2) A party may apply for a hearing subpoena at any time before the commencement of a hearing. During a hearing, a party may make an application for a subpoena orally on the record before the administrative law judge.

(3) The administrative law judge shall promptly issue any hearing subpoena requested pursuant to this section. If the administrative law judge determines that the

application does not set forth a valid basis for the issuance of the subpoena, or that any of its terms are unreasonable, oppressive, excessive in scope, or unduly burdensome, he or she may refuse to issue the subpoena or may issue it in a modified form upon any conditions consistent with this subpart. Upon issuance by the administrative law judge, the party making the application shall serve the subpoena on the person named in the subpoena and on each party.

(b) *Motion to quash or modify.* (1) Any person to whom a hearing subpoena is directed or any party may file a motion to quash or modify the subpoena, accompanied by a statement of the basis for quashing or modifying the subpoena. The movant must serve the motion on each party and on the person named in the subpoena. Any party may respond to the motion within ten days of service of the motion.

(2) Any motion to quash or modify a hearing subpoena must be filed prior to the time specified in the subpoena for compliance, but not more than ten days after the date of service of the subpoena upon the movant.

(c) *Enforcing subpoenas.* If a subpoenaed person fails to comply with any subpoena issued pursuant to this section or any order of the administrative law judge which directs compliance with all or any portion of a document subpoena, the subpoenaing party or any other aggrieved party may seek enforcement of the subpoena pursuant to § 109.26(c) of this subpart.

§ 109.35 Conduct of hearings.

(a) *General rules.* (1) Hearings shall be conducted so as to provide a fair and expeditious presentation of the relevant disputed issues. Each party has the right to

present its case or defense by oral and documentary evidence and to conduct such cross examination as may be required for full disclosure of the facts.

(2) *Order of hearing.* Enforcement Counsel shall present its case-in-chief first, unless otherwise ordered by the administrative law judge, or unless otherwise expressly specified by law or regulation. Enforcement Counsel shall be the first party to present an opening statement and a closing statement, and may make a rebuttal statement after the respondent's closing statement. If there are multiple respondents, respondents may agree among themselves as to their order of presentation of their cases, but if they do not agree the administrative law judge shall fix the order.

(3) *Examination of witnesses.* Only one counsel for each party may conduct an examination of a witness, except that in the case of extensive direct examination, the administrative law judge may permit more than one counsel for the party presenting the witness to conduct the examination. A party may have one counsel conduct the direct examination and another counsel conduct re-direct examination of a witness, or may have one counsel conduct the cross examination of a witness and another counsel conduct the re-cross examination of a witness.

(4) *Stipulations.* Unless the administrative law judge directs otherwise, all stipulations of fact and law previously agreed upon by the parties, and all documents, the admissibility of which have been previously stipulated, will be admitted into evidence upon commencement of the hearing.

(b) *Transcript.* The hearing must be recorded and transcribed. The reporter will make the transcript available to any party upon payment by that party to the reporter of the cost of the transcript. The administrative law judge may order the record corrected,

either upon motion to correct, upon stipulation of the parties, or following notice to the parties upon the administrative law judge's own motion.

§ 109.36 Evidence.

(a) *Admissibility.* (1) Except as is otherwise set forth in this section, relevant, material, and reliable evidence that is not unduly repetitive is admissible to the fullest extent authorized by the APA and other applicable law.

(2) Evidence that would be admissible under the Federal Rules of Evidence is admissible in a proceeding conducted pursuant to this subpart.

(3) Evidence that would be inadmissible under the Federal Rules of Evidence may not be deemed or ruled to be inadmissible in a proceeding conducted pursuant to this subpart if such evidence is relevant, material, reliable and not unduly repetitive.

(b) *Official notice.* (1) Official notice may be taken of any material fact which may be judicially noticed by a United States district court and any material information in the official public records of any Federal or state government agency.

(2) All matters officially noticed by the administrative law judge or Comptroller shall appear on the record.

(3) If official notice is requested or taken of any material fact, the parties, upon timely request, shall be afforded an opportunity to object.

(c) *Documents.* (1) A duplicate copy of a document is admissible to the same extent as the original, unless a genuine issue is raised as to whether the copy is in some material respect not a true and legible copy of the original.

(2) Subject to the requirements of paragraph (a) of this section, any document, including a report of examination, supervisory activity, inspection or visitation, prepared

by the appropriate Federal banking agency, as defined in section 3(q) of the FDIA (12 U.S.C. 1813(q)), or state regulatory agency, is admissible either with or without a sponsoring witness.

(3) Witnesses may use existing or newly created charts, exhibits, calendars, calculations, outlines or other graphic material to summarize, illustrate, or simplify the presentation of testimony. Such materials may, subject to the administrative law judge's discretion, be used with or without being admitted into evidence.

(d) *Objections.* (1) Objections to the admissibility of evidence must be timely made and rulings on all objections must appear on the record.

(2) When an objection to a question or line of questioning propounded to a witness is sustained, the examining counsel may make a specific proffer on the record of what he or she expected to prove by the expected testimony of the witness, either by representation of counsel or by direct interrogation of the witness.

(3) The administrative law judge shall retain rejected exhibits, adequately marked for identification, for the record, and transmit such exhibits to the Comptroller.

(4) Failure to object to admission of evidence or to any ruling constitutes a waiver of the objection.

(e) *Stipulations.* The parties may stipulate as to any relevant matters of fact or the authentication of any relevant documents. Such stipulations must be received in evidence at a hearing, and are binding on the parties with respect to the matters therein stipulated.

(f) *Depositions of unavailable witnesses.* (1) If a witness is unavailable to testify at a hearing, and that witness has testified in a deposition to which all parties in a

proceeding had notice and an opportunity to participate, a party may offer as evidence all or any part of the transcript of the deposition, including deposition exhibits, if any.

(2) Such deposition transcript is admissible to the same extent that testimony would have been admissible had that person testified at the hearing, provided that if a witness refused to answer proper questions during the depositions, the administrative law judge may, on that basis, limit the admissibility of the deposition in any manner that justice requires.

(3) Only those portions of a deposition received in evidence at the hearing constitute a part of the record.

§ 109.37 Post-hearing filings.

(a) *Proposed findings and conclusions and supporting briefs.* (1) Using the same method of service for each party, the administrative law judge shall serve notice upon each party, that the certified transcript, together with all hearing exhibits and exhibits introduced but not admitted into evidence at the hearing, has been filed. Any party may file with the administrative law judge proposed findings of fact, proposed conclusions of law, and a proposed order within 30 days following service of this notice by the administrative law judge or within such longer period as may be ordered by the administrative law judge.

(2) Proposed findings and conclusions must be supported by citation to any relevant authorities and by page references to any relevant portions of the record. A post-hearing brief may be filed in support of proposed findings and conclusions, either as part of the same document or in a separate document. Any party who fails to file timely with the administrative law judge any proposed finding or conclusion is deemed to have

waived the right to raise in any subsequent filing or submission any issue not addressed in such party's proposed finding or conclusion.

(b) *Reply briefs.* Reply briefs may be filed within 15 days after the date on which the parties' proposed findings, conclusions, and order are due. Reply briefs must be strictly limited to responding to new matters, issues, or arguments raised in another party's papers. A party who has not filed proposed findings of fact and conclusions of law or a post-hearing brief may not file a reply brief.

(c) *Simultaneous filing required.* The administrative law judge shall not order the filing by any party of any brief or reply brief in advance of the other party's filing of its brief.

§ 109.38 Recommended decision and filing of record.

(a) *Filing of recommended decision and record.* Within 45 days after expiration of the time allowed for filing reply briefs under § 109.37(b) of this subpart, the administrative law judge shall file with and certify to the Comptroller, for decision, the record of the proceeding. The record must include the administrative law judge's recommended decision, recommended findings of fact, recommended conclusions of law, and proposed order; all prehearing and hearing transcripts, exhibits, and rulings; and the motions, briefs, memoranda, and other supporting papers filed in connection with the hearing. The administrative law judge shall serve upon each party the recommended decision, findings, conclusions, and proposed order.

(b) *Filing of index.* At the same time the administrative law judge files with and certifies to the Comptroller for final determination the record of the proceeding, the administrative law judge shall furnish to the Comptroller a certified index of the entire

record of the proceeding. The certified index shall include, at a minimum, an entry for each paper, document or motion filed with the administrative law judge in the proceeding, the date of the filing, and the identity of the filer. The certified index shall also include an exhibit index containing, at a minimum, an entry consisting of exhibit number and title or description for: Each exhibit introduced and admitted into evidence at the hearing; each exhibit introduced but not admitted into evidence at the hearing; each exhibit introduced and admitted into evidence after the completion of the hearing; and each exhibit introduced but not admitted into evidence after the completion of the hearing.

§ 109.39 Exceptions to recommended decision.

(a) *Filing exceptions.* Within 30 days after service of the recommended decision, findings, conclusions, and proposed order under § 109.38 of this subpart, a party may file with the Comptroller written exceptions to the administrative law judge's recommended decision, findings, conclusions or proposed order, to the admission or exclusion of evidence, or to the failure of the administrative law judge to make a ruling proposed by a party. A supporting brief may be filed at the time the exceptions are filed, either as part of the same document or in a separate document.

(b) *Effect of failure to file or raise exceptions.* (1) Failure of a party to file exceptions to those matters specified in paragraph (a) of this section within the time prescribed is deemed a waiver of objection thereto.

(2) No exception need be considered by the Comptroller if the party taking exception had an opportunity to raise the same objection, issue, or argument before the administrative law judge and failed to do so.

(c) *Contents.* (1) All exceptions and briefs in support of such exceptions must be confined to the particular matters in, or omissions from, the administrative law judge's recommendations to which that party takes exception.

(2) All exceptions and briefs in support of exceptions must set forth page or paragraph references to the specific parts of the administrative law judge's recommendations to which exception is taken, the page or paragraph references to those portions of the record relied upon to support each exception, and the legal authority relied upon to support each exception.

§ 109.40 Review by the Comptroller.

(a) *Notice of submission to the Comptroller.* When the Comptroller determines that the record in the proceeding is complete, the Comptroller shall serve notice upon the parties that the proceeding has been submitted to the Comptroller for final decision.

(b) *Oral argument before the Comptroller.* Upon the initiative of the Comptroller or on the written request of any party filed with the Comptroller within the time for filing exceptions, the Comptroller may order and hear oral argument on the recommended findings, conclusions, decision, and order of the administrative law judge. A written request by a party must show good cause for oral argument and state reasons why arguments cannot be presented adequately in writing. A denial of a request for oral argument may be set forth in the Comptroller's final decision. Oral argument before the Comptroller must be on the record.

(c) *Comptroller's final decision.* (1) Decisional employees may advise and assist the Comptroller in the consideration and disposition of the case. The final decision of the Comptroller will be based upon review of the entire record of the proceeding, except that

the Comptroller may limit the issues to be reviewed to those findings and conclusions to which opposing arguments or exceptions have been filed by the parties.

(2) The Comptroller shall render a final decision within 90 days after notification of the parties that the case has been submitted for final decision, or 90 days after oral argument, whichever is later, unless the Comptroller orders that the action or any aspect thereof be remanded to the administrative law judge for further proceedings. Copies of the final decision and order of the Comptroller shall be served upon each party to the proceeding, upon other persons required by statute, and, if directed by the Comptroller or required by statute, upon any appropriate state or Federal supervisory authority.

§ 109.41 Stays pending judicial review.

The commencement of proceedings for judicial review of a final decision and order of the OCC may not, unless specifically ordered by the Comptroller or a reviewing court, operate as a stay of any order issued by the Comptroller. The Comptroller may, in its discretion, and on such terms as it finds just, stay the effectiveness of all or any part of its order pending a final decision on a petition for review of the order.

Subpart B - Local Rules

§ 109.100 Scope.

The rules and procedures in this subpart B shall apply to those proceedings covered by subpart A of this part. In addition, subpart A of this part and this subpart shall apply to adjudicatory proceedings for which hearings on the record are provided for by the following statutory provisions:

(a) Proceedings under section 10(a)(2)(D) of the HOLA (12 U.S.C. 1467a(a)(2)(D)) to determine whether any person directly or indirectly exercises a

controlling influence over the management or policies of a savings association or any other company; and

(b) [Reserved]

(c) Proceedings under section 15(c)(4) of the Securities and Exchange Act of 1934 (15 U.S.C. 78o(c)(4)) (Exchange Act) to determine whether any Federal savings association or person subject to the jurisdiction of the OCC pursuant to section 12(i) of the Exchange Act (15 U.S.C. 78 *l* (i)) has failed to comply with the provisions of sections 12, 13, 14(a), 14(c), 14(d) or 14(f) of the Exchange Act.

§ 109.101 Appointment of Office of Financial Institution Adjudication.

Unless otherwise directed by the OCC, all hearings under subpart A of this part and this subpart shall be conducted by administrative law judges under the direction of the Office of Financial Institution Adjudication.

§ 109.102 Discovery.

(a) *In general.* A party may take the deposition of an expert, or of a person, including another party, who has direct knowledge of matters that are non-privileged, relevant and material to the proceeding and where there is a need for the deposition. The deposition of experts shall be limited to those experts who are expected to testify at the hearing.

(b) *Notice.* A party desiring to take a deposition shall give reasonable notice in writing to the deponent and to every other party to the proceeding. The notice must state the time and place for taking the deposition and the name and address of the person to be deposed.

(c) *Time limits.* A party may take depositions at any time after the commencement of the proceeding, but no later than ten days before the scheduled hearing date, except with permission of the administrative law judge for good cause shown.

(d) *Conduct of the deposition.* The witness must be duly sworn, and each party shall have the right to examine the witness with respect to all non-privileged, relevant and material matters of which the witness has factual, direct and personal knowledge. Objections to questions or exhibits shall be in short form, stating the grounds for objection. Failure to object to questions or exhibits is not a waiver except where the grounds for the objection might have been avoided if the objection had been timely presented. The court reporter shall transcribe or otherwise record the witness's testimony, as agreed among the parties.

(e) *Protective orders.* At any time after notice of a deposition has been given, a party may file a motion for the issuance of a protective order. Such protective order may prohibit, terminate, or limit the scope or manner of the taking of a deposition. The administrative law judge shall grant such protective order upon a showing of sufficient grounds, including that the deposition:

(1) Is unreasonable, oppressive, excessive in scope, or unduly burdensome;

(2) Involves privileged, investigative, trial preparation, irrelevant or immaterial matters; or

(3) Is being conducted in bad faith or in such manner as to unreasonably annoy, embarrass, or oppress the deponent.

(f) *Fees.* Deposition witnesses, including expert witnesses, shall be paid the same expenses in the same manner as are paid witnesses in the district courts of the United

States in proceedings in which the United States Government is a party. Expenses in accordance with this paragraph shall be paid by the party seeking to take the deposition.

(g) *Deposition subpoenas* - (1) *Issuance.* At the request of a party, the administrative law judge shall issue a subpoena requiring the attendance of a witness at a deposition. The attendance of a witness may be required from any place in any state or territory that is subject to the jurisdiction of the United States or as otherwise permitted by law.

(2) *Service.* The party requesting the subpoena must serve it on the person named therein or upon that person's counsel, by any of the methods identified in § 109.11(d) of this part. The party serving the subpoena must file proof of service with the administrative law judge.

(3) *Motion to quash.* A person named in the subpoena or a party may file a motion to quash or modify the subpoena. A statement of the reasons for the motion must accompany it and a copy of the motion must be served on the party that requested the subpoena. The motion must be made prior to the time for compliance specified in the subpoena and not more than ten days after the date of service of the subpoena, or if the subpoena is served within 15 days of the hearing, within five days after the date of service.

(4) *Enforcement of deposition subpoena.* Enforcement of a deposition subpoena shall be in accordance with the procedures of § 109.27(d) of this part.

§ 109.103 Civil money penalties.

(a) *Assessment.* In the event of consent, or if upon the record developed at the hearing the OCC finds that any of the grounds specified in the notice issued pursuant to §

109.18 of this part have been established, the OCC may serve an order of assessment of civil money penalty upon the party concerned. The assessment order shall be effective immediately upon service or upon such other date as may be specified therein and shall remain effective and enforceable until it is stayed, modified, terminated, or set aside by the OCC or by a reviewing court.

(b) *Payment.* (1) Civil penalties assessed pursuant to subpart A of this part and this subpart B are payable and to be collected within 60 days after the issuance of the notice of assessment, unless the OCC fixes a different time for payment where it determines that the purpose of the civil money penalty would be better served thereby; however, if a party has made a timely request for a hearing to challenge the assessment of the penalty, the party may not be required to pay such penalty until the OCC has issued a final order of assessment following the hearing. In such instances, the penalty shall be paid within 60 days of service of such order unless the OCC fixes a different time for payment. Notwithstanding the foregoing, the OCC may seek to attach the party's assets or to have a receiver appointed to secure payment of the potential civil money penalty or other obligation in advance of the hearing in accordance with section 8(i)(4) of the FDIA (12 U.S.C. 1818(i)(4)).

(2) Checks in payment of civil penalties shall be made payable to the Treasurer of the United States and sent to the OCC. Upon receipt, the OCC shall forward the check to the Treasury of the United States.

(c) *Maximum amount of civil money penalties* - (1) *Statutory formula.* The OCC is required by statute to annually adjust for inflation the maximum amount of each civil money penalty within its jurisdiction to administer. The inflation adjustment is calculated

by multiplying the maximum dollar amount of the civil money penalty for the previous calendar year by the cost-of-living inflation adjustment multiplier provided annually by the Office of Management and Budget and rounding the total to the nearest dollar.

(2) *Notice of inflation adjustments.* The OCC will publish notice in the *Federal Register* of the maximum penalties which may be assessed on an annual basis on, or before, January 15 of each calendar year based on the formula in paragraph (a) of this section, for penalties assessed on, or after, the date of publication of the most recent notice related to conduct occurring on or after November 2, 2015.

§ 109.104 Additional procedures.

(a) *Replies to exceptions.* Replies to written exceptions to the administrative law judge's recommended decision, findings, conclusions or proposed order pursuant to § 109.39 of this part shall be filed within 10-days of the date such written exceptions were required to be filed.

(b) *Motions.* All motions shall be filed with the administrative law judge and an additional copy shall be filed with the OCC Hearing Clerk who receives adjudicatory filings; provided, however, that once the administrative law judge has certified the record to the Comptroller pursuant to § 109.38 of this part, all motions must be filed with the Comptroller to the attention of the Hearing Clerk within the 10-day period following the filing of exceptions allowed for the filing of replies to exceptions. Responses to such motions filed in a timely manner with the Comptroller, other than motions for oral argument before the Comptroller, shall be allowed pursuant to the procedures at § 109.23(d) of this part. No response is required for the Comptroller to make a determination on a motion for oral argument.

(c) *Authority of administrative law judge.* In addition to the powers listed in § 109.5 of this part, the administrative law judge shall have the authority to deny any dispositive motion and shall follow the procedures set forth for motions for summary disposition at § 109.29 of this part and partial summary disposition at § 109.30 of this part in making determinations on such motions.

(d) *Notification of submission of proceeding to the Comptroller.* Upon the expiration of the time for filing any exceptions, any replies to such exceptions or any motions and any ruling thereon, and after receipt of certified record, the OCC shall notify the parties within ten days of the submission of the proceeding to the Comptroller for final determination.

(e) *Extensions of time for final determination.* The Comptroller may, *sua sponte,* extend the time for final determination by signing an order of extension of time within the 90-day time period and notifying the parties of such extension thereafter.

(f) *Service upon the OCC.* Service of any document upon the OCC shall be made by filing with the Hearing Clerk, in addition to the individuals and/or offices designated by the OCC in its Notice issued pursuant to § 109.18 of this part, or such other means reasonably suited to provide notice of the person and/or offices designated to receive filings.

(g) *Filings with the Comptroller.* An additional copy of all materials required or permitted to be filed with or referred to the administrative law judge pursuant to subpart A and B of this part shall be filed with the Hearing Clerk. This rule shall not apply to the transcript of testimony and exhibits adduced at the hearing or to proposed exhibits submitted in advance of the hearing pursuant to an order of the administrative law judge

under § 109.32 of this part. Materials required or permitted to be filed with or referred to the Comptroller pursuant to subparts A and B of this part shall be filed with the Comptroller, to the attention of the Hearing Clerk.

(h) *Presence of cameras and other recording devices.* The use of cameras and other recording devices, other than those used by the court reporter, shall be prohibited and excluded from the proceedings.

PART 112 - RULES FOR INVESTIGATIVE PROCEEDINGS AND FORMAL EXAMINATION PROCEEDINGS

Authority: 12 U.S.C. 1462a, 1463, 1464, 1467, 1467a, 1813, 1817(j), 1818(n), 1820(c), 5412(b)(2)(B); 15 U.S.C. 78*l*.

§ 112.1 Scope of part.

This part prescribes rules of practice and procedure applicable to the conduct of formal examination proceedings with respect to Federal savings associations and their affiliates under section 5(d)(1)(B) of the HOLA, as amended, 12 U.S.C. 1464(d)(1)(B) or section 7(j)(15) of the Federal Deposit Insurance Act, as amended, 12 U.S.C. 1817(j)(15) ("FDIA"), section 8(n) of the FDIA, 12 U.S.C. 1818(n), or section 10(c) of the FDIA, 12 U.S.C. 1820(c). This part does not apply to adjudicatory proceedings as to which hearings are required by statute, the rules for which are contained in part 109 of this chapter.

§ 112.2 Definitions.

As used in this part:

(a) *OCC* means the Office of the Comptroller of the Currency;

(b) [Reserved]

(c) *Formal examination proceeding* means the administration of oaths and affirmations, taking and preserving of testimony, requiring the production of books, papers, correspondence, memoranda, and all other records, the issuance of subpoenas, and all related activities in connection with examination of savings associations and their affiliates conducted pursuant to section 5(d)(1)(B) of the HOLA, section 7(j)(15) of the FDIA, section 8(n) of the FDIA or section 10(c) of the FDIA; and

(d) *Designated representative* means the person or persons empowered by the OCC to conduct an investigative proceeding or a formal examination proceeding.

§ 112.3 Confidentiality of proceedings.

All formal examination proceedings shall be private and, unless otherwise ordered by the OCC, all investigative proceedings shall also be private. Unless otherwise ordered or permitted by the OCC, or required by law, and except as provided in §§ 112.4 and 112.5, the entire record of any investigative proceeding or formal examination proceeding, including the resolution of the OCC or its delegate(s) authorizing the proceeding, the transcript of such proceeding, and all documents and information obtained by the designated representative(s) during the course of said proceedings shall be confidential.

§ 112.4 Transcripts.

Transcripts or other recordings, if any, of investigative proceedings or formal examination proceedings shall be prepared solely by an official reporter or by any other person or means authorized by the designated representative. A person who has submitted documentary evidence or given testimony in an investigative proceeding or formal examination proceeding may procure a copy of his own documentary evidence or

transcript of his own testimony upon payment of the cost thereof; *provided,* that a person seeking a transcript of his own testimony must file a written request with the OCC's Director for Enforcement stating the reason he desires to procure such transcript, and said persons may for good cause deny such request. In any event, any witness (or his counsel) shall have the right to inspect the transcript of the witness' own testimony.

§ 112.5 Rights of witnesses.

(a) Any person who is compelled or requested to furnish documentary evidence or give testimony at an investigative proceeding or formal examination proceeding shall have the right to examine, upon request, the OCC resolution authorizing such proceeding. Copies of such resolution shall be furnished, for their retention, to such persons only with the written approval of the OCC.

(b) Any witness at an investigative proceeding or formal examination proceeding may be accompanied and advised by an attorney personally representing that witness.

(1) Such attorney shall be a member in good standing of the bar of the highest court of any state, Commonwealth, possession, territory, or the District of Columbia, who has not been suspended or debarred from practice by the bar of any such political entity or before the OCC in accordance with the provisions of part 19 of this chapter and has not been excluded from the particular investigative proceeding or formal examination proceeding in accordance with paragraph (b)(3) of this section.

(2) Such attorney may advise the witness before, during, and after the taking of his testimony and may briefly question the witness, on the record, at the conclusion of his testimony, for the sole purpose of clarifying any of the answers the witness has given. During the taking of the testimony of a witness, such attorney may make summary notes

solely for his use in representing his client. All witnesses shall be sequestered, and, unless permitted in the discretion of the designated representative, no witness or accompanying attorney may be permitted to be present during the taking of testimony of any other witness called in such proceeding. Neither attorney(s) for the association(s) that are the subjects of the investigative proceedings or formal examination proceedings, nor attorneys for any other interested persons, shall have any right to be present during the testimony of any witness not personally being represented by such attorney.

(3) The OCC, for good cause, may exclude a particular attorney from further participation in any investigation in which the OCC has found the attorney to have engaged in dilatory, obstructionist, egregious, contemptuous or contumacious conduct. The person conducting an investigation may report to the OCC instances of apparently dilatory, obstructionist, egregious, contemptuous or contumacious conduct on the part of an attorney. After due notice to the attorney, the OCC may take such action as the circumstances warrant based upon a written record evidencing the conduct of the attorney in that investigation or such other or additional written or oral presentation as the OCC may permit or direct.

§ 112.6 Obstruction of the proceedings.

The designated representative shall report to the Comptroller any instances where any witness or counsel has engaged in dilatory, obstructionist, or contumacious conduct or has otherwise violated any provision of this part during the course of an investigative proceeding or formal examination proceeding; and the OCC may take such action as the circumstances warrant, including the exclusion of counsel from further participation in such proceeding.

§ 112.7 Subpoenas.

(a) *Service.* Service of a subpoena in connection with any investigative proceeding or formal examination proceeding shall be effected in the following manner:

(1) *Service upon a natural person.* Service of a subpoena upon a natural person may be effected by handing it to such person; by leaving it at his office with the person in charge thereof, or, if there is no one in charge, by leaving it in a conspicuous place therein; by leaving it at his dwelling place or usual place of abode with some person of suitable age and discretion then residing therein; by mailing it to him by registered or certified mail or by an express delivery service at his last known address; or by any method whereby actual notice is given to him.

(2) *Service upon other persons.* When the person to be served is not a natural person, service of the subpoena may be effected by handing the subpoena to a registered agent for service, or to any officer, director, or agent in charge of any office of such person; by mailing it to any such representative by registered or certified mail or by an express delivery service at his last known address; or by any method whereby actual notice is given to such person.

(b) *Motions to quash.* Any person to whom a subpoena is directed may, prior to the time specified therein for compliance, but in no event more than 10 days after the date of service of such subpoena, apply to the Deputy Chief Counsel or his designee to quash or modify such subpoena, accompanying such application with a statement of the reasons therefor. The Deputy Chief Counsel or his designee, as appropriate, may:

(1) Deny the application;

(2) Quash or revoke the subpoena;

(3) Modify the subpoena; or

(4) Condition the granting of the application on such terms as the Deputy Chief Counsel or his designee determines to be just, reasonable, and proper.

(c) *Attendance of witnesses.* Subpoenas issued in connection with an investigative proceeding or formal examination proceeding may require the attendance and/or testimony of witnesses from any state or territory of the United States and the production by such witnesses of documentary or other tangible evidence at any designated place where the proceeding is being (or is to be) conducted. Foreign nationals are subject to such subpoenas if such service is made upon a duly authorized agent located in the United States.

(d) *Witness fees and mileage.* Witnesses summoned in any proceeding under this part shall be paid the same fees and mileage that are paid witnesses in the district courts of the United States. Such fees and mileage need not be tendered when the subpoena is issued on behalf of the OCC by any of its designated representatives.

PART 165 - PROMPT CORRECTIVE ACTION

Authority: 12 U.S.C. 1831o, 5412(b)(2)(B).

§§ 165.1-165.7 [Reserved]

§ 165.8 Procedures for reclassifying a Federal savings association based on criteria other than capital.

(a) *Reclassification based on unsafe or unsound condition or practice* – (1) *Issuance of notice of proposed reclassification – (i) Grounds for reclassification.* (A) Pursuant to 12 CFR 6.4(d), the OCC may reclassify a well capitalized Federal savings association as adequately capitalized or subject an adequately capitalized or

undercapitalized institution to the supervisory actions applicable to the next lower capital category if:

(*1*) The OCC determines that the savings association is in an unsafe or unsound condition; or

(*2*) The OCC deems the savings association to be engaged in an unsafe or unsound practice and not to have corrected the deficiency.

(B) Any action pursuant to this paragraph (a)(1)(i) shall hereinafter be referred to as "reclassification."

(ii) *Prior notice to institution.* Prior to taking action pursuant to 12 CFR 6.4(d), the OCC shall issue and serve on the Federal savings association a written notice of the OCC's intention to reclassify the savings association.

(2) *Contents of notice.* A notice of intention to reclassify a Federal savings association based on unsafe or unsound condition shall include:

(i) A statement of the savings association's capital measures and capital levels and the category to which the savings association would be reclassified;

(ii) The reasons for reclassification of the savings association;

(iii) The date by which the savings association subject to the notice of reclassification may file with the OCC a written appeal of the proposed reclassification and a request for a hearing, which shall be at least 14 calendar days from the date of service of the notice unless the OCC determines that a shorter period is appropriate in light of the financial condition of the savings association or other relevant circumstances.

(3) *Response to notice of proposed reclassification.* A Federal savings association may file a written response to a notice of proposed reclassification within the time period set by the OCC. The response should include:

(i) An explanation of why the savings association is not in unsafe or unsound condition or otherwise should not be reclassified; and

(ii) Any other relevant information, mitigating circumstances, documentation, or other evidence in support of the position of the savings association or company regarding the reclassification.

(4) *Failure to file response.* Failure by a Federal savings association to file, within the specified time period, a written response with the OCC to a notice of proposed reclassification shall constitute a waiver of the opportunity to respond and shall constitute consent to the reclassification.

(5) *Request for hearing and presentation of oral testimony or witnesses.* The response may include a request for an informal hearing before the OCC or its designee under this section. If the Federal savings association desires to present oral testimony or witnesses at the hearing, the savings association shall include a request to do so with the request for an informal hearing. A request to present oral testimony or witnesses shall specify the names of the witnesses and the general nature of their expected testimony. Failure to request a hearing shall constitute a waiver of any right to a hearing, and failure to request the opportunity to present oral testimony or witnesses shall constitute a waiver of any right to present oral testimony or witnesses.

(6) *Order for informal hearing.* Upon receipt of a timely written request that includes a request for a hearing, the OCC shall issue an order directing an informal

hearing to commence no later than 30 days after receipt of the request, unless the OCC allows further time at the request of the Federal savings association. The hearing shall be held in Washington, DC or at such other place as may be designated by the OCC, before a presiding officer(s) designated by the OCC to conduct the hearing.

(7) *Hearing procedures.* (i) The Federal savings association shall have the right to introduce relevant written materials and to present oral argument at the hearing. The savings association may introduce oral testimony and present witnesses only if expressly authorized by the OCC or the presiding officer(s). Neither the provisions of the Administrative Procedure Act (5 U.S.C. 554-557) governing adjudications required by statute to be determined on the record nor parts 19 or 109 of this chapter apply to an informal hearing under this section unless the OCC orders that such procedures shall apply.

(ii) The informal hearing shall be recorded and a transcript furnished to the savings association upon request and payment of the cost thereof. Witnesses need not be sworn, unless specifically requested by a party or the presiding officer(s). The presiding officer(s) may ask questions of any witness.

(iii) The presiding officer(s) may order that the hearing be continued for a reasonable period (normally five business days) following completion of oral testimony or argument to allow additional written submissions to the hearing record.

(8) *Recommendation of presiding officers.* Within 20 calendar days following the date the hearing and the record on the proceeding are closed, the presiding officer(s) shall make a recommendation to the OCC on the reclassification.

(9) *Time for decision.* Not later than 60 calendar days after the date the record is closed or the date of the response in a case where no hearing was requested, the OCC will decide whether to reclassify the Federal savings association and notify the savings association of the OCC's decision.

(b) *Request for rescission of reclassification.* Any Federal savings association that has been reclassified under this section, may, upon a change in circumstances, request in writing that the OCC reconsider the reclassification, and may propose that the reclassification be rescinded and that any directives issued in connection with the reclassification be modified, rescinded, or removed. Unless otherwise ordered by the OCC, the savings association shall remain subject to the reclassification and to any directives issued in connection with that reclassification while such request is pending before the OCC.

§ 165.9 Order to dismiss a director or senior executive officer.

(a) *Service of notice.* When the OCC issues and serves a directive on a Federal savings association pursuant to subpart B of part 6 of this chapter requiring the savings association to dismiss any director or senior executive officer under section 38(f)(2)(F)(ii) of the FDI Act, the OCC shall also serve a copy of the directive, or the relevant portions of the directive where appropriate, upon the person to be dismissed.

(b) *Response to directive* - (1) *Request for reinstatement.* A director or senior executive officer who has been served with a directive under paragraph (a) of this section (Respondent) may file a written request for reinstatement. The request for reinstatement shall be filed within 10 calendar days of the receipt of the directive by the Respondent, unless further time is allowed by the OCC at the request of the Respondent.

(2) *Contents of request; informal hearing.* The request for reinstatement should include reasons why the Respondent should be reinstated, and may include a request for an informal hearing before the OCC or its designee under this section. If the Respondent desires to present oral testimony or witnesses at the hearing, the Respondent shall include a request to do so with the request for an informal hearing. The request to present oral testimony or witnesses shall specify the names of the witnesses and the general nature of their expected testimony. Failure to request a hearing shall constitute a waiver of any right to a hearing and failure to request the opportunity to present oral testimony or witnesses shall constitute a waiver of any right or opportunity to present oral testimony or witnesses.

(3) *Effective date.* Unless otherwise ordered by the OCC, the dismissal shall remain in effect while a request for reinstatement is pending.

(c) *Order for informal hearing.* Upon receipt of a timely written request from a Respondent for an informal hearing on the portion of a directive requiring a Federal savings association to dismiss from office any director or senior executive officer, the OCC shall issue an order directing an informal hearing to commence no later than 30 days after receipt of the request, unless the Respondent requests a later date. The hearing shall be held in Washington, DC, or at such other place as may be designated by the OCC, before a presiding officer(s) designated by the OCC to conduct the hearing.

(d) *Hearing procedures.* (1) A Respondent may appear at the hearing personally or through counsel. A Respondent shall have the right to introduce relevant written materials and to present oral argument. A Respondent may introduce oral testimony and

present witnesses only if expressly authorized by the OCC or the presiding officer(s). Neither the provisions of the Administrative Procedure Act governing adjudications required by statute to be determined on the record nor parts 19 or 109 of this chapter apply to an informal hearing under this section unless the OCC orders that such procedures shall apply.

(2) The informal hearing shall be recorded and a transcript furnished to the Respondent upon request and payment of the cost thereof. Witnesses need not be sworn, unless specifically requested by a party or the presiding officer(s). The presiding officer(s) may ask questions of any witness.

(3) The presiding officer(s) may order that the hearing be continued for a reasonable period (normally five business days) following completion of oral testimony or argument to allow additional written submissions to the hearing record.

(e) *Standard for review.* A Respondent shall bear the burden of demonstrating that his or her continued employment by or service with the Federal savings association would materially strengthen the savings association's ability:

(1) To become adequately capitalized, to the extent that the directive was issued as a result of the savings association's capital level or failure to submit or implement a capital restoration plan; and

(2) To correct the unsafe or unsound condition or unsafe or unsound practice, to the extent that the directive was issued as a result of classification of the savings association based on supervisory criteria other than capital, pursuant to section 38(g) of the FDI Act.

(f) *Recommendation of presiding officers.* Within 20 calendar days following the date the hearing and the record on the proceeding are closed, the presiding officer(s) shall make a recommendation to the OCC concerning the Respondent's request for reinstatement with the Federal savings association.

(g) *Time for decision.* Not later than 60 calendar days after the date the record is closed or the date of the response in a case where no hearing has been requested, the OCC shall grant or deny the request for reinstatement and notify the Respondent of the OCC's decision. If the OCC denies the request for reinstatement, the OCC shall set forth in the notification the reasons for the OCC's action.

§ 165.10 [Reserved]

PART 108—[REMOVED]

11. Part 108 is removed.

PART 109—[REMOVED]

12. Part 109 is removed.

PART 112—[REMOVED]

13. Part 112 is removed.

PART 150—FIDUCIARY POWERS OF FEDERAL SAVINGS ASSOCIATIONS

14. The authority citation for part 150 continues to read as follows:

Authority: 12 U.S.C. 1462a, 1463, 1464, 5412(b)(2)(B).

§ 150.570 [Amended]

15. Section 150.570 is amended by removing the words “part 109” and adding in their place the words “part 19”.

PART 165—[REMOVED]

16. Part 165 is removed.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM

For the reasons stated in the joint preamble, the Board amends parts 238 and 263 in title 12 of the Code of Federal Regulations as follows:

PART 238 – SAVINGS AND LOAN HOLDING COMPANIES

17. The authority citation for part 238 continues to read as follows:

Authority: 5 U.S.C. 552, 559; 12 U.S.C. 1462, 1462a, 1463, 1464, 1467, 1467a, 1468, 5365; 1813, 1817, 1829e, 1831i, 1972, 15 U.S.C. 78*l*.

Subpart L — [Removed and Reserved]

18. Remove and reserve subpart L, consisting of §§ 238.111 through 238.117.

PART 263 – RULES OF PRACTICE FOR HEARINGS

19. The authority citation for part 263 is revised to read as follows:

Authority: 5 U.S.C. 504, 554-557; 12 U.S.C. 248, 324, 334, 347a, 504, 505, 1464, 1467, 1467a, 1817(j), 1818, 1820(k), 1829, 1831o, 1831p-1, 1832(c), 1847(b), 1847(d), 1884, 1972(2)(F), 3105, 3108, 3110, 3349, 3907, 3909(d), 4717, 5323, 5362, 5365, 5463, 5464, 5466, 5467; 15 U.S.C. 21, 78l(i), 78o-4, 78o-5, 78u-2; 1639e(K); 28 U.S.C. 2461 note; 31 U.S.C. 5321; and 42 U.S.C. 4012a.

20. Subparts A and B are revised to read as follows:

PART 263 – RULES OF PRACTICE FOR HEARINGS

Subpart A—Uniform Rules of Practice and Procedure

Sec.

263.1 Scope.
263.2 Rules of construction.
263.3 Definitions.
263.4 Authority of the Board.

263.5 Authority of the administrative law judge (ALJ).
263.6 Appearance and practice in adjudicatory proceedings.
263.7 Good faith certification.
263.8 Conflicts of interest.
263.9 *Ex parte* communications.
263.10 Filing of papers.
263.11 Service of papers.
263.12 Construction of time limits.
263.13 Change of time limits.
263.14 Witness fees and expenses.
263.15 Opportunity for informal settlement.
263.16 The Board's right to conduct examination.
263.17 Collateral attacks on adjudicatory proceeding.
263.18 Commencement of proceeding and contents of notice.
263.19 Answer.
263.20 Amended pleadings.
263.21 Failure to appear.
263.22 Consolidation and severance of actions.
263.23 Motions.
263.24 Scope of document discovery.
263.25 Request for document discovery from parties.
263.26 Document subpoenas to nonparties.
263.27 Deposition of witness unavailable for hearing.
263.28 Interlocutory review.
263.29 Summary disposition.
263.30 Partial summary disposition.
263.31 Scheduling and prehearing conferences.
263.32 Prehearing submissions.
263.33 Public hearings.
263.34 Hearing subpoenas.
263.35 Conduct of hearings.
263.36 Evidence.
263.37 Post-hearing filings.
263.38 Recommended decision and filing of record.
263.39 Exceptions to recommended decision.
263.40 Review by the Board.
263.41 Stays pending judicial review.

Subpart B—Board Local Rules Supplementing Uniform Rules

263.50 Purpose and scope.
263.51 Definitions.
263.52 Address for filing.
263.53 Discovery depositions.
263.54 Delegation to the Office of Financial Institution Adjudication.
263.55 Board as Presiding Officer.

263.56 Initial licensing proceedings.
263.57 Sanctions relating to conduct in an adjudicatory proceeding.

Subpart A—Uniform Rules of Practice and Procedure

§ 263.1 Scope.

This subpart prescribes Uniform Rules of practice and procedure applicable to adjudicatory proceedings required to be conducted on the record after opportunity for a hearing under the following statutory provisions:

(a) Cease-and-desist proceedings under section 8(b) of the Federal Deposit Insurance Act ("FDIA") (12 U.S.C. 1818(b));

(b) Removal and prohibition proceedings under section 8(e) of the FDIA (12 U.S.C. 1818(e));

(c) Change-in-control proceedings under section 7(j)(4) of the FDIA (12 U.S.C. 1817(j)(4)) to determine whether the Board of Governors of the Federal Reserve System ("Board") should issue an order to approve or disapprove a person's proposed acquisition of a state member bank, bank holding company, or savings and loan holding company;

(d) Proceedings under section 15C(c)(2) of the Securities Exchange Act of 1934 ("Exchange Act") (15 U.S.C. 78o-5), to impose sanctions upon any government securities broker or dealer or upon any person associated or seeking to become associated with a government securities broker or dealer for which the Board is the appropriate agency;

(e) Assessment of civil money penalties by the Board against institutions, institution-affiliated parties, and certain other persons for which the Board is the appropriate agency for any violation of:

(1) Any provision of the Bank Holding Company Act of 1956, as amended ("BHC Act"), or any order or regulation issued thereunder, pursuant to 12 U.S.C. 1847(b) and (d);

(2) Sections 19, 22, 23, 23A and 23B of the Federal Reserve Act ("FRA"), or any regulation or order issued thereunder and certain unsafe or unsound practices or breaches of fiduciary duty, pursuant to 12 U.S.C. 504 and 505;

(3) Section 9 of the FRA pursuant to 12 U.S.C. 324;

(4) Section 106(b) of the Bank Holding Company Act Amendments of 1970 and certain unsafe or unsound practices or breaches of fiduciary duty, pursuant to 12 U.S.C. 1972(2)(F);

(5) Any provision of the Change in Bank Control Act of 1978, as amended, or any regulation or order issued thereunder and certain unsafe or unsound practices or breaches of fiduciary duty, pursuant to 12 U.S.C. 1817(j)(16);

(6) Any provision of the International Lending Supervision Act of 1983 ("ILSA") or any rule, regulation or order issued thereunder, pursuant to 12 U.S.C. 3909;

(7) Any provision of the International Banking Act of 1978 ("IBA") or any rule, regulation or order issued thereunder, pursuant to 12 U.S.C. 3108;

(8) Certain provisions of the Exchange Act, pursuant to section 21B of the Exchange Act (15 U.S.C. 78u-2);

(9) Section 1120 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (12 U.S.C. 3349), or any order or regulation issued thereunder;

(10) The terms of any final or temporary order issued under section 8 of the FDIA or of any written agreement executed by the Board or the former Office of Thrift

Supervision (“OTS”), the terms of any condition imposed in writing by the Board or the former OTS in connection with the grant of an application or request, and certain unsafe or unsound practices or breaches of fiduciary duty or law or regulation pursuant to 12 U.S.C. 1818(i)(2);

(11) Any provision of law referenced in section 102(f) of the Flood Disaster Protection Act of 1973 (42 U.S.C. 4012a(f)) or any order or regulation issued thereunder;

(12) Any provision of law referenced in 31 U.S.C. 5321 or any order or regulation issued thereunder;

(13) Section 5 of the Home Owners' Loan Act (“HOLA”) or any regulation or order issued thereunder, pursuant to 12 U.S.C. 1464(d), (s) and (v);

(14) Section 9 of the HOLA or any regulation or order issued thereunder, pursuant to 12 U.S.C. 1467(d); and

(15) Section 10 of the HOLA, pursuant to 12 U.S.C. 1467a(i) and (r);

(f) Remedial action under section 102(g) of the Flood Disaster Protection Act of 1973 (42 U.S.C. 4012a(g));

(g) Removal, prohibition, and civil monetary penalty proceedings under section 10(k) of the FDIA (12 U.S.C. 1820(k)) for violations of the post-employment restrictions imposed by that section; and

(h) This subpart also applies to all other adjudications required by statute to be determined on the record after opportunity for an agency hearing, unless otherwise specifically provided for in the Local Rules (see § 263.3(i)).

§ 263.2 Rules of construction.

For purposes of this subpart:

(a) Any term in the singular includes the plural, and the plural includes the singular, if such use would be appropriate;

(b) The term *counsel* includes a non-attorney representative; and

(c) Unless the context requires otherwise, a party's counsel of record, if any, may, on behalf of that party, take any action required to be taken by the party.

§ 263.3 Definitions.

For purposes of this subpart, unless explicitly stated to the contrary:

(a) *Administrative law judge* (ALJ) means one who presides at an administrative hearing under authority set forth at 5 U.S.C. 556.

(b) *Adjudicatory proceeding* means a proceeding conducted pursuant to these rules and leading to the formulation of a final order other than a regulation.

(c) *Decisional employee* means any member of the Board's or ALJ's staff who has not engaged in an investigative or prosecutorial role in a proceeding and who may assist the Agency or the ALJ, respectively, in preparing orders, recommended decisions, decisions, and other documents under the Uniform Rules.

(d) *Electronic signature* means electronically affixing the equivalent of a signature to an electronic document filed or transmitted electronically.

(e) *Enforcement Counsel* means any individual who files a notice of appearance as counsel on behalf of the Board in an adjudicatory proceeding.

(f) *Final order* means an order issued by the Board with or without the consent of the affected institution or the institution-affiliated party, that has become final, without regard to the pendency of any petition for reconsideration or review.

(g) *Institution* includes:

(1) Any bank as that term is defined in section 3(a) of the FDIA (12 U.S.C. 1813(a));

(2) Any bank holding company or any subsidiary (other than a bank) of a bank holding company as those terms are defined in the BHC Act (12 U.S.C. 1841 *et seq*.);

(3) Any organization organized and operated under section 25A of the FRA (12 U.S.C. 611 *et seq*.) or operating under section 25 of the FRA (12 U.S.C. 601 *et seq.*);

(4) Any foreign bank or company to which section 8 of the IBA (12 U.S.C. 3106), applies or any subsidiary (other than a bank) thereof;

(5) Any branch or agency as those terms are defined in section 1(b) of the IBA (12 U.S.C. 3101(1), (3), (5), (6));

(6) Any savings and loan holding company or any subsidiary (other than a depository institution) of a savings and loan holding company as those terms are defined in the HOLA (12 U.S.C. 1461 *et seq.*);

(7) Any U.S. or foreign nonbank financial company that the Financial Stability Oversight Council ("FSOC") requires the Board to supervise under section 113 of the Dodd-Frank Act (12 U.S.C. 5323(a)(1), (b)(1)), or any subsidiary (other than a bank) thereof;

(8) Any financial market utility or financial institution conducting payment, clearing, or settlement activities that FSOC designates as systematically important under section 804 of the Dodd-Frank Act (12 U.S.C. 5463); and

(9) Any other entity subject to the supervision of the Board.

(h) *Institution-affiliated party* means any institution-affiliated party as that term is defined in section 3(u) of the FDIA (12 U.S.C. 1813(u)).

(i) *Local Rules* means those rules promulgated by the Board in this part other than this subpart.

(j) *OFIA* means the Office of Financial Institution Adjudication, the executive body charged with overseeing the administration of administrative enforcement proceedings for the Board, the Office of Comptroller of the Currency ("OCC"), the Federal Deposit Insurance Corporation ("FDIC"), and the National Credit Union Administration ("NCUA").

(k) *Party* means the Board and any person named as a party in any notice.

(l) *Person* means an individual, sole proprietor, partnership, corporation, unincorporated association, trust, joint venture, pool, syndicate, agency, or other entity or organization, including an institution as defined in paragraph (g) of this section.

(m) *Respondent* means any party other than the Board.

(n) *Uniform Rules* means those rules in this subpart A that are common to the Board, the OCC, the FDIC, and the NCUA.

(o) *Violation* means any violation as that term is defined in section 3(v) of the FDIA (12 U.S.C. 1813(v)).

§ 263.4 Authority of the Board.

The Board may, at any time during the pendency of a proceeding, perform, direct the performance of, or waive performance of, any act which could be done or ordered by the ALJ.

§ 263.5 Authority of the administrative law judge ("ALJ").

(a) *General rule*. All proceedings governed by this part must be conducted in accordance with the provisions of 5 U.S.C. chapter 5. The ALJ has all powers necessary to conduct a proceeding in a fair and impartial manner and to avoid unnecessary delay.

(b) *Powers*. The ALJ has all powers necessary to conduct the proceeding in accordance with paragraph (a) of this section, including the following powers:

(1) To administer oaths and affirmations;

(2) To issue subpoenas, subpoenas *duces tecum*, protective orders, and other orders, as authorized by this part, and to quash or modify any such subpoenas and orders;

(3) To receive relevant evidence and to rule upon the admission of evidence and offers of proof;

(4) To take or cause depositions to be taken as authorized by this subpart;

(5) To regulate the course of the hearing and the conduct of the parties and their counsel;

(6) To hold scheduling and/or pre-hearing conferences as set forth in § 263.31;

(7) To consider and rule upon all procedural and other motions appropriate in an adjudicatory proceeding, provided that only the Board has the power to grant any motion to dismiss the proceeding or to decide any other motion that results in a final determination of the merits of the proceeding;

(8) To prepare and present to the Board a recommended decision as provided in this section;

(9) To recuse oneself by motion made by a party or on the ALJ's own motion;

(10) To establish time, place and manner limitations on the attendance of the public and the media for any public hearing; and

(11) To do all other things necessary and appropriate to discharge the duties of an ALJ.

§ 263.6 Appearance and practice in adjudicatory proceedings.

(a) *Appearance before the Board or an ALJ*—(1) *By attorneys*. Any member in good standing of the bar of the highest court of any state, commonwealth, possession, territory of the United States, or the District of Columbia may represent others before the Board if such attorney is not currently suspended or debarred from practice before the Board.

(2) *By non-attorneys*. An individual may appear on the individual's own behalf.

(3) *Notice of appearance*. (i) Any individual acting on the individual's own behalf or as counsel on behalf of a party, including the Board, must file a notice of appearance with OFIA at or before the time that the individual submits papers or otherwise appears on behalf of a party in the adjudicatory proceeding. The notice of appearance must include:

(A) A written declaration that the individual is currently qualified as provided in paragraph (a)(1) or (2) of this section and is authorized to represent the particular party; and

(B) A written acknowledgement that the individual has reviewed and will comply with the Uniform Rules and Local Rules in subpart B of this part.

(ii) By filing a notice of appearance on behalf of a party in an adjudicatory proceeding, the counsel agrees and represents that the counsel is authorized to accept service on behalf of the represented party and that, in the event of withdrawal from representation, the counsel will, if required by the ALJ, continue to accept service until

new counsel has filed a notice of appearance or until the represented party indicates that the party will proceed on a *pro se* basis.

(b) *Sanctions*. Dilatory, obstructionist, egregious, contemptuous, or contumacious conduct at any phase of any adjudicatory proceeding may be grounds for exclusion or suspension of counsel from the proceeding.

§ 263.7 Good faith certification.

(a) *General requirement*. Every filing or submission of record following the issuance of a notice must be signed by at least one counsel of record in the counsel's individual name and must state that counsel's mailing address, electronic mail address, and telephone number. A party who acts as the party's own counsel must sign that person's individual name and state that person's mailing address, electronic mail address, and telephone number on every filing or submission of record. Electronic signatures may be used to satisfy the signature requirements of this section.

(b) *Effect of signature*. (1) The signature of counsel or a party will constitute a certification: the counsel or party has read the filing or submission of record; to the best of the counsel's or party's knowledge, information, and belief formed after reasonable inquiry, the filing or submission of record is well-grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and the filing or submission of record is not made for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

(2) If a filing or submission of record is not signed, the ALJ will strike the filing or submission of record, unless it is signed promptly after the omission is called to the attention of the pleader or movant.

(c) *Effect of making oral motion or argument*. The act of making any oral motion or oral argument by any counsel or party constitutes a certification that to the best of the counsel's or party's knowledge, information, and belief formed after reasonable inquiry, the counsel's or party's statements are well-grounded in fact and are warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and are not made for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

§ 263.8 Conflicts of interest.

(a) *Conflict of interest in representation*. No person may appear as counsel for another person in an adjudicatory proceeding if it reasonably appears that such representation may be materially limited by that counsel's responsibilities to a third person or by the counsel's own interests. The ALJ may take corrective measures at any stage of a proceeding to cure a conflict of interest in representation, including the issuance of an order limiting the scope of representation or disqualifying an individual from appearing in a representative capacity for the duration of the proceeding.

(b) *Certification and waiver*. If any person appearing as counsel represents two or more parties to an adjudicatory proceeding or also represents a non-party on a matter relevant to an issue in the proceeding, counsel must certify in writing at the time of filing the notice of appearance required by § 263.6(a):

(1) That the counsel has personally and fully discussed the possibility of conflicts of interest with each such party and non-party; and

(2) That each such party and non-party waives any right it might otherwise have had to assert any known conflicts of interest or to assert any non-material conflicts of interest during the course of the proceeding.

§ 263.9 Ex parte communications.

(a) *Definition* — (1) *Ex parte communication. Ex parte communication* means any material oral or written communication relevant to the merits of an adjudicatory proceeding that was neither on the record nor on reasonable prior notice to all parties that takes place between:

(i) An interested person outside the Board (including such person's counsel); and

(ii) The ALJ handling that proceeding, a member of the Board, or a decisional employee.

(2) *Exception*. A request for status of the proceeding does not constitute an *ex parte* communication.

(b) *Prohibition of ex parte communications*. From the time the notice is issued by the Board until the date that the Board issues a final decision pursuant to § 263.40(c):

(1) An interested person outside the Federal Reserve System must not make or knowingly cause to be made an *ex parte* communication to a member of the Board, the ALJ, or a decisional employee; and

(2) A member of the Board, ALJ, or decisional employee may not make or knowingly cause to be made to any interested person outside the Federal Reserve System any *ex parte* communication.

(c) *Procedure upon occurrence of ex parte communication*. If an *ex parte* communication is received by the ALJ, a member of the Board, or any other person identified in paragraph (a) of this section, that person will cause all such written communications (or, if the communication is oral, a memorandum stating the substance of the communication) to be placed on the record of the proceeding and served on all parties. All other parties to the proceeding may, within ten days of service of the *ex parte* communication, file responses thereto and to recommend any sanctions that they believe to be appropriate under the circumstances. The ALJ or the Board then determines whether any action should be taken concerning the *ex parte* communication in accordance with paragraph (d) of this section.

(d) *Sanctions*. Any party or counsel to a party who makes a prohibited *ex parte* communication, or who encourages or solicits another to make any such communication, may be subject to any appropriate sanction or sanctions imposed by the Board or the ALJ including, but not limited to, exclusion from the proceedings and an adverse ruling on the issue which is the subject of the prohibited communication.

(e) *Separation of functions*—(1) *In general*. Except to the extent required for the disposition of *ex parte* matters as authorized by law, the ALJ may not:

(i) Consult a person or party on a fact in issue unless on notice and opportunity for all parties to participate; or

(ii) Be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for the Board.

(2) *Decision process*. An employee or agent engaged in the performance of investigative or prosecuting functions for the Board in a case may not, in that or a

factually related case, participate or advise in the decision, recommended decision, or agency review of the recommended decision under §263.40, except as witness or counsel in administrative or judicial proceedings.

§ 263.10 Filing of papers.

(a) *Filing*. Any papers required to be filed, excluding documents produced in response to a discovery request pursuant to §§ 263.25 and 263.26, must be filed with OFIA, except as otherwise provided.

(b) *Manner of filing*. Unless otherwise specified by the Board or the ALJ, filing may be accomplished by:

(1) Electronic mail or other electronic means designated by the Board or the ALJ;

(2) Personal service;

(3) Delivering the papers to a same day courier service or overnight delivery service; or

(4) Mailing the papers by first class, registered, or certified mail.

(c) *Formal requirements as to papers filed*—(1) *Form*. All papers filed must set forth the name, mailing address, electronic mail address, and telephone number of the counsel or party making the filing and must be accompanied by a certification setting forth when and how service has been made on all other parties. All papers filed must be double-spaced and printed or typewritten on an 8 1/2×11 inch page and must be clear and legible.

(2) *Signature*. All papers must be dated and signed as provided in § 263.7.

(3) *Caption*. All papers filed must include at the head thereof, or on a title page, the name of the Board and of the filing party, the title and docket number of the proceeding, and the subject of the particular paper.

§ 263.11 Service of papers.

(a) *By the parties*. Except as otherwise provided, a party filing papers must serve a copy upon the counsel of record for all other parties to the proceeding so represented, and upon any party not so represented.

(b) *Method of service*. Except as provided in paragraphs (c)(2) and (d) of this section, a serving party must use one of the following methods of service:

(1) Electronic mail or other electronic means;

(2) Personal service;

(3) Delivering the papers by same day courier service or overnight delivery service; or

(4) Mailing the papers by first class, registered, or certified mail.

(c) *By the Board or the ALJ*. (1) All papers required to be served by the Board or the ALJ upon a party who has appeared in the proceeding in accordance with § 263.6 will be served by electronic mail or other electronic means designated by the Board or ALJ.

(2) If a respondent has not appeared in the proceeding in accordance with § 263.6, the Board or the ALJ will serve the respondent by any of the following methods:

(i) By personal service;

(ii) If the person to be served is an individual, by delivery to a person of suitable age and discretion at the physical location where the individual resides or works;

(iii) If the person to be served is a corporation or other association, by delivery to an officer, managing or general agent, or to any other agent authorized by appointment or by law to receive service and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the respondent;

(iv) By registered or certified mail, delivery by a same day courier service, or by an overnight delivery service to the respondent's last known mailing address; or

(v) By any other method reasonably calculated to give actual notice.

(d) *Subpoenas*. Service of a subpoena may be made:

(1) By personal service;

(2) If the person to be served is an individual, by delivery to a person of suitable age and discretion at the physical location where the individual resides or works;

(3) If the person to be served is a corporation or other association, by delivery to an officer, managing or general agent, or to any other agent authorized by appointment or by law to receive service and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the party;

(4) By registered or certified mail, delivery by a same day courier service, or by an overnight delivery service to the person's last known mailing address; or

(5) By any other method reasonably calculated to give actual notice.

(e) *Area of service*. Service in any state, territory, possession of the United States, or the District of Columbia, on any person or company doing business in any state, territory, possession of the United States, or the District of Columbia, or on any person as otherwise provided by law, is effective without regard to the place where the hearing is held, provided that if service is made on a foreign bank in connection with an action or

proceeding involving one or more of its branches or agencies located in any state, territory, possession of the United States, or the District of Columbia, service must be made on at least one branch or agency so involved.

§ 263.12 Construction of time limits.

(a) *General rule*. In computing any period of time prescribed by this subpart, the date of the act or event that commences the designated period of time is not included. The last day so computed is included unless it is a Saturday, Sunday, or Federal holiday. When the last day is a Saturday, Sunday, or Federal holiday, the period runs until the end of the next day that is not a Saturday, Sunday, or Federal holiday. Intermediate Saturdays, Sundays, and Federal holidays are included in the computation of time. However, when the time period within which an act is to be performed is ten days or less, not including any additional time allowed for in paragraph (c) of this section, intermediate Saturdays, Sundays, and Federal holidays are not included.

(b) *When papers are deemed to be filed or served*. (1) Filing and service are deemed to be effective:

(i) In the case of transmission by electronic mail or other electronic means, upon transmittal by the serving party;

(ii) In the case of overnight delivery service or first class, registered, or certified mail, upon deposit in or delivery to an appropriate point of collection; or

(iii) In the case of personal service or same day courier delivery, upon actual service.

(2) The effective filing and service dates specified in paragraph (b)(1) of this section may be modified by the Board or ALJ in the case of filing or by agreement of the parties in the case of service.

(c) *Calculation of time for service and filing of responsive papers*. Whenever a time limit is measured by a prescribed period from the service of any notice or paper, the applicable time limits are calculated as follows:

(1) If service is made by electronic mail or other electronic means or by same day courier delivery, add one calendar day to the prescribed period;

(2) If service is made by overnight delivery service, add two calendar days to the prescribed period; or

(3) If service is made by first class, registered, or certified mail, add three calendar days to the prescribed period.

§ 263.13 Change of time limits.

Except as otherwise provided by law, the ALJ may, for good cause shown, extend the time limits prescribed by the Uniform Rules or by any notice or order issued in the proceedings. After the referral of the case to the Board pursuant to § 263.38, the Board may grant extensions of the time limits for good cause shown. Extensions may be granted at the motion of a party after notice and opportunity to respond is afforded all non-moving parties or on the Board's or the ALJ's own motion.

§ 263.14 Witness fees and expenses.

(a) *In general*. A witness, including an expert witness, who testifies at a deposition or hearing will be paid the same fees for attendance and mileage as are paid in

the United States district courts in proceedings in which the United States is a party, except as provided in paragraph (b) and unless otherwise waived.

(b) *Exception for testimony by a party*. In the case of testimony by a party, no witness fees or mileage need to be paid. The Board will not be required to pay any fees to, or expenses of, any witness not subpoenaed by the Board.

(c) *Timing of payment*. Fees and mileage in accordance with this paragraph (c)must be paid in advance by the party requesting the subpoena, except that fees and mileage need not be tendered in advance where the Board is the party requesting the subpoena.

§ 263.15 Opportunity for informal settlement.

Any respondent may, at any time in the proceeding, unilaterally submit to Enforcement Counsel written offers or proposals for settlement of a proceeding, without prejudice to the rights of any of the parties. Any such offer or proposal may only be made to Enforcement Counsel. Submission of a written settlement offer does not provide a basis for adjourning or otherwise delaying all or any portion of a proceeding under this part. No settlement offer or proposal, or any subsequent negotiation or resolution, is admissible as evidence in any proceeding.

§ 263.16 The Board's right to conduct examination.

Nothing contained in this subpart limits in any manner the right of the Board to conduct any examination, inspection, or visitation of any institution or institution-affiliated party, or the right of the Board to conduct or continue any form of investigation authorized by law.

§ 263.17 Collateral attacks on adjudicatory proceeding.

If an interlocutory appeal or collateral attack is brought in any court concerning all or any part of an adjudicatory proceeding, the challenged adjudicatory proceeding will continue without regard to the pendency of that court proceeding. No default or other failure to act as directed in the adjudicatory proceeding within the times prescribed in this subpart will be excused based on the pendency before any court of any interlocutory appeal or collateral attack.

§ 263.18 Commencement of proceeding and contents of notice.

(a) *Commencement of proceeding*. (1)(i) Except for change-in-control proceedings under section 7(j)(4) of the FDIA, 12 U.S.C. 1817(j)(4), a proceeding governed by this subpart is commenced by issuance of a notice by the Board.

(ii) The notice must be served by Enforcement Counsel upon the respondent and given to any other appropriate financial institution supervisory authority where required by law. Enforcement Counsel may serve the notice upon counsel for the respondent, provided that Enforcement Counsel has confirmed that counsel represents the respondent in the matter and will accept service of the notice on behalf of the respondent.

(iii) Enforcement Counsel must file the notice with OFIA.

(2) Change-in control proceedings under section 7(j)(4) of the FDIA (12 U.S.C. 1817(j)(4)) commence with the issuance of an order by the Board.

(b) *Contents of notice*. Notice pleading applies. The notice must provide:

(1) The legal authority for the proceeding and for the Board's jurisdiction over the proceeding;

(2) Matters of fact or law showing that the Board is entitled to relief;

(3) A proposed order or prayer for an order granting the requested relief;

(4) The time, place, and nature of the hearing as required by law or regulation;

(5) The time within which to file an answer as required by law or regulation;

(6) The time within which to request a hearing as required by law or regulation; and

(7) That the answer and/or request for a hearing must be filed with OFIA.

§ 263.19 Answer.

(a) *When*. Within 20 days of service of the notice, respondent must file an answer as designated in the notice. In a civil money penalty proceeding, respondent must also file a request for a hearing within 20 days of service of the notice.

(b) *Content of answer*. An answer must specifically respond to each paragraph or allegation of fact contained in the notice and must admit, deny, or state that the respondent lacks sufficient information to admit or deny each allegation of fact. A statement of lack of information has the effect of a denial. Denials must fairly meet the substance of each allegation of fact denied; general denials are not permitted. When a respondent denies part of an allegation, that part must be denied and the remainder specifically admitted. Any allegation of fact in the notice which is not denied in the answer is deemed admitted for purposes of the proceeding. A respondent is not required to respond to the portion of a notice that constitutes the prayer for relief, or proposed order. The answer must set forth affirmative defenses, if any, asserted by the respondent.

(c) *Default*—(1) *Effect of failure to answer*. Failure of a respondent to file an answer required by this section within the time provided constitutes a waiver of the respondent's right to appear and contest the allegations in the notice. If no timely answer is filed, Enforcement Counsel may file a motion for entry of an order of default. Upon a

finding that no good cause has been shown for the failure to file a timely answer, the ALJ will file with the Board a recommended decision containing the findings and the relief sought in the notice. Any final order issued by the Board based upon a respondent's failure to answer is deemed to be an order issued upon consent.

(2) *Effect of failure to request a hearing in civil money penalty proceedings*. If respondent fails to request a hearing as required by law within the time provided, the notice of assessment constitutes a final and unappealable order of the Board without further action by the ALJ.

§ 263.20 Amended pleadings.

(a) *Amendments*. The notice or answer may be amended or supplemented at any stage of the proceeding. The respondent must answer an amended notice within the time remaining for the respondent's answer to the original notice, or within ten days after service of the amended notice, whichever period is longer, unless the Board or ALJ orders otherwise for good cause.

(b) *Amendments to conform to the evidence*. When issues not raised in the notice or answer are tried at the hearing by express or implied consent of the parties, they will be treated in all respects as if they had been raised in the notice or answer, and no formal amendments are required. If evidence is objected to at the hearing on the ground that it is not within the issues raised by the notice or answer, the ALJ may admit the evidence when admission is likely to assist in adjudicating the merits of the action and the objecting party fails to satisfy the ALJ that the admission of such evidence would unfairly prejudice that party's action or defense upon the merits. The ALJ may grant a continuance to enable the objecting party to meet such evidence.

§ 263.21 Failure to appear.

Failure of a respondent to appear in person at the hearing or by a duly authorized counsel constitutes a waiver of respondent's right to a hearing and is deemed an admission of the facts as alleged and consent to the relief sought in the notice. Without further proceedings or notice to the respondent, the ALJ will file with the Board a recommended decision containing the findings and the relief sought in the notice.

§ 263.22 Consolidation and severance of actions.

(a) *Consolidation*. (1) On the motion of any party, or on the ALJ's own motion, the ALJ may consolidate, for some or all purposes, any two or more proceedings, if each such proceeding involves or arises out of the same transaction, occurrence, or series of transactions or occurrences, or involves at least one common respondent or a material common question of law or fact, unless such consolidation would cause unreasonable delay or injustice.

(2) In the event of consolidation under paragraph (a)(1) of this section, appropriate adjustment to the prehearing schedule must be made to avoid unnecessary expense, inconvenience, or delay.

(b) *Severance.* The ALJ may, upon the motion of any party, sever the proceeding for separate resolution of the matter as to any respondent only if the ALJ finds:

(1) Undue prejudice or injustice to the moving party would result from not severing the proceeding; and

(2) Such undue prejudice or injustice would outweigh the interests of judicial economy and expedition in the complete and final resolution of the proceeding.

§ 263.23 Motions.

(a) *In writing*. (1) Except as otherwise provided in this section, an application or request for an order or ruling must be made by written motion.

(2) All written motions must state with particularity the relief sought and must be accompanied by a proposed order.

(3) No oral argument may be held on written motions except as otherwise directed by the ALJ. Written memoranda, briefs, affidavits, or other relevant material or documents may be filed in support of or in opposition to a motion.

(b) *Oral motions*. A motion may be made orally on the record unless the ALJ directs that such motion be reduced to writing.

(c) *Filing of motions*. Motions must be filed with the ALJ, except that following the filing of the recommended decision, motions must be filed with the Board.

(d) *Responses*. (1) Except as otherwise provided in this section, within ten days after service of any written motion, or within such other period of time as may be established by the ALJ or the Board, any party may file a written response to a motion. The ALJ will not rule on any oral or written motion before each party has had an opportunity to file a response.

(2) The failure of a party to oppose a written motion or an oral motion made on the record is deemed a consent by that party to the entry of an order substantially in the form of the order accompanying the motion.

(e) *Dilatory motions*. Frivolous, dilatory or repetitive motions are prohibited. The filing of such motions may form the basis for sanctions.

(f) *Dispositive motions*. Dispositive motions are governed by §§ 263.29 and 263.30.

§ 263.24 Scope of document discovery.

(a) *Limits on discovery*. (1) Subject to the limitations set out in paragraphs (b) through (d) of this section, a party to a proceeding under this subpart may obtain document discovery by serving a written request to produce documents. For purposes of a request to produce documents, the term *documents* includes writings, drawings, graphs, charts, photographs, recordings, electronically stored information, and other data or data compilations stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party, into a reasonably usable form.

(2) Discovery by use of deposition is governed by § 263.53.

(3) Discovery by use of either interrogatories or requests for admission is not permitted.

(4) Any request to produce documents that calls for irrelevant material; or that is unreasonable, oppressive, excessive in scope, unduly burdensome, or repetitive of previous requests, or that seeks to obtain privileged documents will be denied or modified. A request is unreasonable, oppressive, excessive in scope, or unduly burdensome if, among other things, it fails to include justifiable limitations on the time period covered and the geographic locations to be searched, or the time provided to respond in the request is inadequate.

(b) *Relevance*. A party may obtain document discovery regarding any non-privileged matter that has material relevance to the merits of the pending action.

(c) *Privileged matter*. Privileged documents are not discoverable. Privileges include the attorney-client privilege, attorney work-product doctrine, bank examination

privilege, law enforcement privilege, any government's or government agency's deliberative process privilege, and any other privileges the Constitution, any applicable act of Congress, or the principles of common law provide.

(d) *Time limits*. All document discovery, including all responses to discovery requests, must be completed by the date set by the ALJ and no later than 30 days prior to the date scheduled for the commencement of the hearing, except as provided in the Local Rules. No exceptions to this time limit are permitted, unless the ALJ finds on the record that good cause exists for waiving the requirements of this paragraph (d).

§ 263.25 Request for document discovery from parties.

(a) *Document requests*. (1) Any party may serve on any other party a request to produce and permit the requesting party or its representative to inspect or copy any discoverable documents that are in the possession, custody, or control of the party upon whom the request is served. In the case of a request for inspection, the responding party may produce copies of documents or of electronically stored information instead of permitting inspection.

(2) The request:

(i) Must describe with reasonable particularity each item or category of items to be inspected or produced; and

(ii) Must specify a reasonable time, place, and manner for the inspection or production.

(b) *Production or copying*—(1) *General*. Unless otherwise specified by the ALJ or agreed upon by the parties, the producing party must produce copies of documents as they are kept in the usual course of business or organized to correspond to the categories

of the request, and electronically stored information must be produced in a form in which it is ordinarily maintained or in a reasonably usable form.

(2) *Costs*. The producing party must pay its own costs to respond to a discovery request, unless otherwise agreed by the parties.

(c) *Obligation to update responses*. A party who has responded to a discovery request with a response that was complete when made is not required to supplement the response to include documents thereafter acquired, unless the responding party learns:

(1) The response was materially incorrect when made; or

(2) The response, though correct when made, is no longer true and a failure to amend the response is, in substance, a knowing concealment.

(d) *Motions to limit discovery*. (1) Any party that objects to a discovery request may, within 20 days of being served with such request, file a motion in accordance with the provisions of § 263.23 to strike or otherwise limit the request. If an objection is made to only a portion of an item or category in a request, the portion objected to must be specified. Any objections not made in accordance with this paragraph and § 263.23 are waived.

(2) The party who served the request that is the subject of a motion to strike or limit may file a written response within ten days of service of the motion. No other party may file a response.

(e) *Privilege*. At the time other documents are produced, the producing party must reasonably identify all documents withheld on the grounds of privilege and must produce a statement of the basis for the assertion of privilege. When similar documents that are protected by attorney-client privilege, attorney work-product doctrine, bank examination

privilege, law enforcement privilege, any government's or government agency's deliberative process privilege, or any other privileges of the Constitution, any applicable act of Congress, or the principles of common law, or are voluminous, these documents may be identified by category instead of by individual document. The ALJ retains discretion to determine when the identification by category is insufficient.

(f) *Motions to compel production*. (1) If a party withholds any documents as privileged or fails to comply fully with a discovery request, the requesting party may, within ten days of the assertion of privilege or of the time the failure to comply becomes known to the requesting party, file a motion in accordance with the provisions of § 263.23 for the issuance of a subpoena compelling production.

(2) The party who asserted the privilege or failed to comply with the document request may file a written response to a motion to compel within ten days of service of the motion. No other party may file a response.

(g) *Ruling on motions*. After the time for filing responses pursuant to this section has expired, the ALJ will rule promptly on all motions filed pursuant to this section. If the ALJ determines that a discovery request, or any of its terms, calls for irrelevant material, is unreasonable, oppressive, excessive in scope, unduly burdensome, or repetitive of previous requests, or seeks to obtain privileged documents, the ALJ may deny or modify the request, and may issue appropriate protective orders, upon such conditions as justice may require. The pendency of a motion to strike or limit discovery or to compel production is not a basis for staying or continuing the proceeding, unless otherwise ordered by the ALJ. Notwithstanding any other provision in this part, the ALJ may not release, or order a party to produce, documents withheld on grounds of privilege if the

party has stated to the ALJ its intention to file a timely motion for interlocutory review of the ALJ's order to produce the documents, and until the motion for interlocutory review has been decided.

(h) *Enforcing discovery subpoenas*. If the ALJ issues a subpoena compelling production of documents by a party, the subpoenaing party may, in the event of noncompliance and to the extent authorized by applicable law, apply to any appropriate United States district court for an order requiring compliance with the subpoena. A party's right to seek court enforcement of a subpoena will not in any manner limit the sanctions that may be imposed by the ALJ against a party who fails to produce subpoenaed documents.

§ 263.26 Document subpoenas to nonparties.

(a) *General rules*. (1) Any party may apply to the ALJ for the issuance of a document discovery subpoena addressed to any person who is not a party to the proceeding. The application must contain a proposed document subpoena and a brief statement showing the general relevance and reasonableness of the scope of documents sought. The subpoenaing party must specify a reasonable time, place, and manner for making production in response to the document subpoena.

(2) A party may apply for a document subpoena under this section only within the time period during which such party could serve a discovery request under § 263.24(d). The party obtaining the document subpoena is responsible for serving it on the subpoenaed person and for serving copies on all parties. Document subpoenas may be served in any state, territory, or possession of the United States, the District of Columbia, or as otherwise provided by law.

(3) The ALJ will promptly issue any document subpoena requested pursuant to this section. If the ALJ determines that the application does not set forth a valid basis for the issuance of the subpoena, or that any of its terms are unreasonable, oppressive, excessive in scope, or unduly burdensome, the ALJ may refuse to issue the subpoena or may issue it in a modified form upon such conditions as may be consistent with the Uniform Rules.

(b) *Motion to quash or modify*. (1) Any person to whom a document subpoena is directed may file a motion to quash or modify such subpoena with the ALJ. The motion must be accompanied by a statement of the basis for quashing or modifying the subpoena. The movant must serve the motion on all parties, and any party may respond to such motion within ten days of service of the motion.

(2) Any motion to quash or modify a document subpoena must be filed on the same basis, including the assertion of privilege, upon which a party could object to a discovery request under § 263.25(d), and during the same time limits during which such an objection could be filed.

(c) *Enforcing document subpoenas*. If a subpoenaed person fails to comply with any subpoena issued pursuant to this section or any order of the ALJ, which directs compliance with all or any portion of a document subpoena, the subpoenaing party or any other aggrieved party may, to the extent authorized by applicable law, apply to an appropriate United States district court for an order requiring compliance with so much of the document subpoena as the ALJ has not quashed or modified. A party's right to seek court enforcement of a document subpoena will in no way limit the sanctions that may be

imposed by the ALJ on a party who induces a failure to comply with subpoenas issued under this section.

§ 263.27 Deposition of witness unavailable for hearing.

(a) *General rules*. (1) If a witness will not be available for the hearing, a party desiring to preserve that witness' testimony for the record may apply in accordance with the procedures set forth in paragraph (a)(2) of this section, to the ALJ for the issuance of a subpoena, including a subpoena *duces tecum*, requiring the attendance of the witness at a deposition. The ALJ may issue a deposition subpoena under this section upon showing:

(i) The witness will be unable to attend or may be prevented from attending the hearing because of age, sickness or infirmity, or will otherwise be unavailable;

(ii) The witness' unavailability was not procured or caused by the subpoenaing party;

(iii) The testimony is reasonably expected to be material; and

(iv) Taking the deposition will not result in any undue burden to any other party and will not cause undue delay of the proceeding.

(2) The application must contain a proposed deposition subpoena and a brief statement of the reasons for the issuance of the subpoena. The subpoena must name the witness whose deposition is to be taken and specify the time, manner, and place for taking the deposition. A deposition subpoena may require the witness to be deposed at any place within the country in which that witness resides or has a regular place of employment, by remote means, or such other convenient place or manner, as the ALJ fixes.

(3) Any requested subpoena that sets forth a valid basis for its issuance must be promptly issued, unless the ALJ requires a written response or requires attendance at a conference concerning whether the requested subpoena should be issued.

(4) The party obtaining a deposition subpoena is responsible for serving it on the witness and for serving copies on all parties. Unless the ALJ orders otherwise, no deposition under this section may be taken on fewer than ten days' notice to the witness and all parties.

(b) *Objections to deposition subpoenas*. (1) The witness and any party who has not had an opportunity to oppose a deposition subpoena issued under this section may file a motion with the ALJ to quash or modify the subpoena prior to the time for compliance specified in the subpoena, but not more than ten days after service of the subpoena.

(2) A statement of the basis for the motion to quash or modify a subpoena issued under this section must accompany the motion. The motion must be served on all parties.

(c) *Procedure upon deposition*. (1) Each witness testifying pursuant to a deposition subpoena must be duly sworn. By stipulation of the parties or by order of the ALJ, a court reporter or other person authorized to administer an oath may administer the oath remotely without being in the physical presence of the deponent. Each party must have the right to examine the witness. Objections to questions or documents must be in short form, stating the grounds for the objection. Failure to object to questions or documents is not deemed a waiver except where the ground for the objection might have been avoided if the objection had been timely presented. All questions, answers, and objections must be recorded.

(2) Any party may move before the ALJ for an order compelling the witness to answer any questions the witness has refused to answer or submit any evidence the witness has refused to submit during the deposition.

(3) The deposition must be subscribed by the witness, unless the parties and the witness, by stipulation, have waived the signing, or the witness is ill, cannot be found, or has refused to sign. If the deposition is not subscribed by the witness, the court reporter taking the deposition must certify that the transcript is a true and complete transcript of the deposition.

(d) *Enforcing subpoenas*. If a subpoenaed person fails to comply with any subpoena issued pursuant to this section, or fails to comply with any order of the ALJ, which directs compliance with all or any portion of a deposition subpoena under paragraph (b) or (c)(2) of this section, the subpoenaing party or other aggrieved party may, to the extent authorized by applicable law, apply to an appropriate United States district court for an order requiring compliance with the portions of the subpoena with which the subpoenaed party has not complied. A party's right to seek court enforcement of a deposition subpoena in no way limits the sanctions that may be imposed by the ALJ on a party who fails to comply with, or procures a failure to comply with, a subpoena issued under this section.

§ 263.28 Interlocutory review.

(a) *General rule*. The Board may review a ruling of the ALJ prior to the certification of the record to the Board only in accordance with the procedures set forth in this section and § 263.23.

(b) *Scope of review*. The Board may exercise interlocutory review of a ruling of the ALJ if the Board finds:

(1) The ruling involves a controlling question of law or policy as to which substantial grounds exist for a difference of opinion;

(2) Immediate review of the ruling may materially advance the ultimate termination of the proceeding;

(3) Subsequent modification of the ruling at the conclusion of the proceeding would be an inadequate remedy; or

(4) Subsequent modification of the ruling would cause unusual delay or expense.

(c) *Procedure*. Any request for interlocutory review must be filed by a party with the ALJ within ten days of the ruling and must otherwise comply with § 263.23. Any party may file a response to a request for interlocutory review in accordance with § 263.23(d). Upon the expiration of the time for filing all responses, the ALJ will refer the matter to the Board for final disposition.

(d) *Suspension of proceeding*. Neither a request for interlocutory review nor any disposition of such a request by the Board under this section suspends or stays the proceeding unless otherwise ordered by the ALJ or the Board.

§ 263.29 Summary disposition.

(a) *In general*. The ALJ will recommend that the Board issue a final order granting a motion for summary disposition if the undisputed pleaded facts, admissions, affidavits, stipulations, documentary evidence, matters as to which official notice may be taken, and any other evidentiary materials properly submitted in connection with a motion for summary disposition show:

(1) There is no genuine issue as to any material fact; and

(2) The moving party is entitled to a decision in its favor as a matter of law.

(b) *Filing of motions and responses*. (1) Any party who believes there is no genuine issue of material fact to be determined and that the party is entitled to a decision as a matter of law may move at any time for summary disposition in its favor of all or any part of the proceeding. Any party, within 20 days after service of such a motion, or within such time period as allowed by the ALJ, may file a response to such motion.

(2) A motion for summary disposition must be accompanied by a statement of the material facts as to which the moving party contends there is no genuine issue. Such motion must be supported by documentary evidence, which may take the form of admissions in pleadings, stipulations, depositions, investigatory depositions, transcripts, affidavits, and any other evidentiary materials that the moving party contends supports the moving party's position. The motion must also be accompanied by a brief containing the points and authorities in support of the contention of the moving party. Any party opposing a motion for summary disposition must file a statement setting forth those material facts as to which the opposing party contends a genuine dispute exists. Such opposition must be supported by evidence of the same type as that submitted with the motion for summary disposition and a brief containing the points and authorities in support of the contention that summary disposition would be inappropriate.

(c) *Hearing on motion*. At the written request of any party or on the ALJ's own motion, the ALJ may hear oral argument on the motion for summary disposition.

(d) *Decision on motion*. Following receipt of a motion for summary disposition and all responses thereto, the ALJ will determine whether the moving party is entitled to

summary disposition. If the ALJ determines that summary disposition is warranted, the ALJ will submit a recommended decision to that effect to the Board. If the ALJ finds that no party is entitled to summary disposition, the ALJ will make a ruling denying the motion.

§ 263.30 Partial summary disposition.

If the ALJ determines that a party is entitled to summary disposition as to certain claims only, the ALJ will defer submitting a recommended decision as to those claims. A hearing on the remaining issues must be ordered. Those claims for which the ALJ has determined that summary disposition is warranted will be addressed in the recommended decision filed at the conclusion of the hearing.

§ 263.31 Scheduling and prehearing conferences.

(a) *Scheduling conference*. Within 30 days of service of the notice or order commencing a proceeding, the ALJ will direct counsel for all parties to meet with the ALJ at a specified time and manner prior to the hearing for the purpose of scheduling the course and conduct of the proceeding. This meeting is called a "scheduling conference." The schedule for the identification of potential witnesses, the time for and manner of discovery, and the exchange of any prehearing materials including witness lists, statements of issues, stipulations, exhibits, and any other materials may also be determined at the scheduling conference.

(b) *Prehearing conferences*. The ALJ may, in addition to the scheduling conference, on the ALJ's own motion or at the request of any party, direct counsel for the parties to confer with the ALJ at a prehearing conference to address any or all of the following:

(1) Simplification and clarification of the issues;

(2) Stipulations, admissions of fact, and the contents, authenticity and admissibility into evidence of documents;

(3) Matters of which official notice may be taken;

(4) Limitation of the number of witnesses;

(5) Summary disposition of any or all issues;

(6) Resolution of discovery issues or disputes;

(7) Amendments to pleadings; and

(8) Such other matters as may aid in the orderly disposition of the proceeding.

(c) *Transcript*. The ALJ may require that a scheduling or prehearing conference be recorded by a court reporter. A transcript of the conference and any materials filed, including orders, becomes part of the record of the proceeding. A party may obtain a copy of the transcript at the party's expense.

(d) *Scheduling or prehearing orders*. At or within a reasonable time following the conclusion of the scheduling conference or any prehearing conference, the ALJ will serve on each party an order setting forth any agreements reached and any procedural determinations made.

§ 263.32 Prehearing submissions.

(a) *Party prehearing submissions.* Within the time set by the ALJ, but in no case later than 20 days before the start of the hearing, each party must file with the ALJ and serve on every other party:

(1) A prehearing statement that states:

(i) The party's position with respect to the legal issues presented;

(ii) The statutory and case law upon which the party relies; and

(iii) The facts that the party expects to prove at the hearing;

(2) A final list of witnesses to be called to testify at the hearing, including the name, mailing address, and electronic mail address of each witness and a short summary of the expected testimony of each witness, which need not identify the exhibits to be relied upon by each witness at the hearing;

(3) A list of the exhibits expected to be introduced at the hearing along with a copy of each exhibit; and

(4) Stipulations of fact, if any.

(b) *Effect of failure to comply.* No witness may testify and no exhibits may be introduced at the hearing if such witness or exhibit is not listed in the prehearing submissions pursuant to paragraph (a) of this section, except for good cause shown.

§ 263.33 Public hearings.

(a) *General rule*. All hearings must be open to the public, unless the Board, in the Board's discretion, determines that holding an open hearing would be contrary to the public interest. Within 20 days of service of the notice or, in the case of change-in-control proceedings under section 7(j)(4) of the FDIA (12 U.S.C. 1817(j)(4)), within 20 days from service of the hearing order, any respondent may file with the Board a request for a private hearing, and any party may file a reply to such a request. A party must serve on the ALJ a copy of any request or reply the party files with the Board. The form of, and procedure for, these requests and replies are governed by § 263.23. A party's failure to file a request or a reply constitutes a waiver of any objections regarding whether the hearing will be public or private.

(b) *Filing document under seal*. Enforcement Counsel, in Enforcement Counsel's discretion, may file any document or part of a document under seal if disclosure of the document would be contrary to the public interest. The ALJ will take all appropriate steps to preserve the confidentiality of such documents or parts thereof, including closing portions of the hearing to the public.

§ 263.34 Hearing subpoenas.

(a) *Issuance*. (1) Upon application of a party showing general relevance and reasonableness of scope of the testimony or other evidence sought, the ALJ may issue a subpoena or a subpoena *duces tecum* requiring the attendance of a witness at the hearing or the production of documentary or physical evidence at the hearing. The application for a hearing subpoena must also contain a proposed subpoena specifying the attendance of a witness or the production of evidence from any state, territory, or possession of the United States, the District of Columbia, or as otherwise provided by law at any designated place where the hearing is being conducted. The party making the application must serve a copy of the application and the proposed subpoena on every other party.

(2) A party may apply for a hearing subpoena at any time before the commencement of a hearing. During a hearing, a party may make an application for a subpoena orally on the record before the ALJ.

(3) The ALJ will promptly issue any hearing subpoena requested pursuant to this section. If the ALJ determines that the application does not set forth a valid basis for the issuance of the subpoena, or that any of its terms are unreasonable, oppressive, excessive in scope, or unduly burdensome, the ALJ may refuse to issue the subpoena or may issue it in a modified form upon any conditions consistent with this subpart. Upon issuance by

the ALJ, the party making the application must serve the subpoena on the person named in the subpoena and on each party.

(b) *Motion to quash or modify*. (1) Any person to whom a hearing subpoena is directed or any party may file a motion to quash or modify the subpoena, accompanied by a statement of the basis for quashing or modifying the subpoena. The movant must serve the motion on each party and on the person named in the subpoena. Any party may respond to the motion within ten days of service of the motion.

(2) Any motion to quash or modify a hearing subpoena must be filed prior to the time specified in the subpoena for compliance but not more than ten days after the date of service of the subpoena upon the movant.

(c) *Enforcing subpoenas*. If a subpoenaed person fails to comply with any subpoena issued pursuant to this section or any order of the ALJ which directs compliance with all or any portion of a document subpoena, the subpoenaing party or any other aggrieved party may seek enforcement of the subpoena pursuant to § 263.26(c).

§ 263.35 Conduct of hearings.

(a) *General rules*. (1) *Conduct of hearings*. Hearings must be conducted so as to provide a fair and expeditious presentation of the relevant disputed issues. Each party has the right to present its case or defense by oral and documentary evidence and to conduct such cross examination as may be required for full disclosure of the facts.

(2) *Order of hearing*. Enforcement Counsel will present its case-in-chief first, unless otherwise ordered by the ALJ, or unless otherwise expressly specified by law or regulation. Enforcement Counsel will be the first party to present an opening statement and a closing statement and may make a rebuttal statement after the respondent's closing

statement. If there are multiple respondents, respondents may agree among themselves as to their order of presentation of their cases, but if they do not agree, the ALJ will fix the order.

(3) *Examination of witnesses*. Only one counsel for each party may conduct an examination of a witness, except that in the case of extensive direct examination, the ALJ may permit more than one counsel for the party presenting the witness to conduct the examination. A party may have one counsel conduct the direct examination and another counsel conduct re-direct examination of a witness, or may have one counsel conduct the cross examination of a witness and another counsel conduct the re-cross examination of a witness.

(4) *Stipulations*. Unless the ALJ directs otherwise, all stipulations of fact and law previously agreed upon by the parties, and all documents, the admissibility of which have been previously stipulated, will be admitted into evidence upon commencement of the hearing.

(b) *Transcript*. The hearing must be recorded and transcribed. The reporter will make the transcript available to any party upon payment by that party to the reporter of the cost of the transcript. The ALJ may order the record corrected, either upon motion to correct, upon stipulation of the parties, or following notice to the parties upon the ALJ's own motion.

(c) *Electronic presentation*. Based on the circumstances of each hearing, the ALJ may direct the use of, or any party may use, an electronic presentation during the hearing. If the ALJ requires an electronic presentation during the hearing, each party will be

responsible for their own presentation and related costs, unless the parties agree to another manner in which to allocate presentation responsibilities and costs.

§ 263.36 Evidence.

(a) *Admissibility*. (1) Except as is otherwise set forth in this section, relevant, material, and reliable evidence that is not unduly repetitive is admissible to the fullest extent authorized by the Administrative Procedure Act and other applicable law.

(2) Evidence that would be admissible under the Federal Rules of Evidence is admissible in a proceeding conducted pursuant to this subpart.

(3) Evidence that would be inadmissible under the Federal Rules of Evidence may not be deemed or ruled to be inadmissible in a proceeding conducted pursuant to this subpart if such evidence is relevant, material, reliable, and not unduly repetitive.

(b) *Official notice*. (1) Official notice may be taken of any material fact which may be judicially noticed by a United States district court and any material information in the official public records of any Federal or State government agency.

(2) All matters officially noticed by the ALJ or the Board must appear on the record.

(3) If official notice is requested or taken of any material fact, the parties, upon timely request, must be afforded an opportunity to object.

(c) *Documents*. (1) A duplicate copy of a document is admissible to the same extent as the original, unless a genuine issue is raised as to whether the copy is in some material respect not a true and legible copy of the original.

(2) Subject to the requirements of paragraph (a) of this section, any document, including a report of examination, supervisory activity, inspection, or visitation, prepared

by an appropriate Federal financial institutions regulatory agency or by a State regulatory agency, is admissible either with or without a sponsoring witness.

(3) Witnesses may use existing or newly created charts, exhibits, calendars, calculations, outlines, or other graphic material to summarize, illustrate, or simplify the presentation of testimony. Such materials may, subject to the ALJ's discretion, be used with or without being admitted into evidence.

(d) *Objections*. (1) Objections to the admissibility of evidence must be timely made and rulings on all objections must appear on the record.

(2) When an objection to a question or line of questioning propounded to a witness is sustained, the examining counsel may make a specific proffer on the record of what the examining counsel expected to prove by the expected testimony of the witness either by representation of counsel or by direct questioning of the witness.

(3) The ALJ will retain rejected exhibits, adequately marked for identification, for the record, and transmit such exhibits to the Board.

(4) Failure to object to admission of evidence or to any ruling constitutes a waiver of the objection.

(e) *Stipulations*. The parties may stipulate as to any relevant matters of fact or the authentication of any relevant documents. Such stipulations must be received in evidence at a hearing and are binding on the parties with respect to the matters therein stipulated.

(f) *Depositions of unavailable witnesses*. (1) If a witness is unavailable to testify at a hearing, and that witness has testified in a deposition to which all parties in a proceeding had notice and an opportunity to participate, a party may offer as evidence all or any part of the transcript of the deposition, including deposition exhibits, if any.

(2) Such deposition transcript is admissible to the same extent that testimony would have been admissible had that person testified at the hearing, provided that if a witness refused to answer proper questions during the depositions, the ALJ may, on that basis, limit the admissibility of the deposition in any manner that justice requires.

(3) Only those portions of a deposition received in evidence at the hearing constitute a part of the record.

§ 263.37 Post-hearing filings.

(a) *Proposed findings and conclusions and supporting briefs*. (1) Using the same method of service for each party, the ALJ will serve notice upon each party that the certified transcript, together with all hearing exhibits and exhibits introduced but not admitted into evidence at the hearing, has been filed. Any party may file with the ALJ proposed findings of fact, proposed conclusions of law, and a proposed order within 30 days following service of this notice by the ALJ or within such longer period as may be ordered by the ALJ.

(2) Proposed findings and conclusions must be supported by citation to any relevant authorities and by page references to any relevant portions of the record. A post-hearing brief may be filed in support of proposed findings and conclusions, either as part of the same document or in a separate document. Any party who fails to file timely with the ALJ any proposed finding or conclusion is deemed to have waived the right to raise in any subsequent filing or submission any issue not addressed in such party's proposed finding or conclusion.

(b) *Reply briefs*. Reply briefs may be filed within 15 days after the date on which the parties' proposed findings, conclusions, and order are due. Reply briefs must be

strictly limited to responding to new matters, issues, or arguments raised in another party's papers. A party who has not filed proposed findings of fact and conclusions of law or a post-hearing brief may not file a reply brief.

(c) *Simultaneous filing required*. The ALJ will not order the filing by any party of any brief or reply brief in advance of the other party's filing of its brief.

§ 263.38 Recommended decision and filing of record.

(a) *Filing of recommended decision and record*. Within 45 days after expiration of the time allowed for filing reply briefs under § 263.37(b), the ALJ will file with and certify to the Board, for decision, the record of the proceeding. The record must include the ALJ's recommended decision, recommended findings of fact, recommended conclusions of law, and proposed order; all prehearing and hearing transcripts, exhibits, and rulings; and the motions, briefs, memoranda, and other supporting papers filed in connection with the hearing. The ALJ will serve upon each party the recommended decision, findings, conclusions, and proposed order.

(b) *Filing of index*. At the same time the ALJ files with and certifies to the Board for final determination the record of the proceeding, the ALJ will furnish to the Board a certified index of the entire record of the proceeding. The certified index must include, at a minimum, an entry for each paper, document, or motion filed with the ALJ in the proceeding, the date of the filing, and the identity of the filer. The certified index must also include an exhibit index containing, at a minimum, an entry consisting of exhibit number and title or description for: each exhibit introduced and admitted into evidence at the hearing; each exhibit introduced but not admitted into evidence at the hearing; each exhibit introduced and admitted into evidence after the completion of the hearing; and

each exhibit introduced but not admitted into evidence after the completion of the hearing.

§ 263.39 Exceptions to recommended decision.

(a) *Filing exceptions*. Within 30 days after service of the recommended decision, findings, conclusions, and proposed order under § 263.38, a party may file with the Board written exceptions to the ALJ's recommended decision, findings, conclusions, or proposed order, to the admission or exclusion of evidence, or to the failure of the ALJ to make a ruling proposed by a party. A supporting brief may be filed at the time the exceptions are filed, either as part of the same document or in a separate document.

(b) *Effect of failure to file or raise exceptions*. (1) Failure of a party to file exceptions to those matters specified in paragraph (a) of this section within the time prescribed is deemed a waiver of objection thereto.

(2) No exception need be considered by the Board if the party taking exception had an opportunity to raise the same objection, issue, or argument before the ALJ and failed to do so.

(c) *Contents*. (1) All exceptions and briefs in support of such exceptions must be confined to the particular matters in, or omissions from, the ALJ's recommendations to which that party takes exception.

(2) All exceptions and briefs in support of exceptions must set forth page or paragraph references to the specific parts of the ALJ's recommendations to which exception is taken, the page or paragraph references to those portions of the record relied upon to support each exception, and the legal authority relied upon to support each exception.

§ 263.40 Review by the Board.

(a) *Notice of submission to the Board*. When the Board determines that the record in the proceeding is complete, the Board will serve notice upon the parties that the proceeding has been submitted to the Board for final decision.

(b) *Oral argument before the Board*. Upon the initiative of the Board or on the written request of any party filed with the Board within the time for filing exceptions, the Board may order and hear oral argument on the recommended findings, conclusions, decision, and order of the ALJ. A written request by a party must show good cause for oral argument and state reasons why arguments cannot be presented adequately in writing. A denial of a request for oral argument may be set forth in the Board's final decision. Oral argument before the Board must be on the record.

(c) *Board's final decision*. (1) Decisional employees may advise and assist the Board in the consideration and disposition of the case. The final decision of the Board will be based upon review of the entire record of the proceeding, except that the Board may limit the issues to be reviewed to those findings and conclusions to which opposing arguments or exceptions have been filed by the parties.

(2) The Board will render a final decision within 90 days after notification of the parties that the case has been submitted for final decision, or 90 days after oral argument, whichever is later, unless the Board orders that the action or any aspect thereof be remanded to the ALJ for further proceedings. Copies of the final decision and order of the Board will be served upon each party to the proceeding, upon other persons required by statute, and, if directed by the Board or required by statute, upon any appropriate State or Federal supervisory authority.

§ 263.41 Stays pending judicial review.

The commencement of proceedings for judicial review of a final decision and order of the Board may not, unless specifically ordered by the Board or a reviewing court, operate as a stay of any order issued by the Board. The Board may, in the Board's, and on such terms as the Board finds just, stay the effectiveness of all or any part of an order pending a final decision on a petition for review of that order.

Subpart B – Board Local Rules Supplementing the Uniform Rules

§ 263.50 Purpose and scope.

(a) This subpart prescribes the rules of practice and procedure governing formal adjudications set forth in paragraph (b) of this section, and supplements the rules of practice and procedure contained in subpart A of this part.

(b) The rules and procedures of this subpart and subpart A of this part will apply to the formal adjudications set forth in § 263.1 and to the following adjudications:

(1) Suspension of a member bank from use of credit facilities of the Federal Reserve System under section 4 of the FRA (12 U.S.C. 301);

(2) Termination of a bank's membership in the Federal Reserve System under section 9 of the FRA (12 U.S.C. 327);

(3) Issuance of a cease-and-desist order under section 11 of the Clayton Act (15 U.S.C. 21);

(4) Adjudications under sections 2, 3, or 4 of the BHC Act (12 U.S.C. 1841, 1842, or 1843);

(5) Formal adjudications on bank merger applications under section 18(c) of the FDIA (12 U.S.C. 1828(c));

(6) Issuance of a divestiture order under section 5(e) of the BHC Act (12 U.S.C. 1844(e));

(7) Imposition of sanctions upon any municipal securities dealer for which the Board is the appropriate regulatory agency, or upon any person associated or seeking to become associated with such a municipal securities dealer, under section 15B(c)(5) of the Exchange Act (15 U.S.C. 78o-4);

(8) Proceedings where the Board otherwise orders that a formal hearing be held;

(9) Termination of the activities of a state branch, state agency, or commercial lending company subsidiary of a foreign bank in the United States, pursuant to section 7(e) of the IBA (12 U.S.C. 3105(d));

(10) Termination of the activities of a representative office of a foreign bank in the United States, pursuant to section 10(b) of the IBA (12 U.S.C. 3107(b));

(11) Issuance of a prompt corrective action directive to a member bank under section 38 of the FDI Act (12 U.S.C. 1831o);

(12) Reclassification of a member bank on grounds of unsafe or unsound condition under section 38(g)(1) of the FDI Act (12 U.S.C. 1831o(g)(1));

(13) Reclassification of a member bank on grounds of unsafe and unsound practice under section 38(g)(1) of the FDI Act (12 U.S.C. 1831o(g)(1));

(14) Issuance of an order requiring a member bank to dismiss a director or senior executive officer under section 38 (e)(5) and 38(f)(2) (F)(ii) of the FDI Act (12 U.S.C. 1831o(e)(5) and 1831o(f)(2) (F)(ii)); and

(15) Adjudications under section 10 of the HOLA (12 U.S.C. 1467a).

§ 263.51 Definitions.

As used in subparts B through G of this part:

(a) *Secretary* means the Secretary of the Board of Governors of the Federal Reserve System.

(b) *Member bank* means any bank that is a member of the Federal Reserve System.

(c) *Institution* has the same meaning as that assigned to it in subpart A of this part, and includes any foreign bank with a representative office in the United States.

§ 263.52 Address for filing.

All papers to be filed with the Board must be filed with the Secretary of the Board of Governors of the Federal Reserve System, Washington, DC 20551. All papers to be filed with the Board electronically must be sent to: OSEC-Litigation@frb.gov.

§ 263.53 Discovery depositions.

(a) *In general.* In addition to the discovery permitted in subpart A of this part, limited discovery by means of depositions will be allowed for individuals with knowledge of facts material to the proceeding that are not protected from discovery by any applicable privilege, and of identified expert witnesses. Except in unusual cases, accordingly, depositions will be permitted only of individuals identified as hearing witnesses, including experts. All discovery depositions must be completed within the time set forth in § 263.24(d).

(b) *Application.* A party who desires to take a deposition of any other party's proposed witnesses, must apply to the ALJ for the issuance of a deposition subpoena or subpoena duces tecum. The application must state the name and address of the proposed deponent, the subject matter of the testimony expected from the deponent and its

relevancy to the proceeding, and the address of the place, the manner (*e.g.*, remote means, in person), and the time, no sooner than ten days after the service of the subpoena, for the taking of the deposition. Any such application must be treated as a motion subject to the rules governing motions practice set forth in § 263.23.

(c) *Issuance of subpoena.* The ALJ must issue the requested deposition subpoena or subpoena *duces tecum* upon a finding that the application satisfies the requirements of this section and of § 263.24. If the ALJ determines that the taking of the deposition or its proposed location or manner is, in whole or in part, unnecessary, unreasonable, oppressive, excessive in scope or unduly burdensome, the ALJ may deny the application or may grant it upon such conditions as justice may require. The party obtaining the deposition subpoena or subpoena *duces tecum* will be responsible for serving it on the deponent and all parties to the proceeding in accordance with § 263.11. A deposition subpoena may require the witness to be deposed at any place within the country in which that witness resides or has a regular place of employment, by remote means, or such other convenient place or manner, as the ALJ fixes.

(d) *Motion to quash or modify.* A person named in a deposition subpoena or subpoena *duces tecum* may file a motion to quash or modify the subpoena or for the issuance of a protective order. Such motions must be filed within ten days following service of the subpoena, but in all cases at least five days prior to the commencement of the scheduled deposition. The motion must be accompanied by a statement of the reasons for granting the motion and a copy of the motion and the statement must be served on the party which requested the subpoena. Only the party requesting the subpoena may file a

response to a motion to quash or modify, and any such response must be filed within five days following service of the motion.

(e) *Enforcement of a deposition subpoena.* Enforcement of a deposition subpoena must be in accordance with the procedures set forth in § 263.27(d).

(f) *Conduct of the deposition.* The deponent must be duly sworn. By stipulation of the parties or order by the ALJ, a court reporter or other person authorized to administer an oath may administer the oath remotely, without being in the physical presence of the deponent. Each party may examine the deponent with respect to all non-privileged, relevant, and material matters. Objections to questions or evidence must be in the short form, stating the ground for the objection. Failure to object to questions or evidence will not be deemed a waiver except where the grounds for the objection might have been avoided if the objection had been timely presented. The discovery deposition must be transcribed or otherwise recorded as agreed among the parties.

(g) *Protective orders.* At any time during the taking of a discovery deposition, on the motion of any party or of the deponent, the ALJ may terminate or limit the scope and manner of the deposition upon a finding that grounds exist for such relief. Grounds for terminating or limiting the taking of a discovery deposition include a finding that the discovery deposition is being conducted in bad faith or in such a manner as to:

(1) Unreasonably annoy, embarrass, or oppress the deponent;

(2) Unreasonably probe into privilege, irrelevant, or immaterial matters; or

(3) Unreasonably attempt to pry into a party's preparation for trial.

§ 263.54 Delegation to the Office of Financial Institution Adjudication.

Unless otherwise ordered by the Board, administrative adjudications subject to subpart A of this part must be conducted by an ALJ of OFIA.

§ 263.55 Board as Presiding Officer.

The Board may, in its discretion, designate itself, one or more of its members, or an authorized officer, to act as presiding officer in a formal hearing. In such a proceeding, the authority of Board or its designee will include all the authority provided to an ALJ under this part. Proposed findings and conclusions, briefs, and other submissions by the parties permitted in subpart A of this part must be filed with the Secretary for consideration by the Board. Sections 263.38 and 263.39 will not apply to proceedings conducted under this section.

§ 263.56 Initial licensing proceedings.

Proceedings with respect to applications for initial licenses will include, but not be limited to, applications for Board approval under section 3 of the BHC Act and section 10 of HOLA and such proceedings as may be ordered by the Board with respect to applications under section 18(c) of the FDIA. In such initial licensing proceedings, the procedures set forth in subpart A of this part will apply, except that the Board may designate a Board Counsel to represent the Board in a nonadversary capacity for the purpose of developing for the record information relevant to the issues to be determined by the Presiding Officer and the Board. In such proceedings, Board Counsel will be considered to be a decisional employee for purposes of §§ 263.9 and 263.40.

§ 263.57 Sanctions relating to conduct in an adjudicatory proceeding.

(a) *General rule*. The ALJ may impose sanctions when any party or person in an adjudicatory proceeding under this part has failed to comply with an applicable statute, regulation, or order, and that failure to comply:

(1) Constitutes contemptuous conduct;

(2) Materially injures or prejudices another party in terms of substantive injury, incurring additional expenses including attorney's fees, prejudicial delay, or otherwise;

(3) Is a clear and unexcused violation of an applicable statute, regulation, or order; or

(4) Unduly delays the proceeding.

(b) *Sanctions*. Sanctions which may be imposed include any one or more of the following:

(1) Issuing an order against the party;

(2) Rejecting or striking any testimony or documentary evidence offered, or other papers filed, by the party;

(3) Precluding the party from:

(i) Contesting specific issues or findings;

(ii) Offering certain evidence or challenging or contesting certain evidence offered by another party; or

(iii) Making a late filing or conditioning a late filing on any terms that are just;

(4) Assessing reasonable expenses, including attorney's fees, incurred by any other party as a result of the improper action or failure to act; and

(5) Excluding or suspending a party or person from the adjudicatory proceeding.

(c) *Procedure for imposition of sanctions*. (1) Upon the motion of any party, or on the ALJ's own motion, the ALJ may impose sanctions in accordance with this section. The ALJ must submit to the Board for final ruling the sanction of entering a final order determining the case on the merits.

(2) No sanction authorized by this section, other than refusal to accept late filings, must be imposed without prior notice to all parties and an opportunity for any party or person against whom sanctions would be imposed to be heard. Such opportunity to be heard may be on such notice, and the response may be in such form, as the ALJ directs. The ALJ may limit the opportunity to be heard to an opportunity of a party or person to respond orally immediately after the act or inaction covered by this section is noted by the ALJ.

(3) Requests for the imposition of sanctions by any party, and the imposition of sanctions, are subject to interlocutory review in the same manner as any other ruling by the ALJ.

(d) *Section not exclusive*. Nothing in this section precludes the ALJ or the Board from taking any other action, or imposing any restriction or sanction, authorized by applicable statute or regulation.

21. Subpart K is added to read as follows:

Subpart K—Formal Investigative Proceedings

Sec.
263.450 Scope.
263.451 Definitions.
263.452 Conduct of a formal investigative proceeding.
263.453 Powers of the designated representative.
263.454 Confidentiality of proceedings.
263.455 Transcripts.
263.456 Rights of witnesses.

263.457 Subpoenas.

Subpart K—Formal Investigative Proceedings

§ 263.450 Scope.

(a) The procedures of this subpart must be followed when a formal investigation is instituted and conducted pursuant to: section 8(n) of the FDIA (12 U.S.C. 1818(n)); section 10(c) of the FDIA (12 U.S.C. 1820(c)); section 7(j)(15) of the FDIA (12 U.S.C. 1817(j)(15)); section 5(f) of the Bank Holding Company Act (12 U.S.C. 1844(f)); sections 10(b)(4) and 10(g)(2) of HOLA (12 U.S.C. 1464(b)(4) and 1467a(g)(2)); or section 162 of the Dodd-Frank Act (12 U.S.C. 5362).

(b) Nothing in this subpart prohibits the Board from conducting informal investigations or obtaining information by any means other than a subpoena issued pursuant to this subpart.

(c) This subpart does not apply to adjudicatory proceedings as to which hearings are required by statute, the rules for which are contained in part 262 of this chapter and subpart A of this part.

§ 263.451 Definitions.

As used in this subpart:

(a) *Formal investigative proceeding* means an investigation conducted pursuant to an order of investigation as provided in § 263.452(a).

(b) *Designated representative* means the person or persons empowered by the Board or by the General Counsel or his or her designees in accordance with 12 CFR 265.6 to conduct a formal investigative proceeding.

§ 263.452 Conduct of a formal investigative proceeding.

(a) A formal investigative proceeding may be initiated upon issuance of an order of investigation by the Board or by the General Counsel or his or her designees in accordance with 12 CFR 265.6. The order of investigation must indicate the purpose of the formal investigative proceeding and designate the Board's representatives to direct the conduct of the investigation.

(b) Any person who is compelled or requested to furnish documentary evidence or testimony at a formal investigative proceeding may, upon request, inspect a copy of the order of investigation at a time and place that the Board's designated representative determines to be appropriate. Any person who is compelled or requested to furnish documentary evidence or testimony in a formal investigative proceeding may not refuse to comply with a subpoena on the grounds that the order of investigation was not made available in advance of the date of production or testimony set forth in a subpoena.

(c) Copies of an order of investigation may not be produced to or retained by any person except with the express written approval of the Board officer supervising the investigation. The Board may provide a copy of an order of investigation, in whole or in part, if the Board officer concludes, in the officer's discretion, that disclosure of the order of investigation would not infringe upon the privacy of persons involved in the investigation or impede the conduct of the investigation.

§ 263.453 Powers of the designated representative.

The designated representative conducting the formal investigative proceeding will have the power to administer oaths and affirmations, to take and preserve testimony under oath, to issue subpoenas *ad testificandum* and subpoenas *duces tecum* and to apply for their enforcement to the United States District Court for the judicial district or the

United States court in any territory in which the witness or company subpoenaed resides or conducts business, or such other judicial district provided by law.

§ 263.454 Confidentiality of proceedings.

Formal investigative proceedings conducted pursuant to this subpart are confidential and, unless otherwise ordered or permitted by the Board, or required by law, the entire record of any formal investigative proceeding, including the order of investigation authorizing the proceeding, the transcripts of such proceeding, and all documents and information obtained by the designated representative(s) during the course of the formal investigative proceeding will be confidential. If the Board issues a notice of charges or otherwise initiates an administrative (adjudicatory) hearing, disclosure of documents and information obtained by the Board's designated representative(s) during the course of the formal investigative proceeding will be governed by the Uniform Rules and the Board Local Rules Supplementing the Uniform Rules (subparts A and B of this part).

§ 263.455 Transcripts.

(a) Transcripts of testimony, if any, must be recorded by an official reporter, or by any other person or means designated by the designated representative conducting the investigation.

(b) Transcripts will be treated as confidential and must not be disclosed to any party except as provided in this subpart or as otherwise ordered or permitted by the Board, or required by law or regulation.

§ 263.456 Rights of witnesses.

(a) Any witness in a formal investigative proceeding may be accompanied and advised by an attorney personally representing that witness.

(1) Such attorney must be a member in good standing of the bar of any state, Commonwealth, possession, territory, or the District of Columbia, who has not been suspended or debarred from practice before the Board in accordance with any provision of this part, including paragraph (a)(4) of this section.

(2) Such attorney may advise the witness before, during, and after the taking of the witness' testimony and may briefly question the witness, on the record, at the conclusion of the witness' testimony, for the sole purpose of clarifying any of the answers the witness has given. During the taking of the testimony of a witness, such attorney may make summary notes solely for the attorney's use in representing the witness. Neither the attorney nor witness may retain copies of exhibits used or introduced in the course of a witness' testimony.

(3) All witnesses must be sequestered, and, unless permitted in the discretion of the designated representative, no witness or accompanying attorney may be present during the taking of testimony of any other witness called in such formal investigative proceeding. Attorneys for any other interested persons or entities will not, unless permitted in the discretion of the designated representative, have a right to be present during the testimony of any witness not personally being represented by such attorneys.

(4) The Board, for good cause, may exclude a particular attorney from further participation in any formal investigative proceeding in which the Board has found the attorney to have engaged in dilatory, obstructionist, egregious, contemptuous, or

contumacious conduct. The designated representative conducting the formal investigative proceeding may report to the Board instances of apparently dilatory, obstructionist, egregious, contemptuous, or contumacious conduct on the part of an attorney. After due notice to the attorney, the Board may take such action as the circumstances warrant, including suspending any attorney representing a witness from further participation in the investigative proceeding, based upon a written record evidencing the conduct of the attorney in the formal investigative proceeding or such other or additional written or oral presentation as the Board may permit or direct.

(b) A witness may inspect the transcript of the witness' own testimony, without retaining a copy thereof, for the purpose of making non-substantive corrections to the transcript at a time and place that the designated representative determines to be appropriate in consideration of all relevant factors, including the convenience of the witness.

(c) A witness may, solely for the use of the witness and the witness' attorney, obtain a copy of the transcript of the witness' testimony, provided that the witness submits a written request for the transcript and the witness requesting a copy of the witness' testimony bears the cost thereof. However, the Board officer supervising the formal investigative proceeding may deny such a request if, in the officer's discretion, the provision of the transcript may infringe the privacy of third persons involved in the investigation, or impede or interfere with the conduct of any investigation. If the Board issues a notice of charges or otherwise initiates an administrative (adjudicatory) hearing, disclosure of formal investigative transcripts obtained by the Board's designated representative(s) during the course of the formal investigative proceeding will be

governed by the Uniform Rules and the Board Local Rules Supplementing the Uniform Rules (subparts A and B of this part).

§ 263.457 Subpoenas.

(a) *Service.* Service of a subpoena may be made:

(1) By personal service;

(2) If the person to be served is an individual, by delivery to a person of suitable age and discretion at the physical location where the individual resides or works;

(3) By delivery to an agent which, in the case of a corporation or other association, is delivery to an officer, director, managing or general agent, or to any other agent authorized by appointment or by law to receive service and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the party;

(4) By registered or certified mail or by an express delivery service addressed to the person's or authorized agent's last known address; or

(5) In such other manner as is reasonably calculated to give actual notice.

(b) *Area of service*. Service in any state, territory, possession of the United States, or the District of Columbia, on any person or company doing business in any state, territory, possession of the United States, or the District of Columbia, or on any person as otherwise provided by law, is effective without regard to the place where the hearing or testimony is held, provided that if service is made on a foreign bank in connection with an action or proceeding involving one or more of its branches or agencies located in any state, territory, possession of the United States, or the District of Columbia, service must be made on at least one branch or agency so involved. Foreign

nationals are subject to such subpoenas if such service is made upon a duly authorized agent located in the United States or such other means permissible by law.

(c) *Witness fees and mileage*. Witnesses summoned in any proceeding under this subpart must be paid the same fees and mileage that are paid witnesses in the district courts of the United States. Such fees and mileage need not be tendered when the subpoena is issued on behalf of the Board by any of its designated representatives.

22. Appendix A is added to read as follows:

Appendix A to Part 263 – Rules Applicable to Proceedings Initiated Before January 1, 2024

Note: The content of this appendix reproduces the the Uniform Rules of Practice and Procedure and Board Local Rules Supplementing the Uniform Rules in 12 CFR part 263, subparts A and B, respectively, as of January 1, 2024, and apply only to adjudicatory proceedings initiated before January 1, 2024. Proceedings initiated on or after January 1, 2024, are not governed by the version of the rules set out in this appendix. Cross-references to part 263 (as well as to included sections) in this appendix are to those provisions as contained within this appendix.

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Subpart A—Uniform Rules of Practice and Procedure

§ 263.1 Scope.

This subpart prescribes Uniform Rules of practice and procedure applicable to adjudicatory proceedings required to be conducted on the record after opportunity for hearing under the following statutory provisions:

(a) Cease-and-desist proceedings under section 8(b) of the Federal Deposit Insurance Act ("FDIA") (12 U.S.C. 1818(b));

(b) Removal and prohibition proceedings under section 8(e) of the FDIA (12 U.S.C. 1818(e));

(c) Change-in-control proceedings under section 7(j)(4) of the FDIA (12 U.S.C. 1817(j)(4)) to determine whether the Board of Governors of the Federal Reserve System ("Board") should issue an order to approve or disapprove a person's proposed acquisition of a state member bank, bank holding company, or savings and loan holding company;

(d) Proceedings under section 15C(c)(2) of the Securities Exchange Act of 1934 ("Exchange Act") (15 U.S.C. 78o-5), to impose sanctions upon any government securities broker or dealer or upon any person associated or seeking to become associated with a government securities broker or dealer for which the Board is the appropriate agency;

(e) Assessment of civil money penalties by the Board against institutions, institution-affiliated parties, and certain other persons for which the Board is the appropriate agency for any violation of:

(1) Any provision of the Bank Holding Company Act of 1956, as amended ("BHC Act"), or any order or regulation issued thereunder, pursuant to 12 U.S.C. 1847(b) and (d);

(2) Sections 19, 22, 23, 23A and 23B of the Federal Reserve Act ("FRA"), or any regulation or order issued thereunder and certain unsafe or unsound practices or breaches of fiduciary duty, pursuant to 12 U.S.C. 504 and 505;

(3) Section 9 of the FRA pursuant to 12 U.S.C. 324;

(4) Section 106(b) of the Bank Holding Company Act Amendments of 1970 and certain unsafe or unsound practices or breaches of fiduciary duty, pursuant to 12 U.S.C. 1972(2)(F);

(5) Any provision of the Change in Bank Control Act of 1978, as amended, or any regulation or order issued thereunder and certain unsafe or unsound practices or breaches of fiduciary duty, pursuant to 12 U.S.C. 1817(j)(16);

(6) Any provision of the International Lending Supervision Act of 1983 ("ILSA") or any rule, regulation or order issued thereunder, pursuant to 12 U.S.C. 3909;

(7) Any provision of the International Banking Act of 1978 ("IBA") or any rule, regulation or order issued thereunder, pursuant to 12 U.S.C. 3108;

(8) Certain provisions of the Exchange Act, pursuant to section 21B of the Exchange Act (15 U.S.C. 78u-2);

(9) Section 1120 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (12 U.S.C. 3349), or any order or regulation issued thereunder;

(10) The terms of any final or temporary order issued under section 8 of the FDIA or of any written agreement executed by the Board, the terms of any condition imposed in writing by the Board in connection with the grant of an application or request, and certain unsafe or unsound practices or breaches of fiduciary duty or law or regulation pursuant to 12 U.S.C. 1818(i)(2);

(11) Any provision of law referenced in section 102(f) of the Flood Disaster Protection Act of 1973 (42 U.S.C. 4012a(f)) or any order or regulation issued thereunder;

(12) Any provision of law referenced in 31 U.S.C. 5321 or any order or regulation issued thereunder;

(13) Section 5 of the Home Owners' Loan Act ("HOLA") or any regulation or order issued thereunder, pursuant to 12 U.S.C. 1464 (d), (s) and (v);

(14) Section 9 of the HOLA or any regulation or order issued thereunder, pursuant to 12 U.S.C. 1467(d); and

(15) Section 10 of the HOLA, pursuant to 12 U.S.C. 1467a (i) and (r);

(f) Remedial action under section 102(g) of the Flood Disaster Protection Act of 1973 (42 U.S.C. 4012a(g));

(g) Removal, prohibition, and civil monetary penalty proceedings under section 10(k) of the FDI Act (12 U.S.C. 1820(k)) for violations of the special post-employment restrictions imposed by that section; and

(h) This subpart also applies to all other adjudications required by statute to be determined on the record after opportunity for an agency hearing, unless otherwise specifically provided for in the Local Rules.

§ 263.2 Rules of construction.

For purposes of this subpart:

(a) Any term in the singular includes the plural, and the plural includes the singular, if such use would be appropriate;

(b) Any use of a masculine, feminine, or neuter gender encompasses all three, if such use would be appropriate;

(c) The term *counsel* includes a non-attorney representative; and

(d) Unless the context requires otherwise, a party's counsel of record, if any, may, on behalf of that party, take any action required to be taken by the party.

§ 263.3 Definitions.

For purposes of this subpart, unless explicitly stated to the contrary:

(a) *Administrative law judge* means one who presides at an administrative hearing under authority set forth at 5 U.S.C. 556.

(b) *Adjudicatory proceeding* means a proceeding conducted pursuant to these rules and leading to the formulation of a final order other than a regulation.

(c) *Decisional employee* means any member of the Board's or administrative law judge's staff who has not engaged in an investigative or prosecutorial role in a proceeding and who may assist the Agency or the administrative law judge, respectively, in preparing orders, recommended decisions, decisions, and other documents under the Uniform Rules.

(d) *Enforcement Counsel* means any individual who files a notice of appearance as counsel on behalf of the Board in an adjudicatory proceeding.

(e) *Final order* means an order issued by the Board with or without the consent of the affected institution or the institution-affiliated party, that has become final, without regard to the pendency of any petition for reconsideration or review.

(f) *Institution* includes: (1) Any bank as that term is defined in section 3(a) of the FDIA (12 U.S.C. 1813(a));

(2) Any bank holding company or any subsidiary (other than a bank) of a bank holding company as those terms are defined in the BHC Act (12 U.S.C. 1841 *et seq.*);

(3) Any organization operating under section 25 of the FRA (12 U.S.C. 601 *et seq.*);

(4) Any foreign bank or company to which section 8 of the IBA (12 U.S.C. 3106), applies or any subsidiary (other than a bank) thereof;

(5) Any Federal agency as that term is defined in section 1(b) of the IBA (12 U.S.C. 3101(5)); and

(6) Any savings and loan holding company or any subsidiary (other than a savings association) of a savings and loan holding company as those terms are defined in the HOLA (12 U.S.C. 1461 *et seq.*).

(g) *Institution-affiliated party* means any institution-affiliated party as that term is defined in section 3(u) of the FDIA (12 U.S.C. 1813(u)).

(h) *Local Rules* means those rules promulgated by the Board in this part other than subpart A.

(i) *OFIA* means the Office of Financial Institution Adjudication, the executive body charged with overseeing the administration of administrative enforcement proceedings for the Board, the Office of Comptroller of the Currency (the *OCC*), the Federal Deposit Insurance Corporation (the *FDIC*), and the National Credit Union Administration (the *NCUA*).

(j) *Party* means the Board and any person named as a party in any notice.

(k) *Person* means an individual, sole proprietor, partnership, corporation, unincorporated association, trust, joint venture, pool, syndicate, agency or other entity or organization, including an institution as defined in paragraph (f) of this section.

(l) *Respondent* means any party other than the Board.

(m) *Uniform Rules* means those rules in subpart A of this part that are common to the Board, the OCC, the FDIC, and the NCUA.

(n) *Violation* includes any action (alone or with another or others) for or toward causing, bringing about, participating in, counseling, or aiding or abetting a violation.

§ 263.4 Authority of the Board.

The Board may, at any time during the pendency of a proceeding, perform, direct the performance of, or waive performance of, any act which could be done or ordered by the administrative law judge.

§ 263.5 Authority of the administrative law judge.

(a) *General rule.* All proceedings governed by this part shall be conducted in accordance with the provisions of chapter 5 of title 5 of the United States Code. The administrative law judge shall have all powers necessary to conduct a proceeding in a fair and impartial manner and to avoid unnecessary delay.

(b) *Powers.* The administrative law judge shall have all powers necessary to conduct the proceeding in accordance with paragraph (a) of this section, including the following powers:

(1) To administer oaths and affirmations;

(2) To issue subpoenas, subpoenas duces tecum, and protective orders, as authorized by this part, and to quash or modify any such subpoenas and orders;

(3) To receive relevant evidence and to rule upon the admission of evidence and offers of proof;

(4) To take or cause depositions to be taken as authorized by this subpart;

(5) To regulate the course of the hearing and the conduct of the parties and their counsel;

(6) To hold scheduling and/or pre-hearing conferences as set forth in §263.31;

(7) To consider and rule upon all procedural and other motions appropriate in an adjudicatory proceeding, provided that only the Board shall have the power to grant any motion to dismiss the proceeding or to decide any other motion that results in a final determination of the merits of the proceeding;

(8) To prepare and present to the Board a recommended decision as provided herein;

(9) To recuse himself or herself by motion made by a party or on his or her own motion;

(10) To establish time, place and manner limitations on the attendance of the public and the media for any public hearing; and

(11) To do all other things necessary and appropriate to discharge the duties of a presiding officer.

§ 263.6 Appearance and practice in adjudicatory proceedings.

(a) *Appearance before the Board or an administrative law judge*—(1) *By attorneys.* Any member in good standing of the bar of the highest court of any state, commonwealth, possession, territory of the United States, or the District of Columbia may represent others before the Board if such attorney is not currently suspended or debarred from practice before the Board.

(2) *By non-attorneys.* An individual may appear on his or her own behalf; a member of a partnership may represent the partnership; a duly authorized officer,

director, or employee of any government unit, agency, institution, corporation or authority may represent that unit, agency, institution, corporation or authority if such officer, director, or employee is not currently suspended or debarred from practice before the Board.

(3) *Notice of appearance.* Any individual acting as counsel on behalf of a party, including the Board, shall file a notice of appearance with OFIA at or before the time that individual submits papers or otherwise appears on behalf of a party in the adjudicatory proceeding. The notice of appearance must include a written declaration that the individual is currently qualified as provided in paragraph (a)(1) or (a)(2) of this section and is authorized to represent the particular party. By filing a notice of appearance on behalf of a party in an adjudicatory proceeding, the counsel agrees and represents that he or she is authorized to accept service on behalf of the represented party and that, in the event of withdrawal from representation, he or she will, if required by the administrative law judge, continue to accept service until new counsel has filed a notice of appearance or until the represented party indicates that he or she will proceed on a *pro se* basis.

(b) *Sanctions.* Dilatory, obstructionist, egregious, contemptuous or contumacious conduct at any phase of any adjudicatory proceeding may be grounds for exclusion or suspension of counsel from the proceeding.

§ 263.7 Good faith certification.

(a) *General requirement.* Every filing or submission of record following the issuance of a notice shall be signed by at least one counsel of record in his or her individual name and shall state that counsel's address and telephone number. A party who

acts as his or her own counsel shall sign his or her individual name and state his or her address and telephone number on every filing or submission of record.

(b) *Effect of signature.* (1) The signature of counsel or a party shall constitute a certification that: the counsel or party has read the filing or submission of record; to the best of his or her knowledge, information, and belief formed after reasonable inquiry, the filing or submission of record is well-grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and the filing or submission of record is not made for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

(2) If a filing or submission of record is not signed, the administrative law judge shall strike the filing or submission of record, unless it is signed promptly after the omission is called to the attention of the pleader or movant.

(c) *Effect of making oral motion or argument.* The act of making any oral motion or oral argument by any counsel or party constitutes a certification that to the best of his or her knowledge, information, and belief formed after reasonable inquiry, his or her statement is well-grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and is not made for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

§ 263.8 Conflicts of interest.

(a) *Conflict of interest in representation.* No person shall appear as counsel for another person in an adjudicatory proceeding if it reasonably appears that such representation may be materially limited by that counsel's responsibilities to a third

person or by the counsel's own interests. The administrative law judge may take corrective measures at any stage of a proceeding to cure a conflict of interest in representation, including the issuance of an order limiting the scope of representation or disqualifying an individual from appearing in a representative capacity for the duration of the proceeding.

(b) *Certification and waiver.* If any person appearing as counsel represents two or more parties to an adjudicatory proceeding or also represents a non-party on a matter relevant to an issue in the proceeding, counsel must certify in writing at the time of filing the notice of appearance required by §263.6(a):

(1) That the counsel has personally and fully discussed the possibility of conflicts of interest with each such party and non-party; and

(2) That each such party and non-party waives any right it might otherwise have had to assert any known conflicts of interest or to assert any non-material conflicts of interest during the course of the proceeding.

§ 263.9 *Ex parte* communications.

(a) *Definition*—(1) *Ex parte communication* means any material oral or written communication relevant to the merits of an adjudicatory proceeding that was neither on the record nor on reasonable prior notice to all parties that takes place between:

(i) An interested person outside the Board (including such person's counsel); and

(ii) The administrative law judge handling that proceeding, a member of the Board, or a decisional employee.

(2) *Exception.* A request for status of the proceeding does not constitute an *ex parte* communication.

(b) *Prohibition of ex parte communications.* From the time the notice is issued by the Board until the date that the Board issues its final decision pursuant to §263.40(c):

(1) No interested person outside the Federal Reserve System shall make or knowingly cause to be made an *ex parte* communication to a member of the Board, the administrative law judge, or a decisional employee; and

(2) A member of the Board, administrative law judge, or decisional employee shall not make or knowingly cause to be made to any interested person outside the Federal Reserve System any *ex parte* communication.

(c) *Procedure upon occurrence of ex parte communication.* If an ex parte communication is received by the administrative law judge, a member of the Board or any other person identified in paragraph (a) of this section, that person shall cause all such written communications (or, if the communication is oral, a memorandum stating the substance of the communication) to be placed on the record of the proceeding and served on all parties. All other parties to the proceeding shall have an opportunity, within ten days of receipt of service of the *ex parte* communication, to file responses thereto and to recommend any sanctions, in accordance with paragraph (d) of this section, that they believe to be appropriate under the circumstances.

(d) *Sanctions.* Any party or his or her counsel who makes a prohibited ex parte communication, or who encourages or solicits another to make any such communication, may be subject to any appropriate sanction or sanctions imposed by the Board or the administrative law judge including, but not limited to, exclusion from the proceedings and an adverse ruling on the issue which is the subject of the prohibited communication.

(e) *Separation of functions.* Except to the extent required for the disposition of *ex parte* matters as authorized by law, the administrative law judge may not consult a person or party on any matter relevant to the merits of the adjudication, unless on notice and opportunity for all parties to participate. An employee or agent engaged in the performance of investigative or prosecuting functions for the Board in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review of the recommended decision under §263.40, except as witness or counsel in public proceedings.

§ 263.10 Filing of papers.

(a) *Filing.* Any papers required to be filed, excluding documents produced in response to a discovery request pursuant to §§263.25 and 263.26, shall be filed with OFIA, except as otherwise provided.

(b) *Manner of filing.* Unless otherwise specified by the Board or the administrative law judge, filing may be accomplished by:

(1) Personal service;

(2) Delivering the papers to a reliable commercial courier service, overnight delivery service, or to the U.S. Post Office for Express Mail delivery;

(3) Mailing the papers by first class, registered, or certified mail; or

(4) Transmission by electronic media, only if expressly authorized, and upon any conditions specified, by the Board or the administrative law judge. All papers filed by electronic media shall also concurrently be filed in accordance with paragraph (c) of this section.

(c) *Formal requirements as to papers filed*—(1) *Form.* All papers filed must set forth the name, address, and telephone number of the counsel or party making the filing and must be accompanied by a certification setting forth when and how service has been made on all other parties. All papers filed must be double-spaced and printed or typewritten on 8½ × 11 inch paper, and must be clear and legible.

(2) *Signature.* All papers must be dated and signed as provided in §263.7.

(3) *Caption.* All papers filed must include at the head thereof, or on a title page, the name of the Board and of the filing party, the title and docket number of the proceeding, and the subject of the particular paper.

(4) *Number of copies.* Unless otherwise specified by the Board, or the administrative law judge, an original and one copy of all documents and papers shall be filed, except that only one copy of transcripts of testimony and exhibits shall be filed.

§ 263.11 Service of papers.

(a) *By the parties.* Except as otherwise provided, a party filing papers shall serve a copy upon the counsel of record for all other parties to the proceeding so represented, and upon any party not so represented.

(b) *Method of service.* Except as provided in paragraphs (c)(2) and (d) of this section, a serving party shall use one or more of the following methods of service:

(1) Personal service;

(2) Delivering the papers to a reliable commercial courier service, overnight delivery service, or to the U.S. Post Office for Express Mail delivery;

(3) Mailing the papers by first class, registered, or certified mail; or

(4) Transmission by electronic media, only if the parties mutually agree. Any papers served by electronic media shall also concurrently be served in accordance with the requirements of §263.10(c).

(c) *By the Board or the administrative law judge.* (1) All papers required to be served by the Board or the administrative law judge upon a party who has appeared in the proceeding in accordance with §263.6, shall be served by any means specified in paragraph (b) of this section.

(2) If a party has not appeared in the proceeding in accordance with §263.6, the Board or the administrative law judge shall make service by any of the following methods:

(i) By personal service;

(ii) If the person to be served is an individual, by delivery to a person of suitable age and discretion at the physical location where the individual resides or works;

(iii) If the person to be served is a corporation or other association, by delivery to an officer, managing or general agent, or to any other agent authorized by appointment or by law to receive service and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the party;

(iv) By registered or certified mail addressed to the person's last known address; or

(v) By any other method reasonably calculated to give actual notice.

(d) *Subpoenas.* Service of a subpoena may be made:

(1) By personal service;

(2) If the person to be served is an individual, by delivery to a person of suitable age and discretion at the physical location where the individual resides or works;

(3) By delivery to an agent, which, in the case of a corporation or other association, is delivery to an officer, managing or general agent, or to any other agent authorized by appointment or by law to receive service and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the party;

(4) By registered or certified mail addressed to the person's last known address; or

(5) By any other method as is reasonably calculated to give actual notice.

(e) *Area of service.* Service in any state, territory, possession of the United States, or the District of Columbia, on any person or company doing business in any state, territory, possession of the United States, or the District of Columbia, or on any person as otherwise provided by law, is effective without regard to the place where the hearing is held, provided that if service is made on a foreign bank in connection with an action or proceeding involving one or more of its branches or agencies located in any state, territory, possession of the United States, or the District of Columbia, service shall be made on at least one branch or agency so involved.

§ 263.12 Construction of time limits.

(a) *General rule.* In computing any period of time prescribed by this subpart, the date of the act or event that commences the designated period of time is not included. The last day so computed is included unless it is a Saturday, Sunday, or Federal holiday. When the last day is a Saturday, Sunday, or Federal holiday, the period runs until the end of the next day that is not a Saturday, Sunday, or Federal holiday. Intermediate Saturdays,

Sundays, and Federal holidays are included in the computation of time. However, when the time period within which an act is to be performed is ten days or less, not including any additional time allowed for in paragraph (c) of this section, intermediate Saturdays, Sundays, and Federal holidays are not included.

(b) *When papers are deemed to be filed or served.* (1) Filing and service are deemed to be effective:

(i) In the case of personal service or same-day commercial courier delivery, upon actual service;

(ii) In the case of overnight commercial delivery service, U.S. Express Mail delivery, or first class, registered, or certified mail, upon deposit in or delivery to an appropriate point of collection;

(iii) In the case of transmission by electronic media, as specified by the authority receiving the filing, in the case of filing, and as agreed among the parties, in the case of service.

(2) The effective filing and service dates specified in paragraph (b)(1) of this section may be modified by the Board or administrative law judge in the case of filing or by agreement of the parties in the case of service.

(c) *Calculation of time for service and filing of responsive papers.* Whenever a time limit is measured by a prescribed period from the service of any notice or paper, the applicable time limits are calculated as follows:

(1) If service is made by first class, registered, or certified mail, add three calendar days to the prescribed period;

(2) If service is made by express mail or overnight delivery service, add one calendar day to the prescribed period; or

(3) If service is made by electronic media transmission, add one calendar day to the prescribed period, unless otherwise determined by the Board or the administrative law judge in the case of filing, or by agreement among the parties in the case of service.

§ 263.13 Change of time limits.

Except as otherwise provided by law, the administrative law judge may, for good cause shown, extend the time limits prescribed by the Uniform Rules or by any notice or order issued in the proceedings. After the referral of the case to the Board pursuant to §263.38, the Board may grant extensions of the time limits for good cause shown. Extensions may be granted at the motion of a party after notice and opportunity to respond is afforded all non-moving parties or *sua sponte* by the Board or the administrative law judge.

§ 263.14 Witness fees and expenses.

Witnesses subpoenaed for testimony or depositions shall be paid the same fees for attendance and mileage as are paid in the United States district courts in proceedings in which the United States is a party, provided that, in the case of a discovery subpoena addressed to a party, no witness fees or mileage need be paid. Fees for witnesses shall be tendered in advance by the party requesting the subpoena, except that fees and mileage need not be tendered in advance where the Board is the party requesting the subpoena. The Board shall not be required to pay any fees to, or expenses of, any witness not subpoenaed by the Board.

§ 263.15 Opportunity for informal settlement.

Any respondent may, at any time in the proceeding, unilaterally submit to Enforcement Counsel written offers or proposals for settlement of a proceeding, without prejudice to the rights of any of the parties. No such offer or proposal shall be made to any Board representative other than Enforcement Counsel. Submission of a written settlement offer does not provide a basis for adjourning or otherwise delaying all or any portion of a proceeding under this part. No settlement offer or proposal, or any subsequent negotiation or resolution, is admissible as evidence in any proceeding.

§ 263.16 The Board's right to conduct examination.

Nothing contained in this subpart limits in any manner the right of the Board or any Federal Reserve Bank to conduct any examination, inspection, or visitation of any institution or institution-affiliated party, or the right of the Board or any Federal Reserve Bank to conduct or continue any form of investigation authorized by law.

§ 263.17 Collateral attacks on adjudicatory proceeding.

If an interlocutory appeal or collateral attack is brought in any court concerning all or any part of an adjudicatory proceeding, the challenged adjudicatory proceeding shall continue without regard to the pendency of that court proceeding. No default or other failure to act as directed in the adjudicatory proceeding within the times prescribed in this subpart shall be excused based on the pendency before any court of any interlocutory appeal or collateral attack.

§ 263.18 Commencement of proceeding and contents of notice.

(a) *Commencement of proceeding.* (1)(i) Except for change-in-control proceedings under section 7(j)(4) of the FDIA (12 U.S.C. 1817(j)(4)), a proceeding governed by this subpart is commenced by issuance of a notice by the Board.

(ii) The notice must be served by the Board upon the respondent and given to any other appropriate financial institution supervisory authority where required by law.

(iii) The notice must be filed with OFIA.

(2) Change-in-control proceedings under section 7(j)(4) of the FDIA (12 U.S.C. 1817(j)(4)) commence with the issuance of an order by the Board.

(b) *Contents of notice.* The notice must set forth:

(1) The legal authority for the proceeding and for the Board's jurisdiction over the proceeding;

(2) A statement of the matters of fact or law showing that the Board is entitled to relief;

(3) A proposed order or prayer for an order granting the requested relief;

(4) The time, place, and nature of the hearing as required by law or regulation;

(5) The time within which to file an answer as required by law or regulation;

(6) The time within which to request a hearing as required by law or regulation; and

(7) That the answer and/or request for a hearing shall be filed with OFIA.

§ 263.19 Answer.

(a) *When.* Within 20 days of service of the notice, respondent shall file an answer as designated in the notice. In a civil money penalty proceeding, respondent shall also file a request for a hearing within 20 days of service of the notice.

(b) *Content of answer.* An answer must specifically respond to each paragraph or allegation of fact contained in the notice and must admit, deny, or state that the party lacks sufficient information to admit or deny each allegation of fact. A statement of lack

of information has the effect of a denial. Denials must fairly meet the substance of each allegation of fact denied; general denials are not permitted. When a respondent denies part of an allegation, that part must be denied and the remainder specifically admitted. Any allegation of fact in the notice which is not denied in the answer must be deemed admitted for purposes of the proceeding. A respondent is not required to respond to the portion of a notice that constitutes the prayer for relief or proposed order. The answer must set forth affirmative defenses, if any, asserted by the respondent.

(c) *Default*—(1) *Effect of failure to answer.* Failure of a respondent to file an answer required by this section within the time provided constitutes a waiver of his or her right to appear and contest the allegations in the notice. If no timely answer is filed, Enforcement Counsel may file a motion for entry of an order of default. Upon a finding that no good cause has been shown for the failure to file a timely answer, the administrative law judge shall file with the Board a recommended decision containing the findings and the relief sought in the notice. Any final order issued by the Board based upon a respondent's failure to answer is deemed to be an order issued upon consent.

(2) *Effect of failure to request a hearing in civil money penalty proceedings.* If respondent fails to request a hearing as required by law within the time provided, the notice of assessment constitutes a final and unappealable order.

§ 263.20 Amended pleadings.

(a) *Amendments.* The notice or answer may be amended or supplemented at any stage of the proceeding. The respondent must answer an amended notice within the time remaining for the respondent's answer to the original notice, or within ten days after

service of the amended notice, whichever period is longer, unless the Board or administrative law judge orders otherwise for good cause.

(b) *Amendments to conform to the evidence.* When issues not raised in the notice or answer are tried at the hearing by express or implied consent of the parties, they will be treated in all respects as if they had been raised in the notice or answer, and no formal amendments are required. If evidence is objected to at the hearing on the ground that it is not within the issues raised by the notice or answer, the administrative law judge may admit the evidence when admission is likely to assist in adjudicating the merits of the action and the objecting party fails to satisfy the administrative law judge that the admission of such evidence would unfairly prejudice that party's action or defense upon the merits. The administrative law judge may grant a continuance to enable the objecting party to meet such evidence.

§ 263.21 Failure to appear.

Failure of a respondent to appear in person at the hearing or by a duly authorized counsel constitutes a waiver of respondent's right to a hearing and is deemed an admission of the facts as alleged and consent to the relief sought in the notice. Without further proceedings or notice to the respondent, the administrative law judge shall file with the Board a recommended decision containing the findings and the relief sought in the notice.

§ 263.22 Consolidation and severance of actions.

(a) *Consolidation.* (1) On the motion of any party, or on the administrative law judge's own motion, the administrative law judge may consolidate, for some or all purposes, any two or more proceedings, if each such proceeding involves or arises out of

the same transaction, occurrence or series of transactions or occurrences, or involves at least one common respondent or a material common question of law or fact, unless such consolidation would cause unreasonable delay or injustice.

(2) In the event of consolidation under paragraph (a)(1) of this section, appropriate adjustment to the prehearing schedule shall be made to avoid unnecessary expense, inconvenience, or delay.

(b) *Severance.* The administrative law judge may, upon the motion of any party, sever the proceeding for separate resolution of the matter as to any respondent only if the administrative law judge finds that:

(1) Undue prejudice or injustice to the moving party would result from not severing the proceeding; and

(2) Such undue prejudice or injustice would outweigh the interests of judicial economy and expedition in the complete and final resolution of the proceeding.

§ 263.23 Motions.

(a) *In writing.* (1) Except as otherwise provided herein, an application or request for an order or ruling must be made by written motion.

(2) All written motions must state with particularity the relief sought and must be accompanied by a proposed order.

(3) No oral argument may be held on written motions except as otherwise directed by the administrative law judge. Written memoranda, briefs, affidavits or other relevant material or documents may be filed in support of or in opposition to a motion.

(b) *Oral motions.* A motion may be made orally on the record unless the administrative law judge directs that such motion be reduced to writing.

(c) *Filing of motions.* Motions must be filed with the administrative law judge, except that following the filing of the recommended decision, motions must be filed with the Board.

(d) *Responses.* (1) Except as otherwise provided herein, within ten days after service of any written motion, or within such other period of time as may be established by the administrative law judge or the Board, any party may file a written response to a motion. The administrative law judge shall not rule on any oral or written motion before each party has had an opportunity to file a response.

(2) The failure of a party to oppose a written motion or an oral motion made on the record is deemed a consent by that party to the entry of an order substantially in the form of the order accompanying the motion.

(e) *Dilatory motions.* Frivolous, dilatory or repetitive motions are prohibited. The filing of such motions may form the basis for sanctions.

(f) *Dispositive motions.* Dispositive motions are governed by §§263.29 and 263.30.

§ 263.24 Scope of document discovery.

(a) *Limits on discovery.* (1) Subject to the limitations set out in paragraphs (b), (c), and (d) of this section, a party to a proceeding under this subpart may obtain document discovery by serving a written request to produce documents. For purposes of a request to produce documents, the term "documents" may be defined to include drawings, graphs, charts, photographs, recordings, data stored in electronic form, and other data compilations from which information can be obtained, or translated, if necessary, by the

parties through detection devices into reasonably usable form, as well as written material of all kinds.

(2) Discovery by use of deposition is governed by §263.53 of subpart B of this part.

(3) Discovery by use of interrogatories is not permitted.

(b) *Relevance.* A party may obtain document discovery regarding any matter, not privileged, that has material relevance to the merits of the pending action. Any request to produce documents that calls for irrelevant material, that is unreasonable, oppressive, excessive in scope, unduly burdensome, or repetitive of previous requests, or that seeks to obtain privileged documents will be denied or modified. A request is unreasonable, oppressive, excessive in scope or unduly burdensome if, among other things, it fails to include justifiable limitations on the time period covered and the geographic locations to be searched, the time provided to respond in the request is inadequate, or the request calls for copies of documents to be delivered to the requesting party and fails to include the requestor's written agreement to pay in advance for the copying, in accordance with §263.25.

(c) *Privileged matter.* Privileged documents are not discoverable. Privileges include the attorney-client privilege, work-product privilege, any government's or government agency's deliberative-process privilege, and any other privileges the Constitution, any applicable act of Congress, or the principles of common law provide.

(d) *Time limits.* All discovery, including all responses to discovery requests, shall be completed at least 20 days prior to the date scheduled for the commencement of the hearing. No exceptions to this time limit shall be permitted, unless the administrative law

judge finds on the record that good cause exists for waiving the requirements of this paragraph.

§ 263.25 Request for document discovery from parties.

(a) *General rule.* Any party may serve on any other party a request to produce for inspection any discoverable documents that are in the possession, custody, or control of the party upon whom the request is served. The request must identify the documents to be produced either by individual item or by category, and must describe each item and category with reasonable particularity. Documents must be produced as they are kept in the usual course of business or must be organized to correspond with the categories in the request.

(b) *Production or copying.* The request must specify a reasonable time, place, and manner for production and performing any related acts. In lieu of inspecting the documents, the requesting party may specify that all or some of the responsive documents be copied and the copies delivered to the requesting party. If copying of fewer than 250 pages is requested, the party to whom the request is addressed shall bear the cost of copying and shipping charges. If a party requests 250 pages or more of copying, the requesting party shall pay for the copying and shipping charges. Copying charges are the current per-page copying rate imposed by 12 CFR Part 261 implementing the Freedom of Information Act (5 U.S.C. 552). The party to whom the request is addressed may require payment in advance before producing the documents.

(c) *Obligation to update responses.* A party who has responded to a discovery request with a response that was complete when made is not required to supplement the

response to include documents thereafter acquired, unless the responding party learns that:

(1) The response was materially incorrect when made; or

(2) The response, though correct when made, is no longer true and a failure to amend the response is, in substance, a knowing concealment.

(d) *Motions to limit discovery.* (1) Any party that objects to a discovery request may, within ten days of being served with such request, file a motion in accordance with the provisions of §263.23 to strike or otherwise limit the request. If an objection is made to only a portion of an item or category in a request, the portion objected to shall be specified. Any objections not made in accordance with this paragraph and §263.23 are waived.

(2) The party who served the request that is the subject of a motion to strike or limit may file a written response within five days of service of the motion. No other party may file a response.

(e) *Privilege.* At the time other documents are produced, the producing party must reasonably identify all documents withheld on the grounds of privilege and must produce a statement of the basis for the assertion of privilege. When similar documents that are protected by deliberative process, attorney-work-product, or attorney-client privilege are voluminous, these documents may be identified by category instead of by individual document. The administrative law judge retains discretion to determine when the identification by category is insufficient.

(f) *Motions to compel production.* (1) If a party withholds any documents as privileged or fails to comply fully with a discovery request, the requesting party may,

within ten days of the assertion of privilege or of the time the failure to comply becomes known to the requesting party, file a motion in accordance with the provisions of §263.23 for the issuance of a subpoena compelling production.

(2) The party who asserted the privilege or failed to comply with the request may file a written response to a motion to compel within five days of service of the motion. No other party may file a response.

(g) *Ruling on motions.* After the time for filing responses pursuant to this section has expired, the administrative law judge shall rule promptly on all motions filed pursuant to this section. If the administrative law judge determines that a discovery request, or any of its terms, calls for irrelevant material, is unreasonable, oppressive, excessive in scope, unduly burdensome, or repetitive of previous requests, or seeks to obtain privileged documents, he or she may deny or modify the request, and may issue appropriate protective orders, upon such conditions as justice may require. The pendency of a motion to strike or limit discovery or to compel production is not a basis for staying or continuing the proceeding, unless otherwise ordered by the administrative law judge. Notwithstanding any other provision in this part, the administrative law judge may not release, or order a party to produce, documents withheld on grounds of privilege if the party has stated to the administrative law judge its intention to file a timely motion for interlocutory review of the administrative law judge's order to produce the documents, and until the motion for interlocutory review has been decided.

(h) *Enforcing discovery subpoenas.* If the administrative law judge issues a subpoena compelling production of documents by a party, the subpoenaing party may, in the event of noncompliance and to the extent authorized by applicable law, apply to any

appropriate United States district court for an order requiring compliance with the subpoena. A party's right to seek court enforcement of a subpoena shall not in any manner limit the sanctions that may be imposed by the administrative law judge against a party who fails to produce subpoenaed documents.

§ 263.26 Document subpoenas to nonparties.

(a) *General rules.* (1) Any party may apply to the administrative law judge for the issuance of a document discovery subpoena addressed to any person who is not a party to the proceeding. The application must contain a proposed document subpoena and a brief statement showing the general relevance and reasonableness of the scope of documents sought. The subpoenaing party shall specify a reasonable time, place, and manner for making production in response to the document subpoena.

(2) A party shall only apply for a document subpoena under this section within the time period during which such party could serve a discovery request under §263.24(d). The party obtaining the document subpoena is responsible for serving it on the subpoenaed person and for serving copies on all parties. Document subpoenas may be served in any state, territory, or possession of the United States, the District of Columbia, or as otherwise provided by law.

(3) The administrative law judge shall promptly issue any document subpoena requested pursuant to this section. If the administrative law judge determines that the application does not set forth a valid basis for the issuance of the subpoena, or that any of its terms are unreasonable, oppressive, excessive in scope, or unduly burdensome, he or she may refuse to issue the subpoena or may issue it in a modified form upon such conditions as may be consistent with the Uniform Rules.

(b) *Motion to quash or modify.* (1) Any person to whom a document subpoena is directed may file a motion to quash or modify such subpoena, accompanied by a statement of the basis for quashing or modifying the subpoena. The movant shall serve the motion on all parties, and any party may respond to such motion within ten days of service of the motion.

(2) Any motion to quash or modify a document subpoena must be filed on the same basis, including the assertion of privilege, upon which a party could object to a discovery request under §263.25(d), and during the same time limits during which such an objection could be filed.

(c) *Enforcing document subpoenas.* If a subpoenaed person fails to comply with any subpoena issued pursuant to this section or any order of the administrative law judge which directs compliance with all or any portion of a document subpoena, the subpoenaing party or any other aggrieved party may, to the extent authorized by applicable law, apply to an appropriate United States district court for an order requiring compliance with so much of the document subpoena as the administrative law judge has not quashed or modified. A party's right to seek court enforcement of a document subpoena shall in no way limit the sanctions that may be imposed by the administrative law judge on a party who induces a failure to comply with subpoenas issued under this section.

§ 263.27 Deposition of witness unavailable for hearing.

(a) *General rules.* (1) If a witness will not be available for the hearing, a party desiring to preserve that witness's testimony for the record may apply in accordance with the procedures set forth in paragraph (a)(2) of this section, to the administrative law judge

for the issuance of a subpoena, including a subpoena duces tecum, requiring the attendance of the witness at a deposition. The administrative law judge may issue a deposition subpoena under this section upon a showing that:

(i) The witness will be unable to attend or may be prevented from attending the hearing because of age, sickness or infirmity, or will otherwise be unavailable;

(ii) The witness's unavailability was not procured or caused by the subpoenaing party;

(iii) The testimony is reasonably expected to be material; and

(iv) Taking the deposition will not result in any undue burden to any other party and will not cause undue delay of the proceeding.

(2) The application must contain a proposed deposition subpoena and a brief statement of the reasons for the issuance of the subpoena. The subpoena must name the witness whose deposition is to be taken and specify the time and place for taking the deposition. A deposition subpoena may require the witness to be deposed at any place within the country in which that witness resides or has a regular place of employment or such other convenient place as the administrative law judge shall fix.

(3) Any requested subpoena that sets forth a valid basis for its issuance must be promptly issued, unless the administrative law judge on his or her own motion, requires a written response or requires attendance at a conference concerning whether the requested subpoena should be issued.

(4) The party obtaining a deposition subpoena is responsible for serving it on the witness and for serving copies on all parties. Unless the administrative law judge orders otherwise, no deposition under this section shall be taken on fewer than ten days' notice

to the witness and all parties. Deposition subpoenas may be served in any state, territory, possession of the United States, or the District of Columbia, on any person or company doing business in any state, territory, possession of the United States, or the District of Columbia, or as otherwise permitted by law.

(b) *Objections to deposition subpoenas.* (1) The witness and any party who has not had an opportunity to oppose a deposition subpoena issued under this section may file a motion with the administrative law judge to quash or modify the subpoena prior to the time for compliance specified in the subpoena, but not more than ten days after service of the subpoena.

(2) A statement of the basis for the motion to quash or modify a subpoena issued under this section must accompany the motion. The motion must be served on all parties.

(c) *Procedure upon deposition.* (1) Each witness testifying pursuant to a deposition subpoena must be duly sworn, and each party shall have the right to examine the witness. Objections to questions or documents must be in short form, stating the grounds for the objection. Failure to object to questions or documents is not deemed a waiver except where the ground for the objection might have been avoided if the objection had been timely presented. All questions, answers, and objections must be recorded.

(2) Any party may move before the administrative law judge for an order compelling the witness to answer any questions the witness has refused to answer or submit any evidence the witness has refused to submit during the deposition.

(3) The deposition must be subscribed by the witness, unless the parties and the witness, by stipulation, have waived the signing, or the witness is ill, cannot be found, or

has refused to sign. If the deposition is not subscribed by the witness, the court reporter taking the deposition shall certify that the transcript is a true and complete transcript of the deposition.

(d) *Enforcing subpoenas.* If a subpoenaed person fails to comply with any order of the administrative law judge which directs compliance with all or any portion of a deposition subpoena under paragraph (b) or (c)(3) of this section, the subpoenaing party or other aggrieved party may, to the extent authorized by applicable law, apply to an appropriate United States district court for an order requiring compliance with the portions of the subpoena that the administrative law judge has ordered enforced. A party's right to seek court enforcement of a deposition subpoena in no way limits the sanctions that may be imposed by the administrative law judge on a party who fails to comply with, or procures a failure to comply with, a subpoena issued under this section.

§ 263.28 Interlocutory review.

(a) *General rule.* The Board may review a ruling of the administrative law judge prior to the certification of the record to the Board only in accordance with the procedures set forth in this section and §263.23.

(b) *Scope of review.* The Board may exercise interlocutory review of a ruling of the administrative law judge if the Board finds that:

(1) The ruling involves a controlling question of law or policy as to which substantial grounds exist for a difference of opinion;

(2) Immediate review of the ruling may materially advance the ultimate termination of the proceeding;

(3) Subsequent modification of the ruling at the conclusion of the proceeding would be an inadequate remedy; or

(4) Subsequent modification of the ruling would cause unusual delay or expense.

(c) *Procedure.* Any request for interlocutory review shall be filed by a party with the administrative law judge within ten days of his or her ruling and shall otherwise comply with §263.23. Any party may file a response to a request for interlocutory review in accordance with §263.23(d). Upon the expiration of the time for filing all responses, the administrative law judge shall refer the matter to the Board for final disposition.

(d) *Suspension of proceeding.* Neither a request for interlocutory review nor any disposition of such a request by the Board under this section suspends or stays the proceeding unless otherwise ordered by the administrative law judge or the Board.

§ 263.29 Summary disposition.

(a) *In general.* The administrative law judge shall recommend that the Board issue a final order granting a motion for summary disposition if the undisputed pleaded facts, admissions, affidavits, stipulations, documentary evidence, matters as to which official notice may be taken, and any other evidentiary materials properly submitted in connection with a motion for summary disposition show that:

(1) There is no genuine issue as to any material fact; and

(2) The moving party is entitled to a decision in its favor as a matter of law.

(b) *Filing of motions and responses.* (1) Any party who believes that there is no genuine issue of material fact to be determined and that he or she is entitled to a decision as a matter of law may move at any time for summary disposition in its favor of all or any part of the proceeding. Any party, within 20 days after service of such a motion, or within

such time period as allowed by the administrative law judge, may file a response to such motion.

(2) A motion for summary disposition must be accompanied by a statement of the material facts as to which the moving party contends there is no genuine issue. Such motion must be supported by documentary evidence, which may take the form of admissions in pleadings, stipulations, depositions, investigatory depositions, transcripts, affidavits and any other evidentiary materials that the moving party contends support his or her position. The motion must also be accompanied by a brief containing the points and authorities in support of the contention of the moving party. Any party opposing a motion for summary disposition must file a statement setting forth those material facts as to which he or she contends a genuine dispute exists. Such opposition must be supported by evidence of the same type as that submitted with the motion for summary disposition and a brief containing the points and authorities in support of the contention that summary disposition would be inappropriate.

(c) *Hearing on motion.* At the request of any party or on his or her own motion, the administrative law judge may hear oral argument on the motion for summary disposition.

(d) *Decision on motion.* Following receipt of a motion for summary disposition and all responses thereto, the administrative law judge shall determine whether the moving party is entitled to summary disposition. If the administrative law judge determines that summary disposition is warranted, the administrative law judge shall submit a recommended decision to that effect to the Board. If the administrative law

judge finds that no party is entitled to summary disposition, he or she shall make a ruling denying the motion.

§ 263.30 Partial summary disposition.

If the administrative law judge determines that a party is entitled to summary disposition as to certain claims only, he or she shall defer submitting a recommended decision as to those claims. A hearing on the remaining issues must be ordered. Those claims for which the administrative law judge has determined that summary disposition is warranted will be addressed in the recommended decision filed at the conclusion of the hearing.

§ 263.31 Scheduling and prehearing conferences.

(a) *Scheduling conference.* Within 30 days of service of the notice or order commencing a proceeding or such other time as parties may agree, the administrative law judge shall direct counsel for all parties to meet with him or her in person at a specified time and place prior to the hearing or to confer by telephone for the purpose of scheduling the course and conduct of the proceeding. This meeting or telephone conference is called a "scheduling conference." The identification of potential witnesses, the time for and manner of discovery, and the exchange of any prehearing materials including witness lists, statements of issues, stipulations, exhibits and any other materials may also be determined at the scheduling conference.

(b) *Prehearing conferences.* The administrative law judge may, in addition to the scheduling conference, on his or her own motion or at the request of any party, direct counsel for the parties to meet with him or her (in person or by telephone) at a prehearing conference to address any or all of the following:

(1) Simplification and clarification of the issues;

(2) Stipulations, admissions of fact, and the contents, authenticity and admissibility into evidence of documents;

(3) Matters of which official notice may be taken;

(4) Limitation of the number of witnesses;

(5) Summary disposition of any or all issues;

(6) Resolution of discovery issues or disputes;

(7) Amendments to pleadings; and

(8) Such other matters as may aid in the orderly disposition of the proceeding.

(c) *Transcript.* The administrative law judge, in his or her discretion, may require that a scheduling or prehearing conference be recorded by a court reporter. A transcript of the conference and any materials filed, including orders, becomes part of the record of the proceeding. A party may obtain a copy of the transcript at his or her expense.

(d) *Scheduling or prehearing orders.* At or within a reasonable time following the conclusion of the scheduling conference or any prehearing conference, the administrative law judge shall serve on each party an order setting forth any agreements reached and any procedural determinations made.

§ 263.32 Prehearing submissions.

(a) Within the time set by the administrative law judge, but in no case later than 14 days before the start of the hearing, each party shall serve on every other party, his or her:

(1) Prehearing statement;

(2) Final list of witnesses to be called to testify at the hearing, including name and address of each witness and a short summary of the expected testimony of each witness;

(3) List of the exhibits to be introduced at the hearing along with a copy of each exhibit; and

(4) Stipulations of fact, if any.

(b) Effect of failure to comply. No witness may testify and no exhibits may be introduced at the hearing if such witness or exhibit is not listed in the prehearing submissions pursuant to paragraph (a) of this section, except for good cause shown.

§ 263.33 Public hearings.

(a) *General rule.* All hearings shall be open to the public, unless the Board, in the Board's discretion, determines that holding an open hearing would be contrary to the public interest. Within 20 days of service of the notice or, in the case of change-in-control proceedings under section 7(j)(4) of the FDIA (12 U.S.C. 1817(j)(4)), within 20 days from service of the hearing order, any respondent may file with the Board a request for a private hearing, and any party may file a reply to such a request. A party must serve on the administrative law judge a copy of any request or reply the party files with the Board. The form of, and procedure for, these requests and replies are governed by §263.23. A party's failure to file a request or a reply constitutes a waiver of any objections regarding whether the hearing will be public or private.

(b) *Filing document under seal.* Enforcement Counsel, in his or her discretion, may file any document or part of a document under seal if disclosure of the document would be contrary to the public interest. The administrative law judge shall take all

appropriate steps to preserve the confidentiality of such documents or parts thereof, including closing portions of the hearing to the public.

§ 263.34 Hearing subpoenas.

(a) *Issuance.* (1) Upon application of a party showing general relevance and reasonableness of scope of the testimony or other evidence sought, the administrative law judge may issue a subpoena or a subpoena duces tecum requiring the attendance of a witness at the hearing or the production of documentary or physical evidence at the hearing. The application for a hearing subpoena must also contain a proposed subpoena specifying the attendance of a witness or the production of evidence from any state, territory, or possession of the United States, the District of Columbia, or as otherwise provided by law at any designated place where the hearing is being conducted. The party making the application shall serve a copy of the application and the proposed subpoena on every other party.

(2) A party may apply for a hearing subpoena at any time before the commencement of a hearing. During a hearing, a party may make an application for a subpoena orally on the record before the administrative law judge.

(3) The administrative law judge shall promptly issue any hearing subpoena requested pursuant to this section. If the administrative law judge determines that the application does not set forth a valid basis for the issuance of the subpoena, or that any of its terms are unreasonable, oppressive, excessive in scope, or unduly burdensome, he or she may refuse to issue the subpoena or may issue it in a modified form upon any conditions consistent with this subpart. Upon issuance by the administrative law judge,

the party making the application shall serve the subpoena on the person named in the subpoena and on each party.

(b) *Motion to quash or modify.* (1) Any person to whom a hearing subpoena is directed or any party may file a motion to quash or modify the subpoena, accompanied by a statement of the basis for quashing or modifying the subpoena. The movant must serve the motion on each party and on the person named in the subpoena. Any party may respond to the motion within ten days of service of the motion.

(2) Any motion to quash or modify a hearing subpoena must be filed prior to the time specified in the subpoena for compliance, but not more than ten days after the date of service of the subpoena upon the movant.

(c) *Enforcing subpoenas.* If a subpoenaed person fails to comply with any subpoena issued pursuant to this section or any order of the administrative law judge which directs compliance with all or any portion of a document subpoena, the subpoenaing party or any other aggrieved party may seek enforcement of the subpoena pursuant to §263.26(c).

§ 263.35 Conduct of hearings.

(a) *General rules.* (1) Hearings shall be conducted so as to provide a fair and expeditious presentation of the relevant disputed issues. Each party has the right to present its case or defense by oral and documentary evidence and to conduct such cross examination as may be required for full disclosure of the facts.

(2) *Order of hearing.* Enforcement Counsel shall present its case-in-chief first, unless otherwise ordered by the administrative law judge, or unless otherwise expressly specified by law or regulation. Enforcement Counsel shall be the first party to present an

opening statement and a closing statement, and may make a rebuttal statement after the respondent's closing statement. If there are multiple respondents, respondents may agree among themselves as to their order of presentation of their cases, but if they do not agree the administrative law judge shall fix the order.

(3) *Examination of witnesses.* Only one counsel for each party may conduct an examination of a witness, except that in the case of extensive direct examination, the administrative law judge may permit more than one counsel for the party presenting the witness to conduct the examination. A party may have one counsel conduct the direct examination and another counsel conduct re-direct examination of a witness, or may have one counsel conduct the cross examination of a witness and another counsel conduct the re-cross examination of a witness.

(4) *Stipulations.* Unless the administrative law judge directs otherwise, all stipulations of fact and law previously agreed upon by the parties, and all documents, the admissibility of which have been previously stipulated, will be admitted into evidence upon commencement of the hearing.

(b) *Transcript.* The hearing must be recorded and transcribed. The reporter will make the transcript available to any party upon payment by that party to the reporter of the cost of the transcript. The administrative law judge may order the record corrected, either upon motion to correct, upon stipulation of the parties, or following notice to the parties upon the administrative law judge's own motion.

§ 263.36 Evidence.

(a) *Admissibility.* (1) Except as is otherwise set forth in this section, relevant, material, and reliable evidence that is not unduly repetitive is admissible to the fullest extent authorized by the Administrative Procedure Act and other applicable law.

(2) Evidence that would be admissible under the Federal Rules of Evidence is admissible in a proceeding conducted pursuant to this subpart.

(3) Evidence that would be inadmissible under the Federal Rules of Evidence may not be deemed or ruled to be inadmissible in a proceeding conducted pursuant to this subpart if such evidence is relevant, material, reliable and not unduly repetitive.

(b) *Official notice.* (1) Official notice may be taken of any material fact which may be judicially noticed by a United States district court and any material information in the official public records of any Federal or state government agency.

(2) All matters officially noticed by the administrative law judge or Board shall appear on the record.

(3) If official notice is requested or taken of any material fact, the parties, upon timely request, shall be afforded an opportunity to object.

(c) *Documents.* (1) A duplicate copy of a document is admissible to the same extent as the original, unless a genuine issue is raised as to whether the copy is in some material respect not a true and legible copy of the original.

(2) Subject to the requirements of paragraph (a) of this section, any document, including a report of examination, supervisory activity, inspection or visitation, prepared by an appropriate Federal financial institutions regulatory agency or state regulatory agency, is admissible either with or without a sponsoring witness.

(3) Witnesses may use existing or newly created charts, exhibits, calendars, calculations, outlines or other graphic material to summarize, illustrate, or simplify the presentation of testimony. Such materials may, subject to the administrative law judge's discretion, be used with or without being admitted into evidence.

(d) *Objections.* (1) Objections to the admissibility of evidence must be timely made and rulings on all objections must appear on the record.

(2) When an objection to a question or line of questioning propounded to a witness is sustained, the examining counsel may make a specific proffer on the record of what he or she expected to prove by the expected testimony of the witness, either by representation of counsel or by direct interrogation of the witness.

(3) The administrative law judge shall retain rejected exhibits, adequately marked for identification, for the record, and transmit such exhibits to the Board.

(4) Failure to object to admission of evidence or to any ruling constitutes a waiver of the objection.

(e) *Stipulations.* The parties may stipulate as to any relevant matters of fact or the authentication of any relevant documents. Such stipulations must be received in evidence at a hearing, and are binding on the parties with respect to the matters therein stipulated.

(f) *Depositions of unavailable witnesses.* (1) If a witness is unavailable to testify at a hearing, and that witness has testified in a deposition to which all parties in a proceeding had notice and an opportunity to participate, a party may offer as evidence all or any part of the transcript of the deposition, including deposition exhibits, if any.

(2) Such deposition transcript is admissible to the same extent that testimony would have been admissible had that person testified at the hearing, provided that if a

witness refused to answer proper questions during the depositions, the administrative law judge may, on that basis, limit the admissibility of the deposition in any manner that justice requires.

(3) Only those portions of a deposition received in evidence at the hearing constitute a part of the record.

§ 263.37 Post-hearing filings.

(a) *Proposed findings and conclusions and supporting briefs.* (1) Using the same method of service for each party, the administrative law judge shall serve notice upon each party, that the certified transcript, together with all hearing exhibits and exhibits introduced but not admitted into evidence at the hearing, has been filed. Any party may file with the administrative law judge proposed findings of fact, proposed conclusions of law, and a proposed order within 30 days following service of this notice by the administrative law judge or within such longer period as may be ordered by the administrative law judge.

(2) Proposed findings and conclusions must be supported by citation to any relevant authorities and by page references to any relevant portions of the record. A post-hearing brief may be filed in support of proposed findings and conclusions, either as part of the same document or in a separate document. Any party who fails to file timely with the administrative law judge any proposed finding or conclusion is deemed to have waived the right to raise in any subsequent filing or submission any issue not addressed in such party's proposed finding or conclusion.

(b) *Reply briefs.* Reply briefs may be filed within 15 days after the date on which the parties' proposed findings, conclusions, and order are due. Reply briefs must be

strictly limited to responding to new matters, issues, or arguments raised in another party's papers. A party who has not filed proposed findings of fact and conclusions of law or a post-hearing brief may not file a reply brief.

(c) *Simultaneous filing required.* The administrative law judge shall not order the filing by any party of any brief or reply brief in advance of the other party's filing of its brief.

§ 263.38 Recommended decision and filing of record.

(a) *Filing of recommended decision and record.* Within 45 days after expiration of the time allowed for filing reply briefs under §263.37(b), the administrative law judge shall file with and certify to the Board, for decision, the record of the proceeding. The record must include the administrative law judge's recommended decision, recommended findings of fact, recommended conclusions of law, and proposed order; all prehearing and hearing transcripts, exhibits, and rulings; and the motions, briefs, memoranda, and other supporting papers filed in connection with the hearing. The administrative law judge shall serve upon each party the recommended decision, findings, conclusions, and proposed order.

(b) *Filing of index.* At the same time the administrative law judge files with and certifies to the Board for final determination the record of the proceeding, the administrative law judge shall furnish to the Board a certified index of the entire record of the proceeding. The certified index shall include, at a minimum, an entry for each paper, document or motion filed with the administrative law judge in the proceeding, the date of the filing, and the identity of the filer. The certified index shall also include an exhibit index containing, at a minimum, an entry consisting of exhibit number and title or

description for: Each exhibit introduced and admitted into evidence at the hearing; each exhibit introduced but not admitted into evidence at the hearing; each exhibit introduced and admitted into evidence after the completion of the hearing; and each exhibit introduced but not admitted into evidence after the completion of the hearing.

§ 263.39 Exceptions to recommended decision.

(a) *Filing exceptions.* Within 30 days after service of the recommended decision, findings, conclusions, and proposed order under §263.38, a party may file with the Board written exceptions to the administrative law judge's recommended decision, findings, conclusions or proposed order, to the admission or exclusion of evidence, or to the failure of the administrative law judge to make a ruling proposed by a party. A supporting brief may be filed at the time the exceptions are filed, either as part of the same document or in a separate document.

(b) *Effect of failure to file or raise exceptions.* (1) Failure of a party to file exceptions to those matters specified in paragraph (a) of this section within the time prescribed is deemed a waiver of objection thereto.

(2) No exception need be considered by the Board if the party taking exception had an opportunity to raise the same objection, issue, or argument before the administrative law judge and failed to do so.

(c) *Contents.* (1) All exceptions and briefs in support of such exceptions must be confined to the particular matters in, or omissions from, the administrative law judge's recommendations to which that party takes exception.

(2) All exceptions and briefs in support of exceptions must set forth page or paragraph references to the specific parts of the administrative law judge's

recommendations to which exception is taken, the page or paragraph references to those portions of the record relied upon to support each exception, and the legal authority relied upon to support each exception.

§ 263.40 Review by the Board.

(a) *Notice of submission to the Board.* When the Board determines that the record in the proceeding is complete, the Board shall serve notice upon the parties that the proceeding has been submitted to the Board for final decision.

(b) *Oral argument before the Board.* Upon the initiative of the Board or on the written request of any party filed with the Board within the time for filing exceptions, the Board may order and hear oral argument on the recommended findings, conclusions, decision, and order of the administrative law judge. A written request by a party must show good cause for oral argument and state reasons why arguments cannot be presented adequately in writing. A denial of a request for oral argument may be set forth in the Board's final decision. Oral argument before the Board must be on the record.

(c) *Agency final decision.* (1) Decisional employees may advise and assist the Board in the consideration and disposition of the case. The final decision of the Board will be based upon review of the entire record of the proceeding, except that the Board may limit the issues to be reviewed to those findings and conclusions to which opposing arguments or exceptions have been filed by the parties.

(2) The Board shall render a final decision within 90 days after notification of the parties that the case has been submitted for final decision, or 90 days after oral argument, whichever is later, unless the Board orders that the action or any aspect thereof be remanded to the administrative law judge for further proceedings. Copies of the final

decision and order of the Board shall be served upon each party to the proceeding, upon other persons required by statute, and, if directed by the Board or required by statute, upon any appropriate state or Federal supervisory authority.

§ 263.41 Stays pending judicial review.

The commencement of proceedings for judicial review of a final decision and order of the Board may not, unless specifically ordered by the Board or a reviewing court, operate as a stay of any order issued by the Board. The Board may, in its discretion, and on such terms as it finds just, stay the effectiveness of all or any part of its order pending a final decision on a petition for review of that order.

Subpart B—Board Local Rules Supplementing the Uniform Rules

§ 263.50 Purpose and scope.

(a) This subpart prescribes the rules of practice and procedure governing formal adjudications set forth in §263.50(b) of this subpart, and supplements the rules of practice and procedure contained in subpart A of this part.

(b) The rules and procedures of this subpart and subpart A of this part shall apply to the formal adjudications set forth in §263.1 of subpart A and to the following adjudications:

(1) Suspension of a member bank from use of credit facilities of the Federal Reserve System under section 4 of the FRA (12 U.S.C. 301);

(2) Termination of a bank's membership in the Federal Reserve System under section 9 of the FRA (12 U.S.C. 327);

(3) Issuance of a cease-and-desist order under section 11 of the Clayton Act (15 U.S.C. 21);

(4) Adjudications under sections 2, 3, or 4 of the BHC Act (12 U.S.C. 1841, 1842, or 1843);

(5) Formal adjudications on bank merger applications under section 18(c) of the FDIA (12 U.S.C. 1828(c));

(6) Issuance of a divestiture order under section 5(e) of the BHC Act (12 U.S.C. 1844(e));

(7) Imposition of sanctions upon any municipal securities dealer for which the Board is the appropriate regulatory agency, or upon any person associated or seeking to become associated with such a municipal securities dealer, under section 15B(c)(5) of the Exchange Act (15 U.S.C. 78o-4);

(8) Proceedings where the Board otherwise orders that a formal hearing be held;

(9) Termination of the activities of a state branch, state agency, or commercial lending company subsidiary of a foreign bank in the United States, pursuant to section 7(e) of the IBA (12 U.S.C. 3105(d));

(10) Termination of the activities of a representative office of a foreign bank in the United States, pursuant to section 10(b) of the IBA (12 U.S.C. 3107(b));

(11) Issuance of a prompt corrective action directive to a member bank under section 38 of the FDI Act (12 U.S.C. 1831o);

(12) Reclassification of a member bank on grounds of unsafe or unsound condition under section 38(g)(1) of the FDI Act (12 U.S.C. 1831o(g)(1));

(13) Reclassification of a member bank on grounds of unsafe and unsound practice under section 38(g)(1) of the FDI Act (12 U.S.C. 1831o(g)(1));

(14) Issuance of an order requiring a member bank to dismiss a director or senior executive officer under section 38 (e)(5) and 38(f)(2) (F)(ii) of the FDI Act (12 U.S.C. 1831o(e)(5) and 1831o(f)(2) (F)(ii));

(15) Adjudications under section 10 of the HOLA (12 U.S.C. 1467a).

§ 263.51 Definitions.

As used in subparts B through G of this part:

(a) *Secretary* means the Secretary of the Board of Governors of the Federal Reserve System;

(b) *Member bank* means any bank that is a member of the Federal Reserve System.

(c) *Institution* has the same meaning as that assigned to it in §263.3(f) of subpart A, and includes any foreign bank with a representative office in the United States.

§ 263.52 Address for filing.

All papers to be filed with the Board shall be filed with the Secretary of the Board of Governors of the Federal Reserve System, Washington, DC 20551.

§ 263.53 Discovery depositions.

(a) *In general.* In addition to the discovery permitted in subpart A of this part, limited discovery by means of depositions shall be allowed for individuals with knowledge of facts material to the proceeding that are not protected from discovery by any applicable privilege, and of identified expert witnesses. Except in unusual cases, accordingly, depositions will be permitted only of individuals identified as hearing witnesses, including experts. All discovery depositions must be completed within the time set forth in § 263.24(d).

(b) *Application.* A party who desires to take a deposition of any other party's proposed witnesses, shall apply to the administrative law judge for the issuance of a deposition subpoena or subpoena duces tecum. The application shall state the name and address of the proposed deponent, the subject matter of the testimony expected from the deponent and its relevancy to the proceeding, and the address of the place and the time, no sooner than ten days after the service of the subpoena, for the taking of the deposition. Any such application shall be treated as a motion subject to the rules governing motions practice set forth in § 263.23.

(c) *Issuance of subpoena.* The administrative law judge shall issue the requested deposition subpoena or subpoena duces tecum upon a finding that the application satisfies the requirements of this section and of §263.24. If the administrative law judge determines that the taking of the deposition or its proposed location is, in whole or in part, unnecessary, unreasonable, oppressive, excessive in scope or unduly burdensome, he or she may deny the application or may grant it upon such conditions as justice may require. The party obtaining the deposition subpoena or subpoena duces tecum shall be responsible for serving it on the deponent and all parties to the proceeding in accordance with § 263.11.

(d) *Motion to quash or modify.* A person named in a deposition subpoena or subpoena duces tecum may file a motion to quash or modify the subpoena or for the issuance of a protective order. Such motions must be filed within ten days following service of the subpoena, but in all cases at least five days prior to the commencement of the scheduled deposition. The motion must be accompanied by a statement of the reasons for granting the motion and a copy of the motion and the statement must be served on the

party which requested the subpoena. Only the party requesting the subpoena may file a response to a motion to quash or modify, and any such response shall be filed within five days following service of the motion.

(e) *Enforcement of a deposition subpoena.* Enforcement of a deposition subpoena shall be in accordance with the procedures set forth in § 263.27(d).

(f) *Conduct of the deposition.* The deponent shall be duly sworn, and each party shall have the right to examine the deponent with respect to all non-privileged, relevant and material matters. Objections to questions or evidence shall be in the short form, stating the ground for the objection. Failure to object to questions or evidence shall not be deemed a waiver except where the grounds for the objection might have been avoided if the objection had been timely presented. The discovery deposition shall be transcribed or otherwise recorded as agreed among the parties.

(g) *Protective orders.* At any time during the taking of a discovery deposition, on the motion of any party or of the deponent, the administrative law judge may terminate or limit the scope and manner of the deposition upon a finding that grounds exist for such relief. Grounds for terminating or limiting the taking of a discovery deposition include a finding that the discovery deposition is being conducted in bad faith or in such a manner as to:

(1) Unreasonably annoy, embarrass, or oppress the deponent;

(2) Unreasonably probe into privilege, irrelevant or immaterial matters; or

(3) Unreasonably attempt to pry into a party's preparation for trial.

§ 263.54 Delegation to the Office of Financial Institution Adjudication.

Unless otherwise ordered by the Board, administrative adjudications subject to subpart A of this part shall be conducted by an administrative law judge of OFIA.

§ 263.55 Board as Presiding Officer.

The Board may, in its discretion, designate itself, one or more of its members, or an authorized officer, to act as presiding officer in a formal hearing. In such a proceeding, proposed findings and conclusions, briefs, and other submissions by the parties permitted in subpart A shall be filed with the Secretary for consideration by the Board. Sections 263.38 and 263.39 of subpart A will not apply to proceedings conducted under this section.

§ 263.56 Initial licensing proceedings.

Proceedings with respect to applications for initial licenses shall include, but not be limited to, applications for Board approval under section 3 of the BHC Act and section 10 of HOLA and such proceedings as may be ordered by the Board with respect to applications under section 18(c) of the FDIA. In such initial licensing proceedings, the procedures set forth in subpart A of this part shall apply, except that the Board may designate a Board Counsel to represent the Board in a nonadversary capacity for the purpose of developing for the record information relevant to the issues to be determined by the Presiding Officer and the Board. In such proceedings, Board Counsel shall be considered to be a decisional employee for purposes of §§ 263.9 and 263.40 of subpart A.

FEDERAL DEPOSIT INSURANCE CORPORATION

For the reasons set out in the joint preamble, the FDIC amends 12 CFR part 308 as follows.

23. The authority section for part 308 continues to read as follows:

Authority: 5 U.S.C. 504, 554–557; 12 U.S.C. 93(b), 164, 505, 1464, 1467(d), 1467a, 1468, 1815(e), 1817, 1818, 1819, 1820, 1828, 1829, 1829(b), 1831i, 1831m(g)(4), 1831o, 1831p–1, 1832(c), 1884(b), 1972, 3102, 3108(a), 3349, 3909, 4717, 5412(b)(2)(C), 5414(b)(3); 15 U.S.C. 78(h) and (i), 78o(c)(4), 78o–4(c), 78o–5, 78q–1, 78s, 78u, 78u–2, 78u–3, 78w, 6801(b), 6805(b)(1); 28 U.S.C. 2461 note; 31 U.S.C. 330, 5321; 42 U.S.C. 4012a; Pub. L. 104–134, sec. 31001(s), 110 Stat. 1321; Pub. L. 109–351, 120 Stat. 1966; Pub. L. 111–203, 124 Stat. 1376; Pub. L. 114–74, sec. 701, 129 Stat. 584.

24. Subparts A and B are revised to read as follows:

Subpart A – Uniform Rules of Practice and Procedure

Sec.

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308.4 Authority of the Board of Directors.
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308.31 Scheduling and prehearing conferences.
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308.35 Conduct of hearings.
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308.37 Post-hearing filings.
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308.40 Review by the Board of Directors.
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Subpart B – General Rules of Procedure

308.100 Applicability date.
308.101 Scope of Local Rules.
308.102 Authority of Board of Directors and Administrative Officer.
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308.104 Filings with the Board of Directors.
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308.106 Written testimony in lieu of oral hearing.
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Subpart A – Uniform Rules of Practice and Procedure

§ 308.0 Applicability date.

These Uniform Rules set out in this subpart apply to adjudicatory proceedings initiated on or after January 1, 2024. Any adjudicatory proceedings initiated before January 1, 2024, continue to be governed by the previous version of the Uniform Rules included in appendix A of this part.

§ 308.1 Scope.

This subpart prescribes Uniform Rules of practice and procedure applicable to adjudicatory proceedings required to be conducted on the record after opportunity for a hearing under the following statutory provisions:

(a) Cease-and-desist proceedings under section 8(b) of the Federal Deposit Insurance Act (FDIA) (12 U.S.C. 1818(b));

(b) Removal and prohibition proceedings under section 8(e) of the FDIA (12 U.S.C. 1818(e));

(c) Change-in-control proceedings under section 7(j)(4) of the FDIA (12 U.S.C. 1817(j)(4)) to determine whether the Federal Deposit Insurance Corporation (FDIC) should issue an order to approve or disapprove a person's proposed acquisition of an institution;

(d) Proceedings under section 15C(c)(2) of the Securities Exchange Act of 1934 (Exchange Act) (15 U.S.C. 78o-5), to impose sanctions upon any Government securities broker or dealer or upon any person associated or seeking to become associated with a Government securities broker or dealer for which the FDIC is the appropriate agency;

(e) Assessment of civil money penalties by the FDIC against institutions, institution-affiliated parties, and certain other persons for which it is the appropriate agency for any violation of:

(1) Sections 22(h) and 23 of the Federal Reserve Act (FRA), or any implementing regulation, and certain unsafe or unsound practices or breaches of fiduciary duty under 12 U.S.C. 1828(j) or 12 U.S.C. 1468;

(2) Section 106(b) of the Bank Holding Company Act Amendments of 1970 (BHCA Amendments of 1970), and certain unsafe or unsound practices or breaches of fiduciary duty under 12 U.S.C. 1972(2)(F);

(3) Any provision of the Change in Bank Control Act of 1978, as amended (CBCA), or any implementing regulation or order issued, and certain unsafe or unsound

practices, or breaches of fiduciary duty under 12 U.S.C. 1817(j)(16);

(4) Section 7(a)(1) of the FDIA under 12 U.S.C. 1817(a)(1);

(5) Any provision of the International Lending Supervision Act of 1983 (ILSA), or any rule, regulation or order issued under 12 U.S.C. 3909;

(6) Any provision of the International Banking Act of 1978 (IBA), or any rule, regulation or order issued under 12 U.S.C. 3108;

(7) Certain provisions of the Exchange Act under section 21B of the Exchange Act (15 U.S.C. 78u–2);

(8) Section 1120 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA) (12 U.S.C. 3349), or any order or regulation issued under;

(9) The terms of any final or temporary order issued under section 8 of the FDIA or of any written agreement executed by the FDIC, or the former Office of Thrift Supervision (OTS), the terms of any condition imposed in writing by the FDIC in connection with the grant of an application or request, certain unsafe or unsound practices or breaches of fiduciary duty, or any law or regulation not otherwise provided under 12 U.S.C. 1818(i)(2);

(10) Any provision of law referenced in section 102(f) of the Flood Disaster Protection Act of 1973 (42 U.S.C. 4012a(f)) or any order or regulation issued under; and

(11) Any provision of law referenced in 31 U.S.C. 5321 or any order or regulation issued under;

(12) Certain provisions of Section 5 of the Home Owners' Loan Act (HOLA) or any regulation or order issued under 12 U.S.C. 1464(d)(1), (5)-(8), (s), and (v);

(13) Section 9 of the HOLA or any regulation or order issued under 12 U.S.C.

1467(d); and

(14) Section 10 of HOLA under 12 U.S.C. 1467a(a)(2)(D), (g), (i)(2)-(4) and (r);

(f) Remedial action under section 102(g) of the Flood Disaster Protection Act of 1973 (42 U.S.C. 4012a(g));

(g) Proceedings under section 10(k) of the FDIA (12 U.S.C. 1820(k)) to impose penalties for violations of the post-employment restrictions under section 10(k); and

(h) This subpart also applies to all other adjudications required by statute to be determined on the record after opportunity for an agency hearing, unless otherwise specifically provided for in the Local Rules (see § 308.3(n)).

§ 308.2 Rules of construction.

For purposes of this part:

(a) Any term in the singular includes the plural, and the plural includes the singular, if such use would be appropriate;

(b) The term *counsel* includes a non-attorney representative; and

(c) Unless the context requires otherwise, a party's counsel of record, if any, may, on behalf of that party, take any action required to be taken by the party.

§ 308.3 Definitions.

For purposes of this subpart, unless explicitly stated to the contrary:

(a) *Administrative law judge (ALJ)* means one who presides at an administrative hearing under authority set forth at 5 U.S.C. 556.

(b) *Administrative Officer* means an inferior officer of the Federal Deposit Insurance Corporation (FDIC), duly appointed by the Board of Directors of the FDIC to

serve as the Board's designee to hear certain motions or requests in an adjudicatory proceeding and to be the official custodian of the record for the FDIC.

(c) *Adjudicatory proceeding* means a proceeding conducted pursuant to these rules and leading to the formulation of a final order other than a regulation.

(d) *Assistant Administrative Officer* means an inferior officer of the FDIC, duly appointed by the Board of Directors of the FDIC to serve as the Board's designee to hear certain motions or requests in an adjudicatory proceeding upon the designation or unavailability of the Administrative Officer.

(e) *Board of Directors* or *Board* means the Board of Directors of the FDIC or its designee.

(f) *Decisional employee* means any member of the FDIC's or ALJ's staff who has not engaged in an investigative or prosecutorial role in a proceeding and who may assist the Board of Directors, ALJ or the Administrative Officer, in preparing orders, recommended decisions, decisions, and other documents under the Uniform Rules.

(g) *Designee* of the Board of Directors means officers or officials of the FDIC acting pursuant to authority delegated by the Board of Directors.

(h) *Electronic signature* means affixing the equivalent of a signature to an electronic document filed or transmitted electronically.

(i) *Enforcement Counsel* means any individual who files a notice of appearance as counsel on behalf of the FDIC in an adjudicatory proceeding.

(j) *FDIC* means the Federal Deposit Insurance Corporation.

(k) *Final order* means an order issued by the FDIC with or without the consent of the affected institution or the institution-affiliated party that has become final, without regard to the pendency of any petition for reconsideration or review.

(l) *Institution* includes:

(1) Any bank as that term is defined in section 3(a) of the FDIA (12 U.S.C. 1813(a));

(2) Any bank holding company or any subsidiary (other than a bank) of a bank holding company as those terms are defined in the BHCA (12 U.S.C. 1841 *et seq.*);

(3) Any savings association as that term is defined in section 3(b) of the FDIA (12 U.S.C. 1813(b)), any savings and loan holding company or any subsidiary thereof (other than a bank) as those terms are defined in section 10(a) of the HOLA (12 U.S.C. 1467a(a));

(4) Any organization operating under section 25 of the FRA (12 U.S.C. 601 *et seq.*);

(5) Any foreign bank or company to which section 8 of the IBA (12 U.S.C. 3106), applies or any subsidiary (other than a bank) thereof; and

(6) Any Federal agency as that term is defined in section 1(b) of the IBA (12 U.S.C. 3101(5)).

(m) *Institution-affiliated party* means any institution-affiliated party as that term is defined in section 3(u) of the FDIA (12 U.S.C. 1813(u).

(n) *Local Rules* means those rules promulgated by the FDIC in those subparts of this part other than this subpart.

(o) *Office of Financial Institution Adjudication (OFIA)* means the executive body charged with overseeing the administration of administrative enforcement proceedings of the Office of the Comptroller of the Currency (OCC), the Board of Governors of the Federal Reserve Board (Board of Governors), the FDIC, and the National Credit Union Administration (NCUA).

(p) *Party* means the FDIC and any person named as a party in any notice.

(q) *Person* means an individual, sole proprietor, partnership, corporation, unincorporated association, trust, joint venture, pool, syndicate, agency, or other entity or organization, including an institution as defined in this section.

(r) *Respondent* means any party other than the FDIC.

(s) *Uniform Rules* means those rules in this subpart A that pertain to the types of formal administrative enforcement actions set forth at § 308.1, and as specified in subparts B through P of this part.

(t) *Violation* means any violation as that term is defined in section 3(v) of the FDIA (12 U.S.C. 1813(v)).

§ 308.4 Authority of the Board of Directors.

The Board of Directors may, at any time during the pendency of a proceeding, perform, direct the performance of, or waive performance of, any act which could be done or ordered by the ALJ.

§ 308.5 Authority of the administrative law judge (ALJ).

(a) *General rule*. All proceedings governed by this part must be conducted in accordance with the provisions of 5 U.S.C. chapter 5. The ALJ has all powers necessary to conduct a proceeding in a fair and impartial manner and to avoid unnecessary delay.

(b) *Powers*. The ALJ has all powers necessary to conduct the proceeding in accordance with paragraph (a) of this section, including the following powers:

(1) To administer oaths and affirmations;

(2) To issue subpoenas, subpoenas *duces tecum*, protective orders, and other orders, as authorized by this part, and to quash or modify any such subpoenas and orders;

(3) To receive relevant evidence and to rule upon the admission of evidence and offers of proof;

(4) To take or cause depositions to be taken as authorized by this subpart;

(5) To regulate the course of the hearing and the conduct of the parties and their counsel;

(6) To hold scheduling and/or pre-hearing conferences as set forth in § 308.31;

(7) To consider and rule upon all procedural and other motions appropriate in an adjudicatory proceeding, provided that only the Board of Directors has the power to grant any motion to dismiss the proceeding or to decide any other motion that results in a final determination of the merits of the proceeding;

(8) To prepare and present to the Board of Directors a recommended decision as provided in this subpart;

(9) To recuse oneself by motion made by a party or on the ALJ's own motion;

(10) To establish time, place and manner limitations on the attendance of the public and the media for any public hearing; and

(11) To do all other things necessary and appropriate to discharge the duties of an ALJ.

§ 308.6 Appearance and practice in adjudicatory proceedings.

(a) *Appearance before the FDIC or an ALJ*—(1) *By attorneys*. Any member in good standing of the bar of the highest court of any state, commonwealth, possession, territory of the United States, or the District of Columbia may represent others before the FDIC if such attorney is not currently suspended or debarred from practice before the FDIC.

(2) *By non-attorneys*. An individual may appear on the individual's own behalf.

(3) *Notice of appearance*. (i) Any individual acting on the individual's own behalf or as counsel on behalf of a party, including the FDIC, must file a notice of appearance with OFIA at or before the time that the individual submits papers or otherwise appears on behalf of a party in the adjudicatory proceeding. The notice of appearance must include:

(A) A written declaration that the individual is currently qualified as provided in paragraph (a)(1) or (2) of this section and is authorized to represent the particular party; and

(B) A written acknowledgement that the individual has reviewed and will comply with the Uniform Rules and Local Rules in subpart B of this part.

(ii) By filing a notice of appearance on behalf of a party in an adjudicatory proceeding, the counsel agrees and represents that the counsel is authorized to accept service on behalf of the represented party and that, in the event of withdrawal from representation, the counsel will, if required by the ALJ, continue to accept service until new counsel has filed a notice of appearance or until the represented party indicates that the party will proceed on a *pro se* basis.

(b) *Sanctions*. Dilatory, obstructionist, egregious, contemptuous or contumacious conduct at any phase of any adjudicatory proceeding may be grounds for exclusion or suspension of counsel from the proceeding.

§ 308.7 Good faith certification.

(a) *General requirement*. Every filing or submission of record following the issuance of a notice must be signed by at least one counsel of record in the counsel's individual name and must state that counsel's mailing address, electronic mail address, and telephone number. A party who acts as the party's own counsel must sign that person's individual name and state that person's mailing address, electronic mail address, and telephone number on every filing or submission of record. Electronic signatures may be used to satisfy the signature requirements of this section.

(b) *Effect of signature*. (1) The signature of counsel or a party will constitute a certification: the counsel or party has read the filing or submission of record; to the best of the counsel's or party's knowledge, information, and belief formed after reasonable inquiry, the filing or submission of record is well-grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and the filing or submission of record is not made for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

(2) If a filing or submission of record is not signed, the ALJ will strike the filing or submission of record, unless it is signed promptly after the omission is called to the attention of the pleader or movant.

(c) *Effect of making oral motion or argument*. The act of making any oral motion or oral argument by any counsel or party constitutes a certification that to the best of the counsel's or party's knowledge, information, and belief formed after reasonable inquiry, the counsel's or party's statements are well-grounded in fact and are warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and are not made for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

§ 308.8 Conflicts of interest.

(a) *Conflict of interest in representation*. No person may appear as counsel for another person in an adjudicatory proceeding if it reasonably appears that such representation may be materially limited by that counsel's responsibilities to a third person or by the counsel's own interests. The ALJ may take corrective measures at any stage of a proceeding to cure a conflict of interest in representation, including the issuance of an order limiting the scope of representation or disqualifying an individual from appearing in a representative capacity for the duration of the proceeding.

(b) *Certification and waiver*. If any person appearing as counsel represents two or more parties to an adjudicatory proceeding or also represents a non-party on a matter relevant to an issue in the proceeding, counsel must certify in writing at the time of filing the notice of appearance required by § 308.6(a):

(1) That the counsel has personally and fully discussed the possibility of conflicts of interest with each such party and non-party; and

(2) That each such party and non-party waives any right it might otherwise have had to assert any known conflicts of interest or to assert any non-material conflicts of interest during the course of the proceeding.

§ 308.9 Ex parte communications.

(a) *Definition* — (1) *Ex parte communication* means any material oral or written communication relevant to the merits of an adjudicatory proceeding that was neither on the record nor on reasonable prior notice to all parties that takes place between:

(i) An interested person outside the FDIC (including such person's counsel); and

(ii) The ALJ handling that proceeding, the Board of Directors, or a decisional employee.

(2) *Exception*. A request for status of the proceeding does not constitute an *ex parte* communication.

(b) *Prohibition of ex parte communications*. From the time the notice is issued by the FDIC until the date that the Board of Directors issues a final decision pursuant to § 308.40(c):

(1) An interested person outside the FDIC must not make or knowingly cause to be made an *ex parte* communication to any member of the Board of Directors, the ALJ, or a decisional employee; and

(2) Any member of the Board of Directors, ALJ, or decisional employee may not make or knowingly cause to be made to any interested person outside the FDIC any *ex parte* communication.

(c) *Procedure upon occurrence of ex parte communication*. If an *ex parte* communication is received by the ALJ, any member of the Board of Directors, or any

other person identified in paragraph (a) of this section, that person will cause all such written communications (or, if the communication is oral, a memorandum stating the substance of the communication) to be placed on the record of the proceeding and served on all parties. All other parties to the proceeding may, within ten days of service of the *ex parte* communication, file responses thereto and to recommend any sanctions that they believe to be appropriate under the circumstances. The ALJ or the Board of Directors then determines whether any action should be taken concerning the *ex parte* communication in accordance with paragraph (d) of this section.

(d) *Sanctions*. Any party or counsel to a party who makes a prohibited *ex parte* communication, or who encourages or solicits another to make any such communication, may be subject to any appropriate sanction or sanctions imposed by the Board of Directors or the ALJ including, but not limited to, exclusion from the proceedings and an adverse ruling on the issue which is the subject of the prohibited communication.

(e) *Separation of functions*—(1) *In general*. Except to the extent required for the disposition of *ex parte* matters as authorized by law, the ALJ may not:

(i) Consult a person or party on a fact in issue unless on notice and opportunity for all parties to participate; or

(ii) Be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for the FDIC.

(2) *Decision process*. An employee or agent engaged in the performance of investigative or prosecuting functions for the FDIC in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or

agency review of the recommended decision under § 308.40, except as witness or counsel in administrative or judicial proceedings.

§ 308.10 Filing of papers.

(a) *Filing*. Any papers required to be filed, excluding documents produced in response to a discovery request pursuant to §§ 308.25 and 308.26, must be filed with OFIA, except as otherwise provided.

(b) *Manner of filing*. Unless otherwise specified by the Board of Directors or the ALJ, filing may be accomplished by:

(1) Electronic mail or other electronic means designated by the Board of Directors or the ALJ;

(2) Personal service;

(3) Delivering the papers to a same day courier service or overnight delivery service; or

(4) Mailing the papers by first class, registered, or certified mail.

(c) *Formal requirements as to papers filed*—(1) *Form*. All papers filed must set forth the name, mailing address, electronic mail address, and telephone number of the counsel or party making the filing and must be accompanied by a certification setting forth when and how service has been made on all other parties. All papers filed must be double-spaced and printed or typewritten on an 8 1/2×11 inch page and must be clear and legible.

(2) *Signature*. All papers must be dated and signed as provided in § 308.7.

(3) *Caption*. All papers filed must include at the head thereof, or on a title page, the name of the FDIC and of the filing party, the title and docket number of the proceeding, and the subject of the particular paper.

§ 308.11 Service of papers.

(a) *By the parties*. Except as otherwise provided, a party filing papers must serve a copy upon the counsel of record for all other parties to the proceeding so represented, and upon any party not so represented.

(b) *Method of service*. Except as provided in paragraphs (c)(2) and (d) of this section, a serving party must use one of the following methods of service:

(1) Electronic mail or other electronic means;

(2) Personal service;

(3) Delivering the papers by same day courier service or overnight delivery service; or

(4) Mailing the papers by first class, registered, or certified mail.

(c) *By the Board of Directors or the ALJ*. (1) All papers required to be served by the Board of Directors or the ALJ upon a party who has appeared in the proceeding in accordance with § 308.6 will be served by electronic mail or other electronic means designated by the Board of Directors or ALJ.

(2) If a respondent has not appeared in the proceeding in accordance with § 308.6, the Board of Directors or the ALJ will serve the respondent by any of the following methods:

(i) By personal service;

(ii) If the person to be served is an individual, by delivery to a person of suitable age and discretion at the physical location where the individual resides or works;

(iii) If the person to be served is a corporation or other association, by delivery to an officer, managing or general agent, or to any other agent authorized by appointment or by law to receive service and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the respondent;

(iv) By registered or certified mail, delivery by a same day courier service, or by an overnight delivery service to the respondent's last known mailing address; or

(v) By any other method reasonably calculated to give actual notice.

(d) *Subpoenas*. Service of a subpoena may be made:

(1) By personal service;

(2) If the person to be served is an individual, by delivery to a person of suitable age and discretion at the physical location where the individual resides or works;

(3) If the person to be served is a corporation or other association, by delivery to an officer, managing or general agent, or to any other agent authorized by appointment or by law to receive service and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the party;

(4) By registered or certified mail, delivery by a same day courier service, or by an overnight delivery service to the person's last known mailing address; or

(5) By any other method reasonably calculated to give actual notice.

(e) *Area of service*. Service in any state, territory, possession of the United States, or the District of Columbia, on any person or company doing business in any state, territory, possession of the United States, or the District of Columbia, or on any person as

otherwise provided by law, is effective without regard to the place where the hearing is held, provided that if service is made on a foreign bank in connection with an action or proceeding involving one or more of its branches or agencies located in any state, territory, possession of the United States, or the District of Columbia, service must be made on at least one branch or agency so involved.

§ 308.12 Construction of time limits.

(a) *General rule*. In computing any period of time prescribed by this subpart, the date of the act or event that commences the designated period of time is not included. The last day so computed is included unless it is a Saturday, Sunday, or Federal holiday. When the last day is a Saturday, Sunday, or Federal holiday, the period runs until the end of the next day that is not a Saturday, Sunday, or Federal holiday. Intermediate Saturdays, Sundays, and Federal holidays are included in the computation of time. However, when the time period within which an act is to be performed is ten days or less, not including any additional time allowed for in paragraph (c) of this section, intermediate Saturdays, Sundays, and Federal holidays are not included.

(b) *When papers are deemed to be filed or served*. (1) Filing and service are deemed to be effective:

(i) In the case of transmission by electronic mail or other electronic means, upon transmittal by the serving party;

(ii) In the case of overnight delivery service or first class, registered, or certified mail, upon deposit in or delivery to an appropriate point of collection; or

(iii) In the case of personal service or same day courier delivery, upon actual service.

(2) The effective filing and service dates specified in paragraph (b)(1) of this section may be modified by the Board of Directors or ALJ in the case of filing or by agreement of the parties in the case of service.

(c) *Calculation of time for service and filing of responsive papers*. Whenever a time limit is measured by a prescribed period from the service of any notice or paper, the applicable time limits are calculated as follows:

(1) If service is made by electronic mail or other electronic means or by same day courier delivery, add one calendar day to the prescribed period;

(2) If service is made by overnight delivery service, add two calendar days to the prescribed period; or

(3) If service is made by first class, registered, or certified mail, add three calendar days to the prescribed period.

§ 308.13 Change of time limits.

Except as otherwise provided by law, the ALJ may, for good cause shown, extend the time limits prescribed by the Uniform Rules or by any notice or order issued in the proceedings. After the referral of the case to the Board of Directors pursuant to § 308.38, the Board of Directors may grant extensions of the time limits for good cause shown. Extensions may be granted at the motion of a party after notice and opportunity to respond is afforded all non-moving parties or on the Board of Directors' or the ALJ's own motion.

§ 308.14 Witness fees and expenses.

(a) *In general*. A witness, including an expert witness, who testifies at a deposition or hearing will be paid the same fees for attendance and mileage as are paid in

the United States district courts in proceedings in which the United States is a party, except as provided in paragraph (b) of this section and unless otherwise waived.

(b) *Exception for testimony by a party*. In the case of testimony by a party, no witness fees or mileage need to be paid. The FDIC will not be required to pay any fees to, or expenses of, any witness not subpoenaed by the FDIC.

(c) *Timing of payment*. Fees and mileage in accordance with this paragraph (c) must be paid in advance by the party requesting the subpoena, except that fees and mileage need not be tendered in advance where the FDIC is the party requesting the subpoena.

§ 308.15 Opportunity for informal settlement.

Any respondent may, at any time in the proceeding, unilaterally submit to Enforcement Counsel written offers or proposals for settlement of a proceeding, without prejudice to the rights of any of the parties. Any such offer or proposal may only be made to Enforcement Counsel. Submission of a written settlement offer does not provide a basis for adjourning or otherwise delaying all or any portion of a proceeding under this part. No settlement offer or proposal, or any subsequent negotiation or resolution, is admissible as evidence in any proceeding.

§ 308.16 FDIC's right to conduct examination.

Nothing contained in this subpart limits in any manner the right of the FDIC to conduct any examination, inspection, or visitation of any institution or institution-affiliated party, or the right of the FDIC to conduct or continue any form of investigation authorized by law.

§ 308.17 Collateral attacks on adjudicatory proceeding.

If an interlocutory appeal or collateral attack is brought in any court concerning all or any part of an adjudicatory proceeding, the challenged adjudicatory proceeding will continue without regard to the pendency of that court proceeding. No default or other failure to act as directed in the adjudicatory proceeding within the times prescribed in this subpart will be excused based on the pendency before any court of any interlocutory appeal or collateral attack.

§ 308.18 Commencement of proceeding and contents of notice.

(a) *Commencement of proceeding*. (1)(i) Except for change-in-control proceedings under section 7(j)(4) of the FDIA, 12 U.S.C. 1817(j)(4), a proceeding governed by this subpart is commenced by issuance of a notice by the FDIC.

(ii) The notice must be served by Enforcement Counsel upon the respondent and given to any other appropriate financial institution supervisory authority where required by law. Enforcement Counsel may serve the notice upon counsel for the respondent, provided that Enforcement Counsel has confirmed that counsel represents the respondent in the matter and will accept service of the notice on behalf of the respondent.

(iii) Enforcement Counsel must file the notice with OFIA.

(2) Change-in control proceedings under section 7(j)(4) of the FDIA (12 U.S.C. 1817(j)(4)) commence with the issuance of an order by the FDIC.

(b) *Contents of notice*. Notice pleading applies. The notice must provide:

(1) The legal authority for the proceeding and for the FDIC's jurisdiction over the proceeding;

(2) Matters of fact or law showing that the FDIC is entitled to relief;

(3) A proposed order or prayer for an order granting the requested relief;

(4) The time, place, and nature of the hearing as required by law or regulation;

(5) The time within which to file an answer as required by law or regulation;

(6) The time within which to request a hearing as required by law or regulation; and

(7) That the answer and/or request for a hearing must be filed with OFIA.

§ 308.19 Answer.

(a) *When*. Within 20 days of service of the notice, respondent must file an answer as designated in the notice. In a civil money penalty proceeding, respondent must also file a request for a hearing within 20 days of service of the notice.

(b) *Content of answer*. An answer must specifically respond to each paragraph or allegation of fact contained in the notice and must admit, deny, or state that the respondent lacks sufficient information to admit or deny each allegation of fact. A statement of lack of information has the effect of a denial. Denials must fairly meet the substance of each allegation of fact denied; general denials are not permitted. When a respondent denies part of an allegation, that part must be denied and the remainder specifically admitted. Any allegation of fact in the notice which is not denied in the answer is deemed admitted for purposes of the proceeding. A respondent is not required to respond to the portion of a notice that constitutes the prayer for relief, or proposed order. The answer must set forth affirmative defenses, if any, asserted by the respondent.

(c) *Default*—(1) *Effect of failure to answer*. Failure of a respondent to file an answer required by this section within the time provided constitutes a waiver of the respondent's right to appear and contest the allegations in the notice. If no timely answer is filed, Enforcement Counsel may file a motion for entry of an order of default. Upon a

finding that no good cause has been shown for the failure to file a timely answer, the ALJ will file with the Board of Directors a recommended decision containing the findings and the relief sought in the notice. Any final order issued by the Board of Directors based upon a respondent's failure to answer is deemed to be an order issued upon consent.

(2) *Effect of failure to request a hearing in civil money penalty proceedings*. If respondent fails to request a hearing as required by law within the time provided, the notice of assessment constitutes a final and unappealable order of the Board of Directors without further action by the ALJ.

§ 308.20 Amended pleadings.

(a) *Amendments*. The notice or answer may be amended or supplemented at any stage of the proceeding. The respondent must answer an amended notice within the time remaining for the respondent's answer to the original notice, or within ten days after service of the amended notice, whichever period is longer, unless the Board of Directors or ALJ orders otherwise for good cause.

(b) *Amendments to conform to the evidence*. When issues not raised in the notice or answer are tried at the hearing by express or implied consent of the parties, they will be treated in all respects as if they had been raised in the notice or answer, and no formal amendments are required. If evidence is objected to at the hearing on the ground that it is not within the issues raised by the notice or answer, the ALJ may admit the evidence when admission is likely to assist in adjudicating the merits of the action and the objecting party fails to satisfy the ALJ that the admission of such evidence would unfairly prejudice that party's action or defense upon the merits. The ALJ may grant a continuance to enable the objecting party to meet such evidence.

§ 308.21 Failure to appear.

Failure of a respondent to appear in person at the hearing or by a duly authorized counsel constitutes a waiver of respondent's right to a hearing and is deemed an admission of the facts as alleged and consent to the relief sought in the notice. Without further proceedings or notice to the respondent, the ALJ will file with the Board of Directors a recommended decision containing the findings and the relief sought in the notice.

§ 308.22 Consolidation and severance of actions.

(a) *Consolidation*. (1) On the motion of any party, or on the ALJ's own motion, the ALJ may consolidate, for some or all purposes, any two or more proceedings, if each such proceeding involves or arises out of the same transaction, occurrence, or series of transactions or occurrences, or involves at least one common respondent or a material common question of law or fact, unless such consolidation would cause unreasonable delay or injustice.

(2) In the event of consolidation under paragraph (a)(1) of this section, appropriate adjustment to the prehearing schedule must be made to avoid unnecessary expense, inconvenience, or delay.

(b) *Severance*. The ALJ may, upon the motion of any party, sever the proceeding for separate resolution of the matter as to any respondent only if the ALJ finds:

(1) Undue prejudice or injustice to the moving party would result from not severing the proceeding; and

(2) Such undue prejudice or injustice would outweigh the interests of judicial economy and expedition in the complete and final resolution of the proceeding.

§ 308.23 Motions.

(a) *In writing*. (1) Except as otherwise provided in this section, an application or request for an order or ruling must be made by written motion.

(2) All written motions must state with particularity the relief sought and must be accompanied by a proposed order.

(3) No oral argument may be held on written motions except as otherwise directed by the ALJ. Written memoranda, briefs, affidavits, or other relevant material or documents may be filed in support of or in opposition to a motion.

(b) *Oral motions*. A motion may be made orally on the record unless the ALJ directs that such motion be reduced to writing.

(c) *Filing of motions*. Motions must be filed with the ALJ, except that following the filing of the recommended decision, motions must be filed with the Board of Directors.

(d) *Responses*. (1) Except as otherwise provided in this section, within ten days after service of any written motion, or within such other period of time as may be established by the ALJ or the Administrative Officer, any party may file a written response to a motion. The ALJ will not rule on any oral or written motion before each party has had an opportunity to file a response.

(2) The failure of a party to oppose a written motion or an oral motion made on the record is deemed a consent by that party to the entry of an order substantially in the form of the order accompanying the motion.

(e) *Dilatory motions*. Frivolous, dilatory or repetitive motions are prohibited. The filing of such motions may form the basis for sanctions.

(f) *Dispositive motions*. Dispositive motions are governed by §§ 308.29 and 308.30.

§ 308.24 Scope of document discovery.

(a) *Limits on discovery*. (1) Subject to the limitations set out in paragraphs (b), (c), and (d) of this section, a party to a proceeding under this subpart may obtain document discovery by serving a written request to produce documents. For purposes of a request to produce documents, the term *documents* includes writings, drawings, graphs, charts, photographs, recordings, electronically stored information, and other data or data compilations stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party, into a reasonably usable form.

(2) Discovery by use of deposition is governed by subpart B of this part.

(3) Discovery by use of either interrogatories or requests for admission is not permitted.

(4) Any request to produce documents that calls for irrelevant material; or that is unreasonable, oppressive, excessive in scope, unduly burdensome, or repetitive of previous requests, or that seeks to obtain privileged documents will be denied or modified. A request is unreasonable, oppressive, excessive in scope, or unduly burdensome if, among other things, it fails to include justifiable limitations on the time period covered and the geographic locations to be searched, or the time provided to respond in the request is inadequate.

(b) *Relevance*. A party may obtain document discovery regarding any non-privileged matter that has material relevance to the merits of the pending action.

(c) *Privileged matter*. Privileged documents are not discoverable. Privileges include the attorney-client privilege, attorney work-product doctrine, bank examination privilege, law enforcement privilege, any government's or government agency's deliberative process privilege, and any other privileges the Constitution, any applicable act of Congress, or the principles of common law provide.

(d) *Time limits*. All document discovery, including all responses to discovery requests, must be completed by the date set by the ALJ and no later than 30 days prior to the date scheduled for the commencement of the hearing, except as provided in the Local Rules. No exceptions to this time limit are permitted, unless the ALJ finds on the record that good cause exists for waiving the requirements of this paragraph (d).

§ 308.25 Request for document discovery from parties.

(a) *Document requests*. (1) Any party may serve on any other party a request to produce and permit the requesting party or its representative to inspect or copy any discoverable documents that are in the possession, custody, or control of the party upon whom the request is served. In the case of a request for inspection, the responding party may produce copies of documents or of electronically stored information instead of permitting inspection.

(2) The request:

(i) Must describe with reasonable particularity each item or category of items to be inspected or produced; and

(ii) Must specify a reasonable time, place, and manner for the inspection or production.

(b) *Production or copying*—(1) *General*. Unless otherwise specified by the ALJ or agreed upon by the parties, the producing party must produce copies of documents as they are kept in the usual course of business or organized to correspond to the categories of the request, and electronically stored information must be produced in a form in which it is ordinarily maintained or in a reasonably usable form.

(2) *Costs*. The producing party must pay its own costs to respond to a discovery request, unless otherwise agreed by the parties.

(c) *Obligation to update responses*. A party who has responded to a discovery request with a response that was complete when made is not required to supplement the response to include documents thereafter acquired, unless the responding party learns:

(1) The response was materially incorrect when made; or

(2) The response, though correct when made, is no longer true and a failure to amend the response is, in substance, a knowing concealment.

(d) *Motions to limit discovery*. (1) Any party that objects to a discovery request may, within 20 days of being served with such request, file a motion in accordance with the provisions of § 308.23 to strike or otherwise limit the request. If an objection is made to only a portion of an item or category in a request, the portion objected to must be specified. Any objections not made in accordance with this paragraph and § 308.23 are waived.

(2) The party who served the request that is the subject of a motion to strike or limit may file a written response within ten days of service of the motion. No other party may file a response.

(e) *Privilege*. At the time other documents are produced, the producing party must reasonably identify all documents withheld on the grounds of privilege and must produce a statement of the basis for the assertion of privilege. When similar documents that are protected by attorney-client privilege, attorney work-product doctrine, bank examination privilege, law enforcement privilege, any government's or government agency's deliberative process privilege, or any other privileges of the Constitution, any applicable act of Congress, or the principles of common law, or are voluminous, these documents may be identified by category instead of by individual document. The ALJ retains discretion to determine when the identification by category is insufficient.

(f) *Motions to compel production*. (1) If a party withholds any documents as privileged or fails to comply fully with a discovery request, the requesting party may, within ten days of the assertion of privilege or of the time the failure to comply becomes known to the requesting party, file a motion in accordance with the provisions of § 308.23 for the issuance of a subpoena compelling production.

(2) The party who asserted the privilege or failed to comply with the document request may file a written response to a motion to compel within ten days of service of the motion. No other party may file a response.

(g) *Ruling on motions*. After the time for filing responses pursuant to this section has expired, the ALJ will rule promptly on all motions filed pursuant to this section. If the ALJ determines that a discovery request, or any of its terms, calls for irrelevant material, is unreasonable, oppressive, excessive in scope, unduly burdensome, or repetitive of previous requests, or seeks to obtain privileged documents, the ALJ may deny or modify the request, and may issue appropriate protective orders, upon such conditions as justice

may require. The pendency of a motion to strike or limit discovery or to compel production is not a basis for staying or continuing the proceeding, unless otherwise ordered by the ALJ. Notwithstanding any other provision in this part, the ALJ may not release, or order a party to produce, documents withheld on grounds of privilege if the party has stated to the ALJ its intention to file a timely motion for interlocutory review of the ALJ's order to produce the documents, and until the motion for interlocutory review has been decided.

(h) *Enforcing discovery subpoenas*. If the ALJ issues a subpoena compelling production of documents by a party, the subpoenaing party may, in the event of noncompliance and to the extent authorized by applicable law, apply to any appropriate United States district court for an order requiring compliance with the subpoena. A party's right to seek court enforcement of a subpoena will not in any manner limit the sanctions that may be imposed by the ALJ against a party who fails to produce subpoenaed documents.

§ 308.26 Document subpoenas to nonparties.

(a) *General rules*. (1) Any party may apply to the ALJ for the issuance of a document discovery subpoena addressed to any person who is not a party to the proceeding. The application must contain a proposed document subpoena and a brief statement showing the general relevance and reasonableness of the scope of documents sought. The subpoenaing party must specify a reasonable time, place, and manner for making production in response to the document subpoena.

(2) A party may apply for a document subpoena under this section only within the time period during which such party could serve a discovery request under § 308.24(d).

The party obtaining the document subpoena is responsible for serving it on the subpoenaed person and for serving copies on all parties. Document subpoenas may be served in any state, territory, or possession of the United States, the District of Columbia, or as otherwise provided by law.

(3) The ALJ will promptly issue any document subpoena requested pursuant to this section. If the ALJ determines that the application does not set forth a valid basis for the issuance of the subpoena, or that any of its terms are unreasonable, oppressive, excessive in scope, or unduly burdensome, the ALJ may refuse to issue the subpoena or may issue it in a modified form upon such conditions as may be consistent with the Uniform Rules.

(b) *Motion to quash or modify*. (1) Any person to whom a document subpoena is directed may file a motion to quash or modify such subpoena with the ALJ. The motion must be accompanied by a statement of the basis for quashing or modifying the subpoena. The movant must serve the motion on all parties, and any party may respond to such motion within ten days of service of the motion.

(2) Any motion to quash or modify a document subpoena must be filed on the same basis, including the assertion of privilege, upon which a party could object to a discovery request under § 308.25(d), and during the same time limits during which such an objection could be filed.

(c) *Enforcing document subpoenas*. If a subpoenaed person fails to comply with any subpoena issued pursuant to this section or any order of the ALJ, which directs compliance with all or any portion of a document subpoena, the subpoenaing party or any other aggrieved party may, to the extent authorized by applicable law, apply to an

appropriate United States district court for an order requiring compliance with so much of the document subpoena as the ALJ has not quashed or modified. A party's right to seek court enforcement of a document subpoena will in no way limit the sanctions that may be imposed by the ALJ on a party who induces a failure to comply with subpoenas issued under this section.

§ 308.27 Deposition of witness unavailable for hearing.

(a) *General rules*. (1) If a witness will not be available for the hearing, a party desiring to preserve that witness' testimony for the record may apply in accordance with the procedures set forth in paragraph (a)(2) of this section, to the ALJ for the issuance of a subpoena, including a subpoena *duces tecum*, requiring the attendance of the witness at a deposition. The ALJ may issue a deposition subpoena under this section upon showing:

(i) The witness will be unable to attend or may be prevented from attending the hearing because of age, sickness or infirmity, or will otherwise be unavailable;

(ii) The witness' unavailability was not procured or caused by the subpoenaing party;

(iii) The testimony is reasonably expected to be material; and

(iv) Taking the deposition will not result in any undue burden to any other party and will not cause undue delay of the proceeding.

(2) The application must contain a proposed deposition subpoena and a brief statement of the reasons for the issuance of the subpoena. The subpoena must name the witness whose deposition is to be taken and specify the time, manner, and place for taking the deposition. A deposition subpoena may require the witness to be deposed at any place within the country in which that witness resides or has a regular place of

employment, by remote means, or such other convenient place or manner, as the ALJ fixes.

(3) Any requested subpoena that sets forth a valid basis for its issuance must be promptly issued, unless the ALJ requires a written response or requires attendance at a conference concerning whether the requested subpoena should be issued.

(4) The party obtaining a deposition subpoena is responsible for serving it on the witness and for serving copies on all parties. Unless the ALJ orders otherwise, no deposition under this section may be taken on fewer than ten days' notice to the witness and all parties.

(b) *Objections to deposition subpoenas*. (1) The witness and any party who has not had an opportunity to oppose a deposition subpoena issued under this section may file a motion with the ALJ to quash or modify the subpoena prior to the time for compliance specified in the subpoena, but not more than ten days after service of the subpoena.

(2) A statement of the basis for the motion to quash or modify a subpoena issued under this section must accompany the motion. The motion must be served on all parties.

(c) *Procedure upon deposition*. (1) Each witness testifying pursuant to a deposition subpoena must be duly sworn. By stipulation of the parties or by order of the ALJ, a court reporter or other person authorized to administer an oath may administer the oath remotely without being in the physical presence of the deponent. Each party must have the right to examine the witness. Objections to questions or documents must be in short form, stating the grounds for the objection. Failure to object to questions or documents is not deemed a waiver except where the ground for the objection might have

been avoided if the objection had been timely presented. All questions, answers, and objections must be recorded.

(2) Any party may move before the ALJ for an order compelling the witness to answer any questions the witness has refused to answer or submit any evidence the witness has refused to submit during the deposition.

(3) The deposition must be subscribed by the witness, unless the parties and the witness, by stipulation, have waived the signing, or the witness is ill, cannot be found, or has refused to sign. If the deposition is not subscribed by the witness, the court reporter taking the deposition must certify that the transcript is a true and complete transcript of the deposition.

(d) *Enforcing subpoenas*. If a subpoenaed person fails to comply with any subpoena issued pursuant to this section, or fails to comply with any order of the ALJ, which directs compliance with all or any portion of a deposition subpoena under paragraph (b) or (c)(2) of this section, the subpoenaing party or other aggrieved party may, to the extent authorized by applicable law, apply to an appropriate United States district court for an order requiring compliance with the portions of the subpoena with which the subpoenaed party has not complied. A party's right to seek court enforcement of a deposition subpoena in no way limits the sanctions that may be imposed by the ALJ on a party who fails to comply with, or procures a failure to comply with, a subpoena issued under this section.

§ 308.28 Interlocutory review.

(a) *General rule*. The Board of Directors may review a ruling of the ALJ prior to the certification of the record to the Board of Directors only in accordance with the procedures set forth in this section and § 308.23.

(b) *Scope of review*. The Board of Directors may exercise interlocutory review of a ruling of the ALJ if the Board of Directors finds:

(1) The ruling involves a controlling question of law or policy as to which substantial grounds exist for a difference of opinion;

(2) Immediate review of the ruling may materially advance the ultimate termination of the proceeding;

(3) Subsequent modification of the ruling at the conclusion of the proceeding would be an inadequate remedy; or

(4) Subsequent modification of the ruling would cause unusual delay or expense.

(c) *Procedure*. Any request for interlocutory review must be filed by a party with the ALJ within ten days of the ruling and must otherwise comply with § 308.23. Any party may file a response to a request for interlocutory review in accordance with § 308.23(d). Upon the expiration of the time for filing all responses, the ALJ will refer the matter to the Board of Directors for final disposition.

(d) *Suspension of proceeding*. Neither a request for interlocutory review nor any disposition of such a request by the Board of Directors under this section suspends or stays the proceeding unless otherwise ordered by the ALJ or the Board of Directors.

§ 308.29 Summary disposition.

(a) *In general*. The ALJ will recommend that the Board of Directors issue a final order granting a motion for summary disposition if the undisputed pleaded facts,

admissions, affidavits, stipulations, documentary evidence, matters as to which official notice may be taken, and any other evidentiary materials properly submitted in connection with a motion for summary disposition show:

(1) There is no genuine issue as to any material fact; and

(2) The moving party is entitled to a decision in its favor as a matter of law.

(b) *Filing of motions and responses*. (1) Any party who believes there is no genuine issue of material fact to be determined and that the party is entitled to a decision as a matter of law may move at any time for summary disposition in its favor of all or any part of the proceeding. Any party, within 20 days after service of such a motion, or within such time period as allowed by the ALJ, may file a response to such motion.

(2) A motion for summary disposition must be accompanied by a statement of the material facts as to which the moving party contends there is no genuine issue. Such motion must be supported by documentary evidence, which may take the form of admissions in pleadings, stipulations, depositions, investigatory depositions, transcripts, affidavits, and any other evidentiary materials that the moving party contends supports the moving party's position. The motion must also be accompanied by a brief containing the points and authorities in support of the contention of the moving party. Any party opposing a motion for summary disposition must file a statement setting forth those material facts as to which the opposing party contends a genuine dispute exists. Such opposition must be supported by evidence of the same type as that submitted with the motion for summary disposition and a brief containing the points and authorities in support of the contention that summary disposition would be inappropriate.

(c) *Hearing on motion*. At the written request of any party or on the ALJ's own motion, the ALJ may hear oral argument on the motion for summary disposition.

(d) *Decision on motion*. Following receipt of a motion for summary disposition and all responses thereto, the ALJ will determine whether the moving party is entitled to summary disposition. If the ALJ determines that summary disposition is warranted, the ALJ will submit a recommended decision to that effect to the Board of Directors. If the ALJ finds that no party is entitled to summary disposition, the ALJ will make a ruling denying the motion.

§ 308.30 Partial summary disposition.

If the ALJ determines that a party is entitled to summary disposition as to certain claims only, the ALJ will defer submitting a recommended decision as to those claims. A hearing on the remaining issues must be ordered. Those claims for which the ALJ has determined that summary disposition is warranted will be addressed in the recommended decision filed at the conclusion of the hearing.

§ 308.31 Scheduling and prehearing conferences.

(a) *Scheduling conference*. Within 30 days of service of the notice or order commencing a proceeding, the ALJ will direct counsel for all parties to meet with the ALJ at a specified time and manner prior to the hearing for the purpose of scheduling the course and conduct of the proceeding. This meeting is called a "scheduling conference." The schedule for the identification of potential witnesses, the time for and manner of discovery, and the exchange of any prehearing materials including witness lists, statements of issues, stipulations, exhibits, and any other materials may also be determined at the scheduling conference.

(b) *Prehearing conferences*. The ALJ may, in addition to the scheduling conference, on the ALJ's own motion or at the request of any party, direct counsel for the parties to confer with the ALJ at a prehearing conference to address any or all of the following:

(1) Simplification and clarification of the issues;

(2) Stipulations, admissions of fact, and the contents, authenticity and admissibility into evidence of documents;

(3) Matters of which official notice may be taken;

(4) Limitation of the number of witnesses;

(5) Summary disposition of any or all issues;

(6) Resolution of discovery issues or disputes;

(7) Amendments to pleadings; and

(8) Such other matters as may aid in the orderly disposition of the proceeding.

(c) *Transcript*. The ALJ may require that a scheduling or prehearing conference be recorded by a court reporter. A transcript of the conference and any materials filed, including orders, becomes part of the record of the proceeding. A party may obtain a copy of the transcript at the party's expense.

(d) *Scheduling or prehearing orders*. At or within a reasonable time following the conclusion of the scheduling conference or any prehearing conference, the ALJ will serve on each party an order setting forth any agreements reached and any procedural determinations made.

§ 308.32 Prehearing submissions.

(a) *Party prehearing submissions*. Within the time set by the ALJ, but in no case later than 20 days before the start of the hearing, each party must file with the ALJ and serve on every other party:

(1) A prehearing statement that states:

(i) The party's position with respect to the legal issues presented;

(ii) The statutory and case law upon which the party relies; and

(iii) The facts that the party expects to prove at the hearing;

(2) A final list of witnesses to be called to testify at the hearing, including the name, mailing address, and electronic mail address of each witness and a short summary of the expected testimony of each witness, which need not identify the exhibits to be relied upon by each witness at the hearing;

(3) A list of the exhibits expected to be introduced at the hearing along with a copy of each exhibit; and

(4) Stipulations of fact, if any.

(b) *Effect of failure to comply.* No witness may testify and no exhibits may be introduced at the hearing if such witness or exhibit is not listed in the prehearing submissions pursuant to paragraph (a) of this section, except for good cause shown.

§ 308.33 Public hearings.

(a) *General rule*. All hearings must be open to the public, unless the FDIC, in its discretion, determines that holding an open hearing would be contrary to the public interest. Within 20 days of service of the notice or, in the case of change-in-control proceedings under section 7(j)(4) of the FDIA (12 U.S.C. 1817(j)(4)), within 20 days from service of the hearing order, any respondent may file with the Administrative

Officer a request for a private hearing, and any party may file a reply to such a request. A party must serve on the ALJ a copy of any request or reply the party files with the Administrative Officer. The form of, and procedure for, these requests and replies are governed by § 308.23. A party's failure to file a request or a reply constitutes a waiver of any objections regarding whether the hearing will be public or private.

(b) *Filing document under seal*. Enforcement Counsel, in Enforcement Counsel's discretion, may file any document or part of a document under seal if disclosure of the document would be contrary to the public interest. The ALJ will take all appropriate steps to preserve the confidentiality of such documents or parts thereof, including closing portions of the hearing to the public.

§ 308.34 Hearing subpoenas.

(a) *Issuance*. (1) Upon application of a party showing general relevance and reasonableness of scope of the testimony or other evidence sought, the ALJ may issue a subpoena or a subpoena *duces tecum* requiring the attendance of a witness at the hearing or the production of documentary or physical evidence at the hearing. The application for a hearing subpoena must also contain a proposed subpoena specifying the attendance of a witness or the production of evidence from any state, territory, or possession of the United States, the District of Columbia, or as otherwise provided by law at any designated place where the hearing is being conducted. The party making the application must serve a copy of the application and the proposed subpoena on every other party.

(2) A party may apply for a hearing subpoena at any time before the commencement of a hearing. During a hearing, a party may make an application for a subpoena orally on the record before the ALJ.

(3) The ALJ will promptly issue any hearing subpoena requested pursuant to this section. If the ALJ determines that the application does not set forth a valid basis for the issuance of the subpoena, or that any of its terms are unreasonable, oppressive, excessive in scope, or unduly burdensome, the ALJ may refuse to issue the subpoena or may issue it in a modified form upon any conditions consistent with this subpart. Upon issuance by the ALJ, the party making the application must serve the subpoena on the person named in the subpoena and on each party.

(b) *Motion to quash or modify*. (1) Any person to whom a hearing subpoena is directed or any party may file a motion to quash or modify the subpoena, accompanied by a statement of the basis for quashing or modifying the subpoena. The movant must serve the motion on each party and on the person named in the subpoena. Any party may respond to the motion within ten days of service of the motion.

(2) Any motion to quash or modify a hearing subpoena must be filed prior to the time specified in the subpoena for compliance but not more than ten days after the date of service of the subpoena upon the movant.

(c) *Enforcing subpoenas*. If a subpoenaed person fails to comply with any subpoena issued pursuant to this section or any order of the ALJ which directs compliance with all or any portion of a document subpoena, the subpoenaing party or any other aggrieved party may seek enforcement of the subpoena pursuant to § 308.26(c).

§ 308.35 Conduct of hearings.

(a) *General rules*. (1) *Conduct of hearings.* Hearings must be conducted so as to provide a fair and expeditious presentation of the relevant disputed issues. Each party has

the right to present its case or defense by oral and documentary evidence and to conduct such cross examination as may be required for full disclosure of the facts.

(2) *Order of hearing*. Enforcement Counsel will present its case-in-chief first, unless otherwise ordered by the ALJ, or unless otherwise expressly specified by law or regulation. Enforcement Counsel will be the first party to present an opening statement and a closing statement and may make a rebuttal statement after the respondent's closing statement. If there are multiple respondents, respondents may agree among themselves as to their order of presentation of their cases, but if they do not agree, the ALJ will fix the order.

(3) *Examination of witnesses*. Only one counsel for each party may conduct an examination of a witness, except that in the case of extensive direct examination, the ALJ may permit more than one counsel for the party presenting the witness to conduct the examination. A party may have one counsel conduct the direct examination and another counsel conduct re-direct examination of a witness, or may have one counsel conduct the cross examination of a witness and another counsel conduct the re-cross examination of a witness.

(4) *Stipulations*. Unless the ALJ directs otherwise, all stipulations of fact and law previously agreed upon by the parties, and all documents, the admissibility of which have been previously stipulated, will be admitted into evidence upon commencement of the hearing.

(b) *Transcript*. The hearing must be recorded and transcribed. The reporter will make the transcript available to any party upon payment by that party to the reporter of the cost of the transcript. The ALJ may order the record corrected, either upon motion to

correct, upon stipulation of the parties, or following notice to the parties upon the ALJ's own motion.

(c) *Electronic presentation*. Based on the circumstances of each hearing, the ALJ may direct the use of, or any party may use, an electronic presentation during the hearing. If the ALJ requires an electronic presentation during the hearing, each party will be responsible for their own presentation and related costs, unless the parties agree to another manner in which to allocate presentation responsibilities and costs.

§ 308.36 Evidence.

(a) *Admissibility*. (1) Except as is otherwise set forth in this section, relevant, material, and reliable evidence that is not unduly repetitive is admissible to the fullest extent authorized by the Administrative Procedure Act and other applicable law.

(2) Evidence that would be admissible under the Federal Rules of Evidence is admissible in a proceeding conducted pursuant to this subpart.

(3) Evidence that would be inadmissible under the Federal Rules of Evidence may not be deemed or ruled to be inadmissible in a proceeding conducted pursuant to this subpart if such evidence is relevant, material, reliable, and not unduly repetitive.

(b) *Official notice*. (1) Official notice may be taken of any material fact which may be judicially noticed by a United States district court and any material information in the official public records of any Federal or State government agency.

(2) All matters officially noticed by the ALJ or the Board of Directors must appear on the record.

(3) If official notice is requested or taken of any material fact, the parties, upon timely request, must be afforded an opportunity to object.

(c) *Documents*. (1) A duplicate copy of a document is admissible to the same extent as the original, unless a genuine issue is raised as to whether the copy is in some material respect not a true and legible copy of the original.

(2) Subject to the requirements of paragraph (a) of this section, any document, including a report of examination, supervisory activity, inspection, or visitation, prepared by an appropriate Federal financial institutions regulatory agency or by a State regulatory agency, is admissible either with or without a sponsoring witness.

(3) Witnesses may use existing or newly created charts, exhibits, calendars, calculations, outlines, or other graphic material to summarize, illustrate, or simplify the presentation of testimony. Such materials may, subject to the ALJ's discretion, be used with or without being admitted into evidence.

(d) *Objections*. (1) Objections to the admissibility of evidence must be timely made and rulings on all objections must appear on the record.

(2) When an objection to a question or line of questioning propounded to a witness is sustained, the examining counsel may make a specific proffer on the record of what the examining counsel expected to prove by the expected testimony of the witness either by representation of counsel or by direct questioning of the witness.

(3) The ALJ will retain rejected exhibits, adequately marked for identification, for the record, and transmit such exhibits to the Board of Directors.

(4) Failure to object to admission of evidence or to any ruling constitutes a waiver of the objection.

(e) *Stipulations*. The parties may stipulate as to any relevant matters of fact or the authentication of any relevant documents. Such stipulations must be received in evidence at a hearing and are binding on the parties with respect to the matters therein stipulated.

(f) *Depositions of unavailable witnesses*. (1) If a witness is unavailable to testify at a hearing, and that witness has testified in a deposition to which all parties in a proceeding had notice and an opportunity to participate, a party may offer as evidence all or any part of the transcript of the deposition, including deposition exhibits, if any.

(2) Such deposition transcript is admissible to the same extent that testimony would have been admissible had that person testified at the hearing, provided that if a witness refused to answer proper questions during the depositions, the ALJ may, on that basis, limit the admissibility of the deposition in any manner that justice requires.

(3) Only those portions of a deposition received in evidence at the hearing constitute a part of the record.

§ 308.37 Post-hearing filings.

(a) *Proposed findings and conclusions and supporting briefs*. (1) Using the same method of service for each party, the ALJ will serve notice upon each party that the certified transcript, together with all hearing exhibits and exhibits introduced but not admitted into evidence at the hearing, has been filed. Any party may file with the ALJ proposed findings of fact, proposed conclusions of law, and a proposed order within 30 days following service of this notice by the ALJ or within such longer period as may be ordered by the ALJ.

(2) Proposed findings and conclusions must be supported by citation to any relevant authorities and by page references to any relevant portions of the record. A post-

hearing brief may be filed in support of proposed findings and conclusions, either as part of the same document or in a separate document. Any party who fails to file timely with the ALJ any proposed finding or conclusion is deemed to have waived the right to raise in any subsequent filing or submission any issue not addressed in such party's proposed finding or conclusion.

(b) *Reply briefs*. Reply briefs may be filed within 15 days after the date on which the parties' proposed findings, conclusions, and order are due. Reply briefs must be strictly limited to responding to new matters, issues, or arguments raised in another party's papers. A party who has not filed proposed findings of fact and conclusions of law or a post-hearing brief may not file a reply brief.

(c) *Simultaneous filing required*. The ALJ will not order the filing by any party of any brief or reply brief in advance of the other party's filing of its brief.

§ 308.38 Recommended decision and filing of record.

(a) *Filing of recommended decision and record*. Within 45 days after expiration of the time allowed for filing reply briefs under § 308.37(b), the ALJ will file with and certify to the Administrative Officer, for decision, the record of the proceeding. The record must include the ALJ's recommended decision, recommended findings of fact, recommended conclusions of law, and proposed order; all prehearing and hearing transcripts, exhibits, and rulings; and the motions, briefs, memoranda, and other supporting papers filed in connection with the hearing. The ALJ will serve upon each party the recommended decision, findings, conclusions, and proposed order.

(b) *Filing of index*. At the same time the ALJ files with and certifies to the Administrative Officer for final determination the record of the proceeding, the ALJ will

furnish to the Administrative Officer a certified index of the entire record of the proceeding. The certified index must include, at a minimum, an entry for each paper, document, or motion filed with the ALJ in the proceeding, the date of the filing, and the identity of the filer. The certified index must also include an exhibit index containing, at a minimum, an entry consisting of exhibit number and title or description for: each exhibit introduced and admitted into evidence at the hearing; each exhibit introduced but not admitted into evidence at the hearing; each exhibit introduced and admitted into evidence after the completion of the hearing; and each exhibit introduced but not admitted into evidence after the completion of the hearing.

§ 308.39 Exceptions to recommended decision.

(a) *Filing exceptions*. Within 30 days after service of the recommended decision, findings, conclusions, and proposed order under § 308.38, a party may file with the Administrative Officer written exceptions to the ALJ's recommended decision, findings, conclusions, or proposed order, to the admission or exclusion of evidence, or to the failure of the ALJ to make a ruling proposed by a party. A supporting brief may be filed at the time the exceptions are filed, either as part of the same document or in a separate document.

(b) *Effect of failure to file or raise exceptions*. (1) Failure of a party to file exceptions to those matters specified in paragraph (a) of this section within the time prescribed is deemed a waiver of objection thereto.

(2) No exception need be considered by the Board of Directors if the party taking exception had an opportunity to raise the same objection, issue, or argument before the ALJ and failed to do so.

(c) *Contents*. (1) All exceptions and briefs in support of such exceptions must be confined to the particular matters in, or omissions from, the ALJ's recommendations to which that party takes exception.

(2) All exceptions and briefs in support of exceptions must set forth page or paragraph references to the specific parts of the ALJ's recommendations to which exception is taken, the page or paragraph references to those portions of the record relied upon to support each exception, and the legal authority relied upon to support each exception.

§ 308.40 Review by the Board of Directors.

(a) *Notice of submission to the Board of Directors*. When the Administrative Officer determines that the record in the proceeding is complete, the Administrative Officer will serve notice upon the parties that the proceeding has been submitted to the Board of Directors for final decision.

(b) *Oral argument before the Board of Directors*. Upon the initiative of the Board of Directors or on the written request of any party filed with the Administrative Officer within the time for filing exceptions, the Board of Directors may order and hear oral argument on the recommended findings, conclusions, decision, and order of the ALJ. A written request by a party must show good cause for oral argument and state reasons why arguments cannot be presented adequately in writing. A denial of a request for oral argument may be set forth in the Board of Directors' final decision. Oral argument before the Board of Directors must be on the record.

(c) *Board of Directors' final decision*. (1) Decisional employees may advise and assist the Board of Directors in the consideration and disposition of the case. The final

decision of the Board of Directors will be based upon review of the entire record of the proceeding, except that the Board of Directors may limit the issues to be reviewed to those findings and conclusions to which opposing arguments or exceptions have been filed by the parties.

(2) The Board of Directors will render a final decision within 90 days after notification of the parties that the case has been submitted for final decision, or 90 days after oral argument, whichever is later, unless the Board of Directors orders that the action or any aspect thereof be remanded to the ALJ for further proceedings. Copies of the final decision and order of the Board of Directors will be served upon each party to the proceeding, upon other persons required by statute, and, if directed by the Board of Directors or required by statute, upon any appropriate State or Federal supervisory authority.

§ 308.41 Stays pending judicial review.

The commencement of proceedings for judicial review of a final decision and order of the FDIC may not, unless specifically ordered by the Board of Directors or a reviewing court, operate as a stay of any order issued by the FDIC. The Board of Directors may, in its discretion, and on such terms as the Board of Directors finds just, stay the effectiveness of all or any part of an order pending a final decision on a petition for review of that order.

Subpart B – General Rules of Procedure

§ 308.100 Applicability date.

These Local Rules in this subpart B apply to adjudicatory proceedings initiated on or after January 1, 2024. Any adjudicatory proceedings initiated before January 1, 2024,

continue to be governed by the previous version of the Local Rules included in appendix A to this part.

§ 308.101 Scope of Local Rules.

(a) This subpart B and subpart C of this part prescribe rules of practice and procedure to be followed in the administrative enforcement proceedings initiated by the FDIC as set forth in § 308.1.

(b) Except as otherwise specifically provided, the Uniform Rules and subpart B of the Local Rules will not apply to subparts D through T of this part.

(c) Subpart C of this part will apply to any administrative proceeding initiated by the FDIC.

(d) Subparts A through C of this part prescribe the rules of practice and procedure to applicable to adjudicatory proceedings as to which hearings on the record are provided for by the assessment of civil money penalties by the FDIC against institutions, institution-affiliated parties, and certain other persons for which it is the appropriate regulatory agency for any violation of 15 U.S.C. 78o(c)(4).

§ 308.102 Authority of Board of Directors and Administrative Officer.

(a) *The Board of Directors.* (1) The Board of Directors may, at any time during the pendency of a proceeding, perform, direct the performance of, or waive performance of, any act which could be done or ordered by the Administrative Officer.

(2) Nothing contained in this part shall be construed to limit the power of the Board of Directors granted by applicable statutes or regulations.

(b) *The Administrative Officer.* (1) When no ALJ has jurisdiction over a proceeding, the Administrative Officer may act in place of, and with the same authority

as, an ALJ, except that the Administrative Officer may not hear a case on the merits or make a recommended decision on the merits to the Board of Directors. (2) Pursuant to authority delegated by the Board of Directors, the Administrative Officer and Assistant Administrative Officer, upon the advice and recommendation of the Deputy General Counsel for Litigation or, in the Deputy General Counsel's absence, the Assistant General Counsel for General Litigation, may issue rulings in proceedings under 12 U.S.C. 1817(j), 1818 1828(j), 1829, 1831i, and 1831*o* concerning:

(i) Denials of requests for private hearing;

(ii) Interlocutory appeals;

(iii) Stays pending judicial review;

(iv) Reopenings of the record and/or remands of the record to the ALJ;

(v) Supplementation of the evidence in the record;

(vi) All remands from the courts of appeals not involving substantive issues;

(vii) Extensions of stays of orders terminating deposit insurance; and

(viii) All matters, including final decisions, in proceedings under 12 U.S.C. 1818(g).

§ 308.103 Assignment of Administrative Law Judge (ALJ).

(a) *Assignment*. Unless otherwise directed by the Board of Directors or as otherwise provided in the Local Rules, a hearing within the scope of this part must be held before an ALJ of the Office of Financial Institution Adjudication (OFIA).

(b) *Procedures.* Upon receiving a copy of the notice under § 308.18(a) from Enforcement Counsel, OFIA must assign an ALJ to the matter and advise the parties, in writing, of the ALJ assignment.

§ 308.104 Filings with the Board of Directors.

(a) *General rule.* All materials required to be filed with or referred to the Board of Directors in any proceedings under this part must be filed with the Administrative Officer in a manner specified in § 308.10(b). The Administrative Officer's address is: Federal Deposit Insurance Corporation, Attn: Administrative Officer, 550 17th Street, NW, Washington, DC 20429. Electronic copies of all pleadings must be sent to ESSEnforcementActionDocket@fdic.gov with the docket number clearly identified.

(b) *Scope.* Filings to be made with the Administrative Officer include pleadings and motions filed during the proceeding; the record filed by the ALJ after the issuance of a recommended decision; the recommended decision filed by the ALJ following a motion for summary disposition; referrals by the ALJ of motions for interlocutory review; motions and responses to motions filed by the parties after the record has been certified to the Board of Directors; exceptions and requests for oral argument; and any other papers required to be filed with the Board of Directors under this part.

§ 308.105 Custodian of the record.

The Administrative Officer is the official custodian of the record when no ALJ has jurisdiction over the proceeding. The Administrative Officer will maintain the official record of all papers filed in each proceeding.

§ 308.106 Written testimony in lieu of oral hearing.

(a) *General rule.* (1) At any time more than 15 days before the hearing is to commence, on the motion of any party or on the ALJ's own motion, the ALJ may order that the parties present part or all of their case-in-chief and, if ordered, their rebuttal, in the form of exhibits and written statements sworn to by the witness offering such

statements as evidence, provided that if any party objects, the ALJ will not require such a format if that format would violate the objecting party's right under the Administrative Procedure Act, or other applicable law, or would otherwise unfairly prejudice that party.

(2) Any such order will provide that each party must, upon request, have the same right of oral cross-examination (or redirect examination) as would exist had the witness testified orally rather than through a written statement. Such order must also provide that any party has a right to call any hostile witness or adverse party to testify orally.

(b) *Scheduling of submission of written testimony.* (1) If written direct testimony and exhibits are ordered under paragraph (a) of this section, the ALJ will require that it be filed within the time period for commencement of the hearing, and the hearing will be deemed to have commenced on the day such testimony is due.

(2) Absent good cause shown, written rebuttal, if any, must be submitted and the oral portion of the hearing begun within 30 days of the date set for filing written direct testimony.

(3) The ALJ will direct, unless good cause requires otherwise, that –

(i) All parties must simultaneously file any exhibits and written direct testimony required under paragraph (b)(1) of this section; and

(ii) All parties must simultaneously file any exhibits and written rebuttal required under paragraph (b)(2) of this section.

(c) *Failure to comply with order to file written testimony.* (1) The failure of any party to comply with an order to file written testimony or exhibits at the time and in the matter required under this section will be deemed a waiver of that party's right to present any evidence, except testimony of a previously identified adverse party or hostile witness.

Failure to file written testimony or exhibits is, however, not a waiver of that party's right of cross-examination or a waiver of the right to present rebuttal evidence that was not required to be submitted in written form.

(2) Late filings of papers under this section may be allowed and accepted only upon good cause shown.

§ 308.107 Supplemental discovery rules.

(a) *Scope of discovery.* Subject to the limitations set out in § 308.24, a party may obtain discovery regarding any non-privileged matter that has material relevance to the merits of the pending action, and is proportional to the needs of the action, considering the importance of the issues at stake in the action, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Parties may obtain discovery only through the production of documents and depositions, as set forth in the Uniform Rules and the Local Rules.

(b) *Joint Discovery Plan.* Within the time period set by the ALJ and prior to serving any discovery requests, the parties must meet and confer to consider the discovery needed to support their claims and defenses and discuss any issues about preserving discoverable information.

(1) At the meet and confer, the parties must use reasonable efforts to develop a Joint Discovery Plan that should contain the following elements:

(i) The subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to, or focused on, particular issues;

(ii) Any issues about disclosure, discovery, or preservation of electronically stored information (ESI), including the form or forms in which it should be produced;

(iii) Provisions regarding any anticipated discovery of nonparties;

(iv) Whether depositions are anticipated and the appropriate limits on the taking of such depositions, consistent with paragraph (e)(1) of this section, including the maximum number of depositions to be allowed;

(v) The anticipated timing of the production of any document identifying and describing privileged documents that a party intends to redact or withhold from production; and

(vi) Provisions regarding any inadvertent disclosure of privileged information.

(2) The Joint Discovery Plan must comply with the provisions of this section and § 308.24.

(3) The parties must submit their proposed Joint Discovery Plan to the ALJ for review, modification, and/or approval. In the event the parties cannot agree to some or all of the provisions, the parties must file their respective proposals with the ALJ for resolution. After review, the ALJ must issue an approved Joint Discovery Plan, which must include any modifications made by the ALJ.

(c) *Document and electronically stored information (ESI) discovery*—(1) *Scope of document discovery*. Parties to proceedings set forth at § 308.1 and as provided in the Local Rules may obtain discovery through the production of documents and ESI.

(2) *Depositions to determine completeness of document production*. Any counsel is permitted to depose a person producing documents or ESI pursuant to a document subpoena on the strictly limited topics of the identification of documents and ESI

produced by that person, and a reasonable examination to determine whether the subpoenaed person made an adequate search for, and has produced, all subpoenaed documents and ESI.

(3) *Specific limitations on ESI discovery.* A party need not provide discovery of ESI from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the ALJ may nonetheless order discovery from such sources if the requesting party shows good cause. The ALJ may specify conditions for the discovery.

(4) *Request for production*. Consistent with the Joint Discovery Plan, a party may serve on any other party a request to produce documents, and permit the requesting party or its representative to inspect, copy, test, or sample documents in the responding party's possession, custody, or control.

(5) *Privilege*. Consistent with § 308.25(e) and the Joint Discovery Plan, and prior to the close of the discovery period set by the ALJ, the producing party must reasonably identify all documents withheld or redacted on the grounds of privilege and must produce a statement of the basis for the assertion of privilege.

(6) *Document subpoenas to nonparties*. (i) The provisions of § 308.26 apply to document subpoenas to nonparties. Any requests for nonparty subpoenas must comply with § 308.24(b) and the Joint Discovery Plan.

(ii) If the ALJ determines that the application does not set forth a valid basis for the issuance of the subpoena, or that it does not otherwise comply with § 308.24(b) or the

Joint Discovery Plan, the ALJ may refuse to issue the subpoena or may issue it in a modified form upon such conditions as may be consistent with the Uniform Rules and the Local Rules.

(d) *Expert witness disclosures*. (1) *Required elements.* When expert witness disclosures are required, the disclosures must include: name, mailing address, and electronic mail address of each expert witness:

(i) If the expert is one retained or specially employed to provide expert testimony in the matter, or one whose duties as the party's employee regularly involve giving expert testimony, the witness must provide a written report in compliance with paragraph (d)(2)(i) of this section.

(ii) If the expert is an employee of a party who does not regularly provide expert testimony, including a commissioned bank examiner employed by the FDIC, the witness must provide written disclosures in compliance with paragraph (d)(2)(ii) of this section.

(2) *Disclosure of expert testimony*—(i) *Witnesses* who *must provide written report*. Unless otherwise stipulated or ordered by the ALJ, experts described in paragraph (d)(1)(i) of this section must prepare a signed expert report that contains:

(A) A complete statement of all opinions the witness will express and the basis and reasons for them;

(B) The facts or data considered by the witness in forming the opinions;

(C) Any exhibits that will be used to summarize or support the opinions;

(D) The witness' qualifications, including a list of all publications authored in the previous 10 years;

(E) A list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and

(F) A statement of the compensation to be paid for the study and testimony in the case.

(ii) *Witnesses who provide written disclosures instead of a written report.* Unless otherwise stipulated or ordered by the ALJ, expert witnesses described in paragraph (d)(1)(ii) of this section are not required to provide a written report, but must provide written disclosures that state:

(A) The subject matter on which the witness is expected to present evidence; and

(B) A summary of the facts and opinions to which the witness is expected to testify.

(e) *Depositions*—(1) *In general.* In addition to paragraph (c)(2) of this section, and subject to the provisions of § 308.24 and paragraph (a) of this section, a party may take depositions of individuals with direct knowledge of facts relevant to the proceeding and individuals designated as an expert under paragraph (d)(1) of this section, where the evidence sought cannot be obtained from some other source that is more convenient, less burdensome, or less expensive. Absent exceptional circumstances, depositions will only be permitted of individuals expected to testify at the hearing, including experts.

(i) *Limits on depositions.* Unless otherwise stipulated by the parties, depositions are only permitted to the extent ordered by the ALJ upon a showing of good cause.

(ii) *Privileged matters.* Privileged matters are not discoverable by deposition. Privileges include those set forth in § 308.24(c).

(iii) *Report*. A party must produce any disclosure required by paragraph (d)(2) of this section before the deposition of the witness required to provide such disclosure. Unless otherwise provided by the ALJ, the party must produce this report at least 20 days prior to any deposition of the witness.

(2) *Notice*. A party desiring to take a deposition must give reasonable notice in writing to the deponent and to every other party to the proceeding. The notice must state the time, manner, and place for taking the deposition, and the name and address of the person to be deposed.

(i) *Location*. A deposition notice may require the witness to be deposed at any place within a State, territory, or possession of the United States or the District of Columbia in which that witness resides or has a regular place of employment, or such other convenient place as agreed by the parties and the witness.

(ii) *Remote participation*. The parties may stipulate, or the ALJ may order, that a deposition be taken by telephone or other remote means.

(iii) *Deposition subpoenas*. A deponent's attendance may be compelled by subpoena.

(A) *Issuance*. At the request of a party, the ALJ will issue a subpoena requiring the attendance of a witness at a deposition under this paragraph (e) unless the ALJ determines that the requested subpoena is outside the scope of paragraph (e)(1) of this section.

(B) *Service.* The party requesting the subpoena must serve it on the person named therein, or on that person's counsel, by any of the methods identified in § 308.11(d). The

party serving the subpoena must file proof of service with the ALJ, unless the ALJ issues an order indicating the filing of proof of service is not required.

(C) *Objection to deposition subpoena.* A motion to modify or quash a deposition subpoena must be in accordance with the procedures of § 308.27(b).

(D) *Enforcement of deposition subpoena*. Enforcement of a deposition subpoena must be in accordance with the procedures of § 308.27(c)(2) and (d).

(3) *Time for taking depositions*. A party may take depositions at any time after the issuance of the approved Joint Discovery Plan, but no later than 20 days before the scheduled hearing date, except with permission of the ALJ for good cause shown.

(4) *Conduct of the deposition*. The witness must be duly sworn. By stipulation of the parties or by order of the ALJ, a court reporter or other person authorized to administer an oath may administer the oath remotely without being in the physical presence of the deponent. Unless the parties otherwise agree, all objections to questions or exhibits must be in short form and must state the grounds for the objection. Failure to object to questions or exhibits is not a waiver except when the grounds for the objection might have been avoided if the objection had been timely presented.

(5) *Duration.* Unless otherwise stipulated by the parties or ordered by the ALJ, a deposition is limited to 1 day of 7 hours. The ALJ may, when it is consistent with § 308.24 and paragraph (a) of this section, order additional time if it is necessary to fairly examine the witness, including when any person or circumstance has impeded the examination.

(6) *Recording the testimony*—(i) *Generally*. The party taking the deposition must have a certified court reporter record the witness' testimony:

(A) By stenotype machine or electronic means, such as by sound or video recording device;

(B) Upon agreement of the parties, by any other method; or

(C) For good cause and with leave of the ALJ, by any other method.

(ii) *Cost*. The party taking the deposition must bear the cost of recording and transcribing the witness' testimony.

(iii) *Transcript*. The court reporter must provide a transcript of the witness' testimony to the party taking the deposition and must make a copy of the transcript available to each party upon payment by that party of the cost of the copy. The transcript must be subscribed or certified in accordance with § 308.27(c)(3).

(f) *Discovery motions*—(1) *Motions to limit discovery*. In addition to § 308.25(d), upon a motion by a party or on the ALJ's own motion, the ALJ must limit the frequency or extent of discovery otherwise allowed by this subpart if the ALJ determines that:

(i) The discovery sought is unreasonably cumulative or duplicative or can be obtained from some other source that is more convenient, less burdensome, or less expensive;

(ii) Involves privileged, irrelevant, or immaterial matters;

(iii) The party seeking discovery has already had ample opportunity to obtain the information by discovery in the action; or

(iv) The proposed discovery is outside the scope of this section or § 308.24.

(2) *Motions to terminate depositions*. At any time during a deposition, the deponent or a party may move to terminate or limit it on the ground that it is being

conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party. Upon such a motion, the ALJ may order that the deposition be terminated or may limit its scope and manner. If terminated, the deposition may be resumed only by order of the ALJ.

(3) *Motions to compel discovery*. The provisions of § 308.25(f) apply to any motion to compel discovery.

25. Appendix A, is added to read as follows:

Appendix A to Part 308 – Rules of Practice and Procedure.

Note: This appendix is effective for all adjudicatory proceedings initiated prior to January 1, 2024. Cross-references to 12 CFR part 308 (as well as to included sections) in this appendix are to those provisions as contained within this appendix.

Subpart A - Uniform Rules of Practice and Procedure.

§ 308.1 Scope.

This subpart prescribes rules of practice and procedure applicable to adjudicatory proceedings as to which hearings on the record are provided for by the following statutory provisions:

(a) Cease-and-desist proceedings under section 8(b) of the Federal Deposit Insurance Act ("FDIA") (12 U.S.C. 1818(b));

(b) Removal and prohibition proceedings under section 8(e) of the FDIA (12 U.S.C. 1818(e));

(c) Change-in-control proceedings under section 7(j)(4) of the FDIA (12 U.S.C. 1817(j)(4)) to determine whether the Federal Deposit Insurance Corporation ("FDIC"),

should issue an order to approve or disapprove a person's proposed acquisition of an institution and/or institution holding company;

(d) Proceedings under section 15C(c)(2) of the Securities Exchange Act of 1934 ("Exchange Act") (15 U.S.C. 78o-5), to impose sanctions upon any government securities broker or dealer or upon any person associated or seeking to become associated with a government securities broker or dealer for which the FDIC is the appropriate regulatory agency;

(e) Assessment of civil money penalties by the FDIC against institutions, institution-affiliated parties, and certain other persons for which it is the appropriate regulatory agency for any violation of:

(1) Sections 22(h) and 23 of the Federal Reserve Act (FRA), or any regulation issued thereunder, and certain unsafe or unsound practices or breaches of fiduciary duty, pursuant to 12 U.S.C. 1828(j) or 12 U.S.C. 1468;

(2) Section 106(b) of the Bank Holding Company Act Amendments of 1970 ("BHCA Amendments of 1970"), and certain unsafe or unsound practices or breaches of fiduciary duty, pursuant to 12 U.S.C. 1972(2)(F);

(3) Any provision of the Change in Bank Control Act of 1978, as amended (the "CBCA"), or any regulation or order issued thereunder, and certain unsafe or unsound practices, or breaches of fiduciary duty, pursuant to 12 U.S.C. 1817(j)(16);

(4) Section 7(a)(1) of the FDIA, pursuant to 12 U.S.C. 1817(a)(1);

(5) Any provision of the International Lending Supervision Act of 1983 ("ILSA"), or any rule, regulation or order issued thereunder, pursuant to 12 U.S.C. 3909;

(6) Any provision of the International Banking Act of 1978 (“IBA”), or any rule, regulation or order issued thereunder, pursuant to 12 U.S.C. 3108;

(7) Certain provisions of the Exchange Act, pursuant to section 21B of the Exchange Act (15 U.S.C. 78u-2);

(8) Section 1120 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (“FIRREA”) (12 U.S.C. 3349), or any order or regulation issued thereunder;

(9) The terms of any final or temporary order issued under section 8 of the FDIA or of any written agreement executed by the FDIC or the former Office of Thrift Supervision (OTS), the terms of any condition imposed in writing by the FDIC in connection with the grant of an application or request, certain unsafe or unsound practices or breaches of fiduciary duty, or any law or regulation not otherwise provided herein pursuant to 12 U.S.C. 1818(i)(2);

(10) Any provision of law referenced in section 102(f) of the Flood Disaster Protection Act of 1973 (42 U.S.C. 4012a(f)) or any order or regulation issued thereunder; and

(11) Any provision of law referenced in 31 U.S.C. 5321 or any order or regulation issued thereunder;

(12) Certain provisions of Section 5 of the Home Owners' Loan Act (HOLA) or any regulation or order issued thereunder, pursuant to 12 U.S.C. 1464(d)(1), (5)-(8), (s), and (v);

(13) Section 9 of the HOLA or any regulation or order issued thereunder, pursuant to 12 U.S.C. 1467(d);

(14) Section 10 of HOLA, pursuant to 12 U.S.C. 1467a(a)(2)(D), (g), (i)(2)-(4) and (r); and

(f) Remedial action under section 102(g) of the Flood Disaster Protection Act of 1973 (42 U.S.C. 4012a(g));

(g) Proceedings under section 10(k) of the FDIA (12 U.S.C. 1820(k)) to impose penalties for violations of the post-employment restrictions under that subsection; and

(h) This subpart also applies to all other adjudications required by statute to be determined on the record after opportunity for an agency hearing, unless otherwise specifically provided for in the Local Rules.

§ 308.2 Rules of construction.

For purposes of this subpart:

(a) Any term in the singular includes the plural, and the plural includes the singular, if such use would be appropriate;

(b) Any use of a masculine, feminine, or neuter gender encompasses all three, if such use would be appropriate;

(c) The term *counsel* includes a non-attorney representative; and

(d) Unless the context requires otherwise, a party's counsel of record, if any, may, on behalf of that party, take any action required to be taken by the party.

§ 308.3 Definitions.

For purposes of this subpart, unless explicitly stated to the contrary:

Administrative law judge means one who presides at an administrative hearing under authority set forth at 5 U.S.C. 556.

Administrative Officer means an inferior officer of the Federal Deposit Insurance Corporation, duly appointed by the Board of Directors of the Federal Deposit Insurance Corporation to serve as the Board's designee to hear certain motions or requests in an

adjudicatory proceeding and to be the official custodian of the record for the Federal Deposit Insurance Corporation.

Adjudicatory proceeding means a proceeding conducted pursuant to these rules and leading to the formulation of a final order other than a regulation.

Assistant Administrative Officer means an inferior officer of the Federal Deposit Insurance Corporation, duly appointed by the Board of Directors of the Federal Deposit Insurance Corporation to serve as the Board's designee to hear certain motions or requests in an adjudicatory proceeding upon the designation or unavailability of the Administrative Officer.

Board of Directors or *Board* means the Board of Directors of the Federal Deposit Insurance Corporation or its designee.

Decisional employee means any member of the Federal Deposit Insurance Corporation's or administrative law judge's staff who has not engaged in an investigative or prosecutorial role in a proceeding and who may assist the Board of Directors, the administrative law judge, or the Administrative Officer, or the Assistant Administrative Officer, in preparing orders, recommended decisions, decisions, and other documents under the Uniform Rules.

Designee of the Board of Directors means officers or officials of the Federal Deposit Insurance Corporation acting pursuant to authority delegated by the Board of Directors.

Enforcement Counsel means any individual who files a notice of appearance as counsel on behalf of the FDIC in an adjudicatory proceeding.

FDIC means the Federal Deposit Insurance Corporation.

Final order means an order issued by the FDIC with or without the consent of the affected institution or the institution-affiliated party, that has become final, without regard to the pendency of any petition for reconsideration or review.

Institution includes:

(1) Any bank as that term is defined in section 3(a) of the FDIA (12 U.S.C. 1813(a));

(2) Any bank holding company or any subsidiary (other than a bank) of a bank holding company as those terms are defined in the BHCA (12 U.S.C. 1841 *et seq.*);

(3) Any savings association as that term is defined in section 3(b) of the FDIA (12 U.S.C. 1813(b)), any savings and loan holding company or any subsidiary thereof (other than a bank) as those terms are defined in section 10(a) of the HOLA (12 U.S.C. 1467a(a));

(4) Any organization operating under section 25 of the FRA (12 U.S.C. 601 *et seq.*);

(5) Any foreign bank or company to which section 8 of the IBA (12 U.S.C. 3106), applies or any subsidiary (other than a bank) thereof; and

(6) Any federal agency as that term is defined in section 1(b) of the IBA (12 U.S.C. 3101(5)).

Investigation means any investigation conducted pursuant to section 10(c) of the FDIA or pursuant to section 5(d)(1)(B) of HOLA (12 U.S.C. 1464(d)(1)(B)).

Local Rules means those rules promulgated by the FDIC in those subparts of this part other than subpart A.

Office of Financial Institution Adjudication (OFIA) means the executive body charged with overseeing the administration of administrative enforcement proceedings of the Office of the Comptroller of the Currency (OCC), the Board of Governors of the Federal Reserve Board (FRB), the FDIC, and the National Credit Union Administration (NCUA).

Party means the FDIC and any person named as a party in any notice.

Person means an individual, sole proprietor, partnership, corporation, unincorporated association, trust, joint venture, pool, syndicate, agency, or other entity or organization, including an institution as defined in this section.

Respondent means any party other than the FDIC.

Uniform Rules means those rules in subpart A of this part that pertain to the types of formal administrative enforcement actions set forth at § 308.1 and as specified in subparts B through P of this part.

Violation includes any action (alone or with another or others) for or toward causing, bringing about, participating in, counseling, or aiding or abetting a violation.

§ 308.4 Authority of Board of Directors.

The Board of Directors may, at any time during the pendency of a proceeding, perform, direct the performance of, or waive performance of, any act which could be done or ordered by the administrative law judge.

§ 308.5 Authority of the administrative law judge.

(a) *General rule.* All proceedings governed by this part shall be conducted in accordance with the provisions of chapter 5 of title 5 of the United States Code. The administrative law judge shall have all powers necessary to conduct a proceeding in a fair and impartial manner and to avoid unnecessary delay.

(b) *Powers.* The administrative law judge shall have all powers necessary to conduct the proceeding in accordance with paragraph (a) of this section, including the following powers:

(1) To administer oaths and affirmations;

(2) To issue subpoenas, subpoenas duces tecum, and protective orders, as authorized by this part, and to quash or modify any such subpoenas and orders;

(3) To receive relevant evidence and to rule upon the admission of evidence and offers of proof;

(4) To take or cause depositions to be taken as authorized by this subpart;

(5) To regulate the course of the hearing and the conduct of the parties and their counsel;

(6) To hold scheduling and/or pre-hearing conferences as set forth in § 308.31;

(7) To consider and rule upon all procedural and other motions appropriate in an adjudicatory proceeding, provided that only the Board of Directors shall have the power to grant any motion to dismiss the proceeding or to decide any other motion that results in a final determination of the merits of the proceeding;

(8) To prepare and present to the Board of Directors a recommended decision as provided herein;

(9) To recuse himself or herself by motion made by a party or on his or her own motion;

(10) To establish time, place and manner limitations on the attendance of the public and the media for any public hearing; and

(11) To do all other things necessary and appropriate to discharge the duties of a presiding officer.

§ 308.6 Appearance and practice in adjudicatory proceedings.

(a) *Appearance before the FDIC or an administrative law judge* - (1) *By attorneys.* Any member in good standing of the bar of the highest court of any state, commonwealth, possession, territory of the United States, or the District of Columbia may represent

others before the FDIC if such attorney is not currently suspended or debarred from practice before the FDIC.

(2) *By non-attorneys.* An individual may appear on his or her own behalf; a member of a partnership may represent the partnership; a duly authorized officer, director, or employee of any government unit, agency, institution, corporation or authority may represent that unit, agency, institution, corporation or authority if such officer; director, or employee is not currently suspended or debarred from practice before the FDIC.

(3) *Notice of appearance.* Any individual acting as counsel on behalf of a party, including the FDIC, shall file a notice of appearance with OFIA at or before the time that individual submits papers or otherwise appears on behalf of a party in the adjudicatory proceeding. The notice of appearance must include a written declaration that the individual is currently qualified as provided in paragraph (a)(1) or (a)(2) of this section and is authorized to represent the particular party. By filing a notice of appearance on behalf of a party in an adjudicatory proceeding, the counsel agrees and represents that he or she is authorized to accept service on behalf of the represented party and that, in the event of withdrawal from representation, he or she will, if required by the administrative law judge, continue to accept service until new counsel has filed a notice of appearance or until the represented party indicates that he or she will proceed on a *pro se* basis.

(b) *Sanctions.* Dilatory, obstructionist, egregious, contemptuous or contumacious conduct at any phase of any adjudicatory proceeding may be grounds for exclusion or suspension of counsel from the proceeding.

§ 308.7 Good faith certification.

(a) *General requirement.* Every filing or submission of record following the issuance of a notice shall be signed by at least one counsel of record in his or her individual name and shall state that counsel's address and telephone number. A party who acts as his or her own counsel shall sign his or her individual name and state his or her address and telephone number on every filing or submission of record.

(b) *Effect of signature.* (1) The signature of counsel or a party shall constitute a certification that: The counsel or party has read the filing or submission of record; to the best of his or her knowledge, information, and belief formed after reasonable inquiry, the filing or submission of record is well-grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and the filing or submission of record is not made for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

(2) If a filing or submission of record is not signed, the administrative law judge shall strike the filing or submission of record, unless it is signed promptly after the omission is called to the attention of the pleader or movant.

(c) *Effect of making oral motion or argument.* The act of making any oral motion or oral argument by any counsel or party constitutes a certification that to the best of his or her knowledge, information, and belief formed after reasonable inquiry, his or her statements are well-grounded in fact and are warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and are not made for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

§ 308.8 Conflicts of interest.

(a) *Conflict of interest in representation.* No person shall appear as counsel for another person in an adjudicatory proceeding if it reasonably appears that such representation may be materially limited by that counsel's responsibilities to a third person or by the counsel's own interests. The administrative law judge may take corrective measures at any stage of a proceeding to cure a conflict of interest in representation, including the issuance of an order limiting the scope of representation or disqualifying an individual from appearing in a representative capacity for the duration of the proceeding.

(b) *Certification and waiver.* If any person appearing as counsel represents two or more parties to an adjudicatory proceeding or also represents a non-party on a matter relevant to an issue in the proceeding, counsel must certify in writing at the time of filing the notice of appearance required by § 308.6(a):

(1) That the counsel has personally and fully discussed the possibility of conflicts of interest with each such party and non-party; and

(2) That each such party and non-party waives any right it might otherwise have had to assert any known conflicts of interest or to assert any non-material conflicts of interest during the course of the proceeding.

§ 308.9 Ex parte communications.

(a) *Definition* - (1) *Ex parte communication* means any material oral or written communication relevant to the merits of an adjudicatory proceeding that was neither on the record nor on reasonable prior notice to all parties that takes place between:

(i) An interested person outside the FDIC (including such person's counsel); and

(ii) The administrative law judge handling that proceeding, the Board of Directors, or a decisional employee.

(2) *Exception.* A request for status of the proceeding does not constitute an ex parte communication.

(b) *Prohibition of ex parte communications.* From the time the notice is issued by the FDIC until the date that the Board of Directors issues its final decision pursuant to § 308.40(c):

(1) No interested person outside the FDIC shall make or knowingly cause to be made an ex parte communication to any member of the Board of Directors, the administrative law judge, or a decisional employee; and

(2) No member of the Board of Directors, no administrative law judge, or decisional employee shall make or knowingly cause to be made to any interested person outside the FDIC any ex parte communication.

(c) *Procedure upon occurrence of ex parte communication.* If an ex parte communication is received by the administrative law judge, any member of the Board of Directors or other person identified in paragraph (a) of this section, that person shall cause all such written communications (or, if the communication is oral, a memorandum stating the substance of the communication) to be placed on the record of the proceeding and served on all parties. All other parties to the proceeding shall have an opportunity, within ten days of receipt of service of the ex parte communication, to file responses thereto and to recommend any sanctions that they believe to be appropriate under the circumstances. The administrative law judge or the Board of Directors shall then determine whether any action should be taken concerning the ex parte communication in accordance with paragraph (d) of this section.

(d) *Sanctions.* Any party or his or her counsel who makes a prohibited ex parte communication, or who encourages or solicits another to make any such communication, may be subject to any appropriate sanction or sanctions imposed by the Board of Directors or the administrative law judge including, but not limited to, exclusion from the proceedings and an adverse ruling on the issue which is the subject of the prohibited communication.

(e) *Separation of functions.* Except to the extent required for the disposition of ex parte matters as authorized by law, the administrative law judge may not consult a person or party on any matter relevant to the merits of the adjudication, unless on notice and opportunity for all parties to participate. An employee or agent engaged in the performance of investigative or prosecuting functions for the FDIC in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review of the recommended decision under § 308.40 except as witness or counsel in public proceedings.

§ 308.10 Filing of papers.

(a) *Filing.* Any papers required to be filed, excluding documents produced in response to a discovery request pursuant to §§ 308.25 and 308.26, shall be filed with the OFIA, except as otherwise provided.

(b) *Manner of filing.* Unless otherwise specified by the Board of Directors or the administrative law judge, filing may be accomplished by:

(1) Personal service;

(2) Delivering the papers to a reliable commercial courier service, overnight delivery service, or to the U.S. Post Office for Express Mail delivery;

(3) Mailing the papers by first class, registered, or certified mail; or

(4) Transmission by electronic media, only if expressly authorized, and upon any conditions specified, by the Board of Directors or the administrative law judge. All papers filed by electronic media shall also concurrently be filed in accordance with paragraph (c) of this section.

(c) *Formal requirements as to papers filed* - (1) *Form.* All papers filed must set forth the name, address, and telephone number of the counsel or party making the filing and must be accompanied by a certification setting forth when and how service has been made on all other parties. All papers filed must be double-spaced and printed or typewritten on 81⁄2 × 11 inch paper, and must be clear and legible.

(2) *Signature.* All papers must be dated and signed as provided in § 308.7.

(3) *Caption.* All papers filed must include at the head thereof, or on a title page, the name of the FDIC and of the filing party, the title and docket number of the proceeding, and the subject of the particular paper.

(4) *Number of copies.* Unless otherwise specified by the Board of Directors, or the administrative law judge, an original and one copy of all documents and papers shall be filed, except that only one copy of transcripts of testimony and exhibits shall be filed.

§ 308.11 Service of papers.

(a) *By the parties.* Except as otherwise provided, a party filing papers shall serve a copy upon the counsel of record for all other parties to the proceeding so represented, and upon any party not so represented.

(b) *Method of service.* Except as provided in paragraphs (c)(2) and (d) of this section, a serving party shall use one or more of the following methods of service:

(1) Personal service;

(2) Delivering the papers to a reliable commercial courier service, overnight delivery service, or to the U.S. Post Office for Express Mail delivery;

(3) Mailing the papers by first class, registered, or certified mail; or

(4) Transmission by electronic media, only if the parties mutually agree. Any papers served by electronic media shall also concurrently be served in accordance with the requirements of § 308.10(c).

(c) *By the Board of Directors.* (1) All papers required to be served by the Board of Directors or the administrative law judge upon a party who has appeared in the proceeding in accordance with § 308.6, shall be served by any means specified in paragraph (b) of this section.

(2) If a party has not appeared in the proceeding in accordance with § 308.6, the Board of Directors or the administrative law judge shall make service by any of the following methods:

(i) By personal service;

(ii) If the person to be served is an individual, by delivery to a person of suitable age and discretion at the physical location where the individual resides or works;

(iii) If the person to be served is a corporation or other association, by delivery to an officer, managing or general agent, or to any other agent authorized by appointment or by law to receive service and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the party;

(iv) By registered or certified mail addressed to the party's last known address; or

(v) By any other method reasonably calculated to give actual notice.

(d) *Subpoenas.* Service of a subpoena may be made:

(1) By personal service;

(2) If the person to be served is an individual, by delivery to a person of suitable age and discretion at the physical location where the individual resides or works;

(3) By delivery to an agent which, in the case of a corporation or other association, is delivery to an officer, managing or general agent, or to any other agent authorized by appointment or by law to receive service and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the party;

(4) By registered or certified mail addressed to the person's last known address; or

(5) In such other manner as is reasonably calculated to give actual notice.

(e) *Area of service.* Service in any state, territory, possession of the United States, or the District of Columbia, on any person or company doing business in any state, territory, possession of the United States, or the District of Columbia, or on any person as otherwise provided by law, is effective without regard to the place where the hearing is held, provided that if service is made on a foreign bank in connection with an action or proceeding involving one or more of its branches or agencies located in any state, territory, possession of the United States, or the District of Columbia, service shall be made on at least one branch or agency so involved.

§ 308.12 Construction of time limits.

(a) *General rule.* In computing any period of time prescribed by this subpart, the date of the act or event that commences the designated period of time is not included. The last day so computed is included unless it is a Saturday, Sunday, or Federal holiday. When the last day is a Saturday, Sunday, or Federal holiday, the period runs until the end of the

next day that is not a Saturday, Sunday, or Federal holiday. Intermediate Saturdays, Sundays, and Federal holidays are included in the computation of time. However, when the time period within which an act is to be performed is ten days or less, not including any additional time allowed for in paragraph (c) of this section, intermediate Saturdays, Sundays, and Federal holidays are not included.

(b) *When papers are deemed to be filed or served.* (1) Filing and service are deemed to be effective:

(i) In the case of personal service or same day commercial courier delivery, upon actual service;

(ii) In the case of overnight commercial delivery service, U.S. Express Mail delivery, or first class, registered, or certified mail, upon deposit in or delivery to an appropriate point of collection;

(iii) In the case of transmission by electronic media, as specified by the authority receiving the filing, in the case of filing, and as agreed among the parties, in the case of service.

(2) The effective filing and service dates specified in paragraph (b)(1) of this section may be modified by the Board of Directors or administrative law judge in the case of filing or by agreement of the parties in the case of service.

(c) *Calculation of time for service and filing of responsive papers.* Whenever a time limit is measured by a prescribed period from the service of any notice or paper, the applicable time limits are calculated as follows:

(1) If service is made by first class, registered, or certified mail, add three calendar days to the prescribed period;

(2) If service is made by express mail or overnight delivery service, add one calendar day to the prescribed period; or

(3) If service is made by electronic media transmission, add one calendar day to the prescribed period, unless otherwise determined by the Board of Directors or the administrative law judge in the case of filing, or by agreement among the parties in the case of service.

§ 308.13 Change of time limits.

Except as otherwise provided by law, the administrative law judge may, for good cause shown, extend the time limits prescribed by the Uniform Rules or by any notice or order issued in the proceedings. After the referral of the case to the Board of Directors pursuant to § 308.38, the Board of Directors may grant extensions of the time limits for good cause shown. Extensions may be granted at the motion of a party or of the Board of Directors after notice and opportunity to respond is afforded all non-moving parties, or on the administrative law judge's own motion.

§ 308.14 Witness fees and expenses.

Witnesses subpoenaed for testimony or depositions shall be paid the same fees for attendance and mileage as are paid in the United States district courts in proceedings in which the United States is a party, provided that, in the case of a discovery subpoena addressed to a party, no witness fees or mileage need be paid. Fees for witnesses shall be tendered in advance by the party requesting the subpoena, except that fees and mileage need not be tendered in advance where the FDIC is the party requesting the subpoena. The FDIC shall not be required to pay any fees to, or expenses of, any witness not subpoenaed by the FDIC.

§ 308.15 Opportunity for informal settlement.

Any respondent may, at any time in the proceeding, unilaterally submit to Enforcement Counsel written offers or proposals for settlement of a proceeding, without prejudice to the rights of any of the parties. No such offer or proposal shall be made to any FDIC representative other than Enforcement Counsel. Submission of a written settlement offer does not provide a basis for adjourning or otherwise delaying all or any portion of a proceeding under this part. No settlement offer or proposal, or any subsequent negotiation or resolution, is admissible as evidence in any proceeding.

§ 308.16 FDIC's right to conduct examination.

Nothing contained in this subpart limits in any manner the right of the FDIC to conduct any examination, inspection, or visitation of any institution or institution-affiliated party, or the right of the FDIC to conduct or continue any form of investigation authorized by law.

§ 308.17 Collateral attacks on adjudicatory proceeding.

If an interlocutory appeal or collateral attack is brought in any court concerning all or any part of an adjudicatory proceeding, the challenged adjudicatory proceeding shall continue without regard to the pendency of that court proceeding. No default or other failure to act as directed in the adjudicatory proceeding within the times prescribed in this subpart shall be excused based on the pendency before any court of any interlocutory appeal or collateral attack.

§ 308.18 Commencement of proceeding and contents of notice.

(a) *Commencement of proceeding.* (1)(i) Except for change-in-control proceedings under section 7(j)(4) of the FDIA (12 U.S.C. 1817(j)(4)), a proceeding governed by this subpart is commenced by issuance of a notice by the FDIC.

(ii) The notice must be served by Enforcement Counsel upon the respondent and given to any other appropriate financial institution supervisory authority where required by law.

(iii) The notice must be filed with the OFIA.

(2) Change-in-control proceedings under section 7(j)(4) of the FDIA (12 U.S.C. 1817(j)(4)) commence with the issuance of an order by the FDIC.

(b) *Contents of notice.* The notice must set forth:

(1) The legal authority for the proceeding and for the FDIC's jurisdiction over the proceeding;

(2) A statement of the matters of fact or law showing that the FDIC is entitled to relief;

(3) A proposed order or prayer for an order granting the requested relief;

(4) The time, place, and nature of the hearing as required by law or regulation;

(5) The time within which to file an answer as required by law or regulation;

(6) The time within which to request a hearing as required by law or regulation; and

(7) That the answer and/or request for a hearing shall be filed with OFIA.

§ 308.19 Answer.

(a) *When.* Within 20 days of service of the notice, respondent shall file an answer as designated in the notice. In a civil money penalty proceeding, respondent shall also file a request for a hearing within 20 days of service of the notice.

(b) *Content of answer.* An answer must specifically respond to each paragraph or allegation of fact contained in the notice and must admit, deny, or state that the party

lacks sufficient information to admit or deny each allegation of fact. A statement of lack of information has the effect of a denial. Denials must fairly meet the substance of each allegation of fact denied; general denials are not permitted. When a respondent denies part of an allegation, that part must be denied and the remainder specifically admitted. Any allegation of fact in the notice which is not denied in the answer must be deemed admitted for purposes of the proceeding. A respondent is not required to respond to the portion of a notice that constitutes the prayer for relief or proposed order. The answer must set forth affirmative defenses, if any, asserted by the respondent.

(c) *Default* - (1) *Effect of failure to answer.* Failure of a respondent to file an answer required by this section within the time provided constitutes a waiver of his or her right to appear and contest the allegations in the notice. If no timely answer is filed, Enforcement Counsel may file a motion for entry of an order of default. Upon a finding that no good cause has been shown for the failure to file a timely answer, the administrative law judge shall file with the Board of Directors a recommended decision containing the findings and the relief sought in the notice. Any final order issued by the Board of Directors based upon a respondent's failure to answer is deemed to be an order issued upon consent.

(2) *Effect of failure to request a hearing in civil money penalty proceedings.* If respondent fails to request a hearing as required by law within the time provided, the notice of assessment constitutes a final and unappealable order.

§ 308.20 Amended pleadings.

(a) *Amendments.* The notice or answer may be amended or supplemented at any stage of the proceeding. The respondent must answer an amended notice within the time remaining for the respondent's answer to the original notice, or within ten days after

service of the amended notice, whichever period is longer, unless the Board of Directors or administrative law judge orders otherwise for good cause.

(b) *Amendments to conform to the evidence.* When issues not raised in the notice or answer are tried at the hearing by express or implied consent of the parties, they will be treated in all respects as if they had been raised in the notice or answer, and no formal amendments are required. If evidence is objected to at the hearing on the ground that it is not within the issues raised by the notice or answer, the administrative law judge may admit the evidence when admission is likely to assist in adjudicating the merits of the action and the objecting party fails to satisfy the administrative law judge that the admission of such evidence would unfairly prejudice that party's action or defense upon the merits. The administrative law judge may grant a continuance to enable the objecting party to meet such evidence.

§ 308.21 Failure to appear.

Failure of a respondent to appear in person at the hearing or by a duly authorized counsel constitutes a waiver of respondent's right to a hearing and is deemed an admission of the facts as alleged and consent to the relief sought in the notice. Without further proceedings or notice to the respondent, the administrative law judge shall file with the Board of Directors a recommended decision containing the findings and the relief sought in the notice.

§ 308.22 Consolidation and severance of actions.

(a) *Consolidation.* (1) On the motion of any party, or on the administrative law judge's own motion, the administrative law judge may consolidate, for some or all purposes, any two or more proceedings, if each such proceeding involves or arises out of the same

transaction, occurrence or series of transactions or occurrences, or involves at least one common respondent or a material common question of law or fact, unless such consolidation would cause unreasonable delay or injustice.

(2) In the event of consolidation under paragraph (a)(1) of this section, appropriate adjustment to the prehearing schedule must be made to avoid unnecessary expense, inconvenience, or delay.

(b) *Severance.* The administrative law judge may, upon the motion of any party, sever the proceeding for separate resolution of the matter as to any respondent only if the administrative law judge finds that:

(1) Undue prejudice or injustice to the moving party would result from not severing the proceeding; and

(2) Such undue prejudice or injustice would outweigh the interests of judicial economy and expedition in the complete and final resolution of the proceeding.

§ 308.23 Motions.

(a) *In writing.* (1) Except as otherwise provided herein, an application or request for an order or ruling must be made by written motion.

(2) All written motions must state with particularity the relief sought and must be accompanied by a proposed order.

(3) No oral argument may be held on written motions except as otherwise directed by the administrative law judge. Written memoranda, briefs, affidavits or other relevant material or documents may be filed in support of or in opposition to a motion.

(b) *Oral motions.* A motion may be made orally on the record unless the administrative law judge directs that such motion be reduced to writing.

(c) *Filing of motions.* Motions must be filed with the administrative law judge, except that following the filing of the recommended decision, motions must be filed with the Administrative Officer for disposition by the Board of Directors.

(d) *Responses.* (1) Except as otherwise provided in this paragraph (d), within ten days after service of any written motion, or within such other period of time as may be established by the administrative law judge or the Administrative Officer, any party may file a written response to a motion. The administrative law judge shall not rule on any oral or written motion before each party has had an opportunity to file a response.

(2) The failure of a party to oppose a written motion or an oral motion made on the record is deemed a consent by that party to the entry of an order substantially in the form of the order accompanying the motion.

(e) *Dilatory motions.* Frivolous, dilatory or repetitive motions are prohibited. The filing of such motions may form the basis for sanctions.

(f) *Dispositive motions.* Dispositive motions are governed by §§ 308.29 and 308.30.

§ 308.24 Scope of document discovery.

(a) *Limits on discovery.* (1) Subject to the limitations set out in paragraphs (b), (c), and (d) of this section, a party to a proceeding under this subpart may obtain document discovery by serving a written request to produce documents. For purposes of a request to produce documents, the term "documents" may be defined to include drawings, graphs, charts, photographs, recordings, data stored in electronic form, and other data compilations from which information can be obtained, or translated, if necessary, by the parties through detection devices into reasonably usable form, as well as written material of all kinds.

(2) Discovery by use of deposition is governed by subpart I of this part.

(3) Discovery by use of interrogatories is not permitted.

(b) *Relevance.* A party may obtain document discovery regarding any matter, not privileged, that has material relevance to the merits of the pending action. Any request to produce documents that calls for irrelevant material, that is unreasonable, oppressive, excessive in scope, unduly burdensome, or repetitive of previous requests, or that seeks to obtain privileged documents will be denied or modified. A request is unreasonable, oppressive, excessive in scope or unduly burdensome if, among other things, it fails to include justifiable limitations on the time period covered and the geographic locations to be searched, the time provided to respond in the request is inadequate, or the request calls for copies of documents to be delivered to the requesting party and fails to include the requestor's written agreement to pay in advance for the copying, in accordance with § 308.25.

(c) *Privileged matter.* Privileged documents are not discoverable. Privileges include the attorney-client privilege, work-product privilege, any government's or government agency's deliberative-process privilege, and any other privileges the Constitution, any applicable act of Congress, or the principles of common law provide.

(d) *Time limits.* All discovery, including all responses to discovery requests, shall be completed at least 20 days prior to the date scheduled for the commencement of the hearing. No exceptions to this time limit shall be permitted, unless the administrative law judge finds on the record that good cause exists for waiving the requirements of this paragraph.

§ 308.25 Request for document discovery from parties.

(a) *General rule.* Any party may serve on any other party a request to produce for inspection any discoverable documents that are in the possession, custody, or control of the party upon whom the request is served. The request must identify the documents to be produced either by individual item or by category, and must describe each item and category with reasonable particularity. Documents must be produced as they are kept in the usual course of business or must be organized to correspond with the categories in the request.

(b) *Production or copying.* The request must specify a reasonable time, place, and manner for production and performing any related acts. In lieu of inspecting the documents, the requesting party may specify that all or some of the responsive documents be copied and the copies delivered to the requesting party. If copying of fewer than 250 pages is requested, the party to whom the request is addressed shall bear the cost of copying and shipping charges. If a party requests 250 pages or more of copying, the requesting party shall pay for the copying and shipping charges. Copying charges are the current per page copying rate imposed by 12 CFR part 309 implementing the Freedom of Information Act (5 U.S.C. 552). The party to whom the request is addressed may require payment in advance before producing the documents.

(c) *Obligation to update responses.* A party who has responded to a discovery request with a response that was complete when made is not required to supplement the response to include documents thereafter acquired, unless the responding party learns that:

(1) The response was materially incorrect when made; or

(2) The response, though correct when made, is no longer true and a failure to amend the response is, in substance, a knowing concealment.

(d) *Motions to limit discovery.* (1) Any party that objects to a discovery request may, within ten days of being served with such request, file a motion in accordance with the provisions of § 308.23 to strike or otherwise limit the request. If an objection is made to only a portion of an item or category in a request, the portion objected to shall be specified. Any objections not made in accordance with this paragraph and § 308.23 are waived.

(2) The party who served the request that is the subject of a motion to strike or limit may file a written response within five days of service of the motion. No other party may file a response.

(e) *Privilege.* At the time other documents are produced, the producing party must reasonably identify all documents withheld on the grounds of privilege and must produce a statement of the basis for the assertion of privilege. When similar documents that are protected by deliberative process, attorney-work-product, or attorney-client privilege are voluminous, these documents may be identified by category instead of by individual document. The administrative law judge retains discretion to determine when the identification by category is insufficient.

(f) *Motions to compel production.* (1) If a party withholds any documents as privileged or fails to comply fully with a discovery request, the requesting party may, within ten days of the assertion of privilege or of the time the failure to comply becomes known to the requesting party, file a motion in accordance with the provisions of § 308.23 for the issuance of a subpoena compelling production.

(2) The party who asserted the privilege or failed to comply with the request may file a written response to a motion to compel within five days of service of the motion. No other party may file a response.

(g) *Ruling on motions.* After the time for filing responses pursuant to this section has expired, the administrative law judge shall rule promptly on all motions filed pursuant to this section. If the administrative law judge determines that a discovery request, or any of its terms, calls for irrelevant material, is unreasonable, oppressive, excessive in scope, unduly burdensome, or repetitive of previous requests, or seeks to obtain privileged documents, he or she may deny or modify the request, and may issue appropriate protective orders, upon such conditions as justice may require. The pendency of a motion to strike or limit discovery or to compel production is not a basis for staying or continuing the proceeding, unless otherwise ordered by the administrative law judge. Notwithstanding any other provision in this part, the administrative law judge may not release, or order a party to produce, documents withheld on grounds of privilege if the party has stated to the administrative law judge its intention to file a timely motion for interlocutory review of the administrative law judge's order to produce the documents, and until the motion for interlocutory review has been decided.

(h) *Enforcing discovery subpoenas.* If the administrative law judge issues a subpoena compelling production of documents by a party, the subpoenaing party may, in the event of noncompliance and to the extent authorized by applicable law, apply to any appropriate United States district court for an order requiring compliance with the subpoena. A party's right to seek court enforcement of a subpoena shall not in any

manner limit the sanctions that may be imposed by the administrative law judge against a party who fails to produce subpoenaed documents.

§ 308.26 Document subpoenas to nonparties.

(a) *General rules.* (1) Any party may apply to the administrative law judge for the issuance of a document discovery subpoena addressed to any person who is not a party to the proceeding. The application must contain a proposed document subpoena and a brief statement showing the general relevance and reasonableness of the scope of documents sought. The subpoenaing party shall specify a reasonable time, place, and manner for making production in response to the document subpoena.

(2) A party shall only apply for a document subpoena under this section within the time period during which such party could serve a discovery request under § 308.24(d). The party obtaining the document subpoena is responsible for serving it on the subpoenaed person and for serving copies on all parties. Document subpoenas may be served in any state, territory, or possession of the United States, the District of Columbia, or as otherwise provided by law.

(3) The administrative law judge shall promptly issue any document subpoena requested pursuant to this section. If the administrative law judge determines that the application does not set forth a valid basis for the issuance of the subpoena, or that any of its terms are unreasonable, oppressive, excessive in scope, or unduly burdensome, he or she may refuse to issue the subpoena or may issue it in a modified form upon such conditions as may be consistent with the Uniform Rules.

(b) *Motion to quash or modify.* (1) Any person to whom a document subpoena is directed may file a motion to quash or modify such subpoena, accompanied by a statement of the

basis for quashing or modifying the subpoena. The movant shall serve the motion on all parties, and any party may respond to such motion within ten days of service of the motion.

(2) Any motion to quash or modify a document subpoena must be filed on the same basis, including the assertion of privilege, upon which a party could object to a discovery request under § 308.25(d), and during the same time limits during which such an objection could be filed.

(c) *Enforcing document subpoenas.* If a subpoenaed person fails to comply with any subpoena issued pursuant to this section or any order of the administrative law judge which directs compliance with all or any portion of a document subpoena, the subpoenaing party or any other aggrieved party may, to the extent authorized by applicable law, apply to an appropriate United States district court for an order requiring compliance with so much of the document subpoena as the administrative law judge has not quashed or modified. A party's right to seek court enforcement of a document subpoena shall in no way limit the sanctions that may be imposed by the administrative law judge on a party who induces a failure to comply with subpoenas issued under this section.

§ 308.27 Deposition of witness unavailable for hearing.

(a) *General rules.* (1) If a witness will not be available for the hearing, a party desiring to preserve that witness' testimony for the record may apply in accordance with the procedures set forth in paragraph (a)(2) of this section, to the administrative law judge for the issuance of a subpoena, including a subpoena duces tecum, requiring the attendance

of the witness at a deposition. The administrative law judge may issue a deposition subpoena under this section upon showing that:

(i) The witness will be unable to attend or may be prevented from attending the hearing because of age, sickness or infirmity, or will otherwise be unavailable;

(ii) The witness' unavailability was not procured or caused by the subpoenaing party;

(iii) The testimony is reasonably expected to be material; and

(iv) Taking the deposition will not result in any undue burden to any other party and will not cause undue delay of the proceeding.

(2) The application must contain a proposed deposition subpoena and a brief statement of the reasons for the issuance of the subpoena. The subpoena must name the witness whose deposition is to be taken and specify the time and place for taking the deposition. A deposition subpoena may require the witness to be deposed at any place within the country in which that witness resides or has a regular place of employment or such other convenient place as the administrative law judge shall fix.

(3) Any requested subpoena that sets forth a valid basis for its issuance must be promptly issued, unless the administrative law judge on his or her own motion, requires a written response or requires attendance at a conference concerning whether the requested subpoena should be issued.

(4) The party obtaining a deposition subpoena is responsible for serving it on the witness and for serving copies on all parties. Unless the administrative law judge orders otherwise, no deposition under this section shall be taken on fewer than ten days' notice to the witness and all parties. Deposition subpoenas may be served in any state, territory, possession of the United States, or the District of Columbia, on any person or company

doing business in any state, territory, possession of the United States, or the District of Columbia, or as otherwise permitted by law.

(b) *Objections to deposition subpoenas.* (1) The witness and any party who has not had an opportunity to oppose a deposition subpoena issued under this section may file a motion with the administrative law judge to quash or modify the subpoena prior to the time for compliance specified in the subpoena, but not more than ten days after service of the subpoena.

(2) A statement of the basis for the motion to quash or modify a subpoena issued under this section must accompany the motion. The motion must be served on all parties.

(c) *Procedure upon deposition.* (1) Each witness testifying pursuant to a deposition subpoena must be duly sworn, and each party shall have the right to examine the witness. Objections to questions or documents must be in short form, stating the grounds for the objection. Failure to object to questions or documents is not deemed a waiver except where the ground for the objection might have been avoided if the objection had been timely presented. All questions, answers, and objections must be recorded.

(2) Any party may move before the administrative law judge for an order compelling the witness to answer any questions the witness has refused to answer or submit any evidence the witness has refused to submit during the deposition.

(3) The deposition must be subscribed by the witness, unless the parties and the witness, by stipulation, have waived the signing, or the witness is ill, cannot be found, or has refused to sign. If the deposition is not subscribed by the witness, the court reporter taking the deposition shall certify that the transcript is a true and complete transcript of the deposition.

(d) *Enforcing subpoenas.* If a subpoenaed person fails to comply with any order of the administrative law judge which directs compliance with all or any portion of a deposition subpoena under paragraph (b) or (c)(3) of this section, the subpoenaing party or other aggrieved party may, to the extent authorized by applicable law, apply to an appropriate United States district court for an order requiring compliance with the portions of the subpoena that the administrative law judge has ordered enforced. A party's right to seek court enforcement of a deposition subpoena in no way limits the sanctions that may be imposed by the administrative law judge on a party who fails to comply with, or procures a failure to comply with, a subpoena issued under this section.

§ 308.28 Interlocutory review.

(a) *General rule.* The Board of Directors may review a ruling of the administrative law judge prior to the certification of the record to the Board of Directors only in accordance with the procedures set forth in this section and § 308.23.

(b) *Scope of review.* The Board of Directors may exercise interlocutory review of a ruling of, the administrative law judge if the Board of Directors finds that:

(1) The ruling involves a controlling question of law or policy as to which substantial grounds exist for a difference of opinion;

(2) Immediate review of the ruling may materially advance the ultimate termination of the proceeding;

(3) Subsequent modification of the ruling at the conclusion of the proceeding would be an inadequate remedy; or

(4) Subsequent modification of the ruling would cause unusual delay or expense.

(c) *Procedure.* Any request for interlocutory review shall be filed by a party with the administrative law judge within ten days of his or her ruling and shall otherwise comply with § 308.23. Any party may file a response to a request for interlocutory review in accordance with § 308.23(d). Upon the expiration of the time for filing all responses, the administrative law judge shall refer the matter to the Board of Directors for final disposition.

(d) *Suspension of proceeding.* Neither a request for interlocutory review nor any disposition of such a request by the Board of Directors under this section suspends or stays the proceeding unless otherwise ordered by the administrative law judge or the Board of Directors.

§ 308.29 Summary disposition.

(a) *In general.* The administrative law judge shall recommend that the Board of Directors issue a final order granting a motion for summary disposition if the undisputed pleaded facts, admissions, affidavits, stipulations, documentary evidence, matters as to which official notice may be taken, and any other evidentiary materials properly submitted in connection with a motion for summary disposition show that:

(1) There is no genuine issue as to any material fact; and

(2) The moving party is entitled to a decision in its favor as a matter of law.

(b) *Filing of motions and responses.* (1) Any party who believes that there is no genuine issue of material fact to be determined and that he or she is entitled to a decision as a matter of law may move at any time for summary disposition in its favor of all or any part of the proceeding. Any party, within 20 days after service of such a motion, or within

such time period as allowed by the administrative law judge, may file a response to such motion.

(2) A motion for summary disposition must be accompanied by a statement of the material facts as to which the moving party contends there is no genuine issue. Such motion must be supported by documentary evidence, which may take the form of admissions in pleadings, stipulations, depositions, investigatory depositions, transcripts, affidavits and any other evidentiary materials that the moving party contends support his or her position. The motion must also be accompanied by a brief containing the points and authorities in support of the contention of the moving party. Any party opposing a motion for summary disposition must file a statement setting forth those material facts as to which he or she contends a genuine dispute exists. Such opposition must be supported by evidence of the same type as that submitted with the motion for summary disposition and a brief containing the points and authorities in support of the contention that summary disposition would be inappropriate.

(c) *Hearing on motion.* At the request of any party or on his or her own motion, the administrative law judge may hear oral argument on the motion for summary disposition.

(d) *Decision on motion.* Following receipt of a motion for summary disposition and all responses thereto, the administrative law judge shall determine whether the moving party is entitled to summary disposition. If the administrative law judge determines that summary disposition is warranted, the administrative law judge shall submit a recommended decision to that effect to the Board of Directors. If the administrative law judge finds that no party is entitled to summary disposition, he or she shall make a ruling denying the motion.

§ 308.30 Partial summary disposition.

If the administrative law judge determines that a party is entitled to summary disposition as to certain claims only, he or she shall defer submitting a recommended decision as to those claims. A hearing on the remaining issues must be ordered. Those claims for which the administrative law judge has determined that summary disposition is warranted will be addressed in the recommended decision filed at the conclusion of the hearing.

§ 308.31 Scheduling and prehearing conferences.

(a) *Scheduling conference.* Within 30 days of service of the notice or order commencing a proceeding or such other time as parties may agree, the administrative law judge shall direct counsel for all parties to meet with him or her in person at a specified time and place prior to the hearing or to confer by telephone for the purpose of scheduling the course and conduct of the proceeding. This meeting or telephone conference is called a "scheduling conference." The identification of potential witnesses, the time for and manner of discovery, and the exchange of any prehearing materials including witness lists, statements of issues, stipulations, exhibits and any other materials may also be determined at the scheduling conference.

(b) *Prehearing conferences.* The administrative law judge may, in addition to the scheduling conference, on his or her own motion or at the request of any party, direct counsel for the parties to meet with him or her (in person or by telephone) at a prehearing conference to address any or all of the following:

(1) Simplification and clarification of the issues;

(2) Stipulations, admissions of fact, and the contents, authenticity and admissibility into evidence of documents;

(3) Matters of which official notice may be taken;

(4) Limitation of the number of witnesses;

(5) Summary disposition of any or all issues;

(6) Resolution of discovery issues or disputes;

(7) Amendments to pleadings; and

(8) Such other matters as may aid in the orderly disposition of the proceeding.

(c) *Transcript.* The administrative law judge, in his or her discretion, may require that a scheduling or prehearing conference be recorded by a court reporter. A transcript of the conference and any materials filed, including orders, becomes part of the record of the proceeding. A party may obtain a copy of the transcript at his or her expense.

(d) *Scheduling or prehearing orders.* At or within a reasonable time following the conclusion of the scheduling conference or any prehearing conference, the administrative law judge shall serve on each party an order setting forth any agreements reached and any procedural determinations made.

§ 308.32 Prehearing submissions.

(a) Within the time set by the administrative law judge, but in no case later than 14 days before the start of the hearing, each party shall serve on every other party, his or her:

(1) Prehearing statement;

(2) Final list of witnesses to be called to testify at the hearing, including name and address of each witness and a short summary of the expected testimony of each witness;

(3) List of the exhibits to be introduced at the hearing along with a copy of each exhibit; and

(4) Stipulations of fact, if any.

(b) Effect of failure to comply. No witness may testify and no exhibits may be introduced at the hearing if such witness or exhibit is not listed in the prehearing submissions pursuant to paragraph (a) of this section, except for good cause shown.

§ 308.33 Public hearings.

(a) *General rule.* All hearings shall be open to the public, unless the FDIC, in its discretion, determines that holding an open hearing would be contrary to the public interest. Within 20 days of service of the notice or, in the case of change-in-control proceedings under section 7(j)(4) of the FDIA (12 U.S.C. 1817(j)(4)), within 20 days from service of the hearing order, any respondent may file with the Administrative Officer a request for a private hearing, and any party may file a reply to such a request. A party must serve on the administrative law judge a copy of any request or reply the party files with the Administrative Officer. The form of, and procedure for, these requests and replies are governed by § 308.23. A party's failure to file a request or a reply constitutes a waiver of any objections regarding whether the hearing will be public or private.

(b) *Filing document under seal.* Enforcement Counsel, in his or her discretion, may file any document or part of a document under seal if disclosure of the document would be contrary to the public interest. The administrative law judge shall take all appropriate steps to preserve the confidentiality of such documents or parts thereof, including closing portions of the hearing to the public.

§ 308.34 Hearing subpoenas.

(a) *Issuance.* (1) Upon application of a party showing general relevance and reasonableness of scope of the testimony or other evidence sought, the administrative law judge may issue a subpoena or a subpoena *duces tecum* requiring the attendance of a

witness at the hearing or the production of documentary or physical evidence at the hearing. The application for a hearing subpoena must also contain a proposed subpoena specifying the attendance of a witness or the production of evidence from any state, territory, or possession of the United States, the District of Columbia, or as otherwise provided by law at any designated place where the hearing is being conducted. The party making the application shall serve a copy of the application and the proposed subpoena on every other party.

(2) A party may apply for a hearing subpoena at any time before the commencement of a hearing. During a hearing, a party may make an application for a subpoena orally on the record before the administrative law judge.

(3) The administrative law judge shall promptly issue any hearing subpoena requested pursuant to this section. If the administrative law judge determines that the application does not set forth a valid basis for the issuance of the subpoena, or that any of its terms are unreasonable, oppressive, excessive in scope, or unduly burdensome, he or she may refuse to issue the subpoena or may issue it in a modified form upon any conditions consistent with this subpart. Upon issuance by the administrative law judge, the party making the application shall serve the subpoena on the person named in the subpoena and on each party.

(b) *Motion to quash or modify.* (1) Any person to whom a hearing subpoena is directed or any party may file a motion to quash or modify the subpoena, accompanied by a statement of the basis for quashing or modifying the subpoena. The movant must serve the motion on each party and on the person named in the subpoena. Any party may respond to the motion within ten days of service of the motion.

(2) Any motion to quash or modify a hearing subpoena must be filed prior to the time specified in the subpoena for compliance, but not more than ten days after the date of service of the subpoena upon the movant.

(c) *Enforcing subpoenas.* If a subpoenaed person fails to comply with any subpoena issued pursuant to this section or any order of the administrative law judge which directs compliance with all or any portion of a document subpoena, the subpoenaing party or any other aggrieved party may seek enforcement of the subpoena pursuant to § 308.26(c).

§ 308.35 Conduct of hearings.

(a) *General rules.* (1) Hearings shall be conducted so as to provide a fair and expeditious presentation of the relevant disputed issues. Each party has the right to present its case or defense by oral and documentary evidence and to conduct such cross examination as may be required for full disclosure of the facts.

(2) *Order of hearing.* Enforcement Counsel shall present its case-in-chief first, unless otherwise ordered by the administrative law judge, or unless otherwise expressly specified by law or regulation. Enforcement Counsel shall be the first party to present an opening statement and a closing statement, and may make a rebuttal statement after the respondent's closing statement. If there are multiple respondents, respondents may agree among themselves as to their order of presentation of their cases, but if they do not agree the administrative law judge shall fix the order.

(3) *Examination of witnesses.* Only one counsel for each party may conduct an examination of a witness, except that in the case of extensive direct examination, the administrative law judge may permit more than one counsel for the party presenting the witness to conduct the examination. A party may have one counsel conduct the direct

examination and another counsel conduct re-direct examination of a witness, or may have one counsel conduct the cross examination of a witness and another counsel conduct the re-cross examination of a witness.

(4) *Stipulations.* Unless the administrative law judge directs otherwise, all stipulations of fact and law previously agreed upon by the parties, and all documents, the admissibility of which have been previously stipulated, will be admitted into evidence upon commencement of the hearing.

(b) *Transcript.* The hearing must be recorded and transcribed. The reporter will make the transcript available to any party upon payment by that party to the reporter of the cost of the transcript. The administrative law judge may order the record corrected, either upon motion to correct, upon stipulation of the parties, or following notice to the parties upon the administrative law judge's own motion.

§ 308.36 Evidence.

(a) *Admissibility.* (1) Except as is otherwise set forth in this section, relevant, material, and reliable evidence that is not unduly repetitive is admissible to the fullest extent authorized by the Administrative Procedure Act and other applicable law.

(2) Evidence that would be admissible under the Federal Rules of Evidence is admissible in a proceeding conducted pursuant to this subpart.

(3) Evidence that would be inadmissible under the Federal Rules of Evidence may not be deemed or ruled to be inadmissible in a proceeding conducted pursuant to this subpart if such evidence is relevant, material, reliable and not unduly repetitive.

(b) *Official notice.* (1) Official notice may be taken of any material fact which may be judicially noticed by a United States district court and any material information in the official public records of any Federal or state government agency.

(2) All matters officially noticed by the administrative law judge or Board of Directors shall appear on the record.

(3) If official notice is requested or taken of any material fact, the parties, upon timely request, shall be afforded an opportunity to object.

(c) *Documents.* (1) A duplicate copy of a document is admissible to the same extent as the original, unless a genuine issue is raised as to whether the copy is in some material respect not a true and legible copy of the original.

(2) Subject to the requirements of paragraph (a) of this section, any document, including a report of examination, supervisory activity, inspection or visitation, prepared by an appropriate Federal financial institution regulatory agency or state regulatory agency, is admissible either with or without a sponsoring witness.

(3) Witnesses may use existing or newly created charts, exhibits, calendars, calculations, outlines or other graphic material to summarize, illustrate, or simplify the presentation of testimony. Such materials may, subject to the administrative law judge's discretion, be used with or without being admitted into evidence.

(d) *Objections.* (1) Objections to the admissibility of evidence must be timely made and rulings on all objections must appear on the record.

(2) When an objection to a question or line of questioning propounded to a witness is sustained, the examining counsel may make a specific proffer on the record of what he or

she expected to prove by the expected testimony of the witness, either by representation of counsel or by direct interrogation of the witness.

(3) The administrative law judge shall retain rejected exhibits, adequately marked for identification, for the record, and transmit such exhibits to the Board of Directors.

(4) Failure to object to admission of evidence or to any ruling constitutes a waiver of the objection.

(e) *Stipulations.* The parties may stipulate as to any relevant matters of fact or the authentication of any relevant documents. Such stipulations must be received in evidence at a hearing, and are binding on the parties with respect to the matters therein stipulated.

(f) *Depositions of unavailable witnesses.* (1) If a witness is unavailable to testify at a hearing, and that witness has testified in a deposition to which all parties in a proceeding had notice and an opportunity to participate, a party may offer as evidence all or any part of the transcript of the deposition, including deposition exhibits, if any.

(2) Such deposition transcript is admissible to the same extent that testimony would have been admissible had that person testified at the hearing, provided that if a witness refused to answer proper questions during the depositions, the administrative law judge may, on that basis, limit the admissibility of the deposition in any manner that justice requires.

(3) Only those portions of a deposition received in evidence at the hearing constitute a part of the record.

§ 308.37 Post-hearing filings.

(a) *Proposed findings and conclusions and supporting briefs.* (1) Using the same method of service for each party, the administrative law judge shall serve notice upon each party, that the certified transcript, together with all hearing exhibits and exhibits introduced but

not admitted into evidence at the hearing, has been filed. Any party may file with the administrative law judge proposed findings of fact, proposed conclusions of law, and a proposed order within 30 days following service of this notice by the administrative law judge or within such longer period as may be ordered by the administrative law judge.

(2) Proposed findings and conclusions must be supported by citation to any relevant authorities and by page references to any relevant portions of the record. A post-hearing brief may be filed in support of proposed findings and conclusions, either as part of the same document or in a separate document. Any party who fails to file timely with the administrative law judge any proposed finding or conclusion is deemed to have waived the right to raise in any subsequent filing or submission any issue not addressed in such party's proposed finding or conclusion.

(b) *Reply briefs.* Reply briefs may be filed within 15 days after the date on which the parties' proposed findings, conclusions, and order are due. Reply briefs must be strictly limited to responding to new matters, issues, or arguments raised in another party's papers. A party who has not filed proposed findings of fact and conclusions of law or a post-hearing brief may not file a reply brief.

(c) *Simultaneous filing required.* The administrative law judge shall not order the filing by any party of any brief or reply brief in advance of the other party's filing of its brief.

§ 308.38 Recommended decision and filing of record.

(a) *Filing of recommended decision and record.* Within 45 days after expiration of the time allowed for filing reply briefs under § 308.37(b), the administrative law judge shall file with and certify to the Administrative Officer, for decision, the record of the proceeding. The record must include the administrative law judge's recommended

decision, recommended findings of fact, recommended conclusions of law, and proposed order; all prehearing and hearing transcripts, exhibits, and rulings; and the motions, briefs, memoranda, and other supporting papers filed in connection with the hearing. The administrative law judge shall serve upon each party the recommended decision, findings, conclusions, and proposed order.

(b) *Filing of index.* At the same time the administrative law judge files with and certifies to the Administrative Officer for final determination the record of the proceeding, the administrative law judge shall furnish to the Administrative Officer a certified index of the entire record of the proceeding. The certified index shall include, at a minimum, an entry for each paper, document or motion filed with the administrative law judge in the proceeding, the date of the filing, and the identity of the filer. The certified index shall also include an exhibit index containing, at a minimum, an entry consisting of exhibit number and title or description for: Each exhibit introduced and admitted into evidence at the hearing; each exhibit introduced but not admitted into evidence at the hearing; each exhibit introduced and admitted into evidence after the completion of the hearing; and each exhibit introduced but not admitted into evidence after the completion of the hearing.

§ 308.39 Exceptions to recommended decision.

(a) *Filing exceptions.* Within 30 days after service of the recommended decision, findings, conclusions, and proposed order under § 308.38, a party may file with the Administrative Officer written exceptions to the administrative law judge's recommended decision, findings, conclusions, or proposed order, to the admission or exclusion of evidence, or to the failure of the administrative law judge to make a ruling proposed by a

party. A supporting brief may be filed at the time the exceptions are filed, either as part of the same document or in a separate document.

(b) *Effect of failure to file or raise exceptions.* (1) Failure of a party to file exceptions to those matters specified in paragraph (a) of this section within the time prescribed is deemed a waiver of objection thereto.

(2) No exception need be considered by the Board of Directors if the party taking exception had an opportunity to raise the same objection, issue, or argument before the administrative law judge and failed to do so.

(c) *Contents.* (1) All exceptions and briefs in support of such exceptions must be confined to the particular matters in, or omissions from, the administrative law judge's recommendations to which that party takes exception.

(2) All exceptions and briefs in support of exceptions must set forth page or paragraph references to the specific parts of the administrative law judge's recommendations to which exception is taken, the page or paragraph references to those portions of the record relied upon to support each exception, and the legal authority relied upon to support each exception.

§ 308.40 Review by Board of Directors.

(a) *Notice of submission to Board of Directors.* When the Administrative Officer determines that the record in the proceeding is complete, the Administrative Officer shall serve notice upon the parties that the proceeding has been submitted to the Board of Directors for final decision.

(b) *Oral argument before the Board of Directors.* Upon the initiative of the Board of Directors or on the written request of any party filed with the Administrative Officer

within the time for filing exceptions, the Board of Directors may order and hear oral argument on the recommended findings, conclusions, decision, and order of the administrative law judge. A written request by a party must show good cause for oral argument and state reasons why arguments cannot be presented adequately in writing. A denial of a request for oral argument may be set forth in the Board of Directors' final decision. Oral argument before the Board of Directors must be on the record.

(c) *Final decision.* (1) Decisional employees may advise and assist the Board of Directors in the consideration and disposition of the case. The final decision of the Board of Directors will be based upon review of the entire record of the proceeding, except that the Board of Directors may limit the issues to be reviewed to those findings and conclusions to which opposing arguments or exceptions have been filed by the parties.

(2) The Board of Directors shall render a final decision within 90 days after notification of the parties that the case has been submitted for final decision, or 90 days after oral argument, whichever is later, unless the Board of Directors orders that the action or any aspect thereof be remanded to the administrative law judge for further proceedings. Copies of the final decision and order of the Board of Directors shall be served upon each party to the proceeding, upon other persons required by statute, and, if directed by the Board of Directors or required by statute, upon any appropriate state or Federal supervisory authority.

§ 308.41 Stays pending judicial review.

The commencement of proceedings for judicial review of a final decision and order of the FDIC may not, unless specifically ordered by the Board of Directors or a reviewing court, operate as a stay of any order issued by the FDIC. The Board of Directors may, in its

discretion, and on such terms as it finds just, stay the effectiveness of all or any part of its order pending a final decision on a petition for review of that order.

Subpart B – General Rules of Procedure.

§ 308.101 Scope of Local Rules.

(a) Subparts B and C of the Local Rules prescribe rules of practice and procedure to be followed in the administrative enforcement proceedings initiated by the FDIC as set forth in § 308.1 of the Uniform Rules.

(b) Except as otherwise specifically provided, the Uniform Rules and subpart B of the Local Rules shall not apply to subparts D through T of the Local Rules.

(c) Subpart C of the Local Rules shall apply to any administrative proceeding initiated by the FDIC.

(d) Subparts A, B, and C of this part prescribe the rules of practice and procedure to applicable to adjudicatory proceedings as to which hearings on the record are provided for by the assessment of civil money penalties by the FDIC against institutions, institution-affiliated parties, and certain other persons for which it is the appropriate regulatory agency for any violation of section 15(c)(4) of the Exchange Act (15 U.S.C. 78o(c)(4)).

§ 308.102 Authority of Board of Directors and Administrative Officer.

(a) *The Board of Directors.* (1) The Board of Directors may, at any time during the pendency of a proceeding, perform, direct the performance of, or waive performance of, any act which could be done or ordered by the Administrative Officer.

(2) Nothing contained in this part shall be construed to limit the power of the Board of Directors granted by applicable statutes or regulations.

(b) *The Administrative Officer.* (1) When no administrative law judge has jurisdiction over a proceeding, the Administrative Officer may act in place of, and with the same authority as, an administrative law judge, except that the Administrative Officer may not hear a case on the merits or make a recommended decision on the merits to the Board of Directors.

(2) Pursuant to authority delegated by the Board of Directors, the Administrative Officer and Assistant Administrative Officer, upon the advice and recommendation of the Deputy General Counsel for Litigation or, in his absence, the Assistant General Counsel for General Litigation, may issue rulings in proceedings under sections 7(j), 8, 18(j), 19, 32 and 38 of the FDIA (12 U.S.C. 1817(j), 1818, 1828(j), 1829, 1831i and 1831*o*) concerning:

(i) Denials of requests for private hearing;

(ii) Interlocutory appeals;

(iii) Stays pending judicial review;

(iv) Reopenings of the record and/or remands of the record to the ALJ;

(v) Supplementation of the evidence in the record;

(vi) All remands from the courts of appeals not involving substantive issues;

(vii) Extensions of stays of orders terminating deposit insurance; and

(viii) All matters, including final decisions, in proceedings under section 8(g) of the FDIA (12 U.S.C. 1818(g)).

§ 308.103 Appointment of administrative law judge.

(a) *Appointment.* Unless otherwise directed by the Board of Directors or as otherwise provided in the Local Rules, a hearing within the scope of this part 308 shall be held

before an administrative law judge of the Office of Financial Institution Adjudication ("OFIA").

(b) *Procedures.* (1) The Enforcement Counsel shall promptly after issuance of the notice file the matter with the Office of Financial Institution Adjudication ("OFIA") which shall secure the appointment of an administrative law judge to hear the proceeding.

(2) OFIA shall advise the parties, in writing, that an administrative law judge has been appointed.

§ 308.104 Filings with the Board of Directors.

(a) *General rule.* All materials required to be filed with or referred to the Board of Directors in any proceedings under this part shall be filed with the Administrative Officer, Federal Deposit Insurance Corporation, 550 17th Street NW, Washington, DC 20429.

(b) *Scope.* Filings to be made with the Administrative Officer include pleadings and motions filed during the proceeding; the record filed by the administrative law judge after the issuance of a recommended decision; the recommended decision filed by the administrative law judge following a motion for summary disposition; referrals by the administrative law judge of motions for interlocutory review; motions and responses to motions filed by the parties after the record has been certified to the Board of Directors; exceptions and requests for oral argument; and any other papers required to be filed with the Board of Directors under this part.

§ 308.105 Custodian of the record.

The Administrative Officer is the official custodian of the record when no administrative law judge has jurisdiction over the proceeding. As the official custodian, the

Administrative Officer shall maintain the official record of all papers filed in each proceeding.

§ 308.106 Written testimony in lieu of oral hearing.

(a) *General rule.* (1) At any time more than fifteen days before the hearing is to commence, on the motion of any party or on his or her own motion, the administrative law judge may order that the parties present part or all of their case-in-chief and, if ordered, their rebuttal, in the form of exhibits and written statements sworn to by the witness offering such statements as evidence, provided that if any party objects, the administrative law judge shall not require such a format if that format would violate the objecting party's right under the Administrative Procedure Act, or other applicable law, or would otherwise unfairly prejudice that party.

(2) Any such order shall provide that each party shall, upon request, have the same right of oral cross-examination (or redirect examination) as would exist had the witness testified orally rather than through a written statement. Such order shall also provide that any party has a right to call any hostile witness or adverse party to testify orally.

(b) *Scheduling of submission of written testimony.* (1) If written direct testimony and exhibits are ordered under paragraph (a) of this section, the administrative law judge shall require that it be filed within the time period for commencement of the hearing, and the hearing shall be deemed to have commenced on the day such testimony is due.

(2) Absent good cause shown, written rebuttal, if any, shall be submitted and the oral portion of the hearing begun within 30 days of the date set for filing written direct testimony.

(3) The administrative law judge shall direct, unless good cause requires otherwise, that -

(i) All parties shall simultaneously file any exhibits and written direct testimony required under paragraph (b)(1) of this section; and

(ii) All parties shall simultaneously file any exhibits and written rebuttal required under paragraph (b)(2) of this section.

(c) *Failure to comply with order to file written testimony.* (1) The failure of any party to comply with an order to file written testimony or exhibits at the time and in the manner required under this section shall be deemed a waiver of that party's right to present any evidence, except testimony of a previously identified adverse party or hostile witness. Failure to file written testimony or exhibits is, however, not a waiver of that party's right of cross-examination or a waiver of the right to present rebuttal evidence that was not required to be submitted in written form.

(2) Late filings of papers under this section may be allowed and accepted only upon good cause shown.

§ 308.107 Document discovery.

(a) Parties to proceedings set forth at § 308.1 of the Uniform Rules and as provided in the Local Rules may obtain discovery only through the production of documents. No other form of discovery shall be allowed.

(b) Any questioning at a deposition of a person producing documents pursuant to a document subpoena shall be strictly limited to the identification of documents produced by that person and a reasonable examination to determine whether the subpoenaed person made an adequate search for, and has produced, all subpoenaed documents.

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Part 747

Authority and Issuance

For the reasons set out in the joint preamble, the NCUA amends 12 CFR part 747 as follows:

PART 747 – ADMINISTRATIVE ACTIONS, ADJUDICATIVE HEARINGS, RULES OF PRACTICE AND PROCEDURE, AND INVESTIGATIONS

26. The authority citation for part 747 continues to read as follows:

Authority: 12 U.S.C. 1766, 1782, 1784, 1785, 1786, 1787, 1790a, 1790d; 15 U.S.C. 1639e; 42 U.S.C. 4012a; Pub. L. 101-410; Pub. L. 104-134; Pub. L. 109-351; Pub. L. 114-74.22.

27. Revise 747.0 to read as follows:

§ 747.0 Scope of this part.

(a) This part describes the various formal and informal adjudicative actions and non-adjudicative proceedings available to the National Credit Union Administration Board (NCUA Board), the grounds for those actions and proceedings, and the procedures used in formal and informal hearings related to each available action. As mandated by section 916 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (12 U.S.C. 1818 note) (FIRREA), this part incorporates uniform rules of practice and procedure (Uniform Rules), which govern formal adjudications generally, as well as proceedings involving cease-and-desist actions, assessment of civil money penalties, and removal, prohibition and suspension actions. In addition, the Uniform Rules are incorporated in other subparts of this part that provide for formal adjudications. The administrative actions and proceedings described in this section, as well as the grounds and hearing procedures for each, are controlled by sections 120(b) (except where the

Federal credit union is closed due to insolvency), 202(a)(3), and 206 of the Federal Credit Union Act (the Act), 12 U.S.C. 1766(b), 1782(a)(3), and 1786. Should any provision of this part be inconsistent with these or any other provisions of the Act, as amended, the Act shall control. Judicial enforcement of any action or order described in this part, as well as judicial review thereof, shall be as prescribed under the Act (12 U.S.C. 1751 *et seq.*) and the Administrative Procedure Act (5 U.S.C. 500 *et seq.*).

(b) As used in this part, the term "insured credit union" means any Federal credit union or any State-chartered credit union insured under subchapter II of the Act, unless the context indicates otherwise.

(c) The Uniform Rules in subpart A apply to adjudicatory proceedings initiated on or after January 1, 2024. Any adjudicatory proceedings initiated before January 1, 2024, continue to be governed by the previous version of the Uniform Rules in 12 CFR part 747, subpart A.

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28. Subpart A is revised to read as follows:

PART 747 – ADMINISTRATIVE ACTIONS, ADJUDICATIVE HEARINGS, RULES OF PRACTICE AND PROCEDURE, AND INVESTIGATIONS

747.0 Scope of part 747.

Subpart A – Uniform Rules of Practice and Procedure

Sec.

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747.39 Exceptions to recommended decision.
747.40 Review by the NCUA Board.
747.41 Stays pending judicial review.

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Subpart A—Uniform Rules of Practice and Procedure

§ 747.1 Scope.

This subpart prescribes uniform rules of practice and procedure applicable to adjudicatory proceedings required to be conducted on the record after opportunity for a hearing under the following statutory provisions:

(a) Cease-and-desist proceedings under section 206(e) of the Act (12 U.S.C. 1786(e));

(b) Removal and prohibition proceedings under section 206(g) of the Act (12 U.S.C. 1786(g));

(c) Assessment of civil money penalties by the NCUA Board against institutions and institution-affiliated parties for any violation of:

(1) Section 202 of the Act (12 U.S.C. 1782);

(2) Section 1120 of FIRREA (12 U.S.C. 3349), or any order or regulation issued thereunder;

(3) The terms of any final or temporary order issued under section 206 of the Act or any written agreement executed by the National Credit Union Administration ("NCUA"), any condition imposed in writing by the NCUA in connection with any action on any application, notice, or other request by the credit union or institution-affiliated party, certain unsafe or unsound practices or breaches of fiduciary duty, or any law or regulation not otherwise provided in this section, pursuant to 12 U.S.C. 1786(k);

(4) Any provision of law referenced in section 102(f) of the Flood Disaster Protection Act of 1973 (42 U.S.C. 4012a(f)) or any order or regulation issued thereunder;

(d) Remedial action under section 102(g) of the Flood Disaster Protection Act of 1973 (42 U.S.C. 4012a(g)); and

(e) This subpart also applies to all other adjudications required by statute to be

determined on the record after opportunity for an agency hearing, unless otherwise specifically provided for in subparts B through J of this part.

§ 747.2 Rules of construction.

For purposes of this part:

(a) Any term in the singular includes the plural, and the plural includes the singular, if such use would be appropriate;

(b) The term *counsel* includes a non-attorney representative; and

(c) Unless the context requires otherwise, a party's counsel of record, if any, may, on behalf of that party, take any action required to be taken by the party.

§ 747.3 Definitions.

For purposes of this part, unless explicitly stated to the contrary:

(a) *Administrative Law Judge (ALJ)* means one who presides at an administrative hearing under authority set forth at 5 U.S.C. 556.

(b) *Adjudicatory proceeding* means a proceeding conducted pursuant to these rules and leading to the formulation of a final order other than a regulation.

(c) *Decisional employee* means any member of the NCUA Board's or ALJ's staff who has not engaged in an investigative or prosecutorial role in a proceeding and who may assist the NCUA Board or the ALJ, respectively, in preparing orders, recommended decisions, decisions, and other documents under the Uniform Rules.

(d) *Electronic signature* means affixing the equivalent of a signature to an electronic document filed or transmitted electronically.

(e) *Enforcement Counsel* means any individual who files a notice of appearance as counsel on behalf of the NCUA in an adjudicatory proceeding.

(f) *Final order* means an order issued by the NCUA with or without the consent of the affected institution or the institution-affiliated party, that has become final, without regard to the pendency of any petition for reconsideration or review.

(g) *Institution* includes:

(1) Any Federal credit union as that term is defined in section 101(1) of the Act (12 U.S.C. 1752(1)); and

(2) Any insured State-chartered credit union as that term is defined in section 101(7) of the FCUA (12 U.S.C. 1752(7)).

(h) *Institution-affiliated party* means any institution-affiliated party as that term is defined in section 206(r) of the Act (12 U.S.C. 1786(r)).

(i) *Local Rules* means those rules promulgated by the NCUA in subparts B through I of this part.

(j) *NCUA* means the National Credit Union Administration.

(k) *NCUA Board* means the National Credit Union Administration Board or a person delegated to perform the functions of the NCUA Board.

(l) *OFIA* means the Office of Financial Institution Adjudication, the executive body charged with overseeing the administration of administrative enforcement proceedings for the NCUA, the Board of Governors of the Federal Reserve System (Board of Governors), the Federal Deposit Insurance Corporation (FDIC), and the Office of the Comptroller of the Currency (OCC).

(m) *Party* means the NCUA and any person named as a party in any notice.

(n) *Person* means an individual, sole proprietor, partnership, corporation, unincorporated association, trust, joint venture, pool, syndicate, agency, or other entity or

organization, including an institution as defined in paragraph (g) of this section.

(o) *Respondent* means any party other than the NCUA.

(p) *Uniform Rules* means those rules in this subpart that are common to the NCUA, the Board of Governors, the FDIC, and the OCC.

(q) *Violation* means any violation as that term is defined in section 3(v) of the Federal Deposit Insurance Act (12 U.S.C. 1813(v)).

§ 747.4 Authority of the NCUA Board.

The NCUA Board may, at any time during the pendency of a proceeding, perform, direct the performance of, or waive performance of, any act which could be done or ordered by the ALJ.

§ 747.5 Authority of the administrative law judge (ALJ).

(a) *General rule*. All proceedings governed by this part must be conducted in accordance with the provisions of 5 U.S.C. chapter 5. The ALJ has all powers necessary to conduct a proceeding in a fair and impartial manner and to avoid unnecessary delay.

(b) *Powers*. The ALJ has all powers necessary to conduct the proceeding in accordance with paragraph (a) of this section, including the following powers:

(1) To administer oaths and affirmations;

(2) To issue subpoenas, subpoenas *duces tecum*, protective orders, and other orders, as authorized by this part, and to quash or modify any such subpoenas and orders;

(3) To receive relevant evidence and to rule upon the admission of evidence and offers of proof;

(4) To take or cause depositions to be taken as authorized by this subpart;

(5) To regulate the course of the hearing and the conduct of the parties and their counsel;

(6) To hold scheduling and/or pre-hearing conferences as set forth in § 747.31;

(7) To consider and rule upon all procedural and other motions appropriate in an adjudicatory proceeding, provided that only the NCUA Board has the power to grant any motion to dismiss the proceeding or to decide any other motion that results in a final determination of the merits of the proceeding;

(8) To prepare and present to the NCUA Board a recommended decision as provided in this subpart;

(9) To recuse oneself by motion made by a party or on the ALJ's own motion;

(10) To establish time, place and manner limitations on the attendance of the public and the media for any public hearing; and

(11) To do all other things necessary and appropriate to discharge the duties of an ALJ.

§ 747.6 Appearance and practice in adjudicatory proceedings.

(a) *Appearance before the NCUA or an ALJ*—(1) *By attorneys*. Any member in good standing of the bar of the highest court of any state, commonwealth, possession, territory of the United States, or the District of Columbia may represent others before the NCUA if such attorney is not currently suspended or debarred from practice before the NCUA.

(2) *By non-attorneys*. An individual may appear on the individual's own behalf.

(3) *Notice of appearance*. (i) Any individual acting on the individual's own behalf or as counsel on behalf of a party, including the NCUA Board, must file a notice of

appearance with OFIA at or before the time that the individual submits papers or otherwise appears on behalf of a party in the adjudicatory proceeding. The notice of appearance must include:

(A) A written declaration that the individual is currently qualified as provided in paragraph (a)(1) or (2) of this section and is authorized to represent the particular party; and

(B) A written acknowledgement that the individual has reviewed and will comply with the Uniform Rules and Local Rules in this part 747.

(ii) By filing a notice of appearance on behalf of a party in an adjudicatory proceeding, the counsel agrees and represents that the counsel is authorized to accept service on behalf of the represented party and that, in the event of withdrawal from representation, the counsel will, if required by the ALJ, continue to accept service until new counsel has filed a notice of appearance or until the represented party indicates that the party will proceed on a *pro se* basis.

(b) *Sanctions*. Dilatory, obstructionist, egregious, contemptuous or contumacious conduct at any phase of any adjudicatory proceeding may be grounds for exclusion or suspension of counsel from the proceeding.

§ 747.7 Good faith certification.

(a) *General requirement*. Every filing or submission of record following the issuance of a notice must be signed by at least one counsel of record in the counsel's individual name and must state that counsel's mailing address, electronic mail address, and telephone number. A party who acts as the party's own counsel must sign that person's individual name and state that person's mailing address, electronic mail address,

and telephone number on every filing or submission of record. Electronic signatures may be used to satisfy the signature requirements of this section.

(b) *Effect of signature*. (1) The signature of counsel or a party will constitute a certification: the counsel or party has read the filing or submission of record; to the best of the counsel's or party's knowledge, information, and belief formed after reasonable inquiry, the filing or submission of record is well-grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and the filing or submission of record is not made for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

(2) If a filing or submission of record is not signed, the ALJ will strike the filing or submission of record, unless it is signed promptly after the omission is called to the attention of the pleader or movant.

(c) *Effect of making oral motion or argument*. The act of making any oral motion or oral argument by any counsel or party constitutes a certification that to the best of the counsel's or party's knowledge, information, and belief formed after reasonable inquiry, the counsel's or party's statements are well-grounded in fact and are warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and are not made for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

§ 747.8 Conflicts of interest.

(a) *Conflict of interest in representation*. No person may appear as counsel for another person in an adjudicatory proceeding if it reasonably appears that such

representation may be materially limited by that counsel's responsibilities to a third person or by the counsel's own interests. The ALJ may take corrective measures at any stage of a proceeding to cure a conflict of interest in representation, including the issuance of an order limiting the scope of representation or disqualifying an individual from appearing in a representative capacity for the duration of the proceeding.

(b) *Certification and waiver*. If any person appearing as counsel represents two or more parties to an adjudicatory proceeding or also represents a non-party on a matter relevant to an issue in the proceeding, counsel must certify in writing at the time of filing the notice of appearance required by § 747.6(a):

(1) That the counsel has personally and fully discussed the possibility of conflicts of interest with each such party and non-party; and

(2) That each such party and non-party waives any right it might otherwise have had to assert any known conflicts of interest or to assert any non-material conflicts of interest during the course of the proceeding.

§ 747.9 Ex parte *communications.*

(a) Definition — (1) Ex parte communications. Ex parte communication means any material oral or written communication relevant to the merits of an adjudicatory proceeding that was neither on the record nor on reasonable prior notice to all parties that takes place between:

(i) An interested person outside the NCUA (including such person's counsel); and

(ii) The ALJ handling that proceeding, the NCUA Board, or a decisional employee.

(2) *Exception*. A request for status of the proceeding does not constitute an *ex parte* communication.

(b) *Prohibition of ex parte communications*. From the time the notice is issued by the NCUA Board until the date that the NCUA Board issues a final decision pursuant to § 747.40(c):

(1) An interested person outside the NCUA must not make or knowingly cause to be made an *ex parte* communication to the NCUA Board, the ALJ, or a decisional employee; and

(2) The NCUA Board, ALJ, or decisional employee may not make or knowingly cause to be made to any interested person outside the NCUA any *ex parte* communication.

(c) *Procedure upon occurrence of ex parte communication*. If an *ex parte* communication is received by the ALJ, the NCUA Board, or any other person identified in paragraph (a) of this section, that person will cause all such written communications (or, if the communication is oral, a memorandum stating the substance of the communication) to be placed on the record of the proceeding and served on all parties. All other parties to the proceeding may, within ten days of service of the *ex parte* communication, file responses thereto and to recommend any sanctions that they believe to be appropriate under the circumstances. The ALJ or the NCUA Board then determines whether any action should be taken concerning the *ex parte* communication in accordance with paragraph (d) of this section.

(d) *Sanctions*. Any party or counsel to a party who makes a prohibited *ex parte* communication, or who encourages or solicits another to make any such communication,

may be subject to any appropriate sanction or sanctions imposed by the NCUA Board or the ALJ including, but not limited to, exclusion from the proceedings and an adverse ruling on the issue which is the subject of the prohibited communication.

(e) *Separation of functions*—(1) *In general*. Except to the extent required for the disposition of *ex parte* matters as authorized by law, the ALJ may not:

(i) Consult a person or party on a fact in issue unless on notice and opportunity for all parties to participate; or

(ii) Be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for the NCUA.

(2) *Decision process*. An employee or agent engaged in the performance of investigative or prosecuting functions for the NCUA in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review of the recommended decision under § 747.40, except as witness or counsel in administrative or judicial proceedings.

§ 747.10 Filing of papers.

(a) *Filing*. Any papers required to be filed, excluding documents produced in response to a discovery request pursuant to §§ 747.25 and 747.26, must be filed with OFIA, except as otherwise provided.

(b) *Manner of filing*. Unless otherwise specified by the NCUA Board or the ALJ, filing may be accomplished by:

(1) Electronic mail or other electronic means designated by the NCUA Board or the ALJ;

(2) Personal service;

(3) Delivering the papers to a same day courier service or overnight delivery service; or

(4) Mailing the papers by first class, registered, or certified mail.

(c) *Formal requirements as to papers filed*—(1) *Form*. All papers filed must set forth the name, mailing address, electronic mail address, and telephone number of the counsel or party making the filing and must be accompanied by a certification setting forth when and how service has been made on all other parties. All papers filed must be double-spaced and printed or typewritten on an 8 1/2×11 inch page and must be clear and legible.

(2) *Signature*. All papers must be dated and signed as provided in § 747.7.

(3) *Caption*. All papers filed must include at the head thereof, or on a title page, the name of the NCUA and of the filing party, the title and docket number of the proceeding, and the subject of the particular paper.

§ 747.11 Service of papers.

(a) *By the parties*. Except as otherwise provided, a party filing papers must serve a copy upon the counsel of record for all other parties to the proceeding so represented, and upon any party not so represented.

(b) *Method of service*. Except as provided in paragraphs (c)(2) and (d) of this section, a serving party must use one of the following methods of service:

(1) Electronic mail or other electronic means;

(2) Personal service;

(3) Delivering the papers by same day courier service or overnight delivery service; or

(4) Mailing the papers by first class, registered, or certified mail.

(c) *By the NCUA Board or the ALJ*. (1) All papers required to be served by the NCUA Board or the ALJ upon a party who has appeared in the proceeding in accordance with § 747.6 will be served by electronic mail or other electronic means designated by the NCUA Board or ALJ.

(2) If a respondent has not appeared in the proceeding in accordance with § 747.6, the NCUA Board or the ALJ will serve the respondent by any of the following methods:

(i) By personal service;

(ii) If the person to be served is an individual, by delivery to a person of suitable age and discretion at the physical location where the individual resides or works;

(iii) If the person to be served is a corporation or other association, by delivery to an officer, managing or general agent, or to any other agent authorized by appointment or by law to receive service and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the respondent;

(iv) By registered or certified mail, delivery by a same day courier service, or by an overnight delivery service to the respondent's last known mailing address; or

(v) By any other method reasonably calculated to give actual notice.

(d) *Subpoenas*. Service of a subpoena may be made:

(1) By personal service;

(2) If the person to be served is an individual, by delivery to a person of suitable age and discretion at the physical location where the individual resides or works;

(3) If the person to be served is a corporation or other association, by delivery to an officer, managing or general agent, or to any other agent authorized by appointment or by law to receive service and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the party;

(4) By registered or certified mail, delivery by a same day courier service, or by an overnight delivery service to the person's last known mailing address; or

(5) By any other method reasonably calculated to give actual notice.

(e) *Area of service*. Service in any state, territory, possession of the United States, or the District of Columbia, on any person or company doing business in any state, territory, possession of the United States, or the District of Columbia, or on any person as otherwise provided by law, is effective without regard to the place where the hearing is held, provided that if service is made on a foreign bank in connection with an action or proceeding involving one or more of its branches or agencies located in any state, territory, possession of the United States, or the District of Columbia, service must be made on at least one branch or agency so involved.

§ 747.12 Construction of time limits.

(a) *General rule*. In computing any period of time prescribed by this subpart, the date of the act or event that commences the designated period of time is not included. The last day so computed is included unless it is a Saturday, Sunday, or Federal holiday. When the last day is a Saturday, Sunday, or Federal holiday, the period runs until the end of the next day that is not a Saturday, Sunday, or Federal holiday. Intermediate Saturdays, Sundays, and Federal holidays are included in the computation of time. However, when the time period within which an act is to be performed is ten days or less, not including

any additional time allowed for in paragraph (c) of this section, intermediate Saturdays, Sundays, and Federal holidays are not included.

(b) *When papers are deemed to be filed or served*. (1) Filing and service are deemed to be effective:

(i) In the case of transmission by electronic mail or other electronic means, upon transmittal by the serving party;

(ii) In the case of overnight delivery service or first class, registered, or certified mail, upon deposit in or delivery to an appropriate point of collection; or

(iii) In the case of personal service or same day courier delivery, upon actual service.

(2) The effective filing and service dates specified in paragraph (b)(1) of this section may be modified by the NCUA Board or ALJ in the case of filing or by agreement of the parties in the case of service.

(c) *Calculation of time for service and filing of responsive papers*. Whenever a time limit is measured by a prescribed period from the service of any notice or paper, the applicable time limits are calculated as follows:

(1) If service is made by electronic mail or other electronic means or by same day courier delivery, add one calendar day to the prescribed period;

(2) If service is made by overnight delivery service, add two calendar days to the prescribed period; or

(3) If service is made by first class, registered, or certified mail, add three calendar days to the prescribed period.

§ 747.13 Change of time limits.

Except as otherwise provided by law, the ALJ may, for good cause shown, extend the time limits prescribed by the Uniform Rules or by any notice or order issued in the proceedings. After the referral of the case to the NCUA Board pursuant to § 747.38, the NCUA Board may grant extensions of the time limits for good cause shown. Extensions may be granted at the motion of a party after notice and opportunity to respond is afforded all non-moving parties or on the NCUA Board's or the ALJ's own motion.

§ 747.14 Witness fees and expenses.

(a) *In general*. A witness, including an expert witness, who testifies at a deposition or hearing will be paid the same fees for attendance and mileage as are paid in the United States district courts in proceedings in which the United States is a party, except as provided in paragraph (b) of this section and unless otherwise waived.

(b) *Exception for testimony by a party*. In the case of testimony by a party, no witness fees or mileage need to be paid. The NCUA will not be required to pay any fees to, or expenses of, any witness not subpoenaed by the NCUA.

(c) *Timing of payment*. Fees and mileage in accordance with this paragraph (c) must be paid in advance by the party requesting the subpoena, except that fees and mileage need not be tendered in advance where the NCUA is the party requesting the subpoena.

§ 747.15 Opportunity for informal settlement.

Any respondent may, at any time in the proceeding, unilaterally submit to Enforcement Counsel written offers or proposals for settlement of a proceeding, without prejudice to the rights of any of the parties. Any such offer or proposal may only be made to Enforcement Counsel. Submission of a written settlement offer does not provide a

basis for adjourning or otherwise delaying all or any portion of a proceeding under this part. No settlement offer or proposal, or any subsequent negotiation or resolution, is admissible as evidence in any proceeding.

§ 747.16 The NCUA's right to conduct examination.

Nothing contained in this subpart limits in any manner the right of the NCUA to conduct any examination, inspection, or visitation of any institution or institution-affiliated party, or the right of the NCUA to conduct or continue any form of investigation authorized by law.

§ 747.17 Collateral attacks on adjudicatory proceeding.

If an interlocutory appeal or collateral attack is brought in any court concerning all or any part of an adjudicatory proceeding, the challenged adjudicatory proceeding will continue without regard to the pendency of that court proceeding. No default or other failure to act as directed in the adjudicatory proceeding within the times prescribed in this subpart will be excused based on the pendency before any court of any interlocutory appeal or collateral attack.

§ 747.18 Commencement of proceeding and contents of notice.

(a) *Commencement of proceeding*. (1) A proceeding governed by this subpart is commenced by issuance of a notice by the NCUA Board.

(2) The notice must be served by Enforcement Counsel upon the respondent and given to any other appropriate financial institution supervisory authority where required by law. Enforcement Counsel may serve the notice upon counsel for the respondent, provided that Enforcement Counsel has confirmed that counsel represents the respondent in the matter and will accept service of the notice on behalf of the respondent.

(3) Enforcement Counsel must file the notice with OFIA.

(b) *Contents of notice*. Notice pleading applies. The notice must provide:

(1) The legal authority for the proceeding and for the NCUA's jurisdiction over the proceeding;

(2) Matters of fact or law showing that the NCUA is entitled to relief;

(3) A proposed order or prayer for an order granting the requested relief;

(4) The time, place, and nature of the hearing as required by law or regulation;

(5) The time within which to file an answer as required by law or regulation;

(6) The time within which to request a hearing as required by law or regulation; and

(7) That the answer and/or request for a hearing must be filed with OFIA.

§ 747.19 Answer.

(a) *When*. Within 20 days of service of the notice, respondent must file an answer as designated in the notice. In a civil money penalty proceeding, respondent must also file a request for a hearing within 20 days of service of the notice.

(b) *Content of answer*. An answer must specifically respond to each paragraph or allegation of fact contained in the notice and must admit, deny, or state that the respondent lacks sufficient information to admit or deny each allegation of fact. A statement of lack of information has the effect of a denial. Denials must fairly meet the substance of each allegation of fact denied; general denials are not permitted. When a respondent denies part of an allegation, that part must be denied and the remainder specifically admitted. Any allegation of fact in the notice which is not denied in the answer is deemed admitted for purposes of the proceeding. A respondent is not required

to respond to the portion of a notice that constitutes the prayer for relief, or proposed order. The answer must set forth affirmative defenses, if any, asserted by the respondent.

(c) *Default*—(1) *Effect of failure to answer*. Failure of a respondent to file an answer required by this section within the time provided constitutes a waiver of the respondent's right to appear and contest the allegations in the notice. If no timely answer is filed, Enforcement Counsel may file a motion for entry of an order of default. Upon a finding that no good cause has been shown for the failure to file a timely answer, the ALJ will file with the NCUA Board a recommended decision containing the findings and the relief sought in the notice. Any final order issued by the NCUA Board based upon a respondent's failure to answer is deemed to be an order issued upon consent.

(2) *Effect of failure to request a hearing in civil money penalty proceedings*. If respondent fails to request a hearing as required by law within the time provided, the notice of assessment constitutes a final and unappealable order of the NCUA Board without further action by the ALJ.

§ 747.20 Amended pleadings.

(a) *Amendments*. The notice or answer may be amended or supplemented at any stage of the proceeding. The respondent must answer an amended notice within the time remaining for the respondent's answer to the original notice, or within ten days after service of the amended notice, whichever period is longer, unless the NCUA Board or ALJ orders otherwise for good cause.

(b) *Amendments to conform to the evidence*. When issues not raised in the notice or answer are tried at the hearing by express or implied consent of the parties, they will be treated in all respects as if they had been raised in the notice or answer, and no formal

amendments are required. If evidence is objected to at the hearing on the ground that it is not within the issues raised by the notice or answer, the ALJ may admit the evidence when admission is likely to assist in adjudicating the merits of the action and the objecting party fails to satisfy the ALJ that the admission of such evidence would unfairly prejudice that party's action or defense upon the merits. The ALJ may grant a continuance to enable the objecting party to meet such evidence.

§ 747.21 Failure to appear.

Failure of a respondent to appear in person at the hearing or by a duly authorized counsel constitutes a waiver of respondent's right to a hearing and is deemed an admission of the facts as alleged and consent to the relief sought in the notice. Without further proceedings or notice to the respondent, the ALJ will file with the NCUA Board a recommended decision containing the findings and the relief sought in the notice.

§ 747.22 Consolidation and severance of actions.

(a) *Consolidation*. (1) On the motion of any party, or on the ALJ's own motion, the ALJ may consolidate, for some or all purposes, any two or more proceedings, if each such proceeding involves or arises out of the same transaction, occurrence, or series of transactions or occurrences, or involves at least one common respondent or a material common question of law or fact, unless such consolidation would cause unreasonable delay or injustice.

(2) In the event of consolidation under paragraph (a)(1) of this section, appropriate adjustment to the prehearing schedule must be made to avoid unnecessary expense, inconvenience, or delay.

(b) *Severance*. The ALJ may, upon the motion of any party, sever the proceeding for separate resolution of the matter as to any respondent only if the ALJ finds:

(1) Undue prejudice or injustice to the moving party would result from not severing the proceeding; and

(2) Such undue prejudice or injustice would outweigh the interests of judicial economy and expedition in the complete and final resolution of the proceeding.

§ 747.23 Motions.

(a) *In writing*. (1) Except as otherwise provided in this section, an application or request for an order or ruling must be made by written motion.

(2) All written motions must state with particularity the relief sought and must be accompanied by a proposed order.

(3) No oral argument may be held on written motions except as otherwise directed by the ALJ. Written memoranda, briefs, affidavits, or other relevant material or documents may be filed in support of or in opposition to a motion.

(b) *Oral motions*. A motion may be made orally on the record unless the ALJ directs that such motion be reduced to writing.

(c) *Filing of motions*. Motions must be filed with the ALJ, except that following the filing of the recommended decision, motions must be filed with the NCUA Board.

(d) *Responses*. (1) Except as otherwise provided in this section, within ten days after service of any written motion, or within such other period of time as may be established by the ALJ or the NCUA Board, any party may file a written response to a motion. The ALJ will not rule on any oral or written motion before each party has had an opportunity to file a response.

(2) The failure of a party to oppose a written motion or an oral motion made on the record is deemed a consent by that party to the entry of an order substantially in the form of the order accompanying the motion.

(e) *Dilatory motions*. Frivolous, dilatory or repetitive motions are prohibited. The filing of such motions may form the basis for sanctions.

(f) *Dispositive motions*. Dispositive motions are governed by §§ 747.29 and 747.30.

§ 747.24 Scope of document discovery.

(a) *Limits on discovery*. (1) Subject to the limitations set out in paragraphs (b), (c), and (d) of this section, a party to a proceeding under this subpart may obtain document discovery by serving a written request to produce documents. For purposes of a request to produce documents, the term *documents* includes writings, drawings, graphs, charts, photographs, recordings, electronically stored information, and other data or data compilations stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party, into a reasonably usable form.

(2) Discovery by use of deposition is governed by § 747.100.

(3) Discovery by use of either interrogatories or requests for admission is not permitted.

(4) Any request to produce documents that calls for irrelevant material; or that is unreasonable, oppressive, excessive in scope, unduly burdensome, or repetitive of previous requests, or that seeks to obtain privileged documents will be denied or modified. A request is unreasonable, oppressive, excessive in scope, or unduly

burdensome if, among other things, it fails to include justifiable limitations on the time period covered and the geographic locations to be searched, or the time provided to respond in the request is inadequate.

(b) *Relevance*. A party may obtain document discovery regarding any non-privileged matter that has material relevance to the merits of the pending action.

(c) *Privileged matter*. Privileged documents are not discoverable. Privileges include the attorney-client privilege, attorney work-product doctrine, bank examination privilege, law enforcement privilege, any government's or government agency's deliberative process privilege, and any other privileges the Constitution, any applicable act of Congress, or the principles of common law provide.

(d) *Time limits*. All document discovery, including all responses to discovery requests, must be completed by the date set by the ALJ and no later than 30 days prior to the date scheduled for the commencement of the hearing, except as provided in the Local Rules. No exceptions to this time limit are permitted, unless the ALJ finds on the record that good cause exists for waiving the requirements of this paragraph (d).

§ 747.25 Request for document discovery from parties.

(a) *Document requests*. (1) Any party may serve on any other party a request to produce and permit the requesting party or its representative to inspect or copy any discoverable documents that are in the possession, custody, or control of the party upon whom the request is served. In the case of a request for inspection, the responding party may produce copies of documents or of electronically stored information instead of permitting inspection.

(2) The request:

(i) Must describe with reasonable particularity each item or category of items to be inspected or produced; and

(ii) Must specify a reasonable time, place, and manner for the inspection or production.

(b) *Production or copying*—(1) *General*. Unless otherwise specified by the ALJ or agreed upon by the parties, the producing party must produce copies of documents as they are kept in the usual course of business or organized to correspond to the categories of the request, and electronically stored information must be produced in a form in which it is ordinarily maintained or in a reasonably usable form.

(2) *Costs*. The producing party must pay its own costs to respond to a discovery request, unless otherwise agreed by the parties.

(c) *Obligation to update responses*. A party who has responded to a discovery request with a response that was complete when made is not required to supplement the response to include documents thereafter acquired, unless the responding party learns:

(1) The response was materially incorrect when made; or

(2) The response, though correct when made, is no longer true and a failure to amend the response is, in substance, a knowing concealment.

(d) *Motions to limit discovery*. (1) Any party that objects to a discovery request may, within 20 days of being served with such request, file a motion in accordance with the provisions of § 747.23 to strike or otherwise limit the request. If an objection is made to only a portion of an item or category in a request, the portion objected to must be specified. Any objections not made in accordance with this paragraph and § 747.23 are waived.

(2) The party who served the request that is the subject of a motion to strike or limit may file a written response within ten days of service of the motion. No other party may file a response.

(e) *Privilege*. At the time other documents are produced, the producing party must reasonably identify all documents withheld on the grounds of privilege and must produce a statement of the basis for the assertion of privilege. When similar documents that are protected by attorney-client privilege, attorney work-product doctrine, bank examination privilege, law enforcement privilege, any government's or government agency's deliberative process privilege, or any other privileges of the Constitution, any applicable act of Congress, or the principles of common law, or are voluminous, these documents may be identified by category instead of by individual document. The ALJ retains discretion to determine when the identification by category is insufficient.

(f) *Motions to compel production*. (1) If a party withholds any documents as privileged or fails to comply fully with a discovery request, the requesting party may, within ten days of the assertion of privilege or of the time the failure to comply becomes known to the requesting party, file a motion in accordance with the provisions of § 747.23 for the issuance of a subpoena compelling production.

(2) The party who asserted the privilege or failed to comply with the document request may file a written response to a motion to compel within ten days of service of the motion. No other party may file a response.

(g) *Ruling on motions*. After the time for filing responses pursuant to this section has expired, the ALJ will rule promptly on all motions filed pursuant to this section. If the ALJ determines that a discovery request, or any of its terms, calls for irrelevant material,

is unreasonable, oppressive, excessive in scope, unduly burdensome, or repetitive of previous requests, or seeks to obtain privileged documents, the ALJ may deny or modify the request, and may issue appropriate protective orders, upon such conditions as justice may require. The pendency of a motion to strike or limit discovery or to compel production is not a basis for staying or continuing the proceeding, unless otherwise ordered by the ALJ. Notwithstanding any other provision in this part, the ALJ may not release, or order a party to produce, documents withheld on grounds of privilege if the party has stated to the ALJ its intention to file a timely motion for interlocutory review of the ALJ's order to produce the documents, and until the motion for interlocutory review has been decided.

(h) *Enforcing discovery subpoenas*. If the ALJ issues a subpoena compelling production of documents by a party, the subpoenaing party may, in the event of noncompliance and to the extent authorized by applicable law, apply to any appropriate United States district court for an order requiring compliance with the subpoena. A party's right to seek court enforcement of a subpoena will not in any manner limit the sanctions that may be imposed by the ALJ against a party who fails to produce subpoenaed documents.

§ 747.26 Document subpoenas to nonparties.

(a) *General rules*. (1) Any party may apply to the ALJ for the issuance of a document discovery subpoena addressed to any person who is not a party to the proceeding. The application must contain a proposed document subpoena and a brief statement showing the general relevance and reasonableness of the scope of documents

sought. The subpoenaing party must specify a reasonable time, place, and manner for making production in response to the document subpoena.

(2) A party may apply for a document subpoena under this section only within the time period during which such party could serve a discovery request under § 747.24(d). The party obtaining the document subpoena is responsible for serving it on the subpoenaed person and for serving copies on all parties. Document subpoenas may be served in any state, territory, or possession of the United States, the District of Columbia, or as otherwise provided by law.

(3) The ALJ will promptly issue any document subpoena requested pursuant to this section. If the ALJ determines that the application does not set forth a valid basis for the issuance of the subpoena, or that any of its terms are unreasonable, oppressive, excessive in scope, or unduly burdensome, the ALJ may refuse to issue the subpoena or may issue it in a modified form upon such conditions as may be consistent with the Uniform Rules.

(b) *Motion to quash or modify*. (1) Any person to whom a document subpoena is directed may file a motion to quash or modify such subpoena with the ALJ. The motion must be accompanied by a statement of the basis for quashing or modifying the subpoena. The movant must serve the motion on all parties, and any party may respond to such motion within ten days of service of the motion.

(2) Any motion to quash or modify a document subpoena must be filed on the same basis, including the assertion of privilege, upon which a party could object to a discovery request under § 747.25(d), and during the same time limits during which such an objection could be filed.

(c) *Enforcing document subpoenas*. If a subpoenaed person fails to comply with any subpoena issued pursuant to this section or any order of the ALJ, which directs compliance with all or any portion of a document subpoena, the subpoenaing party or any other aggrieved party may, to the extent authorized by applicable law, apply to an appropriate United States district court for an order requiring compliance with so much of the document subpoena as the ALJ has not quashed or modified. A party's right to seek court enforcement of a document subpoena will in no way limit the sanctions that may be imposed by the ALJ on a party who induces a failure to comply with subpoenas issued under this section.

§ 747.27 Deposition of witness unavailable for hearing.

(a) *General rules*. (1) If a witness will not be available for the hearing, a party desiring to preserve that witness' testimony for the record may apply in accordance with the procedures set forth in paragraph (a)(2) of this section, to the ALJ for the issuance of a subpoena, including a subpoena *duces tecum*, requiring the attendance of the witness at a deposition. The ALJ may issue a deposition subpoena under this section upon showing:

(i) The witness will be unable to attend or may be prevented from attending the hearing because of age, sickness or infirmity, or will otherwise be unavailable;

(ii) The witness' unavailability was not procured or caused by the subpoenaing party;

(iii) The testimony is reasonably expected to be material; and

(iv) Taking the deposition will not result in any undue burden to any other party and will not cause undue delay of the proceeding.

(2) The application must contain a proposed deposition subpoena and a brief statement of the reasons for the issuance of the subpoena. The subpoena must name the witness whose deposition is to be taken and specify the time, manner, and place for taking the deposition. A deposition subpoena may require the witness to be deposed at any place within the country in which that witness resides or has a regular place of employment, by remote means, or such other convenient place or manner, as the ALJ fixes.

(3) Any requested subpoena that sets forth a valid basis for its issuance must be promptly issued, unless the ALJ requires a written response or requires attendance at a conference concerning whether the requested subpoena should be issued.

(4) The party obtaining a deposition subpoena is responsible for serving it on the witness and for serving copies on all parties. Unless the ALJ orders otherwise, no deposition under this section may be taken on fewer than ten days' notice to the witness and all parties.

(b) *Objections to deposition subpoenas*. (1) The witness and any party who has not had an opportunity to oppose a deposition subpoena issued under this section may file a motion with the ALJ to quash or modify the subpoena prior to the time for compliance specified in the subpoena, but not more than ten days after service of the subpoena.

(2) A statement of the basis for the motion to quash or modify a subpoena issued under this section must accompany the motion. The motion must be served on all parties.

(c) *Procedure upon deposition*. (1) Each witness testifying pursuant to a deposition subpoena must be duly sworn. By stipulation of the parties or by order of the ALJ, a court reporter or other person authorized to administer an oath may administer the

oath remotely without being in the physical presence of the deponent. Each party must have the right to examine the witness. Objections to questions or documents must be in short form, stating the grounds for the objection. Failure to object to questions or documents is not deemed a waiver except where the ground for the objection might have been avoided if the objection had been timely presented. All questions, answers, and objections must be recorded.

(2) Any party may move before the ALJ for an order compelling the witness to answer any questions the witness has refused to answer or submit any evidence the witness has refused to submit during the deposition.

(3) The deposition must be subscribed by the witness, unless the parties and the witness, by stipulation, have waived the signing, or the witness is ill, cannot be found, or has refused to sign. If the deposition is not subscribed by the witness, the court reporter taking the deposition must certify that the transcript is a true and complete transcript of the deposition.

(d) *Enforcing subpoenas*. If a subpoenaed person fails to comply with any subpoena issued pursuant to this section, or fails to comply with any order of the ALJ, which directs compliance with all or any portion of a deposition subpoena under paragraph (b) or (c)(2) of this section, the subpoenaing party or other aggrieved party may, to the extent authorized by applicable law, apply to an appropriate United States district court for an order requiring compliance with the portions of the subpoena with which the subpoenaed party has not complied. A party's right to seek court enforcement of a deposition subpoena in no way limits the sanctions that may be imposed by the ALJ

on a party who fails to comply with, or procures a failure to comply with, a subpoena issued under this section.

§ 747.28 Interlocutory review.

(a) *General rule*. The NCUA Board may review a ruling of the ALJ prior to the certification of the record to the NCUA Board only in accordance with the procedures set forth in this section and § 747.23.

(b) *Scope of review*. The NCUA Board may exercise interlocutory review of a ruling of the ALJ if the NCUA Board finds:

(1) The ruling involves a controlling question of law or policy as to which substantial grounds exist for a difference of opinion;

(2) Immediate review of the ruling may materially advance the ultimate termination of the proceeding;

(3) Subsequent modification of the ruling at the conclusion of the proceeding would be an inadequate remedy; or

(4) Subsequent modification of the ruling would cause unusual delay or expense.

(c) *Procedure*. Any request for interlocutory review must be filed by a party with the ALJ within ten days of the ruling and must otherwise comply with §747.23. Any party may file a response to a request for interlocutory review in accordance with § 747.23(d). Upon the expiration of the time for filing all responses, the ALJ will refer the matter to the NCUA Board for final disposition.

(d) *Suspension of proceeding*. Neither a request for interlocutory review nor any disposition of such a request by the NCUA Board under this section suspends or stays the proceeding unless otherwise ordered by the ALJ or the NCUA Board.

§ 747.29 Summary disposition.

(a) *In general*. The ALJ will recommend that the NCUA Board issue a final order granting a motion for summary disposition if the undisputed pleaded facts, admissions, affidavits, stipulations, documentary evidence, matters as to which official notice may be taken, and any other evidentiary materials properly submitted in connection with a motion for summary disposition show:

(1) There is no genuine issue as to any material fact; and

(2) The moving party is entitled to a decision in its favor as a matter of law.

(b) *Filing of motions and responses*. (1) Any party who believes there is no genuine issue of material fact to be determined and that the party is entitled to a decision as a matter of law may move at any time for summary disposition in its favor of all or any part of the proceeding. Any party, within 20 days after service of such a motion, or within such time period as allowed by the ALJ, may file a response to such motion.

(2) A motion for summary disposition must be accompanied by a statement of the material facts as to which the moving party contends there is no genuine issue. Such motion must be supported by documentary evidence, which may take the form of admissions in pleadings, stipulations, depositions, investigatory depositions, transcripts, affidavits, and any other evidentiary materials that the moving party contends supports the moving party's position. The motion must also be accompanied by a brief containing the points and authorities in support of the contention of the moving party. Any party opposing a motion for summary disposition must file a statement setting forth those material facts as to which the opposing party contends a genuine dispute exists. Such opposition must be supported by evidence of the same type as that submitted with the

motion for summary disposition and a brief containing the points and authorities in support of the contention that summary disposition would be inappropriate.

(c) *Hearing on motion*. At the written request of any party or on the ALJ's own motion, the ALJ may hear oral argument on the motion for summary disposition.

(d) *Decision on motion*. Following receipt of a motion for summary disposition and all responses thereto, the ALJ will determine whether the moving party is entitled to summary disposition. If the ALJ determines that summary disposition is warranted, the ALJ will submit a recommended decision to that effect to the NCUA Board. If the ALJ finds that no party is entitled to summary disposition, the ALJ will make a ruling denying the motion.

§ 747.30 Partial summary disposition.

If the ALJ determines that a party is entitled to summary disposition as to certain claims only, the ALJ will defer submitting a recommended decision as to those claims. A hearing on the remaining issues must be ordered. Those claims for which the ALJ has determined that summary disposition is warranted will be addressed in the recommended decision filed at the conclusion of the hearing.

§ 747.31 Scheduling and prehearing conferences.

(a) *Scheduling conference*. Within 30 days of service of the notice or order commencing a proceeding, the ALJ will direct counsel for all parties to meet with the ALJ at a specified time and manner prior to the hearing for the purpose of scheduling the course and conduct of the proceeding. This meeting is called a "scheduling conference." The schedule for the identification of potential witnesses, the time for and manner of discovery, and the exchange of any prehearing materials including witness lists,

statements of issues, stipulations, exhibits, and any other materials may also be determined at the scheduling conference.

(b) *Prehearing conferences*. The ALJ may, in addition to the scheduling conference, on the ALJ's own motion or at the request of any party, direct counsel for the parties to confer with the ALJ at a prehearing conference to address any or all of the following:

(1) Simplification and clarification of the issues;

(2) Stipulations, admissions of fact, and the contents, authenticity and admissibility into evidence of documents;

(3) Matters of which official notice may be taken;

(4) Limitation of the number of witnesses;

(5) Summary disposition of any or all issues;

(6) Resolution of discovery issues or disputes;

(7) Amendments to pleadings; and

(8) Such other matters as may aid in the orderly disposition of the proceeding.

(c) *Transcript*. The ALJ may require that a scheduling or prehearing conference be recorded by a court reporter. A transcript of the conference and any materials filed, including orders, becomes part of the record of the proceeding. A party may obtain a copy of the transcript at the party's expense.

(d) *Scheduling or prehearing orders*. At or within a reasonable time following the conclusion of the scheduling conference or any prehearing conference, the ALJ will serve on each party an order setting forth any agreements reached and any procedural determinations made.

§ 747.32 Prehearing submissions.

(a) *Party prehearing submissions.* Within the time set by the ALJ, but in no case later than 20 days before the start of the hearing, each party must file with the ALJ and serve on every other party:

(1) A prehearing statement that states:

(i) The party's position with respect to the legal issues presented;

(ii) The statutory and case law upon which the party relies; and

(iii) The facts that the party expects to prove at the hearing;

(2) A final list of witnesses to be called to testify at the hearing, including the name, mailing address, and electronic mail address of each witness and a short summary of the expected testimony of each witness, which need not identify the exhibits to be relied upon by each witness at the hearing;

(3) A list of the exhibits expected to be introduced at the hearing along with a copy of each exhibit; and

(4) Stipulations of fact, if any.

(b) *Effect of failure to comply.* No witness may testify and no exhibits may be introduced at the hearing if such witness or exhibit is not listed in the prehearing submissions pursuant to paragraph (a) of this section, except for good cause shown.

§ 747.33 Public hearings.

(a) *General rule*. All hearings must be open to the public, unless the NCUA Board, in the NCUA Board's discretion, determines that holding an open hearing would be contrary to the public interest. Within 20 days of service of the notice, any respondent may file with the NCUA Board a request for a private hearing, and any party may file a

reply to such a request. A party must serve on the ALJ a copy of any request or reply the party files with the NCUA Board. The form of, and procedure for, these requests and replies are governed by § 747.23. A party's failure to file a request or a reply constitutes a waiver of any objections regarding whether the hearing will be public or private.

(b) *Filing document under seal*. Enforcement Counsel, in Enforcement Counsel's discretion, may file any document or part of a document under seal if disclosure of the document would be contrary to the public interest. The ALJ will take all appropriate steps to preserve the confidentiality of such documents or parts thereof, including closing portions of the hearing to the public.

§ 747.34 Hearing subpoenas.

(a) *Issuance*. (1) Upon application of a party showing general relevance and reasonableness of scope of the testimony or other evidence sought, the ALJ may issue a subpoena or a subpoena *duces tecum* requiring the attendance of a witness at the hearing or the production of documentary or physical evidence at the hearing. The application for a hearing subpoena must also contain a proposed subpoena specifying the attendance of a witness or the production of evidence from any state, territory, or possession of the United States, the District of Columbia, or as otherwise provided by law at any designated place where the hearing is being conducted. The party making the application must serve a copy of the application and the proposed subpoena on every other party.

(2) A party may apply for a hearing subpoena at any time before the commencement of a hearing. During a hearing, a party may make an application for a subpoena orally on the record before the ALJ.

(3) The ALJ will promptly issue any hearing subpoena requested pursuant to this section. If the ALJ determines that the application does not set forth a valid basis for the issuance of the subpoena, or that any of its terms are unreasonable, oppressive, excessive in scope, or unduly burdensome, the ALJ may refuse to issue the subpoena or may issue it in a modified form upon any conditions consistent with this subpart. Upon issuance by the ALJ, the party making the application must serve the subpoena on the person named in the subpoena and on each party.

(b) *Motion to quash or modify*. (1) Any person to whom a hearing subpoena is directed or any party may file a motion to quash or modify the subpoena, accompanied by a statement of the basis for quashing or modifying the subpoena. The movant must serve the motion on each party and on the person named in the subpoena. Any party may respond to the motion within ten days of service of the motion.

(2) Any motion to quash or modify a hearing subpoena must be filed prior to the time specified in the subpoena for compliance but not more than ten days after the date of service of the subpoena upon the movant.

(c) *Enforcing subpoenas*. If a subpoenaed person fails to comply with any subpoena issued pursuant to this section or any order of the ALJ which directs compliance with all or any portion of a document subpoena, the subpoenaing party or any other aggrieved party may seek enforcement of the subpoena pursuant to § 747.26(c).

§ 747.35 Conduct of hearings.

(a) *General rules*. (1) *Conduct of hearings.* Hearings must be conducted so as to provide a fair and expeditious presentation of the relevant disputed issues. Each party has

the right to present its case or defense by oral and documentary evidence and to conduct such cross examination as may be required for full disclosure of the facts.

(2) *Order of hearing*. Enforcement Counsel will present its case-in-chief first, unless otherwise ordered by the ALJ, or unless otherwise expressly specified by law or regulation. Enforcement Counsel will be the first party to present an opening statement and a closing statement and may make a rebuttal statement after the respondent's closing statement. If there are multiple respondents, respondents may agree among themselves as to their order of presentation of their cases, but if they do not agree, the ALJ will fix the order.

(3) *Examination of witnesses*. Only one counsel for each party may conduct an examination of a witness, except that in the case of extensive direct examination, the ALJ may permit more than one counsel for the party presenting the witness to conduct the examination. A party may have one counsel conduct the direct examination and another counsel conduct re-direct examination of a witness, or may have one counsel conduct the cross examination of a witness and another counsel conduct the re-cross examination of a witness.

(4) *Stipulations*. Unless the ALJ directs otherwise, all stipulations of fact and law previously agreed upon by the parties, and all documents, the admissibility of which have been previously stipulated, will be admitted into evidence upon commencement of the hearing.

(b) *Transcript*. The hearing must be recorded and transcribed. The reporter will make the transcript available to any party upon payment by that party to the reporter of the cost of the transcript. The ALJ may order the record corrected, either upon motion to

correct, upon stipulation of the parties, or following notice to the parties upon the ALJ's own motion.

(c) *Electronic presentation*. Based on the circumstances of each hearing, the ALJ may direct the use of, or any party may use, an electronic presentation during the hearing. If the ALJ requires an electronic presentation during the hearing, each party will be responsible for their own presentation and related costs, unless the parties agree to another manner in which to allocate presentation responsibilities and costs.

§ 747.36 Evidence.

(a) *Admissibility*. (1) Except as is otherwise set forth in this section, relevant, material, and reliable evidence that is not unduly repetitive is admissible to the fullest extent authorized by the Administrative Procedure Act and other applicable law.

(2) Evidence that would be admissible under the Federal Rules of Evidence is admissible in a proceeding conducted pursuant to this subpart.

(3) Evidence that would be inadmissible under the Federal Rules of Evidence may not be deemed or ruled to be inadmissible in a proceeding conducted pursuant to this subpart if such evidence is relevant, material, reliable, and not unduly repetitive.

(b) *Official notice*. (1) Official notice may be taken of any material fact which may be judicially noticed by a United States district court and any material information in the official public records of any Federal or State government agency.

(2) All matters officially noticed by the ALJ or the NCUA Board must appear on the record.

(3) If official notice is requested or taken of any material fact, the parties, upon timely request, must be afforded an opportunity to object.

(c) *Documents*. (1) A duplicate copy of a document is admissible to the same extent as the original, unless a genuine issue is raised as to whether the copy is in some material respect not a true and legible copy of the original.

(2) Subject to the requirements of paragraph (a) of this section, any document, including a report of examination, supervisory activity, inspection, or visitation, prepared by an appropriate Federal financial institutions regulatory agency or by a State regulatory agency, is admissible either with or without a sponsoring witness.

(3) Witnesses may use existing or newly created charts, exhibits, calendars, calculations, outlines, or other graphic material to summarize, illustrate, or simplify the presentation of testimony. Such materials may, subject to the ALJ's discretion, be used with or without being admitted into evidence.

(d) *Objections*. (1) Objections to the admissibility of evidence must be timely made and rulings on all objections must appear on the record.

(2) When an objection to a question or line of questioning propounded to a witness is sustained, the examining counsel may make a specific proffer on the record of what the examining counsel expected to prove by the expected testimony of the witness either by representation of counsel or by direct questioning of the witness.

(3) The ALJ will retain rejected exhibits, adequately marked for identification, for the record, and transmit such exhibits to the NCUA Board.

(4) Failure to object to admission of evidence or to any ruling constitutes a waiver of the objection.

(e) *Stipulations*. The parties may stipulate as to any relevant matters of fact or the authentication of any relevant documents. Such stipulations must be received in evidence at a hearing and are binding on the parties with respect to the matters therein stipulated.

(f) *Depositions of unavailable witnesses*. (1) If a witness is unavailable to testify at a hearing, and that witness has testified in a deposition to which all parties in a proceeding had notice and an opportunity to participate, a party may offer as evidence all or any part of the transcript of the deposition, including deposition exhibits, if any.

(2) Such deposition transcript is admissible to the same extent that testimony would have been admissible had that person testified at the hearing, provided that if a witness refused to answer proper questions during the depositions, the ALJ may, on that basis, limit the admissibility of the deposition in any manner that justice requires.

(3) Only those portions of a deposition received in evidence at the hearing constitute a part of the record.

§ 747.37 Post-hearing filings.

(a) *Proposed findings and conclusions and supporting briefs*. (1) Using the same method of service for each party, the ALJ will serve notice upon each party that the certified transcript, together with all hearing exhibits and exhibits introduced but not admitted into evidence at the hearing, has been filed. Any party may file with the ALJ proposed findings of fact, proposed conclusions of law, and a proposed order within 30 days following service of this notice by the ALJ or within such longer period as may be ordered by the ALJ.

(2) Proposed findings and conclusions must be supported by citation to any relevant authorities and by page references to any relevant portions of the record. A post-

hearing brief may be filed in support of proposed findings and conclusions, either as part of the same document or in a separate document. Any party who ails to file timely with the ALJ any proposed finding or conclusion is deemed to have waived the right to raise in any subsequent filing or submission any issue not addressed in such party's proposed finding or conclusion.

(b) *Reply briefs*. Reply briefs may be filed within 15 days after the date on which the parties' proposed findings, conclusions, and order are due. Reply briefs must be strictly limited to responding to new matters, issues, or arguments raised in another party's papers. A party who has not filed proposed findings of fact and conclusions of law or a post-hearing brief may not file a reply brief.

(c) *Simultaneous filing required*. The ALJ will not order the filing by any party of any brief or reply brief in advance of the other party's filing of its brief.

§ 747.38 Recommended decision and filing of record.

(a) *Filing of recommended decision and record*. Within 45 days after expiration of the time allowed for filing reply briefs under § 747.37(b), the ALJ will file with and certify to the NCUA Board, for decision, the record of the proceeding. The record must include the ALJ's recommended decision, recommended findings of fact, recommended conclusions of law, and proposed order; all prehearing and hearing transcripts, exhibits, and rulings; and the motions, briefs, memoranda, and other supporting papers filed in connection with the hearing. The ALJ will serve upon each party the recommended decision, findings, conclusions, and proposed order.

(b) *Filing of index*. At the same time the ALJ files with and certifies to the NCUA Board for final determination the record of the proceeding, the ALJ will furnish to the

NCUA Board a certified index of the entire record of the proceeding. The certified index must include, at a minimum, an entry for each paper, document, or motion filed with the ALJ in the proceeding, the date of the filing, and the identity of the filer. The certified index must also include an exhibit index containing, at a minimum, an entry consisting of exhibit number and title or description for: each exhibit introduced and admitted into evidence at the hearing; each exhibit introduced but not admitted into evidence at the hearing; each exhibit introduced and admitted into evidence after the completion of the hearing; and each exhibit introduced but not admitted into evidence after the completion of the hearing.

§ 747.39 Exceptions to recommended decision.

(a) *Filing exceptions*. Within 30 days after service of the recommended decision, findings, conclusions, and proposed order under § 747.38, a party may file with the NCUA Board written exceptions to the ALJ's recommended decision, findings, conclusions, or proposed order, to the admission or exclusion of evidence, or to the failure of the ALJ to make a ruling proposed by a party. A supporting brief may be filed at the time the exceptions are filed, either as part of the same document or in a separate document.

(b) *Effect of failure to file or raise exceptions*. (1) Failure of a party to file exceptions to those matters specified in paragraph (a) of this section within the time prescribed is deemed a waiver of objection thereto.

(2) No exception need be considered by the NCUA Board if the party taking exception had an opportunity to raise the same objection, issue, or argument before the ALJ and failed to do so.

(c) *Contents*. (1) All exceptions and briefs in support of such exceptions must be confined to the particular matters in, or omissions from, the ALJ's recommendations to which that party takes exception.

(2) All exceptions and briefs in support of exceptions must set forth page or paragraph references to the specific parts of the ALJ's recommendations to which exception is taken, the page or paragraph references to those portions of the record relied upon to support each exception, and the legal authority relied upon to support each exception.

§ 747.40 Review by the NCUA Board.

(a) *Notice of submission to the NCUA Board*. When the NCUA Board determines that the record in the proceeding is complete, the NCUA Board will serve notice upon the parties that the proceeding has been submitted to the NCUA Board for final decision.

(b) *Oral argument before the NCUA Board*. Upon the initiative of the NCUA Board or on the written request of any party filed with the NCUA Board within the time for filing exceptions, the NCUA Board may order and hear oral argument on the recommended findings, conclusions, decision, and order of the ALJ. A written request by a party must show good cause for oral argument and state reasons why arguments cannot be presented adequately in writing. A denial of a request for oral argument may be set forth in the NCUA Board's final decision. Oral argument before the NCUA Board must be on the record.

(c) *The NCUA Board's final decision*. (1) Decisional employees may advise and assist the NCUA Board in the consideration and disposition of the case. The final decision of the NCUA Board will be based upon review of the entire record of the

proceeding, except that the NCUA Board may limit the issues to be reviewed to those findings and conclusions to which opposing arguments or exceptions have been filed by the parties.

(2) The NCUA Board will render a final decision within 90 days after notification of the parties that the case has been submitted for final decision, or 90 days after oral argument, whichever is later, unless the NCUA Board orders that the action or any aspect thereof be remanded to the ALJ for further proceedings. Copies of the final decision and order of the NCUA Board will be served upon each party to the proceeding, upon other persons required by statute, and, if directed by the NCUA Board or required by statute, upon any appropriate State or Federal supervisory authority.

§ 747.41 Stays pending judicial review.

The commencement of proceedings for judicial review of a final decision and order of the NCUA Board may not, unless specifically ordered by the NCUA Board or a reviewing court, operate as a stay of any order issued by the NCUA Board. The NCUA Board may, in the NCUA Board's discretion, and on such terms as the NCUA Board finds just, stay the effectiveness of all or any part of an order pending a final decision on a petition for review of that order.

Michael J. Hsu,
Acting Comptroller of the Currency.

By order of the Board of Governors of the Federal Reserve System.
Michele Taylor Fennell,
Deputy Associate Secretary of the Board.

Federal Deposit Insurance Corporation.
By order of the Board of Directors.
Dated at Washington, DC, on May 31, 2023.
James P. Sheesley,
Assistant Executive Secretary.

By order of the National Credit Union Administration Board.
Dated at Alexandria, VA, this 31st day of October, 2023.
Melane Conyers-Ausbrooks,
Secretary of the NCUA Board.

BILLING CODES: 4810–33–P; 6210–01–P; 6714-01-P; 7535-01-P