

**DEPARTMENT OF THE TREASURY****Office of the Comptroller of the Currency****12 CFR Parts 3, 4, 6, 19, 108, 109, 112, 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:** Notice of proposed rulemaking.

**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 proposing 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 proposing to modify their agency-specific rules of administrative practice and procedure (Local Rules). The OCC also proposes to integrate its Uniform Rules and Local Rules so that one set of rules applies to both national banks and Federal savings associations and to amend its rules on organization and functions to address service of process.

**DATES:** Comments must be received on or before June 13, 2022.

**ADDRESSES:** Comments should be directed to: OCC: Commenters are

encouraged to submit comments through the Federal eRulemaking Portal. Please use the title “Uniform Rules of Practice and Procedure” to facilitate the organization and distribution of the comments. You may submit comments by any of the following methods:

☐ *Federal eRulemaking Portal—Regulations.gov:* Go to <https://regulations.gov/>. Enter “Docket ID OCC–2021–0007” in the Search Box and click “Search.” Public comments can be submitted via the “Comment” box below the displayed document information or by clicking on the document title and then clicking the “Comment” box on the top-left side of the screen. For help with submitting effective comments please click on “Commenter’s Checklist.” For assistance with the *Regulations.gov* site, please call (877) 378–5457 (toll free) or (703) 454–9859 Monday–Friday, 9 a.m.–5 p.m. ET or email [regulations@erulemakinghelpdesk.com](mailto:regulations@erulemakinghelpdesk.com).

☐ *Mail:* Chief Counsel’s Office, Attention: Comment Processing, Office of the Comptroller of the Currency, 400 7th Street SW, Suite 3E–218, Washington, DC 20219.

☐ *Hand Delivery/Courier:* 400 7th Street SW, Suite 3E–218, Washington, DC 20219.

*Instructions:* You must include “OCC” as the agency name and “Docket ID OCC–2021–0007” in your comment. In general, the OCC will enter all comments received into the docket and publish the comments on the *Regulations.gov* website without change, including any business or personal information provided such as name and address information, email addresses, or phone numbers. Comments received, including attachments and other supporting materials, are part of the public record and subject to public disclosure. Do not include any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure.

You may review comments and other related materials that pertain to this action by the following method:

☐ *Viewing Comments Electronically—Regulations.gov:* Go to <https://regulations.gov/>. Enter “Docket ID OCC–2021–0007” in the Search Box and click “Search.” Click on the “Documents” tab and then the document’s title. After clicking the document’s title, click the “Browse Comments” tab. Comments can be viewed and filtered by clicking on the “Sort By” drop-down on the right side of the screen or the “Refine Results” options on the left side of the screen. Supporting materials can be viewed by

clicking on the “Documents” tab and filtered by clicking on the “Sort By” drop-down on the right side of the screen or the “Refine Documents Results” options on the left side of the screen.” For assistance with the *Regulations.gov* site, please call (877) 378–5457 (toll free) or (703) 454–9859 Monday–Friday, 9 a.m.–5 p.m. ET or email [regulations@erulemakinghelpdesk.com](mailto:regulations@erulemakinghelpdesk.com).

The docket may be viewed after the close of the comment period in the same manner as during the comment period.

*Board:* You may submit comments, identified by Docket No. R–1766 and RIN 7100–AG26 by any of the following methods:

- *Agency Website:* <http://www.federalreserve.gov>. Follow the instructions for submitting comments at <http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm>.

- *Email:* [regs.comments@federalreserve.gov](mailto:regs.comments@federalreserve.gov). Include the docket number in the subject line of the message.

- *Fax:* (202) 452–3819.

- *Mail:* Ann E. Misback, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue NW, Washington, DC 20551.

All public comments are available from the Board’s website at <http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm> as submitted, unless modified for technical reasons or to remove personally identifiable information at the commenter’s request. Accordingly, comments will not be edited to remove any identifying or contact information. Public comments may also be viewed electronically or in paper in Room 146, 1709 New York Avenue NW, Washington, DC 20006, between 9:00 a.m. and 5:00 p.m. on weekdays.

*FDIC:* You may submit comments, identified by RIN 3064–AF10 by any of the following methods:

- *FDIC Website:* <https://www.fdic.gov/resources/regulations/federal-register-publications/>. Follow instructions for submitting comments on the agency website.

- *Email:* [Comments@fdic.gov](mailto:Comments@fdic.gov). Include RIN 3064–AF10 on the subject line of the message.

- *Mail:* James P. Sheesley, Assistant Executive Secretary, Attention: Comments, Federal Deposit Insurance Corporation, 550 17th Street NW, Washington, DC 20429.

- *Hand Delivery to FDIC:* Comments may be hand-delivered to the guard station at the rear of the 550 17th Street NW building (located on F Street) on business days between 7 a.m. and 5 p.m.

Please include your name, affiliation, address, email address, and telephone number(s) in your comment. All statements received, including attachments and other supporting materials, are part of the public record and are subject to public disclosure. You should submit only information that you wish to make publicly available.

*Please note:* All comments received will be posted generally without change to <https://www.fdic.gov/resources/regulations/federal-register-publications/>, including any personal information provided.

NCUA: You may submit comments, identified by RIN 3133-AF37 by any of the following methods (please send comments by one method only):

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments for docket number NCUA-2021-0079.

- *Fax:* (703) 518-6319. Use the subject line “[Your name] Comments on ‘Uniform Rules of Practice and Procedure’ on the transmission cover sheet.”

- *Mail:* Address to Melane Conyers-Ausbrooks, Secretary of the Board, National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314-3428.

- *Hand Delivery/Courier:* Use the same address as for mailed comments.

*Public Inspection:* You can view all public comments on the NCUA website at: <http://www.ncua.gov/Legal/Regs/Pages/PropRegs.aspx> as submitted, except for those we cannot post for technical reasons. The NCUA will not edit or remove any identifying or contact information from the public comments. Due to social distancing measures in effect, the usual opportunity to inspect paper copies of comments in the NCUA’s law library is not currently available. After social distancing measures are relaxed, visitors may make an appointment to review paper copies by calling (703) 518-6540 or emailing [OGCMail@ncua.gov](mailto:OGCMail@ncua.gov).

#### 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](mailto:david.williams@frb.gov), (202) 452-3973, and Héctor G. Bladuell, Senior Counsel, Legal Division, [hector.g.bladuell@frb.gov](mailto:hector.g.bladuell@frb.gov), (202) 452-2491. FDIC: Heather M. Walters, Counsel, Legal Division, [hewalters@fdic.gov](mailto:hewalters@fdic.gov), (202) 898-6729 and

Michael P. Farrell, Counsel, Legal Division, [mfarrell@fdic.gov](mailto:mfarrell@fdic.gov), (202) 898-3853. 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, Public Law 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.<sup>1</sup> Based on the experience gained in administrative hearings, the Agencies, together with OTS, modified the Uniform Rules and Local Rules in 1996.<sup>2</sup>

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 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 have identified sections of the Uniform Rules that should be modified to recognize electronic pleadings and communications in administrative hearings and other sections that require modification based on the experience of the Agencies in

administrative litigation. The Agencies also propose to remove the remaining references to the Office of Thrift Supervision (OTS), which was abolished in 2011.<sup>3</sup> In addition, the OCC, Board, and FDIC propose to amend certain sections of their Local Rules that they believe should be updated, improved, or clarified. Furthermore, the OCC proposes to consolidate its uniform and local rules by applying part 19 to both national bank- and Federal savings association-related proceedings and investigations and removing its separate enforcement-related rules for Federal savings associations, 12 CFR parts 108, 109, 112, and 165. Finally, the OCC proposes to amend subpart A of 12 CFR part 4, Organization and Functions, to add a new § 4.8 that would address service of process. The Agencies intend that any final rules issued in connection with this rulemaking will only apply to actions filed after the effective date of any final rule.

The Agencies invite comments on all aspects of this joint proposed rule. Comments on the Local Rules should be sent only to the appropriate agency.

##### II. Section-by-Section Discussion of Proposed Amendments to the Uniform Rules

###### General Comments

The text of the proposed amendments to the Uniform Rules appears at the end of the preamble. Agency-specific proposed amendments to the Uniform Rules and Local Rules appear in the instructions below. Where appropriate, the Agencies propose to replace gender references such as “him or her,” “his or her,” and “himself or herself” with gender neutral terminology. Consistent with **Federal Register** drafting guidelines,<sup>4</sup> the Agencies also propose to replace the word “shall” throughout the rule with the terms “must,” “will,” or other appropriate language. The Agencies are also proposing to use the abbreviation “ALJ” for “administrative law judge,” as this abbreviation is commonly used and understood, and using this abbreviation will reduce the length of the rules. These changes are proposed throughout the Uniform Rules and will not be discussed further in the individual sections below.

<sup>3</sup> The FDIC removed references to the OTS and updated its definitions by Final Rule on Jan. 30, 2015 (80 FR 5009). The Board similarly removed references to the OTS from its definitions on September 13, 2011 (76 FR 56603).

<sup>4</sup> National Archives, **Federal Register** Writing Resources for Federal Agencies: Drafting Legal Documents, <https://www.archives.gov/federal-register/write/legal-docs/clear-writing.html>.

<sup>1</sup> 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 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).

<sup>2</sup> 61 FR 20330, May 6, 1996.

### Section \_\_\_\_\_.1 Scope

Section \_\_\_\_\_.1 lists the types of adjudicatory proceeding to which the Uniform Rules apply. To the extent necessary, the Agencies propose to update 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).<sup>5</sup> 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 supervised by the Board. The Agencies also propose to add references to "the former Office of Thrift Supervision" in § \_\_\_\_\_.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 \_\_\_\_\_.3 Definitions

Section \_\_\_\_\_.3 of the Uniform Rules includes definitions applicable to the Uniform Rules and, unless otherwise specified, the Local Rules. The Agencies propose adding a definition of the term "electronic signature" in § \_\_\_\_\_.3. The Agencies are proposing that electronic signatures be used to satisfy the good faith certification requirement in § \_\_\_\_\_.7 and, therefore, are including a definition of the term "electronic signature" in this section. The OCC, Board, and FDIC are proposing to replace 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). To the extent necessary, the Agencies also propose to remove the legacy reference to the Office of Thrift Supervision both in the definition of "OFIA" and the definition of "Uniform Rules" in § \_\_\_\_\_.3.

The OCC proposes to add the term "Federal savings association" to its definition of "institution" 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.<sup>6</sup>

The Board proposes to add "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).<sup>7</sup> In addition, the Board proposes to clarify 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." The Board also proposes to replace 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 Agencies propose to amend § \_\_\_\_\_.5(b)(2) to add the term "other orders" to the list of specific orders an ALJ is authorized to issue, quash, or modify. The Agencies are proposing this change to clarify 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 section. The Agencies also propose to amend § \_\_\_\_\_.5(b)(11) to change the term "presiding officer" to "ALJ" in order 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 Agencies propose to amend § \_\_\_\_\_.6(a)(2) to state simply that an individual may appear on their own behalf. In making this change, the Agencies would eliminate the additional language that is duplicative and unnecessary to the meaning of the provision. The Agencies also propose to amend § \_\_\_\_\_.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. The Agencies propose to add this requirement in order to ensure 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 Agencies propose to amend § \_\_\_\_\_.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 Agencies also propose to amend this section to permit electronic signatures to satisfy the signature requirements of the certification. These proposed changes to the rules 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 Agencies propose to amend § \_\_\_\_\_.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 Agencies also propose to amend § \_\_\_\_\_.9(e)(1) to better align it with section 5 of the Administrative Procedure Act, 5 U.S.C. 554(d). Specifically, the Agencies propose to add 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 Agencies propose to amend § \_\_\_\_\_.9(e)(2) to refer to administrative or judicial proceedings rather than public proceedings. The Agencies are proposing this change 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 Agencies propose to amend and renumber § \_\_\_\_\_.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 Agencies further propose to amend § \_\_\_\_\_.10(b) to eliminate references to specific carriers and names of mail delivery services and

<sup>5</sup> The Board made these updates on September 13, 2011 (76 FR 56603).

<sup>6</sup> As described elsewhere in this **SUPPLEMENTARY INFORMATION**, the OCC is proposing to remove its Uniform Rules and Local Rules applicable to Federal savings associations, parts 108, 109, 112, and 165 of title 12.

<sup>7</sup> Public Law 111–203, 124 Stat. 1376 (2010).

instead refer generally to same day courier services and overnight delivery services. The Agencies propose to amend § \_\_\_\_\_.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 Agencies propose to strike § \_\_\_\_\_.10(c)(4), which requires the filing of an original and one copy of each filing. The Agencies believe this requirement is no longer necessary, especially given that the vast majority of papers are filed electronically, consistent with current adjudicatory practice. The Agencies also propose to retain the existing methods of filing by paper, such as personal service, same day courier, overnight delivery, and mail, and have modified 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 proposed modifications to § \_\_\_\_\_.11 are intended to provide for electronic filing, where appropriate, and simplify and update the descriptions for other, non-electronic, means of filing. The Agencies propose to amend § \_\_\_\_\_.11(b) to add service by electronic mail or other electronic means as a method for serving papers, consistent with current practice. The Agencies also propose to retain the existing methods of service by paper, such as personal service, same day courier, overnight delivery, and mail, and have replaced references to specific carriers and delivery services with general references to same day courier service and overnight delivery service. The Agencies also propose to amend § \_\_\_\_\_.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 Agencies have preserved the option for non-electronic methods of service. The Agencies propose to modify the descriptions of some of those methods to conform to current terminology and standards for delivery. Finally, in § \_\_\_\_\_.11(d), the Agencies propose to generally retain 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 Agencies propose to amend § \_\_\_\_\_.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 Agencies also propose to retain the existing times for non-electronic methods of filing and service and update the descriptions of these methods to make them consistent with the updated descriptions in §§ \_\_\_\_\_.10 and \_\_\_\_\_.11. The Agencies propose to amend § \_\_\_\_\_.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. The Agencies further propose to modify the rule to provide for the addition of two calendar days, rather than one, in the case of service by overnight delivery service and retain the rule 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 Agencies propose to amend § \_\_\_\_\_.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 Agencies further propose to add language in § \_\_\_\_\_.14(b) to clarify that the Agencies are not required to pay witness fees and mileage for testimony by a party. The Agencies propose to retain existing 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 Agencies propose to revise the language of 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 Agencies propose to amend § \_\_\_\_\_.18(a)(ii) to provide that Enforcement Counsel serves the notice upon the respondent to begin proceedings.<sup>8</sup> The Agencies also propose to amend 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. The Agencies propose to amend § \_\_\_\_\_.18(a)(iii) to make it clear that Enforcement Counsel files the notice with OFIA.<sup>9</sup>

Section \_\_\_\_\_.18(b) of the Uniform Rules addresses the contents of the notice in administrative proceedings. The Agencies propose to amend § \_\_\_\_\_.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 Agencies further propose to make 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, propose to remove it.

#### Section \_\_\_\_\_.19 Answer

Section \_\_\_\_\_.19 of the Uniform Rules sets out the requirements for an answer in an administrative proceeding. The Agencies propose to amend § \_\_\_\_\_.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.

<sup>8</sup> 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.

<sup>9</sup> The NCUA proposes to delete the reference to change-in-control proceedings from part 747 under 12 U.S.C. 1817(j), which does not apply to credit unions or the NCUA. The NCUA proposes the same deletion under § \_\_\_\_\_.33.

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 the proposed 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 Agencies propose to update 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 Agencies further propose to amend § \_\_\_\_\_.24(a)(3) to clarify that discovery by the use of either interrogatories or requests for admission is not permitted. The Agencies propose to move the paragraph on relevance currently in § \_\_\_\_\_.24(b) to a new paragraph § \_\_\_\_\_.24(a)(4) because that provision functions as a limitation on discovery. The Agencies propose to amend § \_\_\_\_\_.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 Agencies propose to add 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 proposed 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 by Parties

Section \_\_\_\_\_.25 of the Uniform Rules addresses requests for document discovery from parties in administrative proceedings. The Agencies propose to reorganize the section to improve clarity and make additional changes. The Agencies propose to replace the heading

“General rule” with “Document requests” in § \_\_\_\_\_.25(a) to better identify the subject matter of the section. The Agencies propose to amend § \_\_\_\_\_.25(a) to add a paragraph (1) stating that a party may serve on another party a request to not only 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 the proposed language formalizes that practice under the rules. The Agencies propose to include 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 the proposed amendment preserves the right of a responding party to make that choice. The Agencies further propose to add a new paragraph (2) to simplify the language that previously appeared in § \_\_\_\_\_.25(b) regarding the identification of documents to be produced. The proposal would require that the 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 Agencies propose to amend 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 Agencies propose to simplify the rules associated with the costs of document production in a new § \_\_\_\_\_.25(b)(2), which would require the producing party to pay its own costs to respond to a discovery request unless otherwise agreed by the parties. This proposed language would eliminate 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 Agencies propose to modify the time limits for motions to limit discovery in § \_\_\_\_\_.25(d). In § \_\_\_\_\_.25(d)(1), the Agencies propose to extend 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 Agencies propose to extend 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 Agencies propose to amend § \_\_\_\_\_.25(e) to specify the available privileges that may be asserted in connection with a request for production. The section 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 Non-Parties

Section \_\_\_\_\_.26 of the Uniform Rules addresses document subpoenas to third parties in administrative proceedings. The Agencies propose to amend § \_\_\_\_\_.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 Agencies propose to amend § \_\_\_\_\_.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 Agencies propose to simplify

§ \_\_\_\_\_.27(a)(4) by eliminating unnecessary language related to where subpoenas may be served. In order to further provide for remote depositions, the Agencies propose to amend § \_\_\_\_\_.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 Agencies further propose to amend § \_\_\_\_\_.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 Agencies are making a correction to an inaccurate cross-reference in the rule. The cross reference to paragraph (c)(3) has been changed to correctly reference paragraph (c)(2).

#### Section \_\_\_\_\_.29 Summary Disposition

Section \_\_\_\_\_.29 of the Uniform Rules addresses summary disposition. The Agencies propose to modify § \_\_\_\_\_.29(c) to provide that a request for a hearing on a motion must be made in writing. This change will formalize the process of requesting a hearing and increase the clarity of the process.

#### Section \_\_\_\_\_.31 Scheduling and Prehearing Conferences

Section \_\_\_\_\_.31 of the Uniform Rules addresses scheduling and prehearing conferences. The Agencies propose to amend § \_\_\_\_\_.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 Agencies also propose to add 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 Agencies propose to eliminate references to “telephone” conferences in order to make the provision more technologically neutral.

#### Section \_\_\_\_\_.32 Prehearing Submission

Section \_\_\_\_\_.32 of the Uniform Rules addresses prehearing submissions. The Agencies propose to amend § \_\_\_\_\_.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. The Agencies propose this change to give the parties more flexibility in completing their filings.

The Agencies propose to further amend § \_\_\_\_\_.32 to update the required prehearing submissions. The Agencies propose to amend § \_\_\_\_\_.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 Agencies propose to amend § \_\_\_\_\_.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 Agencies propose to add 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 is necessary to account 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 Agencies propose to amend § \_\_\_\_\_.36(b)(2) to refer to “direct questioning” rather than “direct interrogation” of witnesses in order to clarify, in plain language, the meaning of this section.

### III. Section-by-Section Summary and Discussion of Proposed Amendments to the Local Rules of Each Agency

#### A. Proposed Amendments to the 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 proposed rule would consolidate these rules by applying part 19 to both national bank- and Federal savings association-related proceedings and investigations and remove parts 108, 109, 112, and 165. The proposed rule also would amend 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 OCC proposes to reorganize certain rules in part 19, including subparts D, E, F, and G relating to actions under the Federal securities laws; add new provisions addressing the Equal Access to Justice Act (EAJA); and add a new subpart O 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. As set forth in proposed subpart R, the revised consolidated rules would apply to adjudicatory actions filed on or after the effective date of the final rule resulting from this proposal.

The proposed amendments to the OCC’s local rules are discussed below.

#### Subpart B—Procedural Rules for OCC Adjudications

##### 19.100—Filing Documents

Sections 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 rule applies. As a result of the proposed application of part 19 to Federal savings associations and removal of part 109, § 19.100 also would apply to filings in Federal savings association-related proceedings. Furthermore, the proposed rule would amend § 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). Section 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 proposal, filings would be permitted by electronic mail or other electronic means designated by the Comptroller or the

ALJ. Lastly, the proposal would amend the current provision to clarify that the materials filed include any attachments or exhibits to the listed documents.

#### 19.101 Delegation to OFIA

Both §§ 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 proposed application of part 19 to Federal savings associations, § 19.101 would apply to adjudicatory actions brought against either national banks or Federal savings associations. The proposal would make one stylistic revision to § 19.101 to remove the passive sentence structure.

#### 19.102 Civil Money Penalties

The proposed rule would add a new § 19.102 that would incorporate parts of § 109.103(b), which provides rules for the payment of civil money penalties. The national bank rules 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 be applicable to both national banks and Federal savings associations. As a result of this amendment, respondents would be 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 would not be required to pay the penalty until the OCC has issued a final order of assessment. In such instances, the respondent would be 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

Subpart C of part 19 includes the rules applicable in hearings brought against any institution-affiliated party <sup>10</sup>

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 proposed rule would amend subpart C to incorporate certain provisions of part 108 that would be helpful to the OCC in these adjudicatory actions, specifically 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 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 proposed rule would amend § 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 rule and simplify the rule text. New § 19.110(b) would define “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 proposal would label the existing paragraph in § 19.110 as paragraph (a), Scope, and retitle the section heading to account for the addition of definitions.

#### 19.111 Suspension, Removal, or Prohibition

The proposed rule would reorganize § 19.111 into paragraphs; retitle the section heading, as well as the subpart, to clarify that it applies to institution-

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.

affiliated parties and remove passive sentence structure. In newly designated § 19.111(a), the proposal would correct 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 proposed rule would add a reference to this notice of prohibition to this paragraph. In addition, § 108.4 provides for method of service by the Comptroller. Like § 108.4, newly designated § 19.111(a) would specify the manner of service by the Comptroller, providing that the Comptroller serve the notice or order in the manner set forth in § 19.11(c), Service of papers. The OCC also proposes to move the information regarding a request for a hearing by the institution-affiliated party to a separate paragraph § 19.111(b); add 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 add the caveat that this submission rule applies unless instructed otherwise by the Comptroller. This proposed revision also utilizes the newly defined term “OCC Supervisory Office.”

In addition, the proposed rule would include 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 would be treated as a denial. Proposed § 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), proposed § 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

<sup>10</sup> “Institution-affiliated party,” as defined in § 19.3 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



Federal savings association rule should help narrow the issues to be contested and make this rule more consistent with the adjudicatory rule in § 19.19.

Furthermore, the proposed rule would add 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 would remain in effect until the information, indictment, or complaint is finally disposed of and the order of removal or prohibition would remain in effect until terminated by the OCC. The OCC believes the application of this provision to national banks should clarify that there are consequences if a petitioner fails to appear or fails to answer.

#### 19.112 Informal Hearing

The proposal would make 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 proposal would update the name of the OCC's Enforcement and Compliance Division to OCC Enforcement. The proposal also would remove 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 proposal would add language to clarify that, when responding to a petitioner's submissions, the OCC would serve other parties in the manner set forth in § 19.11(c).

In § 19.112(d), the proposal would amend 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 proposal also would clarify paragraph (d)(3)(i) by breaking up the first sentence into two sentences. In paragraph (d)(3)(ii), the proposal would provide 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 proposal also would amend § 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 would update the current oath requirement for witnesses to account for remote proceedings and conform this provision to § 19.112(d)(4), which permits electronic presentations at the hearing. In paragraph (d)(3)(iii), the proposal would make 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 proposal would make technical corrections by replacing "appointed OCC attorney" with "OCC."

The proposed rule also would add a new paragraph (d)(4) to § 19.112 to provide rules governing electronic presentations in the course of a hearing. As in proposed § 19.35(c), this provision would provide 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 would 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 proposal would utilize the newly defined term "OCC Supervisory Office" and remove passive sentence structure.

#### 19.113 Recommended and Final Decisions

The proposed rule would make a number of changes to § 19.113, which provides the procedures for decisions by the presiding officer and the OCC. The proposal would update § 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 proposal also would make 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 proposal would clarify that there could be more than one charge against an institution-affiliated party. In § 19.113(f), the proposal would remove the passive sentence structure. Lastly, the proposal would add headings to each paragraph.

#### Subparts D Through G—Actions Under the Federal Securities Laws

Subparts D, E, F, and G of 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 part 109, subpart A applied to proceedings under the Exchange Act. The OCC proposes to amend the rules in subparts D, E, F, and G to apply to Federal savings associations and to make other changes, described below. To streamline the rules, the OCC also proposes to combine subparts D, E, F, and G into one subpart D entitled "Actions under the Federal Securities Laws," reserve subparts E, F and G; and remove § 109.100(c).

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

The proposed rule would move the provisions in subpart D of part 19 to a new § 19.120. Current subpart D governs informal hearings by the Comptroller to determine whether, pursuant to authority in sections 12(h) and (i) of the Exchange Act (15 U.S.C. 78l(h) and (i)), 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. 78l(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. 78l(g)). In addition to proposing to apply this provision to issuers that



are Federal savings associations, the OCC proposes the following changes.

Specifically, the proposal would clarify in proposed § 19.120(a) that this section would apply to national bank and Federal savings association issued securities that may be subject to registration in addition to those securities already registered. This change would permit a national bank or Federal savings association to obtain an exemption from the OCC in advance of registering.

The OCC also proposes 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 should make it easier and less burdensome to comply with this notice requirement.

In addition, as in proposed §§ 19.35(c) and 19.112(d)(4), the proposed rule would add a provision, § 19.120(d)(8), governing electronic presentations in the course of an Exchange Act-related hearing. This provision would provide 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 would 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 proposed rule would make a conforming change in § 19.120(d)(6) that would 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 proposed rule would clarify in proposed § 19.120(d)(9) that a transcript of the hearing may be provided by electronic means.

Lastly, the OCC proposes technical changes to § 19.120. The proposed rule would make minor, non-substantive changes in provisions redesignated as paragraphs (b) and (c), remove passive sentence structure in text redesignated as paragraph (d)(9), allow for more than one applicant in provisions redesignated as paragraphs (d)(4) and (5) and (e), and change 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 proposed rule would move the provisions in 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.<sup>11</sup> The proposal would apply 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 proposed rule would define “transfer agent,” “municipal securities dealer,” “government securities broker,” “government securities dealer,” and person associated 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 proposal also makes conforming changes to these defined terms throughout the section. The OCC also is proposing 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 OCC proposes to remove 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 OCC proposes a clarifying change to replace the term “party” with the more accurate term “respondent” in redesignated paragraphs (b)(1) and (c)(2).

<sup>11</sup> 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.

#### 19.122 Civil Money Penalty Authority Under Federal Securities Laws

The proposed rule would move the provisions in 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.<sup>12</sup> As with proposed § 19.121, the proposed rule would apply 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 OCC also proposes to define “transfer agent,” “municipal securities dealer,” “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 proposed § 19.121, the OCC has made 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 Under Federal Securities Laws

The proposed rule would move the provisions in subpart G of part 19 to a new § 19.123. 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. 78l, 78m, 78n(a), 78n(c), 78n(d), 78n(f), and 78p) or implementing regulations. The proposed rule would apply this provision to both national banks and Federal savings associations. It also would update this provision by adding violations enacted by, or rules or regulations enacted thereunder, the Sarbanes-Oxley Act in 2002, as amended,<sup>13</sup> specifically sections 301<sup>14</sup> (audit committees), 302 (corporate responsibility for financial reports), 303 (improper influence on conduct of audits), 304 (forfeiture of certain

<sup>12</sup> *Id.*

<sup>13</sup> Public Law 107–204, 116 Stat. 745 (2002).

<sup>14</sup> Adding section 10A(m) to the Exchange Act.

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 financial officers), and 407 (disclosure of audit committee financial expert)<sup>15</sup> (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. 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 proposed rule would amend subpart H by adding language that would make it 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 refers all filers who have been disapproved under § 5.50 to the part 19 procedures, the proposed rule would amend subpart H to make it also applicable to uninsured institutions. In addition, the proposed rule would streamline 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 proposal also would add section headings to § 19.160 and revise the section heading in § 19.161.

#### Subpart I—Discovery Depositions and Subpoenas

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 proposed rule would apply part 19, subpart I to Federal savings associations and remove § 109.102. The OCC also proposes further changes to subpart I. In § 19.170(a) and (d), the proposal 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 would clarify that persons being deposed have information of material relevance to the proceeding and would be consistent with the requirements for document discovery in current and proposed § 19.24(b). Furthermore, the proposal would amend 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 would define a hybrid fact-expert witness as a fact witness who also will provide relevant expert opinion testimony based on the witness’s training and experience.

The proposal also adds a new 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’s 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 would ensure 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, new paragraph (a)(2) of § 19.170 would provide that respondents, collectively, are limited to a combined total of five depositions from all fact witnesses and hybrid fact-expert witnesses. This paragraph also would provide that Enforcement Counsel has the same deposition limit.

This limit in the number of depositions would add efficiencies to the discovery process and prevent deposition requests from delaying the completion of the proceeding. Lastly, proposed § 19.170(a)(2) provides that a party is entitled to take a deposition of each expert witness designated by an opposing party. This provision would codify the right of a party to depose the opposing party’s designated expert witness.

The proposal would amend § 19.170(b) to require that a deposition notice provide the manner for taking the deposition in addition to the time and place. In addition, the proposal would add 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 would permit 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 would 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 proposal would provide 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 proposal, the OCC proposes to amend § 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 would update the current oath requirement for witnesses to account for remote proceedings and conform this provision to § 19.170(b)(ii), which allows depositions to be taken by telephone or other remote means.

The proposal would update § 19.170(e)(1)(i) to allow for the witness’s 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. The proposed change would update the rule to reflect new

<sup>15</sup> 15 U.S.C. 78j–1(m), 7241, 7242, 7243, 7244, 7261, 7262, 7264, and 7265.

technology and add flexibility to the testimony process.

Lastly, the proposal would make a non-substantive change to the heading in paragraph (a) and change the heading of paragraph (g) from “Fees” to “Expenses” to more accurately describe the subject of the paragraph.

With respect to § 19.171, the proposal would amend 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 proposal also would amend 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 proposing this change because, in some OCC proceedings, the ALJ indicated they did not wish to receive this proof of service. Finally, the proposal would amend 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 would ensure that a party has the right to seek to quash or modify a third-party deposition subpoena.

#### Subpart J—Formal Investigations

Subpart J of part 19 and part 112 address formal investigations against national banks and Federal savings associations, respectively. The proposed rule would amend subpart J to make it applicable to both national banks and Federal savings associations and remove 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 because the recipient may challenge investigative subpoenas in Federal court. However, the proposal would add 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 would permit 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 proposed provision also would subject 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 should eliminate the disputes that previously have arisen on this issue. Furthermore, the addition of language regarding international subpoena requirements would codify existing OCC practice.

The OCC also proposes further changes to subpart J. First, the OCC is proposing to amend § 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 OCC proposes to describe in more detail the information or documents that are confidential to better ensure the confidentiality of formal investigations. Specifically, proposed § 19.181 would state 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 proposal also would add that this information may be disclosed pursuant to the OCC discovery obligations under subpart A of part 19.

Second, the OCC proposes to amend § 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 proposal would add 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 would make this section more consistent with the powers enumerated in the relevant underlying statutes, including 12 U.S.C. 1818(n) and 1820(c). The proposal also would make 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 proposal would clarify that the Comptroller may also terminate the order. Finally, the proposal would

amend § 19.182 to specifically indicate that the persons conducting the investigation are empowered by the Comptroller to do so.

Third, the proposed rule would amend § 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 proposal would amend this provision to provide that such persons may not retain copies of the order without first receiving written approval of the OCC. This amendment would ensure the confidentiality of the order.

Current paragraph (b) of § 19.183 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 proposal would amend this description of permissible attorney activities to provide that the attorney's questioning of the person may be on the record. This change would ensure a more complete formal record of the proceeding. In addition, the proposal would provide that the notes taken by the attorney during testimony may be used solely in representing the person. This change would allow 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.

Current paragraph (c) of § 19.183 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 proposal would amend 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 proposal would provide 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 would 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 paragraph (d) of § 19.183 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 proposal would remove the burden of proving "cause" included in this provision, as the OCC finds this unnecessary. The proposal also would eliminate 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.

Paragraph (e) of § 19.183 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 OCC proposes to redesignate this paragraph as a new § 19.185. In redesignated § 19.185, the OCC proposes replacing the phrase "has been guilty of" with "has engaged in." The phrase "has been guilty of" is unclear in the context of this rule. 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 proposal would amend § 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-reference to the more detailed rule for witness payments contained in revised § 19.14, discussed previously.

Lastly, the OCC proposes technical changes to subpart J. The proposal would replace references to "the Comptroller" with "the OCC" in § 19.183(b) and (d) and in redesignated § 19.185 and replace the term "representatives" with "designated representatives" in § 19.183(d) to align the provisions more closely with the statute. The proposal also would remove 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 proposal would add 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 proposal would add section headings to § 19.183.

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

Subpart K of part 19 contains rules relating to parties and representational practice before the OCC. The OCC is proposing mostly technical changes to this subpart.

First, in § 19.190, Scope, the proposal would make a confirming change to a cross-reference to reflect this rulemaking's proposed amendments to subpart D.

Second, the proposal would amend the definition of "practice before the OCC" in paragraph (a) of § 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 proposed rule would clarify this statement so that it applies to both written and oral presentations. Section 19.191(a) 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 proposal would amend 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 change "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 proposal would amend § 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 proposal would amend § 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 proposed rule would delete 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 proposal would replace the reference to the OTS in § 19.196(g) with "the former OTS," as the OTS no longer exists.

Sixth, the proposal would amend § 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 OCC is proposing to broaden 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 proposal would amend § 19.198, Conferences, to add the terms “censure” in paragraph (a) and “debarment” in paragraph (b) to correct missing references. The proposal also would change 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 proposal would amend paragraph (a) of § 19.200, 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 proposal also would revise the heading of § 19.200 to reflect the order of topics covered by the section.

Ninth, the proposal would remove 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 proposal would make several minor, nonsubstantive wording changes throughout subpart K.

#### Subpart L—Equal Access to Justice Act

In general, EAJA,<sup>16</sup> 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.<sup>17</sup> The OCC currently meets this requirement in subpart L of part 19, which provides that EAJA implementing regulation 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 OCC is proposing to delete the cross-reference to the Treasury regulation and amend subpart L to set forth EAJA regulations specifically applicable to certain OCC adversary adjudications conducted under part 19.

The OCC has based proposed subpart L on the revised model rule implementing EAJA published in 2019 by the Administrative Conference of the United States (ACUS) (Model Rule).<sup>18</sup> As discussed below, the OCC has customized the proposed rule in certain places to reflect the OCC’s procedures in adversary adjudications, reorganized a few provisions included in the Model Rule, made other changes based on the Treasury EAJA rule as well as the EAJA rules of the Board and FDIC<sup>19</sup> 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.*

Proposed § 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 proposed provision provides that no presumption under this subpart arises that the agency’s position was not substantially justified because the agency did not prevail.<sup>20</sup>

The proposed rule does not contain the provision in the 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.”<sup>21</sup> 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 OCC’s proposed EAJA rule does not include provisions in the Model Rule specifically related to excessive demand awards.

As provided in proposed § 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 the EAJA definition of “adjudicatory adjudications” and are covered by subpart L.

Paragraph (c) of § 19.205 provides that after reasonable notice to the parties, the presiding officer or 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 the EAJA. Although this provision is not included in the ACUS model rule, the OCC finds that this provision would provide useful discretion to the presiding officer and the OCC, as relevant, during the EAJA process and would provide 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.* Proposed § 19.206 sets forth definitions of terms used in this subpart. Unless otherwise noted, these

<sup>17</sup> 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 Model Rule, the OCC will notify the Office of the Chairman of ACUS of the proposed rule and will consider any comments provided by ACUS when drafting a final rule. See 84 FR 38934.

<sup>18</sup> 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 315). ACUS issued its model rule to assist agencies when adopting 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.

<sup>19</sup> 12 CFR 263, subpart G (Board) and 12 CFR 308, subpart P (FDIC). Both the Board and FDIC EAJA rules are based on the earlier versions of the ACUS model rule.

<sup>20</sup> 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).

<sup>21</sup> 5 U.S.C. 504(a)(4).

<sup>16</sup> Public Law 96–481, title II, sec. 203(a)(1), (c) (1980), revived and amended Public Law 99–80, sec. 1, 6 (1985).

definitions are substantively identical to the definitions in the Model Rule and based on the definitions in EAJA.

Paragraph (a) would define “adversary adjudication” to mean an adjudication under 5 U.S.C. 554 in which the position of the OCC is represented by Enforcement Counsel.<sup>22</sup> With certain exceptions, section 554 applies to adjudications required by statute to be determined on the record after opportunity for an agency hearing.<sup>23</sup> 19.230, and 19.241. Unlike EAJA and the Model Rule, the OCC’s proposed definition would not specifically exclude from this definition adjudications related to setting rates, licensing decisions, contract appeals, and the Religious Freedom Restoration Act of 1993.<sup>24</sup> These categories of adjudications are not covered by part 19 and therefore a specific exclusion in the OCC rule is not necessary.

Paragraph (b) would define “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.<sup>25</sup>

Paragraph (c) would define “party” to mean a party, defined in 5 U.S.C. 551(3),<sup>26</sup> 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 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.<sup>27</sup> This proposed 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 Model Rule, because, as discussed below, the OCC is proposing to require information on affiliates for certain parties.

Paragraph (d) would define “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 would provide 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.<sup>28</sup>

Paragraph (e) would define “presiding officer” as an official, whether an administrative law judge or otherwise, that presided over the adversary adjudication or the official presiding over an EAJA proceeding.<sup>29</sup> As noted below in proposed § 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.* Proposed § 19.207 sets out application requirements for a party seeking an award under EAJA. This section would require a party to file an application with the OCC within 30 days after the OCC’s final disposition of the adversary adjudication. It would require 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 proposed § 19.206(e), including documentation of net worth pursuant to proposed § 19.208; (6) documentation of the fees and expenses sought per proposed § 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 Model Rule,<sup>30</sup> except for the provision, taken from the Treasury rule,<sup>31</sup> 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 Model Rule, proposed § 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 is proposing this provision because it believes that the official presiding over the adversary proceeding subject to the EAJA application is in the best position to review the EAJA application, and that this referral directive should be included in the proposed rule for clarity.

*Net worth exhibit.* Proposed § 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 proposed § 19.206(c) and therefore be eligible for an EAJA award. Paragraph (a) would require 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 would permit 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

<sup>22</sup> See 5 U.S.C. 504(b)(1)(C) and § 2.01(b) of the Model Rule.

<sup>23</sup> 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. 504(a).

<sup>24</sup> EAJA and the Model Rule specifically (i) exclude an adjudication for the purpose of establishing or fixing a rate or for the purpose of granting or renewing a license, (ii) 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, (iii) any hearing conducted under chapter 38 of title 31, and (iv) the Religious Freedom Restoration Act of 1993.

<sup>25</sup> See § 2.01(e) of the Model Rule.

<sup>26</sup> 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.

<sup>27</sup> See 5 U.S.C. 504(b)(1)(B) and § 2.01(f) of the Model Rule.

<sup>28</sup> See 5 U.S.C. 504(b)(1)(E) and § 2.01(g) of the Model Rule.

<sup>29</sup> See the definition of “adjudicative officer” in 5 U.S.C. 504(b)(1)(D) and § 2.01(a) of the 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.

<sup>30</sup> See also 5 U.S.C. 504(a)(2).

<sup>31</sup> 31 CFR 6.8(d).

the standards of this subpart. Furthermore, this paragraph would permit 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 Model Rule, except that the proposal would require 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.<sup>32</sup>

Proposed § 19.208 also includes further provisions included in the Board's and the FDIC's EAJA regulation but not included in the Model Rule.<sup>33</sup> 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) would permit 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) would require the submission of a Consolidated Report of Condition and Income (Call Report) and would provide that net worth would be 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 model rule, paragraph (b) would provide 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 the § 3.03 of the Model Rule, proposed § 19.209 would require

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 EAJA award. Specifically, this section would require 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 would authorize a presiding officer to require an applicant to provide vouchers, receipts, or other substantiation for any fees or expenses claimed.

Unlike the Model Rule, this provision also provides that an application seeking an increase in fees to account for inflation pursuant to proposed § 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 Model Rule, proposed § 19.210 requires that applications for an award, or any accompanying documentation related to an application, be filed and served on all parties to the proceeding in accordance with § 19.11, Service of papers, except for confidential information pursuant to proposed § 19.208(b).

*Answer to application.* As provided in § 4.02 of the Model Rule, proposed § 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 proposed § 19.213. This section would provide 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 proposed § 19.213. This section would require 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, Enforcement Counsel would be required to provide supporting affidavits or a request for further proceedings under proposed § 19.214 with the answer. Unlike the Model Rule, proposed § 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 Model Rule, proposed § 19.212 would permit an applicant to reply within 15 days after service of an answer. For facts not already in the record, the applicant would be 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 Model Rule, proposed § 19.213 would provide 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 would require the application to be filed with the proposed settlement. Proposed § 19.213 also would clarify 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 Model Rule by including a provision the Model Rule includes in its section relating to an answer to an application, § 4.02. Specifically, proposed § 19.213 would specify 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 would extend the time for filing an answer under proposed § 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 indicated above, 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, proposed § 19.214(a) would permit an applicant or Enforcement Counsel to request the

<sup>32</sup> See 31 CFR 6.4(f) (Treasury); 12 CFR part 263.105 (Board); and 12 CFR part 308.177 (FDIC).

<sup>33</sup> *Id.*



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) would require that further proceedings be held as promptly as possible so as not to delay resolution of the EAJA application. The proposed 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 Model Rule. However, proposed § 19.214 does not contain the 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, Decisions. In addition, to list all possible further proceedings available more completely, the proposed rule also permits the applicant or Enforcement Counsel to request an informal conference, which is not listed in the Model Rule.

As in § 4.05 of the Model Rule, paragraph (b) of proposed § 19.214 would require 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 OCC's proposed section on EAJA decisions, § 19.215, is based on 5 U.S.C. 504(a)(3) and in part on § 4.06 of the Model Rule. Proposed paragraph (a) of § 19.215 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 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 rule outlining EAJA decisions because it provides parameters for the presiding officer's decision.

As in § 4.06 of the Model Rule, proposed paragraph (b) of § 19.215 would mandate the timing of the presiding officer's decisions. It would require 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 proposed § 19.214.<sup>34</sup>

Also, as in § 4.06 of the Model Rule, proposed 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 must also include, if applicable, an explanation of the reasons for any difference between the amount requested and the amount awarded, findings on whether the OCC's position was substantially justified, whether the applicant unduly and unreasonably protracted the proceedings, or whether special circumstances would make an award unjust. Paragraph (c) differs from § 4.06 of the Model Rule in that it includes language taken from § 4.05 of the 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.

Proposed paragraph (d) of § 19.215 would provide the requirements for EAJA decisions. Paragraphs (d)(1), (2) and (3) of proposed § 19.215 are not included in the Model Rule but are based on the EAJA statute, provisions included in the FDIC and Board EAJA rules,<sup>35</sup> and provisions included in the prior ACUS model rule that ACUS determined were largely substantive matters beyond the Conference's statutory charge.<sup>36</sup> The OCC believes that 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, proposed § 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.<sup>37</sup> Pursuant to EAJA, this paragraph also would prohibit an award for expert witness fees that exceed the highest rate paid for expert witnesses by the OCC.<sup>38</sup>

Proposed § 19.215(d)(2) would provide 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's customary fee for similar services; (2) if an employee of the applicant, the fully allocated cost of the attorney's, agent's, or witness's 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 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.

Proposed § 19.215(d)(3) would provide 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 Model Rule, proposed paragraph (d)(4) would permit 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 Model Rule, paragraph (d)(4) also would permit the presiding officer to reduce or deny the award if special circumstances would make the award sought unjust. This provision is included in 5 U.S.C. 504(a)(1) and in the Treasury rule<sup>39</sup> and is noted in the authority and scope section of this rule, proposed

<sup>34</sup> The Model Rule provides that an agency may determine the specific time period for this section.

<sup>35</sup> 12 CFR 263.106, 308.175.

<sup>36</sup> See 84 FR 38934.

<sup>37</sup> 5 U.S.C. 504(b)(1)(A).

<sup>38</sup> *Id.*

<sup>39</sup> See 31 CFR 6.14.

§ 19.205(a). The OCC believes it would be helpful to include it in § 19.215 as this section is specifically related to the decision making of the presiding officer.

Finally, proposed paragraph (e) of § 19.215 would provide 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 Model Rule. However, the OCC believes for clarity and completeness that its proposed 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 Model Rule, proposed § 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, proposed § 19.216 does not include the provision in the 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 proposed rule includes a separate provision in § 19.215(d) that is 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 Model Rule, proposed § 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 Model Rule, proposed § 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 Model Rule, proposed § 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 proposed section also would provide 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

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 proposed rule would amend subpart M to include Federal savings associations in addition to national banks and remove § 165.8. As this subpart currently also applies to insured Federal branches of foreign banks, the proposed rule would specifically include insured Federal branches in the scope section. Specifically, the proposal would replace the term “bank” each time it appears in subpart M with the term “insured depository institution,” and define this term to mean an insured national bank, an insured Federal savings association, an insured Federal savings bank, and an insured Federal branch of a foreign bank. The proposal also would replace the incorrect reference to subpart M with a reference to part 6 in § 19.220. In addition, the proposal would make 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 proposed §§ 19.35, 19.112, and 19.120, the OCC proposes to add a new paragraph (3) to § 19.221(g) to provide rules governing electronic presentations in the course of a hearing. Specifically, this provision would provide 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 would 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 OCC also proposes a conforming change in paragraph (g)(2) that would 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. Additionally, the proposal would revise

the heading to subpart M to include insured depository institutions and to describe the subject of the subpart more accurately. Lastly, the proposal would make technical changes to 12 CFR 6.3, 6.4, and 6.5 to remove the separate references to § 165.8 with respect to savings associations.

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

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 proposed rule would apply subpart N to Federal savings associations in addition to national banks and remove § 165.9. The proposal also would replace the term “bank” each time it appears in § 19.230 with the term “insured depository institution” and define 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 OCC also is proposing to amend paragraph (b) of § 19.231. This paragraph 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 proposal would provide 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 proposing to add this statement to the rule to clarify the result of a failure to request reinstatement. The OCC also is proposing a stylistic revision to § 19.231(b) to remove passive sentence structure.

In addition, the proposal would amend § 19.231(c), which 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 proposed amendment would provide that a later hearing date may occur only if permitted by the OCC, and, therefore, the request for an extension would not be automatically approved. This change would allow the OCC some discretion as

to how far into the future a hearing may take place.

The OCC also proposes to amend § 19.231(d) to provide rules governing electronic presentations in the course of a hearing. Specifically, this provision would provide 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 would 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 OCC also proposes a conforming change in § 19.231(d)(5) that would 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 proposed rule also would make a clarifying change in paragraph (d)(1), Hearing procedures. Among other things, this paragraph provides that a Respondent has the right to introduce relevant written materials and to present oral argument. The proposal would clarify that these written materials and oral arguments would 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 proposed rule also would move the sentence regarding oral testimony and witnesses in paragraph (d)(1) to paragraph (d)(5) to better organize paragraph (d) and add paragraph headings.

Furthermore, the proposal would revise the heading of subpart N to describe the subject of the subpart more accurately.

Lastly, the proposal would make 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 proposal would remove part 165 in its entirety.

#### Subpart O—Civil Money Penalty Inflation Adjustments

Subpart O of part 19 and § 109.103 provide the statutorily required formula to calculate inflation adjustments for civil money penalties assessed against national banks and 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 OCC is proposing to retain subpart O and remove § 109.103. No amendments are necessary to apply subpart O to Federal savings associations. The proposal would amend the section heading to be more descriptive and make 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) requires the Comptroller, 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 under section 5322 or 5324 of title 31 (31 U.S.C. 5322, 5324), to 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 OCC proposes adding a new subpart Q that sets forth APA compliant procedures for pretermination hearings, which will be conducted before a presiding officer appointed by the Comptroller. The proposed 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, proposed § 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.

Proposed § 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. Proposed § 19.251(b) details the requisite contents of the notice and proposed § 19.251(c) provides that failure to answer the notice would be deemed consent to the termination and that the Comptroller may order the termination. The proposed notice of intent to terminate is similar to the notice in § 19.18 except that the subpart Q notice of intent would list the basis of termination pursuant to factors listed in proposed § 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. Proposed § 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).

Proposed § 19.252 provides that the Comptroller will designate a presiding officer to conduct the pretermination hearing. The presiding officer would have the same powers set forth in § 19.5, including the discretion necessary to conduct the pretermination hearing in a manner that avoids unnecessary delay. Proposed § 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.

Proposed § 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)(1)(C)(2) and 1464(w)(1)(C)(2). The factors are the extent to which directors or senior executive officials knew of or were involved in the criminal offense; 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; the extent to which the institution fully cooperated with law enforcement authorities regarding the

investigation of the offense; the extent to which the institution has implemented additional internal controls since the commission of the offense to prevent a reoccurrence; and 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, proposed § 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).

#### Subpart R—Effective Date

The OCC is proposing a new subpart R to part 19 to address questions about the effective date of the amendments to part 19 and their application to proceedings and investigations in progress. Specifically, subpart R provides that the rules of practice and procedure set forth in subparts A through E and H, I, J, L, M, N, P, and Q (as revised or added by this rulemaking) would apply to adjudicatory proceedings initiated on or after the effective date of a final rule. Rules applicable to national banks, Federal savings associations, or Federal branches and agencies in effect prior to this effective date would continue to govern actions initiated and in process prior to this effective date. This timing would ensure that parties to adjudicatory proceedings involving national banks, Federal savings associations, or Federal branches and agencies would have adequate notice of the rules governing those proceedings.

#### Technical Changes

The proposed rule would make 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) and making other non-substantive grammatical, clarifying, organizational, and stylistic changes. The proposal also makes a technical change to 12 CFR 3.405 to correct the reference to part 19 and remove the reference to part 109 with respect to savings associations because this rulemaking proposes to remove part

109 and apply part 19 to Federal savings associations.

#### *B. Proposed Amendments to the Board's Local Rules*

Part 263, subparts B through J, contain rules specific to Board proceedings. The Board proposes several amendments to subpart B that supplement the Uniform Rules, the creation of a new subpart K establishing rules governing all Board formal investigations, and the elimination of subpart L of Regulation LL (12 CFR part 238), which would be replaced by the new subpart K. The proposed amendments are described below. The Board invites comments on all aspects of this proposal.

#### Subpart B—Board Local Rules Supplementing the Uniform Rules

##### Technical Changes

The proposal makes three general non-substantive changes to the language of the Board's Local Rules (12 CFR 265.50–263.56). First, consistent with **Federal Register** drafting guidelines, the proposal replaces the word “shall” throughout the Local Rules with the terms “must,” “will,” or other appropriate language. Second, the proposal replaces gender specific references with gender neutral language. And third, the proposal replaces the term “administrative law judge” with the abbreviation “ALJ” as this shortened form is commonly used and understood. These changes are proposed throughout the Local Rules and will not be discussed in the individual sections below.

#### Section 263.52 Address for Filing

The proposal adds a second sentence providing an electronic mail address (*OSEC-Litigation@frb.gov*) for papers to be filed electronically with the Secretary of the Board. The Board recognizes that electronic filings have become more frequent and deems it appropriate to identify the electronic mail address that must be used to file papers electronically with the Board.

#### Section 263.53 Discovery Depositions

The proposal makes four changes to this section to provide for the increasing frequency of depositions by remote means. First, the proposal changes § 263.53(b) to require parties to state in the application the manner (*e.g.*, remote means, in person) in which the deposition is to be taken, in addition to the place and time. Second, the proposal changes § 263.53(c) to include the proposed manner of the deposition as a factor to be considered by the ALJ in determining whether a deposition is unnecessary, unreasonable, oppressive,

excessive in scope or unduly burdensome. Third, the proposal adds that a deposition subpoena may require the witness to be deposed where the witness resides or has a regular place of employment, by remote means, or such other convenient place or manner as the ALJ fixes. This language is consistent with § 263.27(a)(2) and provides explicitly for depositions by remote means. And fourth, the proposal adds a sentence in § 263.53(f) indicating that, by stipulation of the parties or order by the ALJ, a deponent may be sworn remotely and is not required to be in the physical presence of the person administering the oath. The Board believes these changes would facilitate discovery by making depositions more flexible and less burdensome.

#### Section 263.55 Board as Presiding Officer

Section 263.55 authorizes the Board to designate itself, one or more of its members, or an authorized officer, to act as presiding officer in a formal hearing. The proposal adds a sentence clarifying that when such designations occur, the authority of the Board or its designee will include all the authority provided to an ALJ under the rules governing formal hearings. This ensures that the authority of the Board or its designee will include all powers vested in the ALJ by the language of the rules.

#### Section 263.57 Sanctions Related to Conduct in Adjudicatory Proceedings

Several sections of the Uniform Rules authorize the ALJ to impose sanctions for particular types of misconduct.<sup>40</sup> However, the Uniform Rules do not specify the rules and procedures governing the sanctions available where a party generally engages in contemptuous conduct. Sanctions provisions are instead found in the local rules of other banking regulators.<sup>41</sup> To date, the Board has not adopted a similar sanctions provision. The proposal fills this void by adding a new section establishing the rules governing the imposition of sanctions against parties or persons participating in administrative adjudicatory proceedings. The proposed new section: (a) Explicitly authorizes the ALJ to impose sanctions against parties or persons; (b) describes the sanctions the ALJ may impose; (c) describes

<sup>40</sup> See, *e.g.*, 12 CFR 263.6(b) (authorizing the exclusion or suspension of counsel for misconduct); 12 CFR 263.9 (authorizing various sanctions against a party or counsel for *ex parte* communications); 12 CFR 263.23(e) (authorizing sanctions for dilatory conduct).

<sup>41</sup> See 12 CFR 308.108 (FDIC); 12 CFR 19.192 (OCC).

procedures for imposing sanctions: And (d) establishes that the ALJ or the Board may impose other sanctions authorized by applicable statute or regulation.

First, subsection (a) establishes that the ALJ may impose sanctions against any party or person who violates a statute, regulation, or order. In addition, sanctions may only be imposed where such violation constitutes contemptuous conduct, materially injures another party, amounts to a clear and unexcused violation, or unduly delays the proceedings.

Second, subsection (b) describes the sanctions the ALJ may impose against parties or persons. Appropriate sanctions include: (1) Issuing an order making findings against a party; (2) rejecting or striking testimony or other evidence offered by a party; (3) precluding the party from contesting specific issues or findings, offering or challenging certain evidence, or making late filings or conditioning such late filings; (4) assessing reasonable expenses incurred by the other party as a result of the misconduct; and (5) excluding the party or person from the adjudicatory proceeding. This list is non-exhaustive. As expressed in subsection (d), the ALJ or the Board may impose other sanctions authorized by an applicable statute or regulation.

Third, subsection (c) describes procedures for imposing and reviewing sanctions. First, sanctions could be imposed upon the motion of any party or upon the ALJ's own motion, although the ALJ would be required to submit to the Board any sanction that includes a final order on the merits. Second, no sanction beyond refusal to accept late filings may be imposed without affording the party or person to be sanctioned the opportunity to be heard. And third, an order imposing sanctions would be subject to interlocutory review like any other order. Finally, subsection (d) clarifies that an ALJ or the Board may also impose any other restriction or sanction authorized by another applicable statute or regulation.

The Board believes that this new proposed section promotes fairness and transparency in adjudicatory proceedings by providing clear standards governing the authority of the ALJ to manage the conduct of the proceedings when presented with contemptuous conduct.<sup>42</sup> In addition, because this proposed section is modeled on the sanctions provisions

already adopted by other banking regulators, it promotes uniformity in the rules of banking regulators.

#### Subpart K—Formal Investigative Proceedings

Under section 8(n) of the Federal Deposit Insurance Act and other statutory provisions, the Board has authority to conduct formal investigations, including authority to administer oaths, take depositions, and issue subpoenas in connection with the Board's examination and enforcement authority.<sup>43</sup> In 2011, the Board adopted regulations previously issued by the OTS which govern formal investigations of savings and loan holding companies and their subsidiaries under Home Owners' Loan Act.<sup>44</sup> These regulations, which are found in subpart L of Regulation LL (12 CFR part 238), do not govern formal investigations of other banking institutions or individuals under the Board's jurisdiction. While the Board has long-standing practices concerning the conduct of formal administrative investigations involving other banking organizations or individuals within its jurisdiction, these practices have heretofore not been incorporated in regulations governing such formal investigations.

The Board now proposes to codify and clarify its long-standing practices concerning the conduct of formal administrative investigations and promulgate rules governing all formal investigations of organizations and individuals within the Board's jurisdiction. The proposal deletes subpart L of Regulation LL and replaces it with a new section (subpart K to 12 CFR part 263). This new section establishes a single set of rules governing formal investigations for all Board-regulated organizations, including but not limited to state member banks, foreign banks, bank holding companies and their subsidiaries, savings and loan holding companies and their subsidiaries, Edge Act and agreement corporations, nonbank financial companies that the Financial Stability Oversight Council

has determined should be supervised by the Board pursuant to section 113 of the Dodd-Frank Act (nonbank financial companies) or any subsidiaries of such companies,<sup>45</sup> and any other entity or individual that the Board has authority to investigate or bring an enforcement action against. Proposed subpart K would govern only the conduct of formal investigations; administrative adjudicatory proceedings would continue to be governed by the Board's Uniform Rules and Local Rules (subparts A and B of 12 CFR 263).

Proposed subpart K is modeled on the investigative procedures of other Federal financial industry enforcement agencies, including the FDIC and OCC. Like the existing rules of these agencies, proposed subpart K would, among other things, define a formal investigative proceeding by the Board and its scope; delineate some of the powers of the Board's designated representatives conducting formal investigative proceedings; require the confidentiality of formal investigative proceedings; provide for certain rights of witnesses in formal investigative proceedings; and establish investigative subpoena procedures.

The proposed rules authorize the Board or the General Counsel or the General Counsel's designee (in accordance with 12 CFR 265.6) to commence a formal investigation by issuing an order of investigation which designates both the purpose of the investigation and the "designated representatives" of the Board. These designated representatives would be authorized to administer oaths, to take and preserve testimony under oath, and to issue subpoenas *ad testificandum* and subpoenas *duces tecum* and to apply to the appropriate court to enforce such subpoenas.

The proposed rules also set forth the rights of persons from whom the Board seeks to compel information in a formal investigation. Specifically, the proposed rules describe a person's right to counsel during investigative testimony, an attorney's ability to advise and question a witness during investigative testimony, and the ability of a witness to obtain a copy of any testimony the witness provided. The proposed rules would also require the confidentiality of formal investigative proceedings and generally require sequestration of witnesses.

Proposed subpart K generally incorporates the substantive provisions currently contained in subpart L of Regulation LL with two major exceptions. First, the proposed subpart

<sup>43</sup> 12 U.S.C. 1818(n).

<sup>44</sup> In 2011, pursuant to section 312 of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act") (12 U.S.C. 5412), the responsibility for the supervision and regulation of savings and loan holding companies and their non-savings association subsidiaries transferred from the former-OTS to the Board. Shortly thereafter, the Board adopted an interim final rule that provided for the corresponding transfer of certain OTS regulations necessary for the Board to administer the statutes relating to supervision of savings and loan holding companies, including provisions governing formal investigative proceedings set forth at subpart L of Regulation LL (12 CFR 238.111–117) (see 76 FR 56508 (September 13, 2011)).

<sup>42</sup> The Board believes that the power to impose sanctions is inherent in the ALJ's power to "regulate the course of a proceeding." 5 U.S.C. 556(c)(5), and to "do all things necessary and appropriate to discharge the duties of a presiding officer." 12 CFR 263.5(b)(11).

<sup>45</sup> 12 U.S.C. 5323; 12 U.S.C. 5362.

K does not include provisions (currently found in 12 CFR part 238.117(b)) providing for the filing and resolution of applications seeking to quash or modify subpoenas within 10 days of their service. Since the Board already vests with the General Counsel or his or her designee the authority to quash, modify, or revoke subpoenas that have been issued,<sup>46</sup> any person or entity to whom a subpoena is directed may seek a modification or revocation of a subpoena by application to the General Counsel. A separate procedure is not necessary.

Second, the proposed subpart K provides that the officer supervising a formal investigative proceeding may, in certain circumstances, deny a written request for a copy of a transcript. Both subpart L of Regulation LL and the proposed rules (see 12 CFR part 238.114 and proposed rule 263.456(b)) provide that a witness may inspect a copy of the transcript without retaining a copy. Similarly, both subpart L of Regulation LL and the proposed rules (see 12 CFR part 238.114 and proposed rule 263.456(c)) provide that any request for a copy of a transcript may be denied. Although subpart L of Regulation LL vests the Board with the authority to deny a witness's request to inspect a copy of a transcript (see 12 CFR part 238.114), proposed subpart K vests the officer supervising a formal investigative proceeding with the authority to deny such request if provision of the transcript may infringe the privacy of third persons involved in the investigation, or impede or interfere with the conduct of any Board investigation.

The proposed subpart K also reorganizes or re-orders provisions currently found in subpart L of Regulation LL. For example, subpart L of Regulation LL had a separate provision regarding transcripts of investigative testimony (12 CFR part 238.114) that provides, among other things, that a witness may inspect the transcript of the witness's testimony. Proposed subpart K instead places the provision to permit inspection of a transcript of a witness's testimony in the proposed rule concerning the rights of witnesses (see proposed subpart K rule 263.456). Other provisions of proposed subpart K conform provisions of subpart L of Regulation LL to current practices followed in Board investigations. For example, proposed subpart K rule 263.457, governing service of subpoenas in formal investigations, conforms to the current rules governing service of subpoenas in adjudicatory proceedings,

12 CFR part 263.11(d). These technical modifications are not intended to affect the substantive rights of parties.

In summary, proposed subpart K clarifies and centralizes the Board's existing investigative practices by codifying those procedures uniformly across all Board formal investigations.

#### *C. Proposed Amendments to the FDIC's Local Rules*

When the Uniform Rules were adopted in 1991, each Agency also adopted Local Rules to address procedures to supplement the Uniform Rules or otherwise facilitate the processing of administrative enforcement actions within an Agency. The Local Rules at issue here are set forth at 12 CFR part 308, subpart B: General Rules of Procedure, and supplement the Uniform Rules and procedures set forth in 12 CFR part 308, subpart A.

The FDIC requests comment on proposed amendments to the FDIC's Local Rules at subpart B. These revisions are intended to enhance the Uniform Rules and to further modernize and streamline the discovery process in administrative enforcement actions brought by the FDIC. The FDIC proposes changes that 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 proposes to add new provisions regarding modern discovery practices, depositions, and disclosure of expert witness testimony to promote cooperation, fairness, and transparency.

Since the Local Rules were last updated, the development and utilization of electronically stored information has drastically increased the amount of potentially discoverable materials. In 2015, the Federal Rules of Civil Procedure (FRCP) were amended, in part, to address concerns regarding the volume of available materials and the effort and expense in processing those materials for discovery purposes. Although neither the FRCP, nor the Federal Rules of Evidence, apply to administrative proceedings at the FDIC, they do provide guidance and direction. Additionally, the FRCP are thoroughly vetted and considered to be best practices and procedures by the legal community. The FDIC is not adopting the FRCP; however, there are certain best practices and procedures that the FDIC believes would be advantageous to all parties to the administrative proceedings. Over the past few years, the ALJs have implemented, on a case-by-case basis, certain case management orders related to discovery procedures

and requirements that mirror certain provisions of the FRCP. The FDIC wishes to formalize these procedures in the Local Rules to provide notice and clarity of the discovery rules applicable to administrative proceedings.

Similar to the changes in the Uniform Rules, the FDIC also proposes to update the language throughout its Local Rules to reflect the modernized language used in rulemaking. Where appropriate, the FDIC proposes to replace the term "shall" with "must" or "will" to reflect the current convention for a legal requirement and changes made to the FRCP in 2000. Additionally, the FDIC proposes to provide shortened references to "administrative law judge" (ALJ) and "electronically stored information" (ESI) because the shortened terms are well understood and the repetition of the shortened terms reduces the length of the regulations. These changes are proposed throughout the Local Rules and will not be discussed further in the individual sections below.

#### *Section 308.102 Authority of Board of Directors and Administrative Officer*

Section 308.102 contains minor changes to reflect the current internal organization of the FDIC.

#### *Section 308.103 Assignment to Administrative Law Judge (ALJ)*

Section 308.103 is being renamed to better reflect additional changes to how matters are currently 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 is being 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) is a new section that describes the permitted scope of discovery. The FDIC proposes to adopt the concept of "proportionality" in discovery production and set forth limits on ESI, both of which were added to the FRCP in 2015. Because the FDIC maintains the data collected from failed insured depository institutions in its

<sup>46</sup> See 12 CFR part 265.6.

role as Receiver, it has custody and control of voluminous amounts of failed bank data. Generally, the vast majority of this information would not be materially relevant to an administrative enforcement proceeding. Instituting a requirement that discovery be proportional will decrease unnecessary expenditures and promote a more efficient process for all parties to the administrative proceedings.

#### Section 308.107(b) Joint Discovery Plan

Section 308.107(b) sets forth the FDIC's proposal to add a Joint Discovery Plan to the discovery process. Currently, the ALJs routinely require both parties agree to an ESI Plan that governs the production of ESI. The FDIC proposes to combine the current practice with certain provisions similar to the FRCP Rule 26(f)(3). This new section would require the parties to meet and confer at the beginning of the discovery process to facilitate communication and cooperation on discovery matters. The purpose is to develop a Joint Discovery Plan that meets the parties' needs, decreases discovery disputes, encourages collegiality, and conserves resources. If necessary, this section provides a mechanism for resolution of discovery disputes.

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

Section 308.107(c) was created to integrate the proposed provisions of the Local Rules with the Uniform Rules. Additionally, the provisions related to the production of documents now include modern concepts from the FRCP related to the production of ESI.

#### Section 308.107(d) Expert Witness Disclosures

Section 308.107(d) is a new section mirroring the 1993 updates to the FRCP 26(a)(2) that describe the proposed disclosures for expert witness testimony. The vast majority of modern administrative enforcement proceedings involve expert testimony; however, there are currently no rules governing how expert testimony is fairly and properly disclosed to the opposing party. As a result, the ALJs began issuing orders, on a case-by-case basis, requiring disclosure of expert testimony similar to the requirements set forth in FRCP 26(a)(2). The FDIC proposes to incorporate these expert witness disclosure requirements into the written rules to improve transparency and promote fairness. Similar to the 1993 and 2010 revisions to the FRCP 26(a)(2), § 308.107(d) provides two categories of

expert witnesses with two different levels of required disclosures. Section 308.107(d)(2)(i) is intended for 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) is intended to cover 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. Consistent with the FRCP 26(a)(2), these rules are intended as disclosure requirements. Similar to the Federal rules of evidence and case law, these documents are prior written disclosures of future opinion testimony to be offered at the hearing to assist the ALJ. Neither category of written disclosures is intended to serve as substitutes for expert witness testimony at the hearing. Moreover, occasionally the ALJ orders mandated more disclosure from expert witnesses than the FRCP 26(a)(2) required. The FDIC believes that the FRCP 26(a)(2) created a two-tier system for disclosure that represents a legitimate and reasonable divide between the two categories of expert witnesses. Those individuals who are not in the business of providing professional expert testimony do not need to provide a heightened level of disclosures. As the Federal Rules Committee notes stated in the 2010 Amendments "[c]ourts must take care against requiring undue detail, keeping in mind that these witnesses have not been specially retained and may not be as responsive to counsel as those who have."

#### Section 308.107(e) Depositions

Section 308.107(e) is a new section that provides for the possibility of depositions during the discovery process in cases where such discovery is appropriate. The FDIC does not currently allow for deposition discovery in its enforcement matters, and parties are not legally entitled to take depositions in administrative actions under the Administrative Procedure Act.<sup>47</sup> Nonetheless, the FDIC has observed that the OCC, the Board, and other Federal agencies have voluntarily provided respondents in administrative proceedings with an opportunity for limited depositions in appropriate

cases.<sup>48</sup> For these reasons, the FDIC proposes adding the option for the parties to pursue limited depositions of individuals with direct knowledge of facts relevant to the proceeding and individuals designated as an expert in cases where such discovery is appropriate and proportional to the needs of the case.

Under § 308.107(e)(1), the FDIC is proposing limitations to ensure that any depositions that do take place do not cause undue delay or burden. Under the FDIC's proposed rules, any deposition discovery would be limited by the requirement that discovery be proportional to the needs of the case, as required for all discovery under § 308.107(a). Additionally, depositions would only be allowed where the information sought from the depositions cannot be obtained from another source that is more convenient, less burdensome, or less expensive. Finally, the FDIC is proposing that, in the absence of extraordinary circumstances, depositions will be limited to individuals expected to testify at the hearing. The FDIC believes that the limitations proposed strike an appropriate balance between the potential for a demonstrable need for depositions in some cases and the interest in resolving cases efficiently.

The remainder of the § 308.107(e) sets forth various procedural rules that will apply to any deposition discovery, including notices, transcription, timing and duration of depositions. These provisions are largely adapted from procedures under the FRCP and those used by the OCC and the Board.

#### Section 308.107(f) Discovery Motions

Section 308.107(f) is a new section aimed at clarifying 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.

<sup>48</sup> Until recently, the rules of practice governing administrative actions before the Securities and Exchange Commission (SEC) were similar to those in the Uniform Rules, allowing for the taking of depositions only upon a showing that a deponent will be unlikely to be able to attend and testify at a hearing. In 2016, the SEC amended its rules of practice to remove this restriction and to allow parties with broader, albeit still limited, access to depositions in administrative proceedings. 81 FR 50211 (July 13, 2016).

<sup>47</sup> See, e.g., *Starr Comm'r of Internal Revenue*, 226 F.2d 721,722 (7th Cir. 1955), cert. denied, 350 U.S. 993 (1955); *McClelland v. Andrus*, 606 F.2d 1278, 1285 (D.C. Cir. 1979); *Jones Total Health Care Pharmacy, LLC v. Drug Enforcement Administration*, 881 F.3d 823, 834 (C.A.11, 2018).



#### IV. Discussion of OCC Changes to Part 4, Service of Process

The OCC proposes to amend subpart A of 12 CFR part 4, Organization and Functions, to add a new § 4.8 that would address service of process. This new provision would put 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. Codifying this process in the rule should help avoid possible confusion as to where and how private parties serve the OCC, Comptroller, or officers or employees of the OCC, which should ensure that the OCC has adequate notice to respond to a complaint or other filing. The proposal provides that “officers” are officials who are not employees of the OCC, such as an ALJ.

Specifically, proposed § 4.8(a) provides that paragraphs (b), (c), and (d) of this section apply to service of process upon the OCC, the Comptroller acting in his 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. Proposed § 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.<sup>49</sup> Proposed § 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. Proposed § 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.<sup>50</sup> Proposed § 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 would clarify that a summons or complaint should not be sent to another office of the OCC.

Finally, proposed § 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.

#### V. Regulatory Analysis

##### A. Regulatory Flexibility Act

**OCC:** The Regulatory Flexibility Act (RFA)<sup>51</sup> requires an agency, in connection with a proposed rule, to prepare an Initial Regulatory Flexibility Analysis (IRFA) 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 \$600 million or less and trust companies with total assets of \$41.5 million or less)<sup>52</sup> or to certify that the proposed rule would not have a significant economic impact on a substantial number of small entities.

The OCC currently supervises approximately 1,122 institutions (commercial banks, trust companies, Federal savings associations, and branches or agencies of foreign banks, collectively banks), of which 669 are small entities.<sup>53</sup> The rule could impact any OCC-supervised institution, including any of these small entities. However, it is unlikely that the proposed rule, if implemented, would impact more than a *de minimis* number of OCC-supervised institutions in any

given year.<sup>54</sup> Furthermore, the proposed rule would facilitate the orderly determination of administrative proceedings and its proposed changes are primarily updates and clarifications of administrative procedure and in general reflect current practices. Therefore, the OCC concludes that the proposed 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 proposed rule would be *de minimis*, the OCC certifies that the proposed rule would not have a significant economic impact on a substantial number of small entities supervised by the OCC. Accordingly, an IRFA is not required.

**Board:** The RFA generally requires an agency to consider the impact of the agency’s proposed rules on small entities and to conduct an IRFA of any rule subject to notice-and-comment rulemaking requirements, unless the head of the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.<sup>55</sup> An IRFA must contain (1) a description of the reasons why action by agency is being considered; (2) a succinct statement of the objectives of, and legal basis for, the proposed rule; (3) a description of, and where feasible, an estimate of the number of small entities to which the proposed rule will apply; (4) a description of the projected reporting, recordkeeping, and other compliance requirements of the proposed rule; (5) an identification, to the extent practicable, of all relevant Federal rules which may duplicate, overlap with, or conflict with the proposed rule; and (6) a description of any significant alternatives to the proposed rule which accomplish its stated objectives.

As stated in this notice of proposed rulemaking, the Agencies are proposing amendments to the Uniform Rules and to their local 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. In addition, the Board is proposing to establish a single set of rules governing all formal investigations. The proposed rules only establish procedures

<sup>51</sup> 5 U.S.C. 601 *et seq.*

<sup>52</sup> See the SBA’s size thresholds for commercial banks and savings institutions, and trust companies, 13 CFR 121.201.

<sup>53</sup> 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, 2020, 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*.

<sup>54</sup> 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.

<sup>55</sup> 5 U.S.C. 601–612.

<sup>49</sup> See Rule 4(i) of the Federal Rules of Civil Procedure.

<sup>50</sup> *Id.*

governing Board formal investigations and adjudicatory proceedings. The proposed rules would not impose any requirement on regulated entities, and regulated entities would not need to take any action in response to the proposed rules. As such, the proposed rules will not have a significant economic impact on a substantial number of small entities. The proposed rules will not duplicate, overlap with, or conflict with other Federal rules, as they would only apply to Board formal investigations and administrative adjudications. Finally, the Board believes there are no significant alternatives to the proposed rules. The Board welcomes comments on this analysis.

**FDIC:** The RFA requires that, in connection with a notice of proposed rulemaking, an agency prepare and make available for public comment an initial regulatory flexibility analysis that describes the impact of the proposed rule on small entities.<sup>56</sup> 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 \$600 million.<sup>57</sup> 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 these thresholds typically represent significant effects for FDIC-supervised institutions.

As of the quarter ending March 31, 2021, the FDIC supervised 3,215 depository institutions,<sup>58</sup> of which 2,333 were considered small for the purposes of the RFA.<sup>59</sup> As previously discussed, the Agencies are proposing

changes to 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 proposing to modify the Local Rules of administrative practice and procedure. If adopted, the proposed amendments would apply to administrative proceedings held by the FDIC and would not impose any requirement on regulated entities. Further, the FDIC typically brings less than five formal administrative proceedings annually. Finally, the proposed amendments are primarily updates and clarifications of administrative procedure and impose no significant additional burdens on small entities. Therefore, the FDIC concludes that the proposed 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 proposed rule will not have a significant economic impact on a substantial number of small entities. The FDIC invites comments on all aspects of the supporting information provided in this RFA section. In particular, would this proposed rule have any significant effects on small entities that the FDIC has not identified?

**NCUA:** The RFA generally requires that, in connection with a notice of proposed rulemaking, an agency prepare and make available for public comment an initial 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** together with the rule. The proposed rule would amend 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 proposed changes consist of updates and clarifications of administrative procedure and impose no significant new burdens on credit unions, parties to administrative actions, or counsel. Accordingly, the NCUA certifies that the proposed 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<sup>60</sup> (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 proposed rule and determined that it does not create any information collection or revise any existing collection of information. Accordingly, no PRA submissions to OMB will be made with respect to this proposed rule. The Board reviewed the rule under the authority delegated to the Board by OMB.

#### *C. OCC Unfunded Mandates Reform Act of 1995*

The OCC analyzed the proposed rule under the factors set forth in the Unfunded Mandates Reform Act of 1995.<sup>61</sup> Under this analysis, the OCC considered whether the proposal includes a Federal mandate that may result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year (\$158 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 proposed rule would be *de minimis*. Therefore, the OCC concludes that the proposed rule would not result in an expenditure of \$158 million or more annually by State, local, and tribal governments, or by the private sector. Because the proposed 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),<sup>62</sup> 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 must consider, consistent with principles of safety and

<sup>56</sup> 5 U.S.C. 601, *et seq.*

<sup>57</sup> The SBA defines a small banking organization as having \$600 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 84 FR 34261, effective August 19, 2019). “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.

<sup>58</sup> FDIC-supervised institutions are set forth in 12 U.S.C. 1813(q)(2).

<sup>59</sup> FDIC Call Report data, March 31, 2021.

<sup>60</sup> 44 U.S.C. 3501–3521.

<sup>61</sup> 2 U.S.C. 1532.

<sup>62</sup> 12 U.S.C. 4802(a).

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 published in final form.<sup>63</sup> The Agencies invite comments that will further inform their consideration of RCDRIA.

#### E. Plain Language

Section 722 of the Gramm-Leach-Bliley Act<sup>64</sup> requires the OCC, Board, and FDIC to use plain language in all proposed and final rules published after January 1, 2000. The Agencies have sought to present the proposed rule in a simple and straightforward manner and invite comment on the use of plain language. For example:

- Have the Agencies organized the material to inform your needs? If not, how could the Agencies present the proposed rule more clearly?
- Are the requirements in the proposed rule clearly stated? If not, how could the proposed rule be more clearly stated?
- Does the proposed rule contain technical language or jargon that is not clear? If so, which language requires clarification?
- Would a different format (grouping and order of sections, use of headings, paragraphing) make the proposed rule easier to understand? If so, what changes would achieve that?
- Is this section format adequate? If not, which of the sections should be changed and how?
- What other changes can the Agencies incorporate to make the proposed rule easier to understand?

#### 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 NCUA has determined that this proposed 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

The NCUA has determined that this proposed rule will not affect family well-being within the meaning of section 654 of the Treasury and General Government Appropriations Act, 1999.<sup>65</sup>

### Common Text of Proposed Uniform Rules (All Agencies)

#### Subpart A—Uniform Rules of Practice and Procedure

##### Sec.

- \_\_\_\_.1 [Reserved]
- \_\_\_\_.2 Rules of construction.
- \_\_\_\_.3 [Reserved]
- \_\_\_\_.4 Authority of the [Agency Head].
- \_\_\_\_.5 Authority of the administrative law judge.
- \_\_\_\_.6 Appearance and practice in adjudicatory proceedings.
- \_\_\_\_.7 Good faith certification.
- \_\_\_\_.8 Conflicts of interest.
- \_\_\_\_.9 *Ex parte* communications.
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- \_\_\_\_.41 Stays pending judicial review.

### Subpart A—Uniform Rules of Practice and Procedure

#### § \_\_\_\_ .1 [Reserved]

#### § \_\_\_\_ .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.

#### § \_\_\_\_ .3 [Reserved]

#### § \_\_\_\_ .4 Authority of the [Agency Head].

The [Agency Head] 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.

#### § \_\_\_\_ .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 chapter 5 of title 5 of the United States Code. 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 § \_\_\_\_ .31;
- (7) To consider and rule upon all procedural and other motions appropriate in an adjudicatory

<sup>63</sup> 12 U.S.C. 4802.

<sup>64</sup> Public Law 106–102, section 722, 113 Stat. 1338, 1471 (1999), 12 U.S.C. 4809.

<sup>65</sup> Public Law 105–277, 112 Stat. 2681 (1998).

proceeding, provided that only the [Agency Head] 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 [Agency Head] a recommended decision as provided herein;

(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.

#### **§ \_\_\_\_ .6 Appearance and practice in adjudicatory proceedings.**

(a) *Appearance before the [AGENCY] 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 [AGENCY] if such attorney is not currently suspended or debarred from practice before the [AGENCY].

(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 [Agency Head], 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 [agency specific reference].

(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.

#### **§ \_\_\_\_ .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.

#### **§ \_\_\_\_ .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 § \_\_\_\_ .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.

#### **§ \_\_\_\_ .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 [AGENCY] (including such person's counsel); and

(ii) The ALJ handling that proceeding, the [Agency Head], 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 [Agency Head] until the date that the [Agency Head] issues a final decision pursuant to § \_\_\_\_ .40(c):

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

(2) The [Agency Head], ALJ, or decisional employee may not make or knowingly cause to be made to any interested person outside the [AGENCY] any *ex parte* communication.

(c) *Procedure upon occurrence of ex parte communication.* If an *ex parte* communication is received by the ALJ, the [Agency Head] 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 [Agency Head] 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 [Agency Head] 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 [AGENCY].

(2) *Decision process*. An employee or agent engaged in the performance of investigative or prosecuting functions for the [AGENCY] 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 § \_\_\_.40, except as witness or counsel in administrative or judicial proceedings.

#### § \_\_\_.10 Filing of papers.

(a) *Filing*. Any papers required to be filed, excluding documents produced in response to a discovery request pursuant to §§ \_\_\_.25 and \_\_\_.26, must be filed with OFIA, except as otherwise provided.

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

(1) Electronic mail or other electronic means designated by the [Agency Head] 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 8½ × 11 inch page and must be clear and legible.

(2) *Signature*. All papers must be dated and signed as provided in § \_\_\_.7.

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

#### § \_\_\_.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 [Agency Head] or the ALJ*. (1) All papers required to be served by the [Agency Head] or the ALJ upon a party who has appeared in the proceeding in accordance with § \_\_\_.6 will be served by electronic mail or other electronic means designated by the [Agency Head] or ALJ.

(2) If a respondent has not appeared in the proceeding in accordance with § \_\_\_.6, the [Agency Head] 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 an individual 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.

#### § \_\_\_.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 [Agency Head] 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.

#### **§ \_\_\_\_ .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 [Agency Head] pursuant to § \_\_\_\_ .38, the [Agency Head] 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 [Agency Head]'s or the ALJ's own motion.

#### **§ \_\_\_\_ .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 [AGENCY] will not be required to pay any fees to, or expenses of, any witness not subpoenaed by the [AGENCY].

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

#### **§ \_\_\_\_ .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.

#### **§ \_\_\_\_ .16 [AGENCY]'s right to conduct examination.**

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

#### **§ \_\_\_\_ .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.

#### **§ \_\_\_\_ .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 [Agency Head].

(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 [Agency Head].

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

(1) The legal authority for the proceeding and for the [AGENCY]'s jurisdiction over the proceeding;

(2) Matters of fact or law showing that the [AGENCY] 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 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 [Agency Head] a recommended decision containing the findings and the relief sought in the notice. Any final order issued by the [Agency Head] 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 [Agency Head] without further action by the ALJ.

#### § \_\_\_\_\_.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 [Agency Head] 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.

#### § \_\_\_\_\_.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 [Agency Head] a recommended decision containing the findings and the relief sought in the notice.

#### § \_\_\_\_\_.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.

#### § \_\_\_\_\_.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 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 [Agency Head].

(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 ALJ or the [Agency Head], 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 §§ \_\_\_\_\_.29 and \_\_\_\_\_.30.

#### § \_\_\_\_\_.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 [agency specific reference] 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.

**§ \_\_\_\_\_.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 § \_\_\_\_\_.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 § \_\_\_\_\_.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 § \_\_\_\_\_.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.

**§ \_\_\_\_\_.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 § \_\_\_\_\_.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 § \_\_\_\_\_.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.

#### § \_\_\_\_\_.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 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.

#### § \_\_\_\_\_.28 Interlocutory review.

(a) *General rule.* The [Agency Head] may review a ruling of the ALJ prior to the certification of the record to the [Agency Head] only in accordance with the procedures set forth in this section and § \_\_\_\_\_.23.

(b) *Scope of review.* The [Agency Head] may exercise interlocutory review of a ruling of the ALJ if the [Agency Head] 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 § \_\_\_\_\_.23. Any party may file a response to a request for interlocutory review in accordance with § \_\_\_\_\_.23(d). Upon the expiration of the time for filing all responses, the ALJ will refer the matter to the [Agency Head] for final disposition.

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

#### § \_\_\_.29 Summary disposition.

(a) *In general.* The ALJ will recommend that the [Agency Head] 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 [Agency Head]. If the ALJ finds that no party is entitled to summary disposition, the ALJ will make a ruling denying the motion.

#### § \_\_\_.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.

#### § \_\_\_.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.

#### § \_\_\_.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.

#### § \_\_\_.33 Public hearings.

(a) *General rule.* All hearings must be open to the public, unless the [Agency Head], in the [Agency Head]'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 [Agency Head] 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 [Agency Head]. The form of,

and procedure for, these requests and replies are governed by § \_\_\_\_\_.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.

#### § \_\_\_\_\_.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 \_\_\_\_\_.26(c).

#### § \_\_\_\_\_.35 Conduct of hearings.

(a) *General rules.* (1) 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.

#### § \_\_\_\_\_.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 [Agency Head] 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 [Agency Head].

(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.

#### **§ \_\_\_\_\_.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.

#### **§ \_\_\_\_\_.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 § \_\_\_\_\_.37(b), the ALJ will file with and certify to the [Agency Head], 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 [Agency Head] for final determination the record of the proceeding, the ALJ will furnish to the [Agency Head] 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.

#### **§ \_\_\_\_\_.39 Exceptions to recommended decision.**

(a) *Filing exceptions.* Within 30 days after service of the recommended decision, findings, conclusions, and proposed order under § \_\_\_\_\_.38, a party may file with the [Agency Head] 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 [Agency Head] 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.

#### **§ \_\_\_\_\_.40 Review by the [Agency Head].**

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

(b) *Oral argument before the [Agency Head].* Upon the initiative of the [Agency Head] or on the written request

of any party filed with the [Agency Head] within the time for filing exceptions, the [Agency Head] 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 [Agency Head]'s final decision. Oral argument before the [Agency Head] must be on the record.

(c) *[Agency Head]'s final decision.* (1) Decisional employees may advise and assist the [Agency Head] in the consideration and disposition of the case. The final decision of the [Agency Head] will be based upon review of the entire record of the proceeding, except that the [Agency Head] 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 [Agency Head] 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 [Agency Head] 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 [Agency Head] will be served upon each party to the proceeding, upon other persons required by statute, and, if directed by the [Agency Head] or required by statute, upon any appropriate State or Federal supervisory authority.

#### **§ \_\_\_\_ .41 Stays pending judicial review.**

The commencement of proceedings for judicial review of a final decision and order of the [Agency Head] may not, unless specifically ordered by the [Agency Head] or a reviewing court, operate as a stay of any order issued by the [Agency Head]. The [Agency Head] may, in the [Agency Head's discretion], and on such terms as the [Agency Head] 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.

#### **End of Common Rule Text**

#### **Proposed Adoption of the Uniform Rules**

The agency specific adoptions of the amendments to the Common Rule text which appears at the end of the common preamble, as well as other amendments to agency rules, appear below.

#### **List of Subjects**

##### **12 CFR Part 3**

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 165**

Administrative practice and procedure, Savings associations.

##### **12 CFR Part 238**

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

##### **12 CFR Part 263**

Administrative practice and procedure, Investigations, Federal Reserve System.

##### **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, Share insurance, Claims,

Credit unions, Crime, Equal access to justice, Investigations, Lawyers, Penalties.

#### **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 proposes to amend 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 19 is revised to read as follows:

**Authority:** 5 U.S.C. 504, 554–557; 12 U.S.C. 93, 93(d), 93a, 164, 481, 504, 1464(w); 1817, 1818, 1820, 1831m, 1831o, 1832, 1884, 1972, 3102, 3108, 3110, 3909, and 4717; 15 U.S.C. 78l, 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 42 U.S.C. 4012a.

■ 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), (c), and (d) of this section apply to service of process upon the OCC, the Comptroller acting in his official capacity, officers (officials who are not employees of the OCC, such as an 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, 400 7th Street SW, 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 should be served with a copy of the summons or complaint at the Washington, DC headquarters office in accordance with paragraph (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 in paragraphs (a)(1) and (2) and paragraph (b) by 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.

### § 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”.

## PART 19—RULES OF PRACTICE AND PROCEDURE

■ 10. The authority citation for part 19 is revised to read as follows:

**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. 78l, 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.

## Subpart A—Uniform Rules of Practice and Procedure

■ 11. Revise subpart A as set forth at the end of the common preamble.

■ 12. Section 19.1 is added to read as follows:

### § 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 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;



(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 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.

■ 13. Section 19.3 is added to read as follows:

### § 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 administrative law judge, 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 subpart A.

(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) of this section.

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

(p) *Uniform Rules* means those rules in subpart A of this part 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)).

### Subpart B—Procedural Rules for OCC Adjudications

#### § 19.100 [Amended]

■ 14. Section 19.100 is amended by:

■ a. Removing the phrase "administrative law judge" wherever it appears and adding in its place "ALJ";

■ b. Removing the phrase "Hearing Clerk, Office of the Comptroller of the Currency, 400 7th Street SW, Washington, DC 20219" and adding in its place the phrase "OCC Hearing Clerk in a manner prescribed by § 19.10(b) and (c)";

■ c. Removing the word "and" before "any other papers required to be filed with the Comptroller" in the second sentence; and

■ d. Adding before the period at the end of the second sentence the phrase "; and any attachments or exhibits to such documents".

■ 15. Section 19.101 is revised to read as follows:

#### § 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.

■ 16. Section 19.102 is added to read as follows:

#### § 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

■ 17. The heading for subpart C is revised to read as set forth above.

■ 18. Section 19.110 is revised to read as follows:

#### § 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. Section 19.111 is revised to read as follows:

#### § 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 attorney, or fails to submit a written argument where oral argument has been waived pursuant to § 19.112(c) of this part, 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.

■ 20. Section 19.112 is revised to read as follows:

#### § 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.

■ 21. Section 19.113 is amended by:

■ a. Adding paragraph headings to paragraphs (a) and (b);

■ b. Adding a paragraph heading to, and revising the first sentence in, paragraph (c);

■ c. Adding a paragraph heading to, and adding the phrase “or charges” after the phrase “or other disposition of the charge” in, paragraph (d);

■ d. Adding a paragraph heading to paragraph (e); and

■ e. Adding a paragraph heading to, and removing the phrase “No hearing need be granted” and adding in its place the phrase “The Comptroller is not required to grant a hearing” in, the last sentence of paragraph (f).

The additions and revision read as follows:

#### **§ 19.113 Recommended and final decisions.**

(a) *Issuance of recommended decision.* \* \* \*

(b) *Comments.* \* \* \*

(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.

\* \* \*

(d) *Other actions.* \* \* \*

(e) *Expiration of order.* \* \* \*

(f) *Petition for reconsideration.* \* \* \*

■ 22. Revise subpart D to read as follows:

#### **Subpart D—Actions Under the Federal Securities Laws**

Sec.

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 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. 78l(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. 78l(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. 78l(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. 78l(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), 78l, 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, F, and G [Removed and Reserved]**

■ 23. Remove and reserve subparts E, F, and G.

#### **Subpart H—Change in Bank Control**

■ 24. Section 19.160 is revised to read as follows:

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

■ 25. Section 19.161 is amended by:

■ a. Revising the section heading;

■ b. Removing paragraph (a);

■ c. Redesignating paragraphs (b) through (e) as paragraphs (a) through (d), respectively;

■ d. Revising newly redesignated paragraph (a) introductory text;

■ e. Removing the word “shall” and adding in its place the word “will” in newly redesignated paragraph (b) introductory text; and

■ f. In newly redesignated paragraph (d):

■ i. Removing the phrase “enforcement counsel” in the second sentence and adding in its place the phrase “Enforcement Counsel” and removing the word “shall” and adding in its place the word “will” in the third sentence; and

■ ii. Removing the phrase “administrative law judge” in the third sentence and adding in its place the word “ALJ”.

The revisions read as follows:

#### § 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:

\* \* \* \* \*

#### Subpart I—Discovery Depositions and Subpoenas

■ 26. Section 19.170 is amended by:

■ a. Revising paragraphs (a) and (b);

■ b. Removing the phrase “ten days” and adding in its place the phrase “20 days” and removing the phrase “administrative law judge” and adding in its place the word “ALJ” in paragraph (c);

■ c. Revising the first sentence of paragraph (d);

■ d. Removing the phrase “electronic sound” and adding in its place the phrase “electronic means, such as by sound or video” in paragraph (e)(1)(i);

■ e. Removing the phrase “administrative law judge” and adding in its place the word “ALJ” in paragraph (e)(1)(iii); and

■ f. Removing the phrase “the cost of the recording” and adding in its place

the phrase “the cost of recording” in paragraph (e)(2);

■ g. In paragraph (f) introductory text, removing the phrase “administrative law judge shall grant such protective order”, and adding in its place the phrase “ALJ may grant a protective order”; and

■ h. Revising the heading and removing the word “shall” and adding in its place the word “must” wherever it appears in paragraph (g).

The revisions read as follows:

#### § 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’s 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’s 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.

\* \* \* \* \*

(d) \* \* \* 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. \* \* \*

\* \* \* \* \*

(g) *Expenses.* \* \* \*

#### § 19.171 [Amended]

■ 27. Section 19.171 is amended:

■ a. In paragraph (a) by:

■ i. Removing the phrase “administrative law judge shall” and adding in its place the phrase “ALJ may”; and

■ ii. Removing the phrase “under paragraph (a) of this section” and adding in its place the phrase “under § 19.170”; and

■ iii. Removing the phrase “state or territory that is subject to the jurisdiction of the United States” and adding in its place the phrase “State, territory, or possession of the United States or the District of Columbia”;

■ b. By removing the phrase “administrative law judge” and adding in its place the phrase “ALJ, unless the ALJ issues an order indicating the filing of proof of service is not required” in paragraph (b)(2);

■ c. Adding the phrase “, or any party,” in the first sentence after the phrase “A person named in a subpoena” and removing the word “which” in the second sentence and adding in its place the word “that” in paragraph (c); and

■ d. Removing the word “shall” and adding in its place the word “must” in paragraph (d).

#### Subpart J—Formal Investigations

■ 28. Section 19.180 is revised to read as follows:

#### § 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.

■ 29. Section 19.181 is revised to read as follows:

**§ 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.

■ 30. Section 19.182 is revised to read as follows:

**§ 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.

■ 31. Section 19.183 is revised to read as follows:

**§ 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.

■ 32. Section 19.184 is amended by revising paragraph (b) and adding paragraph (c) to read as follows:

**§ 19.184 Service of subpoena and payment of witness expenses.**

\* \* \* \* \*

(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.

■ 33. Section 19.185 is added to read as follows:

**§ 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 [Amended]**

■ 34. Section 19.190 is amended:

■ a. In the second sentence by:

■ i. Removing the phrase “administrative law judge” and adding in its place the word “ALJ”; and

■ ii. Removing the phrase “subparts C and D of this part” and adding in its place the phrase “subpart C of this part and § 19.120”; and

■ b. In the third sentence, by removing the phrase “censure, suspension or debarment” and adding in its place the phrase “censure, suspension, or debarment”.

**§ 19.191 [Amended]**

■ 35. Section 19.191 is amended by:

■ a. In the introductory text, removing the word “shall”;

■ b. In paragraph (a):

■ i. Adding the phrase “written or oral” before the phrase “presentations to the OCC” and adding a comma after the word “privileges” in the first sentence;

■ ii. Removing the word “which” and adding in its place the word “that” in the second sentence; and

■ iii. Removing the word “bank” and adding in its place the phrase “national bank, Federal savings association, or Federal branch or agency of a foreign bank” in the last sentence;

■ c. In paragraph (b), removing the phrase “territory, commonwealth, of the United States” and adding in its place the phrase “territory, or commonwealth of the United States” and

■ d. In paragraph (c), adding the word

“or” before “commonwealth” and removing the comma after the phrase “of the United States”.

■ 36. Section 19.192 is amended by:

■ a. Revising the paragraph (a) heading;

■ b. Removing the phrase “his or her” and adding in its place the word



“their”, removing the phrase “administrative law judge” and adding in its place the word “ALJ”, and removing the word “shall” and adding in its place the word “will” in paragraph (c)(1);

■ c. Removing the phrase “administrative law judge and adding in its place the word “ALJ” in paragraph (c)(2); and

■ d. In paragraph (d), removing the phrase “Nothing in this section shall be read as precluding the administrative law judge” and adding in its place the phrase “This section does not preclude the ALJ”.

The revision reads as follows:

**§ 19.192 Sanctions relating to conduct in an adjudicatory proceeding.**

(a) *In general.* \* \* \*

\* \* \* \* \*

■ 37. Section 19.193 is amended by:

■ a. Revising the section heading; and

■ b. Removing the phrase “such an individual from practice before the OCC if he or she” and adding in its place the phrase “an individual from practice before the OCC if the individual” in the first sentence.

The revision reads as follows:

**§ 19.193 Censure, suspension, or debarment.**

\* \* \* \* \*

**§ 19.194 [Amended]**

■ 38. Section 19.194 is amended by:

■ a. Removing the phrase “who is qualified to practice as an attorney and is” in paragraph (a); and

■ b. Removing the phrase “who is qualified to practice as a certified public accountant or public accountant and is” in paragraph (b).

**§ 19.195 [Amended]**

■ 39. Section 19.195 is amended:

■ a. In the introductory text, by adding a comma after the word “judgment”;

■ b. In paragraph (a), by:

■ i. Removing the word “which” and adding in its place the word “that”; and

■ ii. Removing the phrase “he or she” and adding in its place the word “they”;

■ iii. Removing the period at the end of the paragraph and adding in its place a semi-colon; and

■ c. By removing the period at the end of paragraph (b) and adding in its place “; or”;

**§ 19.196 [Amended]**

■ 40. Section 19.196 is amended:

■ a. In paragraph (c) by:

■ i. Adding a comma after the word “duress”;

■ ii. Removing the comma after the word “coercion” and adding a semicolon in its place; and

■ iii. Adding a semi-colon after the word “advantage”;

■ b. In paragraph (d), by removing the comma after the phrase “of the United States” and removing the phrase “in matters relating to the supervisory responsibilities of the OCC”;

■ c. In paragraph (g) by adding a comma after the word “debarment” and adding the word “former” before “OTS”; and

■ d. In paragraph (h), by removing the phrase “Willful violation of” and adding in its place the phrase “Willfully violating”.

**§ 19.197 [Amended]**

■ 41. Section 19.197 is amended by:

■ a. Adding a comma after the word “suspension” and removing the citation “§ 19.192” and adding in its place the phrase “this subpart” in paragraph (a);

■ b. Removing the phrase “or the Comptroller’s delegate” in paragraph (b); and

■ c. Adding a comma after the word “suspension” in the first sentence, removing the word “which” wherever it appears in the second and third sentences and adding in its place the word “that”, and removing the phrase “or the Comptroller’s delegate” in paragraph (c).

■ 42. Section 19.198 is amended:

■ a. In paragraph (a), in the first sentence, by:

■ i. Adding a comma after the word “debarment” the first time it appears;

■ ii. Removing the phrase “proceeding for debarment” and adding in its place the phrase “proceeding for censure, debarment,”;

■ b. In paragraph (b), by:

■ i. Revising the paragraph heading; and

■ ii. Adding the phrase “or debarment” before the phrase “from practice” in the first sentence.

The revision reads as follows:

**§ 19.198 Conferences.**

\* \* \* \* \*

(b) *Voluntary suspension or debarment.* \* \* \*

**§ 19.199 [Amended]**

■ 43. Section 19.199 is amended by:

■ a. Removing the phrase “administrative law judge” wherever it appears and adding in its place the word “ALJ”;

■ b. Removing the phrase “or the Comptroller’s delegate”;

■ c. Removing the word “shall” wherever it appears and adding in its place the word “will”;

■ d. Removing the word “which” and adding in its place the word “that”;

■ e. Removing the phrase “the Comptroller on his or her own initiative, or” and adding the phrase “the

Comptroller, on the Comptroller’s initiative or”

■ f. Adding a comma after the phrase “decision to the Comptroller”; and

■ g. Adding a comma after the word “debar” in the last sentence.

■ 44. Section 19.200 is amended by:

■ a. Revising the section heading;

■ b. In paragraph (a), adding the phrase “pursuant to § 19.201” at the end; and

■ c. In paragraph (d);

■ i. Removing the word “shall” wherever it appears and adding in its place the word “will”; and

■ ii. Removing the phrase “or the Comptroller’s delegate”.

The revision reads as follows:

**§ 19.200 Effect of debarment, suspension, or censure.**

\* \* \* \* \*

**§ 19.201 [Amended]**

■ 45. Section 19.201 is amended in the last sentence by:

■ a. Removing the phrase “shall be” and adding in its place the word “is”; and

■ b. Removing the phrase “in his or her” and adding in its place the phrase “at the Comptroller’s”.

■ 46. Subpart L is revised to read as follows:

**Subpart L—Equal Access to Justice Act**

Sec.

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 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 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 the 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 exempt from taxation under section 501(a) of such 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 definition.

(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(e), 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 herein, 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) Unaudited financial statements are 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 under § 19.211, 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 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's customary fee for similar services;

(ii) If an employee of the applicant, the fully allocated cost of the attorney's, agent's, or witness's 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, 400 7th St. SW, 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**

■ 47. The heading for subpart M is revised to read as set forth above.

■ 48. Section 19.220 is revised to read as follows:

#### **§ 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.

■ 49. Section 19.221 is revised to read as follows:

#### **§ 19.221 Reclassification of an insured depository institution based on unsafe or unsound condition or practice.**

(a) *Issuance of notice of proposed 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) hereinafter is referred to 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;

(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 [Amended]

■ 50. Section 19.222 is amended by:

- a. Removing the word “bank” in the first and second sentences and adding in its place the phrase “insured depository institution”; and
- b. Removing the word “shall” in the second sentence and adding in its place the word “will”.

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

■ 51. The heading for subpart N is revised to read as set forth above.

■ 52. Section 19.230 is amended by:

- a. Removing the phrase “12 U.S.C. 1831o and part 6 of this chapter” and adding in its place the phrase “section 38 of the FDIA (12 U.S.C. 1831o) and 12 CFR part 6 (prompt corrective action)”; and
- b. Adding a second sentence.

The addition reads as follows:

#### § 19.230 Scope.

\* \* \* 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.

■ 53. Section 19.231 is revised to read as follows:

#### § 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

■ 54. The heading for subpart O is revised to read as set forth above.

#### § 19.240 [Amended]

■ 55. Section 19.240 is amended in paragraph (a) by removing the phrase "inflation adjustment is calculated by" and adding in its place the phrase "OCC calculates the inflation adjustment by".

■ 56. Subpart Q is added to read as follows:

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

Sec.

19.250 Scope.

19.251 Notice and hearing.

19.252 Presiding officer.

19.253 Grounds for termination.

19.254 Judicial review.

### 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 or 31 U.S.C. 5322 or 5324, the Comptroller will:

(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 section 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;

(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 12 CFR 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).

■ 57. Subpart R, consisting of § 19.260, is added to read as follows:

#### **Subpart R—Effective Date**

##### **§ 19.260 Effective date.**

Subparts A through E and H, I, J, L, M, N, P, and Q of this part will apply to adjudicatory proceedings initiated on or after [EFFECTIVE DATE OF FINAL RULE]. Actions filed and in process before the effective date will continue to be governed by the Rules of Practice and Procedure for national banks, Federal savings associations, and Federal branches and agencies that were in place prior to [EFFECTIVE DATE OF FINAL RULE].

#### **PART 108—[REMOVED]**

■ 58. Part 108 is removed.

#### **PART 109—[REMOVED]**

■ 59. Part 109 is removed.

#### **PART 112—[REMOVED]**

■ 60. Part 112 is removed.

#### **PART 165—[REMOVED]**

■ 61. Part 165 is removed.

### **Board of Governors of the Federal Reserve System**

#### **Authority and Issuance**

For the reasons stated in the preamble, the Board proposes to amend parts 238 and 263 in title 12 of the Code of Federal Regulations as follows:

#### **PART 238—SAVINGS AND LOAN HOLDING COMPANIES**

■ 62. 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. 78l.

#### **Subpart L—[Removed and Reserved]**

■ 63. Remove and reserve subpart L, consisting of §§ 238.111 through 238.117.

#### **PART 263—RULES OF PRACTICE FOR HEARINGS**

■ 64. The authority citation for part 263 is revised 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.

#### **Subpart A—Uniform Rules of Practice and Procedure**

■ 65. Revise subpart A as set forth at the end of the common preamble.

■ 66. Section 263.1 is added to read as follows:

##### **§ 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.

■ 67. Section 263.3 is added to read as follows:

#### § 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 subpart A.

(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 (the OCC), the Federal Deposit Insurance Corporation (the FDIC), and the National Credit Union Administration (the 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 subpart A of this part 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)).

#### Subpart B—Board Local Rules Supplementing the Uniform Rules

##### § 263.50 [Amended]

■ 68. Section 263.50 is amended:

■ a. By removing "\$ 263.50(b) of this subpart" and adding in its place "paragraph (b) of this section" in paragraph (a); and

■ b. By removing "shall" and adding in its place the word "will" in paragraph (b) introductory text.

##### § 263.51 [Amended]

■ 69. Section 263.51 is amended by removing "\$ 263.3(f) of" and adding "of this part" after "subpart A" in its place in paragraph (c).

■ 70. Section 263.52 is amended by:

■ a. Removing "shall" and adding in its place "must"; and

■ b. Adding a second sentence.

The addition reads as follows:

##### § 263.52 Address for filing.

\* \* \* All papers to be filed with the Board electronically must be sent to: *OSEC-Litigation@frb.gov*.

■ 71. Section 263.53 is amended by:

■ a. Removing "shall" and adding in its place "will" in the first sentence in paragraph (a);

■ b. Removing "administrative law judge" and adding in its place "ALJ" in the first sentence of paragraph (b).

■ c. Adding in the second sentence of paragraph (b) "the manner (e.g., remote means, in person)," after "and the address of the place"; and in the last sentence of paragraph (b) removing "shall" and adding in its place "must";

■ d. Revising paragraph (c);

■ e. Removing "shall" and adding in its place "must" in the last sentence of paragraph (d);

■ f. Removing "shall" and adding in its place "must" in paragraph (e);

■ g. Revising paragraph (f); and

■ h. Removing "administrative law judge" and adding in its place "ALJ" in the first sentence of paragraph (g).

The revisions read as follows:

##### § 263.53 Discovery depositions.

\* \* \* \* \*

(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.

\* \* \* \* \*

(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.

\* \* \* \* \*

#### § 263.54 [Amended]

■ 72. Section 263.54 is amended by removing “shall” and adding in its place “must” and removing “administrative law judge” and adding in its place “ALJ”.

■ 73. Section 263.55 is revised to read as follows:

#### § 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 these rules. Proposed findings and conclusions, briefs, and other submissions by the parties permitted in subpart A must 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 [Amended]

■ 74. Section 263.56 is amended by removing “shall” wherever it appears and adding in its place “will”.

■ 75. Section 263.57 is added to read as follows:

#### § 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.

■ 76. 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's testimony and may briefly question the witness, on the record, at the conclusion of the witness's 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's 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's 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's attorney, obtain a copy of the transcript of the witness's testimony, provided that the witness submits a written request for the transcript and the witness requesting a copy of the witness's 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.

**FEDERAL DEPOSIT INSURANCE CORPORATION**

For the reasons set out in the joint preamble, the FDIC proposes to amend 12 CFR part 308 as follows.

**PART 308—RULES OF PRACTICE AND PROCEDURE**

■ 77. The authority citation 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.

**Subpart A—Uniform Rules of Practice and Procedure**

■ 78. Revise subpart A as set forth at the end of the common preamble.

■ 79. Section 308.1 is added to read as follows:

**§ 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 15(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 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.

■ 80. Section 308.3 is added to read as follows:

### § 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 subpart A.

(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 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.

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

## Subpart B—General Rules of Procedure

### § 308.101 [Amended]

■ 81. Section 308.101 is amended by:

■ a. Removing the word “shall” wherever it appears and adding “will” in its place in paragraphs (b) and (c); and

■ b. Removing the phrase, “section 15(c)(4) of the Exchange Act (15 U.S.C. 78o(c)(4))” and adding “15 U.S.C. 78o(c)(4)” in its place in paragraph (d).

■ 82. Section 308.102 is amended by:

■ a. Removing the phrase “administrative law judge” and adding “ALJ” in its place wherever it appears in paragraph (b)(1); and

■ b. Revising paragraph (b)(2).

The revision reads as follows:

### § 308.102 Authority of Board of Directors and Administrative Officer.

\* \* \* \* \*

(b) \* \* \*

(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 these sections of the FDIA 12 U.S.C. 1817(j), 1818 1828(j), 1829, 1831i, and 1831o 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).

■ 83. Section 308.103 is revised to read as follows:

### § 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.

■ 84. Section 308.104 is amended by:

■ a. Revising paragraph (a); and

■ b. Removing the phrase

“administrative law judge” and adding “ALJ” in its place wherever it appears in paragraph (b).

The revision reads as follows:

#### **§ 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](mailto:ESSEnforcementActionDocket@fdic.gov) with the docket number clearly identified.

\* \* \* \* \*

#### **§ 308.105 [Amended]**

■ 85. Section 308.105 is amended by:

■ a. Removing the phrase

“administrative law judge” and adding “ALJ” in its place in the first sentence; and

■ b. Removing the phrase “As the official custodian, the” and adding in its place “The” in the second sentence; and

■ c. Removing the word “shall” in the second sentence and adding “will” in its place in the second sentence.

#### **§ 308.106 [Amended]**

■ 86. Section 308.106 is revised to read as follows:

#### **§ 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.

■ 87. Section 308.107 is revised to read as follows:

#### **§ 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 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 of the Uniform Rules 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) 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's 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's 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's testimony.

(iii) *Transcript.* 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. 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 these rules 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.

## NATIONAL CREDIT UNION ADMINISTRATION

For the reasons set out in the joint preamble, the NCUA proposes to amend 12 CFR part 747 as follows:

### PART 747—ADMINISTRATIVE ACTIONS, ADJUDICATIVE HEARINGS, RULES OF PRACTICE AND PROCEDURE, AND INVESTIGATIONS

■ 88. 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.

#### Subpart A—Uniform Rules of Practice and Procedure

■ 89. Revise subpart A as set forth at the end of the common preamble.

■ 90. Section 747.1 is added to read as follows:

##### § 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 herein, pursuant to 12 U.S.C. 1786(k); and

(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.

■ 91. Section 747.3 is added to read as follows:

##### § 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 subpart A of this part that are common to the NCUA, the Board, 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)).

#### § 747.18 [Amended]

■ 92. Section 747.18 is amended by removing “Except for change-in-control proceedings under section 7(j)(4) of the FDIA, 12 U.S.C. 1817(j)(4), a” and adding in its place “A” in paragraph (a)(1)(i) and removing and reserving paragraph (a)(2).

#### § 747.33 [Amended]

■ 93. Section 747.33 is amended by removing “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” in the second sentence in paragraph (a).

**Michael J. Hsu,**

*Acting Comptroller of the Currency.*

By order of the Board of Governors of the Federal Reserve System.

**Ann Misback,**

*Secretary of the Board.*

Federal Deposit Insurance Corporation.

By order of the Board of Directors.

Dated at Washington, DC, on October 21, 2021.

**James P. Sheesley,**

*Assistant Executive Secretary.*

By order of the Board of the National Credit Union Administration.

Dated at Alexandria, VA, this 21st day of October, 2021.

**Melane Conyers-Ausbrooks,**

*Secretary of the Board, National Credit Union Administration.*

**Editorial Note:** This document was received for publication by the Office of the Federal Register on February 28, 2022.

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