

coupons only from a specified customer or customers if it meets the requirements of paragraphs (a) and (b) of this section, and FNS determines it is required as a redemption outlet (1) for one or more specified authorized drug addict or alcoholic treatment programs, (2) for one or more specified authorized group living arrangements, (3) for one or more specified authorized shelters for battered women and children, (4) for one or more specified authorized nonprofit cooperative food-purchasing ventures, or (5) for one or more specified authorized retail food stores which are without access to a bank which will redeem their coupons. No firm may be authorized to accept and redeem coupons concurrently as both a retail food store and a wholesale food concern. Authorizations of wholesale food concerns granted prior to January 28, 1982 shall expire on May 31, 1982. Wholesale food concerns desiring to participate in the program after that date must reapply for authorization in accordance with the provisions of this paragraph.

3. Paragraph 278.3(a) is revised to read as follows:

§ 278.3 Participation of wholesale food concerns.

(a) *Accepting coupons.* An authorized wholesale food concern may accept endorsed coupons from one or more specified authorized retail food stores, from one or more specified authorized nonprofit cooperative food-purchasing ventures, from one or more specified authorized group living arrangements, from one or more specified authorized drug addict or alcoholic treatment programs, or from one or more specified authorized shelters for battered women and children if the coupons are accompanied by a properly filled-out and signed redemption certificate, and are not marked "paid," "canceled," or "specimen." A wholesaler authorized to accept coupons from an authorized drug addict or alcoholic treatment program, or from an authorized group living arrangement, or from an authorized shelter for battered women and children, may accept coupons from that treatment program, or group living arrangement, or shelter for battered women and children, only in exchange for food.

(91 Stat. 958 (7 U.S.C. 2011-2027))

(Catalog of Federal Domestic Assistance Programs No. 10.551 Food Stamps)

Dated: December 23, 1981.

Patricia M. Kearney,

Confidential Assistant to the Assistant Secretary.

[FR Doc. 81-37119 Filed 12-28-81; 8:45 am]

BILLING CODE 3410-30-M

Agricultural Marketing Service

7 CFR Part 1135

[Docket No. AO-380-A1]

Milk in the Southwestern Idaho-Eastern Oregon Marketing Area; Order Amending Order

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This action amends the Southwestern Idaho-Eastern Oregon order provisions pertaining to the basis for pooling a distributing plant and to how much milk may be moved directly from producers' farms to nonpool manufacturing plants and still be priced under the order. The amendments are based on industry proposals considered at a public hearing held July 15, 1981. The changes, which have been approved by more than two-thirds of the producers in the market, are necessary to reflect current marketing conditions and to assure orderly marketing in the area.

EFFECTIVE DATE: January 1, 1982.

FOR FURTHER INFORMATION CONTACT: Maurice M. Martin, Marketing Specialist, Dairy Division, U.S. Department of Agriculture, Washington, D.C. 20250, (202) 447-7183.

SUPPLEMENTARY INFORMATION: Prior documents in this proceeding:

Notice of Hearing: Issued June 22, 1981; published June 25, 1981 (46 FR 32873).

Order Suspending certain provisions: Issued August 28, 1981; published September 3, 1981 (46 FR 44147).

Recommended Decision: Issued October 27, 1981; published November 2, 1981 (46 FR 54374).

Final Decision: Issued December 11, 1981.

Findings and Determinations

The findings and determinations hereinafter set forth are supplementary and in addition to the findings and determinations previously made in connection with the issuance of the aforesaid order and all of the said previous findings and determinations are hereby ratified and affirmed, except insofar as such findings and determinations may be in conflict with

the findings and determinations set forth herein.

(a) *Findings upon the basis of the hearing record.* Pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601 *et seq.*), and the applicable rules of practice and procedure governing the formulation of marketing agreements and marketing orders (7 CFR Part 900), a public hearing was held upon certain proposed amendments to the tentative marketing agreement and to the order regulating the handling of milk in the Southwestern Idaho-Eastern Oregon marketing area.

Upon the basis of the evidence introduced at such hearing and the record thereof, it is found that:

(1) The said order as hereby amended, and all of the terms and conditions thereof, will tend to effectuate the declared policy of the Act;

(2) The parity prices of milk, as determined pursuant to Section 2 of the Act, are not reasonable in view of the price of feeds, available supplies of feeds, and other economic conditions which affect market supply and demand for milk in the said marketing area, and the minimum prices specified in the order as hereby amended, are such prices as will reflect the aforesaid factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest; and

(3) The said order as hereby amended, regulates the handling of milk in the same manner as, and is applicable only to persons in the respective classes of industrial or commercial activity specified in, a marketing agreement upon which a hearing has been held.

(b) *Additional findings.* It is necessary in the public interest to make this order amending the order effective not later than January 1, 1982. Any delay beyond that date would tend to disrupt the orderly marketing of milk in the marketing area.

The provisions of this order are known to handlers. The recommended decision of the Deputy Administrator, Marketing Program Operations, was issued October 27, 1981, and the decision of the Deputy Assistant Secretary containing all amendment provisions of this order was issued December 11, 1981. The changes effected by this order will not require extensive preparation or substantial alteration in the method of operation for handlers. In view of the foregoing, it is hereby found and determined that good cause exists for making this order amending the order effective January 1, 1982, and that it would be contrary to the public interest to delay the effective date of

this amendment for 30 days after its publication in the *Federal Register*. (Sec. 553(d), Administrative Procedure Act, 5 U.S.C. 551-559.)

(c) *Determinations*. It is hereby determined that:

(1) The refusal or failure of handlers (excluding cooperative associations specified in Section 8c(9) of the Act) of more than 50 percent of the milk, which is marketed within the marketing area, to sign a proposed marketing agreement, tends to prevent the effectuation of the declared policy of the Act;

(2) The issuance of this order, amending the order, is the only practical means pursuant to the declared policy of the Act of advancing the interests of producers as defined in the order as hereby amended; and

(3) The issuance of the order amending the order is approved or favored by at least two-thirds of the producers who during the determined representative period were engaged in the production of milk for sale in the marketing area.

Order Relative to Handling

It is therefore ordered, That on and after the effective date hereof, the handling of milk in the Southwestern Idaho-Eastern Oregon marketing area shall be in conformity to and in compliance with the terms and conditions of the aforesaid order as hereby amended as follows:

PART 1135—MILK IN THE SOUTHWESTERN IDAHO-EASTERN OREGON MARKETING AREA

1. In § 1135.7, paragraph (a)(2) is revised to read as follows:

§ 1135.7 Pool plant.

(a) * * *

(2) Total route disposition (except filled milk) during the month equal to not less than 40 percent of such receipts. A unit consisting of two or more distributing plants operated by a handler shall be considered as one distributing plant for the purpose of meeting this requirement if the handler notifies the market administrator in writing before the first day of the month that the plants should be considered as a unit. The unit shall continue from month to month thereafter without further notification. If, however, there is any change in the composition of the unit, the handler shall notify the market administrator in writing on or before the first day of the month such change is to be made.

2. In § 1135.13, paragraph (f) (3), (4), and (5) are revised to read as follows:

§ 1135.13 Producer milk.

(f) * * *

(3) The total quantity of milk diverted by a cooperative association during the month may not exceed 70 percent in the months of September through February, and 80 percent in other months, of the producer milk that the cooperative association causes to be delivered to or diverted from pool plants during the month. Two or more cooperative associations may have their allowable diversions computed on the basis of the combined deliveries of the producer milk which the associations cause to be delivered to pool plants or diverted from pool plants during the month if each association has filed a request in writing with the market administrator on or before the first day of the month the agreement is to be effective. This request shall specify the basis for assigning over-diverted milk to the producer deliveries of each cooperative according to a method approved by the market administrator;

(4) The total quantity of milk diverted during the month by a proprietary bulk tank handler described in § 1135.9(d) may not exceed 70 percent in the months of September through February, and 80 percent in other months, of the producer milk that the handler causes to be delivered to or diverted from pool plants during the month;

(5) The operator of a pool plant may divert for its account any milk that is not under the control of a cooperative association or a proprietary bulk tank handler that diverts milk during the month pursuant to paragraph (f) (3) and (4) of this section. The total quantity so diverted during the month may not exceed 70 percent in the months of September through February, and 80 percent in other months, of the producer milk received at or diverted from such pool plant during the month that is eligible to be diverted by the plant operator; and

(Secs. 1-19, 48 Stat. 31, as amended (7 U.S.C. 601-674))

Effective date: January 1, 1982.

Signed at Washington, D.C., on December 23, 1981.

John Ford,

Deputy Assistant Secretary, Marketing and Inspection Services.

[FR Doc. 81-37112 Filed 12-28-81; 8:45 am]

BILLING CODE 3410-02-M

Animal and Plant Health Inspection Service

9 CFR Part 92

Restrictions on Importation of Horses From Denmark

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Final rule.

SUMMARY: This document makes final the interim rule that extended to Denmark the prohibitions previously placed on the importation into the United States of certain horses from or that have been in countries affected with contagious equine metritis (CEM). This action is necessary to protect the livestock of the United States from such disease.

EFFECTIVE DATE: December 30, 1981.

FOR FURTHER INFORMATION CONTACT: Dr. D. E. Herrick, USDA, APHIS, VS, Federal Building, Room 821, Hyattsville, Maryland 20782, 301-436-8530.

SUPPLEMENTARY INFORMATION:

Executive Order 12291

This final rule has been determined to be not a "major rule" under Executive Order 12291. Based on information received by the Department, it has been determined that this rule will not have an annual effect on the economy of \$100 million or more; will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; and will not have any significant adverse effects on competition, employment, investment, productivity, or innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

Background

A document published in the *Federal Register* on July 20, 1981 (46 FR 37240-37241) amended the regulations (9 CFR 92.2(i)(1)), to extend to Denmark the prohibitions previously placed on the importation into the United States of certain horses from or that have been in countries affected with contagious equine metritis (CEM).

The Department is responsible for protecting the livestock of the United States against the introduction and dissemination of communicable diseases of livestock. CEM is a communicable disease of horses. Under the circumstances, the prohibition of the importation of certain horses from Denmark is the only alternative

available which protects the livestock of the United States against the introduction and dissemination of CEM into the United States.

It appears that the benefits of preventing the introduction and dissemination of CEM into the United States far outweighs the minimum costs that could be imposed by the final rule.

Written comments were solicited for 60 days after publication of the amendment. No comments were received in response to the amendment. The factual situation which was set forth in the document published in the Federal Register on July 20, 1981, still provides a basis for the amendment.

PART 92—IMPORTATION OF CERTAIN ANIMALS AND POULTRY AND CERTAIN ANIMAL AND POULTRY PRODUCTS; INSPECTION AND OTHER REQUIREMENTS FOR CERTAIN MEANS OF CONVEYANCE AND SHIPPING CONTAINERS THEREON

After careful consideration of all relevant information available to the Department, the Deputy Administrator has determined that the interim rule revising 9 CFR 92.2(i)(1) should be made a permanent regulation as it appeared in the Federal Register on July 20, 1981.

(Sec. 2, 32 Stat. 792, as amended, secs. 4 and 11, 76 Stat. 130, 132, (21 U.S.C. 111, 134c, 134f); 37 FR 28404, 28477; 38 FR 19141)

Done at Washington, D.C., this 22nd day of December 1981.

J. K. Atwell,

Deputy Administrator, Veterinary Services.

[FR Doc. 81-37121 Filed 12-28-81; 8:45 am]

BILLING CODE 3410-34-M

FEDERAL RESERVE SYSTEM

12 CFR Part 204

[Docket No. R-0380; Reg. D]

Reserve Requirements of Depository Institutions; International Banking Facilities

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Final interpretation.

SUMMARY: The Board of Governors has issued an interpretation concerning the extent to which international banking facilities ("IBFs") may purchase or sell IBF-eligible assets such as loans (including loan participations), securities, Eurocurrency certificates of deposit, and bankers' acceptances from (or to) third parties under Regulation D—Reserve Requirements of Depository Institutions. The interpretation generally provides that IBFs may purchase IBF-

eligible assets from, or sell such assets to, any domestic or foreign customer provided that the transactions are at arm's length without recourse. The requirement that the proceeds of IBF assets be used to finance business outside the United States will apply to assets acquired by IBFs from third parties.

EFFECTIVE DATE: December 16, 1981.

FOR FURTHER INFORMATION CONTACT: Gilbert T. Schwartz, Associate General Counsel (202/452-3625) or Paul S. Pilecki, Senior Attorney (202/452-3281), Legal Division; or Sydney J. Key, Economist (202/452-3522), Division of International Finance, Board of Governors of the Federal Reserve System, Washington, D.C. 20551.

SUPPLEMENTARY INFORMATION: Pursuant to the Board's authority under sections 19, 25, and 25(a) of the Federal Reserve Act (12 U.S.C. 461 *et seq.*, 601 *et seq.*, 611 *et seq.*) and section 7 of the International Banking Act of 1978 (12 U.S.C. 3105), Regulation D (12 CFR Part 204) is amended by adding a new § 204.122 as follows:

§ 204.122 Secondary market activities of International Banking Facilities.

(a) Questions have been raised concerning the extent to which International Banking Facilities may purchase (or sell) IBF-eligible assets such as loans (including loan participations), securities, CDs, and bankers' acceptances from (or to) third parties. Under the Board's regulations, as specified in § 204.8 of Regulation D, IBFs are limited, with respect to making loans and accepting deposits, to dealing only with certain customers, such as other IBFs and foreign offices of other organizations, and with the entity establishing the IBF. In addition, an IBF may extend credit to a nonbank customer only to finance the borrower's non-U.S. operations and may accept deposits from a nonbank customer that are used only to support the depositor's non-U.S. business.

(b) Consistent with the Board's intent, IBFs may purchase IBF-eligible assets¹ from, or sell such assets to, any domestic or foreign customer provided that the transactions are at arm's length without recourse. Therefore, an IBF may not purchase such assets from, or sell such assets to, affiliates of the institution establishing the IBF. (However, this restriction does not affect the IBF's ability to purchase (or

sell) assets directly from (or to) the institution establishing the IBF; such purchases from the institution establishing the IBF would continue to be subject to Eurocurrency reserve requirements except during the initial four-week transition period.) Since repurchase agreements are regarded as loans, transactions involving repurchase agreements are permitted only with customers who are otherwise eligible to deal with IBFs, as specified in Regulation D.

(c) In the case of purchases of assets, in order to determine that the Board's use-of-proceeds requirement has been met, it is necessary for the IBF (1) to ascertain that the applicable IBF notices and acknowledgments have been provided, or (2) in the case of loans or securities, to review the documentation underlying the loan or security, or accompanying the security (e.g., the prospectus or offering statement), to determine that the proceeds are being used only to finance the obligor's operations outside the U.S., or (3) in the case of loans, to obtain a statement from either the seller or borrower that the proceeds are being used only to finance operations outside the U.S., or in the case of securities, to obtain such a statement from the obligor, or (4) in the case of bankers' acceptances, to review the underlying documentation to determine that the proceeds are being used only to finance the parties' operations outside the United States.

(d) Under the Board's regulations, IBFs are not permitted to issue negotiable Euro-CDs, bankers' acceptances, or similar instruments. Accordingly, consistent with the Board's intent in this area, IBFs may sell such instruments issued by third parties that qualify as IBF-eligible assets provided that the IBF, its establishing institution and any affiliate of the institution establishing the IBF do not endorse, accept, or otherwise guarantee the instrument.

By order of the Board of Governors, December 22, 1981.

William W. Wiles,
Secretary of the Board.

[FR Doc. 81-37020 Filed 12-28-81; 8:45 am]

BILLING CODE 6210-01-M

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 308

Rules of Practice and Procedures

AGENCY: Federal Deposit Insurance Corporation.

¹ In order for an asset to be eligible to be held by an IBF, the obligor or issuer of the instrument, or in the case of bankers' acceptances, the customer and any endorser or acceptor, must be an IBF-eligible customer.

ACTION: Final rule.

SUMMARY: The Federal Deposit Insurance Corporation ("FDIC") has amended its Rules of Practice and Procedures, which contain rules for the conduct of administrative proceedings before the FDIC. A new subpart M to the Rules of Practice and Procedures implements the Equal Access to Justice Act. That act allows certain parties who prevail against the FDIC in contested administrative proceedings to recover litigation expenses from the FDIC, if the position of the FDIC in the proceeding was not substantially justified. The new subpart establishes procedures to be used in applying for fee awards and in determining whether the conditions for a fee award have been met and, if so, the proper amount for the award. Additionally, the FDIC has amended preexisting subparts of the Rules of Practice and Procedures to delegate certain responsibilities to the FDIC's Executive Secretary and to correct certain procedural impediments to efficient operation. These changes are intended to enhance agency capability and responsiveness. The changes delegate authority to the Executive Secretary to perform many ministerial functions similar to duties of clerks of court, and they transfer to the administrative law judge certain duties formerly handled by the Executive Secretary.

EFFECTIVE DATE: December 29, 1981.

FOR FURTHER INFORMATION CONTACT: On fee awards, Brian D. Alprin, Attorney, Legal Division, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, D.C. 20429 (202-389-4637); on all other subjects, James L. Meador, Attorney, Legal Division, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, D.C. 20429 (202-389-4422).

SUPPLEMENTARY INFORMATION: Proposed rulemaking was published on pages 43,431-43,452 of the Federal Register of August 28, 1981, and comments were invited for sixty days ending October 27, 1981. Written comments were received from officials of three banks and from the Office of the Chairman of the Administrative Conference of the United States ("ACUS"). The following summarizes the comments and actions taken.

Equal Access to Justice Act

Two commentators suggested that the FDIC should undertake to pay fees of all parties who prevail against it when the position of the FDIC was not substantially justified, rather than pay awards only to prevailing parties who

meet standards relating to net worth and number of employees. The Equal Access to Justice Act ("EAJA") defines eligible parties to exclude "any individual whose net worth exceeded \$1,000,000 at the time the adversary adjudication was initiated, and any sole owner of an unincorporated business, or any partnership, corporation, association, or organization whose net worth exceeded \$5,000,000 at the time the adversary adjudication was initiated" and "any sole owner of an unincorporated business, or any partnership, corporation, association, or organization, having more than 500 employees at the time the adversary adjudication was initiated." 5 U.S.C. 504(b)(1)(B). Since Congress deliberately set financial criteria that limit the EAJA's applicability to those eligible parties specified in the FDIC's proposal, the FDIC is reluctant to amend its proposal to mandate the payment of fees of prevailing parties regardless of their size and financial means—a result apparently not desired by Congress. See H.R. Rep. No. 96-1418, 96th Cong., 2d Sess. 15 (1980). For a similar reason, the FDIC declines to follow the recommendation of a commentator who suggested that the FDIC pay all actual expenses of an applicant entitled to an award (rather than "reasonable expenses" as desired by Congress) and pay punitive damages in some situations (a matter not provided for by Congress).

The ACUS observed that § 308.98 of the proposed rule, which clarifies the meaning of the term "prevailing party," fails to mention that a party may prevail through the obvious course of winning a fully litigated proceeding on the merits. The section has accordingly been revised to accommodate this point.

The ACUS recommended the deletion of § 308.97(f) of the proposed rule, which includes in an applicant's net worth the value of assets disposed of, and excludes the value of liabilities incurred, for the purpose of meeting an eligibility standard. The ACUS also recommended the deletion of proposed § 308.102(e), which requires an applicant to describe any transactions within six months before the initiation of the proceeding which reduced the applicant's net worth below the relevant net-worth ceiling. In the view of the ACUS, the likelihood of sham transactions is small compared to the burden of the proposed disclosure requirement, since potential applicants will normally have great difficulty in anticipating the date of initiation of administrative proceedings. The FDIC believes that potential respondents are often able to predict when formal administrative proceedings will begin, given the preliminary informal

discussions that typify the early stages of an FDIC proceeding. The FDIC does agree, however, that in most cases the disclosure requirement is not necessary, and accordingly the requirement has been eliminated. The rule requiring net worth to be determined without giving effect to transactions undertaken to meet an eligibility standard has been retained. It should be noted that when disclosure of such transactions is thought necessary, the administrative law judge and the Board of Directors retain power to call for disclosure of them under the last sentence of § 308.102(c).

The ACUS objected to the omission of several rules that were in the model rules published by the ACUS. The ACUS thought that clarity and completeness would be served by their inclusion. Rather than reflect substantive disagreement on any legal matter, these comments reflect differences of rulemaking style between the FDIC and the ACUS. With respect to these omissions the FDIC adheres to its original decisions.

The ACUS recommended the alteration of the requirement of § 308.101(2) that an application contain "an identification of each issue" with regard to which the applicant believes that the position of the FDIC was not substantially justified. The ACUS would prefer an identification of "the position in the proceeding" that the applicant alleges was not substantially justified. The FDIC prefers the language it proposed, which it hopes will allow the questions on substantial justification to be identified more narrowly in the application. The fear of the ACUS, that the reference to individual issues may imply that parties may receive awards for their success on mere procedural issues or on one of the FDIC's alternative theories of a case, is dispelled by § 308.98. That section, which clarifies the meaning of the term "prevailing party," permits awards in connection with victory on the merits, a favorable settlement, a dismissal, substantial vindication on the significant substantive matters at issue, or success on a discrete significant substantive issue or issues. Section 308.98 does not permit an award for success on a procedural point or on an alternative FDIC theory.

The ACUS criticized § 308.104(d) as too narrow. This section permits an application to be filed whenever an applicant has "prevailed" but not later than thirty days after final disposition of the proceeding. In the view of the ACUS, provision should be made for an immediate filing by a party who has

prevailed on a separable issue in the proceeding prior to final disposition of the entire proceeding. The issue is not expected to arise in an FDIC proceeding, as interim orders are normally not entered on significant substantive matters. The ACUS is correct, however, that the EAJA countenances fee awards following final disposition of interim matters. Section 308.104(d) has been changed to reflect the comment of the ACUS.

Section 308.105(d) permits the applicant to file a reply pleading only when the answer of counsel for the FDIC raises affirmative defenses. The ACUS recommended that replies be permitted in all cases. The FDIC believes that such a rule would move applicants to file replies in virtually all cases, whether needed or not, rather than forsake a perceived litigative advantage. Should full and fair resolution of an issue require that an applicant be permitted to file a reply when a reply is not otherwise permitted, however, a request for permission may be made under § 308.107.

A commentator suggested that the Board of Directors of the FDIC be required to abide by any recommended decision of the administrative law judge which recommends a fee award. The FDIC believes that the purport of the EAJA is to vest the ultimate decision on the fee award in the body that adjudicated the underlying controversy. With respect to all contested FDIC proceedings covered by the EAJA, the function of the administrative law judge is recommendatory only, and the Board of Directors renders the actual decision. Thus the conferral or recommendatory authority on the administrative law judge and the retention of decision-making authority by the Board of Directors would be consistent with FDIC practice and would appear the suitable apportionment of roles for fee-award proceedings.

A technical change has been made in the proposed regulation on the recommendation of the staff of the FDIC. Proposed §§ 308.97(d) and 308.102(d) established that a bank's net worth at the time of the initiation of a proceeding would be considered to be the total equity capital as reported on the bank's last Consolidated Report of Condition filed before the initiation of the proceeding. In recognition that the date of actual submission should not receive priority over the reporting date the rule now refers to the report that is filed for the last reporting date before the initiation of the proceeding.

Minor stylistic or clarifying changes have been made to §§ 308.97(f), 308.98(b) (which had been proposed as

§§ 308.98(a)), and 308.102(d). A new § 308.105(e) has been added to make it clear that filings in the nature of pleadings, if not permitted by a specific rule, may be submitted only with the permission of the administrative law judge.

Technical Changes to Rules of Practice and Procedures

No comments were received on the proposed technical changes to preexisting subparts of Part 308. These changes have been adopted as proposed, except that the heading to Subpart B has been reworded for the sake of accuracy, and minor technical, stylistic, or clarifying changes have been made to §§ 308.01(d), 308.01(j), 308.03, 308.07(b), and 308.21(b).

Certification Under Regulatory Flexibility Act

A certification that this rule will not have a significant economic impact on a substantial number of small entities was published at 46 FR 43,433 (1981).

Effective Date

This rule is effective December 29, 1981. The requirement of thirty days' advance notice does not apply because the rule establishes or changes procedures for the conduct of administrative proceedings. As a procedural rule it is not "substantive" under 5 U.S.C. 553(d) (1976). In addition, good cause exists for the rule to be made effective immediately. Since the effective date of the EAJA, October 1, 1981, the FDIC has been without formal, published procedures for the submission and consideration of fee applications. An immediate effective date for the present rule will clarify the procedures that are available to applicants, thus promoting the timely pursuit of appropriate redress under the EAJA by eligible parties.

For the reasons set out in the preamble, Part 308 of chapter III of title 12 of the *Code of Federal Regulations* is revised to read as set forth below.

PART 308—RULES OF PRACTICE AND PROCEDURES

Subpart A—Definitions and Rules of Construction

- Sec.
308.01 Definitions.
308.02 Rules of construction.

Subpart B—Rules of Practice Generally

- 308.03 Scope.
308.04 Appearance and practice before the FDIC.
308.05 Notice of hearing.
308.06 Answer.
308.07 Conduct of hearings.

- Sec.
308.08 Subpenas.
308.09 Procedure on depositions.
308.10 Payment of witness fees.
308.11 Rules of evidence.
308.12 Motions.
308.13 Proposed findings and conclusions, supporting and reply briefs, and recommended decision.
308.14 Exceptions to proposed findings and conclusions and recommended decision.
308.15 Briefs in support of exceptions.
308.16 Notice of submission to the Board of Directors.
308.17 Oral argument before the Board of Directors.
308.18 Decision of the Board of Directors.
308.19 Filing papers with the Executive Secretary.
308.20 Documents in proceedings confidential.
308.21 Service of papers other than subpenas.
308.22 Computing time.

Subpart C—Rules and Procedures Applicable to Proceedings for the Involuntary Termination of Insured Status

- 308.23 Scope.
308.24 Notice of finding grounds for termination of insurance.
308.25 Extraterritorial acts of foreign banks or their directors or trustees.
308.26 Failure of a foreign bank to secure removal of personnel.
308.27 Notice of intention to terminate insured status and hearing.
308.28 Order terminating insured status.
308.29 Consent to termination of insured status.
308.30 Notice to depositors of termination of insured status.
308.31 Termination of insured status of bank not engaged in the business of receiving deposits, other than trust funds.

Subpart D—Rules and Procedures Applicable to Proceedings Relating to Cease-and-Desist Orders

- 308.32 Scope.
308.33 Grounds for cease-and-desist orders.
308.34 Notice to State supervisory authority.
308.35 Notice of charges and of hearing, and consent.
308.36 Issuance and effective date of cease-and-desist order.
308.37 Issuance and effective date of temporary cease-and-desist order.
308.38 Extraterritorial acts of foreign banks or their officials.

Subpart E—Rules and Procedures Applicable to Proceedings Relating to Removal and Suspension Orders

- 308.39 Scope.
308.40 Grounds for removal or prohibition.
308.41 Notice to State supervisory authority.
308.42 Notice of intention to remove, hearing and consent.
308.43 Issuance and effective date of removal or prohibition order.
308.44 Grounds for suspension or prohibition.
308.45 Issuance and effective date of suspension or prohibition order.
308.46 Extraterritorial acts of officials of foreign banks.

Subpart F—Procedures Applicable to Proceedings Pursuant to Section 10(c) of the Federal Deposit Insurance Act

Sec.

- 308.47 Scope.
- 308.48 Order to conduct proceedings.
- 308.49 Powers of presiding officer.
- 308.50 Proceedings confidential.
- 308.51 Rights of witnesses.
- 308.52 Service of subpoena.
- 308.53 Transcripts.
- 308.54 Special examinations and examinations of closed banks.

Subpart G—Procedures and Standards Applicable to Suspension, Removal, and Prohibition Where Felony Charged, and Petition for Reconsideration of Denial of an Application Under Section 19 of the Federal Deposit Insurance Act

- 308.55 Scope.
- 308.56 Relevant considerations.
- 308.57 Notice of suspension or prohibition.
- 308.58 Order of removal or prohibition.
- 308.59 Notice of opportunity and request for hearing.
- 308.60 Waiver of hearing.
- 308.61 Hearing.
- 308.62 Decision of the Board of Directors.
- 308.63 Reconsideration by the Board of Directors.

Subpart H—Rules and Procedures Applicable to Proceedings Relating to Assessment and Collection of Civil Penalties for the Violation of Cease-and-Desist Orders or Certain Federal Statutes

- 308.64 Scope.
- 308.65 Violation of order as ground for assessment.
- 308.66 Violation of laws limiting dealings with bank officials and affiliates as ground for assessment.
- 308.67 Violation of laws governing correspondent accounts as ground for assessment.
- 308.68 Relevant considerations.
- 308.69 Notice of assessment of civil penalty, and opportunity and request for hearing.
- 308.70 Waiver of hearing.
- 308.71 Hearing and order.
- 308.72 Payment of civil penalty.

Subpart I—Rules and Procedures Applicable to Proceedings Relating To Disapproval of Acquisition of Control

- 308.73 Scope.
- 308.74 Grounds for disapproval.
- 308.75 Notice of disapproval, and opportunity and request for hearing.
- 308.76 Exceptions.
- 308.77 Hearing and order.

Subpart J—Rules and Procedures Applicable to Proceedings Relating To Assessment of Civil Penalties for Willful Violation of the Change in Bank Control Act

- 308.78 Scope.
- 308.79 Notice of intention to assess civil penalty, and opportunity and request for hearing.
- 308.80 Waiver of hearing.
- 308.81 Hearing.
- 308.82 Assessment.
- 308.83 Collection.

Subpart K—Rules and Procedures for Imposition of Sanctions Upon Municipal Securities Dealers or Persons Associated With Them, and Upon Clearing Agencies or Transfer Agents

Sec.

- 308.84 Scope.
- 308.85 Grounds for imposition of sanctions.
- 308.86 Notice and consultation with the Securities and Exchange Commission.
- 308.87 Notice of intention to impose sanctions.
- 308.88 Hearing.
- 308.89 Issuance and effective date of order imposing sanctions.

Subpart L—Rules and Procedures Relating to Exemption Proceedings Under Section 12(h) of the Securities Exchange Act of 1934

- 308.90 Scope.
- 308.91 Application for exemption.
- 308.92 Newspaper notice.
- 308.93 Notice of hearing.
- 308.94 Hearing.
- 308.95 Decision of the Board of Directors.

Subpart M—Rules and Procedures Relating to the Recovery of Attorney Fees and Other Expenses

- 308.96 Scope.
- 308.97 Eligibility of applicants.
- 308.98 Prevailing party.
- 308.99 Standards for awards.
- 308.100 Measure of awards.
- 308.101 Contents of application.
- 308.102 Statement of net worth.
- 308.103 Statement of fees and expenses.
- 308.104 Filing and service of documents.
- 308.105 Answer to application.
- 308.106 Comments by other parties.
- 308.107 Further proceedings.
- 308.108 Recommended decision.
- 308.109 Decision of the Board of Directors.
- 308.110 Payment of awards.

Authority: Sec. 2(9), Pub. L. No. 797, 64 Stat. 881 (12 U.S.C. 1819); sec. 18, Pub. L. No. 94-29, 89 Stat. 155 (15 U.S.C. 78w); sec. 801, Pub. L. No. 95-630, 92 Stat. 3641 (12 U.S.C. 1972); sec. 203, Pub. L. No. 96-481, 94 Stat. 2325 (5 U.S.C. 504).

Subpart A—Definitions and Rules of Construction**§ 308.01 Definitions.**

For purposes of this part, except where explicitly stated to the contrary,

(a) The term "bank" means, in general, any bank to which reference is being made. For purposes of subpart F, the term means an insured bank or its affiliate, an institution applying to become an insured bank, or a branch of a foreign bank (except where used in § 308.54);

(b) The term "Board of Directors" or "Board" means the Board of Directors of the Federal Deposit Insurance Corporation;

(c) The term "FDIC" means the Federal Deposit Insurance Corporation;

(d) The term "depositors" as used in subpart D, notwithstanding any

limitation in any other paragraph of § 308.01, includes the customers of any municipal securities dealer, participants in a clearing agency, and persons doing business with a transfer agent, if for the municipal securities dealer, clearing agency, or transfer agent the FDIC is the appropriate regulatory agency;

(e) The term "Executive Secretary" means the Executive Secretary of the Federal Deposit Insurance Corporation;

(f) For the purposes of § 308.07(c), the term "ex parte communication" means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given. This does not include requests for status reports;

(g) The term "foreign bank" means any company which engages in the business of banking and which is organized under the laws of a foreign country, a territory of the United States, Puerto Rico, Guam, American Samoa, the Northern Mariana Islands, or the Virgin Islands. "Foreign bank" includes, without limitations, foreign commercial banks, foreign merchant banks and other institutions which engage in banking activities usual in connection with the business of banking in the countries where such foreign institutions are organized or operating;

(h) The term "insured bank" means any bank or banking institution (including a foreign bank having an insured branch) the deposits of which are insured in accordance with the Federal Deposit Insurance Act;

(i) The term "insured branch" means a branch of a foreign bank any deposits of which are insured in accordance with the Federal Deposit Insurance Act;

(j) The term "insured nonmember bank" means any bank or banking institution the deposits of which are insured in accordance with the Federal Deposit Insurance Act and which is not a national bank, a District bank, or a member of the Federal Reserve System. The term also includes a foreign bank having an insured branch, and any municipal securities dealer, clearing agency or transfer agent for which the FDIC is the appropriate regulatory agency (notwithstanding any limitation in any other paragraph of § 308.01);

(k) For the purposes of enforcing any law, rule, regulation, or cease-and-desist order in connection with an interlocking relationship, the term "officer" as used in subpart E means an employee or officer who has management functions and the term "director" includes an advisory or honorary director, a trustee of a bank under the control of trustees, or any person who has a representative or nominee serving in any such capacity.

For other purposes, the terms "officer" and "director" as used in this part are defined according to common usage in the banking industry;

(l) The term "official" means any director, trustee, officer, employee or agent of a bank to which reference is being made, or any other person participating in the conduct of the affairs of a bank;

(m) The term "party" means a person or agency named or admitted as a party, or any person or agency who has filed a written request and is entitled as of right to be admitted as a party, unless the context otherwise suggests. A person or agency may be admitted for a limited purpose;

(n) For purposes of subparts I and J, the term "person" means an individual or a corporation, partnership, trust, association, joint venture, pool, syndicate, sole proprietorship, unincorporated organization, or any other entity;

(o) The term "presiding officer" means any person designated by the Board of Directors to conduct a hearing, or proceedings pursuant to section 10(c) of the Federal Deposit Insurance Act;

(p) The term "proceedings pursuant to section 10(c)" means the exercise of any power specified in section 10(c) or 8(n) of the Federal Deposit Insurance Act, or any proceeding conducted pursuant to the exercise of such powers.

§ 308.02 Rules of construction.

Throughout this part, any use of a term in the singular shall include the plural, and the plural shall include the singular, if such use would be appropriate.

Subpart B—Rules of Practice Generally

§ 308.03 Scope.

This subpart prescribes rules of practice and procedures followed by the FDIC in hearings pursuant to the provisions of the Federal Deposit Insurance Act or other applicable law pertaining to:

(a) Involuntary termination of the insured status of any bank including an insured branch of a foreign bank;

(b) Issuance of cease-and-desist orders against any insured nonmember bank or its official;

(c) Assessment of civil penalties against (1) an insured nonmember bank or its official, for violation of a cease-and-desist order which has become final, or (2) an insured nonmember bank or its official, for violation of (i) the provisions of section 22(h) or 23A of the Federal Reserve Act, made applicable by section 18(j) of the Federal Deposit

Insurance Act, or (ii) the provisions of section 106(b)(2) of the Bank Holding Company Act Amendments of 1970, as amended;

(d) Issuance of orders that remove or suspend from office or prohibit from further participation in the conduct of the affairs of an insured nonmember bank, a director or officer, or that prohibit any other person from further participation in the conduct of the affairs of such a bank, except where the removal or suspension or prohibition is within the scope of subpart G as set forth in § 308.55;

(e) Disapproval of a proposed acquisition of control of an insured nonmember bank; and

(f) Imposition of sanctions upon (1) any municipal securities dealer for which the FDIC is the appropriate regulatory agency, (2) any person associated or seeking to become associated with such a municipal securities dealer, or (3) any clearing agency or transfer agent for which the FDIC is the appropriate regulatory agency (except for hearings on postponement of registration by such clearing agency or transfer agent pending registration denial proceedings, and for hearings on suspension of registration by such clearing agency or transfer agent pending registration revocation proceedings).

§ 308.04 Appearance and practice before the FDIC.

(a) *Qualification, authorization and notice of appearance.* Any member in good standing of the bar of the highest court of any State, Commonwealth, possession, territory, or the District of Columbia, may represent others before the FDIC upon filing with the Executive Secretary a written declaration of current qualification to practice and an authorization to represent the particular party. Any other person desiring to appear before, or transact business with, the FDIC in a representative capacity may be required to file with the Executive Secretary a power of attorney showing authority to act in such capacity, and may be required to demonstrate to the satisfaction of the Executive Secretary possession of the requisite qualifications. Attorneys and representatives of parties shall file a written notice of appearance with the Executive Secretary or the administrative law judge.

(b) *Summary suspension.* Contemptuous conduct at an argument before the Board of Directors or at a hearing before an administrative law judge shall be grounds for exclusion and suspension for the duration of the argument or hearing.

§ 308.05 Notice of hearing.

Whenever a hearing within the scope of this subpart is ordered by the Board of Directors, a notice of hearing shall be given by the Executive Secretary (or designee of the Board) to the party afforded the hearing and to any appropriate supervisory authority. The notice shall indicate the time, place, and nature of the hearing, the legal authority and jurisdiction for the hearing, and shall contain a statement of the matters of fact or law constituting the grounds for the hearing. The notice shall be delivered by personal service, by registered or certified mail to the party's last known address, or by other appropriate means, sufficiently in advance of the hearing date to comply with the provisions of the Federal Deposit Insurance Act.

§ 308.06 Answer.

(a) *Filing.* Every party to a proceeding shall file an answer with the Executive Secretary within 20 days after service of the notice of hearing upon the party afforded the hearing, unless the Board specifies a different filing period of not less than 10 days after service of the notice. For good cause shown, the Board, the Executive Secretary or the administrative law judge may permit filing of an answer after expiration of the filing period.

(b) *Requirements; effect of failure to deny.* An answer filed under this section shall specifically admit, deny, or state that the party lacks sufficient information to admit or deny each allegation. A statement of lack of information shall have the effect of a denial. When a party intends to deny part of an allegation, that part shall be denied and the remainder specifically admitted. Any allegation not denied shall be deemed admitted.

(c) *Admitted allegations.* If a party elects not to contest any of the allegations of fact in the notice, the party's answer shall consist of a statement that all of the allegations are admitted to be true. Such an answer shall constitute a waiver of hearing on the facts and allegations contained in the notice. This answer and the notice shall provide a record basis upon which the administrative law judge shall make a recommended decision (containing findings of fact, conclusions of law and proposed order) that shall be filed with the Executive Secretary. The recommended decisions shall be served on the party, who may file exceptions thereto within the time period provided in § 308.14(a).

(d) *Effect of failure to answer.* Failure of a party to file an answer required by

this section within the time provided shall be deemed a waiver of the right to appear and contest the allegations of the notice of hearing and shall authorize the administrative law judge, without further notice to the party, to find the facts to be as alleged in the notice and to file with the Executive Secretary a recommended decision containing such findings and appropriate conclusions.

§ 308.07 Conduct of hearings.

(a) *Selection of administrative law judge.* Unless otherwise directed by the Board, a hearing within the scope of this subpart shall be held before an administrative law judge selected by the Office of Personnel Management. The provisions of this section shall not apply to a hearing before the Board.

(b) *Authority of administrative law judge.* Hearings governed by this subpart shall be conducted in accordance with the provisions of the Administrative Procedure Act (5 U.S.C. 554-557), and the provisions of this subpart. The administrative law judge shall conduct the hearing in a fair and impartial manner and shall avoid delay in the disposition of proceedings. The administrative law judge shall have all powers necessary to that end, including the power:

- (1) To administer oaths and affirmations;
- (2) To issue subpoenas and subpoenas duces tecum as authorized by law, and to revoke, quash, or modify any such subpoena;
- (3) To take depositions or cause depositions to be taken;
- (4) To hold conferences for the settlement or simplification of issues or for any other proper purpose;
- (5) To regulate the course of the hearing and the conduct of the parties and their counsel;
- (6) To receive relevant evidence and rule upon the admission of evidence and offers of proof;
- (7) To grant extensions of time for filing or performing any act required or permitted within a specified time during the course of a proceeding for good cause shown;
- (8) To continue or adjourn a hearing from time to time and place to place, as permitted by law or as agreed by the parties;
- (9) To consider and rule upon all procedural and other motions appropriate in an adversary proceeding, except that an administrative law judge shall not have power to decide any motion to dismiss the proceedings or other motion resulting in final determination of the merits of the proceeding; and

(10) To call for the production of further evidence, to permit oral argument and submission of briefs, and to reopen a hearing in accordance with § 308.07(j).

(11) Without limitation on the foregoing provisions of this paragraph, the administrative law judge shall, subject to the provisions of this part, have all the authority provided in section 556(c) of title 5 of the United States Code.

(c) *Ex parte communications prohibited.* (1) The following prohibitions against ex parte communications apply from the time a proceeding is noticed for hearing: However, when the person responsible for the communication has knowledge that the proceeding will be noticed, the prohibitions apply from the time such knowledge is acquired.

(i) No interested person outside the FDIC shall make or knowingly cause to be made an ex parte communication relevant to the merits of the proceeding to anyone who is or may reasonably be expected to be involved in the decisional process.

(ii) No person who is or may reasonably be expected to be involved in the decisional process shall make or knowingly cause to be made an ex parte communication relevant to the merits of the proceeding to any interested person outside the FDIC.

(2) Except as authorized by law, the administrative law judge shall not consult anyone within the FDIC on any fact in issue, unless upon notice and opportunity for all parties to participate. The administrative law judge shall not be responsible to, or subject to the supervision or direction of, any officer, employee, or agent of the FDIC engaged in the performance of investigative or prosecuting functions. An officer, employee or agent engaged in the performance of such functions in any case shall not, in that case or a factually related case, participate or advise in the decision of the administrative law judge, except as a witness or counsel in the proceedings, or as otherwise authorized by law.

(3) If an ex parte communication is made or knowingly caused to be made, all such written communications, any written responses, and memoranda stating the substance of any oral responses, shall be placed on the public record.

(4) Upon receipt of a communication knowingly made or caused to be made in violation of § 308.07(c)(1)(i), the responsible party may be required to show cause why such party's claim or interest should not be dismissed, denied, or otherwise adversely affected. To the

extent consistent with the interests of justice and the policy of the Federal Deposit Insurance Act, knowing violation of § 308.07(c)(1)(i) may be ground for a decision adverse to a party in violation of that section.

(d) *Prehearing conferences.* (1) Upon the initiative of the administrative law judge, or at the request of any party, counsel for all parties may be directed to meet at a specified time and place prior to the hearing, or to make written submissions, for the purpose of considering the following:

- (i) Simplification and clarification of the issues;
- (ii) Stipulations, admissions of fact, admissions of contents and authenticity of documents;
- (iii) Matters of which official notice will be taken; and
- (iv) Other matters which may aid in the orderly disposition of the proceeding, including disclosure of the names of witnesses and of documents or other exhibits to be introduced in evidence.

(2) At the request of any party, the conference shall be recorded. The administrative law judge shall enter in the record an order reciting the results of the conference, any rulings upon matters considered at the conference, and any directions to the parties. The subsequent course of the proceeding shall be controlled by this order, which may be modified to prevent manifest injustice.

(e) *Attendance at hearings.* A hearing shall ordinarily be private and shall be attended only by the parties, their representatives or counsel, witnesses while testifying, and other persons having an official interest in the proceedings. To the extent authorized by law, the Board of Directors in its discretion may permit other persons to attend on written request by a party or on the Board's own motion, or the Board may order a public hearing.

(f) *Order of procedure.* The counsel for the FDIC shall open and close.

(g) *Transcript of testimony.* Hearings shall be recorded and copies of the transcript made available to any party upon payment of the cost therefor. When the hearing is public, copies of the transcript shall be similarly available to other interested persons.

(h) *Filing and transmittal of the record.* A copy of the transcript duly certified by the reporter, and all exhibits, papers and requests filed in the proceeding, shall be filed by the reporter with the administrative law judge. The administrative law judge shall promptly serve notice upon all parties of such filing and transmittal.

(i) *Changes of time; change of hearing location; continuance.* Except as otherwise expressly provided by law, the Board of Directors may provide time limits different from those specified in this subpart or in a notice of hearing, upon its own initiative or for good cause shown, and the Board may change the time and place for a hearing to commence. The administrative law judge may continue or adjourn a hearing in accordance with § 308.07(b)(8).

(j) *Reopening of hearing.* The administrative law judge, upon appropriate notice, may reopen a hearing at any time prior to certification of the administrative law judge's recommended decision to the Executive Secretary. The Board of Directors may reopen a case in accordance with § 308.18.

(k) *Opportunity for informal settlement.* At any time, and without prejudice to the rights of the parties, any interested party may submit to the Executive Secretary for consideration by the Board of Directors, written offers or proposals for settlement of a proceeding. An offer, proposal, or counter-offer shall not be admissible in evidence over the objection of any party. Steps taken toward informal settlement shall not preclude settlement of any proceeding through the regular adjudicatory process by filing an answer or exceptions as provided in § 308.06 and § 308.76, or by submission of the case to the administrative law judge on a stipulation of facts and an agreed order.

§ 308.08 Subpenas.

(a) *Issuance.* The administrative law judge, or the Executive Secretary in the event the administrative law judge is unavailable, may issue subpoenas or subpoenas duces tecum at the request of any party, requiring the attendance or deposition of witnesses or the production of documentary evidence in connection with a hearing pursuant to subparts B, C, D, E, H, I or K of this part, from any State, Commonwealth or territory at any designated place of hearing. Notice of issuance of the subpoena or subpoena duces tecum shall be served upon each of the parties within a reasonable time not less than 10 days before the date fixed for taking the deposition or production of documents.

(1) The party seeking the subpoena shall include a statement showing the general relevance and reasonable scope of the testimony or other evidence sought. If, after consideration of all circumstances, the administrative law judge or the Executive Secretary determines the subpoena in whole or in part is unreasonable, oppressive,

excessive in scope or unduly burdensome, the administrative law judge or the Executive Secretary may refuse to issue the subpoena or may issue it upon such conditions as fairness requires.

(2) The administrative law judge or the Executive Secretary by subpoena may order that a deposition be taken, upon a showing that (i) the proposed 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, and (ii) the testimony will be material, and (iii) taking the deposition will not result in any undue burden to any other party or in undue delay of the proceeding. The subpoena shall name the witness whose deposition is to be taken and specify the time and place for taking the deposition and the person before whom the deposition is to be taken. The time, place and person before whom the deposition is to be taken may differ from those stated in the application.

(b) *Application.* A party requesting the deposition of a witness or the production of documents, shall apply in writing to the administrative law judge, or to the Executive Secretary in the event the administrative law judge is unavailable, stating the reasons for the application, the name and address of the witness or the person who is to produce the documents, the matters concerning which the witness is expected to testify or the contents of the documents, the relevance of the testimony or documents, the time and place for taking the deposition or production of documents, and the name and address of the person before whom the deposition is to be taken or the documents are to be produced. The party making the application shall serve a copy of the subpoena and application on every other party to the proceeding. Any party opposing the issuance of the subpoena may file a response or opposition to the application within 10 days. Failure to do so within the time allowed will be deemed a waiver of objection to the subpoena.

(c) *Service of subpoena.* Service of a subpoena shall be made by delivering a copy of the subpoena to the person named therein and by tendering the fees for one day's attendance and mileage as specified in § 308.10. A subpoena issued on behalf of the FDIC shall be similarly served, however, the fees for attendance and mileage need not be tendered at the time of service. If service is made by the U.S. Marshal, a deputy U.S. Marshal or an employee of the FDIC, a return of service shall be made. If service is made by any other person, that person shall make a return of service by affidavit on

or with the original subpoena that states how service was made. The reasons for failure of service shall be stated. The original subpoena with the required return shall be promptly delivered to the administrative law judge.

(1) *Natural persons.* Delivery of a copy of a subpoena and tender of fees to a natural person may be made by handing them to the person; or by leaving them at the person's office with someone in charge; or by leaving them in a conspicuous place in the office if there is no one in charge; or by leaving them at the person's dwelling place or usual place of abode with someone of suitable age and discretion residing there; or by mailing them by registered or certified mail to the last known address of the person; or by any method that gives actual notice to the person and makes the fees available prior to the return date.

(2) *Other entities.* When the person to be served is not a natural person, delivery of a copy of the subpoena and tender of the fees may be effected by handing them to a registered agent for service or to an officer or director or agent in charge of any office of the person; or by mailing them by registered or certified mail to the representative at the person's last known address; or by any method that gives actual notice to the person's authorized representative and makes the fees available prior to the return date. Any service on a foreign bank may be made on any branch or agency located within any State or the District of Columbia, but if the service is in connection with an action or proceeding involving one or more such branches or agencies, service shall be made on at least one branch or agency so involved.

(d) *Motion to quash.* A person named in a subpoena or subpoena duces tecum who is not a party to the proceeding and who has not had the opportunity to oppose the issuance of the subpoena pursuant to § 308.08(b) may apply to the administrative law judge, or to the Executive Secretary if the administrative law judge is unavailable, to revoke, quash, or modify the subpoena. A statement of the reasons for the application must accompany it and notice of the application must be given to the party requesting the subpoena. The application must be made prior to the time for compliance specified in the subpoena and not more than 10 days after the date of service of the subpoena.

§ 308.09 Procedure on depositions.

(a) *When taken.* The administrative law judge, or the Executive Secretary in the event the administrative law judge is

unavailable, may order by subpoena evidence to be taken by deposition at any stage of a proceeding. A deposition may be taken by the administrative law judge, or before any person having power to administer oaths and who is designated by the Executive Secretary or the administrative law judge. A deposition shall be taken no sooner than 10 days after the parties to the proceeding have received notice of the deposition, where such notice has not been waived.

(b) *Procedure.* Each witness testifying upon oral deposition shall be duly sworn, and the adverse party shall have the right to cross-examine. Objections to questions or evidence shall be in short form, stating the grounds for the objection. The person taking the deposition shall not have power to rule upon questions of competency or materiality or relevance of evidence. Failure to object to questions or evidence shall not be deemed a waiver except where the ground for the objection is one which might have been avoided or removed if presented at that time. All questions, answers, and objections (not including argument or debate) shall be recorded by the person taking the deposition, or under such person's direction. The deposition shall be subscribed by the witness, unless the parties by stipulation have waived the signing, or the witness is ill or cannot be found or has refused to sign. If the deposition is not subscribed by the witness, the person taking the deposition shall state this on the record and the reason therefor. The transcript shall be certified as a true and complete transcript of the deposition by the person taking it. Such person shall promptly send by registered or certified mail, the original of the deposition, and the originals of all exhibits, to the administrative law judge, unless otherwise directed in the order authorizing the deposition. Interested parties may make their own arrangements with the person taking the deposition for copies of the transcript and exhibits.

(c) *Introduction as evidence.* The deposition or any part of it may be read in evidence by any party to a proceeding, subject to appropriate rulings on objections to questions or evidence noted during the taking of the deposition and objections that would be valid were the witness testifying in person. This does not include objections waived in accordance with the fourth sentence of paragraph (b) of this section. Only those portions of a deposition received in evidence at the hearing shall

constitute a part of the record upon which a decision shall be based.

§ 308.10 Payment of witness fees.

Witnesses who testify or whose depositions are taken shall be paid the same fees for attendance and mileage paid in the United States district courts. Fees of the witness, the reporter and the person taking a deposition shall be paid by the party requesting attendance at a proceeding or deposition.

§ 308.11 Rules of evidence.

(a) *Evidence.* All parties shall have the right to present their case or defense by oral and documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts.

(b) *Objections.* Objections to the admission or exclusion of evidence shall be in short form, stating the grounds therefor. The record need not include argument on objections except as ordered, allowed, or requested by the administrative law judge. Rulings on such objections and on any other matters shall be a part of the record. Failure to object to the admission or exclusion of evidence or to any ruling shall be considered a waiver of the objection.

(c) *Official notice.* All matters officially noticed by the administrative law judge shall appear on the record.

§ 308.12 Motions.

(a) *In writing.* An application or request for an order or ruling not otherwise specifically provided for in this subpart shall be made by motion. Applications or requests shall be addressed to and filed with the administrative law judge prior to filing of the recommended decision with the Executive Secretary pursuant to § 308.13. At all other times, motions shall be addressed to and filed with the Executive Secretary. Motions may be made orally upon the record at a session of a hearing, unless the administrative law judge requires a written motion. All other motions shall be in writing. All written motions shall state with particularity the order or relief sought and the grounds therefor. All written motions and oppositions shall be accompanied by a form of proposed order.

(b) *Oppositions.* Within 10 days after service of any written motion, or within such other period of time fixed by the administrative law judge or the Executive Secretary, any party may file a written answer or opposition to the motion. The moving party shall not have a right to reply, except as permitted by

the administrative law judge or the Executive Secretary. As a matter of discretion, the administrative law judge or the Executive Secretary may waive the requirements of this section as to motions for extensions of time, and may rule upon such motions ex parte.

(c) *Oral argument.* Oral argument shall not be heard on motions, except as directed by the administrative law judge or the Board of Directors. Supporting memoranda or briefs may be filed with motions or answers or oppositions thereto.

(d) *Rulings on motions.* The administrative law judge or the Executive Secretary shall rule upon all motions properly submitted in accordance with the provisions of this part, and upon such other motions as directed by the Board of Directors. If the administrative law judge or the Executive Secretary finds that a prompt decision by the Board on a motion is essential to the proper conduct of the proceeding, the motion may be referred to the Board for decision.

(e) *Appeal from rulings on motions.* All motions, answers, oppositions and rulings shall become part of the record. Rulings of an administrative law judge or the Executive Secretary on any motion may not be appealed to the Board of Directors prior to its consideration of the administrative law judge's recommended decision, findings and conclusions, except by special permission of the Board. Such rulings shall be considered by the Board in reviewing the record. Requests to the Board for special permission to appeal from such rulings shall be filed promptly in writing, and shall briefly state the grounds for the request. The moving party shall immediately serve a copy of the request on every other party to the proceeding.

(f) *Proceeding with hearing.* The hearing shall proceed pending the determination of any motion by the Board of Directors, unless otherwise ordered by the administrative law judge or the Board.

§ 308.13 Proposed findings and conclusions, supporting and reply briefs, and recommended decision.

(a) *Proposed findings and conclusions by parties.* After service of the notice by the administrative law judge that the record has been filed and transmitted as provided in § 308.07(h), each party to a hearing shall have 30 days to file with the administrative law judge proposed findings of fact, conclusions of law and a proposed order. For good cause, the administrative law judge may allow

additional time for filing. The proposals may be accompanied by a supporting brief or memorandum citing statutes, decisions, other authorities, and page references to the record. All proposals, briefs and memoranda shall become part of the record. Reply briefs may be filed within 15 days of service of initial briefs and shall be confined to matters in original briefs of opposing parties.

(b) *Recommended decision and filing of record.* Within 45 days after expiration of the time allowed for filing of proposed findings, conclusions and order by the parties, the administrative law judge shall file with the Executive Secretary and shall certify to the Board of Directors for decision, the record of the hearing. For good cause, the Board may extend the period for filing and certification. The record shall include a recommended decision, findings of fact, conclusions of law, and proposed order, the transcript, exhibits, exceptions, rulings, and briefs and memoranda filed in connection with the hearing. Upon request of any party, the record shall include exhibits excluded from evidence or tenders of proof. At the time of filing of the record with the Executive Secretary the administrative law judge shall serve upon each party a copy of the recommended decision, findings, conclusions, and proposed order. The provisions of this paragraph shall not apply to a hearing before the Board of Directors.

§ 308.14 Exceptions to proposed findings and conclusions and recommended decision.

(a) *Filing.* Within 20 days after service of the recommended decision, findings, conclusions, and proposed order of the administrative law judge, a party may file with the Executive Secretary written exceptions thereto, exceptions to the failure of the administrative law judge to make any recommendation or finding or conclusion, exceptions to the admission or exclusion of evidence, and exceptions to any other rulings, subject to the provisions of this section. A supporting brief may also be filed. For good cause, the Executive Secretary may allow additional time for filing. A party who has not filed an answer in accordance with paragraphs (a) and (d) of § 308.06, or exceptions in accordance with § 308.76 may not file exceptions pursuant to this section.

(b) *Waiver.* Failure of a party to file exceptions to those matters specified in paragraph (a) of this section within the time prescribed shall be a waiver of objection thereto.

(c) *Hearing before the Board of Directors.* The provisions of § 308.14

shall not apply to a hearing before the Board of Directors.

§ 308.15 Briefs in support of exceptions.

(a) *Contents.* All briefs in support of exceptions shall be confined to the particular matters in issue, citing statutes, decisions, other authorities, and page references to the record or recommended decision of the administrative law judge. If the exception relates to the admission or exclusion of evidence, the substance of the evidence admitted or excluded shall be set forth in the brief with appropriate references to the transcript.

(b) *Late filing.* Briefs not filed on or before the time fixed in this subpart and documents not provided for in this subpart shall be received only with the special permission of the Board of Directors.

§ 308.16 Notice of submission to the Board of Directors.

The Executive Secretary shall submit the case to the Board after expiration of the time for filing exceptions and notify the parties that the case has been submitted to the Board of Directors for final decision.

§ 308.17 Oral argument before the Board of Directors.

(a) *Scheduling of Argument.* Upon the written request of a party or upon its own initiative, the Board of Directors may order an oral argument on the findings, conclusions and recommended decisions of the administrative law judge, when it considers justice will best be served thereby. The request must be made within the time prescribed for filing exceptions, and briefs in support of exceptions. The oral argument shall be before the Board or one or more members of the Board, and shall be recorded, unless otherwise ordered by the Board. Counsel will be notified of the exact time, date and place of the argument.

(b) *Order of Procedure.* Presentation of oral argument will be limited to a total of 45 minutes. Counsel for the respondent will open with a presentation limited to 20 minutes. Counsel for FDIC will follow with a presentation and response also limited to 20 minutes. Counsel for the respondent will then be given 5 minutes for a rebuttal. The Board may make adjustments to this schedule as it deems appropriate.

§ 308.18 Decision of the Board of Directors.

(a) *Decision and reopening of case.* The Board of Directors shall render its decision within 90 days after the Executive Secretary has notified the

parties pursuant to § 308.17 that the case has been submitted to the Board for final decision. Within the 90-day period, the Board may order that the notice be set aside and the case reopened.

(b) *FDIC staff participation.* Appropriate members of the staff, who are not participating in the performance of investigative or prosecutorial functions in the particular case, or in a factually related case, may advise and assist the Board of Directors in the consideration of the particular case and in the preparation of documents for its disposition.

(c) *Copies.* The Executive Secretary shall furnish copies of the decision and order of the Board to the parties and to the bank concerned. Copies shall also be furnished to the appropriate State supervisory authority in the case of an insured nonmember bank, including a State branch of a foreign bank. Where the proceedings involve involuntary termination of the insured status of a State member bank, copies shall also be furnished to the Board of Governors of the Federal Reserve System. Where the proceedings involve involuntary termination of the insured status of a national bank, a District bank or a Federal branch of a foreign bank, copies shall also be furnished to the Comptroller of the Currency.

§ 308.19 Filing papers with the Executive Secretary.

(a) *Filing.* Papers required or permitted to be filed with the Board of Directors or the Executive Secretary, shall be filed with the Executive Secretary, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, D.C. 20429. The papers may be sent to the Executive Secretary by mail or express, but must be postmarked or received by the FDIC in Washington, D.C., within the prescribed time limit for filing.

(b) *Formal requirements.* All papers filed under this subpart shall be printed or typewritten, and copies shall be clear and legible. The original of all papers filed by a party not a natural person shall be signed by the party's duly authorized representative. Papers filed by a party who is a natural person shall be signed by the party or a duly authorized representative. The signer's address and telephone number must appear on the original. Counsel for the FDIC shall sign the original of all papers filed on behalf of the FDIC. All papers filed must name in the heading or on a title page, the party, the FDIC, the docket number and the subject of the papers.

(c) *Copies.* An original and four copies of all documents and papers required or permitted to be filed or served upon the Board of Directors or the Executive Secretary under this subpart (except the transcript of testimony and exhibits), shall be furnished to the Executive Secretary, unless otherwise specifically provided in the notice of hearing.

§ 308.20 Documents in proceedings confidential.

Unless otherwise ordered by the Board or required by law, the notice of hearing, the transcript, the recommended decision of the administrative law judge, exceptions thereto, proposed findings or conclusions, the findings and conclusions of the Board of Directors and other papers filed in connection with any hearing shall be for the confidential use of the Board, the administrative law judge or presiding officer, and appropriate supervisory authorities.

§ 308.21 Service of papers other than subpoenas.

(a) *By the Board of Directors.* All documents or papers required to be served by the Board of Directors upon any party afforded a hearing shall be served by the Executive Secretary or the Board's designee. Service shall be made by personal service or by registered or certified mail, addressed to the last known address as shown on the records of the Board, of a party's attorney or representative of record. If there is no attorney or representative of record, service shall be made upon a party at the party's last known address as shown on the records of the Board. Service may also be made in such other manner reasonably calculated to give actual notice, as the Board may provide by regulation or otherwise. The foregoing provisions do not apply to service by the Board on counsel for the FDIC.

(b) *By the parties.* Except as otherwise expressly provided, a party filing papers in accordance with this subpart shall serve them upon the attorneys or representatives of record of all other parties to the proceeding, or upon such other parties if there is no attorney or representative. Service may be made by personal service or by registered, certified, or regular first class mail addressed to the last known address of such parties, or their attorneys or representatives of record. When filed with the Board of Directors or the administrative law judge, all papers shall show that service has been made.

§ 308.22 Computing time.

(a) *General rule.* In computing any period of time prescribed or allowed by this part, the date of the act or event or default from which the designated period of time begins to run is not to be included. The last day so computed shall be included, unless it is a Saturday, Sunday, or Federal holiday. When the last day is a Saturday, Sunday, or Federal holiday, the period shall run until the end of the next day that is not a Saturday, Sunday or Federal holiday, and intermediate Saturdays, Sundays and Federal holidays shall be included in the computation; however, when the period of time within which an act is to be performed is seven days or less, intermediate Saturdays, Sundays and Federal holidays shall not be included.

(b) *Service by mail.* Under this part, when a party has the right or is required to perform an act within a prescribed time period after the service by mail of any papers upon the party, three days shall be added to the prescribed time period for performance.

Subpart C—Rules and Procedures Applicable to Proceedings for the Involuntary Termination of Insured Status

§ 308.23 Scope.

Under the authority of section 8 of the Federal Deposit Insurance Act, the Board of Directors may terminate the insured status of an insured bank or an insured branch of a foreign bank upon the grounds set forth in section 8 and enumerated in § 308.24, § 308.26, and § 308.31. Hearings required to terminate insured status shall be conducted in accordance with the rules and procedures of subpart B and this subpart.

§ 308.24 Notice of finding grounds for termination of insurance.

The Board of Directors shall notify the Comptroller of the Currency in the case of a national bank or a District bank or an insured Federal branch of a foreign bank, and shall notify the appropriate supervisory authority in the case of an insured nonmember bank, including an insured State branch of a foreign bank, and shall notify the Board of Governors of the Federal Reserve System in the case of a State member bank, when the Board finds (a) that an insured bank (including a foreign bank having an insured branch) or its directors or trustees have engaged or are engaging in unsafe or unsound practices in conducting the business of such bank, or (b) that such bank is in an unsafe or unsound condition to continue

operations as an insured bank, or (c) that such bank or its directors or trustees have violated an applicable law, rule, regulation, order, or any condition imposed in writing by the FDIC in connection with the granting of any application or other request by the bank, or have violated any written agreement entered into with the FDIC. The appropriate supervisory authorities shall be notified for the purpose of securing correction of the practices or violations of a bank or its directors or trustees, or of the condition of the bank. The Board shall furnish a copy of the notice to the bank.

§ 308.25 Extraterritorial acts of foreign banks or their directors or trustees.

An act or practice committed outside the United States by a foreign bank or its directors or trustees, which act or practice in and of itself would otherwise be a ground for termination of the insured status of a branch of the foreign bank under this subpart, shall be a ground for such termination only if the Board of Directors finds either that: (a) The act or practice has been, is, or is likely to be a cause of or carried on in connection with or in furtherance of, an act or practice committed within any State of the United States or the District of Columbia that in and of itself would be an appropriate basis for action by the FDIC, or (b) the act or practice committed outside the United States, if proven, would adversely affect the insurance risk of the FDIC.

§ 308.26 Failure of a foreign bank to secure removal of personnel.

When any person associated with a foreign bank fails to appear promptly as a party to a proceeding pursuant to § 308.40 or § 308.44 for removal or suspension of that person, or fails to comply with an effective order or judgment issued in such proceeding, any failure by the bank to secure that person's removal from office and preclude the person from further participation in the conduct of the affairs of the bank, shall be a ground for termination of insurance of deposits in any branch of the bank.

§ 308.27 Notice of intention to terminate insured status and hearing.

(a) *Notice and period of correction.* Unless correction of the practices, condition or violations specified in the notice issued pursuant to § 308.24 is made within 120 days of service of the notice, or a specified period of correction of not less than 20 days, the Board of Directors, if it determines to proceed further, shall give the bank or insured branch of a foreign bank not

less than 30 days written notice of its intention to terminate insured status. The period of correction of not less than 20 days shall be fixed by the Board in any case where the Board in its discretion has determined that the insurance risk of the FDIC is unduly jeopardized, or fixed by the Comptroller of the Currency in the case of a national bank, or a District bank or an insured Federal branch of a foreign bank, or fixed by the State authority in the case of an insured nonmember bank, including an insured State branch of a foreign bank, or fixed by the Board of Governors of the Federal Reserve System in the case of a State member bank.

(b) *Hearing.* The notice shall fix a time and place for a hearing on the proposed termination of insurance, before an administrative law judge selected by the Office of Personnel Management. The rules and procedures of subpart B of this part and the provisions of the Administrative Procedure Act (5 U.S.C. 554-557) shall apply. After consideration of the record made at the hearing, the Board shall make written findings which shall be conclusive.

§ 308.28 Order terminating insured status.

If the Board of Directors finds that any unsafe or unsound practice or condition, or violation specified in the notice issued pursuant to § 308.24 has been established and has not been corrected within the time prescribed in § 308.27(a), the Board may order that the insured status of the bank or branch be terminated on a subsequent date not earlier than the expiration of the time period specified in the notice of intention issued pursuant to § 308.27(a).

§ 308.29 Consent to termination of insured status.

If the bank does not appear by a duly authorized representative at the hearing pursuant to § 308.27(b), the bank shall be deemed to have consented to termination of the insured status of the bank or branch. The administrative law judge shall promptly report this failure to appear to the Board of Directors. The Board may then issue an order terminating the insured status of the bank or branch.

§ 308.30 Notice to depositors of termination of insured status.

Within the time specified by the Board of Directors and prior to the date of termination of the insured status of a bank or branch, the bank shall mail a notice of termination of insured status to each depositor at the depositor's last address of record on the books of the

bank or branch. The bank shall publish the notice in two issues of a local newspaper of general circulation and shall furnish the FDIC with proof of such publications. The notice shall be as follows:

Notice

(Date) _____.

1. The status of the _____, as an (insured bank) (insured branch) under the provisions of the Federal Deposit Insurance Act, will terminate as of the close of business on the _____ day of _____, 19____.

2. Any deposits made by you after that date, either new deposits or additions to existing deposits, will not be insured by the Federal Deposit Insurance Corporation;

3. Insured deposits in the (bank) (branch) on the _____ day of _____, 19____ will continue to be insured, as provided by the Federal Deposit Insurance Act, for 2 years after the close of business on the _____ day of _____, 19____. Provided, however, that any withdrawals after the close of business on the _____ day of _____, 19____, will reduce the insurance coverage by the amount of such withdrawals.

(Name of bank or branch)

(Address)

The notice may include any additional information the bank deems advisable.

§ 308.31 Termination of insured status of bank not engaged in the business of receiving deposits, other than trust funds.

(a) *Notice to show cause.* When the Board of Directors has evidence that an insured nonmember bank or an insured bank is not engaged in the business of receiving deposits, other than trust funds, the Board shall give written notice of this to the bank and shall direct the bank to show cause why its insured status should not be terminated under the provisions of section 8(p) of the Federal Deposit Insurance Act. The bank shall have 30 days after receipt of the notice, or such longer period prescribed by the Board, to submit affidavits or other written proof that it is engaged in the business of receiving deposits, other than trust funds.

(b) *Hearing and notice of termination date.* Upon written request of the bank, the Board shall authorize a hearing before an administrative law judge selected by the Office of Personnel Management. The rules and procedures of subpart B of this part and the provisions of the Administrative Procedure Act (5 U.S.C. 554-557) shall apply to the hearing. If, upon consideration of the record made at the hearing, the Board finds that the bank is not engaged in the business of receiving deposits, other than trust funds, the finding shall be conclusive and the Board shall notify the bank that its insured status will terminate at the

expiration of the first full semiannual assessment period following issuance of the notice.

(c) *Notice to depositors of termination of insured status.* Within the time specified by the Board and prior to the date of termination of its insured status, the bank shall mail a notice of termination of insured status to each depositor at the depositor's last address of record on the books of the bank. The bank shall publish the notice in two issues of a local newspaper of general circulation and shall furnish the FDIC with proof of such publications. The notice shall be as follows:

Notice

(Date) _____.

The status of the _____ as an (insured bank) (insured branch) under the Federal Deposit Insurance Act, will terminate on the _____ day of _____, 19____, and its deposits will thereupon cease to be insured.

(Name of bank or branch)

(Address)

The notice may include any additional information the bank deems advisable.

Subpart D—Rules and Procedures Applicable to Proceedings Relating to Cease-and-Desist Orders

§ 308.32 Scope.

(a) The rules and procedures of subpart B and this subpart apply to proceedings by the Board of Directors to order an insured nonmember bank or its official to cease and desist from practices and violations described in section 8 of the Federal Deposit Insurance Act and enumerated in § 308.33.

(b) The rules and procedures of subpart B and this subpart apply to proceedings by the Board of Directors to order a municipal securities dealer or a person associated with the municipal securities dealer to cease and desist from any violation of law or regulation specified in section 15B(c)(5) of the Securities Exchange Act of 1934, as amended (15 U.S.C. 78o-4(c)(5)), where the municipal securities dealer is an insured nonmember bank as defined in § 308.01, a subsidiary or department or division thereof.

(c) The rules and procedures of subpart B and this subpart apply to proceedings by the Board of Directors to order a clearing agency or transfer agent to cease and desist from failure to comply with the applicable provisions of section 17, 17A, and 19 of the Securities Exchange Act of 1934, as amended (15 U.S.C. 78q, 78q-1, 78s), and the applicable rules and regulations thereunder, where the clearing agency

or transfer agent is an insured nonmember bank as defined in § 308.01, or a subsidiary thereof.

§ 308.33 Grounds for cease-and-desist orders.

The Board of Directors may issue and serve upon any insured nonmember bank or its official a written notice of charges and of hearing as specified in § 308.35, if (a) in the Board's opinion the bank or official is engaging or has engaged in an unsafe or unsound practice, or (b) the Board has reasonable cause to believe the bank or official is about to engage in an unsafe or unsound practice or (c) in the Board's opinion the bank or official has violated or the Board has reasonable cause to believe that the bank or official is about to violate a law, rule or regulation, or any condition the Board has imposed in writing in connection with granting an application or request of the bank, or any written agreement with the FDIC.

§ 308.34 Notice to State supervisory authority.

The Board of Directors shall give the appropriate State supervisory authority timely notice of its intent to institute a proceeding pursuant to subpart D, and the grounds therefor. The proceeding shall be conducted according to subpart D, unless within the time period specified in the notice pursuant to § 308.35, the State supervisory authority has effected satisfactory corrective action.

§ 308.35 Notice of charges and of hearing, and consent.

The notice issued pursuant to § 308.33 shall contain a statement of the facts constituting any alleged violation or unsafe or unsound practice, and shall fix a time and place for a hearing to determine whether an order to cease and desist should issue against the bank or its official. The hearing shall be not earlier than 30 days nor later than 60 days after service of the notice, unless an earlier or later date is set by the Board of Directors in its discretion at the request of any party served with the notice. If such party does not appear at the hearing personally or by a duly authorized representative, the party will be deemed to have consented to issuance of the cease-and-desist order.

§ 308.36 Issuance and effective date of cease-and-desist order.

(a) *Issuance.* Upon consent, or if upon the record made at any hearing referred to in § 308.35, the Board of Directors finds that any violation or unsafe or unsound practice specified in the notice of charges has been established, the Board may issue and cause to be served

upon the bank or its official, an order to cease and desist from any such violation or practice and to take affirmative action to correct any conditions resulting therefrom.

(b) *Effective date.* A cease-and-desist order shall become effective at the expiration of 30 days after the service of the order upon the bank or its official. A cease-and-desist order issued upon consent shall become effective at the time specified therein. All cease-and-desist orders shall remain effective and enforceable, except to the extent they are stayed, modified, terminated, or set aside by the Board of Directors or a reviewing court.

§ 308.37 Issuance and effective date of temporary cease-and-desist order.

(a) *Issuance.* When the Board of Directors determines that the violation, threatened violation or the unsafe or unsound practice (or the continuation of any of the foregoing) as specified in the notice of charges pursuant to § 308.35, is likely to cause insolvency or substantial dissipation of assets or earnings of the bank, or is likely to weaken seriously the condition of the bank or otherwise to prejudice seriously the interests of its depositors prior to the completion of the proceedings pursuant to section 8(b) of the Federal Deposit Insurance Act and § 308.35, the Board may issue a temporary order requiring the bank or its official to cease and desist from any such violation or practice and to take affirmative action to prevent such insolvency, dissipation, condition, or prejudice pending completion of the proceedings.

(b) *Effective date.* A temporary order shall become effective when served upon the bank or its official. Unless the order is set aside, limited or suspended by a court in proceedings authorized under the Federal Deposit Insurance Act, it shall remain effective and enforceable pending completion of administrative proceedings pursuant to the notice of charges issued under § 308.35 and until the Board of Directors dismisses the charges.

§ 308.38 Extraterritorial acts of foreign banks or their officials.

An act or practice committed outside the United States by a foreign bank or its official that would otherwise be a ground for issuing a cease-and-desist order under § 308.36, or a temporary cease-and-desist order under § 308.37, shall be a ground for an order only if the Board of Directors finds either that (a) the act or practice has been, is, or is likely to be a cause of, or carried on in connection with or in furtherance of, an act or practice committed within any

State of the United States or the District of Columbia which act or practice in and of itself would be an appropriate basis for action by the FDIC, or (b) the act or practice, if proven, would adversely affect the insurance risk of the FDIC.

Subpart E—Rules and Procedures Applicable to Proceedings Relating to Removal and Suspension Orders

§ 308.39 Scope.

The rules and procedures of subpart B and this subpart apply to proceedings by the Board of Directors to remove or suspend directors or officers of an insured nonmember bank or any other person participating in the conduct of the affairs of such bank, or proceedings to prohibit such director, officer or other person from further participation in the conduct of the affairs of such bank, upon the grounds set forth in section 8(e) of the Federal Deposit Insurance Act and enumerated in this subpart. The rules and procedures of this subpart and subpart B do not apply to suspension, removal, or prohibition proceedings upon the grounds set forth in section 8(g) of the Federal Deposit Insurance Act and enumerated in subpart G.

§ 308.40 Grounds for removal or prohibition.

(a) The Board of Directors may issue and serve upon a director or officer of any insured nonmember bank a written notice of its intention to remove the individual from office when the Board determines that (1) the individual has committed a violation of law, rule, regulation or of a cease-and-desist order which has become final, or has engaged or participated in any unsafe or unsound practice in connection with the bank, or has engaged in any act or omission or practice constituting a breach of fiduciary duty as a director or officer; and (2) the bank has suffered or will probably suffer substantial financial loss or other damage, or that the interests of its depositors could be seriously prejudiced by the violation or practice or breach of fiduciary duty, or that the director or officer has received financial gain by reason of the violation or practice or breach of fiduciary duty. The violation, practice, or breach of fiduciary duty must be one that involves personal dishonesty on the part of the individual, or that demonstrates the individual's willful or continuing disregard for the safety or soundness of the bank.

(b) The Board may issue and serve a written notice of its intention to remove any director or officer or an insured nonmember bank from office when the

Board determines that the individual by conduct or practice with respect to another insured bank or other business institution that resulted in substantial financial loss or other damage, has evidenced either personal dishonesty or a willful or continuing disregard for its safety or soundness, and, in addition, has evidenced unfitness to continue as a director or officer.

(c) The Board may issue and serve upon any other person participating in the conduct of the affairs of an insured nonmember bank a written notice of its intention to prohibit the individual's further participation in the conduct of the affairs of the bank when the Board determines that the individual by conduct or practice with respect to such bank or other insured bank or other business institution that resulted in substantial financial loss or other damage, has evidenced either personal dishonesty or a willful or continuing disregard for the safety or soundness of such insured bank and has evidenced unfitness to participate in the conduct of the affairs of such insured bank.

§ 308.41 Notice to State supervisory authority.

The Board of Directors shall give the appropriate State supervisory authority timely notice of its intent to institute a proceeding pursuant to subpart E, and the grounds therefor. The proceeding shall be conducted according to subpart E unless within the time specified in the notice pursuant to § 308.42, the State supervisory authority has effected satisfactory corrective action.

§ 308.42 Notice of intention to remove, hearing and consent.

A written notice issued pursuant to § 308.40 shall be served upon the director, officer or other person named therein, and a copy shall be served upon the bank concerned. The notice shall state the facts constituting the grounds for removal or prohibition and shall fix a time and place for a hearing. The hearing shall not be earlier than 30 days nor later than 60 days after the date of service of the notice, unless an earlier or a later date is set by the Board of Directors at the request of (a) the director or officer or other person, and for good cause shown, or (b) the Attorney General of the United States. Failure of the individual to appear at the hearing in person or by a duly authorized representative shall be deemed a consent to issuance of an order of removal or prohibition.

§ 308.43 Issuance and effective date of removal or prohibition order.

When the Board of Directors finds upon the record made at a hearing referred to in § 308.42 that any of the grounds specified in the notice have been established, the Board may issue orders of removal or prohibition that shall become effective at the expiration of 30 days after the date of service of the order upon the individual and the bank. A consent order issued by the Board in accordance with § 308.42 shall become effective at the time specified therein. All orders shall remain effective and enforceable except to the extent they are stayed, modified, terminated or set aside by the Board or a reviewing court.

§ 308.44 Grounds for suspension or prohibition.

The Board of Directors may suspend from office or prohibit from further participation in the conduct of the affairs of an insured nonmember bank, a director or officer of such bank or any other person participating in the conduct of the affairs of such bank, as referred to in § 308.40, when the Board deems it necessary for the protection of the bank or the interests of its depositors.

§ 308.45 Issuance and effective date of suspension or prohibition order.

(a) *Notice of suspension or prohibition.* Notice of suspension or prohibition shall be given by written order accompanying a notice issued pursuant to § 308.42, and setting forth the grounds for the suspension or prohibition as specified in § 308.44. The order shall be served upon the officer, director, or other person participating in the conduct of the affairs of the bank, and a copy shall be served upon the bank.

(b) *Effective date.* A suspension or prohibition shall become effective upon service of the order of suspension or prohibition and unless stayed by a court in proceedings authorized by the Federal Deposit Insurance Act, the order shall remain in effect pending completion of the administrative proceedings pursuant to the notice served under § 308.42 and until the Board of Directors dismisses the charges specified in such notice.

§ 308.46 Extraterritorial acts of officials of foreign banks.

An act or practice committed outside the United States by a director or officer of a foreign bank or by any other person participating in the conduct of the affairs of a foreign bank, that would otherwise be a ground for suspension, removal, or prohibition proceedings under this subpart, shall be a ground for such proceedings only if the Board of

Directors finds that (a) the act or practice has been, is, or is likely to be a cause of or carried on in connection with or in furtherance of an act or practice within any State of the United States or the District of Columbia which act or practice in and of itself would be an appropriate basis for action by the FDIC, or (b) the act or practice, if proven, would adversely affect the insurance risk of the FDIC.

Subpart F—Procedures Applicable to Proceedings Pursuant to Section 10(c) of the Federal Deposit Insurance Act

§ 308.47 Scope.

The procedures in this subpart shall be followed in proceedings pursuant to section 10(c) of the Federal Deposit Insurance Act, conducted in connection with examinations or investigations of banks.

§ 308.48 Order to conduct proceedings.

A proceeding pursuant to section 10(c) shall be initiated only upon issuance of an order by the Board of Directors, the General Counsel or designee thereof, or the Director of the Division of Bank Supervision or designee thereof. The order shall designate a presiding officer as the FDIC's representative to conduct such proceedings. Upon application and for good cause shown, the Board or the person issuing the order may limit, quash, modify or withdraw the order.

§ 308.49 Powers of presiding officer.

The presiding officer in a section 10(c) proceeding shall have the power, among other things, to administer oaths and affirmations, to take and preserve testimony under oath, to issue subpoenas 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 main office of the bank is located or in which the witness resides or conducts business. The Board or a person issuing the order initiating the proceeding may limit, quash, or modify any subpoena or subpoena duces tecum, upon application and for good cause shown. The presiding officer shall report to the Board of Directors any instance where any person has been guilty of dilatory, obstructionist, or contumacious conduct during the proceeding, or any other instance involving a violation of these rules. The Board shall thereupon take such action as the circumstances warrant, and in addition may exclude the person from further participation in the proceeding.

§ 308.50 Proceedings confidential.

Proceedings pursuant to section 10(c) shall be confidential unless otherwise provided by § 308.51(c). Information or documents obtained by the FDIC in the course of such proceedings shall be disclosed in accordance with Part 309 of the FDIC's rules and regulations, and as otherwise required by law.

§ 308.51 Rights of witnesses.

In a proceeding pursuant to section 10(c):

(a) Any person compelled or requested to furnish testimony, documentary evidence, or other information, shall upon request be shown the order initiating the proceeding. At the discretion of the presiding officer, a copy of the order may be furnished to such person;

(b) Any person compelled, requested or permitted to appear and testify has the right to be accompanied, represented and advised by counsel. While testifying, such person may have counsel present who may (1) advise the witness before, during and after such testimony; (2) briefly question the witness at the conclusion of such testimony for clarification of answers; (3) make summary notes during such testimony solely for the use of the witness;

(c) All persons testifying shall be sequestered. Such persons and their counsel shall not be present during the testimony of any other person, unless permitted in the discretion of the presiding officer;

(d) If the record developed in the course of the proceeding contains allegations of wrongdoing by any person with respect to the affairs or ownership of any bank, such person shall be advised of the alleged wrongdoing and shall be afforded a reasonable opportunity, consistent with administrative efficiency, to produce rebuttal evidence in documentary form (including depositions and statements under oath), or in the form of testimony given before the presiding officer. The evidence shall be on the record;

(e) Witness fees shall be paid in accordance with § 308.10.

§ 308.52 Service of subpoena.

Service of a subpoena shall be in accordance with § 308.08(c).

§ 308.53 Transcripts.

Transcripts of testimony, if any, in a proceeding pursuant to section 10(c) shall be recorded by the official reporter, or by any other person or means designated by the presiding officer. A person submitting documentary evidence or testimony may

obtain a copy of the transcript, if any, upon payment of the cost thereof.

§ 308.54 Special examinations and examinations of closed banks.

Procedures in this subpart shall be followed when proceedings pursuant to section 10(c) are instituted in connection with the special examination of any State member bank, any national or District bank, any insured Federal branch of a foreign bank, or the examination of any closed insured bank or branch, or the examination of an affiliate of any of the foregoing.

Subpart G—Procedures and Standards Applicable to Suspension, Removal and Prohibition Where Felony Charged, and Petition for Reconsideration of Denial of an Application Under Section 19 of the Federal Deposit Insurance Act

§ 308.55 Scope.

The rules and procedures set forth in this subpart apply to proceedings by the Board of Directors (a) to suspend any director or officer of an insured nonmember bank or any other person participating in the conduct of the affairs of such a bank, or to prohibit such individuals from further participation in the conduct of the affairs of the bank where the individual is charged in any State, Federal or territorial information or indictment, or charged in any complaint authorized by a United States attorney, with the commission of, or participation in, a crime involving dishonesty or breach of trust punishable by imprisonment exceeding one year under State or Federal law; (b) to remove from office any such director or officer or other person, or to prohibit such individuals from further participation in the conduct of the affairs of the bank, except with the consent of the Board, where a judgment of conviction not subject to further appellate review has been entered against the individual for the commission of, or participation in, a crime involving dishonesty or breach of trust punishable by imprisonment exceeding one year under State or Federal law; and (c) to consider a petition for reconsideration of a denial of an application by an insured bank under section 19 of the Federal Deposit Insurance Act (hereafter in this subpart "section 19") to engage the services of an individual who has been convicted of any criminal offense involving dishonesty or a breach of trust.

§ 308.56 Relevant considerations.

(a) In deciding whether to suspend, remove or prohibit under this subpart, the Board of Directors shall consider (1)

whether the alleged offense is a crime which is punishable by imprisonment for a term exceeding one year under State or Federal law, and which involves dishonesty or breach of trust; and (2) whether the presence of the individual in a position with an insured bank may pose a threat to the interest of the bank's depositors or may threaten to impair public confidence in the bank. The Board of Directors may consider additional factors in the specific case that appear relevant to its decision to continue in effect, rescind, terminate or modify a suspension, removal or prohibition order. The Board shall not consider the guilt or innocence of the individual charged with the crime.

(b) In proceedings for reconsideration of a denial of an application under section 19, the Board of Directors shall consider: (1) Whether the conviction is for a criminal offense, either misdemeanor or felony, involving dishonesty or breach of trust; (2) whether service of the individual to the bank constitutes a significant threat to the safety and soundness of the applicant bank or the interests of its depositors, or may threaten to impair public confidence in the bank; (3) evidence of the affected individual's rehabilitation; (4) the position to be held by the affected individual; and (5) applicable fidelity bond coverage for the affected individual. In evaluating these factors, significant weight will be given to the judgment of the applicant bank's boards of directors and bonding company, provided the judgments are made at arm's length.

§ 308.57 Notice of suspension or prohibition.

Proceedings by the Board of Directors to suspend an individual from office or prohibit further participation in the conduct of the affairs of the bank as referred to in § 308.55(a), shall be initiated by written notice of suspension or prohibition served on the individual, upon prior determination by the Board that the offense alleged in the information or indictment or complaint involved dishonesty or breach of trust, and that the individual's participation in the conduct of the affairs of the bank may pose a threat to the bank's depositors or may threaten to impair public confidence in the bank. The suspension or prohibition shall remain in effect until final disposition of the information or indictment or complaint, and until the Board terminates the suspension or prohibition. A copy of the notice shall be served upon the bank concerned.

§ 308.58 Order of removal or prohibition.

When a final judgment of conviction not subject to further appellate review is entered against a director or officer of an insured nonmember bank or any other person participating in the conduct of the affairs of such bank for a crime referred to in § 308.55(b), the Board of Directors may issue and serve upon the individual an order removing the individual from office or prohibiting further participation in the conduct of the affairs of the bank except with the Board's consent where continued service or participation by the director, officer, or other person may pose a threat to the interests of the bank's depositors or may threaten to impair public confidence in the bank. A copy of the order shall be served upon the bank, at which time the director or officer named in the order shall be removed from office. The order shall remain effective until completion of the hearing or appeal authorized under section 8(g) of the Federal Deposit Insurance Act and this subpart, unless the order is terminated by the Board. A finding of not guilty or other disposition of the case will not preclude the Board from thereafter instituting proceedings to remove an individual from office or prohibit further participation in the conduct of the affairs of the bank, pursuant to section 8(e) of the Federal Deposit Insurance Act and subpart E.

§ 308.59 Notice of opportunity and request for hearing.

A notice pursuant to § 308.57, an order pursuant to § 308.58 and a denial of an application under section 19 shall be accompanied by (a) a statement that within 15 days of receipt of such notice or order, the individual or, in the case of a section 19 denial, the affected individual or the bank may file with the Executive Secretary a written request for a hearing stating the relief desired and the grounds therefor and that is accompanied by supporting evidence when available; and (b) a description of the hearing procedure and relevant considerations specified in § 308.56.

§ 308.60 Waiver of hearing.

Failure to request a hearing pursuant to § 308.59 shall constitute a waiver of the opportunity of hearing. Failure to appear at a hearing in person, through an authorized bank officer, through counsel, or personally with counsel shall constitute a waiver of hearing. The individual or, in the case of a section 19 denial, the affected individual or the bank may in writing waive a hearing and elect to have the matter determined by the Board of Directors on the basis of written submissions.

§ 308.61 Hearing.

(a) The Executive Secretary shall order a hearing to commence within 30 days after receipt of a request for hearing pursuant to § 308.59, except in the case of a petition for reconsideration of denial of a section 19 application, for which the time periods set forth in § 303.10(e) shall apply. The hearing shall be held in Washington, D.C., or at another designated place, before a presiding officer designated by the Board of Directors. The Board may order a later hearing date upon petition of the individual or, in the case of a section 19 denial, the affected individual or the bank afforded the hearing.

(b) The provisions of § 308.04, § 308.05, § 308.20 and § 308.22 apply to proceedings conducted under this subpart, except as otherwise specifically provided. The formal rules of evidence and the adjudicative procedures of the Administrative Procedure Act (5 U.S.C. 554-557) shall not apply to the hearing.

(c) The individual or, in the case of a section 19 denial, the affected individual or the bank may appear at the hearing personally, through an authorized bank officer, through counsel, or personally with counsel, and shall have the right to introduce relevant and material documents and to present oral argument.

(d) Staff members of the FDIC's Office of the General Counsel may attend the hearing and participate as a party.

(e) The proceedings shall be recorded and a transcript shall be furnished to the individual or, in the case of a section 19 denial, the affected individual or the bank afforded the hearing upon request and after payment of the cost thereof. At the discretion of the presiding officer witnesses may be presented within specified time limits, provided that a list of witnesses is furnished to the presiding officer prior to the hearing. Witnesses shall be sworn, unless otherwise directed by the presiding officer. The presiding officer may ask questions of any witness. Each party shall have the opportunity to cross-examine any witness presented by an opposing party.

(f) In the course of, or in connection with any proceeding under this subpart, the Board of Directors or the presiding officer shall have the power to administer oaths and affirmations, to take or cause to be taken depositions, and to issue, revoke, quash, or modify subpoenas and subpoenas duces tecum. Where the presentation of witnesses is permitted, the presiding officer may require the attendance of witnesses from any State, territory or other place subject to the jurisdiction of the United

States at any location where the proceeding is being conducted. Witness fees shall be paid in accordance with § 308.10. The Board or the presiding officer may require the production of documents from any such State, territory, or other place subject to the jurisdiction of the United States.

(g) Upon the request of the individual or, in the case of a section 19 denial, the affected individual or the bank afforded the hearing or the staff members of the FDIC's Office of the General Counsel, the record shall remain open for 5 business days following the hearing for the parties to make additional submissions to the record. The record shall thereafter be closed.

(h) The presiding officer shall make recommendations to the Board, where possible, within 10 days after the record is closed.

§ 308.62 Decision of the Board of Directors.

Within 60 days following the hearing or receipt of written submissions pursuant to § 308.60, the Board of Directors shall notify the individual or, in the case of a section 19 denial, the affected individual and the bank whether the suspension or prohibition or denial will be continued, terminated, or otherwise modified, or whether the order of removal or prohibition or denial will be rescinded or otherwise modified. The notification shall state the basis for any decision of the Board adverse to the individual or, in the case of a section 19 denial, the affected individual and the bank. The Board shall promptly rescind or modify an order of removal or prohibition or denial where the decision is favorable to the individual or, in the case of a section 19 denial, the affected individual and the bank.

§ 308.63 Reconsideration by the Board of Directors.

The individual, except for the affected individual or the bank in the case of a section 19 denial, afforded a hearing pursuant to § 308.61 shall have 10 days following receipt of the decision of the Board of Directors to petition the Board for reconsideration. The individual or, in the case of a section 19 denial, the affected individual or the bank shall be entitled to petition the Board for reconsideration of its decision after the expiration of 12 months from the date of the Board's decision. A petition shall state with particularity the basis for reconsideration, the relief sought, and any exceptions to the findings of the Board. It may be accompanied by a supporting memorandum and by other documentation. Promptly following

receipt of the petition for reconsideration, the Board shall determine whether to grant a hearing.

Subpart H—Rules and Procedures Applicable to Proceedings Relating to Assessment and Collection of Civil Penalties for the Violation of Cease-and-Desist Orders or Certain Federal Statutes

§ 308.64 Scope.

(a) The rules and procedures in this subpart and subpart B apply to proceedings by the Board of Directors to assess and collect civil penalties from (1) an insured nonmember bank or its official (as defined in § 308.02(l)) where the bank or official has violated the terms of any cease-and-desist order which has become final, or (2) an insured nonmember bank or its official where the bank or official has violated the provisions of section 22(h) or 23A of the Federal Reserve Act (as made applicable by section 18(j) of the Federal Deposit Insurance Act), or (3) the provisions of section 106(b)(2) of the Bank Holding Company Act Amendments of 1970, as amended.

(b) As used in § 308.65, § 308.66, and § 308.67, the term "has violated" includes, but is not limited to, any action (alone or with another) for or towards causing, bringing about, participating in, counseling, or aiding or abetting a violation.

§ 308.65 Violation of order as ground for assessment.

If, in the opinion of the Board of Directors, an insured nonmember bank or its official has violated any final order issued pursuant to section 8(b) or 8(c) of the Federal Deposit Insurance Act and subpart D, the Board may assess upon the bank or official a civil penalty of not more than \$1,000 per day for each day the violation continues.

§ 308.66 Violation of laws limiting dealings with bank officials and affiliates as ground for assessment.

If, in the opinion of the Board of Directors, an insured nonmember bank or its official has violated any provision of section 22(h) or 23A of the Federal Reserve Act, as amended (made applicable by section 18(j) of the Federal Deposit Insurance Act), or has violated any lawful regulation issued pursuant thereto, the Board may assess upon the bank or official a civil penalty of not more than \$1,000 per day for each day the violation continues.

§ 308.67 Violation of law governing correspondent accounts as ground for assessment.

If, in the opinion of the Board of Directors, an insured nonmember bank or its official has violated any provision of section 106(b)(2) of the Bank Holding Company Act Amendments of 1970, as amended, the Board may assess upon the bank or official a civil penalty of not more than \$1,000 per day for each day the violation continues.

§ 308.68 Relevant considerations.

In determining the amount of the penalty assessed pursuant to § 308.65, § 308.66, or § 308.67, the Board of Directors shall consider the financial resources and good faith of the insured nonmember bank or its official, the gravity of the violation, any previous violations, and such other matters as justice may require.

§ 308.69 Notice of assessment of civil penalty, and opportunity and request for hearing.

(a) Civil penalties pursuant to § 308.65, § 308.66, or § 308.67 shall be assessed by written notice served upon the bank or official. The notice shall state the amount of the penalty, the period for payment, the legal authority for assessment, and the matters of fact or law constituting the grounds for assessment.

(b) The notice shall further indicate that within 10 days of receipt of the notice, the individual assessed may file with the Executive Secretary or other designee of the Board of Directors a written request for a hearing. A description of the hearing procedure shall accompany the notice.

(c) The notice shall be delivered by personal service, by registered or certified mail, or by other appropriate means, to the last known address of the party assessed.

§ 308.70 Waiver of hearing.

Failure to request a hearing pursuant to § 308.69(b) shall constitute a waiver of the opportunity of hearing and the notice of assessment pursuant to § 308.69(a) shall constitute a final and unappealable order.

§ 308.71 Hearing and order.

The Executive Secretary or designee of the Board of Directors shall order a hearing to commence within 60 days after receipt of a request for a hearing pursuant to § 308.69(b). The provisions of the Administrative Procedure Act (5 U.S.C. 554-557) and subpart B shall apply to the hearing. If, upon the record made at the hearing, the Board finds that the grounds for assessing the civil penalty have been established, the

Board shall issue its final order and cause it to be served upon the party. The final order shall require payment of the penalty, as specified in the notice of assessment, or the Board, in its discretion, may reduce the amount of the penalty.

§ 308.72 Payment of civil penalty.

Civil penalties assessed pursuant to § 308.65, § 308.66, or § 308.67 are payable and to be collected within the 60-day period after issuance of the notice of assessment, unless the Board of Directors shortens the period for payment or makes the amount payable upon receipt of the notice, where the Board determines the purpose of the penalty would be better served thereby. Notwithstanding any other provision of this subpart, if a party has requested a hearing pursuant to § 308.69(b) to challenge a penalty or an antecedent finding, the party shall not be required to pay the penalty until the Board has issued a final order following the hearing. Checks in payment of civil penalties shall be forwarded to the Division of Accounting and Corporate Services, Federal Deposit Insurance Corporation, and made payable to the Treasurer of the United States. The Office of the Director of Accounting and Corporate Services shall prepare a receipt and notify the Executive Secretary who shall close the record on the case.

Subpart I—Rules and Procedures Applicable to Proceedings Relating to Disapproval of Acquisition of Control

§ 308.73 Scope.

The rules and procedures in this subpart and subpart B apply to proceedings by the Board of Directors in connection with the disapproval by the Board of a proposed acquisition of control of an insured nonmember bank.

§ 308.74 Grounds for disapproval.

The following are grounds for disapproval of a proposed acquisition of control:

(a) The proposed acquisition of control would result in a monopoly or would be in furtherance of any combination or conspiracy to monopolize or attempt to monopolize the banking business in any part of the United States;

(b) The effect of the proposed acquisition of control in any part of the United States would be to substantially lessen competition or tend to create a monopoly or would in any other manner be in restraint of trade, and anticompetitive effects of the proposed acquisition of control are not clearly

outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served;

(c) The financial condition of any acquiring person might jeopardize the financial stability of the bank or prejudice the interest of the depositors of the bank;

(d) The competence, experience, or integrity of any acquiring person or of any of the proposed management personnel indicates that it would not be in the interest of the depositors of the bank, or in the interest of the public to permit such person to control the bank; or

(e) Any acquiring person neglects, fails, or refuses to furnish to the FDIC all the information required by it.

§ 308.75 Notice of disapproval and opportunity and request for hearing.

(a) Within 3 days of its decision to disapprove a proposed acquisition of control of an insured nonmember bank, the Board of Directors shall serve a written notice of disapproval upon the party seeking to acquire control. The notice shall state the legal authority and the basis for the disapproval.

(b) The notice shall further indicate that within 10 days of receipt the individual may file with the Executive Secretary a written request for a hearing. A description of the hearing procedure shall accompany the notice.

(c) The notice shall be delivered by personal service, by registered or certified mail, or by other appropriate means to the last known address of the party being afforded the notice.

(d) Failure to request a hearing pursuant to this section shall constitute a waiver of the opportunity of hearing and the notice of disapproval shall constitute a final and unappealable order.

§ 308.76 Exceptions.

(a) *Filing.* The Board of Directors may direct the party requesting a hearing pursuant to § 308.75(b) or the party may elect to file exceptions to the statement of the basis for disapproval contained in the notice of disapproval. Exceptions shall be filed with the Executive Secretary within 20 days after receipt of the notice by the party, unless the Board specifies a different filing period of not less than 10 days after receipt of the notice. For good cause shown, the Executive Secretary or the administrative law judge may permit filing of exceptions after expiration of the filing period.

(b) *Requirements.* Exceptions filed under this section to a statement of the basis for disapproval of a proposed

acquisition of control shall specifically designate the part of the statement to which exception is taken. Only those parts of a statement of the basis for disapproval so designated may be challenged by the party at the hearing.

(c) *Effect of failure to except.* Failure of a party to timely file required exceptions to a statement of the basis for disapproval of a proposed acquisition of control shall be deemed a waiver of the party's right to appear and contest the disapproval and shall authorize the administrative law judge to conduct the hearing without further notice to that party. If every party has waived the right to appear in a disapproval proceeding, the administrative law judge is authorized to recommend to the Board that it dispense with further proceedings.

§ 308.77 Hearing and order.

The Executive Secretary shall order a hearing to commence within 60 days after receipt of a request for hearing pursuant to § 308.75(b). If the appropriate State bank supervisory agency has submitted views and recommendations on the proposed acquisition, it shall be entitled as of right to appear as a party. The provisions of the Administrative Procedure Act (5 U.S.C. 554-557) and subpart B shall apply to the hearing. If, upon the record made at the hearing, and after giving due considerations to any views or recommendations previously submitted by an appropriate State bank supervisory agency, the Board of Directors finds that there are adequate grounds for approving or disapproving the acquisition, the Board shall issue its final order approving or disapproving the acquisition and cause it to be served on the party seeking control.

Subpart J—Rules and Procedures Applicable to Proceedings Relating to Assessment of Civil Penalties for Willful Violation of the Change in Bank Control Act

§ 308.78 Scope.

The rules and procedures of this subpart apply to proceedings by the Board of Directors to assess civil penalties against any person for willful violation of the Change in Bank Control Act of 1978 (12 U.S.C. 1817(j)) or any regulation or order issued pursuant thereto, in connection with the affairs of an insured nonmember bank.

§ 308.79 Notice of intention to assess civil penalty and opportunity and request for hearing.

(a) If, in the opinion of the Board of Directors, any person has willfully

violated the Change in Bank Control Act of 1978 (12 U.S.C. 1817(j)) or any regulation or order issued pursuant thereto, in connection with the affairs of an insured nonmember bank, the Board may cause notice to be served upon the person of its intention to assess a civil penalty of not more than \$10,000 per day for each day the violation continues. The notice shall state the legal authority and grounds for assessment and the amount of the penalty.

(b) The notice shall further state that within 10 days of receipt of the notice the individual may file with the Executive Secretary a written request for a hearing. A description of the hearing procedure shall accompany the notice.

(c) The notice shall be delivered by personal service, by registered or certified mail, or by other appropriate means, to the last known address of the person assessed.

§ 308.80 Waiver of hearing.

Failure to request a hearing pursuant to § 308.79(b) shall constitute a waiver of the opportunity for hearing. The Board of Directors, for good cause shown, may extend the period to request a hearing. A party may in writing waive a hearing and elect to have the propriety of the penalty determined by the Board solely on the basis of written submissions.

308.81 Hearing.

The Executive Secretary shall order a hearing to commence within 30 days after receipt of a request for a hearing pursuant to § 308.79(b), in Washington, D.C., or another place designated by the Executive Secretary, before a presiding officer designated by the Board of Directors. The provisions of § 308.61 (b), (c), (d), (e), and (g) shall apply to the hearing.

§ 308.82 Assessment.

If, after considering the data, views, and arguments presented at the hearing pursuant to § 308.81, or any written submissions made pursuant to § 308.80, and the gravity of the violation and the financial resources and good faith of the party, the Board concludes that a civil penalty is warranted, it shall assess against the party a penalty of not more than \$10,000 per day for each day the violation continues. Based upon the same consideration, the Board, in its discretion, may reduce the penalty from the amount stated in the notice of intention. The Board shall cause a final order of assessment to be served upon the party.

§ 308.83 Collection.

The FDIC may collect the civil penalty assessed pursuant to § 308.82 by agreement with the party, or the FDIC may bring an action against the party to recover the penalty amount in the appropriate United States District Court.

Subpart K—Rules and Procedures for Imposition of Sanctions Upon Municipal Securities Dealers or Persons Associated With Them, and Upon Clearing Agencies or Transfer Agents

§ 308.84 Scope.

The rules and procedures in this subpart and subpart B apply to proceedings by the Board of Directors (a) to censure, limit the activities of, suspend, or revoke the registration of, any municipal securities dealer for which the FDIC is the appropriate regulatory agency; and (b) to censure, or suspend or bar from being associated with such a municipal securities dealer, any person associated with such a municipal securities dealer; and (c) to deny registration to, censure, limit the activities of, suspend, or revoke the registration of, any transfer agent or clearing agency for which the FDIC is the appropriate regulatory agency. This subpart and subpart B shall not apply to proceedings to postpone or suspend registration of a transfer agent or clearing agency pending final determination of denial or revocation of registration.

§ 308.85 Grounds for imposition of sanctions.

(a) The Board of Directors may issue and serve upon any municipal securities dealer for which the FDIC is the appropriate regulatory agency, a written notice of its intention to censure, limit the activities or functions or operations of, suspend, or revoke the registration of, such municipal securities dealer, when the Board determines (1) that such municipal securities dealer (i) has committed any prohibited act or omitted any required act specified in subparagraph (A), (D), or (E) of section 15(b)(4) of the Securities Exchange Act of 1934, as amended (15 U.S.C. 78o), or (ii) has been convicted of any offense specified in section 15(b)(4)(B) of that Act within 10 years of commencement of proceedings under this section, or (iii) is enjoined from any act, conduct or practice specified in section 15(b)(4)(C) of that Act; and (2) that it is in the public interest to impose any of the foregoing sanctions of this paragraph (a).

(b) The Board of Directors may issue and serve upon any person associated or seeking to become associated with a

municipal securities dealer for which the FDIC is the appropriate regulatory agency a written notice of its intention to censure, suspend or bar the person from being associated with the municipal securities dealer, when the Board determines (1) that such person (i) has committed any prohibited act or omitted any required act specified in subparagraph (A), (D) or (E) of section 15(b)(4) of the Securities Exchange Act of 1934, as amended, or (ii) has been convicted of any offense specified in section 15(b)(4)(B) of that Act within 10 years of the commencement of proceedings under this section, or (iii) is enjoined from any act, conduct or practice specified in section 15(b)(4)(C) of that Act; and (2) that it is in the public interest to censure, suspend or bar such person.

(c) The Board of Directors may issue and serve upon any transfer agent or clearing agency for which the FDIC is the appropriate regulatory agency, a written notice of its intention to deny registration to, censure, place limitations on the activities or functions or operations of, suspend, or revoke the registration of, the transfer agent or clearing agency, when the Board determines (1) that the transfer agent or clearing agency has willfully violated, or is unable to comply with, any applicable provision of section 17 or 17A of the Securities Exchange Act of 1934, as amended, or any applicable rule or regulation issued pursuant thereto; and (2) that it is in the public interest to impose any of the foregoing sanctions of this paragraph (c).

§ 308.86 Notice and consultation with the Securities and Exchange Commission.

Before initiating any proceedings under § 308.85 (a) or (b), the Board of Directors shall (a) notify the Securities and Exchange Commission of the identity of the municipal securities dealer or associated person against whom proceedings are to be initiated, and the nature of and basis for the proposed action, and (b) consult with the Securities and Exchange Commission concerning the effect of the proposed action on the protection of investors and the possibility of coordinating the action with any proceeding by the Commission against the municipal securities dealer or associated person.

§ 308.87 Notice of intention to impose sanctions.

A notice of intention to impose sanctions referred to in § 308.85 shall contain a statement of the proposed sanctions and the grounds for imposition of the sanctions, and shall fix a time and

place for a hearing. The notice shall be delivered by personal service, by registered or certified mail, or by other appropriate means, to the last known address of the party upon whom sanctions are to be imposed.

§ 308.88 Hearing.

The hearing shall not be earlier than 30 days nor later than 60 days after the date of service of the notice, unless an earlier or later date is set by the Board of Directors at the request of the municipal securities dealer, associated person, or transfer agent or clearing agency, and for good cause shown. The procedures of subpart B and the provisions of the Administrative Procedure Act (5 U.S.C. 554-557) shall apply to the hearing. Failure to appear at the hearing in person or by a duly authorized representative shall be deemed a consent to issuance of the order by the Board.

§ 308.89 Issuance and effective date of order imposing sanctions.

If the Board of Directors finds upon the record made at the hearing pursuant to § 308.88 that the grounds specified in the notice pursuant to § 308.87 have been established, the Board may issue an order containing the sanctions specified in the notice. The order shall be effective at the expiration of 30 days after the service of the notice, except that an order of censure, denial or revocation of registration is effective when served. A consent order in accordance with § 308.88 shall become effective at the time specified therein. All orders shall remain effective and enforceable except to the extent they are stayed, modified, terminated or set aside by the Board or a reviewing court; however, orders of suspension shall continue in effect no longer than 12 months.

Subpart L—Rules and Procedures Relating to Exemption Proceedings Under Section 12(h) of the Securities Exchange Act of 1934

§ 308.90 Scope.

The rules and procedures of this subpart apply to proceedings by the Board of Directors to exempt in whole or in part, an issuer of securities from the provisions of section 12(g), 13, 14(a), 14(c), 14(d), or 14(f) of the Securities Exchange Act of 1934, as amended, or to exempt an officer or director or beneficial owner of securities of such an issuer from the provisions of section 16 of that Act.

§ 308.91 Application for exemption.

Any interested person may file a written application for an exemption under this subpart with the Executive Secretary, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, D.C. 20429. The application shall specify the exemption sought and the reason therefor, and shall include a statement indicating why the exemption would be consistent with the public interest or the protection of investors.

§ 308.92 Newspaper notice.

If the Board of Directors decides to further consider the application for exemption, it shall serve upon the applicant instructions to publish one notice in a newspaper of general circulation in the community where the main office of the issuer is located. The applicant shall furnish proof of such publication to the Executive Secretary. The notice shall contain (a) the name and address of the issuer and the name and title of the applicant, (b) the exemption sought, (c) a statement that a hearing will be held, and (d) a statement that within 30 days of publication of the newspaper notice, interested persons may submit to the FDIC written comments on the application for exemption and a written request for an opportunity to be heard. The address of the FDIC must appear in the notice.

§ 308.93 Notice of hearing.

Within 10 days after expiration of the period for receipt of comments pursuant to § 308.92, the Executive Secretary shall serve upon the applicant and any person who has requested an opportunity to be heard, a notice indicating the place and time of the hearing, to be held not later than 30 days after service of the notice of hearing. The notice shall contain the name and address of the presiding officer designated by the Board of Directors and a statement of the matters to be considered.

§ 308.94 Hearing.

Parties to the hearing may appear personally, through counsel, or personally with counsel. Parties shall have the right to introduce relevant and material documents and to make an oral statement. The formal rules of evidence, the adjudicative procedures of the Administrative Procedure Act (5 U.S.C. 554-557), and subpart B shall not apply. The Board of Directors or the presiding officer shall have discretion to permit presentation of witnesses within specified time limits, provided that a list of witnesses is furnished to the presiding officer prior to the hearing. Witnesses shall not be sworn. The presiding officer may ask questions of

any witness and each party may cross-examine any witness presented by an opposing party.

§ 308.95 Decision of the Board of Directors.

Following submission of the hearing transcript to the Board of Directors, the Board may grant the exemption where it determines by reason of the number of public investors, the amount of trading interest in the securities, the nature and extent of the issuer's activities, the issuer's income or assets, or otherwise, that the exemption is consistent with the public interest or the protection of investors. An exemption shall be granted by an order specifying the terms of the exemption, the person to whom it is granted, and the period for which it is granted. A copy of the order shall be served upon each party to the proceeding.

Subpart M—Rules and Procedures Relating to the Recovery of Attorney Fees and Other Expenses**§ 308.96 Scope.**

This subpart, and the Equal Access to Justice Act (5 U.S.C. 504 and 504 note) which it implements, apply to adversary adjudications that are pending before the FDIC at any time between October 1, 1981, and September 30, 1984. The types of adjudication covered by this subpart are those listed in § 308.03.

§ 308.97 Eligibility of applicants.

(a) To be eligible for an award under this subpart, an applicant must have been named or admitted as a party to the proceeding. In addition, the applicant must show that it meets all other conditions of eligibility set out in this subpart.

(b) The types of eligible applicant are as follows:

- (1) An individual with a net worth of not more than \$1 million;
- (2) A sole owner of an unincorporated business who has a net worth of not more than \$5 million, including both personal and business interests, and not more than 500 employees; and
- (3) A corporation, association, partnership, or public or private organization with a net worth of not more than \$5 million and not more than 500 employees.

(c) An applicant who owns an unincorporated business will be considered as an "individual" rather than a "sole owner of an unincorporated business" if the issues on which he or she prevails are related primarily to personal interests rather than to business interests.

(d) For the purpose of determining eligibility, the net worth of an applicant shall be its net worth as of the date the underlying proceeding was initiated. As provided in § 308.102(d), in the case of a bank, net-worth information reported in conformity with applicable instructions and guidelines on the bank's Consolidated Report of Condition filed for the last reporting date before the initiation of the underlying proceeding will be used in establishing the bank's net worth as of the date the underlying proceeding was initiated.

(e) The employees of an applicant include all those persons who were regularly providing services for remuneration for the applicant, under its direction and control, on the date the proceeding was initiated. Part-time employees are included as though they were full-time employees.

(f) An applicant's net worth includes the value of any assets disposed of for the purpose of meeting an eligibility standard and excludes the value of any obligations incurred for this purpose. Transfers of assets or obligations incurred for less than reasonably equivalent value will be presumed to have been made for this purpose.

(g) The net worth and number of employees of the applicant and all of its affiliates shall be aggregated to determine eligibility. The aggregated net worth shall be adjusted if necessary to avoid counting the net worth of any entity twice. As used in this subpart, "affiliates" are (1) individuals, corporations, and entities that directly or indirectly or acting through one or more entities control a majority of the voting shares of the applicant, and (2) corporations and entities of which the applicant directly or indirectly owns or controls a majority of the voting shares. The Board of Directors may, however, on the recommendation of the administrative law judge or otherwise, determine that such aggregation with regard to one or more of the applicant's affiliates would be unjust and contrary to the purposes of this subpart in light of the actual relationship between the affiliated entities. In such a case the net worth and employees of the relevant affiliate or affiliates will not be aggregated with those of the applicant. In addition, the Board may determine that financial relationships of the applicant other than those described in this paragraph constitute special circumstances that would make an award unjust.

(h) An applicant that participates in a proceeding primarily on behalf of one or more other persons or entities that

would be ineligible is not itself eligible for an award.

§ 308.98 Prevailing party.

(a) An eligible applicant who, following litigation, has gained victory on the merits in the proceeding is a "prevailing party."

(b) An eligible applicant may be a "prevailing party" if a settlement of the proceeding was effected on terms favorable to it or if the proceeding against it has been dismissed. In appropriate situations an applicant may also have prevailed if the outcome of the proceeding has substantially vindicated the applicant's position on the significant substantive matters at issue, even though the applicant has not totally avoided adverse final action.

(c) When a proceeding has presented a number of discrete substantive issues, an applicant may have prevailed even though all the issues were not resolved in its favor. If such an applicant is deemed to have prevailed, any award shall be based on the fees and expenses incurred in connection with the discrete significant substantive issue or issues on which the applicant's position has been upheld. If such segregation of costs is not practicable, the award may be based on a fair proration of those fees and expenses incurred in the entire proceeding which would be recoverable under § 308.99 if proration were not performed.

(d) Whether separate or prorated treatment under the preceding paragraph is appropriate, and the appropriate proration percentage, shall be determined on the facts of the particular case. Attention shall be given to the significance and nature of the respective issues and their separability and interrelationship.

§ 308.99 Standards for awards.

(a) A prevailing applicant may receive an award for fees and expenses unless the position of the FDIC during the proceeding was substantially justified. To avoid an award, counsel for the FDIC must carry the burden of proof that its position was reasonable in fact and law.

(b) An award will be reduced or denied if the applicant has unduly or unreasonably protracted the proceedings or if special circumstances make the award sought unjust.

(c) Awards for fees and expenses incurred before the date on which a proceeding was initiated are allowable if their incurrence was necessary to prepare for the proceeding.

§ 308.100 Measure of awards.

(a) Except as limited by the next subsection, awards will be based on

rates customarily charged by persons engaged in the business of acting as attorneys, agents, and expert witnesses, even if the services were made available without charge or at a reduced rate.

(b) No award under this subpart for the fee of an attorney or agent may exceed \$75 per hour. No award to compensate an expert witness may exceed the highest rate at which the FDIC pays expert witnesses. An award may also, however, include the reasonable expenses of the attorney, agent, or expert witness as a separate item, if the attorney, agent, or expert witness ordinarily charges clients separately for such expenses.

(c) In determining the reasonableness of the fee sought for an attorney, agent, or expert witness, the administrative law judge shall consider the following:

(1) If the attorney, agent, or expert witness is in private practice, his or her customary fee for like services, or, if he or she is an employee of the applicant, the fully allocated cost of the services;

(2) The prevailing rate for similar services in the community in which the attorney, agent, or expert witness ordinarily performs services;

(3) The time actually spent in the representation of the applicant;

(4) The time reasonably spent in light of the difficulty or complexity of the issues in the proceeding; and

(5) Such other factors as may bear on the value of the services provided.

(d) The reasonable cost of any study, analysis, test, project, or similar matter prepared on behalf of an applicant may be awarded to the extent that the charge for the service does not exceed the prevailing rate payable for similar services, and the study or other matter was necessary for preparation of the applicant's case and not otherwise required by law or sound business or financial practice.

§ 308.101 Contents of application.

(a) An application for an award of fees and expenses under the Act shall contain (1) the name of the applicant and an identification of the proceeding, (2) showing that the applicant has prevailed, and an identification of each issue with regard to which the applicant believes that the position of the FDIC in the proceeding was not substantially justified, (3) a statement of the amount of fees and expenses for which an award is sought, (4) if the applicant is not an individual, a statement of the number of its employees on the date the proceeding was initiated, (5) a description of any affiliated individuals or entities, as defined in § 308.97(g), or a statement that none exist, (6) a declaration that the applicant, together

with any affiliates, had a net worth not more than the ceiling established for it by § 308.97(b) as of the date the proceeding was initiated, and (7) any other matters that the applicant wishes the FDIC to consider in determining whether and in what amount an award should be made.

(b) The application shall be signed by the applicant or an authorized officer or attorney of the applicant. It shall also contain or be accompanied by a written verification under oath or under penalty of perjury that the information provided in the application and supporting documents is true and correct.

§ 308.102 Statement of net worth.

(a) A statement of net worth must be filed with the application. It need not be served on parties to the underlying proceeding other than counsel for the FDIC. Unless otherwise ordered by the Board or required by law, the statement shall be for the confidential use of the Board and the administrative law judge.

(b) The statement of net worth shall reflect the net worth of the applicant and all affiliates of the applicant as affiliates are defined in § 308.97(g). To determine eligibility for an award, net worth of affiliates will be aggregated with that of the applicant according to § 308.97(g).

(c) The statement of net worth may be in any form convenient to the applicant which fully discloses all the assets and liabilities of the applicant and all the assets and liabilities of its affiliates, as of the time of the initiation of the underlying proceeding. Unaudited financial statements are acceptable unless the administrative law judge or the Board shall otherwise require. Financial statements or reports to an agency of the Federal Government or to a State, prepared before the initiation of the underlying proceeding for other purposes, and accurate as of a date not more than three months prior to the initiation of the underlying proceeding, are acceptable in establishing net worth as of the time of the initiation of the underlying proceeding, unless the administrative law judge or the Board shall otherwise require. If the applicant or any of its affiliates is a bank, the portion of the statement of net worth which relates to the bank shall consist of a copy of the bank's last Consolidated Report of Condition filed before the initiation of the underlying proceeding. In all cases the administrative law judge or the Board may call for additional information needed to establish the applicant's net worth as of the initiation of the underlying proceeding.

(d) In the case of banks, except as adjusted by additional information that was called for under the preceding sentence, net worth shall be considered for the purposes of this subpart to be the total equity capital (or, in the case of mutual savings banks, the total surplus accounts) as reported, in conformity with applicable instructions and guidelines, on the bank's Consolidated Report of Condition filed for the last reporting date before the initiation of the underlying proceeding. In the case of applicants or affiliates that are not banks, net worth shall 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, except as adjusted under § 308.97(f). Assets and liabilities of individuals shall include those beneficially owned within the meaning of § 335.102(e) of the FDIC's rules and regulations.

§ 308.103 Statement of fees and expenses.

The application shall be accompanied by a statement fully documenting the fees and expenses for which an award is sought. A separate itemized statement shall be submitted for each professional firm or individual whose services are covered by the application, showing the hours spent in work 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 performed. The administrative law judge or the Board of Directors may require the applicant to provide vouchers, receipts, or other substantiation for any expenses claimed.

§ 308.104 Filing and service of documents.

(a) Any application for an award and any other pleading or document related to an application shall be filed with the Executive Secretary. It shall conform to the requirements of § 308.19 (on filing papers) and shall be served on all parties to the underlying proceeding in accordance with § 308.21(b) (on service), except as provided in § 308.102(a) for statements of net worth.

(b) An application may be filed with the Executive Secretary whenever the applicant has prevailed in the proceeding or in a discrete significant substantive portion of the proceeding but in no case later than 30 days after service of the final order of the Board of

Directors in disposition of the proceeding.

§ 308.105 Answer to application.

(a) Within 20 days after service of an application, counsel for the FDIC may file an answer to the application. Unless counsel for the FDIC requests and is granted an extension of time for filing or files a statement of intent to negotiate under paragraph (b) of this section, failure to file an answer within the 20-day period will be treated as a consent to the award requested.

(b) If counsel for the FDIC and the applicant believe that the issues in the fee application can be settled, they may jointly file a statement of their intent to negotiate a settlement. The filing of this statement shall extend the time for filing an answer for an additional 20 days, and further extensions may be granted by the administrative law judge upon the joint request of counsel for the FDIC and the applicant.

(c) The answer shall explain in detail any objections to the award requested and identify the facts relied on in support of counsel's position. If the answer is based on any alleged facts not already in the record of the proceeding, counsel shall include with the answer either supporting affidavits or a request for further proceedings under § 308.107.

(d) Reply to answer. The applicant may file a reply if counsel for the FDIC has addressed in his or her answer any of the following issues: That the position of the FDIC was substantially justified, that the applicant unduly protracted the proceedings, or that special circumstances make an award unjust. The reply shall be filed within 15 days after service of the answer. If the reply is based on any alleged facts not already in the record of the proceeding, the applicant shall include with the reply either supporting affidavits or a request for further proceedings under § 308.107.

(e) Additional filings in the nature of pleadings may be submitted only by leave of the administrative law judge.

§ 308.106 Comments by other parties.

Any party to the proceeding, other than the applicant and counsel for the FDIC, may file comments on an application within 20 days after service of the application. If the applicant is entitled to file a reply to an answer under § 308.105(d), another party may file comments on the answer within 15 days after service of the objection. A commenting party may not participate further in proceedings on the application unless the administrative law judge determines that the public interest requires such participation in order to

permit additional exploration of matters raised in the comments.

§ 308.107 Further proceedings.

(a) *General.* Ordinarily, the determination of a recommended award will be made by the administrative law judge on the basis of the written record. However, on request of either the applicant or counsel for the FDIC, or on his or her initiative, the administrative law judge may order further proceedings such as an informal conference, oral argument, additional written submissions, or an evidentiary hearing. Such further proceedings will be held only when necessary for full and fair resolution of the issues arising from the application and will be conducted as promptly and expeditiously as possible.

(b) *Request for further proceedings.* A request for further proceedings under this section shall specifically identify the information sought or the issues in dispute and shall explain why additional proceedings are necessary.

(c) *Hearing.* The administrative law judge shall hold an oral evidentiary hearing only on disputed issues of material fact which cannot be adequately resolved through written submissions.

§ 308.108 Recommended decision.

The administrative law judge shall file a recommended decision on the fee application with the Executive Secretary no later than 90 days after the filing of the application or 30 days after the conclusion of the hearing, whichever is later. The recommended decision shall include written proposed findings and conclusions on the applicant's eligibility and its status as a prevailing party and an explanation of the reasons for any difference between the amount requested and the amount of the recommended award. The recommended decision shall also include, if at issue, proposed findings on whether the FDIC's position was substantially justified, whether the applicant unduly protracted the proceedings, or whether special circumstances make an award unjust. The administrative law judge shall also file with the Executive Secretary the record of the proceeding on the fee application and a proposed order and at the same time serve upon each party a copy of the recommended decision, findings, conclusions, and proposed order.

§ 308.109 Decision of the Board of Directors.

(a) Within 15 days after service of the recommended decision, findings, conclusions, and proposed order, the

applicant or counsel for the FDIC may file with the Executive Secretary written exceptions thereto. A supporting brief may also be filed.

(b) The Board of Directors shall render its decision within 60 days after the matter is submitted to it. The Executive Secretary shall furnish copies of the decisions and order of the Board to the parties. Judicial review of the decision and order may be obtained as provided in 5 U.S.C. 504(c)(2).

§ 308.110 Payment of awards.

An applicant seeking payment of an award shall submit to the Executive Secretary a statement that it will not seek review of the decision or order in the United States courts. The FDIC will pay the amount awarded within 30 days after receiving the applicant's statement, unless judicial review of the award or of the underlying decision of the adversary adjudication has been sought by the applicant or any other party to the proceeding.

By order of the Board of Directors,
December 21, 1981.

Federal Deposit Insurance Corporation
Alan J. Kaplan,

Assistant Executive Secretary.

[FR Doc. 81-36042 Filed 12-28-81; 8:45 am]

BILLING CODE 6714-01-M

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Parts 701 and 720

Description of Office, Disclosure of Official Records, Availability of Information, and Promulgation of Regulations

AGENCY: National Credit Union
Administration.

ACTION: Final rule.

SUMMARY: The National Credit Union Administration (NCUA) has reviewed its existing regulations governing the disclosure of official records, the availability of information and the promulgation of regulations. As a result, NCUA is revising its regulations to consolidate and clarify NCUA policy on the availability of information.

EFFECTIVE DATE: December 29, 1981.

ADDRESS: National Credit Union
Administration, 1776 G Street NW.,
Washington, D.C. 20456.

FOR FURTHER INFORMATION CONTACT:
Anne K. Scully, Attorney-Advisor,
Office of General Counsel, at the above
address, telephone (202) 357-1030.

SUPPLEMENTARY INFORMATION: On
August 13, 1981, the NCUA Board issued
for public comment proposed rules

regarding NCUA policy on availability and disclosure of information under the Freedom of Information Act. A discussion of the significant issues raised by the comments as well as a section by section analysis of the provisions revised in the final rule follow.

Unpublished Confidential and Privileged Information

Section 720.4 adds clarifying language to the Freedom of Information Act exemptions to avoid conflicting interpretations of the exemptions and to provide additional examples of agency records to which each exemption applies. The commentors supported the additional language because it clarifies NCUA's interpretation of the Freedom of Information Act and how requests will be treated.

One commentor questioned whether the proposed § 720.4(a)(2) would affect public availability of the NCUA Examiners' Manuals and/or Guides. The language in § 720.4(a)(2) indicates that all manuals and instructions to examiners could be subject to release, but only to the extent that the information, if released, would not permit a circumvention of law. For example, portions of a manual describing examination techniques and procedures would not be publicly available if knowledge of these techniques and procedures would permit credit union officials to alter records to hide violations of law. The commentor favored public availability of NCUA's Examiner's Guide because it would be beneficial to credit unions as well as consistent with the intent of the Freedom of Information Act. The additional language is intended to enunciate NCUA's general policy of authorizing release of the applicable examiners' guides edited in accordance with the FOIA exemption. The manuals are available to the public through a Freedom of Information Act request.

One commentor favored deletion of the last sentence of § 720.4(a)(4), regarding trade secrets and commercial or financial information. This sentence provides that assurances of confidentiality given by NCUA staff are not binding upon the agency. The commentor objected to this provision because of its chilling effect on NCUA's relationship with credit unions, thereby undermining the integrity of the examination process.

However, § 720.4(a)(4) applies only to business information and trade secrets obtained by NCUA outside of the examination process. Any and all information obtained by NCUA pertaining to particular credit unions

would fall under the exemption set forth in § 720.4(a)(8). Thus, there should be no chilling effect on the examiners' relations with credit unions. In addition, while the issue as to whether assurances of confidentiality by staff are binding upon NCUA is addressed by existing caselaw, the purpose of this explicit provision is to ensure that such promises of confidentiality are only made by the appropriate officials of NCUA who are authorized to bind the agency. This provision is not intended to indicate that clearly exempt material will not be accorded confidential treatment.

Release of Exempt Records

Section 720.5 establishes NCUA's policy for the discretionary release of information otherwise protected by the Freedom of Information exemptions. The United States Supreme Court has clearly established that the Freedom of Information Act exemptions are permissive rather than mandatory. *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979). The establishment of clear guidelines for the release of exempt material will help to assure that NCUA will not act in an arbitrary and capricious manner. This provision will also bring NCUA's regulations in line with the regulations of the other Federal financial institution regulatory agencies, which, to varying extents, permit the release of exempt material. See 12 CFR 4.16 (Comptroller of the Currency), 261.6 (Federal Reserve Board), 309.4 and 309.6 (Federal Deposit Insurance Corporation), and 505.5 (Federal Home Loan Bank Board).

Two commentors addressed the issue of release of exempt material to third parties under proposed § 702.5(b)(3). Both objected to the disclosure of credit union records, particularly examination reports, to third parties. The first commentor was concerned that the section represents a further weakening of the level of confidentiality in the examination process. Further, he felt that the language broadened the scope of NCUA's position in reference to its Interpretive Ruling and Policy Statement (IRPS) on release of consumer examination reports to a limited group of third parties. The commentor proposed a modification of this section to provide that NCUA not be vested with any discretion to release any examination reports to third parties (to maintain a continued confidential relationship between NCUA and credit union staff needed to ensure an effective examination process). The second commentor stated that no credit union records of any kind should be disclosed