Presidential Documents

Presidential Determination No. 89-3 of October 13, 1988

Determination Pursuant to Section 2(c)(1) of the Migration and Refugee Assistance Act of 1962, as Amended

Memorandum for the Secretary of State

Pursuant to Section 2(c)(1) of the Migration and Refugee Assistance Act of 1962, as amended (22 U.S.C. 2601(c)(1)), in order to meet unexpected urgent refugee and migration needs in the Middle East and Africa, I hereby determine that it is important to the national interest that $17 million be made available from the United States Emergency Refugee and Migration Assistance Fund for assistance to persons in Africa and the Middle East. Up to $15 million will be contributed to the United Nations High Commissioner for Refugees and the League of Red Cross Societies for assistance to African refugees. Up to $2 million will be contributed to the United Nations Relief and Works Agency for medical assistance to Palestinian refugees in Gaza and the West Bank.

You are authorized and directed to inform the appropriate committees of Congress of this Determination and the obligation of funds under this authority.

This Determination shall be published in the **Federal Register**.

Ronald Reagan

THE WHITE HOUSE,
Washington, October 13, 1988.

[FR Doc. 88-25636
Filed 11-1-88; 4:53 pm]
Billing code 3195-01-M

Presidential Documents

Presidential Determination No. 89-4 of October 20, 1988

Determination Pursuant to Section 550 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1989

Memorandum for the Secretary of State

Pursuant to Section 550 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1989 (Public Law 100-461), I hereby certify that the withholding of funds to the multilateral development banks and other international organizations and programs, pursuant to the limitation contained therein prohibiting the obligation of funds appropriated by that Act to finance indirectly any assistance or reparations to certain specific countries, is contrary to the national interest.

This determination shall be published in the **Federal Register.**

Ronald Reagan

THE WHITE HOUSE,
Washington, October 20, 1988.

[FR Doc. 88-25637
Filed 11-1-88; 4:54 pm]
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Rules and Regulations

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DEPARTMENT OF ENERGY

10 CFR Part 1013

Implementation of the Program Fraud Civil Remedies Act

AGENCY: Department of Energy.

ACTION: Final rule.

SUMMARY: The Department of Energy is adopting procedural regulations implementing the Program Fraud Civil Remedies Act of 1986. These regulations establish administrative procedures for imposing the statutorily authorized civil penalties and assessments against any person who makes, submits, or presents a false, fictitious, or fraudulent claim or written statement to the Department of Energy.

EFFECTIVE DATE: October 31, 1988.

FOR FURTHER INFORMATION CONTACT: D. Clifford Crook III, Esq., Office of the Deputy General Counsel for Legal Services, 1000 Independence Avenue, SW., Room 6A-197, Washington, DC 20585, (202) 586-5246.

SUPPLEMENTARY INFORMATION: The Program Fraud Civil Remedies Act (the Act), Pub. L. 99-509, enacted on October 21, 1986, codified at 31 U.S.C. 3801 through 3812, generally provides that any person who knowingly submits a false claim or statement to the Federal Government in an amount less than $150,000 may be liable for an administrative civil penalty of not more than $5,000 for each false claim or statement, and, in certain cases, to an assessment equal to double the amount falsely claimed.

On May 26, 1987, DOE issued a notice of proposed rulemaking (52 FR 20403, June 1, 1987) announcing its intention to implement the Act. Comments on the proposed rule were requested through July 31, 1987 The specific comments, and the response thereto, are set forth as follows:

A. General

1. *Comment:* One commenter found the proposed regulations too detailed and technical in view of Congress' intent that they simply encompass the safeguards afforded by the Administrative Procedure Act (APA). For example, the commenter regarded the filing of post-hearing briefs as unnecessary and wasteful. Believing that the proposed rules would make the proceedings too involved and costly, the commenter suggested that the agency adopt general guidelines and allow the parties to work out procedures for their individual cases. Alternatively, the agency was urged to create two sets of procedures, one incorporating the Federal Rules of Civil Procedure, and another, less formal set.

Response: The commenter is correct that Congress intended authorities already bound by the Administrative Procedure Act (APA) to conform to its requirements in conducting hearings under the Program Fraud Civil Remedies Act (PFCRA, or the Act) and for authorities not so bound to issue regulations under the Act incorporating the APA requirements. 31 U.S.C. 3803(g). However, Congress required *all* authorities covered by the statute to promulgate rules and regulations implementing the Act (31 U.S.C. 3809), and Congress intended such regulations to "be substantially uniform throughout the government." S. Rep. No. 99-212, 99th Cong., 1st Sess. 12 (1985). Furthermore, Congress provided that the ALJ would send to each defendant a description of the procedures that would govern the proceeding. 31 U.S.C. 3803(g)(3)(B)(i).

Congress clearly intended the affected agencies to develop comprehensive procedures for the conduct of hearings under PFCRA through notice and comment rulemaking. It did not envision that each agency would develop general guidelines and leave procedures to be negotiated among the parties and the ALJ in every particular case, as suggested by the commenter. Nor is there any indication that Congress intended the agencies to develop two sets of procedures—one for experienced litigants and another for the less sophisticated.

As the APA provides only general guidelines, which cover the broad range of agency adjudications, the implementing regulations make these requirements specific to proceedings under the Act. Moreover, the Act itself imposes a number of detailed procedural requirements that go beyond those mandated by the APA, such as provisions for prehearing discovery, the disclosure to the defendant of exculpatory information, limiting the venue of the hearing, internal review by a neutral reviewing official, and appeal of an ALJ's initial decision to the authority head. Ironically, many of these requirements were inserted into the Act at the instance of the commenter. The regulations must implement these provisions, as well.

First, we disagree with the commenter's premise—that somehow a lack of specificity and detail ensures that proceedings will be more expeditious or less costly. To the contrary, an agency's failure to anticipate problems and to establish mechanisms for resolving them in regulations often delays litigation while solutions are created ad hoc. That is not only costly to litigants, but it is less fair than informing them in advance of the rules of play.

We disagree that the procedures prescribed in these regulations are too detailed or too technical. We believe that the proposed regulations and those here adopted closely track the prescriptions of the statute and the provisions of the APA, except to the extent necessary to fill in gaps left by the statute. For example, the regulations provide a mechanism for the ALJ to enter a default judgment if a defendant fails to respond to the complaint within the time allowed by the statute, an event not anticipated in the text of the Act.

Although the rules are not so technical that a layperson could not represent him or herself, we believe that an allegation that a person has violated the statute is a very serious matter and that in most instances defendants will choose to be represented by an attorney.

Finally, we think the regulations are sufficiently flexible to permit the ALJ and the parties to tailor the process to their needs and the circumstances of each case. The prehearing conference offers an opportunity for the parties to explore ways to streamline the proceedings by mutual agreement. For example, the parties may agree to submit the case for decision on a stipulated record or on written statements. Sections 1013.19(c) (4) and

(5). Contrary to the commenter's remark, post-hearing briefs are optional with the parties unless required by the ALJ. Section 1013.36.

In sum, we believe that these requirements, which will be sent to all defendants, will provide them with a clear and comprehensive roadmap of the procedures for the conduct of the hearing.

B. Specific

1. *Comment:* The proposed regulation expands the term "benefit" to include anything of value; whereas, Congress used the term as a subset of "money."

Response: The statute uses the term "benefit" in three different places—in the definition of "claim," in the definition of "statement," and in section 3803(c)(2), where it is defined narrowly to refer to benefits under specific governmental assistance programs to individuals. Only in the definition of "claim" is the term referred to parenthetically as a subclass of "money." No such restriction applies when "benefits" is used in the definition of "statement." In that context, we believe that Congress intended the term to be defined broadly to suit the remedial purposes of the statute. The authority dispenses things of value other than money, property, or services—such things as licenses, permits, certificates, employment, etc. We believe that by providing a remedy against making false statements, as well as against false claims, Congress intended the Act to cover material false statements in obtaining these items of value, as well. To make our intention clear, we have amended the definition of "benefit" in § 1013.2 to restrict it to application within the context of "statement."

2. *Comment:* A commenter believed that by defining "representative" as an attorney, the proposed regulation would prevent corporations and other entities from appearing pro se by a corporate owner or officer.

Response: The general rule is that corporations have no right to appear pro se. *Jones v. Niagra Frontier Transportation Authority,* 722 F.2d 20, 22 (2nd Cir. 1983), and cases cited therein. However, the definition of "representative" is not intended to foreclose a corporation or other entity from appearing pro se by a corporate owner, officer, or employee. Individuals, of course, are also free to appear pro se. However, if either individuals or entities choose to be represented by another individual, that representative must be an attorney.

3. *Comment:* A commenter found the proposed definition of "reviewing official" deficient. It permits redelegation of authority to a designee of the General Counsel, allegedly in violation of section 3801(a)(8) of the Act requiring the authority head to designate the reviewing official.

Response: We disagree with the commenter's reading of the statute. The statute neither explicitly nor implicitly prevents the authority head from choosing to vest this responsibility in one agency official or to specify one official with responsibility to manage it through designated subordinates. Contrast section 3801(a)(8) of the Act with section 3812, which expressly prohibits the Attorney General or Assistant Attorney General designated by the Attorney General from redelegating to others the duties assigned to them by the statute. Especially as the statute provides for the disqualification of a particular reviewing official in a given case, the General Counsel must have the flexibility to reassign responsibility for reviewing that case to another reviewing official.

4. *Comment:* A commenter criticized the definition of "statement" because it appears to permit the authority to impose civil penalties and assessments under the Act on the basis of a false statement made to a State or intermediary in a program administered by any agency of the United States.

Response: The definition of "statement" is taken directly from section 3801(a)(9) of the Act. We believe that the commenter's concern that the authority's jurisdiction is impermissibly broad is answered when the definition of "statement" is read in conjunction with section 3801(c)(2) of the Act and § 1013.3(b)(3), which provide that statements are considered *made to the authority* when they are made to an agent, fiscal intermediary, or other entity, including a State or political subdivision thereof, acting for or on behalf of the authority.

5. *Comment:* A commenter criticized § 1013.3(b)(2) of the proposed regulation for leaving open the possibility that the agency will seek dual penalties, one based on a false statement and another based on a false certification accompanying it.

Response: The regulation at issue quotes verbatim section 3801(c)(1) of the Act. However, we agree with the commenter that Congress did not intend that an authority could impose penalties against both the false statement and the certification accompanying it, even though the language of the statute and the proposed regulation appears to permit it.

The statute and regulation broadly define "statement" as "any representation, certification, affirmation, document, record, or accounting or bookkeeping entry made." Section 3801(a)(9) of the Act; § 1013.2 of the regulations. The statute then clarifies that definition by stating that each written "representation, certification or affirmation" is a separate statement. Section 3801(c)(1) of the Act. Because the latter provision is relevant primarily in calculating the number of civil penalties for which a defendant may be liable, we incorporated it into § 1013.3 of the regulations, Basis for civil money penalties and assessments.

The ambiguity arises from the fact that to be actionable under the final version of the statute, any of the types of statements defined in section 3801(a)(9) must either contain or be accompanied by an express certification or affirmation of the truthfulness and accuracy of the statement. Section 3802(a)(2)(C) of the Act. We conclude that Congress intended that where a certification independently asserts a material fact, rather than affirming the truth of facts asserted elsewhere, such certification may be a statement for purposes of section 3802(a)(2) of the Act. On the other hand, where a statement in the form of a representation or a bookkeeping entry, for example, is "accompanied" by a certification as to the truthfulness and accuracy of the representation or entry, the certification is an integral element in making actionable the underlying representation or bookkeeping entry. Hence, only the representation or entry may be counted as a statement subject to liability, not both the representation and the accompanying certification.

6. *Comment:* A commenter believes that there is no statutory basis for proposed § 1013.3(e), which would permit the authority to hold each person found liable for making a claim or statement in contravention of the statute, liable for a civil penalty.

Response: We disagree and have retained § 1013.3(e) as proposed. Congress stated in section 6102(b) of the Act that in addition to recompensing agencies for losses they have sustained as a result of false, fictitious, or fraudulent claims and statements, the statute would serve to deter the making of such claims and statements. That deterrent purpose is clearly better served if each person found liable under the statute may be held liable for a civil penalty without regard to contribution by others also liable for the claim or statement. As to the commenter's claim that this proposal is without precedent, we note that this section follows the precedent set in the regulations implementing the first Civil Monetary

Penalties Act enacted as part of the Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97–35, 95 Stat. 789–792 (1981), codified at 42 U.S.C. 1320a–7(c) and 1320a–7a. *See* 42 CFR 1003.102(c)(1) (1986). Congress used this statute as a model in devising the PFCRA. S. Rep. No. 99–212, 99th Cong., 1st Sess. 3–4, 8–9 (1985).

7. *Comment:* A commenter noted that § 1013.4 of the proposed regulations should incorporate limitations on the investigating official's subpoena authority stated in section 3804(a) of the Act, *viz.*, that a subpoena may be issued only for materials "not otherwise reasonably available to the authority," and only for the purpose of conducting an investigation under the Act.

Response: The statutory limitations are incorporated by reference. However, we disagree that the statute permits the investigating official to issue subpoenas *only* for the purposes of an investigation under the Act. Section 3804(a) of the Act states prefatorily, "For the purposes of an investigation under section 3803(a)(1) of this title, an investigating official is authorized" to issue a subpoena. Compare it with section 3804(b) of the Act, which begins, "For the purposes of conducting a hearing under section 3803(f) of this title," in authorizing ALJs to issue subpoenas. At the outset of an investigation into allegations of false claims or statements, an investigating official does not have all the facts necessary to formally elect from among all remedies and sanctions available to the Government. Furthermore, an agency's authority to compel the production of documents by subpoena has been given wide scope by the courts if the subpoena serves a legitimate statutory purpose; the agency's inquiry need not be focused on the forecast of a probable outcome. *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186 (1946); *United States v. Morton Salt Co.*, 338 U.S. 632 (1950); *United States v. Powell*, 379 U.S. 48 (1964). We believe the statutory language to be satisfied if *a* purpose of issuing a subpoena under section 3804(a) of the Act is to investigate possible violations under the Act.

8. *Comment:* A commenter protested that by requiring the person producing subpoenaed documents to make the certifications required by § 1013.4(a)(3), the proposed regulation purports to authorize the investigating official to compel testimony, which Congress considered and rejected.

Response: While it is true that Congress ultimately declined to grant the investigating official testimonial subpoena authority, the certifications required by § 1013.4(a)(3) of the proposed regulations are auxiliary to the production of documents pursuant to a subpoena *duces tecum*. A custodian of records, with some exceptions, can be compelled, either in the administrative hearing or in a civil action to enforce the subpoena, to identify and authenticate the documents produced or to claim that he or she does not have possession of the records sought. *See Curcio v. United States*, 354 U.S. 118 (1957); *McPhaul v. United States*, 364 U.S. 372 (1960); *United States v. O'Henry's Film Works, Inc.*, 598 F. 2d 313 (2d Cir. 1979); *United States v. Austin-Bagley Corp.* 31 F.2d 229, 234 (2d Cir. 1929). Hence, to ensure compliance with the subpoenas *duces tecum* short of resorting to an enforcement proceeding in federal court in every instance, we have required custodians to attest to their compliance. Likewise, with respect to documents protected by privilege, the regulation provides for the assertion of such privileges in advance of enforcement proceedings. We believe this will help to expedite investigations under the Act and will result in fewer expensive trips to the federal courthouse simply to ensure compliance with the terms of documentary subpoenas.

9. *Comment:* A commenter believes that § 1013.4(b) is contrary to section 3803(a)(1) of the Act. The statute states that the investigating official shall report the findings and conclusions of an investigation, while the proposed regulation requires the investigating official to report such findings and conclusions to the reviewing official only if he or she believes an action under the PFCRA to be warranted.

Response: We disagree with the commenter. The language of the statute is not mandatory in the context of section 3803(a)(1), which gives the investigating official discretion to begin an investigation of allegations of liability under PFCRA. By requiring the investigating official to report the findings and conclusions of his or her investigations to the reviewing official, Congress sought to ensure that a case considered meritorious by the investigating official was subjected to "independent prosecutorial review" by an official "free from any possible 'prosecutorial bias.' " S. Rep. No. 99–212, 99th Cong., 1st Sess. 12 (1985). Congress cannot reasonably have intended an investigating official to write and submit for formal review a program fraud report where the investigation revealed no violation or no possibility of collection, or a *de minimus* or technical violation of no real consequence to the authority's programs or operations. Hence, we decline to adopt the commenter's impractical reading of the statutory provision.

10. *Comment:* The same commenter also found that § 1013.4(c) conflicts with the investigating official's obligation to report his or her findings and conclusions to the reviewing official: only the Attorney General or a designated Assistant Attorney General can delay a proceeding under PFCRA because it may interfere with a criminal investigation.

Response: We likewise reject the commenter's conclusion here. Section 3803(a)(1) of the Act itself explicitly states that the investigating official's responsibility to report on PFCRA investigations "does not modify any responsibility of an investigating official to report violations of criminal law to the Attorney General." Under the Inspector General Act of 1978 and similar enabling statutes, the Inspectors General (generally the investigating officials under PFCRA) are obligated to report violations of Federal criminal law expeditiously to the Attorney General. 5 U.S.C. App. 4(d); 42 U.S.C. 7138(j). Congress intended that the Inspectors General "would be required to contact the Justice Department directly, without clearing the referrals with the agency head, the General Counsel of the agency or any other individual in the agency." S. Rep. No. 95–1071, 95th Cong., 2d Sess. 30 (1978).

Clearly, conduct that could subject a person to liability under the PFCRA also might subject the person to liability under a number of criminal statutes, such as 18 U.S.C. 286, 287, 1001, or 1341. Also, at a particular point in an investigation, it may become clear that an agent of a corporation is personally liable under the PFCRA. However, the investigating official may believe that further investigation would show that the corporation, corporate officers, and perhaps the government contract officer are criminally liable. Premature disclosure to the reviewing official of the agent's liability under PFCRA might jeopardize that ongoing investigation.

Sections 1013.4 (c) and (d) of the proposed regulations make it clear that the investigating official is not obliged to report to the reviewing official under section 3803(a)(1) just because he or she has evidence that a person's conduct may fall within the scope of the PFCRA. Congress required that this responsibility be vested in a highly placed government official, who must exercise discretion and judgment in the performance of his or her duties.

That the Attorney General or Assistant Attorney General has authority to cause a stay of a hearing under the Act, as provided in section 3803(b)(3), in no way implies that the investigating official *lacks* the authority to prevent interference with similar interests *before* such a hearing has been commenced.

Congress has made clear its intention that remedies under the Act are in addition to any other remedies that may be prescribed by law (section 3802(a) of the Act) and has stated explicitly that it does not intend to limit the independent authority of the investigating official to investigate and report criminal violations (section 3803(a)). Thus, it would be ironic if Congress' attempt to add weapons to the agency's arsenal against fraud were used to rob it of weapons already at its disposal.

11. *Comment:* A commenter does not believe that proposed § 1013.5(b)(6) satisfies the statutory requirement that the reviewing official determine that there is a reasonable prospect of collecting from the defendant the amount for which the person may be liable.

Response: We have concluded that the sufficiency of the basis for the reviewing official's statement concerning the financial condition of possible defendants is a matter best left to the authority and the Department of Justice. Hence, without agreeing with the commenter's position, we have deleted the final sentence in § 1013.5(b)(6).

Section 3809(2) of the Act directs the authority to promulgate regulations requiring the reviewing official to include in his notice to the Attorney General a statement that there is a reasonable prospect of collecting the amount for which the person may be held liable. Congress thus sought to ensure that in each case the authority and the Department of Justice would weigh the benefits and costs of pursuing remedies under the Act or others. The reviewing official's statement is obviously intended to assist the authority and the Attorney General in determining how best to deploy their limited enforcement resources, not to confer a right upon potential defendants. This intent is underscored by the fact that a defendant cannot obtain the reviewing official's notice to the Attorney General. Section 3803(g)(3)(B)(ii) of the Act. Also, Congress included the requirement that the reviewing official make such a statement in section 3809(2) rather than list it among the criteria related to the merits of a proposed action, which it specified in section 3803(a)(2) of the Act.

Congress recognized that obtaining financial information is a difficult and uncertain process. The Fair Credit Reporting Act, 15 U.S.C. 1681b, the Right to Financial Privacy Act of 1978, 12 U.S.C. 3401–3422, and the Tax Reform Act of 1976, 26 U.S.C. 6103, for example, limit or prohibit easy access to the kinds of records which typically would illuminate the financial circumstances of a potential defendant. Consequently, judgments about collectability are particularly difficult to make, especially before formal proceedings have been commenced.

Under the circumstances, we believe that § 1013.5(b)(6) as currently worded satisfies the statutory requirement and leaves the authority and the Department of Justice to determine what will constitute sufficient support for the reviewing official's statement.

12. *Comment:* One commenter accused the agency of attempting to circumvent the $150,000 jurisdictional ceiling on agency adjudications under PFCRA by defining "related" claims under section 3803(c)(1) of the Act too narrowly.

Response: Congress provided in section 3803(c)(1) of the Act that no allegations of liability could be referred to an ALJ if the reviewing official determines that an amount of money, or property or services with a value, of more than $150,000 was requested or demanded in a claim or "in a group of related claims which are submitted at the time such claim is submitted." By imposing the cap, Congress sought to ensure that a group of related false claims submitted together that could result in hundreds of thousands or millions of dollars in penalties should be prosecuted jointly in court, not separately in an administrative proceeding. S. Rep. No. 99–212, 99th Cong., 1st Sess. 24–25 (1985).

Claims must satisfy two statutory requirements if they are to be aggregated for purposes of computing the jurisdictional amount: They must be "related," and they must be "submitted at the same time." The commenter's suggestion that the term "related" means that the claims in question were filed at the same time would reduce the term "related" to surplusage. We reject a construction so clearly at odds with the principles of statutory construction. Claims submitted at the same time must also be "related." That is, the mere fact that a contractor chooses to "batch" claims under several contracts together for submission to the agency does not make them "related."

Congress gave little clue as to what it meant by "related," but it did remark that claims for progress payments under the *same* contract would be related. S. Rep. No. 99–212, 99th Cong., 1st Sess. 25 (1985). Section 1013.6(b) of the regulation thus defines "a related group of claims submitted at the same time" as "claims arising from the same transaction (*e.g.*, grant, loan, application, or contract) that are submitted simultaneously as part of a single request, demand, or submission." This definition is both reasonable and fully consistent with the language of the statute and the intent of Congress.

13. *Comment:* A commenter took exception to the incorporation of Fed. R. Civ. P. 4(d) into § 1013.8 of the proposed regulation, noting that section 3803(d)(1) specifies that service of a complaint must be by registered or certified mail or by delivery.

Response: The regulation implements the statute by providing that if the complaint is delivered, delivery of the complaint may be made as permitted under Rule 4(d) of the Federal Rules of Civil Procedure.

14. *Comment:* The same commenter found § 1013.9 of the proposed regulation inconsistent with the statute, in that the former would require a defendant to request a hearing within 30 days of service, whereas the statute measures the 30 days from receipt.

Response: We have modified § 1013.8(b) to clarify that service under § 1013.8 is complete upon receipt, either through the mail, as evidenced by an acknowledged return receipt card or by delivery as attested to by the person who made delivery or who received the complaint. Section 1013.9(a), by allowing the defendant 30 days from service to request a hearing, is fully consonant with section 3803(d)(2) of the Act.

15. *Comment:* A commenter does not believe that the statute permits the agency to require an answer and recommended deleting § 1013.9.

Response: We disagree. The statute provides that a person receiving a notice of allegations of liability (section 3803(d)(1) of the Act) may get a hearing before an ALJ if such person requests a hearing within 30 days of receipt. Congress conceived of the notice of allegations of liability as a "complaint" (S. Rep. No. 99–212, 99th Cong., 1st Sess. 14 (1985)), and we have adopted that concept in these regulations (*See* §§ 1013.7 and 1013.8). Consistent with that approach, we have denominated a defendant's request for a hearing as an "answer" and have specified that the defendant shall admit or deny the allegations in the complaint and shall state any defenses on which the defendant intends to rely. This will expedite the proceeding by focusing the issues for the parties and the ALJ, as well as giving the ALJ important information about the complexity of the case for the purpose of scheduling a hearing, as he is required to do by statute and § 1013.12 upon receiving the answer.

To the objection that the defendant has only 30 days to respond, it should be noted that persons are required to answer a summons and complaint within 20 days under Fed. R. Civ. P. 12(a). However, we have amended the regulation to provide that a defendant may file within 30 days of receipt of the complaint, a request for hearing and a request for an extension of time for up to an additional 30 days to file a complete answer in accordance with § 1013.9. *Cf.* 42 CFR 1003.109(b) (1986).

16. *Comment:* One commenter recommended that we delete § 1013.10 of the proposed regulation allowing for the entry of an order of default upon failure to answer because the statute does not expressly provide for it.

Response: Although the statute does not expressly provide for default upon a defendant's failure to request a hearing, this regulation is necessary to implement the Act. *See* section 3809 of the Act. There must be a provision by which the process may be formally concluded when a defendant concedes the validity of the charge, or chooses not to contest it. Were there no such provision, a defendant's failure or refusal to answer the complaint alone would defeat the process Congress has envisioned for the administrative adjudication of false claims and statements. Congress clearly could not have intended such a result.

17. *Comment:* A commenter challenged proposed § 1013.18(c) as an unauthorized limitation on an ALJ's inherent powers.

Response: Section 1013.18(c) has been revised slightly to state that "the ALJ does not have the authority to find Federal statutes or regulations invalid." This proposition follows from the fact that administrative agencies themselves have no jurisdiction to pass upon the constitutionality of legislative or administrative action. *See, e.g., Motor and Equipment Manufacturers Ass'n., Inc.* v. *EPA*, 627 F.2d 1095, 1114–15 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 952 (1980); *Spiegel* v. *FTC*, 540 F.2d 287, 294 (7th Cir. 1976); *Finnerty* v. *Cowen*, 508 F.2d 979, 982 (2d Cir. 1974). *See also Buckeye Industries, Inc.* v. *Secretary of Labor*, 587 F.2d 231, *reh'g denied*, 591 F.2d 1343 (5th Cir. 1979) ("No administrative tribunal of the United States has the authority to declare unconstitutional the Act it is called upon to administer."). *Cf. Public Utilities Commission* v. *United States*, 355 U.S. 534, 539–40 (1958). The ALJ making an initial decision on behalf of the authority head obviously has no greater authority than the authority head to declare Federal statutes and regulations invalid, and the regulation simply articulates that principle.

Moreover, "[o]n matters of law and policy," the ALJ is "entirely subject to the agency." *Association of Administrative Law Judges* v. *Heckler*, 594 F. Supp. 1132, 1141 (D.D.C. 1984). *See also* Scalia, *The ALJ Fiasco—A Reprise*, 47 U. Chi. L. Rev. 57, 62 (1980). As the agency is given rulemaking authority under 5 U.S.C. 553 and many substantive statutes, the ALJ is powerless to usurp that authority by declaring duly promulgated regulations invalid. The ALJ's role is interpretation not legislation.

18. *Comment:* One commenter believes that the agency is obligated to disclose to the defendant any exculpatory evidence contained in the reviewing official's report to the Attorney General, contrary to proposed § 1013.20(c).

Response: Section 3803(g)(3)(B)(ii) of the Act directly prohibits the disclosure of the reviewing official's report, and § 1013.20(c) implements that provision. However, the reviewing official is to include exculpatory circumstances in his or her report to the Attorney General (§ 1013.5(b)(5)) and the agency is obligated to disclose exculpatory information in the possession of the investigating or reviewing official. Hence, the information that goes into the report will be disclosed to the defendant even though the report itself may not be disclosed.

19. *Comment:* A commenter believed that § 1013.31 of the proposed regulations would create a presumption that the maximum amount of penalties and assessments should be imposed. The commenter noted that the statute vested broad discretion in the ALJ to determine the appropriate amount of penalties and assessments and recommended that the last sentence of proposed § 1013.31 be deleted as inappropriate.

Response: The commenter is correct in noting that the ALJ and the authority head on appeal have broad discretion under the statute in fixing the amount of penalties and assessments. We disagree that § 1013.31 as proposed creates a presumption that the statutory maximum should be imposed in every contested case. However, given the broad range within which penalties and assessments may fall, we believe that it is useful to give some guidance to the ALJ and the authority head, as well as notice to the public. Because of the intangible costs associated with fraud against the government, as well as the tangible cost of investigating and prosecuting it, and the need to deter others, the regulation suggests that the agency ordinarily should recoup double damages and a significant penalty. This gives the decisionmakers a starting point from which to increase or decrease the penalties and assessments depending upon whether there are proven in the individual case factors that aggravate or mitigate the offense.

The regulations are not intended to rob the ALJ or the authority head of their authority to fix penalties and assessments within the range according to the nature and circumstances of the offense. However, there is a tension between the need for flexibility, on the one hand, and the need for fairness and predictability, on the other. We believe that the regulations achieve an appropriate balance between those competing needs by giving the decisionmakers a departure point in exercising their judgment in individual cases. We believe that establishing a regulatory benchmark is particularly important insofar as this is a completely new program without a history of administratively-imposed penalties and assessments that could supply one for the "average" case. Compare § 1013.31 with the regulation adopted in the Civil Monetary Penalty Law administered by the Department of Health and Human Services, 42 CFR 1003.106 (1986).

20. *Comment:* One commenter criticized § 1013.32 of the proposed regulation for failing to create a presumption that the hearing would be held where the defendant resides.

Response: The proposed regulation tracks the statute. Section 3803(g)(4) of the Act specifies three alternative sites for the hearing: (1) Where the defendant resides or transacts business; (2) where the claim or statement was made; or (3) in some place agreed upon by the defendant and the ALJ. It does not create a presumptive venue, nor should it. That determination is best left to the ALJ and the parties framing the case.

21. *Comment:* Considering the gravity of allegations of false claims or statements and the amounts at stake, a commenter recommended that evidence generally should be limited to what is admissible in court. Alternatively, § 1013.34 should be revised to exclude hearsay evidence or at least to create a presumption against the admission of hearsay.

Response: We decline to accept the commenter's suggestions. First, it is well-established that technical rules of evidence—such as the Federal Rules of Evidence—do not apply in an administrative proceeding absent a regulation expressly making them applicable. *See* 5 U.S.C. 556(d); *Richardson* v. *Perales,* 402 U.S. 389 (1971). That Congress chose to provide for the adjudication of allegations of false claims and statements against the government in an administrative forum under the APA strongly suggests that Congress also intended the less restrictive evidentiary standards of the APA to appy. The very advantages of expediency and lower cost that Congress sought to achieve by providing this administrative remedy as an alternative to civil actions, would be lost if the Federal Rules of Evidence and the Federal Rules of Civil Procedure were imported into it from the judicial context. Moreover, the reasons for the more rigorous exclusionary rules of the Federal Rules of Evidence, such as those against hearsay, do not obtain where no jury can be misled. *See, e.g.,* 3 K.C. Davis, *Administrative law Treatise,* § 16.4 (2d ed. 1980); Davis, *An Approach to Rules of Evidence for Nonjury Cases,* 50 A.B.A.J. 723 (1964); Davis, *Hearsay in Administrative Proceedings,* 32 Geo. Wash. L. Rev. 689 (1964); Gellhorn, *Rules of Evidence and Official Notice in Formal Administrative Hearings,* 1971 Duke L.J. 1.

Instead, the provisions of §§ 1013.34 (a) through (d) are based on Recommendation 86–2 of the Administrative Conference of the United States, 1 CFR 305.86–2, published at 51 FR 25,642 (July 16, 1986). They provide that an ALJ shall exclude evidence that is irrelevant and immaterial and may exclude relevant evidence that is unreliable or if its probative value is substantially outweighed by other factors, such as unfair prejudice or the undue consumption of time.

With respect to a defendant's right to confront adverse witnesses, § 1013.33(b) provides that an ALJ may permit testimony to be admitted in the form of a written statement or deposition. If the ALJ allows such testimony, the party seeking to introduce it must provide it to all other parties with the declarant's last known address in a manner which affords other parties sufficient time to subpoena the witness for cross-examination at the hearing. This satisfies due process. *Richardson* v. *Perales, supra.*

22. *Comment:* A commenter objected that § 1013.38 of the proposed regulations conflicts with section 3803(i)(1) of the Act, which provides that the decision of an ALJ is final unless it is appealed by the defendant.

Response: We do not believe that § 1013.38 conflicts with the statute. By providing for reconsideration of the initial decision, the regulation allows for the expeditious resolution of errors of law and fact by the trier of fact, who can most expeditiously resolve these matters, perhaps without resort to an appeal to the authority head.

Under section 3803(h) and (i) of the Act, it appears that an ALJ's decision becomes the final decision of the authority unless it is appealed within 30 days by a person determined to be liable for penalties and assessments. This marks a radical departure from adjudications under the APA. Under 5 U.S.C. 557(b), an ALJ makes an initial or recommended decision, while the agency retains full authority to make a *de novo* determination as to issues of law and fact on the record either on appeal or by review on its own motion. The agency thus can ensure consistency in its decisions and adherence to agency policy—including uniform interpretations of the statutes it administers and its own regulations. Moreover, where novel issues of law arise in the context of adjudications, the agency may articulate its policy in the first instance, subject, of course, to judicial review.

It is difficult to conceive that Congress intended to rob the authorities completely of the prerogative of speaking the final word on statutes and regulations within its purview. Yet, without a process of reconsideration, the agency would be powerless even to seek, let alone make, corrections of misstatements of law and fact in ALJ decisions unless a defendant were found liable and chose to appeal. We do not believe Congress intended to sacrifice uniformity and consistency in decisions under this Act and other substantive statutes that will be subject to interpretation in adjudications thereunder. Hence, we have provided an opportunity for both parties to seek reconsideration of the ALJ's initial decision as necessary for the effective implementation of this statute.

23. *Comment:* The same commenter argued that § 1013.39 of the proposed regulation eliminated for 25 days a defendant's right to appeal to the authority head, as provided in section 3803(i)(2)(A) of the Act. The commenter also took exception to the requirement that the defendant file exceptions to the initial decision and a brief on appeal, stating that a brief letter ought to suffice in some cases.

Response: With regard to the first comment, we have amended § 1013.39(b) to provide that a defendant may file a notice of appeal at any time within 30 days after the ALJ issues a decision, but that if another party files a request for reconsideration in accordance with § 1013.38, action on the appeal will be stayed automatically pending disposition of the motion for reconsideration.

We find the second comment completely meritless. Especially insofar as Congress provided that an ALJ's decision would stand as the authority's own, absent an appeal by the defendant, Congress clearly did not intend for the authority to sort through the decision in search of error or to redetermine all issues *de novo* without any guidance from the aggrieved party. The agency's authority to limit its consideration on appeal to specific exceptions pointing out error is both well-established and of obvious practical value. *See Marshall Field & Co. v. National Labor Relations Board,* 318 U.S. 253, (1943); *National Labor Relations Board v. Cheney California Lumber Co.,* 327 U.S. 385, 387–88 (1946). The Attorney General's Committee on Administrative Procedure long ago urged the agencies to insist upon "meaningful content and exactness in [an] appeal from the [ALJ's] decision * * *" and to cease from shouldering "the burden of complete reexamination. Review of the [ALJ's] decision should in general and in the absence of clear error be limited to grounds specified in the appeal." *Administrative Procedure in Government Agencies,* S. Doc. No. 8, 77th Cong., 1st Sess. 52 (1941) (Final Report of the Attorney General's Committee on Administrative Procedure). We agree.

24. *Comment:* A commenter believes that § 1013.43 should be revised to reflect the fact that investigating and reviewing officials may not make collections under section 3806 of the Act, as provided in section 3809(1) of the Act.

Response: This limitation is already contained in § 1013.14, pertaining to separation of functions.

25. *Comment:* A commenter recommended that § 1013.44 be revised to indicate that only a final decision imposing penalties or assessments may constitute the basis for an administrative offset under section 3807 of the Act.

Response: Section 1013.44 of the regulation reiterates the statutory language. A final decision is defined in §§ 1013.10(d) and (1), 1013.37(d), 1013.38(g), and 1013.39( ).

26. *Comment:* A commenter, on behalf of 13 States, objected to including States in the definition of "person" in proposed regulation § 1013.2.

Response: The proposed regulatory definition expanded on the definition found in the Act. The final regulation now reiterates the narrower statutory definition.

27. *Comment:* A Departmental commenter recommended that a section be added which would address the need to consider appropriate protection for documents, information, testimony, etc., which may include classified or otherwise sensitive information which requires protection from uncontrolled disclosure. This may involve the use of a protective order or other administrative mechanism to restrict access to certain information and materials.

Response: While noteworthy, we believe that sufficient protection is built in the proposed regulation under the powers of the ALJ in § 1013.18 to allay this commenters fears. Motions practice is established under § 1013.28, while protective orders are provided for under § 1013.24. Thus, we decline to add a new section, as suggested.

After comparison of the proposed regulations with those published by other agencies, the Department believes that an expanded definition of "representative" is preferable. Accordingly, that portion of § 1013.2 has been changed to reflect this decision to enlarge the term "attorney."

Technical changes to the Department's regulations have been made to conform with the final model regulations issued by the President's Council on Integrity and Efficiency, and thereby to conform with the congressional intent that regulations under the Program Fraud Civil Remedies Act of 1986 be "substantially uniform throughout government." [S. Rep. No. 99-212, 99th Cong., 1st Sess. 12 (1986).]

The Federal Energy Regulatory Commission (FERC) reviewed the proposed regulations, and had no substantive comments or changes regarding same. The FERC is covered by these regulations as a component of the Department of Energy, and by the terms of the Act.

C. Executive Order 12291

The rule was reviewed under Executive Order 12291, 46 FR 12193, dated February 27, 1981. The Department of Energy has concluded that the rule is not a "major rule" under the Executive Order, because it will not result in: (1) An annual effect on the economy of $100 million or more; (2) a major increase in costs or prices for consumers, individual industries, State, Federal, or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of the United States-based enterprises to compete with foreign-based enterprises in domestic or export markets. Pursuant to section 3(c)(3) of Executive Order 12291, this rule was submitted to the Director of the Office of Management and Budget for review. The Director has concluded his review under that Executive Order.

D. Regulatory Flexibility Act

The Regulatory Flexibility Act (Pub. L. 96-354, 5 U.S.C. 601-612), requires Federal agencies to consider the impact of proposed regulations on small businesses, small governmental units, and other small entities; to consider the ability of small entities to comply with the proposed regulations; and to consider less stringent alternative compliance standards for small entities. An agency is required to prepare a regulatory flexibility analysis to document its consideration of these factors except in the situation where the agency determines that a regulation will not have a significant economic impact on a substantial number of small entities. These procedural regulations will not impose any additional burdens or impact on small entities. Therefore, DOE does not believe the obligations involved have a significant impact on small entities. Thus, a regulatory flexibility analysis will not be prepared.

E. Paperwork Reduction Act

Since there are no information gathering or reporting requirements in these statutorily mandated procedural regulations, no action is necessary under the Paperwork Reduction Act (Pub. L. 96-511, 44 U.S.C. 3501 *et seq.*).

List of Subjects in 10 CFR Part 1013

Administrative practice and procedure, Fraud, Penalties, Department of Energy.

In consideration of the foregoing, the addition to Title 10 of the Code of Federal Regulations, Chapter III is set forth below.

Issued in Washington, DC, this 26th day of October, 1988.

Eric J. Fygi,

Acting General Counsel.

1. Part 1013 is added to read as follows:

PART 1013—PROGRAM FRAUD CIVIL REMEDIES AND PROCEDURES

Sec.

Sec.

Authority: 31 U.S.C. 3801-3812.

§ 1013.1 Basis and purpose.

(a) *Basis.* This part implements the Program Fraud Civil Remedies Act of 1986, Pub. L. 99-509, sections 6101-6104, 100 Stat. 1874 (October 21, 1986), codified at 31 U.S.C. 3801-3812. 31 U.S.C. 3809 of the statute requires each authority head to promulgate regulations necessary to implement the provisions of the statute.

(b) *Purpose.* This part (1) establishes administrative procedures for imposing civil penalties and assessments against persons who make, submit, or present, or cause to be made, submitted, or presented, false, fictitious, or fraudulent claims or written statements to authorities or to their agents, and (2) specifies the hearing and appeal rights of persons subject to allegations of liability for such penalties and assessments.

§ 1013.2 Definitions.

ALJ means an Admininstrative Law Judge in the authority appointed pursuant to 5 U.S.C. 3105 or detailed to the authority pursuant to 5 U.S.C. 3344.

Authority means the Department of Energy.

Authority head means the Secretary or the Under Secretary of the Department of Energy.

Benefit means, in the context of "statement," anything of value, including but not limited to any advantage, preference, privilege, license, permit, favorable decision, ruling, status, or loan guarantee.

Claim means any request, demand, or submission—

(a) Made to the authority for property, services, or money (including money representing grants, loans, insurance, or benefits);

(b) Made to a recipient of property, services, or money from the authority or to a party to a contract with the authority—

(1) For property or services if the United States—

(i) Provided such property or services;

(ii) Provided any portion of the funds for the purchase of such property or services; or

(iii) Will reimburse such recipient or party for the purchase of such property or services; or

(2) For the payment of money (including money representing grants, loans, insurance, or benefits) if the United States—

(i) Provided any portion of the money requested or demanded; or

(ii) Will reimburse such recipient or party for any portion of the money paid on such request or demand; or

(c) Made to the authority which has the effect of decreasing an obligation to pay or account for property, services, or money.

Complaint means the administrative complaint served by the reviewing official on the defendant under § 1013.7 of this part.

Defendant means any person alleged in a complaint under § 1013.7 of this part to be liable for a civil penalty or assessment under § 1013.3 of this part.

Department means the Department of Energy.

Government means the United States Government.

Individual means a natural person.

Initial decision means the written decision of the ALJ required by § 1013.10 or § 1013.37 of this part, and includes a revised initial decision issued following a remand or a motion for reconsideration.

Investigating official means the Inspector General of the Department of Energy or an officer or employee of the Inspector General designated by the Inspector General and serving in a position for which the rate of basic pay is not less than the minimum rate of basic pay for grade GS-16 under the General Schedule.

Knows or has reason to know, means that a person, with respect to a claim or statement—

(a) Has actual knowledge that the claim or statement is false, fictitious, or fraudulent;

(b) Acts in deliberate ignorance of the truth or falsity of the claim or statement; or

(c) Acts in reckless disregard of the truth or falsity of the claim or statement.

Makes, wherever it appears, shall include the terms presents, submits, and causes to be made, presented, or submitted. As the context requires, *making* or *made*, shall likewise include the corresponding forms of such terms.

Person means any individual, partnership, corporation, association, or private organization, and includes the plural of that term.

Representative means an attorney, who is a member in good standing of the bar of any State, Territory, or possession of the United States or of the District of Columbia or the Commonwealth of Puerto Rico, and designated by a party in writing.

Reviewing official means the General Counsel of the Department or his designee who is—

(a) Not subject to supervision by, or required to report to, the investigating official;

(b) Not employed in the organizational unit of the authority in which the investigating official is employed; and

(c) Serving in a position for which the rate of basic pay is not less than the minimum rate of basic pay for grade GS-16 under the General Schedule.

Statement means any representation, certification, affirmation, document, record, or accounting or bookkeeping entry made—

(a) With respect to a claim or to obtain the approval or payment of a claim (including relating to eligibility to make a claim); or

(b) With respect to (including relating to eligibility for)—

(1) A contract with, or a bid or proposal for a contract with; or

(2) A grant, loan, or benefit from, the authority, or any State, political subdivision of a State, or other party, if the United States Government provides any portion of the money or property under such contract or for such grant, loan, or benefit, or if the Government will reimburse such State, political subdivision, or party for any portion of the money or property under such contract or for such grant, loan, or benefit.

§ 1013.3 Basis for civil penalties and assessments.

(a) *Claims*. (1) Except as provided in paragraph (c) of this section, any person who makes a claim that the person knows or has reason to know—

(i) Is false, fictitious, or fraudulent;

(ii) Includes or is supported by any written statement which asserts a material fact which is false, fictitious, or fraudulent;

(iii) Includes or is supported by any written statement that—

(A) Omits a material fact;

(B) Is false, fictitious, or fraudulent as a result of such omission; and

(C) Is a statement in which the person making such statement has a duty to include such material fact; or

(iv) Is for payment for the provision of property or services which the person has not provided as claimed, shall be subject, in addition to any other remedy that may be prescribed by law, to a civil penalty of not more than $5,000 for each such claim.

(2) Each voucher, invoice, claim form, or other individual request or demand for property, services, or money constitutes a separate claim.

(3) A claim shall be considered made to the authority, recipient, or party when such claim is actually made to an agent, fiscal intermediary, or other entity, including any State or political subdivision thereof, acting for or on behalf of such authority, recipient, or party.

(4) Each claim for property, services, or money is subject to a civil penalty regardless of whether such property, services, or money is actually delivered or paid.

(5) If the Government has made any payment (including transferred property or provided services) on a claim, a person subject to a civil penalty under paragraph (a)(1) of this section shall also be subject to an assessment of not more than twice the amount of such claim or that portion thereof that is determined to be in violation of paragraph (a)(1) of this section. Such assessment shall be in lieu of damages sustained by the Government because of such claim.

(b) *Statements*. (1) Except as provided in paragraph (c) of this section, any person who makes a written statement that—

(i) The person knows or has reason to know—

(A) Asserts a material fact which is false, fictitious, or fraudulent; or

(B) Is false, fictitious, or fraudulent because it omits a material fact that the person making the statement has a duty to include in such statement, and

(ii) Contains or is accompanied by an express certification or affirmation of the truthfulness and accuracy of the contents of the statement,

shall be subject, in addition to any other remedy that may be prescribed by law, to a civil penalty of not more than $5,000 for each such statement.

(2) Each written representation, certification, or affirmation constitutes a separate statement.

(3) A statement shall be considered made to the authority when such statement is actually made to an agent, fiscal intermediary, or other entity, including any State or political subdivision thereof, acting for or on behalf of such authority.

(c) *Application for certain benefits.* (1) In the case of any claim or statement made by any individual relating to any of the benefits listed in paragraph (c)(2) of this section received by such individual, such individual may be held liable for penalties and assessments under this section only if such claim or statement is made by such individual in making application for such benefits with respect to such individual's eligibility to receive such benefits.

(2) For purposes of paragraph (c) of this section, the term "benefits" means benefits under part A of the Energy Conservation in Existing Buildings Act of 1976, which are intended for the personal use of the individual who receives the benefits or for a member of the individual's family.

(d) No proof of specific intent to defraud is required to establish liability under this section.

(e) In any case in which it is determined that more than one person is liable for making a claim or statement under this section, each such person may be held liable for a civil penalty under this section.

(f) In any case in which it is determined that more than one person is liable for making a claim under this section on which the Government has made payment (including transferred property or provided services), an assessment may be imposed against any such person or jointly and severally against any combination of such persons.

§ 1013.4 Investigation.

(a) If an investigating official concludes that a subpoena pursuant to the authority conferred by 31 U.S.C. 3804(a) is warranted—

(1) The subpoena so issued shall notify the person to whom it is addressed of the authority under which the subpoena is issued and shall identify the records or documents sought;

(2) The investigating official may designate a person to act on his or her behalf to receive the documents sought; and

(3) The person receiving such subpoena shall be required to tender to the investigating official or the person designated to receive the documents a certification that the documents sought have been produced, or that such documents are not available and the reasons therefor, or that such documents, suitably identified, have been withheld based upon the assertion of an identified privilege.

(b) If the investigating official concludes that an action under the Program Fraud Civil Remedies Act may be warranted, the investigating official shall submit a report containing the findings and conclusions of such investigation to the reviewing official.

(c) Nothing in this section shall preclude or limit an investigating official's discretion to refer allegations directly to the Department of Justice for suit under the False Claims Act or other civil relief, or to preclude or limit such official's discretion to defer or postpone a report or referral to the reviewing official to avoid interference with a criminal investigation or prosecution.

(d) Nothing in this section modifies any responsibility of an investigating official to report violations of criminal law to the Attorney General.

§ 1013.5 Review by the reviewing official.

(a) If, based on the report of the investigating official under § 1013.4(b) of this part, the reviewing official determines that there is adequate evidence to believe that a person is liable under § 1013.3 of this part, the reviewing official shall transmit to the Attorney General a written notice of the reviewing official's intention to issue a complaint under § 1013.7 of this part.

(b) Such notice shall include—

(1) A statement of the reviewing official's reasons for issuing a complaint;

(2) A statement specifying the evidence that supports the allegations of liability;

(3) A description of the claims or statements upon which the allegations of liability are based;

(4) An estimate of the amount of money or the value of property, services, or other benefits requested or demanded in violation of § 1013.3 of this part;

(5) A statement of any exculpatory or mitigating circumstances that may relate to the claims or statements known by the reviewing official or the investigating official; and

(6) A statement that there is a reasonable prospect of collecting an appropriate amount of penalties and assessments.

§ 1013.6 Prerequisites for issuing a complaint.

(a) The reviewing official may issue a complaint under § 1013.7 of this part only if—

(1) The Department of Justice approves the issuance of a complaint in a written statement described in 31 U.S.C. 3803(b)(1), and

(2) In the case of allegations of liability under § 1013.3(a) of this part with respect to a claim, the reviewing official determines that, with respect to such claim or a group of related claims submitted at the same time such claim is submitted (as defined in paragraph (b) of this section), the amount of money or the value of property or services demanded or requested in violation of § 1013.3(a) of this part does not exceed $150,000.

(b) For the purposes of this section, a related group of claims submitted at the same time shall include only those claims arising from the same transaction (*e.g.*, grant, loan, application, or contract) that are submitted simultaneously as part of a single request, demand, or submission.

(c) Nothing in this section shall be construed to limit the reviewing official's authority to join in a single complaint against a person claims that are unrelated or were not submitted simultaneously, regardless of the amount of money, or the value of property or services, demanded or requested.

§ 1013.7 Complaint.

(a) On or after the date the Department of Justice approves the issuance of a complaint in accordance with 31 U.S.C. 3803(b)(1), the reviewing official may serve a complaint on the defendant, as provided in § 1013.8 of this part.

(b) The complaint shall state—

(1) The allegations of liability against the defendant, including the statutory basis for liability, an identification of the claims or statements that are the basis for the alleged liability, and the reasons why liability allegedly arises from such claims or statements;

(2) The maximum amount of penalties and assessments for which the defendant may be held liable;

(3) Instructions for filing an answer to request a hearing, including a specific statement of the defendant's right to request a hearing by filing an answer

and to be represented by a representative; and

(4) That failure to file an answer within 30 days of service of the complaint will result in the imposition of the maximum amount of penalties and assessments without right to appeal, as provided in § 1013.10 of this part.

(c) At the same time the reviewing official serves the complaint, he or she shall serve the defendant with a copy of these regulations.

§ 1013.8 **Service of complaint.**

(a) Service of a complaint must be made by certified or registered mail or by delivery in any manner authorized by Rule 4(d) of the Federal Rules of Civil Procedure. Service is complete upon receipt.

(b) Proof of service, stating the name and address of the person on whom the complaint was served, and the manner and date of service, may be made by—

(1) Affidavit of the individual serving the complaint by delivery;

(2) A United States Postal Service return receipt card acknowledging receipt; or

(3) Written acknowledgment of receipt by the defendant or his or her representative.

§ 1013.9 **Answer.**

(a) The defendant may request a hearing by filing an answer with the reviewing official within 30 days of service of the complaint. An answer shall be deemed to be a request for hearing.

(b) In the answer, the defendant—

(1) Shall admit or deny each of the allegations of liability made in the complaint;

(2) Shall state any defense on which the defendant intends to rely;

(3) May state any reasons why the defendant contends that the penalties and assessments should be less than the statutory maximum; and

(4) Shall state the name, address, and telephone number of the person authorized by the defendant to act as defendant's representative, if any.

(c) If the defendant is unable to file an answer meeting the requirements of paragraph (b) of this section within the time provided, the defendant may, before the expiration of 30 days from service of the complaint, file with the reviewing official a general answer denying liability and requesting a hearing, and a request for an extension of time within which to file an answer meeting the requirements of paragraph (b) of this section. The reviewing offical shall file promptly with the ALJ the complaint, the general answer denying liability, and the request for an extension of time as provided in § 1013.11 of this part. For good cause shown, the ALJ may grant the defendant up to 30 additional days within which to file an answer meeting the requirements of paragraph (b) of this section.

§ 1013.10 **Default upon failure to file an answer.**

(a) If the defendant does not file an answer within the time prescribed in § 1013.9(a) of this part, the reviewing official may refer the complaint to the ALJ.

(b) Upon the referral of the complaint, the ALJ shall promptly serve on defendant in the manner prescribed in § 1013.8 of this part, a notice that an initial decision shall be issued under this section.

(c) The ALJ shall assume the facts alleged in the complaint to be true, and, if such facts establish liability under § 1013.3 of this part, the ALJ shall issue an initial decision imposing the maximum amount of penalties and assessments allowed under the statute.

(d) Except as otherwise provided in this section, by failing to file a timely answer, the defendant waives any right to further review of the penalties and assessments imposed under paragraph (c) of this section, and the initial decision shall become final and binding upon the parties 30 days after it is issued.

(e) If, before such an initial decision becomes final, the defendant files a motion with the ALJ seeking to reopen on the grounds that extraordinary circumstances prevented the defendant from filing an answer, the initial decision shall be stayed pending the ALJ's decision on the motion.

(f) If, on such motion, the defendant can demonstrate extraordinary circumstances excusing the failure to file a timely answer, the ALJ shall withdraw the initial decision in paragraph (c) of this section, if such a decision has been issued, and shall grant the defendant an opportunity to answer the complaint.

(g) A decision of the ALJ denying a defendant's motion under paragraph (e) of this section is not subject to reconsideration under § 1013.38 of this part.

(h) The defendant may appeal to the authority head the decision denying a motion to reopen by filing a notice of appeal with the authority head within 15 days after the ALJ denies the motion. The timely filing of a notice of appeal shall stay the initial decision until the authority head decides the issue.

(i) If the defendant files a timely notice of appeal with the authority head, the ALJ shall forward the record of the proceeding to the authority head.

(j) The authority head shall decide expeditiously whether extraordinary circumstances excuse the defendant's failure to file a timely answer based solely on the record before the ALJ.

(k) If the authority head decides that extraordinary circumstances excused the defendant's failure to file a timely answer, the authority head shall remand the case to the ALJ with instructions to grant the defendant an opportunity to answer.

(l) If the authority head decides that the defendant's failure to file a timely answer is not excused, the authority head shall reinstate the initial decision of the ALJ, which shall become final and binding upon the parties 30 days after the authority head issues such decision.

§ 1013.11 **Referral of complaint and answer to the ALJ.**

Upon receipt of an answer, the reviewing official shall file the complaint and answer with the ALJ.

§ 1013.12 **Notice of hearing.**

(a) When the ALJ receives the complaint and answer, the ALJ shall promptly serve a notice of hearing upon the defendant in the manner prescribed by § 1013.8 of this part. At the same time, the ALJ shall send a copy of such notice to the representative for the Government.

(b) Such notice shall include—

(1) The tentative time, date, and place, and the nature of the hearing;

(2) The legal authority and jurisdiction under which the hearing is to be held;

(3) The matters of fact and law to be asserted;

(4) A description of the procedures for the conduct of the hearing;

(5) The name, address, and telephone number of the representative of the Government and of the defendant, if any; and

(6) Such other matters as the ALJ deems appropriate.

§ 1013.13 **Parties to the hearing.**

(a) The parties to the hearing shall be the defendant and the authority.

(b) Pursuant to 31 U.S.C. 3730(c)(5), a private plaintiff under the False Claims Act may participate in these proceedings to the extent authorized by the provisions of that Act.

§ 1013.14 **Separation of functions.**

(a) The investigating official, the reviewing official, and any employee or agent of the authority who takes part in investigating, preparing, or presenting a particular case may not, in such case or a factually related case—

(1) Participate in the hearing as the ALJ;

(2) Participate or advise in the initial decision or the review of the initial decision by the authority head, except as a witness or a representative in public proceedings; or

(3) Make the collection of penalties and assessments under 31 U.S.C. 3806.

(b) The ALJ shall not be responsible to, or subject to the supervision or direction of, the investigating official or the reviewing official.

(c) Except as provided in paragraph (a) of this section, the representative for the Government may be employed anywhere in the authority, including in the offices of either the investigating official or the reviewing official.

§ 1013.15 Ex parte contacts.

No party or person (except employees of the ALJ's office) shall communicate in any way with the ALJ on any matter at issue in a case, unless on notice and opportunity for all parties to participate. This provision does not prohibit a person or party from inquiring about the status of a case or asking routine questions concerning administrative functions or procedures.

§ 1013.16 Disqualification of reviewing official or ALJ.

(a) A reviewing official or ALJ in a particular case may disqualify himself or herself at any time.

(b) A party may file with the ALJ a motion for disqualification of a reviewing official or an ALJ. Such motion shall be accompanied by an affidavit alleging personal bias or other reason for disqualification.

(c) Such motion and affidavit shall be filed promptly upon the party's discovery of reasons requiring disqualification, or such objections shall be deemed waived.

(d) Such affidavit shall state specific facts that support the party's belief that personal basis or other reason for disqualification exists and the time and circumstances of the party's discovery of such facts. It shall be accompanied by a certificate of the representative of record that it is made in good faith.

(e) Upon the filing of such a motion and affidavit, the ALJ shall proceed no further in the case until he or she resolves the matter of disqualification in accordance with paragraph (f) of this section.

(f)(1) If the ALJ determines that a reviewing official is disqualified, the ALJ shall dismiss the complaint without prejudice.

(2) If the ALJ disqualifies himself or herself, the case shall be reassigned promptly to another ALJ.

(3) If the ALJ denies a motion to disqualify, the authority head may determine the matter only as part of his or her review or the initial decision upon appeal, if any.

§ 1013.17 Rights of parties.

Except as otherwise limited by this part, all parties may—

(a) Be accompanied, represented, and advised by a representative;

(b) Participate in any conference held by the ALJ;

(c) Conduct discovery;

(d) Agree to stipulations of fact or law, which shall be made part of the record;

(e) Present evidence relevant to the issues at the hearing;

(f) Present and cross-examine witnesses;

(g) Present oral arguments at the hearing as permitted by the ALJ; and

(h) Submit written briefs and proposed findings of fact and conclusions of law.

§ 1013.18 Authority of the ALJ.

(a) The ALJ shall conduct a fair and impartial hearing, avoid delay, maintain order, and assure that a record of the proceeding is made.

(b) The ALJ has the authority to—

(1) Set and change the date, time, and place of the hearing upon reasonable notice to the parties;

(2) Continue or recess the hearing in whole or in part for a reasonable period of time;

(3) Hold conferences to identify or simplify the issues, or to consider other matters that may aid in the expeditious disposition of the proceeding;

(4) Administer oaths and affirmations;

(5) Issue subpoenas requiring the attendance of witnesses and the production of documents at depositions or at hearings;

(6) Rule on motions and other procedural matters;

(7) Regulate the scope and timing of discovery;

(8) Regulate the course of the hearing and the conduct of representatives and parties;

(9) Examine witnesses;

(10) Receive, rule on, exclude, or limit evidence;

(11) Upon motion of a party, take official notice of facts; decide cases, in whole or in part, by summary judgment where there is no disputed issue of material fact;

(12) Conduct any conference, argument, or hearing on motions in person or by telephone; and

(13) Exercise such other authority as is necessary to carry out the responsibilities of the ALJ under this part.

(c) The ALJ does not have the authority to find Federal statutes or regulations invalid.

§ 1013.19 Prehearing conferences.

(a) The ALJ may schedule prehearing conferences as appropriate.

(b) Upon the motion of any party, the ALJ shall schedule at least one prehearing conference at a reasonable time in advance of the hearing.

(c) The ALJ may use prehearing conferences to discuss the following:

(1) Simplification of the issues;

(2) The necessity or desirability of amendments to the pleadings, including the need for a more definite statement;

(3) Stipulations and admissions of fact or as to the contents and authenticity of documents;

(4) Whether the parties can agree to submission of the case on a stipulated record;

(5) Whether a party chooses to waive appearance at an oral hearing and to submit only documentary evidence (subject to the objection of other parties) and written argument;

(6) Limitation of the number of witnesses);

(7) Scheduling dates for the exchange of witness lists and of proposed exhibits;

(8) Discovery;

(9) The time, date, and place for the hearing; and

(10) Such other matters as may tend to expedite the fair and just disposition of the proceedings.

(d) The ALJ may issue an order containing all matters agreed upon by the parties or ordered by the ALJ at a prehearing conference.

§ 1013.20 Disclosure of documents.

(a) Upon written request to the reviewing official, the defendant may review any relevant and material documents, transcripts, records, and other materials that relate to the allegations set out in the complaint and upon which the findings and conclusions of the investigating official under § 1013.4(b) are based, unless such documents are subject to a privilege under Federal law. Upon payment of fees for duplication, the defendant may obtain copies of such documents.

(b) Upon written request to the reviewing official, the defendant also may obtain a copy of all exculpatory information in the possession of the reviewing official or investigating official relating to the allegations in the complaint, even if it is contained in a document that would otherwise be privileged. If the document would otherwise be privileged, only that portion containing exculpatory information must be disclosed.

(c) The notice sent to the Attorney General from the reviewing official as described in § 1013.5 of the part is not discoverable under any circumstances.

(d) The defendant may file a motion to compel disclosure of the documents subject to the provisions of this section. Such a motion may only be filed with the ALJ following the filing of an answer pursuant to § 1013.9 of this part.

§ 1013.21 Discovery.

(a) The following types of discovery are authorized:

(1) Requests for production of documents for inspection and copying;

(2) Requests for admissions of the authenticity of any relevant document or of the truth of any relevant fact;

(3) Written interrogatories; and

(4) Depositions.

(b) For the purpose of this section and §§ 1013.22 and 1013.23 of this part, the term "documents" includes information, documents, reports, answers, records, accounts, papers, and other data and documentary evidence. Nothing contained herein shall be interpreted to require the creation of a document.

(c) Unless mutually agreed to by the parties, discovery is available only as ordered by the ALJ. The ALJ shall regulate the timing of discovery.

(d) *Motions for discovery.* (1) A party seeking discovery may file a motion with the ALJ. Such a motion shall be accompanied by a copy of the requested discovery, or in the case of depositions, a summary of the scope of the proposed deposition.

(2) Within ten days of service, a party may file an opposition to the motion and/or a motion for protective order as provided in § 1013.24 of this part.

(3) The ALJ may grant a motion for discovery only if he or she finds that the discovery sought—

(i) Is necessary for the expeditious, fair, and reasonable consideration of the issues;

(ii) Is not unduly costly or burdensome;

(iii) Will not unduly delay the proceeding; and

(iv) Does not seek privileged information.

(4) The burden of showing that discovery should be allowed is on the party seeking discovery.

(5) The ALJ may grant discovery subject to a protective order under § 1013.24 of this part.

(e) *Depositions.* (1) If a motion for deposition is granted, the ALJ shall issue a subpoena for the deponent, which may require the deponent to produce documents. The subpoena shall specify the time, date, and place at which the deposition will be held.

(2) The party seeking to depose shall serve the subpoena in the manner prescribed in § 1013.8 of this part.

(3) The deponent may file with the ALJ a motion to quash the subpoena or a motion for a protective order within ten days of service.

(4) The party seeking to depose shall provide for the taking of a verbatim transcript of the deposition, which it shall make available to all other parties for inspection and copying.

(f) Each party shall bear its own costs of discovery.

§ 1013.22 Exchange of witness lists, statements and exhibits.

(a) At least 15 days before the hearing or at such other time as may be ordered by the ALJ, the parties shall exchange witness lists, copies of prior statements of proposed witnesses, and copies of proposed hearing exhibits, including copies of any written statements that the party intends to offer in lieu of live testimony in accordance with § 1013.33(b) of this part. At the time the above documents are exchanged, any party that intends to rely on the transcript of deposition testimony in lieu of live testimony at the hearing, if permitted by the ALJ, shall provide each party with a copy of the specific pages of the transcript it intends to introduce into evidence.

(b) If a party objects, the ALJ shall not admit into evidence the testimony of any witness whose name does not appear on the witness list or any exhibit not provided to the opposing party as provided above unless the ALJ finds good cause for the failure or that there is no prejudice to the objecting party.

(c) Unless another party objects within the time set by the ALJ, documents exchanged in accordance with paragraph (a) of this section shall be deemed to be authentic for the purpose of admissibility at the hearing.

§ 1013.23 Subpoenas for attendance at hearing.

(a) A party wishing to procure the appearance and testimony of any individual at the hearing may request that the ALJ issue a subpoena.

(b) A subpoena requiring the attendance and testimony of an individual may also require the individual to produce documents at the hearing.

(c) A party seeking a subpoena shall file a written request therefor not less than 15 days before the date fixed for the hearing unless otherwise allowed by the ALJ for good cause shown. Such request shall specify any documents to be produced and shall designate the witnesses and describe the address and location thereof with sufficient particularity to permit such witnesses to be found.

(d) The subpoena shall specify the time, date, and place at which the witness is to appear and any documents the witness is to produce.

(e) The party seeking the subpoena shall serve it in the manner prescribed in § 1013.8 of this part. A subpoena on a party or upon an individual under the control of a party may be served by first class mail.

(f) A party or the individual to whom the subpoena is directed may file with the ALJ a motion to quash the subpoena within ten days after service or on or before the time specified in the subpoena for compliance if it is less than ten days after service.

§ 1013.24 Protective order.

(a) A party or a prospective witness or deponent may file a motion for a protective order with respect to discovery sought by an opposing party or with respect to the hearing, seeking to limit the availability or disclosure of evidence.

(b) In issuing a protective order, the ALJ may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(1) That the discovery not be had;

(2) That the discovery may be had only on specified terms and conditions, including a designation of the time or place;

(3) That the discovery may be had only through a method of discovery other than that requested;

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

(5) That discovery be conducted with no one present except persons designated by the ALJ;

(6) That the contents of discovery or evidence be sealed;

(7) That a deposition after being sealed be opened only by order of the ALJ;

(8) That a trade secret or other confidential research, development, commercial information, or facts pertaining to any criminal investigation, proceeding, or other administrative investigation not be disclosed or be disclosed only in a designated way; or

(9) That the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the ALJ.

§ 1013.25 Witness fees.

The party requesting a subpoena shall pay the cost of the fees and mileage of any witness subpoenaed in the amounts that would be payable to a witness in a proceeding in United States District Court. A check for witness fees and mileage shall accompany the subpoena when served, except that when a subpoena is issued on behalf of the authority, a check for witness fees and mileage need not accompany the subpoena.

§ 1013.26 Form, filing and service of papers.

(a) *Form.* (1) Documents filed with the ALJ shall include an original and two copies.

(2) Every pleading and paper filed in the proceeding shall contain a caption setting forth the title of the action, the case number assigned by the ALJ, and a designation of the paper (*e.g.,* motion to quash subpoena).

(3) Every pleading and paper shall be signed by, and shall contain the address and telephone number of the party or the person on whose behalf the paper was filed, or his or her representative.

(4) Papers are considered filed when they are mailed. Date of mailing may be established by a certificate from the party or its representative or by proof that the document was sent by certified or registered mail.

(b) *Service.* A party filing a document with the ALJ shall, at the time of filing, serve a copy of such document on every other party. Service upon any party of any document other than those required to be served as prescribed in § 1013.8 of this part shall be made by delivering a copy or by placing a copy of the document in the United States mail, postage prepaid, and addressed to the party's last known address. When a party is represented by a representative, service shall be made upon such representative in lieu of the actual party.

(c) *Proof of service.* A certificate by the individual serving the document by personal delivery or by mail, setting forth the manner of service, shall be proof of service.

§ 1013.27 Computation of time.

(a) In computing any period of time under this part or in an order issued thereunder, the time begins with the day following the act, event, or default, and includes the last day of the period, unless it is a Saturday, Sunday, or legal holiday observed by the Federal government, in which event it includes the next business day.

(b) When the period of time allowed is less than seven days, intermediate Saturday, Sundays, and legal holidays observed by the Federal government shall be excluded from the computation.

(c) Where a document has been served or issued by placing it in the mail, an additional five days will be added to the time permitted for any response.

§ 1013.28 Motions.

(a) Any application to the ALJ for an order or ruling shall be by motion. Motions shall state the relief sought, the authority relied upon, and the facts alleged, and shall be filed with the ALJ and served on all other parties.

(b) Except for motions made during a prehearing conference or at the hearing, all motions shall be in writing. The ALJ may require that oral motions be reduced to writing.

(c) Within 15 days after a written motion is served, or such other time as may be fixed by the ALJ, any party may file a response to such motion.

(d) The ALJ may not grant a written motion before the time for filing responses thereto has expired, except upon consent of the parties or following a hearing on the motion, but may overrule or deny such motion without awaiting a response.

(e) The ALJ shall make a reasonable effort to dispose of all outstanding motions prior to the beginning of the hearing.

§ 1013.29 Sanctions.

(a) The ALJ may sanction a person, including any party or representative, for—

(1) Failing to comply with an order, rule, or procedure governing the proceeding;

(2) Failing to prosecute or defend an action; or

(3) Engaging in other misconduct that interferes with the speedy, orderly, or fair conduct of the hearing.

(b) Any such sanction, including but not limited to those listed in paragraphs (c), (d), and (e) of this section, shall reasonably relate to the severity and nature of the failure or misconduct.

(c) When a party fails to comply with an order, including an order for taking a deposition, the production of evidence within the party's control, or a request for admission, the ALJ may—

(1) Draw an inference in favor of the requesting party with regard to the information sought;

(2) In the case of requests for admission, deem each matter of which an admission is requested to be admitted;

(3) Prohibit the party failing to comply with such order from introducing evidence concerning, or otherwise relying upon, testimony relating to the information sought; and

(4) Strike any part of the pleadings or other submissions of the party failing to comply with such request.

(d) If a party fails to prosecute or defend an action under this part commenced by service of a notice of hearing, the ALJ may dismiss the action or may issue an initial decision imposing penalties and assessments.

(e) The ALJ may refuse to consider any motion, request, response, brief or other document which is not filed in a timely fashion.

§ 1013.30 The hearing and burden of proof.

(a) The ALJ shall conduct a hearing on the record in order to determine whether the defendant is liable for a civil penalty or assessment under § 1013.3 of this Part, and, if so, the appropriate amount of any such civil penalty or assessment considering any aggravating or mitigating factors.

(b) The authority shall prove defendant's liability and any aggravating factors by a preponderance of the evidence.

(c) The defendant shall prove any affirmative defenses and any mitigating factors by a preponderance of the evidence.

(d) The hearing shall be open to the public unless otherwise ordered by the ALJ for good cause shown.

§ 1013.31 Determining the amount of penalties and assessments.

(a) In determining an appropriate amount of civil penalties and assessments, the ALJ and the authority head, upon appeal, should evaluate any circumstances that mitigate or aggravate the violation and should articulate in their opinions the reasons that support the penalties and assessments they impose. Because of the intangible costs of fraud, the expense of investigating such conduct, and the need to deter others who might be similarly tempted, ordinarily double damages and a significant civil penalty should be imposed.

(b) Although not exhaustive, the following factors are among those that may influence the ALJ and the authority head in determining the amount of penalties and assessments to impose with respect to the misconduct (*i.e.,* the false, fictitious, or fraudulent claims or statement) charged in the complaint:

(1) The number of false, fictitious, or fraudulent claims or statements;

(2) The time period over which such claims or statements were made;

(3) The degree of the defendant's culpability with respect to the misconduct;

(4) The amount of money or the value of the property, services, or benefit falsely claimed;

(5) The value of the Government's actual loss as a result of the misconduct, including foreseeable consequential damages and the costs of investigation;

(6) The relationship of the amount imposed as civil penalties to the amount of the Government's loss;

(7) The potential or actual impact of the misconduct upon national defense, public health or safety, or public confidence in the management of Government programs and operations, including particularly the impact on the intended beneficiaries of such programs;

(8) Whether the defendant has engaged in a pattern of the same or similar misconduct;

(9) Whether the defendant attempted to conceal the misconduct;

(10) The degree to which the defendant has involved others in the misconduct or in concealing it;

(11) Where the misconduct of employees or agents is imputed to the defendant, the extent to which the defendant's practices fostered or attempted to preclude such misconduct;

(12) Whether the defendant cooperated in or obstructed an investigation of the misconduct;

(13) Whether the defendant assisted in identifying and prosecuting other wrongdoers;

(14) The complexity of the program or transaction, and the degree of the defendant's sophistication with respect to it, including the extent of the defendant's prior participation in the program or in similar transactions;

(15) Whether the defendant has been found, in any criminal, civil, or administrative proceeding to have engaged in similar misconduct or to have dealt dishonestly with the Government of the United States or of a State, directly or indirectly; and

(16) The need to deter the defendant and others from engaging in the same or similar misconduct.

(c) Nothing in this section shall be construed to limit the ALJ or the authority head from considering any other factors that in any given case may mitigate or aggravate the offense for which penalties and assessments are imposed.

§ 1013.32 Location of hearing.

(a) The hearing may be held—

(1) In any judicial district of the United States in which the defendant resides or transacts business;

(2) In any judicial district of the United States in which the claim or statement in issue was made; or

(3) In such other place as may be agreed upon by the defendant and the ALJ.

(b) Each party shall have the opportunity to present argument with respect to the location of the hearing.

(c) The hearing shall be held at the place and at the time ordered by the ALJ.

§ 1013.33 Witnesses.

(a) Except as provided in paragraph (b) of this section, testimony at the hearing shall be given orally by witnesses under oath or affirmation.

(b) At the discretion of the ALJ, testimony may be admitted in the form of a written statement or deposition. Any such written statement must be provided to all other parties along with the last known address of such witness, in a manner which allows sufficient time for other parties to subpoena such witness for cross-examination at the hearing. Prior written statements of witnesses proposed to testify at the hearing and deposition transcripts shall be exchanged as provided in § 1013.22(a) of this part.

(c) The ALJ shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

(d) The ALJ shall permit the parties to conduct such cross-examination as may be required for a full and true disclosure of the facts.

(e) At the discretion of the ALJ, a witness may be cross-examined on matters relevant to the proceeding without regard to the scope of his or her direct examination. To the extent permitted by the ALJ, cross-examination on matters outside the scope of direct examination shall be conducted in the manner of direct examination and may proceed by leading questions only if the witness is a hostile witness, an adverse party, or a witness identified with an adverse party.

(f) Upon motion of any party, the ALJ shall order witnesses excluded so that they cannot hear the testimony of other witnesses. This rule does not authorize exclusion of—

(1) A party who is an individual;

(2) In the case of a party that is not an individual, an officer or employee of the party appearing for the entity *pro se* or designated by the party's representative; or

(3) An individual whose presence is shown by a party to be essential to the presentation of its case, including an individual employed by the Government engaged in assisting the representative for the Government.

§ 1013.34 Evidence.

(a) The ALJ shall determine the admissibility of evidence.

(b) Except as provided in this part, the ALJ shall not be bound by the Federal Rules of Evidence. However, the ALJ may apply the Federal Rules of Evidence where appropriate, *e.g.*, to exclude unreliable evidence.

(c) The ALJ shall exclude irrelevant and immaterial evidence.

(d) Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or by considerations of undue delay or needless presentation of cumulative evidence.

(e) Although relevant, evidence may be excluded if it is privileged under Federal law.

(f) Evidence concerning offers of compromise or settlement shall be inadmissible to the extent provided in Rule 408 of the Federal Rules of Evidence.

(g) The ALJ shall permit the parties to introduce rebuttal witnesses and evidence.

(h) All documents and other evidence offered or taken for the record shall be open to examination by all parties, unless otherwise ordered by the ALJ pursuant to § 1013.24 of this part.

§ 1013.35 The record.

(a) The hearing will be recorded and transcribed. Transcripts may be obtained following the hearing from the ALJ at a cost not to exceed the actual cost of duplication.

(b) The transcript of testimony, exhibits and other evidence admitted at the hearing, and all papers and requests filed in the proceeding constitute the record for the decision by the ALJ and the authority head.

(c) The record may be inspected and copied (upon payment of a reasonable fee) by anyone, unless otherwise ordered by the ALJ pursuant to § 1013.24 of this part.

§ 1013.36 Post-hearing briefs.

The ALJ may require the parties to file post-hearing briefs. In any event, any party may file a post-hearing brief. The ALJ shall fix the time for filing such briefs, not to exceed 60 days from the date the parties receive the transcript of the hearing or, if applicable, the stipulated record. Such briefs may be accompanied by proposed findings of fact and conclusions of law. The ALJ may permit the parties to file reply briefs.

§ 1013.37 Initial decision.

(a) The ALJ shall issue an initial decision based only on the record, which shall contain findings of fact, conclusions of law, and the amount of any penalties and assessments imposed.

(b) The findings of fact shall include a finding on each of the following issues:

(1) Whether the claims or statements identified in the complaint, or any portions thereof, violate § 1013.3 of this part;

(2) If the person is liable for penalties or assessments, the appropriate amount of any such penalties or assessments considering any mitigating or aggravating factors that he or she finds in the case, such as those described in § 1013.31 of this part.

(c) The ALJ shall promptly serve the initial decision on all parties within 90 days after the time for submission of post-hearing briefs and reply briefs (if permitted) has expired. The ALJ shall at the same time serve all parties with a statement describing the right of any defendant determined to be liable for a civil penalty or assessment to file a motion for reconsideration with the ALJ or a notice of appeal with the authority head. If the ALJ fails to meet the deadline contained in this paragraph, he or she shall notify the parties of the reason for the delay and shall set a new deadline.

(d) Unless the initial decision of the ALJ is timely appealed to the authority head, or a motion for reconsideration of the initial decision is timely filed, the initial decision shall constitute the final decision of the authority head and shall be final and binding on the parties 30 days after it is issued by the ALJ.

§ 1013.38 Reconsideration of initial decision.

(a) Except as provided in paragraph (d) of this section, any party may file a motion for reconsideration of the initial decision within 20 days of receipt of the initial decision. If service was made by mail, receipt will be presumed to be five days from the date of mailing in the absence of contrary proof.

(b) Every such motion must set forth the matters claimed to have been erroneously decided and the nature of the alleged errors. Such motion shall be accompanied by a supporting brief.

(c) Responses to such motions shall be allowed only upon request of the ALJ.

(d) No party may file a motion for reconsideration of an initial decision that has been revised in response to a previous motion for reconsideration.

(e) The ALJ may dispose of a motion for reconsideration by denying it or by issuing a revised initial decision.

(f) If the ALJ denies a motion for reconsideration, the initial decision shall constitute the final decision of the authority head and shall be final and binding on the parties 30 days after the ALJ denies the motion, unless the initial decision is timely appealed to the authority head in accordance with § 1013.39.

(g) If the ALJ issues a revised initial decision, that decision shall constitute the final decision of the authority head and shall be final and binding on the parties 30 days after it is issued, unless it is timely appealed to the authority head in accordance with § 1013.39 of this part.

§ 1013.39 Appeal to authority head.

(a) Any defendant who has filed a timely answer and who is determined in an initial decision to be liable for a civil penalty or assessment may appeal such decision to the authority head by filing a notice of appeal with the authority head in accordance with this section.

(b)(1) A notice of appeal may be filed at any time within 30 days after the ALJ issues an initial decision. However, if any party files a motion for reconsideration under § 1013.38 of this part, consideration of the appeal shall be stayed automatically pending resolution of the motion for reconsideration.

(2) If a motion for reconsideration is timely filed, a notice of appeal may be filed within 30 days after the ALJ denies the motion or issues a revised initial decision, whichever applies.

(3) The authority head may extend the initial 30-day period for an additional 30 days if the defendant files with the authority head a request for an extension within the initial 30-day period and shows good cause.

(c) If the defendant files a timely notice of appeal with the authority head and the time for filing motions for reconsideration under § 1013.38 of this part has expired, the ALJ shall forward the record of the proceeding to the authority head.

(d) A notice of appeal shall be accompanied by a written brief specifying exceptions to the initial decision and reasons supporting the exceptions.

(e) The representative for the Government may file a brief in opposition to exceptions within 30 days of receiving the notice of appeal and accompanying brief.

(f) There is no right to appear personally before the authority head.

(g) There is no right to appeal any interlocutory ruling by the ALJ.

(h) In reviewing the initial decision, the authority head shall not consider any objection that was not raised before the ALJ unless a demonstration is made of extraordinary circumstances causing the failure to raise the objection.

(i) If any party demonstrates to the satisfaction of the authority head that additional evidence not presented at such hearing is material and that there were reasonable grounds for the failure to present such evidence at such hearing, the authority head shall remand the matter to the ALJ for consideration of such additional evidence.

(j) The authority head may affirm, reduce, reverse, compromise, remand, or settle any penalty or assessment determined by the ALJ in any initial decision.

(k) The authority head shall promptly serve each party to the appeal with a copy of the decision of the authority head and a statement describing the right of any person determined to be liable for a penalty or an assessment to seek judicial review.

(l) Unless a petition for review is filed as provided in 31 U.S.C. 3805 after a defendant has exhausted all administrative remedies under this part and within 60 days after the date on which the authority head serves the defendant with a copy of the authority head's decision, a determination that a defendant is liable under § 1013.3 of this part is final and is not subject to judicial review.

§ 1013.40 Stays ordered by the Department of Justice.

If at any time the Attorney General or an Assistant Attorney General designated by the Attorney General transmits to the authority head a written finding that continuation of the administrative process described in this part with respect to a claim or statement may adversely affect any pending or potential criminal or civil action related to such claim or statement, the authority head shall stay the process immediately. The authority head may order the process resumed only upon receipt of the written authorization of the Attorney General.

§ 1013.41 Stay pending appeal.

(a) An initial decision is stayed automatically pending disposition of a motion for reconsideration or of an appeal to the authority head.

(b) No administrative stay is available following a final decision of the authority head.

§ 1013.42 Judicial review.

Section 3805 of title 31, United States Code, authorizes judicial review by an appropriate United States District Court of a final decision of the authority head imposing penalties or assessments under this part and specifies the procedures for such review.

§ 1013.43 Collection of civil penalties and assessments.

Sections 3806 and 3808(b) of title 31, United States Code, authorizes actions for collection of civil penalties and assessments imposed under this part and specify the procedures for such actions.

§ 1013.44 Right to administrative offset.

The amount of any penalty or assessment which has become final, or for which a judgment has been entered under § 1013.42 or § 1013.43 of this part, or any amount agreed upon in a compromise or settlement under § 1013.46 of this part, may be collected by administrative offset under 31 U.S.C. 3716, except that an administrative offset may not be made under this subsection against a refund of an overpayment of Federal taxes, then or later owing by the United States to the defendant.

§ 1013.45 Deposit in Treasury of United States.

All amounts collected pursuant to this part shall be deposited as miscellaneous receipts in the Treasury of the United States, except as provided in 31 U.S.C. 3806(g).

§ 1013.46 Compromise or settlement

(a) Parties may make offers of compromise or settlement at any time.

(b) The reviewing official has the exclusive authority to compromise or settle a case under this part at any time after the date on which the reviewing official is permitted to issue a complaint and before the date on which the ALJ issues an initial decision.

(c) The authority head has exclusive authority to compromise or settle a case under this part at any time after the date on which the ALJ issues an initial decision, except during the pendency of any review under § 1013.42 of this part or during the pendency of any action to collect penalties and assessments under § 1013.43 of this part.

(d) The Attorney General has exclusive authority to compromise or settle a case under this part during the pendency of any review under § 1013.42 of this part or of any action to recover penalties and assessments under 31 U.S.C. 3806.

(e) The investigating official may recommend settlement terms to the reviewing official, the authority head, or the Attorney General, as appropriate. The reviewing official may recommend settlement terms to the authority head, or the Attorney General, as appropriate.

(f) Any compromise or settlement must be in writing.

§ 1013.47 Limitations.

(a) The notice of hearing with respect to a claim or statement must be served in the manner specified in § 1013.8 of this part within 6 years after the date on which such claim or statement is made.

(b) If the defendant fails to file a timely answer, service of notice under § 1013.10(b) of this part shall be deemed a notice of a hearing for purposes of this section.

(c) The statute of limitations may be extended by agreement of the parties.

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FEDERAL HOME LOAN BANK BOARD

12 CFR Part 522

[No. 88-1163]

Election of Directors of the Federal Home Loan Bank System

Date: October 25, 1988.

AGENCY: Federal Home Loan Bank Board.

ACTION: Temporary rule.

SUMMARY: The Federal Home Loan Bank Board ("Board") is issuing a new rule to implement special procedures for the election of directors to the boards of the Federal Home Loan Banks ("Banks") during 1988. The rule will add a qualification for election to Bank directorships. Specifically, in order to qualify to become a Bank director, a candidate may not currently be serving as an officer or director of any member institution that fails to meet its minimum regulatory capital requirement. The rule applies only to the election of Bank directors during calendar year 1988, and will expire on December 31, 1988.

EFFECTIVE DATE: October 25, 1988. Section 522.26a shall expire on December 31, 1988.

FOR FURTHER INFORMATION CONTACT: William Carey, (202) 377-6656, Director, Bank Liaison Division, and Patrick G. Berbakos, Director (202) 377-6720, Office of District Banks, Federal Home Loan Bank Board, 1700 G Street NW., Washington, DC 20552.

SUPPLEMENTARY INFORMATION: The Board is issuing a new rule, § 522.26a, to implement special procedures for the 1988 election of Bank directors. The rule adds a specific qualification for election to become a Bank director. In particular, to qualify to become a director in the 1988 election, a candidate may not currently be serving as an officer or director of any member institution that does not meet its minimum regulatory capital requirement. This action is being taken as a part of the Board's overall review of its procedures for the election of Bank System directors. This review includes the issuance of an advance notice of proposed rulemaking, published elsewhere in this edition of the **Federal Register**. The advance notice seeks public comment on how best to address the Board's concerns over the potential for even the appearance of conflicts-of-interest which may adversely effect the public's perception of the Bank System's regulatory process. The Board believes that it may be inappropriate for personnel from institutions that have been the subject of heightened regulatory concern and scrutiny to then serve on the boards of entities, like the Banks, that play an integral role in the Board's regulation and supervision of the entire thrift industry.

The specific action taken today in the form of new § 522.26a will be of limited duration and effect. By its terms, the new rule affects only the elections for this year and will expire at the end of the year. The Board contemplates possible additional regulatory action in this important area that will be of broader scope and effect than the temporary measure taken today.

The Board's action today is taken pursuant to its broad statutory powers and obligations to establish and oversee the Federal Home Loan Bank System, including the specific, express responsibility for overseeing the election and appointment of directors to the boards of the various Banks. In particular, the twelve district Banks are established and overseen by the Board pursuant to the Congressional mandate contained in the Federal Home Loan Bank Act ("FHLBank Act"), 12 U.S.C. 1421 et seq. The Banks may and do act as the Board's agents pursuant to section 17 of the FHLBank Act, 12 U.S.C. 1437, which provides that the Board may authorize officers, employees, agents, or administrative units of the Banks to perform a wide variety of Board functions. Pursuant to that authority, the Board has delegated a number of critical supervisory, examination, and regulatory functions to the Banks. The

President of each Bank is the Principal Supervisory Agent ("PSA") of the Board and the Federal Savings and Loan Insurance Corporation ("FSLIC") for that Bank district. 12 CFR 501.11(a). Other Bank employees may act as Supervisory Agents. In addition to such supervisory and examination functions on behalf of the Board, the Banks also perform a crucial credit function. Specifically, the FHLBank Act empowers the Banks to make advances to their member institutions, thereby performing an essential liquidity function for the thrift industry. 12 U.S.C 1430.

Congress has charged the Board with supervising the Bank System and has given it plenary rulemaking authority "to adopt, amend, and require the observance of such rules, regulations, and orders as shall be necessary from time to time for carrying out the purposes of the provisions" of the FHLBank Act. 12 U.S.C. 1437. This section further provides the Board with the authority to "suspend or remove any director, officer, employee, or agent" of any Bank upon providing written notice to the Bank and to the person suspended or removed.

Section 7 of the FHLBank Act deals specifically with the directors of the Banks. 12 U.S.C. 1427. The board of directors of a Bank is to "administer the affairs of the bank fairly and impartially and without discrimination in favor of or against any member or nonmember borrower, and shall, subject to the provisions hereof, extend to each institution authorized to secure advances such advances as may be made safely and reasonably with due regard for the claims and demands of other institutions, and with due regard to the maintenance of adequate credit standing for the Federal Home Loan Bank and its obligations." 12 U.S.C. 1427(g).

Furthermore, the statute provides the Board with broad authority over the selection of directors of a Bank. Under this statutory scheme, certain directors are to be appointed by the Board while others are to be elected by the member institutions. Elective directors are to be elected by the members of a particular Bank in accordance with regulations of the Board. In particular, section 7(d) of the FHLBank Act, 12 U.S.C. 1427(d) provides:

> The Board is hereby authorized to prescribe such rules and regulations as it may deem necessary or appropriate for the nomination and election of directors of Federal home loan banks, including, without limitation on the generality of the foregoing, rules and regulations with respect to the breaking of ties and with respect to the inclusion of more than one directorship on a single ballot and the methods of voting and of determining the results of voting in such cases.

Pursuant to this specific grant of rulemaking authority, as well as its broad authority under section 17 of the FHLBank Act, 12 U.S.C. 1437, the Board has set forth detailed regulations dealing with the appointment and election of directors of the Banks. 12 CFR 522.20–522.28. Pursuant to this statutory authority, the Board is issuing new § 522.26a which will operate in conjunction with the Board's existing rules administering the Bank System elections, but only as pertains to the elections during 1988. As stated above, the Board is considering whether the best interests of the industry require that these provisions be amended to provide permanent eligibility requirements for elective directors.

Section 522.26a will add a requirement, applicable to candidates for election as Bank directors during the current calendar year, that such a candidate may not currently be serving as an officer or director of any member institution that does not meet its minimum regulatory capital requirement. This temporary measure will help address significant concerns the Board has with regard to the service of personnel from certain types of institutions as elective directors of the Banks. Pursuant to the Board's statutory responsibilities to oversee the Bank System, the measures taken today will help prevent potential conflicts of interest, or even the appearance of such conflicts, which may adversely impact other specific measures being taken to reinforce the ongoing integrity of the Bank System.

In particular, an increasing number of the Board's regulations are tied to an institution's capital position. Congress recently provided the Board with enhanced authority to establish minimum capital levels for insured institutions and authorized the Board to treat an institution's failure "to maintain capital at or above the minimum level" as an unsafe or unsound practice. 12 U.S.C. 1464(s), 1730(t). Institutions that fail to meet their minimum capital requirements are subject to increased regulatory scrutiny. This scrutiny often takes the form of requiring PSA approval before the institution may engage in certain activities or levels of activities. See e.g., 12 CFR 563.4(c) (permissible levels of brokered deposits); 563.13–3(a) (purchase and sale of Federal Home Loan Mortgage Corporation stock); 563.9–8(c)(2)(iii) (making equity risk investments). Given the extensive authority granted to the directors of the Banks to administer the Banks, subject to the Board's authority, and the involvement of the Banks generally in the supervision of individual institutions, the new rule will help avoid any potential for any conflicts of interest, as between the various responsibilities and loyalties of particular persons in the thrift industry. Of course, Bank directors have no responsibility for the supervisory and examination activities performed by any Bank employee on behalf of the Board or FSLIC pursuant to authority delegated by the Board. 12 CFR 522.62. But, for example, where a Bank director also serves as an officer with an institution that is under such heightened regulatory control, there may be a tension between that person's responsibilities to the Bank System at large, and the specific business needs of his institution (for example, for greater advances).

Furthermore, the Board believes that this action will help avoid even the appearance of any conflicts by directors serving on a Bank's board of directors. As required in section 7(j) of the FHLBank Act, special sensitivity must be used by a director in administering the affairs of the Bank fairly and impartially and without discrimination in favor of or against any member. Here again the troubled financial condition of a director's institution might actually or apparently affect the impartial judgment of a director as it pertains to matters affecting individual institutions. Avoidance of even the appearance of such conflicts is necessary to protect fully the overall integrity of the Federal Home Loan Bank System. For example, the condition of one potential director's institution might be unduly imputed to the financial state of a District Bank or the Federal Home Loan Bank System. Even the existence of such an incorrect belief would run counter to the Board's obligation to protect to the utmost the overall integrity of the Bank System. It is important that all the District Banks in the Federal Home Loan Bank System maintain the confidence they presently enjoy in the financial community as well as with the public at large.

Therefore, the Board is adopting special provisions for the election of directors during 1988. New § 522.26a will operate in conjunction with the existing provisions of § 522.26, to accomplish the Board's intent of establishing a new qualification for election during 1988 to become a Bank director. Specifically, directors and officers from institutions not meeting their capital requirement, as of June 30, 1988, are declared ineligible for election to an open Bank directorship under new § 522.26a(b). Furthermore, paragraph (c) of the new rule directs the Board's Office of District Banks to determine which of the current candidates are ineligible for election as a consequence of the ineligibility for election declared in new § 522.26a(b). Simultaneously with the adoption of this rule, the Board is instructing the staff to prepare a schedule which lists all the nominees and their institutions in every Federal Home Loan Bank District and to determine whether any nominee will not be eligible to be declared a new director under the revised criteria. For any state in which a nominee is determined to be ineligible for election, thereby potentially affecting the outcome of the election in that the state under § 522.26, the staff will issue a set of revised ballot materials that do not contain the nominees who are ineligible for election. For those states, a reballoting will then be conducted in accordance with the procedures and time frames described in new § 522.26a.

In a state where a revised balloting process is necessary, the Office of District Banks will notify all members in that state by November 4, 1988. Each member will be asked to cast its vote for the candidates using the revised ballot submitted with the notification. This material must be forwarded and received in the Office of District Banks no later than November 21, 1988. Tabulation of these ballots will not begin until 5 p.m., e.s.t., November 21, 1988. Only those ballots that were furnished by the Bank Board will be considered. Tabulation will also be accomplished for all the other ballots, which had already been received pursuant to section 522.26(c), for states in which no such reballoting was necessary under section 522.26a. The Board will declare who the new elective directors are by December 9, 1988.

The Board notes that the specially revised election procedures for calendar year 1988 will result in only minimal delay in the completion of this year's election and the final declaration of the results to the industry pursuant to sections 522.26(e) and 522.26a(e). These provisions will be applied consistently throughout the Bank System, although the necessity for reballoting is anticipated for only a portion of the states in which there is an open directorship. Therefore, the Board will announce the results of the 1988 election for the Federal Home Loan Bank System no later than December 9, 1988. Finally, the Board notes that new § 522.26a is a temporary rule (expiring on December 31, 1988), that will affect only the elections during the current calendar year. It is the Board's intention to address these issues as they pertain to future elections through the rulemaking process initiated by the advance notice or proposed rulemaking issued today.

Since the action taken herein pertains to rules for the internal organization, practice, and procedures of the Federal Home Loan Bank System, specifically those rules implementing procedures for the elections of Bank System directors, the Board finds that a notice and comment procedure is not necessary under the Administrative Procedures Act. Moreover, for the reasons discussed herein, it is in the public's interest to provide prompt action on these matters. The action taken does not result in any additional burdens to third parties outside the Bank System, and is the alternative least disruptive to the internal operation of the System. The Board has plenary authority to remove directors at any time upon providing notice of cause, and may appoint their replacements. 12 U.S.C. 1427(f), 1437(a). With this rule, the Board has avoided possible recourse to this authority with regard to any new directors elected during this calendar year. Therefore, the Board finds that good cause exists for suspension of the usual thirty-day delayed effective date, as well as the notice and comment procedure. *See* 5 U.S.C. 553.

List of Subjects in 12 CFR Part 522

Conflicts of interest, Federal home loan banks.

Accordingly, the Board hereby amends Part 522, Subchapter B, Chapter V of Title 12, Code of Federal Regulations as set forth below.

SUBCHAPTER B—FEDERAL HOME LOAN BANK SYSTEM

PART 522—ORGANIZATION OF THE BANKS

1. The authority citation for Part 522 continues to read as follows:

Authority: Sec. 5B, 47 Stat. 727, as added by sec. 4, 80 Stat. 824, as amended (12 U.S.C. 1425b); secs. 6–7, 47 Stat. 727, 730, as amended (12 U.S.C. 1426–1427); sec. 17, 47 Stat. 736, as amended (12 U.S.C. 1437); sec. 5, 48 Stat. 132, as amended (12 U.S.C. 1464); secs. 402–403, 407, 48 Stat. 1256–1257, 1260, as amended (12 U.S.C. 1725–1726, 1730); sec. 207, 62 Stat. 692, as added by sec. 1a, 76 Stat. 1123, as amended (18 U.S.C. 207); sec. 602, 92 Stat. 2115, as amended (42 U.S.C. 8101 *et seq.)*; Reorg. Plan No. 6 of 1961, *reprinted in* 12 U.S.C.A. 1437 App. (West Supp. 1986).

2. Following § 522.26, a new § 522.26a is added to Subchapter B, Part 522, which will read as follows:

§ 522.26a Special provisions for election of directors during calendar year 1988.

(a) This section shall apply to the election of directors of the Banks during calendar year 1988. As described herein, this section shall operate in conjunction with § 522.26 which generally governs the election of directors. Until it expires, the special provisions of this section shall govern in the case of any conflict with the provisions of § 522.26. This § 522.26a shall expire on December 31, 1988.

(b) Directors and officers of any member that did not meet its minimum regulatory capital requirement pursuant to § 563.13 as of June 30, 1988, are not eligible for election during calendar year 1988 to become a director of any Bank.

(c) The Board's Office of District Banks shall determine which candidates are ineligible for election as a director as a consequence of the ineligibility for election established under paragraph (b) of this section. By November 4, 1988, the Office of District Banks shall mail to each member in each state in which a candidate has been determined to be ineligible for election a set of revised ballot materials in a form prescribed in § 522.26(a), which revised ballots shall not include the candidates that were determined to be ineligible for election pursuant to paragraph (b) of this section.

(d) Each member entitled to receive a ballot under this section may, by resolution of its governing body, cast its votes or authorize one of its directors or officers to cast its votes for each of as many candidates as there are directorships to be filled. These revised ballot materials shall be sent to the Office of District Banks and must be received on or before November 21, 1988. No ballot may be changed after it is delivered to the Office of District Banks, which will preserve all such ballots until the end of the next calendar year. Election ballots shall not be opened until after 5 p.m., e.s.t., November 21, 1988. Only ballots executed on forms supplied by the Board shall be counted.

(e) By December 9, 1988, the Board shall declare elected those candidates who have won the balloting as determined pursuant to the procedures set forth in § 522.26(d), and the election results will be recorded, the elected directors notified, and all members informed of the results, pursuant to the procedures set forth in § 522.26(e).

By the Federal Home Loan Bank Board.

John F. Ghizzoni,

Assistant Secretary.

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