goal resulting from the award of actual subcontracts to protege firms. The combination of the two shall equal the mentor firm's overall accomplishment toward the SDB goal(s).

E. Adjustments may be made to the amount of credit claimed under A and B above if the Director, DoD, USD(A)/OSDBU determines that:

(1) A mentor firm's performance in the attainment of its SDB subcontracting goals through actual subcontract awards declined from the prior fiscal year without justifiable cause.

(2) Imposition of such a limitation on credit appears to be warranted to prevent abuse of this incentive for mentor firm's participation in the Program.

F. The mentor firm shall be afforded the opportunity to explain the decline in SDB participation before imposition of any such limitation on credit. In making the final decision to impose a limitation on credit, the following shall be considered:

(1) the mentor firm's overall SDB participation rates (in terms of percentages of subcontract awards and dollars awarded) as compared to the participation rates existing during the two fiscal years prior to the firm's admission to the Program;

(2) the mentor firm's aggregate prime contract awards during the prior two fiscal years and the total amount of subcontract awards under such contracts; and

(3) such other information the mentor firm may wish to submit.

G. The decision of the Director regarding the imposition of a limitation on credit shall be final.

H. Any prospective limitation on credit imposed by the Director shall be expressed as a percentage of otherwise eligible credit and shall apply beginning on a specific date in the future and continue until a date certain during the current fiscal year.

I. Any retroactive limitation on credit imposed by the Director shall reflect the actual costs incurred for developmental assistance (not exceeding the maximum amount reimbursed.)

J. For purposes of calculating any incentives to be paid to a mentor firm for exceeding a SDB subcontracting goal pursuant to 252.219–7009, incentives shall only be paid of a SDB subcontracting goal has been exceeded as a result of actual subcontract awards to SDBs.

K. Unreimbursed developmental assistance costs that are incurred pursuant to an approved mentor-protege agreement shall not be charged to, or otherwise reimbursed under any other DoD contract, irrespective of whether they have been recognized for credit against SDB subcontracting goals.

L. Developmental assistance provided under an approved mentor-protege agreement is distinct from, and shall not duplicate, any effort that is the normal and expected product of the award and administration of the mentor firm's subcontracts. Costs associated with the latter shall be accumulated and charged in accordance with the contractor's approved accounting practices.

X. Advance Agreements on the Treatment of Development Assistance Costs

Pursuant to FAR 31.109, approved mentor firms seeking reimbursement, credit, or a combination thereof, are encouraged to enter into an advance agreement with the contracting officer responsible for determining final indirect cost rates under FAR 42.705. The purpose of the advance agreement is to establish the accounting treatment of the costs of the development assistance pursuant to the mentor-protege agreement prior to the incurring of any costs by the mentor firm. While not mandatory, an advance agreement is an attempt by both the Government and the mentor firm to avoid possible subsequent dispute based on questions related to reasonableness, allocability, or allowability of the costs of developmental assistance under the Program. Absent an advance agreement, mentor firms are advised to establish the accounting treatment of such costs and address the need for any changes to their cost accounting practices that may result from the implementation of a mentor-protege agreement, prior to incurring any costs, and irrespective of whether costs will be reimbursed, credited or a combination thereof.

XI. Reporting Requirements and Program Reviews

A. Mentor firms shall report on the progress made under active mentor-protege agreements semi-annually, including an attachment to their SF 295 providing:

(1) The number of active mentor-protege agreements in effect; and

(2) The progress in achieving the developmental assistance objectives under each mentor-protege agreement, including whether the objectives of the Program set forth in the DoD policy statement were met, any problem areas encountered, and any other appropriate information.

(3) A copy of the SF 294 for each contract where developmental assistance was credited, with a statement in Block 18 identifying:

(a) The amount of dollars credited to the SDB subcontract goal as a result of developmental assistance provided to protege firms under the Program; and

(b) An explanation as to the relationship between the developmental assistance provided the protege firm(s) under the Program and the activities under the contract covered by the SF 294(s).

(c) The number and dollar value of subcontracts awarded to the protege firm(s).

B. For companies participating in the DoD "Test Program for Negotiation of Comprehensive Small Business Subcontracting Plans", indicate in Block 16 of the SF 295:

(1) The total dollars credited to the SDB goal as a result of developmental assistance provided to a protege firm(s) under the Program.

(2) The total dollar amount of subcontracts awarded to the protege firm(s).

C. OSADBU will conduct an annual performance review of the progress and accomplishments realized under approved mentor-protege agreements.

XII. Definitions

A. *Emerging SDB Concern* means a small disadvantaged business whose size is no greater than 50% of the numerical size standard applicable to the industrial code for the supplies or services which the protege firm provides or would provide to the mentor firm.

B. *Minority Institution of Higher Education* means an institution of higher education with a student body that reflects the composition specified in 312(b) (3), (4) and (5) of the Higher Education Act of 1965 (20 U.S.C. 1058(b)(3), (4) and (5).

Horace J. Crouch,

Director, Small and Disadvantaged Business Utilization.

[FR Doc. 91–18705 Filed 8–8–91; 8:45 am]

BILLING CODE 3801–01–M

DEPARTMENT OF DEFENSE

48 CFR Parts 219, 232, and 252

Acquisition Regulations; Pilot Mentor-Protege Program

AGENCY: Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: The Defense Acquisition Regulations (DAR) Council has revised the Defense Federal Acquisition Regulation Supplement (DFARS) to implement a pilot Mentor-Protege Program, as provided by the National Defense Authorization Act for Fiscal Year 1991. This Program authorizes incentives for DoD contractors which provide developmental assistance to small disadvantaged businesses (SDBs).

EFFECTIVE DATE: October 1, 1991.

FOR FURTHER INFORMATION CONTACT: Mrs. Alyce Sullivan, Defense Acquisition Regulations System, OUSD (A) DP, Pentagon, Washington, DC 20301–3000.

SUPPLEMENTARY INFORMATION:

A. Background

Section 831, Public Law 101–510, enacted November 5, 1990 provides for the establishment of a pilot "Mentor-Protege Program." This Program authorizes incentives for DoD contractors which provide developmental assistance to small disadvantaged businesses (SDBs).

Participation in the Program is voluntary. Prospective mentor firms must apply to and be approved by the Department of Defense's Office of Small and Disadvantaged Business Utilization, OUSD (A) SADBU. Prospective protege firms are selected by mentor firms.

DoD implementation of section 831 is addressed in a DoD policy statement, entitled: "DoD Policy for the Pilot Mentor-Protege Program." The policy statement addresses the Program's purpose, procedures, duration, eligibility requirements, approval process, and Mentor-Protege Agreements. The DFARS revisions in this final rule are based on the DoD policy statement.

B. Regulatory Flexibility Act

This rule was published for public comment on May 2, 1991 (56 FR 20322). The comments that were received were considered in development of the final rule. A Final Regulatory Flexibility Analysis has been prepared and forwarded to the Chief Counsel for Advocacy of the Small Business Administration. Copies of the Regulatory Flexibility Analysis are available upon written request. Please cite DAR Case 90–314 and submit the request to: Defense Acquisition Regulations System, OUSD (A) DP, ATTN: Mrs. Alyce Sullivan, Pentagon, Washington, DC 20301–3000.

C. Paperwork Reduction Act

This rule contains information collection requirements which increase the estimates for the Standard Form 295, Summary Subcontract Report, which is currently approved under OMB Clearance Number 9000–0007. Accordingly, a revised burden estimate has been prepared and forwarded to the Office of Management and Budget (OMB) for clearance.

List of Subjects in 48 CFR Parts 219, 232, and 252

Government procurement.

Claudia L. Naugle,

Executive Editor, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 219, 232, and 252 are amended as follows:

1. The authority citation for 48 CFR parts 219, 232, and 252 continues to read as follows:

Authority: 5 U.S.C. 301, 10 U.S.C. 2202, DoD Directive 5000.35, and FAR subpart 1.3.

PART 219—SMALL BUSINESS AND SMALL DISADVANTAGED BUSINESS CONCERNS

219.708 [Amended]

2. Section 219.708 is amended by adding a third sentence to paragraph (c)(1) (S–70) to read as follows: "Incentives for exceeding SDB subcontracting goals shall be paid only if an SDB subcontracting goal was exceeded as a result of actual subcontract awards to SDBs, and not as a result of developmental assistance credit under the Pilot Mentor-Protege Program (see subpart 219.71)."

3. Subpart 219.71 is added to read as follows:

Subpart 219.71—Pilot Mentor-Protege Program

Sec.

219.7100 Scope.

This subpart implements the Pilot Mentor-Protege Program (the Program), established under section 831 of the National Defense Authorization Act for Fiscal Year 1991, Public Law 101–510, as amended. The purpose of the Program is to provide incentives for DoD contractors to assist small disadvantaged businesses in enhancing their capabilities and to increase participation of such firms in Government and commercial contracts.

219.7101 Policy.

DoD policy for implementation of the Program is contained in a policy statement entitled, "DoD Policy for the Pilot Mentor-Protege Program." This statement addresses the program purpose, general procedures, duration, eligibility requirements, the selection/approval process, the mentor-protege agreement, advance agreements on the treatment of developmental assistance costs, and reporting requirements. A copy of the statement may be obtained from the Office of Small and Disadvantaged Business Utilization, Office of the Under Secretary of Defense for Acquisition, OUSD (A) SADBU, room 2A340, The Pentagon, Washington, DC 20301–3061, (703) 697–1688.

219.7102 General.

The Program consists of:

(a) Mentor firms, which are prime contractors with at least one active subcontracting plan negotiated under FAR subpart 19.7

(b) Protege firms, which are small disadvantaged business (SDB) concerns, eligible for receipt of Federal contracts and selected by the mentor firm.

(c) Mentor-protege agreements which establish a developmental assistance program for a protege firm.

(d) Incentives, which may be provided to mentor firms by the DoD including:

(1) Reimbursement for developmental assistance costs through a modification to an existing cost reimbursement contract to establish a separately priced contract line item;

(2) Credit toward SDB subcontracting goals, established under a subcontracting plan negotiated under FAR subpart 19.7, for developmental assistance costs not reimbursed; or

(3) A combination of reimbursement and credit.

219.7103 Procedures.

219.7103–1 General.

(a) In accordance with the DoD policy statement, a prospective mentor firm shall:

(1) Apply to OUSD(A) SADBU when seeking credit only or when funding is made available from a DoD program manager to implement a mentor-protege agreement; and

(2) Subsequent to approval as a mentor firm, submit a signed mentor-protege agreement to OUSD(A) SADBU for approval before developmental assistance costs may be reimbursed through an existing DoD contract or credited against SDB subcontracting goals.

(b) OUSD(A) SADBU shall have responsibility for:

(1) Approving contractors as mentor firms;

(2) Approving mentor-protege agreements; and

(3) Forwarding the approved mentor-protege agreement to contracting officer(s) when program funding is available through a DoD program manager.

219.7103-2 Contracting officer responsibilities.

Contracting officers shall:

(a) Negotiate an advance agreement on the treatment of developmental assistance costs for credit, reimbursement, or both, if the mentor firm proposes such an agreement, or delegate this authority to the administrative contracting officer (See FAR 31.109).

(b) Modify (without consideration) applicable contract(s) to incorporate the clause at 252.232-7008, Reimbursement of Subcontractor Advance Payments-DoD Pilot Mentor-Protege Program, when advance payments are provided by a mentor firm to a protege firm under the Program and the mentor firm requests reimbursement of advance payments.

(c) Modify (without consideration) applicable contract(s) to incorporate other than customary progress payments for small disadvantaged businesses in accordance with FAR 32.504(c), if such payments are provided by a mentor firm to a protege firm and the mentor firm requests reimbursement.

(d) Modify applicable contract(s) to establish a contract line item for reimbursement of developmental assistance costs when—

(1) Funds have been made available for that purpose by a DoD program manager; and

(2) The contractor has an approved Mentor-Protege Agreement.

(e) Advise contractors of reporting requirements (see 219.7106).

219.7104 Developmental assistance costs eligible for reimbursement or credit under the program

(a) Developmental assistance provided under an approved mentor-protege agreement is distinct from, and shall not duplicate, any effort that is the normal and expected product of the award and administration of the mentor firm's subcontracts. Costs associated with the latter shall be accumulated and charged in accordance with the contractor's approved accounting practices. The following costs incurred by mentor firms are eligible for reimbursement or credit:

(1) Assistance to the protege firm by mentor firm personnel in—

(i) General business management including organizational management;

(ii) Financial management;

(iii) Personnel management;

(iv) Marketing;

(v) Business development and overall business planning;

(vi) Engineering and technical matters such as production, inventory control, and quality assurance;

(vii) Any other assistance designed to develop the capabilities of the protege firm under the developmental program.

(2) Assistance to the protege firm provided by—

(i) Small Business Development Centers established pursuant to section 21 of the Small business Act (15 U.S.C. 648);

(ii) Entities providing technical assistance pursuant to chapter 142 of Title 10 U.S.C.;

(iii) Historically Black Colleges and Universities (HBCUs) as defined by 34 CFR part 608.2; and

(iv) Minority Institutions of Higher Education with a student body as specified in 20 U.S.C. 1058(b) (3), (4), and (5).

(b) No profit may be associated with the reimbursement of developmental assistance costs.

(c) Before incurring any costs under the Program, mentor firms need to establish the accounting treatment of developmental assistance costs eligible for reimbursement or credit. Advance agreements are encouraged. To be eligible for reimbursement under the Program, costs must be incurred before October 1, 1996.

(d) If a mentor firm is suspended or debarred while performing under an approved mentor-protege agreement, the mentor firm may not be reimbursed or credited for developmental assistance costs incurred more than 30 days after the imposition of the suspension or debarment.

(e) Developmental assistance costs incurred before October 1, 1999 by a mentor firm pursuant to an approved mentor-protege agreement, that are not funded either directly or indirectly under any other DoD contract, may be credited towards subcontracting plan goals as follows:

(1) Four times the total amount of developmental assistance costs provided to protege firms by small business development centers, HBCUs, MIs, and entities providing technical assistance (see paragraph (a)(2) of this section);

(2) Three times the total amount of developmental assistance costs incurred by mentor firm personnel (see paragraph (a)(1) (i) through (vi) of this section); or

(3) Two times the total amount of other developmental assistance costs (see paragraph (a)(1)(vii) of this section).

219.7105 Other forms of assistance.

(a) Mentor firm subcontracts with protege firms may contain provisions for progress payments up to 100 percent (see FAR 32.504(c)) or advance payments (see 232.412(S-72)). However, DoD will reimburse the mentor firm for advance payments only when such payments have been provided under subcontract terms and conditions similar to FAR 52.232-12, Advance Payments.

(b) In accordance with paragraph (f) of section 831 of Public Law 101-510, mentor firms may award subcontracts to protege firms on a non-competitive basis under DoD or other contracts.

219.7106 Reporting.

(a) Mentor firms shall report on the progress made under active mentor-protege agreements semi-annually by including with their SF 295, Summary Subcontract Report:

(1) An attachment which identifies—

(i) The number of active mentor-protege agreements in effect; and

(ii) The progress in achieving the developmental assistance objectives under each mentor-protege agreement, including whether the objectives of the Program set forth in the DoD policy statement were met, and problem areas encountered, and any other appropriate information; and

(2) A copy of the SF 294, Subcontracting Report for Individual Contracts, for each contract where developmental assistance was credited, with a statement in Block 18 of the SF 294 identifying:

(i) The amount of dollars credited to the SDB subcontract goal as a result of developmental assistance provided to protege firms under the Program;

(ii) An explanation as to the relationship between the developmental assistance provided the protege firm(s) under the Program and the activities under the contract covered by the SF 294(s); and

(iii) The number and dollar value of subcontracts awarded to the protege firm(s).

(b) Mentor firms, which are also participants in DoD's comprehensive subcontracting plan test program (see 219.702(a)), shall indicate in Block 16 of the SF 295, Summary Subcontract Report:

(1) The total dollars credited to the SDB goal as a result of developmental assistance provided a protege firm(s) under the Program; and

(2) The total dollar amount of subcontracts awarded to the protege firm(s).

(c) OUSD(A) SADBU will conduct an annual performance review of the progress and accomplishments realized under approved mentor-protege agreements.

PART 232—CONTRACT FINANCING

4. Section 232.412 is amended by adding paragraph (S–72) to read as follows:

232.412 Contract Clause.

* * * * *

(S–72) In the event that advance payments are provided by a prime contractor to a subcontractor pursuant to an approved Mentor-Protege Agreement (see subpart 219.71) and the prime contractor requests reimbursement of advance payments, use the clause at 252.232–7008, Reimbursement of Subcontractor Advance Payments—DoD Pilot Mentor-Protege Program.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

5. Section 252.232–7008 is added to read as follows:

252.232–7008 Reimbursement of Subcontractor Advance Payments—DoD Pilot Mentor-Protege Program.

As prescribed in 232.412(S–72), use the following clause:

Reimbursement of Subcontractor Advance Payments—DOD Pilot Mentor-Protege Program (Oct 1991)

(a) The Government will reimburse the Contractor for any advance payments made by the Contractor, as a mentor firm, to a small disadvantaged business, as a protege firm, pursuant to an approved mentor-protege agreement, provided that:

(1) The Contractor's subcontract with the protege firm includes a provision substantially the same as FAR 52.232–12, Advance Payments;

(2) The Contractor has administered the advance payments in accordance with the policies of FAR Subpart 32.4; and

(3) The Contractor agrees that any financial loss resulting from the failure or inability of the protege firm to repay any unliquidated advance payments is the sole financial responsibility of the Contractor.

(b) For a fixed price type contract, advance payments made to a protege firm shall be paid and administered as if they were 100 percent progress payments. The Contractor shall include as a separate attachment with each Standard Form (SF) 1195, Request for Progress Payments, a request for reimbursement of advance payments made to a protege firm. The attachment shall provide a separate calculation of lines 14a through 14e of SF 1195 for each protege, reflecting the status of advance payments made to that protege.

(c) For cost reimbursable contracts, reimbursement of advance payments shall be made via public voucher. The Contractor shall show the amounts of advance payments made to each protege on the public voucher, in the form and detail directed by the cognizant contracting officer or contract auditor.

[End of clause]

[FR Doc. 91–18706 Filed 8–8–91; 8:45 am]

BILLING CODE 3810–01–M

federal register

Friday
August 9, 1991

Part IV

Federal Deposit Insurance Corporation

12 CFR Part 308

Uniform Rules of Practice and Procedure; Final Rule

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 308

RIN 3064-AA64

Uniform Rules of Practice and Procedure

AGENCY: Federal Deposit Insurance Corporation.

ACTION: Final rule.

SUMMARY: Section 916 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), Public Law No. 101-73, 103 Stat. 183 (1989), requires that the Office of the Comptroller of the Currency ("OCC"), Board of Governors of the Federal Reserve System ("Board of Governors"), Federal Deposit Insurance Corporation ("FDIC"), Office of Thrift Supervision ("OTS"), and the National Credit Union Administration ("NCUA") (collectively, the "Agencies") develop a set of uniform rules of practice and procedures for administrative hearings ("Uniform Rules"). Section 916 further requires that the agencies promulgate provisions for summary judgment rulings where there are no disputes as to the material facts of a case.

In compliance with the mandate of section 916, this final rule makes uniform those rules concerning formal enforcement actions common to at least four of the listed Agencies. In addition to these Uniform Rules, the FDIC and each of the other listed Agencies is adopting complementary "Local Rules" to supplement the Uniform Rules in order to address some or all of the following: Formal enforcement actions not within the scope of the Uniform Rules, informal actions which are not subject to the Administrative Procedure Act ("APA"), and procedures to supplement or facilitate the processing of administrative enforcement actions within the FDIC and the other Agencies. This final rule is intended to standardize procedures for formal administrative actions and to facilitate administrative practice before the Agencies.

EFFECTIVE DATE: August 9, 1991.

FOR FURTHER INFORMATION CONTACT: Nancy L. Alper, Counsel, Compliance and Enforcement Section, telephone 202/898-3720, Federal Deposit Insurance Corporation, 550 17th Street NW., Washington, DC 20429.

SUPPLEMENTARY INFORMATION:

I. Background

Section 916 of FIRREA requires that the FDIC, OCC, Board of Governors, OTS and NCUA develop a set of uniform rules and procedures for administrative hearings. By including this provision in FIRREA, Congress intended that the listed Agencies, by promulgating uniform procedures, would improve and expedite their administrative proceedings. The statutory provision is a reflection of "recent recommendations of the Administrative Conference of the United States and the House Government Operations Committee." H.R. Rep. No. 54, 101st Cong., 1st Sess., pt.1, at 396. The Administrative Conference of the United States found in its December 30, 1987 recommendation that "[g]iven the similar statutory bases for these enforcement actions, the five agencies jointly should be able to develop substantially similar rules of procedure and practice for formal enforcement proceedings." 1 CFR 305.87-12.

To comply with the requirements of section 916, the FDIC and the other Agencies issued for public notice and comment a Joint Notice of Proposed Rulemaking on June 17, 1991 (56 FR 27790). The proposed rules contained one set of Uniform Rules applicable to the Agencies and separate Local Rules applicable to each agency.

The FDIC has received comments on the joint proposed rule and is now issuing a final rule. This final rule is intended to standardize procedures for formal administrative actions common to at least four of the five Agencies and to facilitate administrative practice before the Agencies.

II. Comments and Discussion

A. Comment Summary

In response to the June 17, 1991, joint notice of proposed rulemaking, the FDIC and the other Agencies received three comment letters on its June 17, 1991 proposed rule. The Agencies have reviewed jointly the portions of the comments concerning the Uniform Rules. Overall, while the comments raised certain questions and objections, given the magnitude of the regulation the comments were focused narrowly. One comment commended the Agencies for meeting the mandate of section 916 of FIRREA and creating a set of uniform rules of practice and procedures. The specific questions and objections are discussed below.

B. Discussion of Comments and Agency Responses

1. Uniform Rules

(a) One commenter criticized the proposed rule for failing to accommodate default situations where good cause could be shown for the failure to file an answer. This comment reflects a misunderstanding of the proposed Uniform Rules, which address such situations by allowing an administrative law judge to extend time limits for good cause (§ 308.13), and by requiring that defaults be entered only upon a motion for default filed by Enforcement Counsel (§ 308.19), thereby permitting respondents an opportunity to oppose such a motion. To alleviate confusion, the wording of the final default rule has been modified to make this process more explicit.

(b) Another issue raised by one of the commenters concerns the apparent differences in procedures for formal investigations, rules of practice before the Agencies, and rules concerning the Equal Access to Justice Act. Additionally, this commenter proposed that rules should be drafted governing informal enforcement mechanisms, such as memoranda of understanding, "fifteen-day letter" procedures for initiation of civil money penalties, commitment letters and other informal procedures. Finally, the commenter made a suggestion that the Agencies consider other rules to promote uniformity such as the publication of all enforcement decisions of the Agencies in a loose-leaf service or on-line computer service.

The differences in the various informal or non-APA procedures are based upon the scope of section 916. The purpose behind section 916 of FIRREA was the improvement and expedition of formal administrative proceedings to be conducted pursuant to the Administrative Procedure Act. As was stated in the Report of the House of Representatives, this statutory provision is a reflection of "recent recommendations of the Administrative Conference of the United States and the House Government Operations Committee." H.R. Rep. No. 54, 101st Cong., 1st Sess., pt. 1, at 396. The Administrative Conference of the United States found in its December 30, 1987 recommendation that "[g]iven the similar statutory bases for these enforcement actions, the five agencies jointly should be able to develop substantially similar rules of procedure and practice for *formal enforcement proceedings*." (Emphasis supplied.) 1 CFR 305.87-12. Thus, the inclusion of non-APA proceedings would exceed the statutory mandate of section 916 and would present practical implementation problems as well.

For example, the Uniform Rules do not contain provisions for formal investigations. This is because they are not APA proceedings. In addition, the statutory authority for formal

investigations arises in several statutes, not just the Federal Deposit Insurance Act, and the Agencies have differing policies concerning the frequency, length, and procedures for formal investigations. This diversity in statutory authority is reflected in the independent and separate procedures of each agency.

Similarly, the Uniform Rules do not contain provisions addressing the Equal Access to Justice Act. Again, the diversity of agency structure is a determining factor here. Both the OCC and the OTS are bureaus of the U.S. Department of Treasury. As such, they are subject to Treasury's Equal Access to Justice Act regulatory provisions found at 31 CFR part 6.

With respect to the publication of enforcement orders, the Agencies have already addressed this concern. Pursuant to section 8(u) of the Federal Deposit Insurance Act, 12 U.S.C. 1818(u), each of the Agencies has procedures implementing this statutory directive and most, if not all, enforcement decisions may be found by consulting the Public Reading Rooms or libraries of each Agency. In addition, each of the Agencies frequently issues press releases concerning recent cases.

(c) An issue was raised by two of the commenters concerning the different positions taken by the Agencies on discovery depositions. The commenters stated that use of discovery depositions would encourage settlements and would result in the increased use of summary judgment by establishing the absence of disputes as to material facts.

The scope of discovery which would be permitted in the Uniform Rules was considered at length. It was determined that broad document discovery would be permitted generally; however, it was recognized that there is no constitutional right to prehearing discovery, including deposition discovery, in Federal administrative proceedings. See, *Sims* v. *National Transportation Safety Board*, 662 F.2nd 668, 671 (10th Cir. 1981); *P.S.C. Resources, Inc.* v. *N.L.R.B.*, 576 F.2nd 380, 386 (1st Cir. 1978); *Silverman* v. *Commodity Futures Trading Comm.*, 549 F.2nd 28, 33 (7th Cir. 1977). Further, the Administrative Procedure Act contains no provisions for prehearing discovery, and the discovery provisions of the Federal Rules of Civil Procedure are inapplicable to administrative proceedings. *Frillette* v. *Kimberlin*, 508 F.2nd 205 (3rd Cir. 1974,) *cert. denied*. 421 U.S. 980 (1975). Rather, each agency determines the extent of discovery to which a party in an administrative hearing is entitled. *McClelland* v. *Andrus*, 606 F.2nd 1278, 1285 (DC Cir. 1979).

The Agencies attempted to strike a balance between the due process interests of respondents in obtaining pretrial disclosure, including discovery depositions, and the Agencies' need for swift adjudication while preserving limited resources. This process included taking into account the various interests and concerns of both the industry and public constituencies which each Agency serves, as well as each Agency's own institutional interests and concerns. The contrasting interests and concerns are reflected in the types, complexity and quantity of enforcement actions brought by each Agency; the methods of litigation and opportunity for settlement in such actions; the structure and available resources of each regulator; and the supervisory procedures developed internally by each Agency. This process resulted in divergent provisions on the use of discovery depositions.

Thus, the experiences of the OCC, the Board of Governors and the OTS resulted in a finding that discovery depositions served a useful purpose by promoting fact finding and encouraging settlements. Because of the increasing complexity of enforcement actions, where there were typically multiple counts and multiple parties and where several types of enforcement actions were combined into one, it was found that discovery depositions could be useful in aiding both respondents and the regulator in resolving cases expeditiously. Discovery depositions for the OCC, Board of Governors and the OTS, however, are limited to witnesses that have factual, direct and personal knowledge of the matters at issue and expert witnesses. The FDIC and the NCUA determined that the interests of respondents in further pretrial disclosure in their respective proceedings were mitigated by the availability of extensive document discovery that complements the document intensive nature of their proceedings.

(d) A commenter suggested that the definition of "decisional employee" in proposed rule § 308.3(3) be expanded to preclude from service in a decisional capacity any employee of the Agencies who had served within the previous twelve months on the enforcement staff of any of the Agencies. The commenter stated that this expansion would protect against bias or conflict of interest.

This suggested amendment is not adopted because the final rules incorporate the formulation of the Administrative Procedure Act. The APA forbids an employee from acting in a decisional capacity in a specific case where the employee has acted in an investigative or prosecutorial function in that same case or in a factually related case. 5 U.S.C. 554(d). Accordingly, Congress already has drawn the line defining conflicts of interest in this context, and the Agencies find no basis for modification.

(e) A recommendation was made that § 308.18(b) should be modified to require that an agency set forth in a notice not only those facts showing that an agency is entitled to relief of some kind but also those facts required for the particular relief requested.

With respect to the comment concerning the amount of particularity with which a notice should be pleaded, the Agencies believe that § 308.18(b) meets those standards for notice pleading set forth in Rule 8 of the Federal Rules of Civil Procedure. The Agencies have determined that this is sufficient pleading for administrative proceedings. See *First National Monetary Corporation* v. *Weinberger*, 819 F.2d 1334, 1339 (6th Cir. 1987); *Boise Cascade Corporation* v. *Federal Trade Commission*, 498 F.Supp. 772, 780 (D.Del.1980).

(f) One commenter suggested that the proposed rules regarding severance of proceedings are unduly stringent in light of the severity of sanctions at stake. The commenter argued that any inconsistency or conflict in the positions of respondents should warrant severance without the necessity of weighing any countervailing interests. The commenter further argued that concerns regarding administrative economy are not entitled to weight in light of the small number of cases that have been adjudicated by the Agencies in the past.

This suggestion was not adopted. A similar weighing test for severance is applied by federal courts in criminal cases, *see, e.g., Roach* v. *National Transportation Safety Board*, 804 F 2d 1147, 1151 (10th Cir. 1986), *cert. denied*, 496 U.S. 1006 (1988), demonstrating that the weighing test appropriately may be applied in cases involving substantial sanctions and penalties. In addition, the general interest in economy and efficiency in resolving an administrative adjudication exists independently of the total volume of adjudications at any particular time.

(g) Uniform Rules § 308.24(c) provides that privileged documents are not discoverable. One commenter objected to the right of Enforcement Counsel to assert the deliberative process privilege on the grounds that, in some instances, it is subject to abuse by Enforcement Counsel seeking to prevent disclosure of relevant and probative material. The

commenter suggested, instead, that all material for which the deliberative process privilege is claimed should be produced pursuant to a protective order barring public disclosure, and that Uniform Rule 308.24 should provide for in camera inspection of disputed privileged material by the administrative law judge.

The Agencies have concluded that Enforcement Counsel should retain the right to assert the deliberative process privilege at the outset. Ample means to challenge an improper assertion of privilege already are available to respondents without § 308.24. Section 308.25(e) provides that all documents withheld from production on grounds of privilege must be reasonably identified and must be accompanied by a statement of the basis for the assertion of privilege. In the event that a respondent believes that grounds exist to challenge Enforcement Counsel's assertion of the deliberative process privilege, respondent would be able to utilize the identifying information and statement to challenge the assertion of the privilege before the administrative law judge. Confronted with such a challenge, an administrative law judge would need no further specific authority by rule to inquire of Enforcement Counsel as to the basis of the assertion of the privilege, to conduct an inspection of the assertedly privileged material in camera, and to then rule whether the privilege can be maintained.

(h) One commenter suggested that the determination to seal a document pursuant to § 308.33(b) should be subject to review by an administrative law judge under an abuse of discretion standard. It also was proposed that a respondent should be able to request that certain information such as confidential personal information be filed under seal.

The Uniform Rules accommodate the latter concern of the commenter by permitting a respondent to file a motion to seal a document containing confidential personal information. However, the statutory language of 12 U.S.C. 1818(u)(6) vests the Agencies with exclusive authority to seal all or a part of a document if disclosure would be contrary to the public interest. Thus, the Agencies disagree with the commenter that this determination should be subject to review by the administrative law judge.

(i) One commenter suggested the deletion of § 308.36(c)(2), which provides that any document prepared by a Federal financial institutions regulatory agency or by a state regulatory agency is admissible with or without a sponsoring witness. The commenter argued that the provision violates normal evidentiary standards and raises due process concerns.

The Agencies disagree with the commenter. The first sentence of § 308.36(c)(2) cross-references § 308.36(a), which makes agency prepared documents subject to the same evidentiary standards as those that are applicable to non-agency prepared documents. Moreover, the same types of agency prepared documents tend to be introduced into evidence in every case. These documents, such as examination reports, rarely give rise to authentication issues, and the Agencies feel that requiring a sponsoring witness for such documents needlessly consumes judicial resources and impedes the hearing process.

(j) One commenter stated that, under § 308.39(b)(2), a party should be able to raise a new legal argument in the exceptions filed to the administrative law judge's recommended decision and that the Agency Head should not be precluded from considering such an argument.

The Agencies agree with the commenter that the Agency Head should have the discretion to determine whether a new argument that is raised for the first time in the exceptions should be considered, even if the party had a prior opportunity to make the argument. For example, the Agency Head should have the discretion to consider whether a new argument has important legal and policy implications which warrant its consideration. Accordingly, the language of § 308.39(b)(2) is amended to read that "No exception *need* be considered * * *." (Emphasis added.)

The Agencies do not agree with the commenter that the Agency Head should, in effect, be required to consider new arguments raised for the first time in the exceptions. Such a provision could encourage careless or even deceptive pleading. Generally, a party should be permitted to submit a new argument only if there was no previous opportunity to present the argument, *e.g.*, a relevant court decision has been issued in the interim since the filing of the recommended decision.

2. Local Rules

(a) One commenter objected to the FDIC's having informal hearings in three types of proceedings—change-in-control applications filed pursuant to 12 U.S.C. 1817(j), section 32 notifications filed pursuant to 12 U.S.C. 1831i, and section 19 applications filed pursuant to 12 U.S.C. 1829—and also objected to the allocation of the burden of proof to the applicants.

Proceedings such as these involve various types of applications. [With respect to change-in-control applications it should be noted that the commenter was not correct in referring to the hearing provided in this type of action as informal. Hearings in change-in-control proceedings are formal APA hearings. See 12 U.S.C. 1817(j)(4).] Section 556(d) of the APA (5 U.S.C. 556(d)), states "Except as otherwise provided by statute, the proponent of the rule or order has the burden of proof." Courts have interpreted this section as imposing the burden of proof in licensing or applications cases upon the applicant. *See Savage* v. *Commodity Futures Trading Commission*, 548 F.2d 192 (7th Cir. 1977). The FDIC has adopted this position in *In the Matter of Peder D. Sletteland*, 2 P–H FDIC Enf. Dec. & Ord. ¶ 5152, at p. A–1518. Accordingly, the FDIC has determined that in these proceedings the applicant shall bear the ultimate burden of persuasion while the FDIC has the burden of going forward with a *prima facie* case.

(b) One commenter filed his comment with the FDIC after the comment period had closed. The comment raised the issue of discovery depositions and the FDIC's position on the matter. As stated above, the FDIC has experiences that differ from those of the OCC, the Board of Governors and the OTS. The FDIC's proceedings are document intensive and rely heavily upon detailed Reports of Examination which are available through document discovery. The basis of an FDIC enforcement action is thoroughly revealed during the examination process at meetings and in correspondence with an institution's board of directors. Accordingly, the FDIC concluded that the Uniform Rules accord adequate due process to respondents in the form of pretrial submissions, document discovery, the exchange of proposed trial exhibits, proposed stipulations, and witness lists, including a summary of the expected testimony of each witness.

C. Additional Modifications to the Uniform Rules and the Local Rules

In conjunction with the other Agencies, the FDIC is amending the Uniform Rules to replace generic definitional terms with terms specifically applicable to the FDIC and its operations. Thus, the FDIC is replacing the terms "Agency Head" and "Agency" with "Board of Directors" or "Board" and "FDIC", respectively, and is restricting the "scope" provisions of § 308.01 to those statutes subject to FDIC jurisdiction. Further conforming

changes have been made to the definitions of Local Rules, Uniform Rules, and Office of Financial Institution Adjudication ("OFIA"). Thus, the FDIC has moved the definitional provisions set forth in § 308.100 of the Local Rules to § 308.03, the definition section of the Uniform Rules. The other Agencies have made similar changes. The purpose of these changes is to make the Uniform Rules easier to understand and use. These changes do not affect the substance of the Uniform Rules.

The FDIC is making various other technical and conforming changes to the Uniform and Local Rules to improve the clarity and consistency of the rules, as well as to make amendments to conform to the recent decision handed down by the United States Court of Appeals for the Fifth Circuit, *Amberg* v. *FDIC*, 934 F.2d 681 (5th Cir. 1991). Thus, to ensure consistency of administration, those sections which provide for a waiver of a hearing if an applicant fails to file an answer or request a hearing have been amended to provide the same procedures as in § 308.19(c) of the Uniform Rules. The FDIC believes that these changes adequately address those issues raised in *Amberg*.

III. Rationale for Expedited Publication

The Board of Directors is adopting this regulation effective upon publication in the Federal Register, without the usual 30-day delay of effectiveness provided for in the APA, 5 U.S.C. 553. While the APA requires publication of a substantive regulation not less than 30 days before its effective date, the delayed effective date requirement may be waived for "good cause."

Good cause for the waiver of the 30-day requirement may be found if the delayed effective date is "impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. 553(b)(B). See *Central Lincoln Peoples' Utility Dist.* v. *Johnson*, 735 F.2d 1101, 1117 (9th Cir. 1984). The necessity for compliance with a statutorily prescribed time limit can also contribute to a finding of good cause. See *Philadelphia Citizens in Action* v. *Schweiker*, 669 F.2d 877, 881–888 (3rd Cir. 1982). In the present case, the implementation of a delayed effective date would impair the ability of the Agencies to comply with the statutory mandate in section 916 of FIRREA and would be impracticable and contrary to the public interest.

Section 916 of FIRREA contains a dual mandate from Congress to the five Agencies to (1) establish their own pool of administrative law judges and (2) develop Uniform Rules and procedures for administrative hearings "[b]efore the close of the 24-month period beginning on the date of the enactment of this Act [August 9, 1989]." In order to properly address these two requirements, the Uniform Rules and the administrative law judge pool should be implemented in a coordinated and harmonious fashion. If the pool is established prior to the rules, the administrative law judges may be required to adjudicate some cases under prior regulations before the Uniform Rules are effective. The result would be confusion for parties and a lack of uniformity in adjudication directly contrary to the purpose of section 916. It would, therefore, be impracticable and contrary to the public interest to delay the effective date for implementation of the Uniform Rules.

IV. Applicability of Revised Rules to Enforcement Proceedings

Part 308, as revised by this final rule, applies to any proceeding that is commenced by the issuance of a notice on or after August 9, 1991. The former version of Part 308 applies to any proceeding commenced prior to August 9, 1991 unless, with the consent of the administrative law judge or the Board of Directors, the parties agree to have the proceeding governed by revised part 308.

V. Section-by-Section Summary and Discussion

Subpart A—Uniform Rules of Practice and Procedure

This subpart sets forth rules of practice and procedure governing formal administrative actions, including rules on commencing enforcement proceedings, filing and service of papers, motions, discovery, depositions, prehearing conferences, public hearings, hearing subpoenas, conflict of interest, ex parte communication, rules of evidence, and post-hearing procedures.

Subpart B—General Rules of Procedure

As stated above, in amending the Uniform Rules to replace generic definitional terms with terms specifically applicable to the FDIC and its operations, the FDIC has deleted § 308.100 which contained definitions and moved the definitions to § 308.03 of the Uniform Rules.

Section 308.101, "Scope of Local Rules," makes clear that the rules contained in subpart A, "Uniform Rules", and subpart B, "General Rules of Procedure", of part 308 do not apply to subparts D through P of part 308 unless specifically provided. Subpart C, "Rules of Practice Before the FDIC and Standards of Conduct" shall apply to any proceeding initiated by the FDIC under part 308.

Section 308.102, "Authority of Board of Directors and Executive Secretary", makes explicit that the Board may perform, direct the performance of, or waive the performance of any act which could be done or ordered by the Executive Secretary. This is in addition to the power to do such with regard to any act that could be performed by the administrative law judge. The rule provides that the Executive Secretary shall have the ability to act in place of the administrative law judge but may not hear a case on the merits or make a recommended decision.

Section 308.103, "Appointment of administrative law judge", contains the procedures by which the appointment of an administrative law judge will be accomplished. It provides that all hearings within the scope of part 308 shall be held before an administrative law judge of OFIA unless the Board directs otherwise, or unless the Local Rules specifically provide to the contrary. The Executive Secretary shall immediately upon the issuance of a Notice, refer a proceeding to OFIA for the appointment of the administrative law judge. OFIA shall then advise the parties when a judge has been appointed. This differs from current practice insofar as an administrative law judge is not now appointed until after a respondent requests a hearing or files an answer. It also reflects the establishment of OFIA as the appointing body rather than the Executive Secretary.

Sections 308.104 and 308.105 address housekeeping matters concerning maintenance of the record and the filing of papers. Section 308.104, "Filing with the Board of Directors", makes clear that any papers required to be filed with the Board should be filed with the Executive Secretary at the stated address. Such filings include the record in the case which is to be filed with the Executive Secretary following the issuance of a recommended decision; the recommended decision filed by the administrative law judge after a motion for summary disposition; referrals by the administrative law judge to the Board for interlocutory review; motions filed by the parties after the record has been certified to the Board; exceptions and requests for oral argument; and any other papers required to be filed with the Board under part 308. This reflects the approach stated in § 308.105, that the Executive Secretary will be the official custodian of the record in a case, except when the administrative law judge has jurisdiction over the case.

Section 308.105, "Custodian of the record", makes clear that the Executive Secretary is the official custodian of the record at all times during which the administrative law judge does not have jurisdiction in the case.

Section 308.106, "Written testimony in lieu of oral hearing", preserves current practice at the FDIC, which authorizes hearings in which most, or all, of the direct testimony is presented in written form. Absent objection by a party, the administrative law judge may order that the parties present their cases in chief and rebuttal in the form of exhibits and written statements sworn to by the witness offering the evidence. Any such order shall also allow any party to call adverse witnesses or parties to testify orally, and shall provide for a right to cross examination. Written testimony on direct, exhibits, and rebuttal are to be simultaneously submitted by the parties. The failure of any party to submit written testimony pursuant to such an order is deemed to be a waiver of that party's right to present evidence, except the testimony of a previously identified hostile witness or adverse party. A party's failure to present rebuttal evidence in written form, if not so specifically ordered, is not waived by that party's failure to file written testimony. Late filings may be allowed and accepted only for good cause shown.

Section 308.107, "Document discovery", provides that unless expressly provided in specific subparts, discovery may be had only through the production of documents, and no other form of discovery shall be allowed. Questioning of persons providing documents pursuant to a subpoena shall be limited to the identification of such documents and a reasonable examination as to whether such person conducted an adequate search for and produced all subpoenaed documents. This is the current practice of the FDIC.

Subpart C—Rules of Practice Before the FDIC and Standards of Conduct

Section 308.108, "Sanctions," is included in revised subpart C to make clear that administrative law judges and the Board of Directors have authority to effectively deal with the significant problem of parties and their counsel failing to comply with the requirements of part 308 and/or with orders. Under § 308.108(a), sanctions may be imposed when any counsel or party has acted in a manner contrary to any applicable statute, regulation, or order, and the party's or counsel's conduct is contemptuous or has materially injured or prejudiced some other party.

Sanctions imposed in accordance with § 308.108(b) may include one or more of the following: (1) Issuing an order against the party; (2) striking any testimony, rejecting any documentary evidence offered, or striking papers filed by the party; (3) precluding the party from contesting specific issues; (4) precluding the party from challenging certain evidence offered by another party; (5) refusing a late filing or conditioning acceptance of a late filing on any terms that are just; and (6) assessing reasonable expenses, including attorney's fees, incurred by the other party as a result of the offending party's improper action or inaction.

Under § 308.108(c), dismissal of an action as a sanction for the failure to hold a hearing within the time period specified in part 308 or based upon the failure of an administrative law judge to render a recommended decision within the time period specified in part 308 may only be granted if the delay is solely the result of the conduct of the FDIC enforcement counsel, that conduct is unexcused, the moving respondent took all reasonable steps to oppose and prevent the delay, the respondent has been materially prejudiced or injured, and no lesser or different sanction is adequate.

Paragraph (d) of § 308.108 sets out the general procedure for the imposition of sanctions. The administrative law judge may impose sanctions on his or her own motion or at the request of any party. Prior to their imposition, all sanctions, except the refusal to accept late papers, require notice to the parties and opportunity for counsel or the party against whom sanctions would be imposed to be heard. The form that the opportunity to be heard shall take is largely left to the discretion of the administrative law judge. For example, the opportunity to be heard may be limited to an oral response immediately after the violative action or inaction is noted by the administrative law judge. Requests for, and the imposition of, sanctions are to be treated for interlocutory review purposes in the same manner as any other ruling by the administrative law judge, i.e., in accordance with § 308.28 of the Uniform Rules.

Section 308.109, "Suspension and disbarment," authorizes summary suspension from practice in a particular FDIC matter based upon contemptuous conduct in that matter. Section 308.109 of the proposed regulations provides for mandatory and automatic suspension and disbarment of attorneys under certain circumstances and gives the Board of Directors discretion to suspend and disbar under other circumstances.

Under § 308.109(a), the Board of Directors has the power to suspend or revoke an attorney's privilege of practicing before the FDIC based not only on a finding by the Board of Directors that the attorney engaged in contemptuous conduct before the agency, but also upon a finding that the attorney does not possess the requisite qualifications to represent others, is seriously lacking in integrity or has engaged in material unethical or improper professional conduct, or has engaged in or aided another in engaging in a material and knowing violation of the Federal Deposit Insurance Act ("FDIA"). The Board may suspend or revoke the privilege to practice before the FDIC on these grounds only after notice of and opportunity for a hearing.

Once suspended or disbarred from practice before the FDIC by the Board pursuant to § 308.109(a), a counsel may not make an application for reinstatement for at least one year, and thereafter, may make a new request for reinstatement no sooner than one year after the counsel's most recent reinstatement application. A counsel may be reinstated by the Board for good cause shown.

Under § 308.109(b) a party's counsel is automatically suspended or disbarred if he or she is suspended or disbarred by any court of the United States or by the OCC, the Board of Governors, the OTS, the Securities and Exchange Commission, or the Commodity Futures Trading Commission. A person who has within the past ten years been convicted of a felony, or of a misdemeanor involving moral turpitude, is also automatically suspended from practicing before the FDIC.

Reinstatement after a suspension or disbarment under § 308.109(b) may be made by the Executive Secretary if all grounds for suspension are subsequently removed by a reversal of the conviction or termination of the underlying suspension or disbarment. An application for reinstatement under § 308.109(b) on any other grounds may be filed at any time not less than one year after the applicant's most recent application. Until the Board has reinstated the applicant for good cause shown, the suspension shall continue.

An applicant for reinstatement under either the discretionary or mandatory suspension and disbarment provisions may, in the Board's sole discretion, be afforded a hearing. Hearings conducted

pursuant to this section shall be handled in the same manner as other hearings under this subpart C, except that in proceedings to terminate an existing FDIC suspension or disbarment order, the person seeking the termination shall bear the burden of going forward with the application and with proof, and provided that the Board of Directors may limit any such hearings to written submissions.

Finally, § 308.109(d) of the proposed regulations provides that any counsel found in contempt by the administrative law judge may be summarily suspended from participation in that proceeding.

Preamble to Subparts D–P

Subparts D–P contain rules and procedures that govern specific types of formal and informal proceedings conducted by the FDIC. Generally, revisions made to these subparts are either clarifying in nature, were made to bring the rules into compliance with the statutory provisions of FIRREA or the Comprehensive Thrift and Bank Fraud Prosecution and Taxpayer Recovery Act of 1990 ("Crime Bill"), Public Law 101–647, 104 Stat. 4789 (1990), or were made to conform the subparts to, or avoid overlaps with, the Uniform Rules.

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

Subpart D governs proceedings in connection with the disapproval of a proposed acquisition of control of an insured nonmember bank. Various changes to subpart D were made to make this subpart consistent with the Uniform Rules. A new section, § 308.114, was added to this subpart on procedures relating to disapproval of acquisition of control. That section provides that the person proposing to acquire control of an insured depository institution shall bear the ultimate burden of persuasion and that the FDIC has the burden of going forward with a *prima facie* case. This accords with section 556(d) of the APA (5 U.S.C. 556(d)), which states "Except as otherwise provided by statute, the proponent of the rule or order has the burden of proof." Courts have interpreted this section as imposing the burden of proof in licensing or applications cases upon the applicant. *See Savage* v. *Commodities Futures Trading Commission*, 548 F.2d 192 (7th Cir. 1977). The FDIC has adopted this position in *In the Matter of Peder D. Sletteland*, 2 P–H FDIC Enf. Dec. & Ord. ¶ 5152, at p. A–1518.

Subpart E—Rules and Procedures Applicable to Proceedings Relating to Assessments of Civil Penalties for Willful Violations of the Change in Bank Control Act

Subpart E governs proceedings relating to assessments of civil penalties for willful violations of the Change in Bank Control Act. This subpart has been revised in order to comply with the changes to these provisions made by FIRREA and to make this subpart consistent with the Uniform Rules.

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

Subpart F governs proceedings for the involuntary termination of insured status. This type of action is to be conducted according to the Uniform Rules. Similar to the preceding subparts, this subpart has been changed to make the provisions conform with the changes to the FDIA made by FIRREA. This includes changing the time frames to correspond with those of FIRREA, substituting the term, "insured depository institution," for that of "insured bank" and describing the notification to primary regulator and the notice of intent to terminate insured status.

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

Subpart G governs proceedings relating to cease-and-desist orders. The changes in subpart G were made for purposes of clarity and to make changes to the provisions as mandated by the amendments to the FDIA made by FIRREA.

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

Subpart H governs proceedings relating to assessment and collections of civil money penalties for the violation of cease-and-desist orders and of certain Federal statutes. Several sections of old subpart H have been deleted as being redundant with provisions of the Uniform Rules, and other provisions, including those concerning call report penalties, have been added to reflect the changes made by FIRREA.

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

Subpart I governs procedures for the imposition of sanctions upon municipal securities dealers or persons associated with them and clearing agencies or transfer agents. There have been minor modifications made in this subpart in order to make the provisions herein consistent with the Uniform Rules.

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

Subpart J governs exemption proceedings under section 12(h) of the Securities Exchange Act. Like subpart I, there have been minor structural changes in order to make these provisions consistent with the Uniform Rules.

Subpart K—Procedures Applicable to Investigations Pursuant to Section 10(c) of the FDIA

Subpart K governs procedures applicable to investigations pursuant to section 10(c) of the FDIA. The provisions are designed to spell out the scope of the FDIC's authority under section 10(c) of the FDIA to conduct investigations of both open and failed insured banks, institutions making applications to become insured banks, and any other types of investigations. The provisions make specific certain of the procedures to be used during such investigations.

Section 308.144, "Scope," indicates that the FDIC's investigatory power under section 10(c) of the FDIA extends to both open and failed insured banks.

Section 308.145, "Conduct of investigation," has been modified to state that persons authorized to issue orders of investigation are set forth in part 303. The order of investigation indicates the purpose of the investigation and that the persons who authorized the investigation terminate it upon completion.

Section 308.146, "Powers of person conducting investigation," spells out the Board's authority to summarily suspend for contemptuous conduct any counsel representing a witness during the investigation. This section also has made explicit that the person conducting the investigation may obtain assistance from others both within and outside the FDIC.

Section 308.148, "Rights of witnesses," spells out that a witness is to be furnished with a copy of the order of investigation if the witness so requests.

Subpart L—Procedures and Standards Applicable to a Notice of Change in Senior Executive Officer or Director Pursuant to Section 32 of the FDIA

Subpart L governs proceedings for the disapproval of candidates for senior executive officer and director.

Modifications in this subpart include re-designating the appeal procedures in §§ 308.153 and 308.154 and labeling them "request for review," as well as making these provisions consistent with the Uniform Rules. Under § 308.155, an applicant is given an opportunity for an oral hearing. The hearing is conceived as an informal proceeding where a presiding officer determines whether to allow the presentation of witnesses. No discovery is permitted; however, an applicant may introduce relevant and material documents on the record. Like the provisions on change-in-control proceedings in subpart D, the ultimate burden of persuasion in § 308.155(b) is imposed upon the candidate for director or senior executive officer for the same rationale, and the FDIC has the burden of going forward with its *prima facie* case.

Subpart M—Procedures and Standards Applicable to an Application Pursuant to Section 19 of the FDIA

Subpart M governs proceedings for applications under section 19 of the FDIA. This subpart has been revised in order to comply with the changes to section 19 made by FIRREA and the Comprehensive Thrift and Bank Fraud Prosecution and Taxpayer Recovery Act of 1990, and to make this subpart consistent with the Uniform Rules. Section 308.158(b) of subpart M permits the filing of a section 19 application at any time more than one year after the issuance of a decision denying an application filed pursuant to section 19. Under § 308.160, an applicant is given an opportunity for an oral hearing. The hearing is conceived as an informal proceeding where a presiding officer determines whether to allow the presentation of witness. No discovery is permitted; however, an applicant may introduce relevant and material documents on the record. Like the provisions for the change-in-control proceedings and the procedures for section 32 of the FDIA, the burden of proof in § 308.160(b) has been shifted to the applicant, and the FDIC has the burden of going forward with its *prima facie* case.

Subpart N—Rules and Procedures Applicable to Proceedings Relating to Suspension, Removal, and Prohibition Where a Felony Is Charged

Subpart N governs proceedings for suspension, removal, and prohibition pursuant to section 8(g) of the FDIA where a felony is charged. The changes in subpart N were made for purposes of clarity and to make changes to the provisions as mandated by the amendments to the FDIA made by FIRREA. Consistent with other proceedings in which a presiding officer makes recommended decisions to the Board of Directors, there is no discovery in proceedings conducted under this subpart.

Subpart O—Liability of Commonly-Controlled Depository Institutions

Subpart O is a new subpart of part 308 and governs proceedings pertaining to section 5(e) of the FDIA. The procedures set forth herein reflect those that have been used by the FDIC under current part 308 since the passage of section 5(e) of the FDIA.

Section 308.165, "Scope", states that, in addition to the procedures set forth in this subpart, the procedures in subpart B shall apply to proceedings in connection with the assessment of cross guaranty liability against commonly-controlled institutions. Section 308.166, "Grounds for assessment of liability", restates the statutory requirements for the assessment of liability.

Section 308.167, "Notice of assessment of liability", sets forth the matters that must be contained in the Notice of Assessment of Liability, including the basis for the FDIC's jurisdiction; a statement of the FDIC's good faith estimate of the amount of loss that it has incurred or anticipates incurring; a statement of the method used to calculate such loss; a proposed order directing the payment by the liable institution of the amount of loss and the schedule under which the payment will be due; and, in cases in which more than one liable institution is involved, each institutions's share of the liability. Furthermore, the Notice must advise the liable institution(s) that an answer and a request for a hearing must be filed within 20 days of the service of the Notice, and that failure to timely file a request for a hearing will render the Notice of Assessment a final and unappealable order. Finally, the Notice must state that, if a hearing is requested, such hearing will be held 120 days after service of the Notice in the judicial district where the liable institution is located; or in cases involving more than one liable institution, the hearing will be held in the judicial district in which at least one of the institutions is found. Section 308.168, "Effective date of and payment under an order to pay", makes clear that the payment of the assessed amount shall be due on or before the 21st day after service of the Notice of Assessment in accordance with the terms and schedule set forth therein. Where any Order to Pay has become final and unappealable by reason of default under § 308.19(c)—which provides that failure to request a hearing within the time limits provided by this subpart shall render the Notice of Assessment final and unappealable—payment shall automatically be deemed to have become due and payable upon service of the Order to Pay, or as otherwise stated therein. All payments collected under section 5(e) of the FDIA are to be paid to the FDIC.

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

Subpart P governs proceedings relating to the recovery of attorney fees and other expenses under the Equal Access to Justice Act, 5 U.S.C. 504. The revisions to this subpart are minor and are made to make this subpart conform to the Uniform Rules.

VI. Regulatory Flexibility Act Statement

The Board of Directors certifies pursuant to section 605(b) of the Regulatory Flexibility Act, that this uniform rule is not expected to have a significant economic impact on a substantial number of small entities. Accordingly, a regulatory flexibility analysis is not required.

This rule implements section 916 of FIRREA which requires the Federal banking agencies and the NCUA to develop a set of uniform rules and procedures for administrative hearings. The purpose of this revised regulation is to secure a just and orderly determination of administrative proceedings. Because the Agencies already have in place rules of practice and procedure, this rule should not result in an additional burden for regulated institutions. Furthermore, the rule imposes only minor burdens on all institutions, regardless of size and should not, therefore, cause a significant economic impact upon a substantial number of small entities.

List of Subjects in 12 CFR Part 308

Administrative practice and procedure, Banks, banking, *Ex parte* communication, Hearing procedure, Penalties, State nonmember banks.

Authority and Issuance

For the reasons set forth in the preamble, part 308 of chapter III of title 12 of the Code of Federal Regulations is revised as set forth below:

PART 308—RULES OF PRACTICE AND PROCEDURE

Subpart A—Uniform Rules of Practice and Procedure

Subpart B—General Rules of Procedure

Subpart C—Rules of Practice Before the FDIC and Standards of Conduct

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

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

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

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

Subpart H—Rules and Procedures Applicable to Proceedings Relating to Assessment and Collection of Civil Money Penalties for Violation of Cease-and-Desist Orders and of Certain Federal Statutes, Including Call Report Penalties

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

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

Subpart K—Procedures Applicable to Investigations Pursuant to Section 10(c) of the FDIA

Subpart L—Procedures and Standards Applicable to a Notice of Change in Senior Executive Officer or Director Pursuant to Section 32 of the FDIA

Subpart M—Procedures and Standards Applicable to an Application Pursuant to Section 19 of the FDIA

Subpart N—Rules and Procedures Applicable to Proceedings Relating to Suspension, Removal, and Prohibition Where a Felony Is Charged

Subpart O—Liability of Commonly Controlled Depository Institutions

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

Authority: 12 U.S.C. 1815(e), 1817 (a) and (j), 1818, 1820, 1828(j), 1829, 1831i; 15 U.S.C. 78l(h), 78m, 78n(a), 78n(c), 78n(d), 78n(f), 78o, 78o–4(c)(5), 78p, 78q, 78q–1, 78s; 5 U.S.C. 504; 5 U.S.C. 554–557.

Subpart A—Uniform Rules of Practice and Procedure

§ 308.1 Scope.

This subpart prescribes rules of practice and procedure applicable to adjudicatory proceedings as to which hearings on the record are provided for by the following statutory provisions:

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

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

(c) Change-in-control proceedings under section 7(j)(4) of the FDIA (12 U.S.C. 1817(j)(4)) to determine whether the Federal Deposit Insurance Corporation ("FDIC"), should issue an order to approve or disapprove a person's proposed acquisition of an institution and/or institution holding company;

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

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

(1) Sections 22(h) and 23 of the Federal Reserve Act ("FRA"), or any regulation issued thereunder, and certain unsafe or unsound practices or breaches of fiduciary duty, pursuant to 12 U.S.C. 1828(j);

(2) Section 106(b) of the Bank Holding Company Act Amendments of 1970 ("BHCA Amendments of 1970"), and certain unsafe or unsound practices or breaches of fiduciary duty, pursuant to 12 U.S.C. 1972(2)(F);

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

(4) Section 7(a)(1) of the FDIA, pursuant to 12 U.S.C. 1817(a)(1);

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

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

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

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

(9) The terms of any final or temporary order issued under section 8 of the FDIA or of any written agreement executed by the FDIC, the terms of any condition imposed in writing by the FDIC in connection with the grant of an application or request, certain unsafe or unsound practices or breaches of fiduciary duty, or any law or regulation not otherwise provided herein pursuant to 12 U.S.C. 1818(i)(2);

(f) This subpart also applies to all other adjudications required by statute to be determined on the record after opportunity for an agency hearing, unless otherwise specifically provided for in the FDIC's Local Rules.

§ 308.2 Rules of construction.

For purposes of this subpart:

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

(b) Any use of a masculine, feminine, or neuter gender encompasses all three, if such use would be appropriate;

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

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

§ 308.3 Definitions.

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

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

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

(c) *Board of Directors* or *Board* means the Board of Directors of the Federal Deposit Insurance Corporation or its designee.

(d) *Decisional employee* means any member of the Federal Deposit Insurance Corporation's or administrative law judge's staff who has not engaged in an investigative or prosecutorial role in a proceeding and who may assist the Board of Directors or the administrative law judge, respectively, in preparing orders, recommended decisions, decisions, and other documents under the Uniform Rules.

(e) *Designee* of the Board of Directors means officers or officials of the Federal Deposit Insurance Corporation acting pursuant to authority delegated by the Board of Directors as provided in 12 CFR part 303 of this chapter or by specific resolution of the Board of Directors.

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

(g) *Executive Secretary* means the Executive Secretary of the Federal Deposit Insurance Corporation or his or her designee.

(h) *FDIC* means the Federal Deposit Insurance Corporation.

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

(j) *Institution* includes:

(1) Any bank as that term is defined in section 3(a) of the FDIA (12 U.S.C. 1813(a));

(2) Any bank holding company or any subsidiary (other than a bank) of a bank holding company as those terms are defined in the BHCA (12 U.S.C. 1841 *et seq.*);

(3) Any savings association as that term is defined in section 3(b) of the FDIA (12 U.S.C. 1813(b)), any savings and loan holding company or any subsidiary thereof (other than a bank) as those terms are defined in section 10(a) of the HOLA (12 U.S.C. 1467(a));

(4) Any organization operating under section 25 of the FRA (12 U.S.C. 601 *et seq.*);

(5) Any foreign bank or company to which section 8 of the IBA (12 U.S.C. 3106), applies or any subsidiary (other than a bank) thereof; and

(6) Any federal agency as that term is defined in section 1(b) of the IBA (12 U.S.C. 3101(5)).

(k) *Institution-affiliated party* means any institution-affiliated party as that

term is defined in section 3(u) of the FDIA (12 U.S.C. 1813(u)).

(l) *Local Rules* means those rules promulgated by the FDIC in those subparts of this part other than subpart A.

(m) *Office of Financial Institution Adjudication* ("OFIA") means the executive body charged with overseeing the administration of administrative enforcement proceedings of the Office of the Comptroller of the Currency ("OCC"), the Board of Governors of the Federal Reserve Board ("FRB"), the FDIC, the Office of Thrift Supervision ("OTS") and the National Credit Union Administration ("NCUA").

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

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

(p) *Respondent* means any party other than the FDIC.

(q) *Uniform Rules* means those rules in subpart A of this part that pertain to the types of formal administrative enforcement actions set forth at § 308.01 and as specified in subparts B through P of this part.

(r) *Violation* includes any action (alone or with another or others) for or toward causing, bringing about, participating in, counseling, or aiding or abetting a violation.

§ 308.4 Authority of Board of Directors.

The Board of Directors may, at any time during the pendency of a proceeding, perform, direct the performance of, or waive performance of, any act which could be done or ordered by the administrative law judge.

§ 308.5 Authority of the administrative law judge.

(a) *General rule.* All proceedings governed by this part shall be conducted in accordance with the provisions of chapter 5 of title 5 of the United States Code. The administrative law judge shall have all powers necessary to conduct a proceeding in a fair and impartial manner and to avoid unnecessary delay.

(b) *Powers.* The administrative law judge shall have all powers necessary to conduct the proceeding in accordance with paragraph (a) of this section, including the following powers:

(1) To administer oaths and affirmations;

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

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

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

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

(6) To hold scheduling and/or pre-hearing conferences as set forth in § 308.31;

(7) To consider and rule upon all procedural and other motions appropriate in an adjudicatory proceeding, provided that only the Board of Directors shall have the power to grant any motion to dismiss the proceeding or to decide any other motion that results in a final determination of the merits of the proceeding;

(8) To prepare and present to the Board of Directors a recommended decision as provided herein;

(9) To recuse himself or herself by motion made by a party or on his or her own motion;

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

(11) To do all other things necessary and appropriate to discharge the duties of a presiding officer.

§ 308.6 Appearance and practice in adjudicatory proceedings.

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

(2) *By non-attorneys.* An individual may appear on his or her own behalf; a member of a partnership may represent the partnership; a duly authorized officer, director, or employee of any government unit, agency, institution, corporation or authority may represent that unit, agency, institution, corporation or authority if such officer, director, or employee is not currently suspended or debarred from practice before the FDIC.

(3) *Notice of appearance.* Any individual acting as counsel on behalf of a party, including the FDIC, shall file a notice of appearance with the OFIA at or before the time that individual submits papers or otherwise appears on behalf of a party in the adjudicatory proceeding. Such notice of appearance shall include a written declaration that the individual is currently qualified as provided in paragraph (a)(1) or (a)(2) of this section and is authorized to represent the particular party. By filing a notice of appearance on behalf of a party in an adjudicatory proceeding, the counsel thereby agrees, and represents that he or she is authorized, to accept service on behalf of the represented party.

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

§ 308.7 Good faith certification.

(a) *General requirement.* Every filing or submission of record following the issuance of a notice shall be signed by at least one counsel of record in his or her individual name and shall state that counsel's address and telephone number. A party who acts as his or her own counsel shall sign his or her individual name and state his or her address and telephone number on every filing or submission of record.

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

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

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

§ 308.8 Conflicts of interest.

(a) *Conflict of interest in representation.* No person shall appear as counsel for another person in an adjudicatory proceeding if it reasonably appears that such representation may be materially limited by that counsel's responsibilities to a third person or by the counsel's own interests. The administrative law judge may take corrective measures at any stage of a proceeding to cure a conflict of interest in representation, including the issuance of an order limiting the scope of representation or disqualifying an individual from appearing in a representative capacity for the duration of the proceeding.

(b) *Certification and waiver.* If any person appearing as counsel represents two or more parties to an adjudicatory proceeding or a party and an institution to which notice of the proceeding must be given, counsel must certify in writing at the time of filing the notice of appearance required by § 308.6(a):

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

(2) That each such party or institution has advised its counsel that to its knowledge there is no existing or anticipated material conflict between its interests and the interests of others represented by the same counsel or his or her firm; and

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

§ 308.9 Ex parte communications.

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

(i) A party, his or her counsel, or another person interested in the proceeding; and

(ii) The administrative law judge handling that proceeding, the Board of Directors, or a decisional employee.

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

(b) *Prohibition of ex parte communications.* From the time the notice is issued by the FDIC until the date that the Board of Directors issues its final decision pursuant to § 308.40(c), no party, interested person or counsel therefore shall knowingly make or cause to be made an ex parte communication concerning the merits of the proceeding to any member of the Board of Directors, the administrative law judge, or a decisional employee. No member of the Board of Directors, an administrative law judge, or decisional employee shall knowingly make or cause to be made to a party, or any interested person or counsel therefor, an ex parte communication relevant to the merits of a proceeding.

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

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

§ 308.10 Filing of papers.

(a) *Filing.* Any papers required to be filed, excluding documents produced in response to a discovery request pursuant to §§ 308.25 and 308.26, shall be filed with the OFIA, except as otherwise provided.

(b) *Manner of filing.* Unless otherwise specified by the Board of Directors or the administrative law judge, filing may be accomplished by:

(1) Personal service;

(2) Delivering the papers to a reliable commercial courier service, overnight delivery service, or to the U.S. Post Office for Express Mail delivery;

(3) Mailing the papers by first class, registered, or certified mail; or

(4) Transmission by electronic media, only if expressly authorized, and upon any conditions specified, by the Board of Directors or the administrative law judge. All papers filed by electronic media shall also concurrently be filed in accordance with paragraph (c) of this section.

(c) *Formal requirements as to papers filed.*—(1) *Form.* All papers filed must set forth the name, address, and telephone number of the counsel or party making the filing and must be accompanied by a certification setting forth when and how service has been made on all other parties. All papers filed must be double-spaced and printed or typewritten on 8½×11 inch paper, and must be clear and legible.

(2) *Signature.* All papers must be dated and signed as provided in § 308.7.

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

(4) *Number of copies.* Unless otherwise specified by the Board of Directors, or the administrative law judge, an original and one copy of all documents and papers shall be filed, except that only one copy of transcripts of testimony and exhibits shall be filed.

§ 308.11 Service of papers.

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

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

(1) Personal service;

(2) Delivering the papers to a reliable commercial courier service, overnight delivery service, or to the U.S. Post Office for Express Mail delivery;

(3) Mailing the papers by first class, registered, or certified mail; or

(4) Transmission by electronic media, only if the parties mutually agree. Any papers served by electronic media shall also concurrently be served in accordance with the requirements of § 308.10(c).

(c) *By the Board of Directors.* (1) All papers required to be served by the Board of Directors or the administrative law judge upon a party who has appeared in the proceeding in accordance with § 308.6, shall be served by any means specified in paragraph (b) of this section.

(2) If a party has not appeared in the proceeding in accordance with § 308.6, the Board of Directors or the administrative law judge shall make service by any of the following methods:

(i) By personal service;

(ii) By delivery to a person of suitable age and discretion at the party's residence;

(iii) By registered or certified mail addressed to the party's last known address; or

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

(d) *Subpoenas.* Service of a subpoena may be made by personal service, by delivery to an agent, by delivery to a person of suitable age and discretion at the subpoenaed person's residence, by registered or certified mail addressed to the person's last known address, or in such other manner as is reasonably calculated to give actual notice.

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

§ 308.12 Construction of time limits.

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

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

(i) In the case of personal service or same day commercial courier delivery, upon actual service;

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

(iii) In the case of transmission by electronic media, as specified by the authority receiving the filing, in the case of filing, and as agreed among the parties, in the case of service.

(2) The effective filing and service dates specified in paragraph (b) (1) of this section may be modified by the Board of Directors or administrative law judge in the case of filing or by agreement of the parties in the case of service.

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

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

(2) If service is made by express mail or overnight delivery service, add one day to the prescribed period;

(3) If service is made by electronic media transmission, add one day to the prescribed period, unless otherwise determined by the Board of Directors or the administrative law judge in the case of filing, or by agreement among the parties in the case of service.

§ 308.13 Change of time limits.

Except as otherwise provided by law, the administrative law judge may, for good cause shown, extend the time limits prescribed by the Uniform Rules or by any notice or order issued in the proceedings. After the referral of the case to the Board of Directors pursuant to § 308.36, the Board of Directors may grant extensions of the time limits for good cause shown. Extensions may be granted at the motion of a party or of the Board of Directors after notice and opportunity to respond is afforded all non-moving parties, or on the administrative law judge's own motion.

§ 308.14 Witness fees and expenses.

Witnesses subpoenaed for testimony or depositions shall be paid the same fees for attendance and mileage as are paid in the United States district courts in proceedings in which the United States is a party, provided that, in the case of a discovery subpoena addressed to a party, no witness fees or mileage need be paid. Fees for witnesses shall be tendered in advance by the party requesting the subpoena, except that fees and mileage need not be tendered in advance where the FDIC is the party requesting the subpoena. The FDIC shall not be required to pay any fees to, or expenses of, any witness not subpoenaed by the FDIC.

§ 308.15 Opportunity for informal settlement.

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

§ 308.16 FDIC's right to conduct examination.

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

§ 308.17 Collateral attacks on adjudicatory proceeding.

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

§ 308.18 Commencement of proceeding and contents of notice.

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

(ii) The notice must be served by the Executive Secretary upon the respondent and given to any other appropriate financial institution supervisory authority where required by law.

(iii) The notice must be filed with the OFIA.

(2) Change-in control proceedings under section 7(j)(4) of the FDIA (12

U.S.C. 1817(j)(4)) commence with the issuance of an order by the FDIC.

(b) *Contents of notice.* The notice must set forth:

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

(2) A statement of the matters of fact or law showing that the FDIC is entitled to relief;

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

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

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

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

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

§ 308.19 Answer.

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

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

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

(2) *Effect of failure to request a hearing in civil money penalty proceedings.* If respondent fails to request a hearing as required by law within the time provided, the notice of assessment constitutes a final and unappealable order.

§ 308.20 Amended pleadings.

(a) *Amendments.* The notice or answer may be amended or supplemented at any stage of the proceeding by leave of the administrative law judge. Such leave will be freely given. The respondent shall answer an amended notice within the time remaining for the respondent's answer to the original notice, or within ten days after service of the amended notice, whichever period is longer, unless the Board of Directors or administrative law judge orders otherwise for good cause shown.

(b) *Amendments to conform to the evidence.* When issues not raised in the notice or answer are tried at the hearing by express or implied consent of the parties, they will be treated in all respects as if they had been raised in the notice or answer, and no formal amendments are required. If evidence is objected to at the hearing on the ground that it is not within the issues raised by the notice or answer, the administrative law judge may allow the notice or answer to be amended. The administrative law judge will do so freely when the determination of the merits of the action is served thereby and the objecting party fails to satisfy the administrative law judge that the admission of such evidence would unfairly prejudice that party's action or defense upon the merits. The administrative law judge may grant a continuance to enable the objecting party to meet such evidence.

§ 308.21 Failure to appear.

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

§ 308.22 Consolidation and severance of actions.

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

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

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

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

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

§ 308.23 Motions.

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

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

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

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

(c) *Filing of motions.* Motions must be filed with the administrative law judge, except that following the filing of the recommended decision, motions must be filed with the Executive Secretary for disposition by the Board of Directors.

(d) *Responses.* (1) Except as otherwise provided herein, within ten days after service of any written motion, or within such other period of time as may be established by the administrative law judge or the Executive Secretary, any party may file a written response to a

motion. The administrative law judge shall not rule on any oral or written motion before each party has had an opportunity to file a response.

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

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

(f) *Dispositive motions.* Dispositive motions are governed by §§ 308.29 and 308.30.

§ 308.24 Scope of document discovery.

(a) *Limits on discovery.* (1) Parties to proceedings under this subpart may obtain document discovery through the production of documents, including writings, drawings, graphs, charts, photographs, recordings, and other data compilations from which information can be obtained, or translated, if necessary, by the parties through detection devices into reasonably usable form.

(2) Discovery by use of deposition is governed by the § 308.107 of subpart B of this part.

(b) *Relevance.* Parties may obtain document discovery regarding any matter, not privileged, which has material relevance to the merits of the pending action. It is not a ground for objection that the information sought will be inadmissible at the hearing if the information sought appears reasonably calculated to lead to discovery of admissible evidence. The request may not be unreasonable, oppressive, excessive in scope or unduly burdensome.

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

(d) *Time limits.* All discovery, including all responses to discovery requests, shall be completed at least 20 days prior to the date scheduled for the commencement of the hearing. No exceptions to this time limit shall be permitted, unless the administrative law judge finds on the record that good cause exists for waiving the requirements of this paragraph.

§ 308.25 Request for document discovery from parties.

(a) *General rule.* Any party may serve on any other party a request to produce for inspection any discoverable documents which are in the possession, custody, or control of the party upon whom the request is served. The request must identify the documents to be produced either by individual item or by category, and must describe each item and category with reasonable particularity. Documents must be produced as they are kept in the usual course of business and shall be organized to correspond with the categories in the request.

(b) *Production or copying.* The request must specify a reasonable time, place, and manner for production and performing any related acts. In lieu of inspecting the documents, the requesting party may specify that all or some of the responsive documents are to be copied and the copies delivered to the requesting party. If copying of fewer than 250 pages is requested, the party to whom the request is addressed shall bear the cost of copying and shipping charges. If more than 250 pages of copying is requested, the requesting party shall pay for copying, unless the parties agree otherwise, at the current per-page copying rate imposed by each Agency's rules implementing the Freedom of Information Act (5 U.S.C. 552a) plus the cost of shipping.

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

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

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

(d) *Motions to limit discovery.* (1) Any party that objects to a discovery request may, within ten days of being served with such request, file a motion in accordance with the provisions of § 308.23 to strike or otherwise limit the request. If an objection is made to only a portion of an item or category in a request, the portion objected to shall be specified. Any objections not made in accordance with this paragraph and § 308.23 are waived.

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

(e) *Privilege.* At the time other documents are produced, all documents withheld on the grounds of privilege must be reasonably identified, together with a statement of the basis for the assertion of privilege.

(f) *Motions to compel production.* (1) If a party withholds any documents as privileged or fails to comply fully with a discovery request, the requesting party may, within ten days of the assertion of privilege or of the time the failure to comply becomes known to the requesting party, file a motion in accordance with the provisions of § 308.23 for the issuance of a subpoena compelling production.

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

(g) *Ruling on motions.* After the time for filing responses pursuant to this section has expired, the administrative law judge shall rule promptly on all motions filed pursuant to this section. If the administrative law judge determines that a discovery request, or any of its terms, is unreasonable, unduly burdensome, excessive in scope, repetitive of previous requests or seeks to obtain privileged documents, he or she may modify the request, and may issue appropriate protective orders, upon such conditions as justice may require. The pendency of a motion to revoke or limit discovery or to compel production shall not be a basis for staying or continuing the proceeding, unless otherwise ordered by the administrative law judge.

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

§ 308.26 Document subpoenas to nonparties.

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

relevance and reasonableness of the scope of documents sought. The subpoenaing party shall specify a reasonable time, place, and manner for making production in response to the document subpoena.

(2) A party shall only apply for a document subpoena under this section within the time period during which such party could serve a discovery request under § 308.24(d). The party obtaining the document subpoena is responsible for serving it on the subpoenaed person and for serving copies on all parties. Document subpoenas may be served in any state, territory, or possession of the United States, the District of Columbia, or as otherwise provided by law.

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

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

(2) Any motion to quash or modify a document subpoena must be filed on the same basis, including the assertion of privilege, upon which a party could object to a discovery request under § 308.25(d), and during the same time limits during which such an objection could be filed.

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

§ 308.27 Deposition of witness unavailable for hearing.

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

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

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

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

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

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

(3) Any requested subpoena that sets forth a valid basis for its issuance must be promptly issued, unless the administrative law judge on his or her own motion, requires a written response or requires attendance at a conference concerning whether the requested subpoena should be issued.

(4) The party obtaining a deposition subpoena is responsible for serving it on the witness and for serving copies on all parties. Unless the administrative law judge orders otherwise, no deposition under this section shall be taken on fewer than ten days' notice to the witness and all parties. Deposition subpoenas may be served in any state, territory, possession of the United States, or the District of Columbia, on any person or company doing business in any state, territory, possession of the United States, or the District of Columbia, or as otherwise permitted by law.

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

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

(c) *Procedure upon deposition.* (1) Each witness testifying pursuant to a deposition subpoena must be duly sworn, and each party shall have the right to examine the witness. Objections to questions or documents must be in short form, stating the grounds for the objection. Failure to object to questions or documents is not deemed a waiver except where the ground for the objection might have been avoided if the objection had been timely presented. All questions, answers, and objections must be recorded.

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

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

(d) *Enforcing subpoenas.* If a subpoenaed person fails to comply with any order of the administrative law judge which directs compliance with all or any portion of a deposition subpoena under paragraph (b) or (c)(3) of this section, the subpoenaing party or other aggrieved party may, to the extent authorized by applicable law, apply to an appropriate United States district court for an order requiring compliance with the portions of the subpoena that the administrative law judge has ordered enforced. A party's right to seek court enforcement of a deposition subpoena in no way limits the sanctions that may be imposed by the administrative law judge on a party who fails to comply with, or procures a

failure to comply with, a subpoena issued under this section.

§ 308.28 Interlocutory review.

(a) *General rule.* The Board of Directors may review a ruling of the administrative law judge prior to the certification of the record to the Board of Directors only in accordance with the procedures set forth in this section and § 308.23.

(b) *Scope of review.* The Board of Directors may exercise interlocutory review of a ruling of, the administrative law judge if the Board of Directors finds that:

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

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

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

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

(c) *Procedure.* Any request for interlocutory review shall be filed by a party with the administrative law judge within ten days of his or her ruling and shall otherwise comply with § 308.23. Any party may file a response to a request for interlocutory review in accordance with § 308.23(d). Upon the expiration of the time for filing all responses, the administrative law judge shall refer the matter to the Board of Directors for final disposition.

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

§ 308.29 Summary disposition.

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

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

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

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

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

(c) *Hearing on motion.* At the request of any party or on his or her own motion, the administrative law judge may hear oral argument on the motion for summary disposition.

(d) *Decision on motion.* Following receipt of a motion for summary disposition and all responses thereto, the administrative law judge shall determine whether the moving party is entitled to summary disposition. If the administrative law judge determines that summary disposition is warranted, the administrative law judge shall submit a recommended decision to that effect to the Board of Directors. If the administrative law judge finds that no party is entitled to summary disposition, he or she shall make a ruling denying the motion.

§ 308.30 Partial summary disposition.

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

§ 308.31 Scheduling and prehearing conferences.

(a) *Scheduling conference.* Within 30 days of service of the notice or order commencing a proceeding or such other time as parties may agree, the administrative law judge shall direct counsel for all parties to meet with him or her in person at a specified time and place prior to the hearing or to confer by telephone for the purpose of scheduling the course and conduct of the proceeding. This meeting or telephone conference is called a "scheduling conference." The identification of potential witnesses, the time for and manner of discovery, and the exchange of any prehearing materials including witness lists, statements of issues, stipulations, exhibits and any other materials may also be determined at the scheduling conference.

(b) *Prehearing conferences.* The administrative law judge may, in addition to the scheduling conference, on his or her own motion or at the request of any party, direct counsel for the parties to meet with him or her (in person or by telephone) at a prehearing conference to address any or all of the following:

(1) Simplification and clarification of the issues;

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

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

(4) Limitation of the number of witnesses;

(5) Summary disposition of any or all issues;

(6) Resolution of discovery issues or disputes;

(7) Amendments to pleadings; and

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

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

(d) *Scheduling or prehearing orders.* At or within a reasonable time following the conclusion of the scheduling conference or any prehearing conference, the administrative law judge shall serve on each party an order setting forth any agreements reached

and any procedural determinations made.

§ 308.32 Prehearing submissions.

(a) Within the time set by the administrative law judge, but in no case later than 14 days before the start of the hearing, each party shall serve on every other party, his or her:

(1) Prehearing statement;

(2) Final list of witnesses to be called to testify at the hearing, including name and address of each witness and a short summary of the expected testimony of each witness;

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

(4) Stipulations of fact, if any.

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

§ 308.33 Public hearings.

(a) *General rule.* All hearings shall be open to the public, unless the FDIC, in its discretion, determines that holding an open hearing would be contrary to the public interest. Within 20 days of service of the notice or, in the case of change-in-control proceedings under section 7(j)(4) of the FDIA (12 U.S.C. 1817 (j)(4)), within 20 days from service of the hearing order, any respondent may file with the Executive Secretary a request for a private hearing, and any party may file a pleading in reply to such a request. Such requests and replies are governed by § 308.23. Failure to file a request or a reply is deemed a waiver of any objections regarding whether the hearing will be public or private.

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

§ 308.34 Hearing subpoenas.

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

(2) A party may apply for a hearing subpoena at any time before the commencement of a hearing. During a hearing, such applications may be made orally on the record before the administrative law judge. The party making the application shall serve a copy of the application and the proposed subpoena on every other party to the proceeding.

(3) The administrative law judge shall promptly issue any hearing subpoena requested pursuant to this section. If the administrative law judge determines that the application does not set forth a valid basis for the issuance of the subpoena, or that any of its terms are unreasonable, oppressive, excessive in scope, or unduly burdensome, he or she may refuse to issue the subpoena or may issue it in a modified form upon any conditions consistent with this subpart.

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

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

(c) *Enforcing subpoenas.* If a subpoenaed person fails to comply with any subpoena issued pursuant to this section or any order of the administrative law judge which directs compliance with all or any portion of a document subpoena, the subpoenaing party or any other aggrieved party may seek enforcement of the subpoena pursuant to § 308.26(c).

§ 308.35 Conduct of hearings.

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

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

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

(b) *Transcript.* The hearing must be recorded and transcribed. The transcript shall be made available to any party upon payment of the cost thereof. The administrative law judge shall have authority to order the record corrected, either upon motion to correct, upon stipulation of the parties, or following notice to the parties upon the administrative law judge's own motion. The administrative law judge shall serve notice upon all parties that the certified transcript, together with all hearing exhibits and exhibits introduced but not admitted into evidence at the hearing, has been filed.

§ 308.36 Evidence.

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

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

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

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

(2) All matters officially noticed by the administrative law judge or Board of Directors shall appear on the record.

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

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

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

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

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

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

(3) The administrative law judge shall retain rejected exhibits, adequately marked for identification, for the record, and transmit such exhibits to the Board of Directors.

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

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

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

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

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

§ 308.37 Proposed findings and conclusions.

(a) *Proposed findings and conclusions and supporting briefs.* (1) Any party may file with the administrative law judge proposed findings of fact, proposed conclusions of law, and a proposed order within 30 days after the parties have received notice that the transcript has been filed with the administrative law judge, unless otherwise ordered by the administrative law judge.

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

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

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

§ 308.38 Recommended decision and filing of record.

Within 45 days after expiration of the time allowed for filing reply briefs under § 308.37(b), the administrative law judge shall file with and certify to the Executive Secretary for decision the record of the proceeding. The record must include the administrative law judge's recommended decision, recommended findings of fact, recommended conclusions of law and proposed order; all prehearing and hearing transcripts, exhibits, and rulings; and the motions, briefs, memoranda, and other supporting papers filed in connection with the hearing. The administrative law judge shall serve upon each party the recommended decision, findings, conclusions, and proposed order.

§ 308.39 Exceptions to recommended decision.

(a) *Filing exceptions.* Within 30 days after service of the recommended decision, findings, conclusions, and proposed order under § 308.38, a party may file with the Executive Secretary written exceptions to the administrative law judge's recommended decision, findings, conclusions or proposed order, to the admission or exclusion of evidence, or to the failure of the administrative law judge to make a ruling proposed by a party. A supporting brief may be filed at the time the exceptions are filed, either as part of the same document or in a separate document.

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

(2) No exception need be considered by the Board of Directors if the party taking exception had an opportunity to raise the same objection, issue, or argument before the administrative law judge and failed to do so.

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

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

§ 308.40 Review by Board of Directors.

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

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

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

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

§ 308.41 Stays pending judicial review.

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

Subpart B—General Rules of Procedure

§ 308.101 Scope of Local Rules.

(a) Subparts B and C of the Local Rules prescribe rules of practice and procedure to be followed in the administrative enforcement proceedings initiated by the FDIC as set forth in § 308.01 of the Uniform Rules.

(b) Except as otherwise specifically provided, the Uniform Rules and subpart B of the Local Rules shall not apply to subparts D through P of the Local Rules.

(c) Subpart C of the Local Rules shall apply to any administrative proceeding initiated by the FDIC.

§ 308.102 Authority of Board of Directors and Executive Secretary.

(a) *The Board of Directors.* (1) The Board of Directors may, at any time during the pendency of a proceeding, perform, direct the performance of, or waive performance of, any act which could be done or ordered by the Executive Secretary.

(2) Nothing contained in this part 308 shall be construed to limit the power of the Board of Directors granted by applicable statutes or regulations.

(b) *The Executive Secretary.* When no administrative law judge has jurisdiction over a proceeding, the Executive Secretary may act in place of, and with the same authority as, an administrative law judge, except that the Executive Secretary may not hear a case on the merits or make a recommended decision on the merits to the Board of Directors.

§ 308.103 Appointment of administrative law judge.

(a) *Appointment.* Unless otherwise directed by the Board of Directors or as otherwise provided in the Local Rules, a hearing within the scope of this part 308 shall be held before an administrative law judge of the Office of Financial Institution Adjudication ("OFIA").

(b) *Procedures.* (1) The Executive Secretary shall promptly after issuance of the notice refer the matter to the OFIA which shall secure the appointment of an administrative law judge to hear the proceeding.

(2) OFIA shall advise the parties, in writing, that an administrative law judge has been appointed.

§ 308.104 Filings with the Board of Directors.

(a) *General Rule.* All materials required to be filed with or referred to the Board of Directors in any proceedings under this part 308 shall be filed with the Executive Secretary, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20429.

(b) *Scope.* Filings to be made with the Executive Secretary include pleadings and motions filed during the proceeding; the record filed by the administrative law judge after the issuance of a recommended decision; the recommended decision filed by the administrative law judge following a motion for summary disposition; referrals by the administrative law judge of motions for interlocutory review; motions and responses to motions filed by the parties after the record has been certified to the Board of Directors; exceptions and requests for oral argument; and any other papers required to be filed with the Board of Directors under this part 308.

§ 308.105 Custodian of the record.

The Executive Secretary is the official custodian of the record when no administrative law judge has jurisdiction over the proceeding. As the official custodian, the Executive Secretary shall maintain the official record of all papers filed in each proceeding.

§ 308.106 Written testimony in lieu of oral hearing.

(a) *General rule.* (1) At any time more than fifteen days before the hearing is to commence, on the motion of any party or on his or her own motion, the administrative law judge may order that the parties present part or all of their case-in-chief and, if ordered, their rebuttal, in the form of exhibits and written statements sworn to by the witness offering such statements as evidence, provided that if any party objects, the administrative law judge shall not require such a format if that format would violate the objecting party's right under the Administrative Procedure Act, or other applicable law, or would otherwise unfairly prejudice that party.

(2) Any such order shall provide that each party shall, upon request, have the same right of oral cross-examination (or redirect examination) as would exist had the witness testified orally rather than through a written statement. Such order shall also provide that any party has a right to call any hostile witness or adverse party to testify orally.

(b) *Scheduling of submission of written testimony.* (1) If written direct testimony and exhibits are ordered under paragraph (a) of this section, the administrative law judge shall require that it be filed within the time period for commencement of the hearing, and the hearing shall be deemed to have commenced on the day such testimony is due.

(2) Absent good cause shown, written rebuttal, if any, shall be submitted and the oral portion of the hearing begun within 30 days of the date set for filing written direct testimony.

(3) The administrative law judge shall direct, unless good cause requires otherwise, that—

(i) All parties shall simultaneously file any exhibits and written direct testimony required under paragraph (b)(1) of this section; and

(ii) All parties shall simultaneously file any exhibits and written rebuttal required under paragraph (b)(2) of this section.

(c) *Failure to comply with order to file written testimony.* (1) The failure of any party to comply with an order to file written testimony or exhibits at the time and in the manner required under this section shall be deemed a waiver of that party's right to present any evidence, except testimony of a previously identified adverse party or hostile witness. Failure to file written testimony or exhibits is, however, not a waiver of that party's right of cross-examination or a waiver of the right to present rebuttal evidence that was not required to be submitted in written form.

(2) Late filings of papers under this section may be allowed and accepted only upon good cause shown.

§ 308.107 Document discovery.

(a) Parties to proceedings set forth at § 308.01 of the Uniform Rules and as provided in the Local Rules may obtain discovery only through the production of documents. No other form of discovery shall be allowed.

(b) Any questioning at a deposition of a person producing documents pursuant to a document subpoena shall be strictly limited to the identification of documents produced by that person and a reasonable examination to determine whether the subpoenaed person made an adequate search for, and has produced, all subpoenaed documents.

Subpart C—Rules of Practice Before the FDIC and Standards of Conduct

§ 308.108 Sanctions.

(a) *General rule.* Appropriate sanctions may be imposed when any counsel or party has acted, or failed to act, in a manner required by applicable statute, regulations, or order, and that act or failure to act:

(1) Constitutes contemptuous conduct;

(2) Has in a material way injured or prejudiced some other party in terms of substantive injury, incurring additional expenses including attorney's fees, prejudicial delay, or otherwise;

(3) Is a clear and unexcused violation of an applicable statute, regulation, or order; or

(4) Has unduly delayed the proceeding.

(b) *Sanctions.* Sanctions which may be imposed include any one or more of the following:

(1) Issuing an order against the party;

(2) Rejecting or striking any testimony or documentary evidence offered, or other papers filed, by the party;

(3) Precluding the party from contesting specific issues or findings;

(4) Precluding the party from offering certain evidence or from challenging or contesting certain evidence offered by another party;

(5) Precluding the party from making a late filing or conditioning a late filing on any terms that are just; and

(6) Assessing reasonable expenses, including attorney's fees, incurred by any other party as a result of the improper action or failure to act.

(c) *Limits on dismissal as a sanction.* No recommendation of dismissal shall be made by the administrative law judge or granted by the Board of Directors based on the failure to hold a hearing within the time period called for in this part 308, or on the failure of an administrative law judge to render a recommended decision within the time period called for in this part 308, absent a finding:

(1) That the delay resulted solely or principally from the conduct of the FDIC enforcement counsel;

(2) That the conduct of the FDIC enforcement counsel is unexcused;

(3) That the moving respondent took all reasonable steps to oppose and prevent the subject delay;

(4) That the moving respondent has been materially prejudiced or injured; and

(5) That no lesser or different sanction is adequate.

(d) *Procedure for imposition of sanctions.* (1) The administrative law judge, upon the request of any party, or on his or her own motion, may impose sanctions in accordance with this section, provided that the administrative law judge may only recommend to the Board of Directors the sanction of entering a final order determining the case on the merits.

(2) No sanction, other than refusing to accept late papers, authorized by this section shall be imposed without prior notice to all parties and an opportunity for any counsel or party against whom sanctions would be imposed to be heard. Such opportunity to be heard may be on such notice, and the response may be in such form, as the administrative law judge directs. The opportunity to be heard may be limited to an opportunity to respond orally immediately after the act or inaction covered by this section is noted by the administrative law judge.

(3) Requests for the imposition of sanctions by any party, and the imposition of sanctions, shall be treated for interlocutory review purposes in the same manner as any other ruling by the administrative law judge.

(4) *Section not exclusive* Nothing in this section shall be read as precluding the administrative law judge or the Board of Directors from taking any other action, or imposing any restriction or sanction, authorized by applicable statute or regulation.

§ 308.109 Suspension and disbarment.

(a) *Discretionary suspension and disbarment.* (1) The Board of Directors may suspend or revoke the privilege of any counsel to appear or practice before the FDIC if, after notice of and opportunity for hearing in the matter, that counsel is found by the Board of Directors:

(i) Not to possess the requisite qualifications to represent others;

(ii) To be seriously lacking in character or integrity or to have engaged in material unethical or improper professional conduct;

(iii) To have engaged in, or aided and abetted, a material and knowing violation of the FDIA; or

(iv) To have engaged in contemptuous conduct before the FDIC. Suspension or revocation on the grounds set forth in paragraphs (a)(1) (ii), (iii), and (iv) of this section shall only be ordered upon a further finding that the counsel's conduct or character was sufficiently egregious as to justify suspension or revocation.

(2) Unless otherwise ordered by the Board of Directors, an application for reinstatement by a person suspended or disbarred under paragraph (a)(1) of this section may be made in writing at any time more than three years after the effective date of the suspension or disbarment and, thereafter, at any time more than one year after the person's most recent application for reinstatement. The suspension or disbarment shall continue until the applicant has been reinstated by the Board of Directors for good cause shown or until, in the case of a suspension, the suspension period has expired. An applicant for reinstatement under this provision may, in the Board of Directors' sole discretion, be afforded a hearing.

(b) *Mandatory suspension and disbarment.* (1) Any counsel who has been and remains suspended or disbarred by a court of the United States or of any state, territory, district, commonwealth, or possession; or any person who has been and remains suspended or barred from practice

before the OCC, Board of Governors, the OTS, the NCUA, the Securities and Exchange Commission, or the Commodity Futures Trading Commission; or any person who has been convicted of a felony, or of a misdemeanor involving moral turpitude, within the last ten years, shall be suspended automatically from appearing or practicing before the FDIC. A disbarment, suspension, or conviction within the meaning of this paragraph (b) shall be deemed to have occurred when the disbarring, suspending, or convicting agency or tribunal enters its judgment or order, regardless of whether an appeal is pending or could be taken, and includes a judgment or an order on a plea of nolo contendere or on consent, regardless of whether a violation is admitted in the consent.

(2) Any person appearing or practicing before the FDIC who is the subject of an order, judgment, decree, or finding of the types set forth in paragraph (b)(1) of this section shall promptly file with the Executive Secretary a copy thereof, together with any related opinion or statement of the agency or tribunal involved. Failure to file any such paper shall not impair the operation of any other provision of this section.

(3) A suspension or disbarment under paragraph (b)(1) of this section from practice before the FDIC shall continue until the applicant has been reinstated by the Board of Directors for good cause shown, provided that any person suspended or disbarred under paragraph (b)(1) of this section shall be automatically reinstated by the Executive Secretary, upon appropriate application, if all the grounds for suspension or disbarment under paragraph (b)(1) of this section are subsequently removed by a reversal of the conviction (or the passage of time since the conviction) or termination of the underlying suspension or disbarment. An application for reinstatement on any other grounds by any person suspended or disbarred under paragraph (b)(1) of this section may be filed at any time not less than one year after the applicant's most recent application. An applicant for reinstatement under this provision may, in the Board of Directors' sole discretion, be afforded a hearing.

(c) *Hearings under this section.* Hearings conducted under this section shall be conducted in substantially the same manner as other hearings under the Uniform Rules, provided that in proceedings to terminate an existing FDIC suspension or disbarment order, the person seeking the termination of the order shall bear the burden of going forward with an application and with proof, and that the Board of Directors may, in its sole discretion, direct that any proceeding to terminate an existing suspension or disbarment by the FDIC be limited to written submissions.

(d) *Summary suspension for contemptuous conduct.* A finding by the administrative law judge of contemptuous conduct during the course of any proceeding shall be grounds for summary suspension by the administrative law judge of a counsel or other representative from any further participation in that proceeding for the duration of that proceeding.

(e) *Practice defined.* Unless the Board of Directors orders otherwise, for the purposes of this section, practicing before the FDIC includes, but is not limited to, transacting any business with the FDIC as counsel or agent for any other person and the preparation of any statement, opinion, or other paper by a counsel, which statement, opinion, or paper is filed with the FDIC in any registration statement, notification, application, report, or other document, with the consent of such counsel.

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

§ 308.110 Scope.

Except as specifically indicated in this subpart, the rules and procedures in this subpart, subpart B of the Local Rules, and the Uniform Rules shall apply to proceedings in connection with the disapproval by the Board of Directors or its designee of a proposed acquisition of control of an insured nonmember bank.

§ 308.111 Grounds for disapproval.

The following are grounds for disapproval of a proposed acquisition of control of an insured nonmember bank:

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

(b) The effect of the proposed acquisition of control in any section of the United States may be to substantially lessen competition or to tend to create a monopoly or would in any other manner be in restraint of trade, and the anticompetitive effects of the proposed acquisition of control are not clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served;

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

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

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

(f) The FDIC determines that the proposed acquisition would result in an adverse effect on the Bank Insurance Fund or the Savings Association Insurance Fund.

§ 308.112 Notice of disapproval.

(a) *General rule.* (1) Within three days of the decision by the Board of Directors or its designee to disapprove a proposed acquisition of control of an insured nonmember bank, a written notice of disapproval shall be mailed by first class mail to, or otherwise served upon, the party seeking acquire control.

(2) The notice of disapproval shall:

(i) Contain a statement of the basis for the disapproval; and

(ii) Indicate that a hearing may be requested by filing a written request with the Executive Secretary within ten days after service of the notice of disapproval; and if a hearing is requested, that an answer to the notice of disapproval, as required by § 308.113, must be filed within 20 days after service of the notice of disapproval.

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

(c) Section 308.18(b) of the Uniform Rules shall not apply to the content of the Notice of Disapproval.

§ 308.113 Answer to notice of disapproval.

(a) *Contents.* (1) An answer to the notice of disapproval of a proposed acquisition of control shall be filed within 20 days after service of the notice of disapproval and shall specifically deny those portions of the notice of disapproval which are disputed. Those portions of the notice of disapproval which are not specifically denied are deemed admitted by the applicant.

(2) Any hearing under this subpart shall be limited to those parts of the notice of disapproval that are specifically denied.

(b) *Failure to answer.* Failure of a respondent to file an answer required by this section within the time provided constitutes a waiver of his or her right to appear and contest the allegations in the notice of disapproval. If no timely answer is filed, Enforcement Counsel may file a motion for entry of an order of default. Upon a finding that no good cause has been shown for the failure to file a timely answer, the administrative law judge shall file a recommended decision containing the findings and relief sought in the notice. A final order issued by the Board of Directors based upon a respondent's failure to answer is deemed to be an order issued upon consent.

§ 308.114 Burden of proof.

The ultimate burden of proof shall be upon the person proposing to acquire a depository institution. The burden of going forward with a *prima facie* case shall be upon the FDIC.

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

§ 308.115 Scope.

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

§ 308.116 Assessment of penalties.

(a) *In general.* The civil money penalty shall be assessed upon the service of a Notice of Assessment which shall become final and unappealable unless the respondent requests a hearing pursuant to § 308.19(c)(2).

(b) *Amount.* (1) Any person who violates any provision of the Change in Bank Control Act or any rule, regulation, or order issued by the FDIC pursuant thereto, shall forfeit and pay a civil money penalty of not more than $5,000 for each day the violation continues.

(2) Any person who violates any provision of the Change in Bank Control Act or any rule, regulation, or order issued by the FDIC pursuant thereto; or recklessly engages in any unsafe or unsound practice in conducting the affairs of a depository institution; or breaches any fiduciary duty; which violation, practice or breach is part of a pattern of misconduct; or causes or is likely to cause more than a minimal loss to such institution; or results in pecuniary gain or other benefit to such person, shall forfeit and pay a civil money penalty of not more than $25,000 for each day such violation, practice or breach continues.

(3) Any person who knowingly violates any provision of the Change in Bank Control Act or any rule, regulation, or order issued by the FDIC pursuant thereto; or engages in any unsafe or unsound practice in conducting the affairs of a depository institution; or breaches any fiduciary duty; and knowingly or recklessly causes a substantial loss to such institution or a substantial pecuniary gain or other benefit to such institution or a substantial pecuniary gain or other benefit to such person by reason of such violation, practice or breach, shall forfeit and pay a civil money penalty not to exceed:

(i) In the case of a person other than a depository institution—$1,000,000 per day for each day the violation, practice or breach continues; or

(ii) In the case of a depository institution—an amount not to exceed the lesser of $1,000,000 or one percent of the total assets of such institution for each day the violation, practice or breach continues.

(c) *Mitigating factors.* In assessing the amount of the penalty, the Board of Directors or its designee shall consider the gravity of the violation, the history of previous violations, respondent's financial resources, good faith, and any other matters as justice may require.

(d) *Failure to answer.* Failure of a respondent to file an answer required by this section within the time provided constitutes a waiver of his or her right to appear and contest the allegations in the notice of disapproval. If no timely answer is filed, Enforcement Counsel may file a motion for entry of an order of default. Upon a finding that no good cause has been shown for the failure to file a timely answer, the administrative law judge shall file a recommended decision containing the findings and relief sought in the notice. A final order issued by the Board of Directors based upon a respondent's failure to answer is deemed to be an order issued upon consent.

§ 308.117 Effective date of, and payment under, an order to pay.

If the respondent both requests a hearing and serves an answer, civil penalties assessed pursuant to this subpart are due and payable 60 days after an order to pay, issued after the hearing or upon default, is served upon the respondent, unless the order provides for a different period of payment. Civil penalties assessed pursuant to an order to pay issued upon consent are due and payable within the time specified therein.

§ 308.118 Collection of penalties.

The FDIC may collect any civil penalty assessed pursuant to this subpart by agreement with the respondent, or the FDIC may bring an action against the respondent to recover the penalty amount in the appropriate United States district court. All penalties collected under this section shall be paid over to the Treasury of the United States.

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

§ 308.119 Scope.

(a) *Involuntary termination of insurance pursuant to section 8(a) of the FDIA.* The rules and procedures in this subpart, subpart B of the Local Rules and the Uniform Rules shall apply to proceedings in connection with the involuntary termination of the insured status of an insured bank depository institution or an insured branch of a foreign bank pursuant to section 8(a) of the FDIA (12 U.S.C. 1818(a)), except that the Uniform Rules and subpart B of the Local Rules shall not apply to the temporary suspension of insurance pursuant to section 8(a)(8) of the FDIA (12 U.S.C. 1818(a)(8)).

(b) *Involuntary termination of insurance pursuant to section 8(p) of the Act.* The rules and procedures in § 308.124 of this subpart F shall apply to proceedings in connection with the involuntary termination of the insured status of an insured depository institution or an insured branch of a foreign bank pursuant to section 8(p) of the FDIA (12 U.S.C. 1818(p)). The Uniform Rules shall not apply to proceedings under section 8(p) of the FDIA.

§ 308.120 Grounds for termination of insurance.

(a) *General rule.* The following are grounds for involuntary termination of insurance pursuant to section 8(a) of the FDIA:

(1) An insured depository institution or its directors or trustees have engaged or are engaging in unsafe or unsound practices in conducting the business of such depository institution;

(2) An insured depository institution is in an unsafe or unsound condition such that it should not continue operations as an insured depository institution; or

(3) An insured depository institution or its directors or trustees have violated an applicable law, rule, regulation, order, condition imposed in writing by the FDIC in connection with the granting of any application or other request by the insured depository institution or have violated any written agreement entered into between the insured depository institution and the FDIC.

(b) *Extraterritorial acts of foreign banks.* An act or practice committed outside the United States by a foreign bank or its directors or trustees which would otherwise be a ground for termination of insured status under this section shall be a ground for termination if the Board of Directors finds:

(1) The act or practice has been, is, or is likely to be a cause of, or carried on in connection with or in furtherance of, an act or practice committed within any state, territory, or possession of the United States or the District of Columbia that, in and of itself, would be an appropriate basis for action by the FDIC; or

(2) The act or practice committed outside the United States, if proven, would adversely affect the insurance risk of the FDIC.

(c) *Failure of foreign bank to secure removal of personnel.* The failure of a foreign bank to comply with any order of removal or prohibition issued by the Board of Directors or the failure of any person associated with a foreign bank to appear promptly as a party to a proceeding pursuant to section 8(e) of the FDIA (12 U.S.C. 1818(e)), shall be a ground for termination of insurance of deposits in any branch of the bank.

§ 308.121 Notification to primary regulator.

(a) *Service of notification.* (1) Upon a determination by the Board of Directors or its designee pursuant to § 308.120 of an unsafe or unsound practice or condition or of a violation, a notification shall be served upon the appropriate Federal banking agency of the insured depository institution, or the State banking supervisor if the FDIC is the appropriate Federal banking agency.

The notification shall be served not less than 30 days before the Notice of Intent to Terminate Insured Status required by section 8(a)(2)(B) of the FDIA (12 U.S.C. 1818(a)(2)(B)), and § 308.122, except that this period for notification may be reduced or eliminated with the agreement of the appropriate Federal banking agency.

(2) *Appropriate Federal banking agency* shall have the meaning given that term in section 3(q) of the FDIA (12 U.S.C. 1813(q)), and shall be the OCC in the case of a national bank, a District bank or an insured Federal branch of a foreign bank; the FDIC in the case of an insured nonmember bank, including an insured State branch of a foreign bank; the Board of Governors in the case of a state member bank; or the OTS in the case of an insured Federal or state savings association.

(3) In the case of a state nonmember bank, insured Federal branch of a foreign bank, or state member bank, in addition to service of the notification upon the appropriate Federal banking agency, a copy of the notification shall be sent to the appropriate State banking supervisor.

(4) In instances in which a Temporary Order Suspending Insurance is issued pursuant to section 8(a)(8) of the FDIA (12 U.S.C. 1818(a)(8)), the notification may be served concurrently with such order.

(b) *Contents of notification.* The notification shall contain the FDIC's determination, and the facts and circumstances upon which such determination is based, for the purpose of securing correction of such practice, condition, or violation.

§ 308.122 Notice of intent to terminate.

(a) If, after serving the notification under § 308.121, the Board of Directors determines that any unsafe or unsound practices, condition, or violation, specified in the notification, requires the termination of the insured status of the insured depository institution, the Board of Directors or its designee, if it determines to proceed further, shall cause to be served upon the insured depository institution a notice of its intention to terminate insured status not less than 30 days after service of the notification, unless a shorter time period has been agreed upon by the appropriate Federal banking agency.

(b) The Board of Directors or its designee shall cause a copy of the notice to be sent to the appropriate Federal banking agency and to the appropriate state banking supervisor, if any.

§ 308.123 Notice to depositors.

If the Board of Directors enters an order terminating the insured status of an insured depository institution or branch, the insured depository institution shall, on the day that order becomes final, or on such other day as that order prescribes, mail a notification of termination of insured status to each depositor at the depositor's last address of record on the books of the insured depository institution or branch. The insured depository institution shall also publish the notification in two issues of a local newspaper of general circulation and shall furnish the FDIC with proof of such publications. The notification to depositors shall include information provided in substantially the following form:

Notice

(Date)_____.

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

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

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

_____

(Name of (depository institution or branch)

_____

(Address)

The notification may include any additional information the depository institution deems advisable, provided that the information required by this section shall be set forth in a conspicuous manner on the first page of the notification.

§ 308.124 Involuntary termination of insured status for failure to receive deposits.

(a) *Notice to show cause.* When the Board of Directors or its designee has evidence that an insured depository institution is not engaged in the business of receiving deposits, other than trust funds, the Board of Directors or its designee shall give written notice of this evidence to the depository institution and shall direct the depository institution to show cause why its insured status should not be terminated under the provisions of section 8(p) of the FDIA (12 U.S.C. 1818(p)). The insured depository institution shall have 30 days after receipt of the notice, or such longer period as is prescribed in the notice, to submit affidavits, other written proof, and any legal arguments that it is engaged in the business of receiving deposits other than trust funds.

(b) *Notice of termination date.* If, upon consideration of the affidavits, other written proof, and legal arguments, the Board of Directors determines that the depository institution is not engaged in the business of receiving deposits, other than trust funds, the finding shall be conclusive and the Board of Directors

shall notify the depository institution that its insured status will terminate at the expiration of the first full semiannual assessment period following issuance of that notification.

(c) *Notification to depositors of termination of insured status.* Within the time specified by the Board of Directors and prior to the date of termination of its insured status, the depository institution shall mail a notification of termination of insured status to each depositor at the depositor's last address of record on the books of the depository institution. The depository institution shall also publish the notification in two issues of a local newspaper of general circulation and shall furnish the FDIC with proof of such publications. The notification to depositors shall include information provided in substantially the following form:

Notice

(Date)_____.

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

_____

(Name of depository institution or branch)

_____

(Address)

The notification may include any additional information the depository institution deems advisable, provided that the information required by this section shall be set forth in a conspicuous manner on the first page of the notification.

§ 308.125 Temporary suspension of deposit insurance.

(a) If, while an action is pending under section 8(a)(2) of the FDIA (12 U.S.C. 1818(a)(2)), the Board of Directors, after consultation with the appropriate Federal banking agency, finds that an insured depository institution (other than a special supervisory association to which § 308.126 of this subpart applies) has no tangible capital under the capital guidelines or regulations of the appropriate Federal banking agency, the Board of Directors may issue a Temporary Order Suspending Deposit Insurance, pending completion of the proceedings under section 8(a)(2) of the FDIA (12 U.S.C. 1818(a)(2)).

(b) The temporary order shall be served upon the insured institution and a copy sent to the appropriate Federal banking agency and to the appropriate State banking supervisor.

(c) The temporary order shall become effective ten days from the date of service upon the insured depository institution. Unless set aside, limited, or suspended in proceedings under section 8(a)(8)(D) of the FDIA (12 U.S.C. 1818 (a)(8)(D)), the temporary order shall remain effective and enforceable until an order terminating the insured status of the institution is entered by the Board of Directors and becomes final, or the Board of Directors dismisses the proceedings.

(d) Notification to depositors of suspension of insured status. Within the time specified by the Board of Directors and prior to the suspension of insured status, the depository institution shall mail a notification of suspension of insured status to each depositor at the depositor's last address of record on the books of the depository institution. The depository institution shall also publish the notification in two issues of a local newspaper of general circulation and shall furnish the FDIC with proof of such publications. The notification to depositors shall include information provided in substantially the following form:

Notice

(Date)_____.

1. The status of the _____, as an (insured depository institution) (insured branch) under the provisions of the Federal Deposit Insurance Act, will be suspended as of the close of business on the _____ day of _____, 19____, pending the completion of administrative proceedings under section 8(a) of the Federal Deposit Insurance Act.

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

3. Insured deposits in the (depository institution) (branch) on the _____ day of _____, 19____, will continue to be insured for _____ after the close of business on the_____ day of _____, 19____. Provided, however, that any withdrawals after the close of business on the _____ day of_____, 19____, will reduce the insurance coverage by the amount of such withdrawals.

_____

(Name of depository institution or branch)

_____

(Address)

The notification may include any additional information the depository institution deems advisable, provided that the information required by this section shall be set forth in a conspicuous manner on the first page of the notification.

§ 308.126 Special supervisory associations.

If the Board of Directors finds that a savings association is a special supervisory association under the provisions of section 8(a)(8)(B) of the FDIA (12 U.S.C. 1818(a)(8)(B)) for purposes of temporary suspension of insured status, the Board of Directors shall serve upon the association its findings with regard to the determination that the capital of the association, as computed using applicable accounting standards, has suffered a material decline; that such association or its directors or officers, is engaging in an unsafe or unsound practice in conducting the business of the association; that such association is in an unsafe or unsound condition to continue operating as an insured association; or that such association or its directors or officers, has violated any law, rule, regulation, order, condition imposed in writing by any Federal banking agency, or any written agreement, or that the association failed to enter into a capital improvement plan acceptable to the Corporation prior to January, 1990.

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

§ 308.127 Scope.

(a) *Cease-and-desist proceedings under section 8 of the FDIA.* The rules and procedures of this subpart, subpart B of the Local Rules and the Uniform Rules shall apply to proceedings to order an insured nonmember bank or an institution-affiliated party to cease and desist from practices and violations described in section 8(b) of the FDIA, 12 U.S.C. 1818(b); provided that the provisions of the Uniform Rules and subpart B of the Local Rules shall not apply to the issuance of temporary cease-and-desist orders pursuant to section 8(c) of the FDIA (12 U.S.C. 1818(c)).

(b) *Proceedings under the Securities Exchange Act of 1934.* (1) The rules and procedures of this subpart, subpart B of the Local Rules and the Uniform Rules shall apply to proceedings by the Board of Directors to order a municipal securities dealer to cease and desist from any violation of law or regulation specified in section 15B(c)(5) of the Securities Exchange Act, as amended (15 U.S.C. 78o–4(c)(5)) where the municipal securities dealer is an insured

nonmember bank or a subsidiary thereof.

(2) The rules and procedures of this subpart, subpart B of the Local Rules and the Uniform Rules shall apply to proceedings by the Board of Directors to order a clearing agency or transfer agent to cease and desist from failure to comply with the applicable provisions of section 17, 17A and 19 of the Securities Exchange Act of 1934, as amended (15 U.S.C. 78q, 78q–1, 78s), and the applicable rules and regulations thereunder, where the clearing agency or transfer agent is an insured nonmember bank or a subsidiary thereof.

§ 308.128 Grounds for cease-and-desist orders.

(a) *General rule.* The Board of Directors or its designee may issue and have served upon any insured nonmember bank or an institution-affiliated party a notice, as set forth in § 308.18 of the Uniform Rules for practices and violations as described in § 308.127.

(b) *Extraterritorial acts of foreign banks.* An act, violation or practice committed outside the United States by a foreign bank or an institution-affiliated party that would otherwise be a ground for issuing a cease-and-desist order under paragraph (a) of this section or a temporary cease-and-desist order under section 308.131 of this subpart, shall be a ground for an order if the Board of Directors or its designee finds that:

(1) The act, violation or practice has been, is, or is likely to be a cause of, or carried on in connection with or in furtherance of, an act, violation or practice committed within any state, territory, or possession of the United States or the District of Columbia which act, violation or practice, in and of itself, would be an appropriate basis for action by the FDIC; or

(2) The act, violation or practice, if proven, would adversely affect the insurance risk of the FDIC.

§ 308.129 Notice to state supervisory authority.

The Board of Directors or its designee shall give the appropriate state supervisory authority notification of its intent to institute a proceeding pursuant to subpart G of this part, and the grounds thereof. Any proceedings shall be conducted according to subpart G of this part, unless, within the time period specified in such notification, the state supervisory authority has effected satisfactory corrective action. No insured institution or other party who is the subject of any notice or order issued by the FDIC under this section shall have standing to raise the requirements of this subpart as grounds for attacking the validity of any such notice or order.

§ 308.130 Effective date of order and service on bank.

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

(b) *Service on banks.* In cases where the bank is not the respondent, the cease-and-desist order shall also be served upon the bank.

§ 308.131 Temporary cease-and-desist order.

(a) *Issuance.* (1) When the Board of Directors or its designee determines that the violation, or the unsafe or unsound practice, as specified in the notice, or the continuation thereof, is likely to cause insolvency or significant dissipation of assets or earnings of the bank, or is likely to weaken the condition of the bank or otherwise prejudice the interests of its depositors prior to the completion of the proceedings under section 8(b) of the FDIA (12 U.S.C. 1818(b)) and § 308.128 of this subpart, the Board of Directors or its designee may issue a temporary order requiring the bank or an institution-affiliated party to immediately cease and desist from any such violation, practice or to take affirmative action to prevent such insolvency, dissipation, condition or prejudice pending completion of the proceedings under section 8(b) of the FDIA (12 U.S.C. 1818(b)).

(2) When the Board of Directors or its designee issues a Notice of charges pursuant to 12 U.S.C. 1818(b)(1) which specifies on the basis of particular facts and circumstances that a bank's books and records are so incomplete or inaccurate that the FDIC is unable, through the normal supervisory process, to determine the financial condition of the bank or the details or purpose of any transaction or transactions that may have a material effect on the financial condition of the bank, then the Board of Directors or its designee may issue a temporary order requiring:

(i) The cessation of any activity or practice which gave rise, whether in whole or in part, to the incomplete or inaccurate state of the books or records; or

(ii) Affirmative action to restore such books or records to a complete and accurate state, until the completion of the proceedings under section 8(b) of the FDIA (12 U.S.C. 1818(b)).

(3) The temporary order shall be served upon the bank or the institution-affiliated party named therein and shall also be served upon the bank in the case where the temporary order applies only to an institution-affiliated party.

(b) *Effective date.* A temporary order shall become effective when served upon the bank or the institution-affiliated party. Unless the temporary order is set aside, limited, or suspended by a court in proceedings authorized under section 8(c)(2) of the FDIA (12 U.S.C. 1818(c)(2)), the temporary order shall remain effective and enforceable pending completion of administrative proceedings pursuant to section 8(b) of the FDIA (12 U.S.C. 1818(b)) and entry of an order which has become final, or with respect to paragraph (a)(2) of this section the FDIC determines by examination or otherwise that the bank's books and records are accurate and reflect the financial condition of the bank.

(c) *Uniform Rules do not apply.* The Uniform Rules and subpart B of the Local Rules shall not apply to the issuance of temporary orders under this section.

Subpart H—Rules and Procedures Applicable to Proceedings Relating to Assessment and Collection of Civil Money Penalties for Violation of Cease-and-Desist Orders and of Certain Federal Statutes, Including Call Report Penalties

§ 308.132 Assessment of penalties.

(a) *Scope.* The rules and procedures of this subpart, subpart B of the Local Rules, and the Uniform Rules shall apply to proceedings to assess and collect civil money penalties, including civil money penalties for violation of section 7(a) of the FDIA (12 U.S.C. 1817(a)).

(b) *Relevant considerations.* In determining the amount of the civil penalty to be assessed, the Board of Directors or its designee shall consider the financial resources and good faith of the bank or official, the gravity of the violation, the history of previous violations, and any such other matters as justice may require.

(c) *Amount.* (1) The Board of Directors or its designee may assess civil money penalties pursuant to section 8(i) of the

FDIA (12 U.S.C. 1818(i)), and § 308.01(e)(1) of the Uniform Rules.

(2) The Board of Directors or its designee may assess civil penalties pursuant to section 7(a) of the FDIA (12 U.S.C. 1817(a)) as follows:

(i) *Late filing—Tier One penalties.* In cases in which a bank fails to make or publish its Report of Condition and Income ("Call Report") within the appropriate time periods, the Board of Directors or its designee may assess a civil money penalty of not more than $2,000 per day where the bank maintains procedures in place reasonably adapted to avoid inadvertent error and the late filing occurred unintentionally and as a result of such error; or the bank inadvertently transmitted a Call Report which is minimally late.

(A) *First offense.* Generally, in such cases, the amount assessed shall be $300 per day for each of the first 15 days for which the failure continues, and $600 per day for each subsequent day the failure continues, beginning on the sixteenth day. For banks with less than $25,000,000 in assets, the amount assessed shall be the greater of $100 per day or 1/1000th of the bank's total assets (1/10th of a basis point) for each of the first 15 days for which the failure continues, and $200 or 1/500th of the bank's total assets, ⅕ of a basis point) for each subsequent day the failure continues, beginning on the sixteenth day.

(B) *Second offense.* Where the bank has been delinquent in making or publishing its Call Report within the preceding five quarters, the amount assessed for the most current failure shall generally be $500 per day for each of the first 15 days for which the failure continues, and $1,000 per day for each subsequent day the failure continues, beginning on the sixteenth day. For banks with less than $25,000,000 in assets, those amounts, respectively, shall be 1/500th of the bank's total assets and 1/250th of the bank's total assets.

(C) *Mitigating factors.* The amounts set forth in paragraph (c)(2)(i)(A) of this section may be reduced based upon the factors set forth in paragraph (b) of this section.

(D) *Lengthy or repeated violations.* The amounts set forth in paragraph (c)(2)(i) of this section will be assessed on a case-by-case basis where the amount of time of the bank's delinquency is lengthy or the bank has been delinquent repeatedly in making or publishing its Call Reports.

(E) *Waiver.* Absent extraordinary circumstances outside the control of the bank, penalties assessed for late filing shall not be waived.

(ii) *Late filing—Tier Two penalties.* Where a bank fails to make or publish its Call Report within the appropriate time period, the Board of Directors or its designee may assess a civil money penalty of not more than $20,000 per day for each day the failure continues.

(iii) *False or misleading reports or information.*— (A) *Tier One penalties.* In cases in which a bank submits or publishes any false or misleading Call Report or information, the Board of Directors or its designee may assess a civil money penalty of not more than $2,000 per day for each day the information is not corrected, where the bank maintains procedures in place reasonably adapted to avoid inadvertent error and the violation occurred unintentionally and as a result of such error; or the bank inadvertently transmits a Call Report or information which is false or misleading.

(B) *Tier Two penalties.* Where a bank submits or publishes any false or misleading Call Report or other information, the Board of Directors or its designee may assess a civil money penalty of not more than $20,000 per day for each day the information is not corrected.

(C) *Tier Three penalties.* Where a bank knowingly or with reckless disregard for the accuracy of any Call Report or information submits or publishes any false or misleading Call Report or other information, the Board of Directors or its designee may assess a civil money penalty of not more than the lesser of $1,000,000 or 1 percent of the bank's total assets per day for each day the information is not corrected.

(D) *Mitigating factors.* The amounts set forth in paragraph (c)(2) of this section may be reduced based upon the factors set forth in paragraph (b) of this section.

§ 308.133 Effective date of, and payment under, an order to pay.

(a) *Effective date.* (1) Unless otherwise provided in the Notice, except in situations covered by paragraph (a)(2) of this section, civil penalties assessed pursuant to this subpart are due and payable 60 days after the Notice is served upon the respondent.

(2) If the respondent both requests a hearing and serves an answer, civil penalties assessed pursuant to this subpart are due and payable 60 days after an order to pay, issued after the hearing or upon default, is served upon the respondent, unless the order provides for a different period of payment. Civil penalties assessed pursuant to an order to pay issued upon consent are due and payable within the time specified therein.

(b) *Payment.* All penalties collected under this section shall be paid over to the Treasury of the United States.

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

§ 308.134 Scope.

The rules and procedures in this subpart, subpart B of the Local Rules and the Uniform Rules shall apply to proceedings by the Board of Directors or its designee:

(a) To censure, limit the activities of, suspend, or revoke the registration of, any municipal securities dealer for which the FDIC is the appropriate regulatory agency;

(b) To censure, suspend, or bar from being associated with such a municipal securities dealer, any person associated with such a municipal securities dealer; and

(c) To deny registration, to censure limit the activities of, suspend, or revoke the registration of, any transfer agent or clearing agency for which the FDIC is the appropriate regulatory agency. This subpart and the Uniform Rules shall not apply to proceedings to postpone or suspend registration of a transfer agent or clearing agency pending final determination of denial or revocation of registration.

§ 308.135 Grounds for imposition of sanctions.

(a) *Action under section 15(b)(4) of the Exchange Act.* The Board of Directors or its designee may issue and have served upon any municipal securities dealer for which the FDIC is the appropriate regulatory agency, or any person associated or seeking to become associated with a municipal securities dealer for which the FDIC is the appropriate regulatory agency, a written notice of its intention to censure, limit the activities or functions or operations of, suspend, or revoke the registration of, such municipal securities dealer, or to censure, suspend, or bar the person from being associated with the municipal securities dealer, when the Board of Directors or its designee determines:

(1) That such municipal securities dealer or such person

(i) Has committed any prohibited act or omitted any required act specified in subparagraph (A), (D), or (E) of section 15(b)(4) of the Exchange Act, as amended (15 U.S.C. 78o);

(ii) Has been convicted of any offense specified in section 15(b)(4)(B) of the Exchange Act within ten years of commencement of proceedings under this subpart; or

(iii) Is enjoined from any act, conduct, or practice specified in section 15(b)(4)(C) of the Exchange Act; and

(2) That it is in the public interest to impose any of the sanctions set forth in paragraph (a) of this section.

(b) *Action under sections 17 and 17A of the Exchange Act.* The Board of Directors or its designee may issue, and have served upon any transfer agent or clearing agency for which the FDIC is the appropriate regulatory agency, a written Notice of its intention to deny registration to, censure, place limitations on the activities or function or operations of, suspend, or revoke the registration of, the transfer agent or clearing agency, when the Board of Directors or its designee determines:

(1) That the transfer agent or clearing agency has willfully violated, or is unable to comply with, any applicable provision of section 17 or 17A of the Exchange Act, as amended, or any applicable rule or regulation issued pursuant thereto; and

(2) That it is in the public interest to impose any of the sanctions set forth in paragraph (b) of this section.

§ 308.136 Notice to and consultation with the Securities and Exchange Commission.

Before initiating any proceedings under § 308.135, the FDIC shall:

(a) Notify the Securities and Exchange Commission of the identity of the municipal securities dealer or associated person against whom proceedings are to be initiated, and the nature of and basis for the proposed action; and

(b) Consult with the Commission concerning the effect of the proposed action on the protection of investors and the possibility of coordinating the action with any proceeding by the Commission against the municipal securities dealer or associated person.

§ 308.137 Effective date of order imposing sanctions.

An order issued by the Board of Directors after a hearing or an order issued upon default shall become effective at the expiration of 30 days after the service of the order, except that an order of censure, denial, or revocation of registration is effective when served. An order issued upon consent shall become effective at the time specified therein. All orders shall remain effective and enforceable except to the extent they are stayed, modified, terminated, or set aside by the Board of Directors, its designee, or a reviewing court, provided that orders of suspension shall continue in effect no longer than 12 months.

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

§ 308.138 Scope.

The rules and procedures of this subpart J shall apply to proceedings by the Board of Directors or its designee to exempt, in whole or in part, an issuer of securities from the provisions of sections 12(g), 13, 14(a), 14(c), 14(d), or 14(f) of the Exchange Act, as amended (15 U.S.C. 781, 78m, 78n (a), (c) (d) or (f)), or to exempt an officer or a director or beneficial owner of securities of such an issuer from the provisions of section 16 of the Exchange Act (15 U.S.C. 78p).

§ 308.139 Application for exemption.

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

§ 308.140 Newspaper notice.

(a) *General rule.* If the Board of Directors or its designee, in its sole discretion, decides to further consider an application for exemption, there shall be served upon the applicant instructions to publish one notification in a newspaper of general circulation in the community where the main office of the issuer is located. The applicant shall furnish proof of such publication to the Executive Secretary or such other person as may be directed in the instructions.

(b) *Contents.* The notification shall contain the name and address of the issuer and the name and title of the applicant, the exemption sought, a statement that a hearing will be held, and a statement that within 30 days of publication of the newspaper notice, interested persons may submit to the FDIC written comments on the application for exemption and a written request for an opportunity to be heard. The address of the FDIC must appear in the notice.

§ 308.141 Notice of hearing.

Within ten days after expiration of the period for receipt of comments pursuant to § 308.140, the Executive Secretary shall serve upon the applicant and any person who has requested an opportunity to be heard written notification indicating the place and time of the hearing. The hearing shall be held not later than 30 days after service of the notification of hearing. The notification shall contain the name and address of the presiding officer designated by the Executive Secretary and a statement of the matters to be considered.

§ 308.142 Hearing.

(a) *Proceedings are informal.* Formal rules of evidence, the adjudicative procedures of the APA (5 U.S.C. 554–557), the Uniform Rules and § 308.108 of subpart B of the Local Rules shall not apply to hearings under this subpart.

(b) *Hearing Procedure.* (1) Parties to the hearing may appear personally or through counsel and shall have the right to introduce relevant and material documents and to make an oral statement.

(2) There shall be no discovery in proceeding under this subpart J.

(3) The presiding officer shall have discretion to permit presentation of witnesses within specified time limits, provided that a list of witnesses is furnished to the presiding officer prior to the hearing. Witnesses shall be sworn, unless otherwise directed by the presiding officer. The presiding officer may ask questions of any witness and each party may cross-examine any witness presented by an opposing party.

(4) The proceedings shall be on the record and the transcript shall be promptly submitted to the Board of Directors. The presiding officer shall make recommendations to the Board of Directors, unless the Board of Directors, in its sole discretion, directs otherwise.

§ 308.143 Decision of Board of Directors.

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

Subpart K—Procedures Applicable to Investigations Pursuant to Section 10(c) of the FDIA

§ 308.144 Scope.

The procedures of this subpart shall be followed when an investigation is instituted and conducted in connection with any open or failed insured depository institution, any institutions making application to become insured depository institutions, and affiliates thereof, or with other types of investigations to determine compliance with applicable law and regulations, pursuant to section 10(c) of the FDIA (12 U.S.C. 1820(c)). The Uniform Rules and subpart B of the Local Rules shall not apply to investigations under this subpart.

§ 308.145 Conduct of investigation.

An investigation conducted pursuant to section 10(c) of the FDIA shall be initiated only upon issuance of an order by the Board of Directors; or by the General Counsel, the Director of the Division of Supervision, the Director of the Division of Liquidation, or their respective designees as set forth at § 303.9 of this chapter. The order shall indicate the purpose of the investigation and designate FDIC's representative(s) to direct the conduct of the investigation. Upon application and for good cause shown, the persons who issue the order of investigation may limit, quash, modify, or withdraw it. Upon the conclusion of the investigation, an order of termination of the investigation shall be issued by the persons issuing the order of investigation.

§ 308.146 Powers of person conducting investigation.

The person designated to conduct a section 10(c) investigation shall have the power, among other things, to administer oaths and affirmations, to take and preserve testimony under oath, to issue subpoenas and subpoenas duces tecum and to apply for their enforcement to the United States District Court for the judicial district or the United States court in any territory in which the main office of the bank, institution, or affiliate is located or in which the witness resides or conducts business. The person conducting the investigation may obtain the assistance of counsel or others from both within and outside the FDIC. The persons who issue the order of investigation may limit, quash, or modify any subpoena or subpoena duces tecum, upon application and for good cause shown. The person conducting an investigation may report to the Board of Directors any instance where any attorney has been guilty of contemptuous conduct. The Board of Directors, upon motion of the person conducting the investigation, or on its own motion, may make a finding of contempt and may then summarily suspend, without a hearing, any attorney representing a witness from further participation in the investigation.

§ 308.147 Investigations confidential.

Investigations conducted pursuant to section 10(c) shall be confidential. Information and documents obtained by the FDIC in the course of such investigations shall not be disclosed, except as provided in part 309 of this chapter and as otherwise required by law.

§ 308.148 Rights of witnesses.

In an investigation pursuant to section 10(c):

(a) Any person compelled or requested to furnish testimony, documentary evidence, or other information, shall upon request be shown and provided with a copy of the order initiating the proceeding;

(b) Any person compelled or requested to provide testimony as a witness or to furnish documentary evidence may be represented by a counsel who meets the requirements of § 308.06 of the Uniform Rules. That counsel may be present and may:

(1) Advise the witness before, during, and after such testimony;

(2) Briefly question the witness at the conclusion of such testimony for clarification purposes; and

(3) Make summary notes during such testimony solely for the use and benefit of the witness;

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

(d) In cases of a perceived or actual conflict of interest arising out of an attorney's or law firm's representation of multiple witnesses, the person conducting the investigation may require the attorney to comply with the provisions of § 308.08 of the Uniform Rules; and

(e) Witness fees shall be paid in accordance with § 308.14 of the Uniform Rules.

§ 308.149 Service of subpoena.

Service of a subpoena shall be accomplished in accordance with § 308.11 of the Uniform Rules.

§ 308.150 Transcripts.

(a) *General rule.* Transcripts of testimony, if any, in an investigation pursuant to section 10(c) shall be recorded by an official reporter, or by any other person or means designated by the person conducting the investigation. A witness may, solely for the use and benefit of the witness, obtain a copy of the transcript of his or her testimony at the conclusion of the investigation or, at the discretion of the person conducting the investigation, at an earlier time, provided the transcript is available. The witness requesting a copy of his or her testimony shall bear the cost thereof.

(b) *Subscription by witness.* The transcript of testimony shall be subscribed by the witness, unless the person conducting the investigation and the witness, by stipulation, have waived the signing, or the witness is ill, cannot be found, or has refused to sign. If the transcript of the testimony is not subscribed by the witness, the official reporter taking the testimony shall certify that the transcript is a true and complete transcript of the testimony.

Subpart L—Procedures and Standards Applicable to a Notice of Change in Senior Executive Officer or Director Pursuant to Section 32 of the FDIA

§ 308.151 Scope.

The rules and procedures set forth in this subpart shall apply to the notice filed by a state nonmember bank pursuant to Section 32 of the FDIA (12 U.S.C. 1831i) for the consent of the FDIC to add to or replace an individual on the Board of Directors, or to employ any individual as a senior executive officer, or change the responsibilities of any individual to a position of senior executive officer where the bank:

(a) Has been chartered and operating as an insured nonmember bank for less than two years or the insured state branch has been licensed and operating as an insured branch for less than two years;

(b) Has undergone a change in control within the preceding two years; or

(c) Is not in compliance with the minimum capital requirement applicable to it or is otherwise in a troubled condition as determined by the FDIC on the basis of such institution's most recent report of condition or report of examination or inspection.

§ 308.152 Grounds for disapproval of notice.

The Board of Directors or its designee may issue a notice of disapproval with respect to a notice submitted by a state

nonmember bank pursuant to section 32 of the FDIA (12 U.S.C. 1831i) where:

(a) The competence, experience, character, or integrity of the individual with respect to whom such notice submitted indicates that it would not be in the best interests of the depositors of the state nonmember bank to permit the individual to be employed by or associated with such bank; or

(b) The competence, experience, character, or integrity of the individual with respect to whom such notice is submitted indicated that it would not be in the best interests of the public to permit the individual to be employed by, or associated with, the state nonmember bank.

§ 308.153 Procedures where notice of disapproval issues pursuant to § 303.14 of this chapter.

(a) The Notice of Disapproval shall be served upon the insured state nonmember bank and the candidate for director or senior executive officer. The Notice of Disapproval shall:

(1) Summarize or cite the relevant considerations specified in § 308.152;

(2) Inform the individual and the bank that a request for review of the disapproval may be filed within fifteen days of receipt of the Notice of Disapproval; and

(3) Specify that additional information, if any, must be contained in the request for review.

(b) The request for review must be filed at the appropriate regional office.

(c) The request for review must be in writing and should:

(1) Specify the reasons why the FDIC should reconsider its disapproval; and

(2) Set forth relevant, substantive and material documents, if any, that for good cause were not previously set forth in the notice required to be filed pursuant to section 32 of the FDIA (12 U.S.C. 1831i).

§ 308.154 Decision on review.

(a) Within 30 days of receipt of the request for review, the Board of Directors or its designee, shall notify the bank and/or the individual filing the reconsideration (hereafter "petitioner") of the FDIC's decision on review.

(b) If the decision is to grant the review and approve the notice, the bank and the individual involved shall be so notified.

(c) A denial of the request for review pursuant to section 32 of the FDIA shall:

(1) Inform the petitioner that a written request for a hearing, stating the relief desired and the grounds therefore, may be filed with the Executive Secretary within 15 days after the receipt of the denial; and

(2) Summarize or cite the relevant considerations specified in § 308.152.

(d) If a decision is not rendered within 30 days, the petitioner may file a request for a hearing within fifteen days from the date of expiration.

§ 308.155 Hearing.

(a) *Hearing dates.* The Executive Secretary shall order a hearing to be commenced within 30 days after receipt of a request for a hearing filed pursuant to § 308.154. Upon request of the petitioner or the FDIC, the presiding officer or the Executive Secretary may order a later hearing date.

(b) *Burden of proof.* The ultimate burden of proof shall be upon the candidate for director or senior executive officer. The burden of going forward with a *prima facie* case shall be upon the FDIC.

(c) *Hearing procedure.* (1) The hearing shall be held in Washington, DC or at another designated place, before a presiding officer designated by the Executive Secretary.

(2) The provisions of §§ 308.06 through 308.12, 308.16, and 308.21 of the Uniform Rules and §§ 308.101 through 308.102, and 308.104 through 308.106 of subpart B of the Local Rules shall apply to hearings held pursuant to this subpart.

(3) The petitioner may appear at the hearing and shall have the right to introduce relevant and material documents and make an oral presentation. Members of the FDIC enforcement staff may attend the hearing and participate as representatives of the FDIC enforcement staff.

(4) There shall be no discovery in proceedings under this subpart.

(5) At the discretion of the presiding officer, witnesses may be presented within specified time limits, provided that a list of witnesses is furnished to the presiding officer and to all other parties prior to the hearing. Witnesses shall be sworn, unless otherwise directed by the presiding officer. The presiding officer may ask questions of any witness. Each party shall have the opportunity to cross-examine any witness presented by an opposing party. The transcript of the proceedings shall be furnished, upon request and payment of the cost thereof, to the petitioner afforded the hearing.

(6) In the course of or in connection with any hearing under paragraph (c) of this section the presiding officer shall have the power to administer oaths and affirmations, to take or cause to be taken depositions of unavailable witnesses, and to issue, revoke, quash, or modify subpoenas and subpoenas duces tecum. Where the presentation of witnesses is permitted, the presiding officer may require the attendance of witnesses from any state, territory, or other place subject to the jurisdiction of the United States at any location where the proceeding is being conducted. Witness fees shall be paid in accordance with § 308.14 of the Uniform Rules.

(7) Upon the request of the applicant afforded the hearing, or the members of the FDIC enforcement staff, the record shall remain open for five business days following the hearing for the parties to make additional submissions to the record.

(8) The presiding officer shall make recommendations to the Board of Directors or its designee, where possible, within fifteen days after the last day for the parties to submit additions to the record.

(9) The presiding officer shall forward his or her recommendation to the Executive Secretary who shall promptly certify the entire record, including the recommendation to the Board of Directors or its designee. The Executive Secretary's certification shall close the record.

(d) *Written submissions in lieu of hearing.* The petitioner may in writing waive a hearing and elect to have the matter determined on the basis of written submissions.

(e) *Failure to request or appear at hearing.* Failure to request a hearing shall constitute a waiver of the opportunity for a hearing. Failure to appear at a hearing in person or through an authorized representative shall constitute a waiver of hearing. If a hearing is waived, the order shall be final and unappealable, and shall remain in full force and effect.

(f) *Decision by Board of Directors or its designee.* Within 45 days following the Executive Secretary's certification of the record to the Board of Directors or its designee, the Board of Directors or its designee shall notify the affected individual whether the denial of the notice will be continued, terminated, or otherwise modified. The notification shall state the basis for any decision of the Board of Directors or its designee that is adverse to the petitioner. The Board of Directors or its designee shall promptly rescind or modify the denial where the decision is favorable to the petitioner.

Subpart M—Procedures and Standards Applicable to an Application Pursuant to Section 19 of the FDIA

§ 308.156 Scope.

The rules and procedures set forth in this subpart shall apply to an application filed pursuant to section 19 of the FDIA (12 U.S.C. 1829) by an insured depository institution and a person, who has been convicted of any criminal offense involving dishonesty or a breach of trust or who has agreed to enter into a pretrial diversion or similar program in connection with the prosecution of such offense, to seek the prior written consent of the FDIC to become or continue as an institution-affiliated party with respect to an insured depository institution; to own or control directly or indirectly an insured depository institution; or to participate directly or indirectly in any manner in the conduct of the affairs of an insured depository institution.

§ 308.157 Relevant considerations.

(a) In proceedings under § 308.156 on an application to become or continue as an institution-affiliated party with respect to an insured depository institution; to own or control directly or indirectly an insured depository institution; or to participate directly or indirectly in any manner in the conduct of the affairs of an insured depository institution, the following shall be considered:

(1) Whether the conviction or entry into a pretrial diversion or similar program is for a criminal offense involving dishonesty or breach of trust;

(2) Whether participation directly or indirectly by the person in any manner in the conduct of the affairs of the insured depository institution constitutes a threat to the safety or soundness of the insured depository institution or the interests of its depositors, or threatens to impair public confidence in the insured depository institution;

(3) Evidence of the applicant's rehabilitation;

(4) The position to be held by the applicant;

(5) The amount of influence and control the applicant will be able to exercise over the affairs and operations of the insured depository institution;

(6) The ability of the management at the insured depository institution to supervise and control the activities of the applicant;

(7) The level of ownership which the applicant will have at the insured depository institution;

(8) Applicable fidelity bond coverage for the applicant; and

(9) Additional factors in the specific case that appear relevant.

(b) The question of whether a person who was convicted of a crime or who agreed to enter a pretrial diversion or similar program, was guilty of that crime shall not be at issue in a proceeding under this subpart.

§ 308.158 Filing papers and effective date.

(a) *Filing with the regional office.* Applications pursuant to section 19 shall be filed in the appropriate regional office.

(b) *Effective date.* An application pursuant to section 19 may be made in writing at any time more than one year after the issuance of a decision denying an application pursuant to section 19. The removal and/or prohibition pursuant to section 19 shall continue until the applicant has been reinstated by the Board of Directors or its designee for good cause shown.

§ 308.159 Denial of applications.

A denial of an application pursuant to section 19 shall:

(a) Inform the applicant that a written request for a hearing, stating the relief desired and the grounds therefor and any supporting evidence, may be filed with the Executive Secretary within 60 days after the denial; and

(b) Summarize or cite the relevant considerations specified in § 308.157 of this subpart.

§ 308.160 Hearings.

(a) *Hearing dates.* The Executive Secretary shall order a hearing to be commenced within 60 days after receipt of a request for hearing on an application filed pursuant to § 308.159. Upon the request of the applicant or FDIC enforcement counsel, the presiding officer or the Executive Secretary may order a later hearing date.

(b) *Burden of proof.* The ultimate burden of proof shall be upon the person proposing to become or continue as an institution-affiliated party with respect to an insured depository institution; to own or control directly or indirectly an insured depository institution; or to participate directly or indirectly in any manner in the conduct of the affairs of an insured depository institution. The burden of going forward with a *prima facie* case shall be upon the FDIC.

(c) *Hearing procedure.* (1) The hearing shall be held in Washington, DC, or at another designated place, before a presiding officer designated by the Executive Secretary.

(2) The provisions of §§ 308.06 through 308.12, 308.16, and 308.21 of the Uniform Rules and §§ 308.101 through 308.102 and 308.104 through 308.106 of subpart B of the Local Rules shall apply to hearings held pursuant to this subpart.

(3) The applicant may appear at the hearing and shall have the right to introduce relevant and material documents and oral argument. Members of the FDIC enforcement staff may attend the hearing and participate as a party.

(4) There shall be no discovery in proceedings under this subpart.

(5) At the discretion of the presiding officer, witnesses may be presented within specified time limits, provided that a list of witnesses is furnished to the presiding officer and to all other parties prior to the hearing. Witnesses shall be sworn, unless otherwise directed by the presiding officer. The presiding officer may ask questions of any witness. Each party shall have the opportunity to cross-examine any witness presented by an opposing party. The transcript of the proceedings shall be furnished, upon request and payment of the cost thereof, to the applicant afforded the hearing.

(6) In the course of or in connection with any hearing under this subsection, the presiding officer shall have the power to administer oaths and affirmations, to take or cause to be taken depositions of unavailable witnesses, and to issue, revoke, quash, or modify subpoenas and subpoenas duces tecum. Where the presentation of witnesses is permitted, the presiding officer may require the attendance of witnesses from any state, territory, or other place subject to the jurisdiction of the United States at any location where the proceeding is being conducted. Witness fees shall be paid in accordance with § 308.14 of the Uniform Rules.

(7) Upon the request of the applicant afforded the hearing, or FDIC enforcement staff, the record shall remain open for five business days following the hearing for the parties to make additional submissions to the record.

(8) The presiding officer shall make recommendations to the Board of Directors, where possible, within 20 days after the last day for the parties to submit additions to the record.

(9) The presiding officer shall forward his or her recommendation to the Executive Secretary who shall promptly certify the entire record, including the recommendation to the Board of Directors or its designee. The Executive Secretary's certification shall close the record.

(d) *Written submissions in lieu of hearing.* The applicant or the bank may in writing waive a hearing and elect to

have the matter determined on the basis of written submissions.

(e) *Failure to request or appear at hearing.* Failure to request a hearing shall constitute a waiver of the opportunity for a hearing. Failure to appear at a hearing in person or through an authorized representative shall constitute a waiver of hearing. If a hearing is waived, the person shall remain barred under section 19.

(f) *Decision by Board of Directors or its designee.* Within 60 days following the Executive Secretary's certification of the record to the Board of Directors or its designee, the Board of Directors or its designee shall notify the affected person whether the person shall remain barred under section 19. The notification shall state the basis for any decision of the Board of Directors or its designee that is adverse to the applicant.

Subpart N—Rules and Procedures Applicable to Proceedings Relating to Suspension, Removal, and Prohibition Where a Felony Is Charged

§ 308.161 Scope.

The rules and procedures set forth in this subpart shall apply to the following proceedings:

(a) To suspend an institution-affiliated party of an insured state nonmember bank, or to prohibit such party from further participation in the conduct of the affairs of the bank, where the individual is charged in any state, Federal, or territorial information or indictment, or complaint, with the commission of, or participation in, a crime involving dishonesty or breach of trust punishable by imprisonment exceeding one year under state or Federal law; or

(b) To remove from office or to prohibit an institution-affiliated party from further participation in the conduct of the affairs of the bank, except with the consent of the Board of Directors or its designee, if continued service or participation by such party poses a threat to the interests of the bank's depositors or threatens to impair public confidence in the depository institution, where a judgment of conviction or an agreement to enter a pre-trial diversion or other similar program is entered against such party, not subject to further appellate review, has been entered against the individual for the commission of, or participation in, a crime involving dishonesty or breach of trust punishable by imprisonment exceeding one year under state or Federal law.

§ 308.162 Relevant considerations.

(a)(1) In proceedings under § 308.161 (a) and (b) for a suspension, removal or prohibition order, the following shall be considered:

(i) Whether the alleged offense is a crime which is punishable by imprisonment for a term exceeding one year under state or Federal law, and which involves dishonesty or breach of trust; and

(ii) Whether continued service or participation by the institution-affiliated party may pose a threat to the interest of the bank's depositors, or threatens to impair public confidence in the bank.

(2) Additional factors in the specific case that appear relevant to its decision to continue in effect, rescind, terminate, or modify a suspension, removal or prohibition order may be considered.

(b) The question of whether an institution-affiliated party charged with a crime is guilty of the crime charged shall not be tried or considered in a proceeding under this subpart.

§ 308.163 Notice of suspension, and orders of removal or prohibition.

(a) *Notice of suspension or prohibition.* (i) The Board of Directors or its designee may suspend or prohibit from further participation in the conduct of the affairs of the bank an institution-affiliated party by written notice of suspension or prohibition upon a determination by the Board of Directors or its designee that the grounds for such suspension or prohibition exist. The written notice of suspension or prohibition shall be served upon the institution-affiliated party and the bank.

(2) The written notice of suspension shall:

(i) Inform the institution-affiliated party that a written request for a hearing, stating the relief desired and grounds therefore, and any supporting evidence, may be filed with the Executive Secretary within 30 days after receipt of the written notice; and

(ii) Summarize or cite to the relevant considerations specified in § 308.162 of this subpart.

(3) The suspension or prohibition shall be effective immediately upon service on the institution-affiliated party, and shall remain in effect until final disposition of the information, indictment, complaint, or until it is terminated by the Board of Directors or its designee under the provisions of § 308.164 or otherwise.

(b) *Order of removal or prohibition.* (1) The Board of Directors or its designee may issue an order removing or prohibiting from further participation in the conduct of the affairs of the bank an institution-affiliated party, when:

(i) A final judgment of conviction not subject to further appellate review is entered against the individual for a crime referred to in § 308.161(b); and

(ii) The Board of Directors or its designee determines that continued service or participation of the institution-affiliated party may threaten the interests of the bank's depositors or may threaten to impair public confidence in the bank.

(2) The order shall be served upon the institution-affiliated party and the bank.

(3) The order shall:

(i) Inform the institution-affiliated party that a written request for a hearing, stating the relief desired and grounds therefor, and any supporting evidence, may be filed with the Executive Secretary within 30 days after receipt of the order; and

(ii) Summarize or cite the relevant considerations specified in § 308.162 of this subpart.

(4) The order shall be effective immediately upon service on the institution-affiliated party, and shall remain in effect until it is terminated by the Board of Directors or its designee under the provisions of § 308.164 or otherwise.

§ 308.164 Hearings.

(a) *Hearing dates.* The Executive Secretary shall order a hearing to be commenced within 30 days after receipt of a request for hearing on an application filed pursuant to § 308.163. Upon the request of the applicant, the presiding officer or the Executive Secretary may order a later hearing date.

(b) *Hearing procedure.* (1) The hearing shall be held in Washington, DC, or at another designated place, before a presiding officer designated by the Executive Secretary.

(2) The provisions of §§ 308.06 through 308.12, 308.16, and 308.21 of the Uniform Rules and §§ 308.101 through 308.102 and 308.104 through 308.106 of subpart B of the Local Rules shall apply to hearings held pursuant to this subpart.

(3) The applicant may appear at the hearing and shall have the right to introduce relevant and material documents and oral argument. Members of the FDIC enforcement staff may attend the hearing and participate as representatives of the FDIC enforcement staff.

(4) There shall be no discovery in proceedings under this subpart.

(5) At the discretion of the presiding officer, witnesses may be presented within specified time limits, provided that a list of witnesses is furnished to the presiding officer and to all other

parties prior to the hearing. Witnesses shall be sworn, unless otherwise directed by the presiding officer. The presiding officer may ask questions of any witness. Each party shall have the opportunity to cross-examine any witness presented by an opposing party. The transcript of the proceedings shall be furnished, upon request and payment of the cost thereof, to the applicant afforded the hearing.

(6) In the course of or in connection with any hearing under paragraph (b) of this section, the presiding officer shall have the power to administer oaths and affirmations, to take or cause to be taken depositions of unavailable witnesses, and to issue, revoke, quash, or modify subpoenas and subpoenas duces tecum. Where the presentation of witnesses is permitted, the presiding officer may require the attendance of witnesses from any state, territory, or other place subject to the jurisdiction of the United States at any location where the proceeding is being conducted. Witness fees shall be paid in accordance with § 308.14 of the Uniform Rules.

(7) Upon the request of the applicant afforded the hearing, or the members of the FDIC enforcement staff, the record shall remain open for five business days following the hearing for the parties to make additional submissions to the record.

(8) The presiding officer shall make recommendations to the Board of Directors, where possible, within ten days after the last day for the parties to submit additions to the record.

(9) The presiding officer shall forward his or her recommendation to the Executive Secretary who shall promptly certify the entire record, including the recommendation to the Board of Directors. The Executive Secretary's certification shall close the record.

(c) *Written submissions in lieu of hearing.* The applicant or the bank may in writing waive a hearing and elect to have the matter determined on the basis of written submissions.

(d) *Failure to request or appear at hearing.* Failure to request a hearing shall constitute a waiver of the opportunity for a hearing. Failure to appear at a hearing in person or through an authorized representative shall constitute a waiver of hearing. If a hearing is waived, the order shall be final and unappealable, and shall remain in full force and effect pursuant to § 308.163.

(e) *Decision by Board of Directors or its designee.* Within 60 days following the Executive Secretary's certification of the record to the Board of Directors or its designee, the Board of Directors or its designee shall notify the affected individual whether the order of removal or prohibition will be continued, terminated, or otherwise modified. The notification shall state the basis for any decision of the Board of Directors or its designee that is adverse to the applicant. The Board of Directors or its designee shall promptly rescind or modify an order of removal or prohibition where the decision is favorable to the applicant.

Subpart O—Liability of Commonly Controlled Depository Institutions

§ 308.165 Scope.

The rules and procedures in this subpart, subpart B of the Local Rules and the Uniform Rules shall apply to proceedings in connection with the assessment of cross-guaranty liability against commonly controlled depository institutions.

§ 308.166 Grounds for assessment of liability.

Any insured depository institution shall be liable for any loss incurred or reasonably anticipated to be incurred by the corporation, subsequent to August 9, 1989, in connection with the default of a commonly controlled insured depository institution, or any loss incurred or reasonably anticipated to be incurred in connection with any assistance provided by the Corporation to any commonly controlled depository institution in danger of default.

§ 308.167 Notice of assessment of liability.

(a) The amount of liability shall be assessed upon service of a Notice of Assessment of Liability upon the liable depository institution, within two years of the date the Corporation incurred the loss.

(b) *Contents of Notice.* (1) The Notice of Assessment of Liability shall set forth:

(i) The basis for the FDIC's jurisdiction over the proceeding;

(ii) A statement of the Corporation's good faith estimate of the amount of loss it has incurred or anticipates incurring;

(iii) A statement of the method by which the estimated loss was calculated;

(iv) A proposed order directing payment by the liable institution of the FDIC's estimated amount of loss, and the schedule under which the payment will be due;

(v) In cases involving more than one liable institution, the estimated amount of each institution's share of the liability.

(2) The Notice of Assessment of Liability shall advise the liable institution(s):

(i) That an answer must be filed within 20 days after service of the Notice;

(ii) That, if a hearing is requested, a request for a hearing must be filed within 20 days after service of the Notice;

(iii) That if a hearing is requested, such hearing will be held within the judicial district in which the liable institution is found, or, in cases involving more than one liable institution, within a judicial district in which at least one liable institution is found;

(iv) That, unless the administrative law judge sets a different date, the hearing will commence 120 days after service of the Notice of Assessment of Liability; and

(v) That failure to request a hearing shall render the Notice of Assessment a final and unappealable order.

§ 308.168 Effective date of and payment: under an order to pay.

(a) Unless otherwise provided in the Notice of Assessment of Liability, payment of the assessment shall be due on or before the 21st day after service of the Assessment of Liability, under the terms of the schedule for payment set forth therein.

(b) All payments collected shall be paid to the Corporation.

(c) Failure to request a hearing as prescribed herein shall render the order to pay final and unappealable.

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

§ 308.169 Scope.

This subpart, and the Equal Access to Justice Act (5 U.S.C. 504), which it implements, apply to adversary adjudications before the FDIC. The types of adjudication covered by this subpart are those listed in § 308.01 of the Uniform Rules. The Uniform Rules and subpart B of the Local Rules apply to any proceedings to recover fees and expenses under this subpart.

§ 308.170 Filing, content, and service of documents.

(a) *Time to file.* An application and any other pleading or document related to the application may be filed with the Executive Secretary whenever the applicant has prevailed in the proceeding or in a discrete significant substantive portion of the proceeding within 30 days after service of the final

order of the Board of Directors in disposition of the proceeding.

(b) *Content.* The application and related documents shall conform to the requirements of § 308.10 of the Uniform Rules.

(c) *Service.* The application and related documents shall be served on all parties to the adversary adjudication in accordance with § 308.11 of the Uniform Rules, except that statements of net worth shall be served only on counsel for the FDIC.

(d) Upon receipt of an application, the Executive Secretary shall refer the matter to the administrative law judge who heard the underlying adversary proceeding, provided that if the original administrative law judge is unavailable, or the Executive Secretary determines, in his or her sole discretion, that there is cause to refer the matter to a different administrative law judge, the matter shall be referred to a different administrative law judge.

§ 308.171 Responses to application.

(a) *By FDIC.* (1) Within 20 days after service of an application, counsel for the FDIC may file with the Executive Secretary and serve on all parties an answer to the application. Unless counsel for the FDIC requests and is granted an extension of time for filing or files a statement of intent to negotiate under § 308.179 of this subpart, failure to file an answer within the 20-day period will be treated as a consent to the award requested.

(2) The answer shall explain in detail any objections to the award requested and identify the facts relied on in support of the FDIC's position. If the answer is based on any alleged facts not already in the record of the proceeding, the answer shall include either supporting affidavits or a request for further proceedings under § 308.180.

(b) *Reply to answer.* The applicant may file a reply if the FDIC has addressed in its answer any of the following issues: that the position of the FDIC was substantially justified, that the applicant unduly protracted the proceedings, or that special circumstances make an award unjust. The reply shall be filed within 15 days after service of the answer. If the reply is based on any alleged facts not already in the record of the proceeding, the reply shall include either supporting affidavits or a request for further proceedings under § 308.180.

(c) *By other parties.* Any party to the adversary adjudication, other than the applicant and the FDIC, may file comments on an application within 20 days after service of the application. If the applicant is entitled to file a reply to the FDIC's answer under paragraph (b) of this section, another party may file comments on the answer within 15 days after service of the answer. A commenting party may not participate in any further proceedings on the application unless the administrative law judge determines that the public interest requires such participation in order to permit additional exploration of matters raised in the comments.

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

§ 308.172 Eligibility of applicants.

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

(b) *Types of eligible applicant.* The types of eligible applicant are:

(1) An individual with a net worth of not more than $2,000,000 at the time the adversary adjudication was initiated; or

(2) Any owner of an unincorporated business, or any partnership, corporation, associations, unit of local government or organization, the net worth of which did not exceed $7,000,000 and which did not have more than 500 employees at the time the adversary adjudication was initiated.

(c) *Factors to be considered.* In determining the types of eligible applicants:

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

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

(3) The net worth of a bank shall be established by the net worth information reported in conformity with applicable instructions and guidelines on the bank's Consolidated Report of Condition and Income filed for the last reporting date before the initiation of the adversary adjudication.

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

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

(6) An applicant that participates in a proceeding primarily on behalf of one or more other persons or entities that would be ineligible is not itself eligible for an award.

§ 308.173 Prevailing party.

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

(b) *Segregation of costs.* When a proceeding has presented a number of discrete substantive issues, an applicant may have prevailed even though all the issues were not resolved in its favor. If such an applicant is deemed to have prevailed, any award shall be based on the fees and expenses incurred in

connection with the discrete significant substantive issue or issues on which the applicant's position has been upheld. If such segregation of costs is not practicable, the award may be based on a fair proration of those fees and expenses incurred in the entire proceeding which would be recoverable under § 308.175 if proration were not performed, whether separate or prorated treatment is appropriate, and the appropriate proration percentage, shall be determined on the facts of the particular case. Attention shall be given to the significance and nature of the respective issues and their separability and interrelationship.

§ 308.174 Standards for awards.

A prevailing applicant may receive an award for fees and expenses unless the position of the FDIC during the proceeding was substantially justified or special circumstances make the award unjust. An award will be reduced or denied if the applicant has unduly or unreasonably protracted the proceedings. Awards for fees and expenses incurred before the date on which the adversary adjudication was initiated are allowable if their incurrence was necessary to prepare for the proceeding.

§ 308.175 Measure of awards.

(a) *General rule.* Awards will be based on rates customarily charged by persons engaged in the business of acting as attorneys, agents, and expert witnesses, even if the services were made available without charge or at a reduced rate, provided that no award under this subpart for the fee of an attorney or agent may exceed $75 per hour. No award to compensate an expert witness may exceed the highest rate at which the FDIC pays expert witnesses. An award may include the reasonable expenses of the attorney, agent, or expert witness as a separate item, if the attorney, agent, or expert witness ordinarily charges clients separately for such expenses.

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

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

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

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

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

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

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

§ 308.176 Application for awards.

(a) *Contents.* An application for an award of fees and expenses under this subpart shall contain:

(1) The name of the applicant and an identification of the proceeding;

(2) A showing that the applicant has prevailed, and an identification of each issue with regard to which the applicant believes that the position of the FDIC in the proceeding was not substantially justified;

(3) A statement of the amount of fees and expenses for which an award is sought;

(4) If the applicant is not an individual, a statement of the number of its employees on the date the proceeding was initiated;

(5) A description of any affiliated individuals or entities, as defined in § 308.172(c)(5), or a statement that none exist;

(6) A declaration that the applicant, together with any affiliates, had a net worth not more than the ceiling established for it by § 308.172(b) as of the date the proceeding was initiated; and

(7) Any other matters that the applicant wishes the FDIC to consider in determining whether and in what amount an award should be made.

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

§ 308.177 Statement of net worth.

(a) *General rule.* A statement of net worth must be filed with the application for an award of fees. The statement shall reflect the net worth of the applicant and all affiliates of the applicant.

(b) *Contents.* (1) The statement of net worth may be in any form convenient to the applicant which fully discloses all the assets and liabilities of the applicant and all the assets and liabilities of its affiliates, as of the time of the initiation of the adversary adjudication. Unaudited financial statements are acceptable unless the administrative law judge or the Board of Directors otherwise requires. Financial statements or reports to a Federal or state agency, prepared before the initiation of the adversary adjudication for other purposes, and accurate as of a date not more than three months prior to the initiation of the proceeding, are acceptable in establishing net worth as of the time of the initiation of the proceeding, unless the administrative law judge or the Board of Directors otherwise requires.

(2) In the case of applicants or affiliates that are not banks, net worth shall be considered for the purposes of this subpart to be the excess of total assets over total liabilities, as of the date the underlying proceeding was initiated, except as adjusted under § 308.172(c)(2). Assets and liabilities of individuals shall include those beneficially owned within the meaning of the FDIC's rules and regulations.

(3) If the applicant or any of its affiliates is a bank, the portion of the statement of net worth which relates to the bank shall consist of a copy of the bank's last Consolidated Report of Condition and Income filed before the initiation of the adversary adjudication. In all cases the administrative law judge or the Board of Directors may call for additional information needed to establish the applicant's net worth as of the initiation of the proceeding. Except as adjusted by additional information that was called for under the preceding sentence, net worth shall be considered for the purposes of this subpart to be the total equity capital (or, in the case of mutual savings banks, the total surplus accounts) as reported, in conformity with applicable instructions and guidelines, on the bank's Consolidated Report of Condition and Income filed for the last reporting date before the initiation of the proceeding.

(c) *Statement confidential.* Unless otherwise ordered by the Board of Directors or required by law, the statement of net worth shall be for the confidential use of counsel for the FDIC, the Board of Directors, and the administrative law judge.

§ 308.178 Statement of fees and expenses.

The application shall be accompanied by a statement fully documenting the fees and expenses for which an award is sought. A separate itemized statement shall be submitted for each professional firm or individual whose services are covered by the application, showing the hours spent in work in connection with the proceeding by each individual, a description of the specific services performed, the rate at which each fee has been computed, any expenses for which reimbursement is sought, the total amount claimed, and the total amount paid or payable by the applicant or by any other person or entity for the services performed. The administrative law judge or the Board of Directors may require the applicant to provide vouchers, receipts, or other substantiation for any expenses claimed.

§ 308.179 Settlement negotiations.

If counsel for the FDIC and the applicant believe that the issues in a fee application can be settled, they may jointly file with the Executive Secretary a statement of their intent to negotiate a settlement. The filing of this statement shall extend the time for filing an answer under § 308.171 for an additional 20 days, and further extensions may be granted by the administrative law judge upon the joint request of counsel for the FDIC and the applicant.

§ 308.180 Further proceedings.

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

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

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

§ 308.181 Recommended decision.

The administrative law judge shall file with the Executive Secretary a recommended decision on the fee application not later than 90 days after the filing of the application or 30 days after the conclusion of the hearing, whichever is later. The recommended decision shall include written proposed findings and conclusions on the applicant's eligibility and its status as a prevailing party and an explanation of the reasons for any difference between the amount requested and the amount of the recommended award. The recommended decision shall also include, if at issue, proposed findings on whether the FDIC's position was substantially justified, whether the applicant unduly protracted the proceedings, or whether special circumstances make an award unjust. The administrative law judge shall file the record of the proceeding on the fee application and, at the same time, serve upon each party a copy of the recommended decision, findings, conclusions, and proposed order.

§ 308.182 Board of Directors action.

(a) *Exceptions to recommended decision.* Within 20 days after service of the recommended decision, findings, conclusions, and proposed order, the applicant or counsel for the FDIC may file with the Executive Secretary written exceptions thereto. A supporting brief may also be filed.

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

§ 308.183 Payment of awards.

An applicant seeking payment of an award made by the Board of Directors shall submit to the Executive Secretary a statement that the applicant will not seek judicial review of the decision and order or that the time for seeking further review has passed and no further review has been sought. The FDIC will pay the amount awarded within 30 days after receiving the applicant's statement, unless judicial review of the award or of the underlying decision of the adversary adjudication has been sought by the applicant or any other party to the proceeding.

By order of the Board of Directors. Dated at Washington, DC, this 30th day of July, 1991.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Deputy Executive Secretary.

[FR Doc. 91-18780 Filed 8-8-91; 8:45 am]

BILLING CODE 6714-01-M