

# Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

#### 7 CFR Ch. I

#### Grain Inspection, Packers and Stockyards Administration

#### 7 CFR Ch. VIII

[Docket Number FGIS-2000-001a]

RIN 0580-AA73

#### Request for Public Comments on How USDA Can Best Facilitate the Marketing of Grains, Oilseeds, Fruits, Vegetables, and Nuts in Today's Evolving Marketplace

**AGENCY:** Agricultural Marketing Service Grain Inspection, Packers and Stockyards Administration, USDA

**ACTION:** Advance notice of proposed rulemaking; correction.

**SUMMARY:** The United States Department of Agriculture (USDA) published a document in the **Federal Register** of November 30, 2000, concerning request for comments on How USDA Can Best Facilitate the Marketing of Grains, Oilseeds, Fruits, Vegetables, and Nuts in Today's Evolving Marketplace. The document omitted e-mail as a means of filing public comments.

**FOR FURTHER INFORMATION CONTACT:** Marianne Plaus, 202-690-3460.

#### Correction

In the **Federal Register** of November 30, 2000, in FR Doc. 00-30140, on page 71272, in the second column, correct the first paragraph of the "Addresses" caption to read:

**ADDRESSES:** Interested persons are invited to submit written comments on this notice to Richard Hardy, GIPSA, USDA, 1400 Independence Avenue, SW., Room 0757-S, Washington, DC 20250-3650. Comments may also be sent by fax to (202) 720-2459, filed via the Internet through the GIPSA homepage at [www.usda.gov/gipsa](http://www.usda.gov/gipsa), or

filed via e-mail at [anpr@gipsadc.usda.gov](mailto:anpr@gipsadc.usda.gov).

Dated: December 12, 2000

**David R. Shipman,**

*Deputy Administrator, Grain Inspection, Packers and Stockyards Administration.*

**Michael D. Fernandez,**

*Associate Administrator, Agricultural Marketing Service.*

[FR Doc. 00-32158 Filed 12-15-00; 8:45 am]

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## FEDERAL HOUSING FINANCE BOARD

### 12 CFR Parts 907 and 908

[No. 2000-42]

RIN 3069-AB-03

#### Rules of Practice and Procedure

**AGENCY:** Federal Housing Finance Board.

**ACTION:** Proposed rule.

**SUMMARY:** The Federal Housing Finance Board (Finance Board) is proposing to amend its regulations to implement the provisions of Title VI of the Gramm-Leach-Bliley Act, Public Law 106-102 (1999) and to establish rules of practice and procedure governing hearings on the record in certain administrative enforcement actions. The proposed rule is intended to provide Finance Board personnel, the Federal Home Loan Banks (Banks), the Office of Finance (OF) and the directors and executive officers of the Banks and OF, as well as any other interested parties, with sufficient notice and guidance to fully utilize the procedures.

The Finance Board is also proposing to make certain conforming amendments to its existing rules.

**DATES:** The Finance Board will accept written comments on the proposed rule that are received on or before January 17, 2001.

**ADDRESSES:** Send comments to Elaine L. Baker, Secretary to the Board, by electronic mail at [bakere@fhfb.gov](mailto:bakere@fhfb.gov), or by regular mail at the Federal Housing Finance Board, 1777 F Street, N.W., Washington, D.C. 20006. Comments will be available for public inspection at this address.

**FOR FURTHER INFORMATION CONTACT:** Charlotte A. Reid, Special Counsel, Office of General Counsel, 202/408-2510, [reidc@fhfb.gov](mailto:reidc@fhfb.gov). Staff also can be

reached by regular mail at the Federal Housing Finance Board, 1777 F Street, N.W., Washington, D.C. 20006.

#### SUPPLEMENTARY INFORMATION:

#### I. Statutory and Regulatory Background

##### A. The Federal Home Loan Bank Act

The twelve Banks are instrumentalities of the United States organized under the authority of the Federal Home Loan Bank Act, as amended, 12 U.S.C. 1421-1449 (Act). The Banks are a "government sponsored enterprise" (GSE), i.e., a federally chartered but privately owned institution created by Congress to serve a public purpose. The purpose of the Banks is to support the financing of housing and community development lending. See 12 U.S.C. 1422a(a)(3)(B)(ii), 1430(i), (j)(10). The Banks are cooperatives, meaning that only a member of a Bank may own the Bank's capital stock and share in its profits. An institution that is eligible (typically, an insured depository institution) may become a member of a Bank if it satisfies certain statutory criteria and purchases a specified amount of the Bank's capital stock. 12 U.S.C. 1424, 1426. Only members and certain eligible housing associates (such as state housing finance agencies) may borrow from or use other products and services offered by the Banks. 12 U.S.C. 1426, 1430(a), 1430b.

The Banks, together with the OF, comprise the Federal Home Loan Bank System (Bank System), which operates under the supervision of the Finance Board, an independent agency in the executive branch of the Federal government.<sup>1</sup> Under the Act, the primary duty of the Finance Board is to ensure that the Banks operate in a financially safe and sound manner. Consistent with that duty, the Finance Board is required to supervise the Banks, ensure that they carry out their housing finance mission, and ensure that the Banks remain adequately capitalized and able to raise funds in the capital markets. 12 U.S.C. 1422a(a)(3)(A), (B).

Section 2B of the Act sets forth the powers and duties of the Finance Board. 12 U.S.C. 1422b. In general, the Finance Board is empowered to supervise the Banks and to promulgate and enforce

<sup>1</sup> The Finance Board was created by the Financial Institutions Reform, Recovery and Enforcement Act of 1989, Pub. L. 101-73, 103 Stat. 412 (FIRREA).

such regulations and orders as are necessary to carry out the provisions of the Act. 12 U.S.C. 1422b(a)(1). The Finance Board also is authorized to suspend or remove for cause a director, officer, employee or agent of any Bank or OF. The Act requires that the Finance Board communicate in writing to the subject individual and the Bank or OF the cause of any such suspension or removal. 12 U.S.C. 1422b(a)(2). With the enactment of the Gramm-Leach-Bliley Act in 1999, the Finance Board's enforcement powers were significantly expanded.

#### B. The Gramm-Leach-Bliley Act Amendments

On November 12, 1999, the Gramm-Leach-Bliley Act, Public Law No. 106-102, 113 Stat. 1338 (Nov. 12, 1999) (GLB Act), was enacted. Title VI of the GLB Act, known as the Federal Home Loan Bank System Modernization Act of 1999 (Modernization Act), substantially amended the Act. In particular, section 606 of the Modernization Act amended section 2B of the Act, 12 U.S.C. 1422b(a)(5), to confer on the Finance Board certain administrative enforcement powers with respect to the Banks and the Office of Finance, and their executive officers and directors, which are substantially the same as those granted to the Office of Federal Housing Enterprise Oversight (OFHEO) with respect to the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation (collectively, the housing finance enterprises), or the directors or executive officers of the housing finance enterprises, by the enforcement provisions in Subtitle C of Title XIII of the Housing and Community Development Act of 1992, known as the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (Safety and Soundness Act) in sections 1371 through 1379B (codified at 12 U.S.C. 4631-4641), and those granted to the appropriate Federal banking agency with respect to insured depository institutions under paragraphs (6) and (7) of section 8(b) of the Federal Deposit Insurance Act, *as amended*. (codified at 12 U.S.C. 1818(b)(6) and (7)).

Specifically, section 606 of the Modernization Act enumerates the grounds pursuant to which the Finance Board may issue a notice of charges; incorporates by reference the authority and procedures provided for in sections 1371(c) and (f) of the Safety and Soundness Act (12 U.S.C. 4631(c) and (f)) with regard to the issuance of a notice of charges and cease and desist orders (C&D orders); confers on the Finance Board the same authority to

issue corrective orders as the appropriate Federal banking agencies have with respect to insured depository institutions as set forth in 12 U.S.C. 1818(b)(6) and (7); and provides that the Finance Board has all other powers to enforce the Act that OFHEO has under Subtitle C of Title XIII of the Safety and Soundness Act to enforce its statutes, including the authority to issue a temporary C&D order and to assess a civil money penalty (CMP) (12 U.S.C. 4632 and 4636, respectively). *See* 12 U.S.C. 1422b(a)(5). The Modernization Act also incorporates OFHEO's statutory authority and procedures for hearings, judicial review of final orders, the issuance of subpoenas and subpoenas *duces tecum* to obtain testimony and documents, and the enforcement of final orders (12 U.S.C. 4633-4641). *See id.* These expanded powers in no way restrict the ability of the Finance Board under its existing authority to supervise the Banks or to promulgate and enforce orders or directives under section 2B(a)(1) or any other provision of the Act.

#### II. Synopsis of the Proposed Rule

The Act requires the Finance Board to adopt rules of practice and procedure consistent with the Administrative Procedure Act, 5 U.S.C. 500-559 (APA), for all matters to be determined by the Finance Board on the record after an opportunity for a hearing, including cease-and-desist orders and civil money penalty assessments.<sup>2</sup> Thus, the rules of practice and procedure set forth in the proposed rule are intended to supplement the APA requirements for adjudicatory hearings required by the statute to be held on the record.<sup>3</sup>

Subpart A of the proposed rule defines terms appearing in this part, prescribes the scope of the regulation, and relates the general rules of construction. Subpart B of the proposed rule recites the scope of the Finance Board's authority with respect to certain enforcement proceedings, including cease and desist orders, temporary cease and desist orders and civil money penalties, suspension and removal authority, judicial review of final orders, public disclosure of final orders, and the limitation on any implied private right of action. The proposed rule also provides for the service of a notice of

charges on a former executive officer or director of a Bank or OF, within two years of their separation from service.

Subpart C of the proposed rule provides the general rules that govern the process and recites the authority of the Finance Board, Board of Directors and the presiding officer. The presiding officer is defined to mean an Administrative Law Judge (ALJ), or other neutral, qualified individual who is appointed by the Finance Board under applicable law (presiding officer), to preside over the hearing from the time of the appointment until he or she files the record, including a recommended decision and order, for a final decision.

The Board of Directors may intervene in any matter to perform, direct the performance of, or waive the performance of any authorized action of the presiding officer. The presiding officer is authorized to: Change the hearing date, time or place; issue or modify subpoenas or subpoenas *duces tecum*; issue protective orders; administer oaths and affirmations; regulate the course of the hearing and hold conferences to address issues arising in the hearing; and rule on non-dispositive motions.

All hearings are open to the public, unless the Finance Board determines that an open hearing would be contrary to the public interest. Consistent with a Finance Board determination to hold an open hearing, the presiding officer may limit public and media access to any public hearing. Any party may file a motion with the presiding officer for a closed hearing in accordance with the applicable limitations. Additionally, the Finance Board may file any document or portion of a document under seal and the presiding officer is required to take all appropriate steps to preserve the confidentiality of such document(s) or parts thereof.

The proposed rule provides that every filing or submission of record shall be signed by at least one representative of record to certify that the document has been read and that to the best of the representative's knowledge it is supported in fact and is not made for any improper purpose. *Ex parte* communications are prohibited. Any party or representative who makes or elicits an *ex parte* communication may be subject to appropriate sanctions. The Finance Board anticipates that in the future, under applicable law, the agency will have the necessary technological ability to enable the parties to submit documents by electronic media, and may specify the conditions for such electronic transmission. Until further notice, for purposes of this regulation,

<sup>2</sup> *See* 12 U.S.C. 1422b(a)(5), which incorporates the OFHEO requirement from the Safety and Soundness Act of 1992 (12 U.S.C. 4633(a)(3)).

<sup>3</sup> The procedures set forth in part 908 are distinct from those described in part 907, and are not contingent upon the issuance of an examination finding, any order or directive concerning safety and soundness or compliance, or any other order of the Finance Board under section 2B(a)(1) of the Act.

all papers filed by the parties shall be filed in accordance with the requirements set out in proposed § 908.25(c).

Any respondent may submit a settlement proposal to the Finance Board in accordance with proposed § 908.30. Submission of a settlement offer does not provide a basis for delaying a proceeding, and no settlement offer is admissible in evidence in the adjudicative proceeding or any court. Importantly, nothing in the rule prohibits or restricts the authority of the Finance Board to conduct any examination or inspection of any Bank, or to conduct or to continue any form of investigation authorized by law.

Under subpart D, the Finance Board commences the hearing process by issuing and serving a notice of charges on a respondent. During the course of a hearing, the presiding officer controls virtually all aspects of the proceeding. The presiding officer: determines the hearing schedule; presides over any pre-hearing conferences; rules on motions, discovery, and evidentiary issues; and ensures that the proceeding is fair, equitable, and impartial. The presiding officer does not, however, have the authority to make a ruling that disposes of the proceeding. Only the Board of Directors has the authority to dismiss the proceeding or to make a final determination on the merits of the proceeding following a hearing on the record or a negotiated disposition.

Subpart E of the proposed rule governs hearings and post-hearing proceedings. Section 908.60 of the proposed rule provides that hearings shall be conducted in accordance with the APA, and any other applicable law. The parties to the proceeding have the right to present evidence and witnesses at the hearing and to examine and cross-examine the witnesses. At the completion of the hearing, the parties may submit proposed findings of fact and conclusions of law and a proposed order. The presiding officer then submits the complete record to the Board of Directors for consideration and action. The record includes the presiding officer's recommended decision, recommended findings of fact and conclusions of law, and proposed order. The record also includes all pre-hearing and hearing transcripts, exhibits, rulings, motions, briefs and memoranda, and all supporting papers filed in connection with the hearing. The Board of Directors shall issue a final ruling within 90 days of the date the presiding officer serves notice on the parties that the record is complete and the case has been submitted to the Board of Directors for final decision, or

at such time as is practicable within the discretion of the Board of Directors.

Subpart F, "Rules of Practice Before the Finance Board," governs the parties and their representatives appearing before the Finance Board under this rule and provides for the imposition of disciplinary sanctions—censure, suspension or disbarment—by the presiding officer or the Board of Directors against parties or their representatives. This subpart covers parties and individuals that appear before the Finance Board in a representational capacity. The presiding officer may decide what notice and responses are appropriate where sanctions are at issue for conduct arising in an adjudicatory proceeding or hearing. The proposed rule prescribes when sanctions may be imposed, and what those sanctions may be. Covered representation may include, but is not limited to, the practice of attorneys and accountants. Employees of the Finance Board are not subject to disciplinary proceedings under this subpart. The Finance Board may also apply these qualification and disciplinary rules to parties or representatives in an administrative proceeding under part 907 of the Finance Board's rules and regulations governing requests for regulatory interpretations, approvals, waivers, case-by-case determinations or review of disputed supervisory determinations, which are not required by statute to be resolved following a hearing on the record. See 12 CFR part 907.

### III. Regulatory Impact

#### *Executive Order 13132, Federalism*

Executive Order 13132 requires that Executive departments and agencies identify regulatory actions that have significant federalism implications, that is, regulations or actions that have substantial, direct effects on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities between Federal and State Government. The Finance Board has determined that this proposed rule has no federalism implications that warrant consultation with the states or the preparation of a federalism summary impact statement in accordance with Executive Order 13132.

#### *Executive Order 12866, Regulatory Planning and Review*

In order to make the regulatory process more efficient, Executive Order 12866 requires the centralized review of regulatory action. The Finance Board has determined that this proposed rule

is not a significant regulatory action as such term is defined in Executive Order 12866, has so indicated to the Office of Management and Budget (OMB), and was not notified by OMB that the rule must be reviewed by OMB.

#### *Executive Order 12988, Civil Justice Reform*

Executive Order 12988 sets forth guidelines to promote the just and efficient resolution of civil claims and to reduce the risk of litigation to the Federal Government. This proposed rule meets the applicable standards of sections 3(a) and 3(b) of Executive Order 12988.

#### *Unfunded Mandates Reform Act of 1995*

The Unfunded Mandates Reform Act of 1995 requires for any rule that includes a Federal mandate that may result in an annual expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of \$100 million, that an agency prepare an assessment statement of the anticipated costs and benefits of the Federal mandate. See 2 U.S.C. 1532(a). The proposed rule does not include such a Federal mandate, and, therefore, it does not warrant the preparation of such an assessment statement.

#### *Regulatory Flexibility Act*

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires that a regulation that has a significant economic impact on a substantial number of small entities must include a regulatory flexibility analysis describing the rule's impact on small entities. Such an analysis need not be undertaken if the agency head certifies that the rule will not have a significant economic impact on a substantial number of small entities. 5 U.S.C. 605(b). The proposed rule applies only to the Banks, which do not come within the meaning of small entities as defined in the Regulatory Flexibility Act (RFA). See 5 U.S.C. 601(6). Therefore, in accordance with section 605(b) of the RFA, 5 U.S.C. 605(b), the Finance Board hereby certifies that this proposed rule, when promulgated as a final rule, will not have significant economic impact on a substantial number of small entities.

#### *Paperwork Reduction Act*

The Paperwork Reduction Act seeks to minimize the paperwork burden for individuals, small businesses, and other entities resulting from the collection of information by or for the Federal government. See 44 U.S.C. 3501 *et seq.* This proposed rule does not contain any collections of information pursuant to the Paperwork Reduction Act of 1995.

44 U.S.C. 3502(3). Therefore, the Finance Board has not submitted any information to the Office of Management and Budget for review.

### List of Subjects

#### 12 CFR Part 907

Administrative practice and procedures, Federal Home Loan Banks.

#### 12 CFR Part 908

Administrative practice and procedures, Penalties.

For the reasons stated in the preamble, the Finance Board proposes to amend 12 CFR parts 907 and 908 as follows:

### PART 907—PROCEDURES

1. The authority citation for part 907 continues to read as follows:

**Authority:** 12 U.S.C. 1422b(a)(1).

2. In § 907.15, add paragraph (j) to read as follows:

#### § 907.15 General provisions.

\* \* \* \* \*

(j) *Rules of practice.* In connection with any matter initiated or pending pursuant to subpart C of this part, petitioners, requestors or intervenors shall be subject to the provisions of subpart F of 12 CFR part 908. No other provision of part 908 shall apply to administrative matters under this part.

3. Add a new part 908 to read as follows:

### PART 908—RULES OF PRACTICE AND PROCEDURE IN HEARINGS ON THE RECORD

#### Subpart A—Introduction

Sec.

908.1 Definitions.

908.2 Scope.

908.3 Rules of construction.

#### Subpart B—Scope and Authority—Enforcement and Removal Proceedings

908.4 Cease and desist orders.

908.5 Temporary cease and desist orders.

908.6 Civil money penalties.

908.7 Suspension and removal.

908.8 Subpoenas.

908.9 Hearings on the record.

908.10 Judicial review.

908.11 Jurisdiction, enforcement of orders and notice.

908.12 Notice after separation.

908.13 Public disclosure of final orders.

908.14 No implied private right of action.

908.15—908.19 [Reserved]

#### Subpart C—General Rules

908.20 Authority of the Board of Directors.

908.21 Authority of the presiding officer.

908.22 Public hearings.

908.23 Good faith certification.

908.24 Ex parte communications.

908.25 Filing of papers.

908.26 Service of papers.

908.27 Computing time.

908.28 Change of time limits.

908.29 Witness fees and expenses.

908.30 Settlement or other dispute resolution.

908.31 Right to supervise the Banks.

908.32 Collateral attacks on adjudicatory proceeding.

908.33—908.39 [Reserved]

#### Subpart D—Pre-Hearing Proceedings

908.40 Commencement of proceeding and contents of notice of charges.

908.41 Answer.

908.42 Amended pleadings.

908.43 Failure to appear.

908.44 Consolidation and severance of actions.

908.45 Motions.

908.46 Discovery.

908.47 Request for document discovery from parties.

908.48 Document subpoenas to nonparties.

908.49 Deposition of witness unavailable for hearing.

908.50 Interlocutory review.

908.51 Summary disposition.

908.52 Partial summary disposition.

908.53 Scheduling and prehearing conferences.

908.54 Prehearing submissions.

908.55 Hearing subpoenas.

908.56—908.59 [Reserved]

#### Subpart E—Hearing and Post-Hearing Proceedings

908.60 Conduct of hearings.

908.61 Evidence.

908.62 Post hearing filings.

908.63 Recommended decision and filing of record.

908.64 Exceptions to recommended decision.

908.65 Review by Board of Directors.

908.66 Exhaustion of administrative remedies.

908.67 Stay of order pending judicial review.

908.68—908.69 [Reserved]

#### Subpart F—Rules of Practice Before the Finance Board

908.70 Scope.

908.71 Practice before the Finance Board.

908.72 Appearance and practice in proceedings before the Finance Board.

908.73 Conflicts of interest.

908.74 Sanctions.

908.75 Censure, suspension, disbarment and reinstatement.

**Authority:** 12 U.S.C. 1422b(a)(5), 4631(c) and (f), and 4632–4641. Section 908.4 is also authorized by 12 U.S.C. 1818(b)(6) and (7). Section 908.7 is also authorized by 12 U.S.C. 1422b(a)(2).

#### Subpart A—Introduction

##### § 908.1 Definitions.

For purposes of this part—

(a) *Adjudicatory proceeding or hearing* means a proceeding conducted pursuant to this part and leading to the formulation of a final order other than a regulation;

(b) *Decisional employee* means any employee of the Finance Board or any member of the presiding officer's staff who has not engaged in an investigative or prosecutorial role in an adjudicatory proceeding or hearing and who may assist the Board of Directors or the presiding officer, respectively, in preparing orders, recommended decisions, decisions and other documents under this part.

(c) *OF* means the Office of Finance as defined in § 985.1 of this chapter.

(d) *Notice of charges* means a written order so titled, which is issued by the Finance Board to a respondent, and that describes the alleged violations with sufficient specificity to put the respondent on notice of the nature and scope of the charges being brought against the respondent pursuant to this part.

(e) *Party* means any person named in any notice issued by the Finance Board under this part.

(f) *Person* means an individual, sole proprietor, partnership, corporation, unincorporated association, trust, joint venture, pool, syndicate, agency, Bank, the OF, or other entity or organization.

(g) *Presiding officer* means an administrative law judge or other qualified, neutral individual who is appointed by the Finance Board under applicable law, and, pursuant to Title 5 of the United States Code, may conduct a hearing or adjudicatory proceeding under this part.

(h) *Representative of record* means an individual who is authorized to represent a person or who is representing himself at an adjudicatory proceeding or hearing conducted under this part and who has filed a notice of appearance in accordance with § 908.72.

(i) *Respondent* means any person named in a notice of charges issued by the Finance Board.

(j) *Safety and Soundness Act* means the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (12 U.S.C. 4501–4641) (Title XIII of the Housing and Community Development Act of 1992, Pub. L. No. 102–550).

(k) *Violation* includes any act or omission by a person, undertaken alone or with one or more others, that causes directly or indirectly, counsels, participates in, or otherwise furthers, aids or abets a violation of the Act or any other applicable law, regulation or policy.

##### § 908.2 Scope.

This subpart prescribes rules of practice and procedure applicable to an adjudicatory proceeding or hearing with regard to:

(a) Cease and desist proceedings under section 2B(a)(5) of the Act; or

(b) Civil money penalty assessment proceedings against a Bank or OF, or any executive officer or director of any Bank or OF, under section 2B(a)(5) of the Act.

#### § 908.3 Rules of construction.

For purposes of this part—

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

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

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

#### Subpart B—Scope and Authority—Enforcement and Removal Proceedings

#### § 908.4 Cease and desist orders.

(a) *General rule.* The Finance Board may issue and serve a notice of charges upon a Bank, OF, or any executive officer or director of a Bank or OF, if in the determination of the Finance Board, the Bank, OF, or any executive officer or director of a Bank or OF, is engaging or has engaged in, or, if the Finance Board has reasonable cause to believe that the Bank, OF, or the executive officer or director of a Bank or OF, is about to engage in:

(1) An unsafe or unsound practice in conducting the business of the Bank or OF;

(2) Any conduct that violates any provision of the Act or any applicable law, order, rule or regulation; or

(3) Any conduct that violates any condition imposed in writing by the Finance Board in connection with the granting of any application or other request by the Bank or OF, or any written agreement entered into by the Bank or OF with the Finance Board.

(b) *Actions to limit activities and remedial authority.* (1) *Remedial actions.* The authority of the Finance Board to issue and serve a notice of charges under this part includes the authority to require a Bank or OF or any executive officer or director of a Bank or OF to—

(i) Make restitution or provide reimbursement, indemnification, or guarantee against loss if—

(A) Such Bank or party was unjustly enriched in connection with the violation, conduct or practice described in the notice of charges under paragraph (c) of this section; or

(B) The violation, conduct or practice involved a reckless disregard for the law or any applicable regulations or prior order of the Finance Board;

(ii) Restrict the growth of the Bank;

(iii) Dispose of any loan or asset involved;

(iv) Rescind any agreement or contract;

(v) Employ qualified officers or employees (who may be subject to approval by the Finance Board at the direction of the Finance Board); and

(vi) Take such other action as the Finance Board determines to be appropriate.

(2) *Authority to limit activities.* The authority to issue a notice of charges under this section includes the authority to place limitations on the activities or functions of any Bank or OF, or any executive officer or director of a Bank or OF.

(c) *Procedure.* (1) *Statements in notice of charges.* A notice of charges issued pursuant to paragraph (a) of this section shall contain a statement of the facts constituting the alleged conduct or violation and shall fix a time and place at which a hearing on the record will be held to determine whether an order to cease and desist from such conduct or violation should issue.

(2) *Issuance of order.* If the Board of Directors finds, based on the record of the hearing, that any conduct or violation specified in the notice of charges has been established, or, if a Bank, OF or an executive officer or director of a Bank or OF, is deemed to have consented to the relief sought in the notice of charges pursuant to § 908.43 (or otherwise consents), the Board of Directors may issue and serve upon the Bank, OF, or an executive officer or director of the Bank or OF, an order requiring such party to cease and desist from any such conduct or violation, to take affirmative action to correct or remedy the conditions resulting from any such conduct or violation, or to comply with such limitations on activities or functions as may be prescribed therein, in accordance with paragraph (a) in this section.

(3) *Effective date of order.* An order issued under paragraph (c)(2) of this section shall become effective upon the expiration of the 30-day period beginning on the date of service of the order upon the subject Bank, OF, or executive officer or director of a Bank or OF, (except in the case of an order issued upon consent, which shall become effective at the time specified therein), and shall remain effective and enforceable as provided in the order, except to the extent that the order is

stayed, modified, terminated, or set aside by action of the Board of Directors or otherwise as provided for in this part.

#### § 908.5 Temporary cease and desist orders.

(a) *Grounds for issuance and scope.*

(1) Whenever the Finance Board determines that any conduct or violation, or threatened conduct or violation, specified in a notice of charges issued and served upon a Bank, the OF, or an executive officer or director of a Bank or the OF, under this part, or the continuation thereof, is likely to cause insolvency; to cause a significant depletion of the total capital of a Bank; to cause irreparable harm to a Bank or OF; or to make the books and records of a Bank or OF to be so incomplete or inaccurate such that the Finance Board would be unable, through the normal supervisory process, to determine the true financial condition of the Bank or OF or the purpose of any transaction or transactions that may have a material effect on the financial condition of a Bank or OF, the Finance Board may issue a temporary order requiring a Bank, the OF, or an executive officer or director of a Bank or the OF, to immediately cease and desist from any such conduct or violation, or such threatened conduct or violation, and to take immediate affirmative action to prevent or remedy such insolvency, depletion, or harm pending completion of such proceedings.

(2) Additionally, the Finance Board may issue a temporary order requiring:

(i) The cessation of any activity or practice that caused or contributed, whether in whole or in part, to the incomplete or inaccurate state of the books or records of a Bank or the OF; or

(ii) Affirmative action to restore the books or records to a complete and accurate state.

(3) The Finance Board may issue a temporary cease and desist order under § 908.5 prior to the initiation or completion of a proceeding conducted pursuant to § 908.4.

(b) *Effective date and effective period.*

(1) *Effective date.* Any temporary order issued pursuant to paragraph (a) of this section shall become effective upon service upon the Bank, OF, or executive officer or director of a Bank or the OF.

(2) *Effective period.* Any temporary order issued under paragraph (a) of this section, unless set aside, limited, or suspended by a court in a proceeding under paragraph (c) of this section, shall remain in effect and enforceable:

(i) Pending the completion of a hearing pursuant to § 908.9 on the

notice of charges issued under § 908.4, and:

(A) The temporary order is superceded by a cease and desist order issued by the Board of Directors under section § 908.4; or

(B) The Board of Directors dismisses or otherwise finally resolves the charges specified in the notice of charges; or

(ii) Until the date the Finance Board determines, by examination or otherwise, that the books and records of the Bank or the OF are accurate and reflect the true financial condition of the Bank or the OF, and the Board of Directors issues a written determination that terminates the temporary order.

(c) *Judicial review.* A Bank, the OF, or any executive officer or director of a Bank or the OF, that has been served with a temporary order pursuant to this subsection may apply to the United States District Court for the District of Columbia within 10 days after such service for an injunction setting aside, limiting, or suspending the enforcement, operation, or effectiveness of the order pending the completion of the hearing pursuant to the notice of charges served upon the Bank or the OF, or an executive officer or director of a Bank or the OF, under §§ 908.4 and 908.9. In accordance with § 908.9, the district court shall have jurisdiction only to issue such injunction.

(d) *Enforcement of temporary order.* Pursuant to § 908.10, in the case of a violation or threatened violation of, or failure to obey, a temporary order issued pursuant to this section, the Finance Board may bring an action in the United States District Court for the District of Columbia for an injunction to enforce such temporary order. If the district court finds any such violation, threatened violation, or failure to obey, the district court shall issue such injunction.

#### § 908.6 Civil money penalties.

(a) *Violations or conduct subject to penalty.* The Finance Board may assess a civil money penalty on any Bank, OF, or any executive officer or director of a Bank or the OF, that:

(1) Violates any provision of the Act, or any order, rule, or regulation issued under the Act;

(2) Violates any final or temporary order issued by the Finance Board pursuant to the Act;

(3) Violates any written agreement between a Bank, or an executive officer or director of a Bank and the Finance Board, or the terms of any condition imposed in writing by the Finance Board in connection with the grant or approval of an application or request by a Bank; or

(4) Engages in any conduct that causes a loss, or that the Finance Board has reasonable cause to believe may cause a loss to a Bank, or any conduct that constitutes an unsafe and unsound practice or a breach of fiduciary duty.

(b) *Amount of penalty.* (1) The amount of a civil money penalty the Finance Board may assess under paragraph (a) of this section, except as otherwise provided, shall not exceed \$5,000.00 for each day that such violation or conduct continues;

(2) The Finance Board may assess a civil money penalty on an executive officer or director of a Bank or OF in an amount not to exceed \$10,000.00, or on a Bank or the OF in an amount not to exceed \$25,000.00, for each day that a violation or conduct described in paragraph (a) of this section continues, if the Finance Board finds that the violation or conduct is part of a pattern of misconduct, or involved or continues to involve recklessness and caused or would be likely to cause a material loss to a Bank or, with respect to OF, adverse financial or market conditions; or

(3) The Finance Board may assess a civil money penalty on an executive officer or director of a Bank or OF in an amount not to exceed \$100,000.00, or on a Bank or OF in an amount not to exceed \$1,000,000.00, for each day that a violation or conduct described in paragraph (a) of this section continues, if the Finance Board finds that the violation or conduct was knowing and caused or would be likely to cause a substantial loss to a Bank or the OF.

(c) *Factors in determining the amount of the penalty.* In determining the amount of the civil money penalty to be assessed under this section, the Finance Board shall consider such factors as the gravity of the violation, any history of prior violations, the good faith of the officer or director of a Bank or OF, the effect of the penalty on promoting or protecting the safety and soundness of a Bank or the Bank System, any injury to members of the subject Bank or to the public at large, any benefits received, and the potential for the deterrence of future violations.

(d) *Order shall be made on the record after hearing.* An order to assess a civil money penalty on a Bank or OF, or an executive officer or director of a Bank or OF, shall be issued in writing and made on the record only after the subject Bank or OF, or executive officer or director of a Bank or OF, has been given the opportunity for a hearing on the record in accordance with the procedures set forth in § 908.9.

(e) *Limitation on judicial review.* An order of the Board of Directors assessing a civil money penalty under this

subsection shall not be subject to judicial review except as otherwise provided in § 908.10.

(f) *Judicial enforcement of an order imposing a penalty.* If a Bank, OF, or an executive officer or director of a Bank or OF, fails to comply with an order of the Board of Directors assessing a civil money penalty, the Finance Board may seek to enforce the order as follows:

(1) After the order is final and no longer subject to judicial review under § 908.10, the Finance Board may bring an action in the United States District Court for the District of Columbia to obtain a monetary judgment against a Bank, OF, or the executive officer or director of a Bank or OF;

(2) The Finance Board may, in addition, seek such other relief as may be available from the District Court;

(3) The monetary judgment may, in the discretion of the District Court, include any attorneys fees and other expenses incurred by the Finance Board in connection with the action; and

(4) The validity and appropriateness of the Board of Directors' order assessing a civil money penalty shall not be subject to review of the United States District Court for the District of Columbia.

(g) *Board of Directors' authority to review.* The Board of Directors may:

(1) Review any determination or order to assess a civil money penalty or any interlocutory ruling arising from a hearing on the record, or

(2) Settle, modify, or remit in whole or in part, any civil money penalty, which may be or may have been assessed under this section.

(h) *Availability of other remedies.* Any civil money penalty assessed under this section shall be in addition to any other available civil remedy and may be assessed whether or not the Finance Board imposes other administrative sanctions pursuant to this part.

(i) *Prohibition of reimbursement or indemnification.* A Bank shall not reimburse, indemnify, or otherwise compensate directly or indirectly any individual for any penalty that may be assessed against such individual under this part.

(j) *Applicability.* Any penalty under this part may be assessed for conduct occurring or discovered after November 12, 1999.

(k) *Adjustment of civil money penalties by the rate of inflation.* Pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Debt Collection Improvement Act of 1996, Pub. Law No. 104-134 (1996) (collectively, the Inflation Adjustment Act) (to be codified at 28 U.S.C. 2461 note), the

Finance Board is required to adjust each civil money penalty set forth herein by a prescribed cost-of-living adjustment at least once every four years. The adjustment is based on the formula prescribed in section 5(b) of the Inflation Adjustment Act.

#### § 908.7 Suspension and removal.

(a) *Authority.* The Finance Board may suspend or remove for cause any director, officer, employee, or agent of any Bank or the OF.

(b) *Issuance of order.* The cause of such suspension or removal shall be communicated in writing to such person(s) and the board of directors of the Bank or the OF, as appropriate.

(c) *Cause.* Cause for suspension or removal may, in the discretion of the Finance Board, include without limitation:

(1) Misfeasance in office involving a failure to carry out the duties required of the director, officer, employee or agent of a Bank or OF by the Act or other applicable law, regulation, or order of the Finance Board, including without limitation any failure to operate a Bank in a safe and sound manner, to maintain applicable capital standards, to carry out the housing finance mission, or to maintain the ability of any Bank or OF to raise funds in the capital markets;

(2) Commission of an act by a director, officer, employee or agent of a Bank or OF that constitutes a violation of any state or Federal criminal law involving dishonesty or breach of fiduciary duty or trust, including without limitation, corruption, misapplication of funds, extortion, receipt of illegal fees or gratuities, or the conviction of a director, officer, employee or agent for such an illegal act, and irrespective of whether such act(s) were undertaken in connection with the performance of his or her official Bank or OF duties; or

(3) Conduct on the part of a director, officer, employee or agent of a Bank or OF, which need not be intrinsically improper or illegal, that the Finance Board determines to be a material inefficiency or an abuse of authority or discretion and not in the best interest of the Bank, OF or the Bank System.

(d) *Procedure.* (1) *Effective date.* An order issued pursuant to paragraph (a) of this section shall be a final order, which shall become effective upon service upon the executive officer, director, employee or agent of a Bank or the OF, and unless set aside, limited or suspended by the United States Court of Appeals for the District of Columbia Circuit in an action to review the final order under § 908.10, shall remain in

effect pending completion of the proceeding.

(2) *Enforcement of order.* If an executive officer, director, employee or agent of a Bank or OF fails to comply with an order issued pursuant to paragraph (a) of this section, the Finance Board may seek to enforce the order by filing an action in the United States District Court for the District of Columbia to obtain injunctive relief against the individual(s) and other relief as may be available from the Court, which the Court shall have jurisdiction to grant. The validity and appropriateness of the suspension or removal order shall not be subject to the review of the United States District Court for the District of Columbia under this paragraph.

(e) *Judicial Review.* Any executive officer, director, employee or agent of a Bank or OF upon whom a suspension or removal order has been served pursuant to § 908.7(a) may seek judicial review of the order exclusively as provided in § 908.10.

(f) *No automatic stay.* The commencement of an action for judicial review of an order pursuant to paragraph (e) of this section shall not operate as a stay of any such suspension or removal order in whole or in part, unless the United States Court of Appeals for the District of Columbia Circuit specifically orders a stay of the order in whole or in part.

#### § 908.8 Subpoenas.

(a) *Authority.* The Finance Board, in the course of or in connection with an administrative proceeding or hearing under this part, shall have the authority:

(1) To administer oaths and affirmations;

(2) To take and preserve testimony under oath;

(3) To issue subpoenas and subpoenas *duces tecum*; and

(4) To revoke, quash, or modify subpoenas and subpoenas *duces tecum* issued by the Finance Board pursuant to this part.

(b) *Witnesses and documents.* The attendance of witnesses and the production of documents provided for in this subsection may be required from any place in any State at any designated place where such proceeding is being conducted.

(c) *Enforcement.* The Finance Board may file an action in the United States district court for the judicial district where the proceeding is being conducted or where the witness resides, or in the United States District Court for the District of Columbia, for enforcement of any subpoena or subpoena *duces tecum* issued pursuant

to this section. Such courts shall have jurisdiction over such actions and power to order and require compliance with such subpoenas and subpoenas *duces tecum*.

#### § 908.9 Hearings on the record.

(a) *Requirements.* (1) *Venue and record.* Any adjudicatory proceeding or hearing conducted pursuant to §§ 908.4 or 908.6 shall be held on the record in the District of Columbia.

(2) *Timing.* Any adjudicatory proceeding or hearing shall be set for a date not earlier than 30 days nor later than 60 days after service of a notice of charges under § 908.4 or a determination or order to assess a civil money penalty under § 908.6, unless an earlier or a later date is set by the presiding officer at the request of the party served.

(3) *Procedure.* Any adjudicatory proceeding or hearing held pursuant to §§ 908.4 or 908.6 shall be conducted in accordance with chapter 5 of Title 5 of the United States Code.

(4) *Failure to appear.* If a party who has been served with a subpoena under § 908.8 fails to appear at an adjudicatory proceeding or hearing individually or through a duly authorized representative, such party shall be deemed to have consented to the issuance of the cease and desist order or the imposition of the penalty for which the hearing is held.

(b) *Issuance of final order.* After a hearing on the record has been concluded, and within 90 days after the parties have been notified that the case has been submitted to the Board of Directors for final decision, the Board of Directors shall render the final decision (which shall include findings of fact upon which the decision is predicated) and shall issue and serve upon each party to the proceeding a final order or orders consistent with the provisions of this part.

(c) *Judicial review and modification of final orders.* Judicial review of any such final order shall be exclusively as provided for in § 908.10. Unless a petition for review is timely filed as provided in § 908.10, and thereafter until the record in the proceeding has been filed as so provided, the Board of Directors may at any time modify, terminate, or set aside any such final order, upon such notice and in such manner as the Board of Directors, in its sole discretion, considers proper. Upon such filing of the record, the Board of Directors may modify, terminate, or set aside any such final order with permission of the court.

**§ 908.10 Judicial review.**

(a) *Authority and commencement of action to obtain judicial review of final order.* Any respondent or party to an adjudicatory proceeding or hearing under §§ 908.4 or 908.6 may obtain judicial review of a final order issued under §§ 908.4 or 908.6 by filing a written petition exclusively in the United States Court of Appeals for the District of Columbia Circuit, within thirty (30) days after the date of service of the final order, to request the court of appeals to modify, terminate or set aside the final order.

(b) *Service.* Rule 4 of Federal Rules of Civil Procedure shall govern service of process of a petition on the Finance Board.

(c) *Filing of record.* The clerk of the Court of Appeals shall transmit a copy of the petition to the Finance Board. The Finance Board shall file with the Court of Appeals the hearing record, as provided in section 2112 of Title 28 of the United States Code (28 U.S.C. 2112).

(d) *Jurisdiction.* Upon the filing of a petition, the Court of Appeals shall have jurisdiction, which upon the filing of the record by the Finance Board (except as otherwise provided in § 908.9 of this part) shall be exclusive, to affirm, modify, terminate or set aside, in whole or in part, a final order of the Board of Directors.

(e) *Review.* Review by the Court of Appeals of the final order and the record of the adjudicatory proceeding or hearing conducted pursuant to this part shall be governed by chapter 7 of Title 5 of the United States Code (5 U.S.C. 701 *et seq.*).

(f) *Order to pay civil money penalty.* In connection with the Court of Appeal's review of a final order pursuant to this part, the Court of Appeals shall have authority to order payment of any civil money penalty assessed by the Finance Board.

(g) *No automatic stay.* The commencement of an action for judicial review of a final order shall not operate as a stay of any such final order, unless the court specifically orders a stay of the final order in whole or in part.

**§ 908.11 Jurisdiction, enforcement of orders and notice.**

(a) *Enforcement.* The Finance Board may bring an action in the United States District Court for the District of Columbia for the enforcement of any notice, determination or order issued by the Board of Directors under this part. Such court shall have jurisdiction and power to order and require compliance with any such notice, determination, or order of the Board of Directors.

(b) *Limitation on jurisdiction.* Except as otherwise provided in the Act or this part, no court shall have jurisdiction to affect, by injunction or otherwise, the issuance or enforcement of any notice, determination or order issued by the Board of Directors under this part, or to review, modify, suspend, terminate, or set aside any such notice, determination or order.

(c) *Notice of service.* Any service required or authorized to be made by the Finance Board under this part may be made by registered mail, or in such other manner reasonably calculated to give actual notice.

**§ 908.12 Notice after separation.**

The resignation, termination of employment or participation, or separation of a director or executive officer of a Bank or the OF shall not affect the jurisdiction and authority of the Finance Board to issue any notice and proceed under this part against any such director or executive officer, if such notice is served before the end of the two-year period beginning on the date such director or executive officer ceases to be associated with the Bank.

**§ 908.13 Public disclosure of final orders.**

(a) *In general.* The Finance Board shall make available to the public—

(1) Any written agreement or other written statement for which a violation may be redressed by the Finance Board on any modification to or termination thereof, unless the Finance Board in its discretion, determines that public disclosure would be contrary to the public interest;

(2) Any order that is issued by the Finance Board and that has become final in accordance with this part; and

(3) Any modification to or termination of any final order made public pursuant to this part.

(b) *Delay of public disclosure under exceptional circumstances.* If the Finance Board makes a determination in writing that the public disclosure, pursuant to paragraph (a) of this section, of any final order or final decision of the Board of Directors would seriously threaten the financial health or security of the Bank System, or a Bank individually, the Finance Board may delay the public disclosure of such order for a reasonable time.

(c) *Documents filed under seal in public enforcement hearings.* The Finance Board may file any document or part thereof under seal in any hearing commenced by the Finance Board under this part, if it determines in writing that disclosure thereof would be contrary to the public interest.

(d) *Retention of documents.* The Finance Board shall keep and maintain a record, for not less than 6 years, of all documents described in paragraph (a) of this section and all enforcement agreements and other supervisory actions and supporting documents issued with respect to or in connection with any enforcement proceeding initiated by the Finance Board under this part or any other law.

(e) *Disclosure to Congress.* This section may not be construed to authorize the withholding, or to prohibit the disclosure, of any information to the Congress or any committee or subcommittee thereof.

**§ 908.14 No implied private right of action.**

This part shall not create any private right of action on behalf of any person against a Bank, the OF, or any director or executive officer of a Bank or the OF, or impair any existing private right of action under applicable law.

**§ 908.15—908.19 [Reserved]****Subpart C—General Rules****§ 908.20 Authority of the board of directors.**

The Board of Directors may, at any time during the pendency of a proceeding, perform, direct the performance of, or waive the performance of any act that could be done or ordered by the presiding officer.

**§ 908.21 Authority of the presiding officer.**

(a) *General rule.* All proceedings governed by this subpart shall be conducted in accordance with the provisions of the Administrative Procedure Act, 5 U.S.C. 551–559. The presiding officer shall have complete charge of the hearing, conduct a fair and impartial hearing, avoid unnecessary delay and assure that a record of the proceeding is made.

(b) *Powers.* The presiding officer shall have all powers necessary to conduct the proceeding in accordance with paragraph (a) of this section and 5 U.S.C. 556(c). The presiding officer is authorized to—

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

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

(3) Hold conferences to identify or simplify the issues, or to consider other matters that may aid in the expeditious disposition of the proceeding, including settlement conferences, mediation or other consensual methods of dispute resolution;

(4) Administer oaths and affirmations;

(5) Issue subpoenas, subpoenas *duces tecum*, and protective orders, as authorized by this part, and to revoke, quash, or modify such subpoenas;

(6) Take and preserve testimony under oath;

(7) Rule on motions and other procedural matters appropriate in an adjudicatory proceeding, except that only the Board of Directors shall have the power to grant any motion to dismiss the proceeding or make a final determination of the merits of the proceeding;

(8) Regulate the scope and timing of discovery;

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

(10) Examine witnesses;

(11) Receive, exclude, limit, or otherwise rule on evidence;

(12) Upon motion of a party, take official notice of facts;

(13) Recuse herself/himself upon motion made by a party or on her or his own motion;

(14) Prepare and present to the Board of Directors a recommended decision as provided in this part;

(15) Establish time, place and manner limitations on the attendance of the public and the media for any public hearing; and

(16) Do all other things necessary and appropriate to discharge the duties of a presiding officer.

#### **§ 908.22 Public hearings.**

(a) *General rule.* All adjudicatory proceedings and hearings shall be open to the public, unless the Finance Board, in its discretion, determines that holding an open hearing would be contrary to the public interest. The Finance Board may make such determination *sua sponte* at any time by written notice to all parties.

(b) *Motion for closed hearing.* Within 20 days of service of a notice or a notice of charges, any party or respondent may file with the presiding officer a motion for a non-public hearing and any party or respondent may file a pleading in reply to the motion. The presiding officer shall forward the motion and any reply, together with a recommended decision on the motion, to the Board of Directors, who shall make a final determination. Such motions and replies shall be governed by § 908.45.

(c) *Filing documents under seal.* The Finance Board, in its discretion, may file any document, or any part of any document, under seal if the agency makes a written determination that disclosure of the document would be contrary to the public interest. The presiding officer shall take all

appropriate steps to preserve the confidentiality of such documents or parts thereof, including closing portions of the hearing to the public.

#### **§ 908.23 Good faith certification.**

(a) *General requirement.* Every filing or submission of record following the issuance of a notice by the Finance Board shall be signed by at least one representative of record in her or his individual name and shall state that representative's address and telephone number and the names, addresses and telephone numbers of all other representatives of record for the person making the filing or submission.

(b) *Effect of signature.* (1) By signing a document, the representative of record or party certifies that—

(i) The representative of record or party has read the filing or submission of record;

(ii) To the best of her or his 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, non-frivolous argument for the extension, modification, or reversal of existing law, regulation or Finance Board policy or order; and

(iii) 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 presiding officer 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 representative or party shall constitute a certification that to the best of her or his knowledge, information, and belief, formed after reasonable inquiry, such expressions or statements are well-grounded in fact and are warranted by existing law or a good faith, non-frivolous argument for the extension, modification, or reversal of existing law, regulation, or Finance Board policy or order, 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.

#### **§ 908.24 Ex parte communications.**

(a) *Definition.* (1) *Ex parte* communication means any material oral or written communication relevant to the merits of an adjudicatory proceeding that was neither on the record nor on

reasonable prior notice to all parties that takes place between—

(i) An interested person outside the Finance Board (including the person's representative); and

(ii) The presiding officer handling the proceeding, the Board of Directors or any member thereof, a decisional employee of the Finance Board assigned to that proceeding, or any other person who is or may reasonably be expected to be involved in the decisional process.

(2) A communication that does not concern the merits of an adjudicatory proceeding, such as 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 commencing the proceeding is issued by the Finance Board until the date that the Board of Directors issues its final decision pursuant to § 908.65, no person referred to in paragraph (a)(1)(i) of this section shall knowingly make or cause to be made an *ex parte* communication. The Board of Directors, any member thereof individually, the presiding officer, or an employee of the Finance Board, shall not knowingly make or cause to be made an *ex parte* communication.

(c) *Procedure upon occurrence of ex parte communication.* If an *ex parte* communication is received by any person identified in paragraph (a) of this section, that person promptly 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 parties to the proceeding shall have an opportunity, within ten days of receipt of service of the *ex parte* communication or the written record of an oral communication, to file responses thereto and to recommend any sanctions, in accordance with paragraph (d) of this section, that they believe to be appropriate under the circumstances.

(d) *Sanctions.* Any party or representative for a party who makes an *ex parte* communication, or who encourages or solicits another person or entity to make any such communication, may be subject to any appropriate sanction or sanctions imposed by the Board of Directors or the presiding officer, including, but not limited to, exclusion from the proceedings and an adverse ruling on the issue that is the subject of the prohibited communication.

(e) *Consultations by presiding officer.* Except to the extent required for the disposition of *ex parte* matters as authorized by law, the presiding officer may not consult a person or party on

any matter relevant to the merits of the adjudication, unless on notice and opportunity for all parties to participate.

(f) *Separation of functions.* An employee or agent engaged in the performance of investigative or prosecuting functions for the Finance Board in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or Board of Directors' review under § 908.65 of the recommended decision, except as a witness or counsel in the public proceedings.

#### § 908.25 Filing of papers.

(a) *Filing.* Any papers required to be filed shall be addressed to the presiding officer and filed with the Finance Board, 1777 F Street, NW, Washington, DC 20006.

(b) *Manner of filing.* Unless otherwise specified by the Finance Board or the presiding officer, filing shall be accomplished by:

- (1) Personal service;
- (2) Delivery to the U.S. Postal Service or to a reliable commercial delivery service for same day or overnight delivery;
- (3) Mailing by first class, registered, or certified mail; or
- (4) Transmission by electronic media upon any conditions specified by the Finance Board or the presiding officer. 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 must set forth the name, address and telephone number of the representative 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 x 11-inch paper and must be clear and legible.

(2) *Signature.* All papers must be dated and signed as provided in § 908.23.

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

(4) *Number of copies.* Unless otherwise specified by the Finance Board or the presiding officer, 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.

#### § 908.26 Service of papers.

(a) *By the parties.* Except as otherwise provided, a party filing papers or

-serving a subpoena shall serve a copy upon the representative of record for each party 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) Delivery to the U.S. Postal Service or to a reliable commercial delivery service for same day or overnight delivery;
- (3) Mailing 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 § 908.26(c).

(c) *By the Finance Board or the presiding officer.* (1) All papers required to be served by the Finance Board or the presiding officer upon a party who has appeared in the proceeding in accordance with § 908.72 may be served by any means specified in paragraph (b) of this section.

(2) If a notice of appearance has not been filed in the proceeding for a party in accordance with § 908.72, the Finance Board or the presiding officer shall make service upon the party by any of the following methods:

- (i) Personal service;
- (ii) If the person to be served is an individual, by delivery to a person of suitable age and discretion at the physical location where the individual resides or works;
- (iii) If the person to be served is a corporation or other association, by delivery to an officer, managing or general agent, or to any other agent authorized by appointment or by law to receive service and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the party;
- (iv) By registered or certified mail addressed to the person's last known address; or
- (v) By any other method reasonably calculated to give actual notice.

(d) *Subpoenas.* Subject to applicable provisions in this part, service of a subpoena may be made:

- (1) By personal service;
- (2) If the person to be served is an individual, by delivery to a person of suitable age and discretion at the physical location where the individual resides or works;
- (3) If the person to be served is a corporation or other association, by delivery to an officer, managing or

general agent, or to any other agent authorized by appointment or by law to receive service and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the party;

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

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

(e) *Area of service.* Service in any State, commonwealth, possession, territory of the United States or the District of Columbia on any person doing business in any State, commonwealth, possession, territory of the United States or the District of Columbia, or on any person as otherwise permitted by law, is effective without regard to the place where the hearing is held.

(f) *Proof of service.* Proof of service of papers filed by a party shall be filed before action is taken thereon. The proof of service, which shall serve as prima facie evidence of the fact and date of service, shall show the date and manner of service and may be by written acknowledgment of service, by declaration of the person making service, or by certificate of a representative of record. However, failure to file proof of service contemporaneously with the papers shall not affect the validity of actual service. The presiding officer may allow the proof to be amended or supplied, unless to do so would result in material prejudice to a party.

#### § 908.27 Computing time.

(a) *General rule.* In computing any period of time prescribed or allowed by this subpart, the date of the act or event that commences the designated period of time is not included. The last day so computed is included unless it is a Saturday, Sunday, or Federal holiday. When the last day is a Saturday, Sunday or Federal holiday, the period shall run until the end of the next day that is not a Saturday, Sunday, or Federal holiday. Intermediate Saturdays, Sundays and Federal holidays are included in the computation of time. However, when the time period within which an act is to be performed is 10 days or less, not including any additional time allowed for in paragraph (c) of this section, intermediate Saturdays, Sundays and Federal holidays are not included.

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

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

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

(iii) In the case of 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 Finance Board or the presiding officer 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 shall be calculated as follows:

(1) If service was made by first class, registered, or certified mail, or by delivery to the U.S. Postal Service for longer than overnight delivery service, add three calendar days to the prescribed period for the responsive filing.

(2) If service was made by U.S. Postal Service or reliable commercial overnight delivery service, add 1 calendar day to the prescribed period for the responsive filing.

(3) If service was made by electronic media transmission, add one calendar day to the prescribed period for the responsive filing, unless otherwise determined by the Board of Directors or the presiding officer in the case of filing, or by agreement among the parties in the case of service.

#### **§ 908.28 Change of time limits.**

Except as otherwise provided by law, the presiding officer may, for good cause shown, extend the time limits prescribed above or prescribed by any notice or order issued in the proceedings. After the referral of the case to the Finance Board pursuant to § 908.63, the Finance Board may grant extensions of the time limits for good cause shown. Extensions may be granted on the motion of a party after notice and opportunity to respond is afforded all nonmoving parties, or on the Finance Board's or the presiding officer's own motion.

#### **§ 908.29 Witness fees and expenses.**

Witnesses (other than parties) subpoenaed for testimony or depositions shall be paid the same fees for attendance and mileage as are paid to witnesses pursuant to the Federal Rules of Civil Procedure (title 28 of the U.S. Code) governing proceedings in the

United States district courts, 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 shall 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 Finance Board is the issuer of the subpoena. The Finance Board shall not be responsible for or required to pay any fees to or expenses of any witness not subpoenaed by the Finance Board.

#### **§ 908.30 Settlement or other dispute resolution.**

Any respondent may, at any time in the proceeding, unilaterally submit to the Finance Board's counsel of record written offers or proposals for settlement of a proceeding without prejudice to the rights of any of the parties. Any such offer or proposal shall be made exclusively to the Finance Board. 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. Any party to a proceeding under this part may request a neutral individual preside over settlement negotiations. No settlement offer or proposal, or any subsequent negotiation or resolution, is admissible as evidence in any proceeding under this part or any court.

#### **§ 908.31 Right to supervise the banks.**

Nothing contained in this part shall limit in any manner the right of the Finance Board to conduct any examination, inspection, or visitation of any Bank or the OF, or the right of the Finance Board to conduct or continue any form of investigation authorized by law. Nothing set forth in this part shall restrict or be deemed to restrict the authority of the Finance Board to supervise the Banks or to issue or enforce orders or directives pursuant to section 2B(a)(1) or any other provision of the Act.

#### **§ 908.32 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 or hearing, the challenged adjudicatory proceeding or hearing shall continue without regard to the pendency of that court proceeding. No default or other failure to act as directed in the adjudicatory proceeding or hearing within the times prescribed in this subpart shall be excused based on the pendency before any court of any interlocutory appeal or collateral attack.

#### **§ 908.33—39 [Reserved]**

### **Subpart D—Pre-Hearing Proceedings**

#### **§ 908.40 Commencement of proceeding and contents of notice of charges.**

Proceedings under this subpart are commenced by the issuance of a notice of charges by the Finance Board that must be served upon the respondent. Such notice shall state all of the following:

(a) The legal authority for the proceeding and for the Finance Board's jurisdiction over the proceeding;

(b) A statement of the matters of fact or law showing that the Finance Board is entitled to relief;

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

(d) The time, place and nature of the hearing;

(e) The time within which to file an answer;

(f) The time within which to request a hearing; and

(g) The address for filing the answer and/or request for a hearing.

#### **§ 908.41 Answer.**

(a) *Deadline for filing answer.* Unless otherwise specified by the Finance Board in the notice, respondent shall file an answer within 20 days of service of the notice.

(b) *Content of answer.* An answer shall respond specifically 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 that is not denied in the answer is deemed admitted for purposes of the proceeding. A respondent is not required to respond to the portion of a notice that constitutes the prayer for relief or proposed order. The answer shall set forth affirmative defenses, if any, asserted by the respondent.

(c) *Default.* Failure of a respondent to file an answer required by this section within the time provided constitutes a waiver of such respondent's right to appear and contest the allegations in the notice. If no timely answer is filed, the Finance Board's counsel of record 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 presiding

officer 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 shall be deemed to be an order issued upon consent.

#### § 908.42 Amended pleadings.

(a) *Amendments.* The notice or answer may be amended or supplemented at any stage of the proceeding. The respondent must answer an amended notice within the time remaining for the respondent's answer to the original notice, or within ten days after service of the amended notice, whichever period is longer, unless the Board of Directors or the presiding officer 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 shall be treated in all respects as if they had been raised in the notice or answer, and no formal amendments shall be 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 presiding officer may admit the evidence when admission is likely to assist in adjudicating the merits of the action. The presiding officer will do so freely when the determination of the merits of the action is served thereby and the objecting party fails to satisfy the presiding officer that the admission of such evidence would unfairly prejudice that party's action or defense upon the merits. The presiding officer may grant a continuance to enable the objecting party to meet such evidence.

#### § 908.43 Failure to appear.

Failure of a respondent to appear in person or by a duly authorized representative at the hearing 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 presiding officer shall file with the Board of Directors a recommended decision containing the findings and the relief sought in the notice.

#### § 908.44 Consolidation and severance of actions.

(a) *Consolidation.* On the motion of any party, or on the Finance Board's or the presiding officer's own motion, the presiding officer 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. In the event of consolidation under this section, appropriate adjustment to the pre-hearing schedule must be made to avoid unnecessary expense, inconvenience, or delay.

(b) *Severance.* The presiding officer may, upon the motion of the Finance Board or any party, sever the proceeding for separate resolution of the matter as to any respondent only if the presiding officer finds that undue prejudice or injustice to the moving party would result from not severing the proceeding and such undue prejudice or injustice would outweigh the interests of judicial economy and expedition in the complete and final resolution of the proceeding.

#### § 908.45 Motions.

(a) *Written motions.* (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 shall 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 presiding officer. 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 at an adjudicative proceeding or hearing on the record unless the presiding officer directs that such motion be reduced to writing. Oral motions must be made a part of the record of the adjudicative proceeding or hearing with an accompanying proposed order.

(c) *Filing of motions.* Motions shall be filed with the presiding officer, except that following the filing of a recommended decision with the Board of Directors, motions must be filed with the Board of Directors.

(d) *Responses.* (1) Except as otherwise provided herein, any party may file a written response to a motion within ten days after service of any written motion, or within such other period of time as may be established by the presiding officer or the Board of Directors. The presiding officer 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 to be 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 shall be governed by §§ 908.51 and 908.52.

#### § 908.46 Discovery.

(a) *Limits on discovery.* Subject to the limitations set out in paragraphs (b), (d), and (e) of this section, any party to a hearing under this part may obtain document discovery by serving a written request to produce documents. For purposes of a request to produce documents, the term *documents* may be defined to include drawings, graphs, charts, photographs, recordings, data stored in electronic form, and other data compilations from which information can be obtained or translated, if necessary, by the parties through detection devices into reasonably usable form, as well as written material of all kinds.

(b) *Relevance.* A party may obtain document discovery regarding any matter not privileged that has material relevance to the merits of the pending action. Any request to produce documents that calls for irrelevant material, that is unreasonable, oppressive, excessive in scope, unduly burdensome, or repetitive of previous requests, or that seeks to obtain privileged documents will be denied or modified. A request is unreasonable, oppressive, excessive in scope, or unduly burdensome if, among other things, it fails to include justifiable limitations on the time period covered and the geographic locations to be searched, the time provided to respond in the request is inadequate, or the request calls for copies of documents to be delivered to the requesting party and fails to include the requestor's written agreement to pay in advance for the copying, in accordance with § 908.47.

(c) *Forms of discovery.* Document discovery shall be limited to requests for production of documents for inspection and copying. No other form of discovery shall be allowed. Discovery by use of interrogatories may be permitted. This paragraph shall not be interpreted to require the creation of a document.

(d) *Privileged matter.* Privileged documents shall not be discoverable. Privileges include the attorney-client privilege, work-product privilege, any government's or government agency's

deliberative process privilege and any other privileges provided by the Constitution, any applicable act of Congress, or the principles of common law.

(e) *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 exception to this time limit shall be permitted, unless the presiding officer finds on the record that good cause exists for waiving the requirements of this paragraph.

**§ 908.47 Request for document discovery from parties.**

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

(b) *Production or copying.* The request shall specify a reasonable time, place and manner for production and performing any related acts. In lieu of inspecting the documents, the requesting party may specify that all or some of the responsive documents be copied and the copies delivered to the requesting party. If copying of fewer than 250 pages is requested, the party to whom the request is addressed shall bear the cost of copying and shipping charges. If a party requests more than 250 pages of copying, the requesting party shall pay for copying and shipping charges. Copying charges are at the current rate per page imposed by the Finance Board at § 910.9(g) of this chapter for requests for documents filed under the Freedom of Information Act, 5 U.S.C. 552. The party to whom the request is addressed may require payment in advance before producing the documents.

(c) *Obligation to update responses.* A party who has responded to a discovery request is not required to supplement the response, unless:

(1) The responding party learns that in some material respect the information disclosed is incomplete or incorrect, and

(2) The additional or corrective information has not otherwise been

made known to the other parties during the discovery process or in writing.

(d) *Motions to strike or limit discovery requests.* (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 § 908.45 requesting the presiding officer order the request be stricken or otherwise limited. If an objection is made to only a portion of an item or category in a request, the objection shall specify that portion. Any objections not made in accordance with this paragraph and § 908.45 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. When similar documents that are protected by deliberative process, attorney work-product, or attorney-client privilege are voluminous, these documents may be identified by category instead of by individual document. The presiding officer has discretion to determine when the identification by category is insufficient.

(f) *Motions to compel production.* (1) If a party withholds any documents as privileged or fails to comply fully with a discovery request, the requesting party may, within ten days of the assertion of privilege or of the time the failure to comply becomes known to the requesting party, file a motion in accordance with the provisions of § 908.45 for the issuance of a subpoena compelling production.

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

(g) *Ruling on motions.* After the time for filing responses to motions pursuant to this section has expired, the presiding officer shall rule promptly on all such motions. If the presiding officer determines that a discovery request or any of its terms calls for irrelevant material, is unreasonable, oppressive, excessive in scope, unduly burdensome, or repetitive of previous requests, or seeks to obtain privileged documents, he or she may deny or modify the request and may issue appropriate protective orders, upon such conditions as justice may require. The pendency of

a motion to strike or limit discovery or to compel production shall not be a basis for staying or continuing the proceeding, unless otherwise ordered by the presiding officer. Notwithstanding any other provision in this part, the presiding officer may not release, or order a party to produce, documents withheld on grounds of privilege if the party has stated to the presiding officer its intention to file a timely motion for interlocutory review of the presiding officer's order to produce the documents, until the motion for interlocutory review has been decided.

(h) *Enforcing discovery subpoenas.* If the presiding officer 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 presiding officer against a party who fails to produce or induces another to fail to produce subpoenaed documents.

**§ 908.48 Document subpoenas to nonparties.**

(a) *General rules.* (1) Any party may apply to the presiding officer 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 production in response to the 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 § 908.47. The party requesting 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 presiding officer shall promptly issue any document subpoena applied for under this section; except that, if the presiding officer 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 may

refuse to issue the subpoena or may issue it in a modified form upon such conditions as may be determined by the presiding officer.

(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 shall be filed on the same basis, including the assertion of privilege, upon which a party could object to a discovery request under § 908.47 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 presiding officer that 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 any part of the subpoena that the presiding officer 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 presiding officer on a party who induces a failure to comply with subpoenas issued under this section.

**§ 908.49 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 presiding officer for the issuance of a subpoena, including a subpoena *duces tecum*, requiring the attendance of the witness at a deposition. The presiding officer may issue a deposition subpoena under this section upon a showing that—

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

(ii) The witness' unavailability was not produced 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 anywhere within the United States and its possessions and territories in which that witness resides or has a regular place of employment or such other convenient place as the presiding officer shall fix.

(3) A subpoena shall be promptly issued upon request, unless the presiding officer determines that the request fails to set forth a valid basis under this section for its issuance. The presiding officer shall make a determination that there is a valid basis for issuing the subpoena. The presiding officer may require a written response from the party requesting the subpoena or require attendance at a conference to determine whether there is a valid basis upon which to issue the requested subpoena.

(4) The party obtaining a deposition subpoena is responsible for serving it on the witness and for serving copies on all parties. Unless the presiding officer orders otherwise, no deposition under this section shall be taken on fewer than 10 days' notice to the witness and all parties. Deposition subpoenas may be served anywhere within the United States or its possessions or territories on any person doing business anywhere within the United States or its possessions or territories, 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 under § 908.25 with the presiding officer to quash or modify the subpoena prior to the time for compliance specified in the subpoena, but not more than 10 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 shall accompany the motion. The motion must be served on all parties.

(c) *Procedure upon deposition.* (1) Each witness testifying pursuant to a deposition subpoena shall 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 objection might have been avoided if the objection had been presented timely. All questions, answers and objections must be recorded.

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

(3) The deposition shall 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 subpoena issued pursuant to this section or with any order of the presiding officer made upon motion under paragraph (c)(2) of this section, the subpoenaing party or other aggrieved party may, to the extent authorized by applicable law, apply to an appropriate United States district court for an order requiring compliance with the portions of the subpoena that the presiding officer 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 presiding officer on a party who fails to comply with or induces a failure to comply with a subpoena issued under this section.

**§ 908.50 Interlocutory review.**

(a) *General rule.* The Board of Directors may review a ruling of the presiding officer prior to the certification of the record to the Board of Directors only in accordance with the procedures set forth in this section.

(b) *Scope of review.* The Board of Directors may exercise interlocutory review of a ruling of the presiding officer if it 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 motion for interlocutory review shall be filed by a party with the presiding officer within ten days of his ruling. Upon the expiration of the time for filing all responses, the presiding officer shall refer the matter to the Board of Directors for final disposition. In referring the matter to the Board of Directors, the presiding officer may indicate agreement or disagreement with the asserted grounds for interlocutory review of the ruling in question.

(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 presiding officer or the Board of Directors.

#### **§ 908.51 Summary disposition.**

(a) *In general.* The presiding officer 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 movant is entitled to a decision in its favor as a matter of law.

(b) *Filing of motions and responses.*

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

(2) A motion for summary disposition must be accompanied by a statement of material facts as to which the movant contends there is no genuine issue. Such motion must be supported by documentary evidence, which may take the form of admissions in pleadings, stipulations, written interrogatory responses, depositions, investigatory depositions, transcripts, affidavits and any other evidentiary materials that the movant contends support its position. The motion must also be accompanied by a brief containing the points and authorities in support of the contention of the movant. Any party opposing a motion for summary disposition must

file a statement setting forth those material facts as to which such party contends a genuine dispute exists. Such opposition must be supported by evidence of the same type as that submitted with the motion for summary disposition and a brief containing the points and authorities in support of the contention that summary disposition would be inappropriate.

(c) *Hearing on motion.* At the request of any party or on his own motion, the presiding officer 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 presiding officer shall determine whether the movant is entitled to summary disposition. If the presiding officer determines that summary disposition is warranted, the presiding officer shall submit a recommended decision to that effect to the Board of Directors under § 908.63. If the presiding officer finds that the moving party is not entitled to summary disposition, the presiding officer shall make a ruling denying the motion.

#### **§ 908.52 Partial summary disposition.**

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

#### **§ 908.53 Scheduling and prehearing conferences.**

(a) *Scheduling conference.* Within 30 days of service of the notice or order commencing a proceeding or at such other time as the parties may agree, the presiding officer shall direct representatives 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 pre-hearing materials including witness lists, statements of issues, stipulations, exhibits and any other materials may also be determined at the scheduling conference.

(b) *Pre-hearing conference.* The presiding officer may, in addition to the scheduling conference, on his own motion or at the request of any party, direct representatives for the parties to meet with him (in person or by telephone) at a pre-hearing 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 presiding officer, in his 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 such party's expense.

(d) *Scheduling or pre-hearing orders.* Within a reasonable time following the conclusion of the scheduling conference or any pre-hearing conference, the presiding officer shall serve on each party an order setting forth any agreements reached and any procedural determinations.

#### **§ 908.54 Pre-hearing submissions.**

(a) *Service deadline.* Within the time set by the presiding officer, but in no case later than 10 days before the start of the hearing, each party shall serve on every other party the serving party's:

(1) Pre-hearing 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 pre-hearing submissions pursuant to paragraph (a) of this section, except for good cause shown.

**§ 908.55 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 presiding officer 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, commonwealth, possession, territory of the United States, or the District of Columbia, or as otherwise provided by law at any designated place where the hearing is being conducted. The party making the application shall serve a copy of the application and the proposed subpoena on every other party.

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

(3) The presiding officer shall promptly issue any hearing subpoena applied for under this section; except that, if the presiding officer 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 may refuse to issue the subpoena or may issue the subpoena in a modified form upon any conditions consistent with this subpart. Upon issuance by the presiding officer, the party making the application shall serve the subpoena on the person named in the subpoena and on each party.

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

(2) Any motion to quash or modify a hearing subpoena must be filed prior to the time specified in the subpoena for compliance, but no more than 10 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 presiding officer that directs compliance with all or any portion of a hearing subpoena,

the subpoenaing party or any other aggrieved party may seek enforcement of the subpoena pursuant to § 908.8(c). A party's right to seek court enforcement of a hearing subpoena shall in no way limit the sanctions that may be imposed by the presiding officer on a party who induces a failure to comply with subpoenas issued under this section.

**§§ 908.56–908.59 [Reserved]****Subpart E—Hearing and Post-hearing Proceedings****§ 908.60 Conduct of hearings.**

(a) *General rules.* (1) *Hearings.* Hearings shall be conducted in accordance with chapter 5 of Title 5 of the United States Code (5 U.S.C. 501–559), and other applicable law, so as to provide a fair and expeditious presentation of the relevant disputed issues. Except as limited by this subpart, each party has the right to present its case or defense by oral and documentary evidence and to conduct such cross-examination of witnesses as may be required for full disclosure of the facts.

(2) *Order of hearing.* The Finance Board shall present its case-in-chief first, unless otherwise ordered by the presiding officer or unless otherwise expressly specified by law or regulation. The Finance Board 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 or presentation of their cases, but if they do not agree, the presiding officer shall fix the order.

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

(4) *Stipulations.* Unless the presiding officer directs otherwise, all documents that the parties have stipulated as admissible shall be admitted into evidence upon commencement of the hearing.

(b) *Transcript.* The hearing shall be recorded and transcribed. The transcript

shall be made available to any party upon payment of the cost thereof. The presiding officer 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 presiding officer's own motion.

**§ 908.61 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 (5 U.S.C. 551–559) and other applicable law.

(2) Evidence that would be admissible under the Federal Rules of Evidence (*see generally*, 28 U.S.C.) is admissible in a proceeding conducted pursuant to this subpart.

(3) Evidence that would be inadmissible under the Federal Rules of Evidence (28 U.S.C.) 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 that 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 presiding officer or the Finance Board shall appear on the record.

(3) If official notice is requested 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)(1) of this section, any document, including a report of examination, oversight activity, inspection, or visitation, prepared by the Finance Board or by another Federal or State financial institutions 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 presiding officer'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 in the record.

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

(3) The presiding officer 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 in accordance with § 908.29, 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 presiding officer 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.

#### **§ 908.62 Post-hearing filings.**

(a) *Proposed findings and conclusions and supporting briefs.* (1) Using the same method of service for each party, the presiding officer shall serve notice upon each party that the certified transcript, together with all hearing exhibits and exhibits introduced but not admitted into evidence at the hearing, has been filed. Any party may file with the presiding officer 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 presiding officer, unless otherwise ordered by the presiding officer.

(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.

(3) Any party is deemed to have waived any issue not raised in proposed findings or conclusions timely filed by that party.

(b) *Reply briefs.* Reply briefs may be filed within 15 days after the date on which the parties' proposed findings and conclusions and proposed order are due. Reply briefs must be limited strictly 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 presiding officer shall not order the filing by any party of any brief or reply brief supporting proposed findings and conclusions in advance of the other party's filing of its brief.

#### **§ 908.63 Recommended decision and filing of record.**

(a) *Filing of recommended decision and record.* Within 45 days after expiration of the time allowed for filing reply briefs under § 908.52(b), the presiding officer shall file with and certify to the Board of Directors, for decision, the record of the proceeding. The record must include the presiding officer's recommended decision, recommended findings of fact and conclusions of law, and proposed order; all pre-hearing and hearing transcripts, exhibits and rulings; and the motions, briefs, memoranda and other supporting papers filed in connection with the hearing. The presiding officer shall serve upon each party the recommended decision, recommended findings and conclusions, and proposed order.

(b) *Filing of index.* At the same time the presiding officer files with and certifies to the Board of Directors, for final determination, the record of the proceeding, the presiding officer shall furnish to the Board of Directors a certified index of the entire record of the proceeding. The certified index shall include, at a minimum, an entry for each paper, document or motion filed with the presiding officer in the proceeding, the date of the filing, and the identity of the filer. The certified index shall also include an exhibit index containing, at a minimum, an entry consisting of exhibit number and title or description for: Each exhibit introduced and admitted into evidence at the hearing; each exhibit introduced

but not admitted into evidence at the hearing; each exhibit introduced and admitted into evidence after the completion of the hearing; and each exhibit introduced but not admitted into evidence after the completion of the hearing.

#### **§ 908.64 Exceptions to recommended decision.**

(a) *Filing exceptions.* Within 30 days after service of the recommended decision, recommended findings and conclusions, and proposed order under § 908.63, a party may file with the Finance Board written exceptions to the presiding officer's recommended decision, recommended findings and conclusions, or proposed order; to the admission or exclusion of evidence; or to the failure of the presiding officer 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 presiding officer 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 presiding officer'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 presiding officer'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. Exceptions and briefs in support shall not exceed a total of 30 pages, except by leave of the Finance Board on motion.

(3) Each party may submit one reply brief within ten days of service of exceptions and briefs in support of exceptions. Reply briefs shall not exceed 15 pages, except by leave of the Finance Board on motion.

#### **§ 908.65 Review by Board of Directors.**

(a) *Notice of submission to the Board of Directors.* When the Board of Directors determines that the record in the proceeding is complete, the Finance

Board 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 Board of Directors within the time for filing exceptions under § 908.64, the Board of Directors may order and hear oral argument on the recommended findings, conclusions, decision and order of the presiding officer. 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 transcribed.

(c) *Board of Directors' final decision.*

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

(2) The Board of Directors shall render a final decision and issue an appropriate order within 90 days after notification of the parties that the case has been submitted for final decision, unless the Board of Directors orders that the action or any aspect thereof be remanded to the presiding officer for further proceedings. Copies of the final decision and order of the Board of Directors shall be served upon each party to the proceeding and upon other persons required by statute.

**§ 908.66 Exhaustion of administrative remedies.**

To exhaust administrative remedies as to any issue on which a party disagrees with the presiding officer's recommendations, a party must file exceptions with the Board of Directors under § 908.64. A party must exhaust administrative remedies as a precondition to seeking judicial review of any final decision, in whole or in part, issued under § 908.65.

**§ 908.67 Stay of order pending judicial review.**

The commencement of proceedings for judicial review of a final decision and order of the Board of Directors may not, unless specifically ordered by the Board of Directors or a reviewing court, operate as a stay of any order issued by the Board of Directors. 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 an order of the Board of Directors pending a final decision on a petition for review of that order.

**§ 908.68—908.69 [Reserved]**

**Subpart F—Rules of Practice Before the Finance Board**

**§ 908.70 Scope.**

This subpart contains rules governing practice by parties or their representatives in any proceeding before the Finance Board. These rules of practice may apply to any proceeding before the Finance Board, including adjudicatory proceedings or hearings, or appearances before the Board of Directors, under this part. This subpart also addresses the imposition of sanctions by the Finance Board or a presiding officer against parties or their representatives in an adjudicatory proceeding or hearing under this part. In the sole discretion of the Finance Board, §§ 908.74 and 908.75 may be applied to persons who appear in a representational capacity in an administrative procedure under part 907 of this chapter, an adjudicatory proceeding or hearing under this part 908, or in any other matter connected with presentations to the Finance Board relating to a client's or other principal's rights, privileges, or liabilities, including presentations to or communications with the Board of Directors or any member of the Board of Directors. This representation includes, but is not limited to, the practice of attorneys and accountants. Employees of the Finance Board are not subject to disciplinary proceedings under this subpart.

**§ 908.71 Practice before the finance board.**

Practice before the Finance Board for the purposes of this subpart, includes, but is not limited to, transacting any business with the Finance Board as counsel, representative or agent for any other person, unless the Finance Board orders otherwise. Practice before the Finance Board also includes the preparation of any statement, opinion, or other paper by a counsel, representative or agent that is filed with the Finance Board in any certification, notification, application, report, or other document, with the consent of such counsel, representative or agent. Practice before the Finance Board does not include work prepared for a Bank solely at the request of the Bank for use in the ordinary course of its business.

**§ 908.72 Appearances and practice in proceedings before the Finance Board.**

(a) *Appearances in proceedings before the Finance Board.* (1) *By attorneys.* A party may be represented by an attorney who is a 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 and who is not currently suspended or disbarred from practice before the Finance Board.

(2) *By non-attorneys.* An individual may appear on his own behalf. A member of a partnership may represent the partnership and a duly authorized officer, board of director member, employee, or other agent of any corporation or other entity not specifically listed herein may represent such corporation or other entity; provided that such officer, board of director member, employee, or other agent is not currently suspended or disbarred from practice before the Finance Board. A duly authorized officer or employee of any Government unit, agency, or authority may represent that unit, agency, or authority.

(b) *Notice of appearance.* Any person appearing in a representative capacity on behalf of a party, including the Finance Board, shall execute and file a notice of appearance with the presiding officer at or before the time such person 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 paragraphs (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 representative thereby agrees and represents that he is authorized to accept service on behalf of the represented party and that, in the event of withdrawal from representation, he or she will, if required by the presiding officer, continue to accept service until a new representative has filed a notice of appearance or until the represented party indicates that he or she will proceed on a *pro se* basis. Unless the representative filing the notice is an attorney, the notice of appearance shall also be executed by the person represented or, if the person is not an individual, by the chief executive officer, or duly authorized officer of that person.

**§ 908.73 Conflicts of interest.**

(a) *Conflict of interest in representation.* No representative shall represent another person in an adjudicatory proceeding if it reasonably

appears that such representation may be limited materially by that representative's responsibilities to a third person or by that representative's own interests. The presiding officer 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 or other representative represents two or more parties to an adjudicatory proceeding or also represents a nonparty on a matter relevant to an issue in the proceeding, that representative must certify in writing at the time of filing the notice of appearance required by § 908.7:

(1) That the representative has personally and fully discussed the possibility of conflicts of interest with each such party and nonparty;

(2) That each such party and nonparty 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.

#### § 908.74 Sanctions.

(a) *General rule.* Appropriate sanctions may be imposed during the course of any proceeding when any party or representative of record has acted or failed to act in a manner required by applicable statute, regulation, or order, and that act or failure to act—

(1) Constitutes contemptuous conduct. Contemptuous conduct includes dilatory, obstructionist, egregious, contumacious, unethical, or other improper conduct at any phase of any adjudicatory proceeding or hearing or before the Board of Directors;

(2) Has caused some other party material and substantive injury, including, but not limited to, incurring expenses including attorney's fees or experiencing prejudicial delay;

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

(4) Has delayed the proceeding unduly.

(b) *Sanctions.* Sanctions that may be imposed include, but are not limited to, any one or more of the following:

(1) Issuing an order against a 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 may be just;

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

(c) *Procedure for imposition of sanctions.* (1) The presiding officer, on the motion of any party, or on his own motion, and after such notice and responses as may be directed by the presiding officer, may impose any sanction authorized by this section. The presiding officer shall submit to the Board of Directors for final ruling any sanction that would result in a final order that terminates the case on the merits or is otherwise dispositive of the case.

(2) Except as provided in paragraph (d) of this section, no sanction authorized by this section, other than refusing to accept late papers, shall be imposed without prior notice to all parties and an opportunity for any representative or party against whom sanctions would be imposed to be heard. The presiding officer shall determine and direct the appropriate notice and form for such opportunity to be heard. The opportunity to be heard may be limited to an opportunity to respond verbally immediately after the act or inaction in question is noted by the presiding officer.

(3) For purposes of interlocutory review, motions for the imposition of sanctions by any party and the imposition of sanctions shall be treated the same as motions for any other ruling by the presiding officer.

(4) Nothing in this section shall be read to preclude the presiding officer or the Finance Board from taking any other action or imposing any other restriction or sanction authorized by any applicable statute or regulation.

(d) *Sanctions for contemptuous conduct.* If, during the course of any proceeding, a presiding officer finds any representative or any individual representing himself to have engaged in contemptuous conduct, the presiding officer may summarily suspend that individual from participating in that or any related proceeding or impose any other appropriate sanction.

#### § 908.75 Censure, suspension, disbarment and reinstatement.

(a) *Discretionary censure, suspension and disbarment.* (1) The Finance Board may censure any individual who practices or attempts to practice before it or suspend or revoke the privilege to appear or practice before the Finance

Board of such individual if, after notice of and opportunity for a hearing in the matter, that individual is found by the Finance Board—

(i) Not to possess the requisite qualifications or competence 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 caused unfair and material injury or prejudice to another party, such as prejudicial delay or unnecessary expenses including attorney's fees;

(iv) To have engaged in, or aided and abetted, a material and knowing violation of the Act or the rules or regulations issued under the Act or any other law or regulation governing Bank operations;

(v) To have engaged in contemptuous conduct before the Finance Board;

(vi) With intent to defraud in any manner, to have willfully and knowingly deceived, misled, or threatened any client or prospective client; or

(vii) Within the last 10 years, to have been convicted of an offense involving moral turpitude, dishonesty or breach of trust, if the conviction has not been reversed on appeal. A conviction within the meaning of this paragraph shall be deemed to have occurred when the convicting court 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) Suspension or revocation on the grounds set forth in paragraphs (a)(1)(ii), (iii), (iv), (v), (vi) and (vii) of this section shall only be ordered upon a further finding that the individual's conduct or character was sufficiently egregious as to justify suspension or revocation. Suspension or disbarment under this paragraph shall continue until the applicant has been reinstated by the Finance Board for good cause shown or until, in the case of a suspension, the suspension period has expired.

(3) If the final order against the respondent is for censure, the individual may be permitted to practice before the Finance Board, but such individual's future representations may be subject to conditions designed to promote high standards of conduct. If a written letter of censure is issued, a copy will be maintained in the Finance Board's files.

(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, commonwealth, possession, territory of the United States or the District of Columbia; any accountant or other licensed expert whose license to practice has been revoked in any State, commonwealth, possession, territory of the United States or the District of Columbia; any person who has been and remains suspended or barred from practice before the Department of Housing and Urban Development, the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Office of Thrift Supervision, the Federal Deposit Insurance Corporation, the National Credit Union Administration, the Office of Federal Housing Enterprise Oversight, the Farm Credit Administration, the Securities and Exchange Commission, or the Commodity Futures Trading Commission is also suspended automatically from appearing or practicing before the Finance Board. A disbarment or suspension within the meaning of this paragraph shall be deemed to have occurred when the disbarment or suspending agency or tribunal enters its judgment or order, regardless of whether an appeal is pending or could be taken and regardless of whether a violation is admitted in the consent.

(2) A suspension or disbarment from practice before the Finance Board under paragraph (b)(1) of this section shall continue until the person suspended or disbarred is reinstated under paragraph (d)(2) of this section.

(c) *Notices to be filed.* (1) Any individual appearing or practicing before Finance Board who is the subject of an order, judgment, decree, or finding of the types set forth in paragraph (b)(1) of this section shall file promptly with the Finance Board a copy thereof, together with any related opinion or statement of the agency or tribunal involved.

(2) Any individual appearing or practicing before the Finance Board who is or within the last 10 years has been convicted of a felony or of a misdemeanor that resulted in a sentence of prison term or in a fine or restitution order totaling more than \$5,000 shall file a notice promptly with the Finance Board. The notice shall include a copy of the order imposing the sentence or fine, together with any related opinion or statement of the court involved.

(d) *Reinstatement.* (1) Unless otherwise ordered by the Finance Board, an application for reinstatement for good cause may be made in writing by a person suspended or disbarred under

paragraph (a)(1) of this section 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. An applicant for reinstatement under this paragraph (d)(1) may, in the Finance Board's sole discretion, be afforded a hearing.

(2) An application for reinstatement for good cause by any person suspended or disbarred under paragraph (b)(1) of this section may be filed at any time, but not less than 1 year after the applicant's most recent application. An applicant for reinstatement for good cause under this paragraph (d)(2) may, in the Finance Board's sole discretion, be afforded a hearing. However, if all the grounds for suspension or disbarment under paragraph (b)(1) of this section have been removed by a reversal of the order of suspension or disbarment or by termination of the underlying suspension or disbarment, any person suspended or disbarred under paragraph (b)(1) of this section may apply immediately for reinstatement and shall be reinstated upon written application notifying the Finance Board that the grounds have been removed.

(e) *Conferences.* (1) The Finance Board may confer with a proposed respondent concerning allegations of misconduct or other grounds for censure, disbarment or suspension, regardless of whether a proceeding for censure, disbarment or suspension has been commenced. If a conference results in a stipulation in connection with a proceeding in which the individual is the respondent, the stipulation may be entered in the record at the request of either party to the proceeding.

(2) Resignation or voluntary suspension. In order to avoid the institution of or a decision in a disbarment or suspension proceeding, a person who practices before the Finance Board may consent to censure, suspension or disbarment from practice. At the discretion of the Finance Board, the individual may be censured, suspended or disbarred in accordance with the consent offered.

(f) *Hearings under this section.* Hearings conducted under this section shall be conducted in substantially the same manner as other hearings under this part, provided that in proceedings to terminate an existing suspension or disbarment order, the person seeking the termination of the order shall bear the burden of going forward with an application supported with proof that the suspension should be terminated. The Finance Board may, in its sole discretion, direct that any proceeding to

terminate an existing suspension or disbarment be limited to written submissions. All hearings held under this section shall be closed to the public unless the Finance Board, on its own motion or upon the request of a party, otherwise directs that the hearing be open to the public.

Dated: November 30, 2000.

By the Board of Directors of the Federal Housing Finance Board.

**William C. Apgar,**

*HUD Secretary's Designee to the Board.*

[FR Doc. 00-31978 Filed 12-15-00; 8:45 am]

BILLING CODE 6725-01-P

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## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### 14 CFR Part 73

[Airspace Docket No. 00-AWP-13]

#### Proposed Establishment and Redesignation of Restricted Areas; NV

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** This action proposes to redesignate Restricted Area (R) 4804 Twin Peaks, NV, as R-4804A, and establish R-4804B from FL 180 to FL 350. Additionally, this action proposes to redesignate R-4813 Carson Sink, NV, as R-4813A, and establish R-4813B from FL 180 to FL 350. This action also proposes to revoke R-4802 Lone Rock, NV, and designate the U.S. Navy (USN) Naval Strike and Warfare Center Fallon, NV, as the using agency for R-4804A, R-4804B, R-4813A, and R-4813B.

**DATES:** Comments must be received on or before February 1, 2001.

**ADDRESSES:** Send comments on the proposal in triplicate to: Manager, Air Traffic Division, AWP-500, Docket No. 00-AWP-13, Federal Aviation Administration, 15000 Aviation Boulevard, Lawndale, CA 90261.

The official docket may be examined in the Rules Docket, Office of the Chief Counsel, Room 916, 800 Independence Avenue, SW., Washington, DC, weekdays, except Federal holidays, between 8:30 a.m. and 5 p.m. An informal docket may also be examined during normal business hours at the office of the Regional Air Traffic Division, Federal Aviation Administration, 15000 Aviation Boulevard, Lawndale, CA 90261.

**FOR FURTHER INFORMATION CONTACT:** Ken McElroy, Airspace and Rules Division,