

entitled to one vote if otherwise eligible. The eligibility of one spouse does not affect the eligibility of the other spouse.

(5) *Minors*. A minor shall be entitled to one vote if he or she is otherwise eligible and is 18 years of age or older when he or she votes.

(6) *Interpretation*. In the case of tobacco on a farm where no acreage of tobacco is actually planted but an acreage of the commodity is regarded as planted under applicable regulations of the Department of Agriculture, persons on the farm who it is determined would have had an interest in the commodity as a producer if an acreage of the commodity had been actually planted shall be eligible to vote in the referendum.

(b) *Referenda procedures*. See part 717 of chapter VII of this title for eligibility criteria and the procedures to be used in carrying out mandatory grading referenda. Where not inconsistent with this part, the definitions contained in parts 717, 718 and 723 of this title will govern administration of these referenda. A copy of the regulations in parts 717, 718, and 723 of this title, a referendum ballot, and voting procedures are available for review in any USDA Service Center.

Dated: February 28, 2002.

**A.J. Yates,**

*Administrator, Agricultural Marketing Service.*

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**FEDERAL HOUSING FINANCE BOARD**

**12 CFR Parts 907 and 908**

[No. 2002-03]

RIN 3069-AB03

**Rules of Practice and Procedure**

**AGENCY:** Federal Housing Finance Board.

**ACTION:** Final rule.

**SUMMARY:** The Federal Housing Finance Board (Finance Board) is amending its regulations to implement the provisions of Title VI of the Gramm-Leach-Bliley Act, Pub. L. 106-102 (1999) and to establish rules of practice and procedure governing hearings on the record in certain administrative enforcement actions. The final 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 making certain conforming amendments to its existing rules.

**EFFECTIVE DATE:** April 4, 2002.

**FOR FURTHER INFORMATION CONTACT:**

Charlotte A. Reid, Special Counsel, Office of General Counsel, 202/408-2510, *reidc@fhfb.gov*. Staff also can be reached by regular mail at the Federal Housing Finance Board, 1777 F Street, NW., Washington, DC 20006.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

Pursuant to the Federal Home Loan Bank Act, *as amended*, 12 U.S.C. 1421-1449 (Act), the Federal Housing Finance Board (Finance Board),<sup>1</sup> regulates the twelve Federal Home Loan Banks (Banks).<sup>2</sup> Section 2A of the Act sets forth the duties of the Finance Board and provides that 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 Act requires the Finance Board 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). To ensure that the Banks operate in a safe and sound manner and comply with applicable laws and regulations, section 2B of the Act grants broad authority to the Finance Board to supervise the Banks and to promulgate and enforce such regulations and orders as are necessary to carry out the provisions of the Act. 12 U.S.C. 1422b(a)(1).<sup>3</sup>

In 1999, with the enactment of section 606 of Title VI of the Gramm-Leach-Bliley Act,<sup>4</sup> the Finance Board received

<sup>1</sup> The Finance Board, an independent agency in the executive branch of the Federal government, was created by the Financial Institutions Reform, Recovery and Enforcement Act of 1989, Pub. L. 101-73, § 702, 103 Stat. 412 (FIRREA). 12 U.S.C. 1422a(a)(2).

<sup>2</sup> The Banks, together with the Office of Finance, which is a joint office of the Banks as provided in 12 U.S.C. 1422b(2)(b), comprise the Federal Home Loan Bank System. 12 CFR 985.1. In accordance with section 985.4(a) of the Finance Board's regulations, the Finance Board has the same regulatory and enforcement authority over the Office of Finance and its officers, directors, employees and agents as the agency has with respect to each of the Banks and their respective officers, directors, employees and agents. See 12 CFR 985.4(a).

<sup>3</sup> Additionally, section 20 of the Act authorizes the Finance Board to conduct examinations of the Banks (12 U.S.C. 1440) and section 6 of the Act requires the Finance Board to establish uniform capital requirements for the Banks and directs the Banks to submit conforming capital plans (12 U.S.C. 1426).

<sup>4</sup> Gramm-Leach-Bliley Act, Pub. L. 106-102, 113 Stat. 1338 (Nov. 12, 1999) (GLB Act) (Title VI of the

substantially enhanced civil administrative enforcement powers under section 2B(a)(5) of the Act. See 12 U.S.C. 1422b(a)(5). Section 2B(a)(5) of the Act (12 U.S.C. 1422b(a)(5)) establishes the cease and desist authority of the agency, and adopts certain enforcement powers set out 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),<sup>5</sup> as well as the authority to require affirmative corrective action 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)). Additionally, a new section 2B(a)(7) of the Act confers authority on the agency to act in its own name by and through its own attorneys to enforce any provision of the Act or any regulation promulgated under the Act.<sup>6</sup>

Section 2B(a)(5) of the Act (12 U.S.C. 1422b(a)(5)) establishes the civil administrative enforcement authority of the Finance Board in four parts. First, section 2B(a)(5) of the Act expressly authorizes the Finance Board to issue and enforce cease and desist orders based upon three broad grounds: an unsafe or unsound practice in conducting the business of a Bank; any conduct that violates any provision of the Act or any law, order, rule, or regulation; or 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 a Bank, or any written agreement entered into by a Bank with the Finance Board. See 12 U.S.C. 1422b(a)(5). Thus, among other things, section 2B(a)(5) of the Act authorizes the Finance Board to issue a notice of charges if it determines that a Bank or an executive officer or director of a Bank "is engaging or has engaged in, or the Finance Board has reasonable cause to believe that the Bank, executive officer, or director is about to engage in an unsafe or unsound practice." 12 U.S.C. 1422b(a)(5).

Second, section 2B(a)(5) of the Act (12 U.S.C. 1422b(a)(5)) adopts the procedural provisions for initiating a cease and desist proceeding that govern

GLB Act is known as the Federal Home Loan Bank System Modernization Act of 1999).

<sup>5</sup> The Subtitle C enforcement powers are codified at 12 U.S.C. 4631-4641.

<sup>6</sup> Section 2B(a)(7) also authorizes the Finance Board to act in its own name and through its own attorneys in any action, suit, or proceeding to which the Finance Board is a party that involves the agency's regulation or supervision of any Bank. 12 U.S.C. 1422b(a)(7).

the process by which the Office of Federal Housing Enterprises Oversight (OFHEO) may issue a cease and desist order, which are set forth in sections 1371(c) and (f) of the Safety and Soundness Act.<sup>7</sup> Importantly, these two provisions in section 1371 of the Safety and Soundness Act (12 U.S.C. 4631(c) and (f)), which govern the process for initiating a cease and desist proceeding, are the only provisions in that section that apply to the Finance Board in accordance with section 2B(a)(5) of the Act (12 U.S.C. 1422b(a)(5)). As stated, the Finance Board's cease and desist authority is expressly stated in section 2B(a)(5) of the Act (12 U.S.C. 1422b(a)(5)). Thus, the Finance Board's cease and desist authority is independent of, and unrestricted by, OFHEO's cease and desist authority under section 1371 of the Safety and Soundness Act (12 U.S.C. 4631).

Third, section 2B(a)(5) of the Act provides that the Finance Board shall have all other powers to enforce the Act that OFHEO has under sections 1372 through 1379B of the Safety and Soundness Act, 12 U.S.C. 4632–4641, including the grounds and authority to issue and enforce temporary cease and desist orders (12 U.S.C. 4632) and civil money penalty assessment orders (12 U.S.C. 4636), and the authority to issue subpoenas and subpoenas *duces tecum* (12 U.S.C. 4641). To implement this authority the provision adopts OFHEO's statutory authority and procedures governing hearings on the record, subject matter jurisdiction and judicial review of final orders, as well as the enforcement of final orders. Finally, section 2B(a)(5) of the Act also incorporates the same authority to require affirmative action to correct violations and conditions as the appropriate Federal banking agencies have with respect to insured depository institutions under 12 U.S.C. 1818(b)(6) and (7). See 12 U.S.C. 1422b(a)(5).

## II. Synopsis of the Final Rule

On December 18, 2000, the Finance Board published for notice and comment a proposed rule (65 FR 78944) to implement the enforcement powers set forth in the GLB Act amendments and establish the necessary hearing procedures.<sup>8</sup> The comment period

<sup>7</sup> OFHEO's enforcement powers extend to the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac) (enterprises) and their executive officers (as defined in 12 U.S.C. 4502(7)). Sections 1371(c) and (f) of the Safety and Soundness Act are codified at 12 U.S.C. 4631(c) and (f).

<sup>8</sup> Section 2B(a)(5) of the Act (12 U.S.C. 1422b(a)(5)) incorporates the hearing on the record requirement from section 1373(a)(3) of the Safety

and Soundness Act, 12 U.S.C. 4633(a)(3). These procedures serve a dual purpose to both implement and supplement the procedural requirements for such hearings provided in the Administrative Procedure Act, 5 U.S.C. 551, 553–59, 701–06, 1305, 3344, 5372, 7521 (APA).

ended on January 17, 2001 and the Finance Board received comment letters from seven of the twelve Banks. The Banks' comments generally favor adoption of rules of practice and procedures consistent with those of other banking regulatory agencies. All of the comment letters provide suggestions for revising certain provisions in the rule. The proposed rule has been revised to respond to certain comments, to improve the organization or clarity of the final rule, and to conform the text of subpart B of the final rule as closely as possible to the statutory authority upon which it is based. By way of example, all of the references in the proposed rule to the Office of Finance and its executive officers and directors have been deleted from the final rule. A section-by-section analysis of the final rule follows.<sup>9</sup>

Subpart A of the final rule, which has been revised for improved organization prescribes the scope and authority of the regulation, defines certain terms appearing in this part, and relates the general rules of construction. Some of the commenters suggest that the definition of "violation" be revised to clarify that "policy" means "written policy." The Finance Board has determined that the term "policy," which was intended to refer to directives issued pursuant the Finance Board's supervisory and enforcement authority under the Act, should be deleted in favor of the term "order" in the definition of "violation." Thus, as used in the final rule, "violation" is intended to refer to any violation of "any provision of [the] Act or any law, order, rule, or regulation or any condition imposed in writing by the Finance Board in connection with the granting of any application or other request by the Bank, or any written agreement entered into by the Bank with the agency," as set forth in section 2B(a)(5) of the Act. 12 U.S.C. 1422b(a)(5).

The proposed definition of "adjudicatory proceeding or hearing" has been simplified in the final rule to

and Soundness Act, 12 U.S.C. 4633(a)(3). These procedures serve a dual purpose to both implement and supplement the procedural requirements for such hearings provided in the Administrative Procedure Act, 5 U.S.C. 551, 553–59, 701–06, 1305, 3344, 5372, 7521 (APA).

<sup>9</sup> The Finance Board's authority to proceed under Part 908 of the Finance Board's regulations is distinct from, and is not contingent procedurally upon, the internal review procedures set forth in Part 907 of the Finance Board's regulations. Thus, no civil administrative enforcement proceeding undertaken pursuant to Part 908 is 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 that may be reviewed in accordance with part 907.

indicate that a hearing means an adjudicatory proceeding conducted under part 908. The definition of "decisional employee" has been revised to exclude Finance Board employees in the Office of General Counsel to allow for the agency and agency head to obtain the assistance of counsel in such proceedings. "Notice" is defined to mean a written notice of charges or a written notice of assessment of a civil money penalty, with an exception carved out for the common usage of the word in phrases such as 'reasonable notice.' The definition of "party" has been revised to allow for the common use of the term in the rule, except that for purposes of subparts C through F, party means the Finance Board or respondent. Similarly, the definition of "respondent" has been revised in the final rule to mean any person named in a notice of charges or a notice of assessment of a civil money penalty. Consistent with its effort to conform the rule to the statutory authority, the Finance Board declines to adopt a commenter's request to adopt the definition of "executive officer," in section 1303(7) of the Safety and Soundness Act (12 U.S.C. 4502(7)). The proposed definition, which excludes directors, is inconsistent with section 2B(a)(5) of the Act (12 U.S.C. 1422b(a)(5)), which expressly provides that the Finance Board shall have such enforcement authority over "any executive officer or director" of a Bank. Finally, several commenters request that the term "unsafe and unsound" be expressly defined in subpart A. The Finance Board declines to do so, for the reasons stated in the discussion of subpart B, below.

Subpart B of the final rule specifies the scope of the Finance Board's enforcement authority with respect to the Banks or any executive officer or director of a Bank, including issuing a notice of charges or a notice of assessment of a civil money penalty, and enforcing cease and desist orders, temporary cease and desist orders, assessment of civil money penalty orders. The rule also specifies the process for judicial review of final orders and public disclosure of final orders. Additionally, the final rule states that there is no implied private right of action created by the provision pursuant to section 1378 of the Safety and Soundness Act (12 U.S.C. 4638). The final rule also provides for the service of a notice of charges on a former executive officer or director of a Bank, within two years of the person's departure from the Bank, as is provided

in section 1377 of the Safety and Soundness Act (12 U.S.C. 4637).

Section 908.4 of the final rule contains the Finance Board's authority to issue a notice of charges and the grounds for a cease and desist order as set forth in section 2B(a)(5) of the Act (12 U.S.C. 1422b(a)(5)). Specifically, section 2B(a)(5) states that the Finance Board shall have the power to issue and serve a notice of charges upon a Bank, or upon any executive officer or director of a Bank, if in the determination of the Finance Board, the subject individual or Bank:

is engaging or has engaged in, or the Finance Board has reasonable cause to believe that the Bank, executive officer, or director is about to engage in an unsafe or unsound practice in conducting the business of the bank, or any conduct that violates any provision of this Act or any law, order, rule, or regulation or any condition imposed in writing by the Finance Board in connection with the granting of any application or other request by the Bank, or any written agreement entered into by the Bank with the agency, in accordance with the procedures provided in subsection (c) or (f) of section 1371 of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 [12 U.S.C. § 4631(c) and (f)].

12 U.S.C. 1422b(a)(5).

One commenter suggests that the final rule should establish a definition of "unsafe and unsound" as follows: "Unsafe or unsound practice means a practice that is contrary to prudent standards of operation and is likely to have a material adverse impact on the financial condition of the Bank or on the ability of any Bank or the OF to raise funds in the capital markets." The Finance Board has studied the issue and concludes that the proposed definition is inconsistent with generally accepted interpretations of the meaning of "unsafe and unsound practices." First, "material adverse impact" would unnecessarily establish a higher standard relative to the risk of possible loss than traditional definitions of unsafe and unsound practices cited by many courts. Second, the concept of "unsafe and unsound," by design, is intended to be flexible. Historically, the term "unsafe and unsound" has been broadly interpreted to adapt to the ever-changing nature of banking and finance practices. Finally, the fact that the concept is not defined in the Act supports the conclusion that the Finance Board, as the agency in which Congress has invested exclusive supervisory oversight, is authorized to make judgments concerning safety and soundness issues because it best suited to do so on a case-by-case basis.

In 1966, Mr. John Horne, the Chairman of the Federal Home Loan

Bank Board (FHLBB), the Finance Board's predecessor, provided a useful definition of the phrase "unsafe and unsound practices" in hearings before Congress prior to the adoption of the Financial Institutions Supervisory Act of 1966, Pub. L. No. 89-695 (Supervisory Act of 1966). Chairman Horne stated: "Generally speaking, an 'unsafe or unsound practice' embraces any action, or lack of action, which is contrary to generally accepted standards of prudent operation, the possible consequences of which, if continued, would be abnormal risk or loss or damage to an institution, its shareholders, or the agencies administering the insurance funds." (Financial Institutions Supervisory Act of 1966: Hearings on S. 3158 and S. 3695 before the House Committee on Banking and Currency, 89th Cong., 2d Sess. 49-50.) The Supervisory Act of 1966 gave the federal banking regulatory agencies "authority to issue cease and desist orders or suspension or removal orders \* \* \* as intermediate powers short of conservatorship or withdrawal of insurance, in order to prevent violations of law or regulations and unsafe and unsound practices which otherwise might adversely affect the Nation's financial institutions, with resulting harmful consequences to the growth and development of the Nation's economy." (S. Rep. No. 89-1482, 89th Cong., 2d Sess. 2 (August 18, 1966) (reprinted in 1966 U.S.C.C.A.N. 3532, 3533)).

The interpretation of "unsafe or unsound practice" offered by the commenter departs from this tested model. The courts have interpreted the phrase "as a flexible concept which gives the administering agency the ability to adapt to changing business problems and practices in the regulation of the banking industry." *Seidman v. OTS*, 37 F.3d 911, 927 (3rd Cir. 1994) (citing *Groos Nat'l Bank v. Comptroller of the Currency*, 573 F.2d 889, 897 (5th Cir. 1978) ("The phrase 'unsafe or unsound banking practice' is widely used in the regulatory statutes and in case law, and one of the purposes of the banking acts is clearly to commit the progressive definition and eradication of such practices to the expertise of the appropriate regulatory agencies.")). Therefore, the Finance Board has determined that the final rule should not contain a definition of "unsafe and unsound practices."

The Finance Board's authority to issue cease and desist orders under section 2B(a)(5) of the Act (12 U.S.C. 1422b(a)(5)), which incorporates the provisions of sections 8(b)(6) and (7) of

the Federal Deposit Insurance Act,<sup>10</sup> includes the authority to issue an order requiring a Bank, or any executive officer or director of a Bank, to take affirmative action to correct or remedy any condition resulting from any violation or practice with respect to which such order was issued.<sup>11</sup> Accordingly, as set forth section 908.4(b)(2)(iv) of the final rule [proposed 908.4(b)(1)(iv)], the Finance Board may require such party to, among other things, rescind any agreement or contract. Three commenters support deleting this provision from the final rule. One of those commenters suggests that the provision might create uncertainty for the Banks when they enter the capital markets to raise funds regarding the enforceability of capital market agreements, and suggests that if the provision is not deleted it should be amended to exclude such contracts. The Finance Board is not persuaded that any such risk is presented and declines to adopt that recommendation.

One commenter opposes the rescission provision on the ground that it could seriously jeopardize the Banks' ability to enter binding, enforceable contracts. Another commenter argues that the provision might impair the ability of a Bank to set employees' compensation, rights, and pension or profit-sharing terms by employment contract and suggests amending the provision to exclude employment contracts, change in control agreements, pension or profit sharing plans, or similar employment agreements. This rationale is unavailing. Congress, as the legislative body with exclusive authority to define the extent of the Finance Board's supervisory and oversight authority, has required the Finance Board, as its "primary duty" to "ensure" that the Banks are run in a "financially safe and sound manner" (see 12 U.S.C. 1422a(a)(3)(A)). Congress expressly incorporated into the Act the contract rescission authority under section 8(b)(6) of the FDI Act (12 U.S.C. 1818(b)(6)) as a tool to achieve this mandate. In fact, the banking regulatory agencies have had the identical authority since 1989, with no known negative effect on the regulated financial institutions. Such decisions are, as they should be, made by the banking regulatory agency on a case-by-case basis taking into account many factors that may not be anticipated in a rulemaking. The Finance Board finds no justification for the suggestion that the agency should otherwise interpret the

<sup>10</sup> See 12 U.S.C. 1818(b)(6) and (7).

<sup>11</sup> The Finance Board derives this authority from 12 U.S.C. 1818(b)(6)(D).

clear intent of Congress with respect to such oversight of the Banks. Moreover, this supervisory model ultimately may strengthen the Finance Board's ability to ensure that the Banks remain adequately capitalized and able to access the capital markets, and able to fulfill their housing finance mission, as required under section 2A of the Act. Therefore, the Finance Board has retained this oversight power in the final rule.

Section 908.5 of the final rule revises the proposed rule to clarify that a temporary cease and desist order may be issued only in connection with a notice of charges issued and served by the Finance Board to initiate cease and desist proceedings in accordance with section 2B(a)(5) of the Act. 12 U.S.C. 1422b(a)(5). Pursuant to section 2B(a)(5) of the Act, the statutory authority for the Finance Board to issue a temporary cease and desist order derives from and is governed by section 1372 of the Safety and Soundness Act (12 U.S.C. 4632). Accordingly, the final rule reorders the provisions in sections 908.5(a)(1) and (a)(2) of the proposed rule and restates these provisions in sections 908.5(a) and (b) of the final rule in order to more clearly delineate the separate grounds and authority to issue a temporary cease and desist order. Section 908.5(a) of the final rule consolidates the grounds for a temporary cease and desist order based on conduct or violation or threatened conduct or violation likely to cause insolvency or a significant depletion of capital together with the authority to issue a temporary cease and desist order requiring a Bank or individual respondent to cease and desist from such conduct or violation and to take affirmative action to prevent or remedy such insolvency, depletion, or harm pending completion of the cease and desist hearing. Similarly, the revision set forth in section 908.5(b) of the final rule combines in one provision the Finance Board's authority to base a temporary cease and desist order on a Bank's incomplete or inaccurate books and records and the Finance Board's authority to issue a temporary cease and desist order that would require a respondent to cease and desist from conduct that caused or contributed to the incompleteness of the books and records and to require affirmative action to restore the books to a complete and accurate state. Additionally, in light of the improvements to section 908.5 in the final rule, section 908.5(a)(3) of the proposed rule was deleted in the final rule in response to a comment to make the provisions consistent with the statutory authority.

In accordance with section 1372(d) of the Safety and Soundness Act (12 U.S.C. 4632(d)), which confers subject matter jurisdiction on the United States District Court for the District of Columbia (district court), section 908.5(f) of the final rule [proposed 908.5(c)] describes how a respondent may seek injunctive relief from a temporary cease and desist order. Specifically, a respondent may petition the district court to issue an injunction setting aside, limiting, or suspending the enforcement, operation, or effectiveness of the order pending completion of the hearing pursuant to the notice of charges. In accordance with sections 2B(a)(5) and (7) of the Act (12 U.S.C. 1422b(a)(5) and (a)(7)) and sections 1372(d) and 1375(b) of the Safety and Soundness Act (12 U.S.C. 4632(d) and 4635(b)), the district court's jurisdiction is limited to granting the injunctive relief requested. In effect, the district court lacks subject matter jurisdiction to consider any substantive challenge to the notice of charges, such as an action for judicial review under the Administrative Procedure Act. The means of obtaining judicial review of final orders of the Board of Directors is described separately in § 908.10 of the final rule, in accordance with section 1374 of the Safety and Soundness Act (12 U.S.C. 4634). Under section 908.5(g) of the final rule [proposed 908.5(d)], the district court has subject matter jurisdiction, which is based on sections 2B(a)(5) and (7) of the Act (12 U.S.C. 1422b(a)(5) and (a)(7)) and section 1372(e) of the Safety and Soundness Act (12 U.S.C. 4632(e)), to enforce a temporary cease and desist order if a respondent violates, threatens to violate, or fails to obey such order. Certain commenters contended that the Finance Board cannot confer or limit the jurisdiction of federal courts by regulation. The references to jurisdiction in the proposed rule were intended only to reflect what Congress has provided by statute, and the final rule has been revised to make that point clear.

Section 908.6 of the final rule states the authority of the Finance Board to initiate civil money penalty enforcement proceedings in accordance with section 1376 of the Safety and Soundness Act (12 U.S.C. 4636). As proposed, section 908.6(a)(4) of the rule included unsafe or unsound practices and breaches of fiduciary duty as grounds for assessing a civil money penalty. The Finance Board has deleted these terms from the text of the final rule solely to conform the rule text to that of section 1376(a)(4) of the Safety and Soundness Act (12 U.S.C.

4636(a)(4)). The Finance Board, as the safety and soundness regulator of the Banks, has explicit statutory authority under the Act to determine whether any acts or omissions may constitute an unsafe or unsound practice, a violation of law, order or regulation, or is likely to result in a loss. One commenter opposes the use of the term "loss" in proposed section 908.6(a)(4) of the rule, which provides that the agency may impose a civil money penalty if a Bank or any executive officer or director of a Bank "engages in any conduct that causes or is likely to cause a loss to a Bank." The commenter argues that the term "loss" is too broad and should be deleted from the rule. The Finance Board disagrees and has retained the provision in section 908.6(a)(4) of the final in as much as it is an exact recitation of the statutory authority in section 1376(a)(4) of the Safety and Soundness Act (12 U.S.C. 4636(a)(4)). The Finance Board concludes that any determination of whether or not a "loss" is presented under this provision is to be made on a case-by-case basis and factually established in a hearing on the record. The Finance Board believes that the final rule provides ample procedural safeguards. There is no credible likelihood to suppose, as one commenter suggests, that a determination of "loss" could be made on the basis of shifting market values, or that the provision could make Bank directors guarantors of all Bank activities.

Section 908.6(d) of the final rule [proposed 908.6(c)] lists certain factors to be considered by the Finance Board in assessing a civil money penalty. On its face, the list is not exclusive because it states "such factors as." One commenter urges the Finance Board to adopt additional factors, taking a page from comments submitted by Freddie Mac and Fannie Mae directed to OFHEO in a recent rulemaking. The Finance Board is not persuaded that it is necessary to encumber section 908.6(d) by inserting "any other factors the [agency] may determine by regulation to be appropriate." The change would only add redundancy to the rule, which currently permits the Board of Directors to look to other appropriate factors as needed on a case-by-case basis.

One commenter argues that the Finance Board lacks authority to provide in section 908.6(f)(4) of the rule that, in an action brought by the Finance Board in the district court to enforce a civil money penalty assessment order, the court would not have subject matter jurisdiction to review the validity and appropriateness of the order. The commenter calls for the provision to be

deleted on the ground that due process rights are abridged. This claim lacks merit. Section 908.6(f)(4) of the final rule, as proposed, is based on and faithfully applies the applicable provisions in the Safety and Soundness Act. The Finance Board is bound by the jurisdictional limitations on the district court set by Congress. Sections 1376(c)(3), 1376(d) and 1375(b) of the Safety and Soundness Act (12 U.S.C. 4636(c)(3), 4636(d) and 4635(b)) together provide the district court with exclusive jurisdiction to enforce a civil money penalty assessment order and expressly bar judicial review of such orders in the district court. Section 1374 of the Safety and Soundness Act (12 U.S.C. 4634) vests jurisdiction to review the validity and appropriateness of a civil money penalty assessment order or a cease and desist order exclusively in the United States Court of Appeals for the District of Columbia Circuit (court of appeals). Therefore, the Finance Board has declined to delete section 908.6(f)(4) from the final rule.

One commenter suggests that section 908.6(i) of the proposed rule should be eliminated or, at a minimum, the bar against indemnification of directors and executive officers should be limited to tier 3 violations for knowing conduct that caused or is likely to cause a substantial loss. The Finance Board agrees with the commenter that the rule should state the statutory authority and has revised the indemnification provision in § 908.6(i) of the final rule accordingly.

Section 908.6(k) of the proposed rule set forth the obligation of the Finance Board periodically to adjust the statutory civil money penalty amounts pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. 101-410, Oct. 5, 1990, 104 Stat. 890, as amended by the Debt Collection Improvement Act of 1996, Pub. L. No. 104-134, Title III, § 31001(s)(2), April 26, 1996, 110 Stat. 1321-373, and Pub. L. 105-362, Title XIII, § 1301(a)(1), Nov. 19, 1988, 112 Stat. 3293 (collectively, the Inflation Adjustment Act) (*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 the Inflation Adjustment Act. Section 5(a) of the Inflation Adjustment Act prescribes that the inflation adjustment for each maximum monetary civil penalty (or the range of minimum and maximum civil monetary penalties) shall be determined by the cost-of-living adjustment and shall be rounded to the nearest multiple

of a specified dollar amount as set forth in that provision. Section 5(b) of the act defines the term cost-of-living adjustment to mean "the percentage (if any) for each civil monetary penalty by which the Consumer Price Index for the month of June of the calendar year preceding the adjustment exceeds the Consumer Price Index for the month of June of the calendar year in which the amount of such civil monetary penalty was last set or adjusted pursuant to law." The agencies are required to use the Consumer Price Index for All Urban Consumers (CPI-U), which is compiled by the Bureau of Statistics of the Department of Labor.<sup>12</sup> Section 908.6(k) is included in the final rule for comprehensiveness and clarity.

Section 908.7 of the proposed rule included provisions for the suspension and removal of officers, directors, employees and agents of the Banks under section 2B(a)(2) of the Act (12 U.S.C. 1422b(a)(2)). Numerous comments on the removal provision argue that the agency lacks authority to adopt the rule and challenge whether the rule met the constitutional requirements of due process. The Finance Board has deleted the removal provision from the final rule because section 2B(a)(2) of the Act (12 U.S.C. 1422b(a)(2)) predated the GLB Act, thus it is not logically a necessary element of this rulemaking, the purpose of which is to implement the GLB Act amendments. Moreover, because section 2B(a)(2) of the Act (12 U.S.C. 1422b(a)(2)) does not require that a hearing on the record be held to remove or suspend an officer, director, employee or agent of a Bank, it raises additional and disparate administrative law issues. Section 908.7 of the proposed rule established different procedures than those applicable to cease and desist and civil money penalty proceedings under section 2B(a)(5) of the Act (12 U.S.C. 1422b(a)(5)). In order to eliminate any potential confusion that may arise from addressing these very different remedies in the same rulemaking, the Finance Board has determined to undertake a separate rulemaking in the future to provide a full and fair opportunity for comment and to respond to such comments in detail at that time. Instead, section 908.7 of the final rule establishes in accordance with section 1379A of the Safety and Soundness Act

(12 U.S.C. 4640) that any notice (e.g., notice of charges or notice of civil money penalty assessment) to be served on a respondent under the rule may be served by registered mail or other appropriate manner reasonably calculated to give actual notice to the respondent as the Finance Board may by regulation or otherwise provide.

The Finance Board has adopted several provisions in the final rule pertinent to certain administrative requirements in the Safety and Soundness Act. Briefly, section 908.8 of the rule as proposed was adopted with an additional section that specifies the fees and expenses to be paid witnesses subpoenaed under the provision, in accordance with section 1379B of the Safety and Soundness Act (12 U.S.C. 4641). Section 908.9 of the final rule sets forth the requirement under sections 2B(a)(5) of the Act (12 U.S.C. 1422b(a)(5)) and 1373 of the Safety and Soundness Act (12 U.S.C. 4633) that hearings conducted pursuant to section 908.4 and 908.6 of the rule are to be held on the record and in the District of Columbia. Section 908.13 of the final rule provides that such hearings shall be public in accordance with section 1379(b) of the Safety and Soundness Act (12 U.S.C. 4639(b)). Section 908.10 of the final rule adopts the provision as proposed, but with certain clarifications. The reference to Rule 4 of the Federal Rules of Procedure [proposed 908.10(b)] has been eliminated. Judicial review of a final order of the Board of Directors (whether a cease and desist order or an order assessing a civil money penalty) is governed by the applicable federal law and appellate court rules. Section 1374 of the Safety and Soundness Act (12 U.S.C. 4634) provides that the petition seeking review must be filed within 30 days after the date of service of the final order with the court of appeals. Rule 15(c) of the Federal Rules of Appellate Procedure (FRAP) and Rule 15 of the United States Court of Appeals, District of Columbia Circuit (Local Rules) require the clerk of the court to transmit a copy of the petition to the Finance Board, in a manner prescribed by FRAP Rule 3(d). Sections 908.10(a) and (b) of the rule have been amended accordingly. Similarly, section 908.10(c) has been amended to clarify that the Finance Board shall file the hearing record with the clerk of the court of appeals in accordance with FRAP 17 and Local Rule 17 as provided in section 2112 of Title 28 of the United States Code. Additional language in the remaining paragraphs clearly states the statutory authority for subject matter

<sup>12</sup> By way of example, most recently in October 2000, the Office of Thrift Supervision (OTS) and the Federal Deposit Insurance Corporation (FDIC) each published a final rule adjusting the civil money penalty amounts in their respective regulations pursuant to the Inflation Adjustment Act. See 65 FR 61260 (Oct. 17, 2000) (OTS) and 65 FR 64884 (Oct. 31, 2000) (FDIC).

jurisdiction or other appropriate statutory authority underlying these provisions of the final rule. Finally, section 908.12 of the final rule sets out the Finance Board's authority under section 1377 of the Safety and Soundness Act (12 U.S.C. 4637) to issue a notice of charges or a notice of assessment of a civil money penalty to an individual within two years of separation from a Bank.

Subpart C of the final rule provides the general rules that govern the process and specifies the authority of the Finance Board and the Board of Directors and the presiding officer, an Administrative Law Judge (ALJ) or other neutral, qualified individual who is appointed by the Finance Board to preside over the hearing and file with the Board of Directors a recommended decision and order, which shall be based on the record of the hearing, for a final decision and order to be issued by the Board of Directors. 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 or a party moves for a closed hearing and the Board of Directors orders the hearing closed. Because the presiding officer is fully authorized to regulate the course of the hearing, he or she may limit public and media access to any hearing the Finance Board has determined will be a public hearing. 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 final 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, all papers filed by the parties shall be filed in accordance with the requirements set out in § 908.25(c) of the final rule.

Any respondent may submit a settlement proposal to the Finance Board in accordance with section 908.30 of the final rule. 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. 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 the Act.

Under subpart D, the Finance Board commences proceedings by issuing and serving a notice of charges or a notice of assessment of a civil money penalty 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 final rule governs hearings and post-hearing proceedings. Section 908.60 of the final rule provides that hearings shall be conducted in accordance with the APA. 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; covered representation may include, but is not limited to, the practice of attorneys and accountants. 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 final rule prescribes when sanctions may be imposed, and what those sanctions may be. 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 (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 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 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 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 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 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 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 procedure, Federal Home Loan Banks.

##### *12 CFR Part 908*

Administrative practice and procedure, Penalties.

For the reasons stated in the preamble, the Finance Board amends 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. Add § 907.16 to read as follows:

##### **§ 907.16 Rules of practice.**

In connection with any matter initiated or pending pursuant to this part, petitioners, requestors or intervenors, or their representatives, shall be subject to the provisions of subpart F of 12 CFR part 908. No other provision of part 908 shall apply under this part.

3. Add part 908 to read as follows:

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

##### **Subpart A—Introduction**

Sec.

- 908.1 Scope.
- 908.2 Definitions.
- 908.3 Rules of construction.

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

- 908.4 Cease and desist proceedings.
- 908.5 Temporary cease and desist orders.
- 908.6 Civil money penalties.
- 908.7 Service of notice.
- 908.8 Subpoenas.
- 908.9 Hearings on the record.
- 908.10 Judicial review.
- 908.11 Jurisdiction and enforcement.
- 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 proceedings under this part.
- 908.33–908.39 [Reserved]

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

- 908.40 Commencement of proceeding and contents of notices.
- 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 Pre-hearing 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 final decision and 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 Appearances 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).

##### **Subpart A—Introduction**

###### **§ 908.1 Scope.**

This part prescribes rules of practice and procedure applicable to any hearing with regard to:

- (a) Cease and desist proceedings under section 2B(a)(5) of the Act (12 U.S.C. 1422b(a)(5)); or
- (b) Civil money penalty assessment proceedings under section 2B(a)(5) of the Act (12 U.S.C. 1422b(a)(5)).

###### **§ 908.2 Definitions.**

For purposes of this part—  
*Decisional employee* means any employee of the Finance Board, except

the Office of General Counsel, or any member of the presiding officer's staff who has not engaged in an investigative or prosecutorial role in connection with the subject cease and desist or civil money penalty proceedings 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.

*Hearing* means an adjudicatory proceeding conducted pursuant to this part;

*Notice* means a written notice of charges or notice of assessment of a civil money penalty so titled that served by the Finance Board upon a respondent, which conforms to § 908.40 and describes the alleged violations with sufficient specificity to put the respondent on notice of the nature and scope of the charges being brought against him, except in the context of the plain meaning of the word notice in a provision, such as reasonable notice or actual notice.

*Party* means, for purposes of subparts C through F of this part only, the Finance Board or respondent.

*Person* means an individual, sole proprietor, partnership, corporation, unincorporated association, trust, joint venture, pool, syndicate, agency, Bank, or other entity or organization with the exception of the Finance Board.

*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.

*Representative of record* means an individual who is authorized to represent a respondent (and includes a respondent who represents himself) at a hearing conducted under this part and who has filed a notice of appearance in accordance with § 908.72.

*Respondent* means any person named in a notice of charges or notice of determination to impose civil money penalties issued by the Finance Board.

*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).

*Violation* includes any act or omission by any 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, other applicable law, regulation, or order of the Finance Board.

### § 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 Proceedings

#### § 908.4 Cease and desist proceedings.

(a) *Notice of Charges.* (1) *Grounds.* The Finance Board may issue and serve a notice of charges upon a Bank or any executive officer or director of a Bank if the Finance Board determines that such party is engaging or has engaged in, or, if the Finance Board has reasonable cause to believe is about to engage in:

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

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

(iii) 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 any written agreement between the Bank and the Finance Board.

(2) *Content of notice of charges.* A notice of charges shall contain a statement of the facts constituting the alleged conduct or violation and otherwise shall conform to the requirements set forth in § 908.40.

(b) *Cease and desist order.* (1) *Issuance of order.* An order to cease and desist shall be issued in writing and only after the respondent has been given the opportunity for a hearing on the record in accordance with the requirements set forth in § 908.9. 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 respondent consents (or is deemed to have consented pursuant to § 908.43), the Board of Directors may issue and serve upon the respondent an order requiring the respondent to cease and desist from any such practice, violation or conduct, to take affirmative action to correct or remedy the conditions resulting from any such practice, violation or conduct, or to comply with such limitations on activities or functions as may be prescribed therein.

(2) *Affirmative action.* The authority of the Board of Directors to issue and serve a cease and desist order that requires a respondent to take affirmative action to correct or remedy any conditions resulting from any violation or practice with respect to which such order is issued includes the authority to require a respondent to—

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

(A) The respondent was unjustly enriched in connection with the violation, conduct or practice described in the order; 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, as directed by the Finance Board); and

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

(3) *Authority to limit activities.* The authority of the Board of Directors to issue and serve a cease and desist order includes the authority to place limitations on the activities or functions of a respondent.

(c) *Effective date of order.* An order issued under paragraph (b) 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 respondent, (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.* Whenever the Board of Directors determines that any conduct or violation, or threatened conduct or violation, specified in a notice of charges issued and served upon a respondent, or the continuation of such conduct or violation, is likely to cause insolvency, a significant depletion of total capital, or irreparable harm to a Bank prior to the completion of the cease and desist proceeding, the Board of Directors may issue a temporary order requiring the respondent to cease and

desist from any such conduct or violation, or such threatened conduct or violation, and to take affirmative action to prevent or remedy such insolvency, depletion, or harm pending completion of such proceedings. Such order may include any requirement authorized under § 908.4(b)(2).

(b) *Incomplete records.* If a notice of charges specifies that the books and records of a Bank are so incomplete or inaccurate that the Finance Board is unable, through the normal supervisory process, to determine the financial condition of the Bank or the details or purpose of any transaction or transactions that may have a material effect on the financial condition of a Bank, the Finance Board may issue a temporary order requiring a respondent to:

(1) Cease and desist from any activity or practice that caused or contributed to, whether in whole or in part, the incomplete or inaccurate state of the books or records of a Bank; or

(2) Take affirmative action to restore the books or records to a complete and accurate state.

(c) *Effective date.* Any temporary order issued pursuant to this section shall become effective upon service upon the respondent.

(d) *Effective period.* (1) Any temporary order issued under paragraph (a) of this section, unless set aside, limited, or suspended by a court in a proceeding under paragraph (e) of this section, shall remain in effect and enforceable pending the completion of the proceeding on the notice of charges and shall remain effective until the Board of Directors dismisses the charges specified in the notice of charges or it is superceded by a cease and desist order.

(2) Any temporary order issued under paragraph (b) of this section, unless set aside, limited, or suspended by a court in proceedings pursuant to paragraph (e) of this section, shall remain in effect and enforceable until the earlier of the completion of the proceeding on the notice of charges, or the date that the Finance Board determines, by examination or otherwise, that the books and records of the Bank are accurate and reflect the financial condition of the Bank.

(e) *Judicial relief.* As authorized by section 2B(a)(5) of the Act (12 U.S.C. 1422b(a)(5)) and sections 1372(d) and 1375(b) of the Safety and Soundness Act (12 U.S.C. 4632(d) and 4635(b)), a respondent that has been served with a temporary order may apply to the United States District Court for the District of Columbia within ten 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.

(f) *Enforcement of temporary order.* If a respondent violates, threatens to violate, or fails 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, as authorized by sections 2B(a)(5) and 2B(a)(7) of the Act (12 U.S.C. 1422b(a)(5) and (a)(7)) and section 1372(e) of the Safety and Soundness Act (12 U.S.C. 4632(e)).

#### § 908.6 Civil money penalties.

(a) *Notice of assessment.* (1) *Grounds.* The Finance Board may issue and serve a notice of assessment of a civil money penalty on any Bank or any executive officer or director of a Bank that:

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

(ii) Violates any final or temporary cease and desist order issued by the Finance Board pursuant to the Act;

(iii) Violates any written agreement between a Bank and the Finance Board; or

(iv) Engages in any conduct that causes or is likely to cause a loss to a Bank.

(2) *Content of notice.* A notice of assessment of a civil money penalty shall contain a statement of the facts constituting the alleged conduct or violation and otherwise conform to the requirements set forth in § 908.40.

(b) *Order assessing penalty.* An order assessing a civil money penalty shall be issued in writing and only after the respondent has been given the opportunity for a hearing on the record in accordance with the procedures set forth in § 908.9. If the Board of Directors finds, based on the record of the hearing, that any conduct or violation specified in the notice of assessment of a civil money penalty has been established or if a respondent consents (or is deemed to have consented pursuant to § 908.43), the Board of Directors may issue and serve upon the respondent an order assessing a civil money penalty.

(c) *Amount of penalty.* (1) The Finance Board may impose a civil money penalty under paragraph (b) of this section against a Bank for a violation described in paragraph (a)(i) through (iii) of this section in an amount not to exceed \$5,000.00 for each day that such violation continues;

(2) The Finance Board may impose a civil money penalty on an executive officer or director of a Bank in an amount not to exceed \$10,000.00, or on a Bank 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:

(i) Is part of a pattern of misconduct; or

(ii) Involved recklessness and caused or would be likely to cause a material loss to a Bank; or

(3) The Finance Board may impose a civil money penalty on an executive officer or director of a Bank in an amount not to exceed \$100,000.00, or on a Bank 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.

(d) *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, 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.

(e) *Judicial relief.* Pursuant to section 2B(a)(5) of the Act (12 U.S.C. 1422b(a)(5)) and section 1376(c)(3) of the Safety and Soundness Act (12 U.S.C. 4636(c)(3)), an order of the Board of Directors imposing a civil money penalty under this subsection shall not be subject to judicial review except as otherwise provided in § 908.10, in accordance with section 1374 of the Safety and Soundness Act (12 U.S.C. 4634).

(f) *Judicial enforcement of an order imposing a penalty.* Pursuant to sections 2B(a)(5) and 2B(a)(7) of the Act (12 U.S.C. 1422b(a)(5) and (a)(7)) and section 1376(d) of the Safety and Soundness Act (12 U.S.C. 4636(d)), if a Bank, or an executive officer or director of a Bank, fails to comply with an order of the Board of Directors imposing 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 or the executive officer or director of a Bank;

(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 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 executive officer or director for any penalty imposed against such individual under paragraph (c)(3) of this section.

(j) *Applicability.* Any penalty under this part may be imposed only for conduct or violations occurring 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 (28 U.S.C. 2461 note).

#### § 908.7 Service of notice.

In accordance with section 2B(a)(5) of the Act (12 U.S.C. 1422b(a)(5)) and section 1379A of the Safety and

Soundness Act (12 U.S.C. 4640), 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 as the Finance Board may by regulation or otherwise provide.

#### § 908.8 Subpoenas.

(a) *Authority.* Pursuant to section 2B(a)(5) of the Act (12 U.S.C. 1422b(a)(5)) and section 1379B of the Safety and Soundness Act (12 U.S.C. 4641), the Finance Board, in the course of or in connection with a 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 conducts business, 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*.

(d) *Fees and Expenses.* Witnesses subpoenaed under this section shall be paid the same fees and mileage that are paid witnesses in the district courts of the United States. Any court having jurisdiction of any proceeding instituted under this section by a Bank may allow to any such party such reasonable expenses and attorneys fees as the court deems just and proper. Such expenses shall be paid by the Bank or from its assets.

#### § 908.9 Hearings on the record.

(a) *Requirements.* (1) *Venue and record.* Pursuant to section 2B(a)(5) of the Act (12 U.S.C. 1422b(a)(5)) and section 1373 of the Safety and Soundness Act (12 U.S.C. 4633), any hearing conducted pursuant to §§ 908.4

or 908.6 shall be held on the record and in the District of Columbia.

(2) *Timing.* Any hearing shall be set for a date not earlier than thirty (30) days nor later than sixty (60) days after service of a notice, unless an earlier or a later date is set by the presiding officer at the request of the party served.

(3) *Procedure.* Any 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 respondent fails to appear at a hearing individually or through a duly authorized representative, the respondent shall be deemed to have consented to the issuance of a cease and desist order or an order assessing a civil money penalty for which the hearing is held.

(5) *Open to the public.* All hearings on the record with respect to any notice issued by the Finance Board shall be open to the public, unless the Board of Directors, in its discretion, determines that holding an open hearing would be contrary to the public interest.

(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.

(c) *Judicial review and modification of final orders.* Judicial review of any such final decision and order shall be exclusively as provided for in § 908.10, pursuant to section 2B(a)(5) of the Act (12 U.S.C. 1422b(a)(5)) and sections 1373 and 1374 of the Safety and Soundness Act (12 U.S.C. 4633 and 4634). 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 decision and 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 decision and order with permission of the court.

#### § 908.10 Judicial review.

(a) *Authority.* Pursuant to section 2B(a)(5) of the Act (12 U.S.C. 1422b(a)(5)) and section 1374 of the Safety and Soundness Act (12 U.S.C. 4634), any party to a hearing may obtain judicial review of a final decision and

order issued under §§ 908.4 or 908.6 exclusively by filing a written petition 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 decision and order, requesting the court to modify, terminate or set aside the final decision and order.

(b) *Filing of record.* Upon receiving a copy of the petition from the clerk of the court of appeals, the Finance Board shall file the hearing record with the clerk, as provided in section 2112 of Title 28 of the United States Code (28 U.S.C. 2112).

(c) *Jurisdiction.* Pursuant to section 2B(a)(5) of the Act (12 U.S.C. 1422b(a)(5)) and section 1374(c) of the Safety and Soundness Act (12 U.S.C. 4634(c)), 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) shall be exclusive, to affirm, modify, terminate or set aside, in whole or in part, a final decision and order of the Board of Directors.

(d) *Review.* Review by the court of appeals of a final decision and order of the Board of Directors and the record of any 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.*).

(e) *Order to pay civil money penalty.* In connection with its review of a final order pursuant to this part, the court of appeals shall have authority in accordance with section 2B(a)(5) of the Act (12 U.S.C. 1422b(a)(5)) and section 1374(e) of the Safety and Soundness Act (12 U.S.C. 4634(e)), to order payment of any civil money penalty imposed by the Finance Board.

(f) *No automatic stay.* In accordance with section 2B(a)(5) of the Act (12 U.S.C. 1422b(a)(5)) and section 1374(f) of the Safety and Soundness Act (12 U.S.C. 4634(f)), the commencement of an action for judicial review of a final decision and order of the Board of Directors under this section shall not operate as a stay of any such order, unless the court of appeals specifically orders a stay of the order in whole or in part.

#### § 908.11 Jurisdiction and enforcement.

(a) *Enforcement.* In accordance with sections 2B(a)(5) and 2B(a)(7) of the Act (12 U.S.C. 1422b(a)(5) and (a)(7)) and section 1375(a) of the Safety and Soundness Act (12 U.S.C. 4635(a)), the Finance Board may bring an action in the United States District Court for the District of Columbia for the enforcement of any effective order issued by the

Board of Directors under this part. Such court shall have jurisdiction and power to order and require compliance with such order.

(b) *Limitation on jurisdiction.* In accordance with sections 2B(a)(5) and 2B(a)(7) of the Act (12 U.S.C. 1422b(a)(5) and (a)(7)) and section 1375(b) of the Safety and Soundness Act (12 U.S.C. 4635(b)), and except as otherwise provided in the Act, no court shall have jurisdiction to affect, by injunction or otherwise, the issuance or enforcement of any order issued by the Board of Directors under this part, or to review, modify, suspend, terminate, or set aside any such notice or order.

#### § 908.12 Notice after separation.

The resignation, termination of employment or participation, or separation of a director or executive officer of a Bank 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 or 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 Board of Directors 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 determines in writing that the public disclosure, pursuant to paragraph (a) of this section, of any final decision and order of the Board of Directors would seriously threaten the financial health or security of a Bank, the Finance Board may delay the public disclosure of such decision and order for a reasonable time.

(c) *Documents filed under seal.* 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 six 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 or any director or executive officer of a Bank 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 under this part, 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 cease and desist or civil money penalty proceedings governed by this subpart shall be conducted in a hearing on the record 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 hearing is made.

(b) *Powers.* The presiding officer shall have all powers necessary to conduct the hearing 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 a hearing, except that only the Board of Directors shall have the power to grant any motion to dismiss a cease and desist or civil money penalty proceeding or to make a final determination on the merits of such proceedings;

(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 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 twenty (20) days of service of a notice, any party or respondent may file with the presiding officer a motion for a non-public hearing and any party 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 a cease and desist or civil money penalty proceeding under this part 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 a proceeding under this part, 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 that a notice commencing a proceeding under this part 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 a proceeding, 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 of the recommended decision under § 908.65, except as a witness or counsel in a hearing.

#### § 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 × 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, papers, 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 § 908.25(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 such party by any of the following methods:

- (i) By personal service;
- (ii) If the person to be served is an individual, by delivery to a person of suitable age and discretion at the physical location where the individual resides or works;
- (iii) If the person to be served is a corporation or other association, by delivery to an officer, managing or general agent, or to any other agent authorized by appointment or by law to receive service and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the 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 ten (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 (3) 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 one (1) calendar day to the prescribed period for the responsive filing.

(3) If service was made by electronic media transmission, add one (1) 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 non-dispositive order issued under this part. After the referral of the case to the Board of Directors pursuant to § 908.63, the Board of Directors 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 Board of Directors' 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 a cease and desist or civil money penalty proceeding, unilaterally submit to the Finance Board's counsel of record written offers or proposals for settlement of such proceeding in whole or in part 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 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 (12 U.S.C. 1422b(a)(1)).

#### **§ 908.32 Collateral attacks on proceedings under this part.**

If a respondent files in any court a collateral attack that purports to challenge all or any portion of a proceeding under this part, the hearing on the merits shall continue without regard to the pendency of any such challenge action. No default or other failure to act as directed in the hearing within the times prescribed in this subpart shall be excused based on the pendency of any such challenge action.

#### **§ 908.33—908.39 [Reserved]**

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

#### **§ 908.40 Commencement of proceeding and contents of notices.**

Proceedings under this part are commenced by the issuance of a notice of charges or a notice of assessment of a civil money penalty (notice). A notice that is served by the Finance Board upon a respondent in accordance with § 908.7 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 twenty (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 by the Finance Board prior to the scheduling conference held in accordance with § 908.53, or at any stage of the proceeding with the permission of the presiding officer for good cause shown. The respondent must answer an amended notice within the time remaining for the respondent's answer to the original notice, or within ten (10) 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 and on the record at a hearing, unless the presiding officer directs that such motion be reduced to writing and filed with the presiding officer. Oral motions must be made a part of the record of the hearing, and accompanied by a 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 in accordance with § 908.64.

(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 provided that the information sought has a logical connection to consequential facts (i.e., material) or may tend to prove or disprove a matter in issue (i.e., relevant) related to the merits of the pending action. Any request to produce documents that calls for irrelevant or immaterial information, or that is unreasonable, oppressive, excessive in scope, unduly burdensome, or repetitive of previous requests, or that seeks to obtain privileged documents, shall 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 within the time set by the presiding officer, but in no case later than ten (10) days prior to the service deadline for pre-hearing submissions in accordance with § 908.54. 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 (10) 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 (5) 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 (10) 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 (5) 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 § 908.46(e) and in accordance with § 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) 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 testimony is reasonably expected to be material; and

(ii) 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 ten (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 § 908.45 with the presiding officer to quash or modify the subpoena prior to the time for compliance specified in the subpoena, but not more than ten (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) *Procedure.* Any motion for interlocutory review shall be filed by a party with the presiding officer within ten (10) 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.

(c) *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.

(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 twenty (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 finds that the moving party is not entitled to summary disposition, the presiding officer shall make a ruling denying the motion. 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.

#### § 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 thirty (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 (ten) 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 materiality or 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 ten days after the date of service of the subpoena upon the movant.

(c) *Enforcing subpoenas.* If a subpoenaed person fails to comply with any subpoena issued pursuant to this section or any order of the 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 fails, or induces a failure, to comply with any subpoena 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) The presiding officer may admit evidence, which otherwise would be inadmissible under the Federal Rules of Evidence (28 U.S.C.), upon a finding made on the record that the evidence is relevant, material, probative and reliable, and would not prejudice the rights of or cause an undue burden to any party to the proceeding.

(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 institution's 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 evidentiary 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 § 908.49, 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 thirty (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 fifteen (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 shall 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 forty-five (45) days after expiration of the time allowed for filing reply briefs under § 908.62(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 thirty (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 (10) 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 and order in accordance with this section.

(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 and order. Oral argument before the Board of Directors must be transcribed.

(c) *Board of Directors' final decision and order.* (1) Decisional employees may advise and assist the Board of Directors in the consideration and disposition of the case, and in the preparation of the final decision and order. The final decision and order 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 in accordance with this part.

(2) The Board of Directors shall render and issue a final decision and order within ninety (90) days after notification of the parties that the case has been submitted to the Board of Directors, unless the Board of Directors orders that the action or any aspect thereof be remanded to the presiding officer for further proceedings in accordance with instructions as may be specified by the Board of Directors. Copies of the final decision and order of the Board of Directors shall be served upon each party to the proceeding and otherwise, as may be required by the Board of Directors in accordance with applicable law.

**§ 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 and order, in whole or in part, issued by the Board of Directors under § 908.65.

**§ 908.67 Stay of final decision and order pending judicial review.**

The commencement of proceedings for judicial review of all or part of a final order issued by the Board of Directors in accordance with § 908.65, as provided in § 908.10 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 judicial 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. In particular, these rules of practice shall apply to any appearances before the Board of Directors under this part or part 907 of this chapter. This subpart also shall govern the imposition of sanctions by the Finance Board or a presiding officer against parties or their representatives in a hearing under this part or a proceeding under part 907 of this chapter. 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 any hearing under this part or any proceeding under part 907 of this chapter, or in any other matter that involves contacting the Finance Board as a principal or agent with respect to asserting the rights, privileges, or liabilities of an individual or entity, 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 request, 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 a hearing under this part. 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 a hearing under this part, 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 in a proceeding under this part 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 § 908.72:

- (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 proceeding, hearing, or appearance 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; or

(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 ten 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 ten 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 one (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: February 13, 2002.

By the Federal Housing Finance Board.

**John T. Korsmo,**  
*Chairman.*

[FR Doc. 02-5094 Filed 3-4-02; 8:45 am]

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## FEDERAL TRADE COMMISSION

### 16 CFR Part 20

#### Guides for the Rebuilt, Reconditioned, and Other Used Automobile Parts Industry

**AGENCY:** Federal Trade Commission.

**ACTION:** Final rule.

**SUMMARY:** The Commission has completed its review of the Guides for the Rebuilt, Reconditioned and Other Used Automobile Parts Industry ("Used Auto Parts Guides" or "Guides") and has determined to retain the Guides with updated language and minor revisions.

**EFFECTIVE DATE:** March 5, 2002.

**ADDRESSES:** Requests for copies of this document should be sent to the