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Signed in Washington, DC, on December 21, 2020.

**Trenea V. Garrett,**  
Federal Register Liaison Officer, U.S.  
Department of Energy.

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## **FEDERAL DEPOSIT INSURANCE CORPORATION**

### **12 CFR Part 308**

**RIN 3064-AF69**

#### **FDIC Rules of Practice and Procedure; Technical Revisions**

**AGENCY:** Federal Deposit Insurance Corporation.

**ACTION:** Final rule.

**SUMMARY:** The Federal Deposit Insurance Corporation (FDIC) is amending its rules of practice and procedure to codify the agency's longstanding practice of having certain adjudicative functions performed by an inferior officer of the United States appointed by the FDIC's Board of Directors (Board). Additionally, the FDIC is making other technical edits to its rules of practice and procedure to update references to certain positions within the FDIC Legal Division whose titles are outdated.

**DATES:** The final rule is effective on January 12, 2021.

**FOR FURTHER INFORMATION CONTACT:** Romulus A. Johnson, Counsel, Legal Division, (202) 898-3820, [romjohnson@fdic.gov](mailto:romjohnson@fdic.gov); Josephine M. Bahn, Senior Attorney, Legal Division, (202) 898-6576, [jbahn@fdic.gov](mailto:jbahn@fdic.gov); or Nicholas S. Kazmerski, Counsel, Legal Division, (202) 898-3524, [nkazmerski@fdic.gov](mailto:nkazmerski@fdic.gov).

#### **SUPPLEMENTARY INFORMATION:**

##### **I. Background**

Administrative enforcement proceedings brought by the FDIC are subject to the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, and the FDIC Rules of Practice and Procedure, 12 CFR part 308. Under part 308, evidentiary hearings and related proceedings are generally presided over by an Administrative Law Judge (ALJ). See generally, 5 U.S.C. 556; 12 CFR 308.5, and 308.3. Additionally, part 308 provides that certain procedural and adjudicative functions are reserved to

the Executive Secretary of the FDIC. These functions include but are not limited to: (1) Serving in place of an ALJ when no ALJ has jurisdiction over an administrative proceeding; (2) issuing rulings in certain administrative proceedings; and (3) serving as the custodian of records for administrative proceedings. See generally, 12 CFR 308.102(b) and 308.105.

On June 21, 2018, the U.S. Supreme Court held that the ALJs employed by the U.S. Securities and Exchange Commission (SEC) were "inferior officers" of the United States under the Appointments Clause of the United States Constitution because these ALJs hold a continuing office established by law, and they exercise "significant discretion" in connection with certain "important functions" when presiding over administrative hearings. *Lucia v. SEC*, 138 S. Ct. 2044, 2053–2054 (2018) (*Lucia*). As inferior officers, the Supreme Court held that the SEC's ALJs are "subject to the Appointments Clause and as such, can only be appointed by the President, "Courts of Law" or "Heads of Departments." See, *Lucia*, 138 S. Ct. 2044, 2046.

Although the *Lucia* decision did not directly affect the FDIC or the ALJs for the FDIC, the Board nevertheless elected to formally appoint the ALJs that preside over FDIC enforcement proceedings. The ALJs who were serving at the time of the *Lucia* decision were appointed by the Board on July 19, 2018. See FDIC Board Resolution 085152. Since that time, the Board has appointed all ALJs that preside over FDIC enforcement proceedings.

Since the *Lucia* decision, the FDIC has received questions regarding whether the FDIC's Executive Secretary was also appointed in a manner consistent with the Supreme Court's ruling in *Lucia*. In fact, the Board duly appointed the FDIC's current Executive Secretary as an inferior officer on June 22, 1997, pursuant to Article II of the United States Constitution and 12 U.S.C. 1819(a) (Fifth) (allowing the FDIC to "appoint by its Board of Directors such officers and employees as are not otherwise provided for in this chapter"). Nonetheless, in the interest of transparency and to assuage any outstanding concerns about this issue, we are amending part 308 to clarify and to expressly provide that such adjudicative functions will continue to be performed by an inferior officer of the United States (Administrative Officer) that has been duly appointed by the Board.

In addition to clarifying that these adjudicative functions are performed by an Administrative Officer that is duly

appointed by the Board, the FDIC is making technical changes to part 308 to update outdated references to certain position titles.

#### **II. Exemption From Public Notice and Comment**

Section 553 of the Administrative Procedure Act (APA) (5 U.S.C. 553) sets forth requirements for providing the general public notice of, and the opportunity to comment on, proposed agency rules. However, unless notice or hearing is required by statute, those requirements do not apply to interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice. See 5 U.S.C. 553(b)(A).

The FDIC is updating part 308, its rules of practice and procedure, to substitute the Administrative Officer for the Executive Secretary in multiple places. Since the changes relate to agency organization, procedure, or practice, the rules are being published in final form without public notice and comment.

#### **III. Regulatory Analysis**

##### **A. Congressional Review Act**

Under the Congressional Review Act (CRA), "[b]efore a rule can take effect, the Federal agency promulgating such rule shall submit to each House of the Congress and to the Comptroller General a report containing—(i) a copy of the rule; (ii) a concise general statement relating to the rule, including whether it is a major rule; and (iii) the proposed effective date of the rule."<sup>1</sup> The CRA further defines the term "rule" as having "the meaning given such term in section 551, except that such term does not include—(A) any rule of particular applicability . . . ; (B) any rule relating to agency management or personnel; or (C) any rule of agency organization, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties."<sup>2</sup>

The FDIC is updating part 308, its rules of practice and procedure, to clarify that certain adjudicative functions, specified in part 308 as being performed by the FDIC's Executive Secretary or Assistant Executive Secretary, will be performed by an "Administrative Officer" or "Assistant Administrative Officer" who has been duly appointed by the Board. Additionally, the FDIC is updating outdated references to certain position titles in part 308. These amendments do not constitute substantive changes, but merely conform the titles in the

<sup>1</sup> 5 U.S.C. 801(a)(1)(A).

<sup>2</sup> 5 U.S.C. 804(3).

regulation to the current titles of these positions.

The clarifications relate to agency management and personnel, and to agency practice and procedure. Further, to the extent that non-agency parties are impacted by the amended rules (*i.e.*, they may be required to submit requests and documents to the attention of the Administrative Officer rather than the Executive Secretary), their rights and obligations will not be substantially affected. As such, submission to Congress and the Comptroller General is not required for the rules to become effective.

#### B. Paperwork Reduction Act

This rule does not propose new or revisions to existing “collection[s] of information” as that term is defined under the Paperwork Reduction Act of 1995, Public Law 104–13, 44 U.S.C. chapter 35, and its implementing regulations, 5 CFR part 1320.

#### C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) (5 U.S.C. 601–612) does not apply to a rulemaking where a general notice of proposed rulemaking is not required. (5 U.S.C. 603 and 604). As noted previously, the FDIC has determined that it is unnecessary to publish a notice of proposed rulemaking for the final rule amending part 308. Accordingly, the RFA’s requirements relating to an initial and final regulatory flexibility analysis do not apply to this rulemaking for part 308.

#### D. Riegle Community Development and Regulatory Improvement Act of 1994

Pursuant to section 302(a) of the Riegle Community Development and Regulatory Improvement Act (RCDRIA),<sup>3</sup> in determining the effective date and administrative compliance requirements for new regulations that impose additional reporting, disclosure, or other requirements on insured depository institutions (IDIs), each Federal banking agency must consider, consistent with the principle of safety and soundness and the public interest, any administrative burdens that the regulations would place on depository institutions, including small depository institutions and customers of depository institutions, as well as the benefits of the regulations. In addition, section 302(b) of RCDRIA requires new regulations and amendments to regulations that impose additional reporting, disclosures, or other new requirements on IDIs generally to take effect on the first day of a calendar

quarter that begins on or after the date on which the regulations are published in final form.<sup>4</sup> The FDIC has determined that the rule would not impose additional reporting, disclosure, or other requirements; therefore the requirements of the RCDRIA do not apply.

#### E. Plain Language

Section 722 of the Gramm-Leach-Bliley Act<sup>5</sup> requires the Federal banking agencies to use “plain language” in all proposed and final rules published after January 1, 2000. In light of this requirement, the FDIC has sought to present the final rule in a simple and straightforward manner.

#### List of Subjects in 12 CFR Part 308

Administrative practice and procedure, Bank deposit insurance, Banks, banking, Claims, Crime, Equal access to justice, Fraud, Investigations, Lawyers, Penalties, Savings associations.

### 12 CFR Chapter III

#### Authority and Issuance

For the reasons stated in the preamble, the FDIC amends 12 CFR part 308 as follows:

### PART 308—RULES OF PRACTICE AND PROCEDURE

- 1. The authority citation for part 308 continues to read as follows:

**Authority:** 5 U.S.C. 504, 554–557; 12 U.S.C. 93(b), 164, 505, 1464, 1467(d), 1467a, 1468, 1815(e), 1817, 1818, 1819, 1820, 1828, 1829, 1829(b), 1831i, 1831m(g)(4), 1831o, 1831p–1, 1832(c), 1884(b), 1972, 3102, 3108(a), 3349, 3909, 4717, 5412(b)(2)(C), 5414(b)(3); 15 U.S.C. 78(h) and (i), 78o(c)(4), 78o–4(c), 78o–5, 78q–1, 78s, 78u, 78u–2, 78u–3, 78w, 6801(b), 6805(b)(1); 28 U.S.C. 2461 note; 31 U.S.C. 330, 5321; 42 U.S.C. 4012a; Pub. L. 104–134, sec. 31001(s), 110 Stat. 1321; Pub. L. 109–351, 120 Stat. 1966; Pub. L. 111–203, 124 Stat. 1376; Pub. L. 114–74, sec. 701, 129 Stat. 584.

- 2. Amend § 308.3 by:
  - a. Removing the first-level paragraph designations from paragraphs (a) through (s);
  - b. Adding definitions of “Administrative Officer” and “Assistant Administrative Officer” in alphabetical order;
  - c. Revising the definition of “Decisional employee”;
  - d. Removing the definition of “Executive Secretary”; and
  - e. Revising the definition of “Person”.

The additions and revisions read as follows:

<sup>4</sup> 12 U.S.C. 4802.

<sup>5</sup> 12 U.S.C. 4809.

#### § 308.3 Definitions.

\* \* \* \* \*

*Administrative Officer* means an inferior officer of the Federal Deposit Insurance Corporation, duly appointed by the Board of Directors of the Federal Deposit Insurance Corporation to serve as the Board’s designee to hear certain motions or requests in an adjudicatory proceeding and to be the official custodian of the record for the Federal Deposit Insurance Corporation.

\* \* \* \* \*

*Assistant Administrative Officer* means an inferior officer of the Federal Deposit Insurance Corporation, duly appointed by the Board of Directors of the Federal Deposit Insurance Corporation to serve as the Board’s designee to hear certain motions or requests in an adjudicatory proceeding upon the designation or unavailability of the Administrative Officer.

\* \* \* \* \*

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

\* \* \* \* \*

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

\* \* \* \* \*

- 3. Amend § 308.18 by revising paragraph (a)(1)(ii) to read as follows:

#### § 308.18 Commencement of proceeding and contents of notice.

(a) \* \* \*

(1) \* \* \*

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

\* \* \* \* \*

- 4. Amend § 308.23 by revising paragraphs (c) and (d) to read as follows:

#### § 308.23 Motions.

\* \* \* \* \*

(c) *Filing of motions.* Motions must be filed with the administrative law judge, except that following the filing of the recommended decision, motions must

<sup>3</sup> 12 U.S.C. 4802(a).

be filed with the Administrative Officer for disposition by the Board of Directors.

(d) *Responses.* (1) Except as otherwise provided in this paragraph (d), within ten days after service of any written motion, or within such other period of time as may be established by the administrative law judge or the Administrative Officer, any party may file a written response to a motion. The administrative law judge shall not rule on any oral or written motion before each party has had an opportunity to file a response.

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

\* \* \* \* \*

■ 5. Amend § 308.33 by revising paragraph (a) to read as follows:

#### **§ 308.33 Public hearings.**

(a) *General rule.* All hearings shall be open to the public, unless the FDIC, in its discretion, determines that holding an open hearing would be contrary to the public interest. Within 20 days of service of the notice or, in the case of change-in-control proceedings under section 7(j)(4) of the FDIA (12 U.S.C. 1817(j)(4)), within 20 days from service of the hearing order, any respondent may file with the Administrative Officer a request for a private hearing, and any party may file a reply to such a request. A party must serve on the administrative law judge a copy of any request or reply the party files with the Administrative Officer. The form of, and procedure for, these requests and replies are governed by § 308.23. A party's failure to file a request or a reply constitutes a waiver of any objections regarding whether the hearing will be public or private.

\* \* \* \* \*

■ 6. Revise § 308.38 to read as follows:

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

(a) *Filing of recommended decision and record.* Within 45 days after expiration of the time allowed for filing reply briefs under § 308.37(b), the administrative law judge shall file with and certify to the Administrative Officer, for decision, the record of the proceeding. The record must include the administrative law judge's recommended decision, recommended findings of fact, recommended conclusions of law, and proposed order; all prehearing and hearing transcripts, exhibits, and rulings; and the motions,

briefs, memoranda, and other supporting papers filed in connection with the hearing. The administrative law judge shall serve upon each party the recommended decision, findings, conclusions, and proposed order.

(b) *Filing of index.* At the same time the administrative law judge files with and certifies to the Administrative Officer for final determination the record of the proceeding, the administrative law judge shall furnish to the Administrative Officer 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 administrative law judge 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.

■ 7. Amend § 308.39 by revising paragraph (a) to read as follows:

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

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

\* \* \* \* \*

■ 8. Amend § 308.40 by revising paragraphs (a) and (b) to read as follows:

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

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

(b) *Oral argument before the Board of Directors.* Upon the initiative of the

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

\* \* \* \* \*

■ 9. Amend § 308.102 by revising the section heading and paragraphs (a), (b) heading, (b)(1), and (b)(2) introductory text to read as follows:

#### **§ 308.102 Authority of Board of Directors and Administrative Officer.**

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

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

(b) *The Administrative Officer.* (1) When no administrative law judge has jurisdiction over a proceeding, the Administrative Officer may act in place of, and with the same authority as, an administrative law judge, except that the Administrative Officer may not hear a case on the merits or make a recommended decision on the merits to the Board of Directors.

(2) Pursuant to authority delegated by the Board of Directors, the Administrative Officer and Assistant Administrative Officer, upon the advice and recommendation of the Deputy General Counsel for Litigation or, in his absence, the Assistant General Counsel for General Litigation, may issue rulings in proceedings under sections 7(j), 8, 18(j), 19, 32 and 38 of the FDIA (12 U.S.C. 1817(j), 1818, 1828(j), 1829, 1831i and 1831o) concerning:

\* \* \* \* \*

■ 10. Amend § 308.103 by revising paragraph (b)(1) to read as follows:

#### **§ 308.103 Appointment of administrative law judge.**

\* \* \* \* \*

(b) \* \* \*

(1) The Enforcement Counsel shall promptly after issuance of the notice file

the matter with the Office of Financial Institution Adjudication (“OFIA”) which shall secure the appointment of an administrative law judge to hear the proceeding.

\* \* \* \* \*

- 11. Revise § 308.104 to read as follows:

#### **§ 308.104 Filings with the Board of Directors.**

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

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

- 12. Revise § 308.105 to read as follows:

#### **§ 308.105 Custodian of the record.**

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

- 13. Amend § 308.109 by revising paragraphs (b)(2) and (3) to read as follows:

#### **§ 308.109 Suspension and disbarment.**

\* \* \* \* \*

(b) \* \* \*

(2) Any person appearing or practicing before the FDIC who is the subject of an order, judgment, decree, or finding of the types set forth in paragraph (b)(1) of this section shall promptly file with the Administrative Officer a copy thereof, together with any related opinion or statement of the agency or tribunal involved. Any person who fails to so file a copy of the order, judgment, decree, or finding within 30 days after the entry of the order, judgment, decree, or finding or the date such person initiates practice before the

FDIC, for that reason alone may be disqualified from practicing before the FDIC until such time as the appropriate filing shall be made. Failure to file any such paper shall not impair the operation of any other provision of this section.

(3) A suspension or disbarment under paragraph (b)(1) of this section from practice before the FDIC shall continue until the applicant has been reinstated by the Board of Directors for good cause shown, provided that any person suspended or disbarred under paragraph (b)(1) of this section shall be automatically reinstated by the Administrative Officer, upon appropriate application, if all the grounds for suspension or disbarment under paragraph (b)(1) of this section are subsequently removed by a reversal of the conviction (or the passage of time since the conviction) or termination of the underlying suspension or disbarment. An application for reinstatement on any other grounds by any person suspended or disbarred under paragraph (b)(1) of this section may be filed no sooner than one year after the suspension or disbarment, and thereafter, a new request for reinstatement may be made no sooner than one year after the counsel’s most recent reinstatement application. The application must comply with the requirements of § 303.3 of this chapter. An applicant for reinstatement under this provision may, in the Board of Directors’ sole discretion, be afforded a hearing.

\* \* \* \* \*

- 14. Amend § 308.112 by revising paragraph (a)(2)(ii) to read as follows:

#### **§ 308.112 Notice of disapproval.**

(a) \* \* \*

(2) \* \* \*

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

\* \* \* \* \*

- 15. Revise § 308.139 to read as follows:

#### **§ 308.139 Application for exemption.**

Any interested person may file a written application for an exemption under this subpart with the Administrative Officer, Federal Deposit Insurance Corporation, 550 17th Street NW, Washington, DC 20429. The application shall specify the exemption

sought and the reason therefor, and shall include a statement indicating why the exemption would be consistent with the public interest or the protection of investors.

- 16. Amend § 308.140 by revising paragraph (a) to read as follows:

#### **§ 308.140 Newspaper notice.**

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

\* \* \* \* \*

- 17. Revise § 308.141 to read as follows:

#### **§ 308.141 Notice of hearing.**

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

- 18. Amend § 308.154 by revising paragraph (c)(1) to read as follows:

#### **§ 308.154 Decision on review.**

\* \* \* \* \*

(c) \* \* \*

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

\* \* \* \* \*

- 19. Amend § 308.155 by revising paragraphs (a), (c)(1) and (9), and (f) to read as follows:

#### **§ 308.155 Hearing.**

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

officer or the Administrative Officer may order a later hearing date.

\* \* \* \*

(c) \* \* \*  
 (1) The hearing shall be held in Washington, DC or at another designated place, before a presiding officer designated by the Administrative Officer. \* \* \*

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

\* \* \* \*

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

■ 20. Revise § 308.157 to read as follows:

#### **§ 308.157 Denial of applications.**

If an application is denied under 12 CFR part 303, subpart L, then the applicant may request a hearing under this subpart. The applicant will have 60 days after the date of the denial to file a written request with the Administrative Officer. In the request, the applicant shall state the relief desired, the grounds supporting the request for relief, and provide any supporting evidence that the applicant believes is responsive to the grounds for the denial.

■ 21. Amend § 308.158 by revising paragraphs (a), (c)(1) and (9), and (f) to read as follows:

#### **§ 308.158 Hearings.**

(a) *Hearing dates.* The Administrative Officer shall order a hearing to be commenced within 60 days after receipt of a request for hearing on an application filed under § 308.157. Upon the request of the applicant or FDIC enforcement counsel, the presiding officer or the Administrative Officer may order a later hearing date.

\* \* \* \*

(c) \* \* \*  
 (1) The hearing shall be held in Washington, DC, or at another

designated place, before a presiding officer designated by the Administrative Officer. \* \* \*

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

\* \* \* \*

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

■ 22. Amend § 308.163 by revising paragraphs (c)(1) and (d) introductory text to read as follows:

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

\* \* \* \*

(c) \* \* \*

(1) Inform the institution-affiliated party that a written request for a hearing, stating the relief desired and grounds therefore, and any supporting evidence, may be filed with the Administrative Officer within 30 days after service of the written notice or order; and

\* \* \* \*

(d) To obtain a hearing, the institution-affiliated party shall file with the Administrative Officer a written request for a hearing within 30 days after service of the notice of suspension or prohibition or the order of removal or prohibition, which shall:

\* \* \* \*

■ 23. Amend § 308.164 by revising paragraphs (a), (b)(1) and (9), and (e) to read as follows:

#### **§ 308.164 Hearings.**

(a) *Hearing dates.* The Administrative Officer shall order a hearing to be commenced within 30 days after receipt of a request for hearing filed pursuant to § 308.163. Upon the request of the institution-affiliated party, the presiding officer or the Administrative Officer may order a later hearing date.

\* \* \* \*

(b) \* \* \*

(1) The hearing shall be held in Washington, DC, or at another designated place, before a presiding officer designated by the Administrative Officer. \* \* \*

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

\* \* \* \*

(e) *Decision by Board of Directors or its designee.* Within 60 days following the Administrative Officer's certification of the record to the Board of Directors or its designee, the Board of Directors or its designee shall notify the institution-affiliated party whether the notice of suspension or prohibition or the order of removal or prohibition will be continued, terminated, or otherwise modified. The notification shall state the basis for any decision of the Board of Directors or its designee that is adverse to the institution-affiliated party. The Board of Directors or its designee shall promptly rescind or modify a notice of suspension or prohibition or an order of removal or prohibition where the decision is favorable to the institution-affiliated party.

■ 24. Amend § 308.170 by revising paragraphs (a) introductory text and (d) to read as follows:

#### **§ 308.170 Filing, content, and service of documents.**

(a) *Time to file.* An application and any other pleading or document related to the application shall be filed with the Administrative Officer within 30 days after service of the final order of the Board of Directors in disposition of the proceeding whenever:

\* \* \* \*

(d) *Referral.* Upon receipt of an application, the Administrative Officer shall refer the matter to the administrative law judge who heard the underlying adversary proceeding, provided that if the original administrative law judge is unavailable, or the Administrative Officer determines, in his or her sole discretion, that there is cause to refer the matter to a different administrative law judge, the matter shall be referred to a different administrative law judge.

■ 25. Amend § 308.171 by revising paragraph (a)(1) to read as follows:

#### **§ 308.171 Responses to application.**

(a) \* \* \*

(1) Within 20 days after service of an application, counsel for the FDIC may file with the Administrative Officer and serve on all parties an answer to the application. Unless counsel for the FDIC requests and is granted an extension of

time for filing or files a statement of intent to negotiate under § 308.179, failure to file an answer within the 20-day period will be treated as a consent to the award requested.

\* \* \* \* \*

■ 26. Revise § 308.179 to read as follows:

**§ 308.179 Settlement negotiations.**

If counsel for the FDIC and the applicant believe that the issues in a fee application can be settled, they may jointly file with the Administrative Officer with a copy to the administrative law judge a statement of their intent to negotiate a settlement. The filing of this statement shall extend the time for filing an answer under § 308.171 for an additional 30 days, and further extensions may be granted by the administrative law judge upon the joint request of counsel for the FDIC and the applicant.

■ 27. Revise § 308.181 to read as follows:

**§ 308.181 Recommended decision.**

The administrative law judge shall file with the Administrative Officer a recommended decision on the fee application not later than 90 days after the filing of the application or 30 days after the conclusion of the hearing, whichever is later. The recommended decision shall include written proposed findings and conclusions on the applicant's eligibility and its status as a prevailing party and an explanation of the reasons for any difference between the amount requested and the amount of the recommended award. The recommended decision shall also include, if at issue, proposed findings on whether the FDIC's position was substantially justified, whether the applicant unduly protracted the proceedings, or whether special circumstances make an award unjust. The administrative law judge shall file the record of the proceeding on the fee application and, at the same time, serve upon each party a copy of the recommended decision, findings, conclusions, and proposed order.

■ 28. Revise § 308.182 to read as follows:

**§ 308.182 Board of Directors action.**

(a) *Exceptions to recommended decision.* Within 20 days after service of the recommended decision, findings, conclusions, and proposed order, the applicant or counsel for the FDIC may

file with the Administrative Officer written exceptions thereto. A supporting brief may also be filed.

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

■ 29. Revise § 308.183 to read as follows:

**§ 308.183 Payment of awards.**

An applicant seeking payment of an award made by the Board of Directors shall submit to the Administrative Officer a statement that the applicant will not seek judicial review of the decision and order or that the time for seeking further review has passed and no further review has been sought. The FDIC will pay the amount awarded within 30 days after receiving the applicant's statement, unless judicial review of the award or of the underlying decision of the adversary adjudication has been sought by the applicant or any other party to the proceeding.

■ 30. Amend § 308.602 by revising paragraphs (c)(3) through (6) to read as follows:

**§ 308.602 Removal, suspension, or debarment.**

\* \* \* \* \*

(c) \* \* \*

(3) *Petition to stay.* Any accountant or accounting firm immediately suspended from performing audit services in accordance with paragraph (c)(1) of this section may, within 10 calendar days after service of the notice of immediate suspension, file a petition with the Administrative Officer for a stay of such immediate suspension. If no petition is filed within 10 calendar days, the immediate suspension shall remain in effect.

(4) *Hearing on petition.* Upon receipt of a stay petition, the Administrative Officer will designate a presiding officer who will fix a place and time (not more than 10 calendar days after receipt of the petition, unless extended at the request of petitioner) at which the immediately suspended party may appear, personally or through counsel, to submit written materials and oral argument. Any FDIC employee engaged in investigative or prosecuting functions

for the FDIC in a case may not, in that or a factually related case, serve as a presiding officer or participate or advise in the decision of the presiding officer or of the FDIC, except as witness or counsel in the proceeding. In the sole discretion of the presiding officer, upon a specific showing of compelling need, oral testimony of witnesses also may be presented. Enforcement counsel may represent the agency at the hearing. In hearings held pursuant to this paragraph (c)(4) there shall be no discovery, and the provisions of §§ 308.6 through 308.12, 308.16, and 308.21 will apply.

(5) *Decision on petition.* Within 30 calendar days after the hearing, the presiding officer will issue a decision. The presiding officer will grant a stay upon a demonstration that a substantial likelihood exists of the respondent's success on the issues raised by the notice of intention and that, absent such relief, the respondent will suffer immediate and irreparable injury, loss, or damage. In the absence of such a demonstration, the presiding officer will notify the parties that the immediate suspension will be continued pending the completion of the administrative proceedings pursuant to the notice of intention. The presiding officer will serve a copy of the decision on, and simultaneously certify the record to, the Administrative Officer.

(6) *Review of presiding officer's decision.* The parties may seek review of the presiding officer's decision by filing a petition for review with the Administrative Officer within 10 calendar days after service of the decision. Replies must be filed within 10 calendar days after the petition filing date. Upon receipt of a petition for review and any reply, the Administrative Officer will promptly certify the entire record to the Board of Directors. Within 60 calendar days of the Administrative Officer's certification, the Board of Directors will issue an order notifying the affected party whether or not the immediate suspension should be continued or reinstated. The order will state the basis of the Board's decision.

Federal Deposit Insurance Corporation.

By order of the Board of Directors.

Dated at Washington, DC, on December 15, 2020.

**James P. Sheesley,**

*Assistant Executive Secretary.*

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