Board, unless the order of the ALJ becomes final agency action in accordance with subpart B of part 26 of this title.

[73 FR 60542, Oct. 10, 2008]

§ 25.12 Public access to information; publication of actions.

(a) Where a notice of administrative action does not result in a hearing and in any cases in which a settlement is entered into by the Board and a mortgagee, all non-privileged information regarding the nature of the violation and the resolution of the action shall be available to the public.

(b) Publication in the FEDERAL REGISTER. The Secretary shall publish, in the FEDERAL REGISTER, a description of and the cause for each administrative action taken by the Board against a mortgagee.

(c) *Notification of other agencies.* Whenever the Board has taken any discretionary action to suspend and/or withdraw the approval of a mortgagee, the Secretary shall provide prompt notice of the action and a statement of the reasons for the action to the Secretary of Veterans Affairs; the chief executive officer of the Federal National Mortgage Association; the chief executive officer of the Federal Home Loan Mortgage Corporation; the Administrator of the Rural Housing Service (formerly the Farmers Home Administration); the Comptroller of the Currency, if the mortgagee is a National Bank or District Bank or subsidiary or affiliate of such a bank; the Board of Governors of the Federal Reserve System, if the mortgagee is a state bank that is a member of the Federal Reserve System or a subsidiary or affiliate of such a bank, or a bank holding company or a subsidiary or affiliate of such a company; the Board of Directors of the Federal Deposit Insurance Corporation, if the mortgagee is a state bank that is not a member of the Federal Reserve System, or is a subsidiary or affiliate of such a bank; and the Director of the Office of Thrift Supervision, if the mortgagee is a federal or state savings association or a subsidiary or affiliate of a savings association.

(d) *Notification to GNMA of withdrawal actions.* Whenever the Board issues a notice of violation that could lead to withdrawal of a mortgagee's approval, or is notified by GNMA of an action that could lead to withdrawal of GNMA approval, the Board shall proceed in accordance with 12 U.S.C. 1708(d).

[73 FR 60542, Oct. 10, 2008]

§ 25.13 Notifying GNMA of withdrawal actions.

When the Board issues a notice of violation that could lead to withdrawal of a mortgagee's approval, or is notified by GNMA of an action that could lead to withdrawal of GNMA approval, the Board shall proceed in accordance with 12 U.S.C. 1708(d).

(Approved by the Office of Management and Budget under Control Number 2502–0450)

[61 FR 685, Jan. 9, 1996]

§ 25.15 Retroactive application of Board regulations.

Limitations on participation in HUD mortgage insurance programs proposed or imposed prior to August 12, 1992, under an ancillary procedure shall not be affected by this part. This part shall apply to sanctions initiated after the effective date of the Department of Housing and Urban Development Reform Act of 1989 (December 15, 1989) regardless of the date of the cause giving rise to the sanction.

[57 FR 31051, July 13, 1992. Redesignated at 61 FR 685, Jan. 9, 1996]

§ 25.17 [Reserved]

PART 26—HEARING PROCEDURES

Subpart A—Hearings Before Hearing Officers

Sec.

AUTHORITY: 42 U.S.C. 3535(d).

SOURCE: 73 FR 76833, Dec. 17, 2008, unless otherwise noted.

Subpart A—Hearings Before Hearing Officers

§ 26.1 Purpose and scope.

This part sets forth rules of procedure in certain proceedings of the Department of Housing and Urban Development presided over by a hearing officer. These rules of procedure apply to administrative sanction hearings pursuant to 2 CFR part 2424 and to hearings with respect to determinations by the Multifamily Participation Review Committee pursuant to 24 CFR part 200, subpart H, to the extent that these regulations are not inconsistent and unless these regulations provide otherwise. They also apply in any other case where a hearing is required by statute or regulation, to the extent that rules adopted under such statute or regulation are not inconsistent.

HEARING OFFICER

§ 26.2 Hearing officer, powers, and duties.

(a) *Hearing officer.* Proceedings conducted under these rules shall be presided over by a hearing officer who shall be an Administrative Law Judge or Administrative Judge authorized by the Secretary or designee to conduct proceedings under this part.

(b) *Time and place of hearing.* The hearing officer shall set the time and place of any hearing and shall give reasonable notice to the parties.

(c) *Powers of hearing officers.* The hearing officer shall conduct a fair and impartial hearing and take all action necessary to avoid delay in the disposition of proceedings and to maintain order. The hearing officer shall have

all powers necessary to those ends, including, but not limited to, the power:

(1) To administer oaths and affirmations;

(2) To cause subpoenas to be issued as authorized by law;

(3) To rule upon offers of proof and receive evidence;

(4) To order or limit discovery as the interests of justice may require;

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

(6) To hold conferences for the settlement or simplification of the issues by consent of the parties;

(7) To consider and rule upon all procedural and other motions appropriate in adjudicative proceedings;

(8) To take notice of any material fact not appearing in evidence in the record that is properly a matter of judicial notice;

(9) To make and file determinations; and

(10) To exercise such other authority as is necessary to carry out the responsibilities of the hearing officer under subpart A of this part.

[73 FR 76833, Dec. 17, 2008, as amended at 87 FR 8196, Feb. 14, 2022]

§ 26.3 *Ex parte* communications.

(a) *Definition.* An ex parte communication is any communication with a hearing officer, direct or indirect, oral or written, concerning the merits or procedures of any pending proceeding that is made by a party in the absence of any other party.

(b) *Prohibition of ex parte communications.* Ex parte communications are prohibited except where:

(1) The purpose and content of the communication have been disclosed in advance or simultaneously to all parties; or

(2) The communication is a request for information concerning the status of the case.

(c) *Procedure after receipt of ex parte communication.* Any hearing officer who receives an ex parte communication that the hearing officer knows or has reason to believe is unauthorized shall promptly place the communication, or its substance, in all files and shall furnish copies to all parties. Unauthorized ex parte communications shall not be taken into consideration in deciding any matter in issue.

§ 26.4 Sanctions.

(a) The hearing officer may sanction a person, including any party or representative, for failing to comply with an order, rule, or procedure governing the proceeding; failing to prosecute or defend an action; or engaging in other misconduct that interferes with the speedy, orderly, or fair conduct of the hearing.

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

(c) If a party refuses or fails to comply with an order of the hearing officer, including an order compelling discovery, the hearing officer may enter any appropriate order necessary to the disposition of the hearing including a determination against the noncomplying party, including but not limited to, the following:

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

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

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

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

(d) If a party fails to prosecute or defend an action brought under subpart A of this part, the hearing officer may dismiss the action or may issue an initial decision against the non-prosecuting or defending party.

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

§ 26.5 Disqualification of hearing officer.

(a) When a hearing officer believes there is a basis for disqualification in a particular proceeding, the hearing officer shall withdraw by notice on the

record and shall notify the Secretary and the official initiating the action under appeal.

(b) Whenever any party believes that the hearing officer should be disqualified from presiding in a particular proceeding, the party may file a motion with the hearing officer requesting the hearing officer to withdraw from presiding over the proceedings. This motion shall be supported by affidavits setting forth the alleged grounds for disqualification.

(c) Upon the filing of a motion and affidavit, the hearing officer shall proceed no further in the case until the matter of disqualification is resolved.

(d) If the hearing officer does not withdraw, a written statement of his or her reasons shall be incorporated in the record and the hearing shall proceed, unless the decision is appealed in accordance with the procedures set forth in § 26.27.

REPRESENTATION OF THE PARTIES

§ 26.6 Department representative.

In each case heard before a hearing officer under this part, the Department shall be represented by attorneys from the Office of General Counsel.

§ 26.7 Respondent's representative.

The party against whom the administrative action is taken may be represented at hearing, as follows:

(a) Individuals may appear on their own behalf;

(b) A member of a partnership or joint venture may appear on behalf of the partnership or joint venture;

(c) A bona fide officer may appear on behalf of a corporation or association upon a showing of adequate authorization;

(d) An attorney who files a notice of appearance with the hearing officer may represent any party. For purposes of this paragraph, an attorney is defined as a member of the bar of a federal court or of the highest court of any state or territory of the United States; or

(e) An individual not included within paragraphs (a) through (d) of this section may represent the respondent upon an adequate showing, as determined by the hearing officer, that the individual possesses the legal, technical, or other qualifications necessary to advise and assist in the presentation of the case.

§ 26.8 Standards of practice.

Attorneys shall conform to the standards of professional and ethical conduct required of practitioners in the courts of the United States and by the bars of which the attorneys are members. Any attorney may be prohibited by the hearing officer from representing a party if the attorney is not qualified under § 26.7 or if such action is necessary to maintain order in or the integrity of the pending proceeding.

PLEADINGS AND MOTIONS

§ 26.9 Form and filing requirements.

(a) *Filing.* Unless otherwise provided by statute, rule, or regulation:

(1) Requests for hearings shall be filed with the Office of General Counsel's Docket Clerk, Department of Housing and Urban Development, 451 7th Street, SW., Washington, DC 20410. The OGC Docket Clerk shall assign the docket number and forward the case to HUD's Office of Hearings and Appeals.

(2) All other pleadings, submissions, and documents should be filed directly with the appropriate hearing officer.

(3) Filing may be made by first class mail, delivery, facsimile transmission, or electronic means; however, the hearing officer may place reasonable limits on filing by facsimile or electronic means. Duplicate copies are not required unless so ordered by the hearing officer. A document is considered timely filed if postmarked on or before the date due or delivered to the appropriate person by the date due.

(b) *Title.* Documents shall show clearly the title of the action and the docket number assigned by the Docket Clerk.

(c) *Form.* To the fullest extent possible, all documents shall be printed or typewritten in clear, legible form.

[73 FR 76833, Dec. 17, 2008, as amended at 87 FR 8196, Feb. 14, 2022]

§ 26.10 Service.

(a) *Method of Service.* One copy of all pleadings, motions, and other documents required or permitted under

these rules shall be served upon all parties by the person filing them and shall be accompanied by a certificate of service stating how and when such service has been made. Whenever these rules require or permit service to be made upon a party represented by an attorney, the service shall be made upon the attorney, unless service upon the party is ordered by the hearing officer. Service shall be made by delivery, by first class mail or overnight delivery to that person's last known address, by facsimile transmission, or by electronic means; however, the hearing officer may place reasonable limits on service by facsimile transmission or electronic means. Delivery of a copy within this rule means: handing it to the person to be served; or leaving it at that person's office with a clerk or other person in charge; or, if there is no one in charge, leaving it in a conspicuous place in the office; or, if the office is closed or the person to be served has no office, leaving it at that person's residence or usual place of abode with some person of suitable age and discretion who resides there. Service by mail, overnight delivery, facsimile transmission, or electronic means is complete upon deposit in a mail box, or upon posting, or upon electronic transmission.

(b) *Proof of Service.* Proof of service shall not be required unless the fact of service is put in issue by appropriate motion or objection on the part of the person allegedly served. In these cases, service may be established by written receipt signed by or on behalf of the person to be served, or may be established prima facie by affidavit, certificate of service of mailing, or electronic receipt of sending.

§ 26.11 Time computation.

(a) *Generally.* Computation of any period of time prescribed or allowed by this part shall begin with the first business day following the day on which the act, event, development, or default initiating the period of time occurred. When the last day of the period computed is a Saturday, Sunday, national holiday, or other day on which the Department of Housing and Urban Development is closed, the period shall run until the end of the next following business day. When any prescribed or allowed period of time is 7 days or less, each of the Saturdays, Sundays, and national holidays shall be excluded from the computation of the prescribed or allowed period.

(b) *Entry of orders.* In computing any time period involving the date of the issuance of an order or decision by a hearing officer, the date of the issuance is the date the order or decision is served on the parties by the hearing officer or Docket Clerk.

(c) *Service by mail.* If a document is served by mail, 3 days shall be added to the time permitted for a response.

(d) *Extensions of time periods.* Except where mandated by statute, the hearing officer (or in the case of a review under §§ 26.26 and 26.27, the Secretary or designee) may upon motion enlarge the time within which any act required by these rules must be performed where necessary to avoid prejudicing the public interest or the rights of the parties.

§ 26.12 Notice of administrative action.

In every case, there shall be a notice of administrative action. The notice shall be in writing and inform the party of the nature of that administrative action. The notice shall state the reasons for the proposed or imposed action, except where general terms are permitted by 2 CFR part 2424, and shall inform the party of any right to a hearing to challenge the administrative action, and the manner and time in which to request such hearing. A supplemental notice may be issued in the discretion of the initiating official to add to or modify the reasons for the action.

§ 26.13 Complaint.

(a) *Respondent.* A complaint shall be served upon the party against whom an administrative action is taken, who shall be called the respondent.

(b) *Grounds.* The complaint shall state the legal and factual grounds upon which the administrative action is based. The grounds set forth in the complaint may not contain allegations beyond the scope of the notice of administrative action or any amendment thereto.

(c) *Notice of administrative action as complaint.* A notice of administrative

action may serve as a complaint provided the notice states it is also a complaint and complies with paragraph (b) of this section.

(d) *Timing.* When the notice does not serve as a complaint, the complaint shall be served on or before the 30th day after the referral to a hearing officer or a request for hearing is made, or within any other time period designated by the hearing officer.

§ 26.14 Answer.

(a) Respondent shall file an answer within 30 days of receipt of the complaint, unless otherwise specified in this title or ordered by the hearing officer.

(b) The answer shall:

(1) Respond specifically to each factual allegation contained in the complaint;

(2) Specifically plead any affirmative defense; and

(3) Set forth any mitigating factors or extenuating circumstances.

(c) A general denial shall not be permitted. Allegations are admitted when not specifically denied in respondent's answer.

§ 26.15 Amendments and supplemental pleadings.

(a) *Amendments.* (1) By right: The Department may amend its complaint without leave at any time within 30 days of the date the complaint is filed or at any time before respondent's responsive pleading is filed, whichever is later. Respondent may amend its answer without leave at any time within 30 days of filing of its answer. A party shall plead in response to an amended pleading within 15 days of receipt of the amended pleading.

(2) By leave: Upon conditions as are necessary to avoid prejudicing the public interest and the rights of the parties, the hearing officer may allow amendments to pleadings upon motion of any party.

(3) Conformance to evidence: When issues not raised by the pleadings, but reasonably within the scope of the proceeding initiated by the complaint, are tried by express or implied consent to the parties, they shall be treated in all respects as if they had been raised in the pleadings, and amendments of the pleadings necessary to make them conform to the evidence shall be allowed at any time.

(b) *Supplemental pleadings.* The hearing officer may, upon reasonable notice, permit service of a supplemental pleading concerning transactions, occurrences, or events that have happened or been discovered since the date of prior pleadings.

§ 26.16 Motions.

(a) *Motions.* Requests for rulings or actions to be taken by the hearing officer should be made, wherever appropriate, in the form of a motion. All motions from the commencement of the action until the issuance of a decision shall be addressed to the hearing officer, and shall be served upon all parties to the proceeding.

(b) *Content.* All written motions shall state the particular order, ruling, or action desired and the grounds for granting the motion. The parties may submit a proposed order with any motion.

(c) *Responses to motions.* Within 10 days after receipt of any written motion, or within any other period as may be designated by the hearing officer, the opposing party shall respond to the motion and set forth any objections to the motion. Failure to file a timely response to the motion may constitute a party's consent to the granting of the motion. The moving party shall have no right to reply, except as permitted by the hearing officer.

(d) *Motions for extensions of time.* Either party may file a motion for extension. At the discretion of the hearing officer, a motion for an extension of time may be granted for good cause at any time, notwithstanding an objection or any reply to the motion consistent with the provisions of § 26.2(c)(5) and (7). The hearing officer may waive the requirements of this section as to motions for extensions of time.

(e) *Oral argument.* The hearing officer may order oral argument on any motion.

(f) *Motions for summary judgment.* (1) A party claiming relief or a party against whom relief is sought may timely move, with or without supporting affidavits, for summary judgment on all or part of the claim.

(2) Objections in the consideration of summary judgment motions or answers thereto based upon a failure to strictly comply with the provisions of Rule 56 of the Federal Rules of Civil Procedure may, at the discretion of the hearing officer, be overruled.

(g) *Motions for dismissal.* When a motion to dismiss the proceeding is granted, the hearing officer shall issue a determination and order in accordance with the provisions of § 26.25.

DISCOVERY

§ 26.17 Prehearing conference.

(a) *Prehearing conference.* The hearing officer may, sua sponte or at the request of any party, direct counsel for all parties to confer with the hearing officer before the hearing for the purpose of considering:

(1) Simplification and clarification of the issues;

(2) Stipulations and admissions of fact and of the contents and authenticity of documents;

(3) The disclosure of the names of witnesses;

(4) Matters of which official notice will be taken;

(5) Other matters as may aid in the orderly disposition of the proceeding, including disclosure of the documents or other physical exhibits that will be introduced into evidence in the course of the proceeding.

(b) *Recordation of prehearing conference.* The prehearing conference shall, at the request of any party, be recorded or transcribed.

(c) *Order on prehearing conference.* The hearing officer shall enter in the record an order that states the rulings upon matters considered during the conference, together with appropriate directions to the parties. The order shall control the subsequent course of the proceeding, subject to modifications upon good cause shown.

§ 26.18 Discovery.

(a) *General.* The parties are encouraged to engage in voluntary discovery procedures, which may commence at any time after an answer has been filed. Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. For good cause, the hearing officer may order discovery of any matter relevant to the subject matter involved in the action. To be relevant, information need not be admissible at the hearing, if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. Each party shall bear its own expenses associated with discovery. Discovery may include:

(1) Requests for production of documents as set forth in § 26.19;

(2) Depositions as set forth in § 26.20;

(3) Written interrogatories as set forth in § 26.21; and

(4) Requests for admissions as set forth in § 26.22.

(b) *Supplementation of responses.* A party who has responded to a request for discovery with a response is under a duty to timely amend a prior response to an interrogatory, request for production, or request for admission if so ordered by the hearing officer, or if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

(c) *Requesting an order.* In connection with any discovery procedure, by motion addressed to the hearing officer and upon a showing of a good faith attempt to resolve the issue without the hearing officer's intervention, either party may:

(1) Request an order compelling a response with respect to any objection to or other failure to respond to the discovery requested or any part thereof, or any failure to respond as specifically requested, or

(2) Request a protective order limiting the scope, methods, time and place for discovery, and provisions for protecting privileged information or documents.

(d) *Limitations.* (1) By order, the hearing officer may set or alter limits on the number of document requests,

depositions, and interrogatories, or the length of depositions.

(2) Orders compelling discovery shall be issued only where such discovery will not compel the disclosure of privileged information, unduly delay the hearing, or result in prejudice to the public interest or the rights of the parties, and upon a showing of good cause.

(3) Protective orders may be issued by a hearing officer if the hearing officer determines such an order is necessary to protect a party or other person from annoyance, embarrassment, oppression, or undue burden or expense because:

(i) The discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;

(ii) The party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or

(iii) The burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.

(4) A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the hearing officer may nonetheless order discovery from such sources if the requesting party shows good cause or, when the party's refusal to provide the information sought is solely due to undue expense, if the party seeking the discovery agrees to bear the expense associated with the request.

(e) *Refusal to honor discovery order.* When a party refuses to honor a discovery order, the hearing officer may issue such orders in regard to the refusal as justice shall require.

§ 26.19 Request for production of documents.

(a) *Request to produce.* Any party may serve upon any other party a written request to produce, and permit the party making the request, or someone acting on the requestor's behalf, to inspect, copy, test, or sample any designated documents—including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations stored in any medium from which information can be obtained—translated, if necessary, by the respondent into reasonably usable form, or to inspect, copy, test, or sample any designated tangible things that constitute or contain matters within the scope of § 26.18(a) and which are in the possession, custody, or control of the party upon whom the request is served.

(b) *Procedure.* The request shall set forth, either by individual item or by category, the items to be inspected, and describe each with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts. The request may specify the form or forms in which electronically stored information is to be produced.

(c) *Response to request to produce.* The party upon whom the request is served shall serve a written response within 20 days after service of the request. A shorter or longer time may be directed by the hearing officer, or in the absence of such an order, agreed to by the parties in a written document that shall be timely submitted to the hearing officer. The response shall state, with respect to each item or category, whether inspection and related activities will be permitted as requested. If there are any objections to any requests, including objections to the requested form or forms for producing electronically stored information, the response shall state the reasons for such objections. If objection is made to part of an item or category, the part shall be specified and inspection of the remaining parts shall be permitted. If objection is made to the requested format or forms for producing electronically stored information—or if no form

was specified in the request—the responding party must state the form or forms it intends to use. The party submitting the request may move for an order under § 26.18(c)(1) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

(d) *Form of production.* Unless the parties otherwise agree, or the hearing officer otherwise orders:

(1) A party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request;

(2) If a request does not specify the format or forms for producing electronically stored information, a responding party must produce the information in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable; and

(3) A party need not produce the same electronically stored information in more than one form.

§ 26.20 Depositions.

(a) *Taking oral deposition.* A party may take the oral deposition of any person. Reasonable written notice of deposition shall be served upon the opposing party and the deponent. The attendance of a deponent may be compelled by subpoena where authorized by law or by other order of the hearing officer.

(b) *Testifying on oral deposition.* Each person testifying on oral deposition shall be placed under oath by the person before whom the deposition is taken. The deponent may be examined and cross-examined. The questions and the answers, together with all objections made, shall be recorded by the person before whom the deposition is to be taken, or under that person's direction.

(c) *Objections.* Objection may be made to questions or answers for any reason that would require the exclusion of the testimony under § 26.24 as if the witness were present and testifying at hearing. Objections shall be in short form, stating every ground for objection. Failure to object to any question or answer shall be considered a waiver of objection, unless the parties agree otherwise. Rulings on any objections shall be made by the hearing officer at hearing, or at such other time requested by motion. The examination shall proceed, with the testimony being taken subject to the objections; the deponent may be instructed not to answer only when necessary to preserve a privilege, to enforce a limitation directed by the hearing officer, or to present a motion for a protective order under § 26.18(c)(2).

(d) *Submission to deponent.* A transcript of the deposition shall be submitted to the deponent for examination and signature, unless submission is waived by the deponent and the parties. Any changes in form or substance that the deponent desires to make shall be entered upon the transcript by the person before whom the deposition was taken, with a statement of reasons given by the deponent for making them. The transcript shall then be signed by the deponent, unless the parties by stipulation waive the signing or the deponent is ill, cannot be found, or refuses to sign. If the transcript is not signed, the person before whom the deposition was taken shall sign it and state on the record the reason that it is not signed.

(e) *Certification and filing.* The person before whom the deposition was taken shall make a certification on the transcript as to its accuracy. Interested parties shall make their own arrangements with the person recording the testimony for copies of the testimony and the exhibits.

(f) *Deposition as evidence.* Subject to appropriate rulings by the hearing officer on objections, the deposition or any part may be introduced into evidence for any purpose if the deponent is unavailable. Only that part of a deposition that is received in evidence at a hearing shall constitute a part of the record in the proceeding upon which a decision may be based. Nothing in this rule is intended to limit the use of a deposition for impeachment purposes.

(g) *Payment of fees.* Fees shall be paid by the person upon whose application the deposition is taken.

§ 26.21 Written interrogatories.

(a) *Service of interrogatories.* Any party may serve upon any other party written interrogatories, not to exceed 25 in number, including all discrete subparts, unless additional interrogatories are agreed to by the parties or leave to serve additional interrogatories is granted by the hearing officer.

(b) *Response to interrogatories.* Within 20 days after service of the request, the party upon whom the interrogatories are served shall serve a written response, unless the parties agree in a written document submitted to the hearing officer or the hearing officer determines that a shorter or longer period is appropriate under the circumstances. The response shall specifically answer each interrogatory, separately and fully in writing, unless it is objected to, in which event the objecting party shall state the reasons for any objections with specificity. Any ground not stated in a timely objection is waived unless the party's failure to object is excused by the hearing officer for good cause shown. If objection is made to only part of an interrogatory, the objectionable part shall be specified and the party shall answer to the extent that the interrogatory is not objectionable.

(c) *Option to produce business records.* Where the answer to an interrogatory may be derived or ascertained from the business records, including electronically stored information, of the party upon whom the interrogatory has been served or from an examination, audit, or inspection of such business records, including a compilation, abstract, or summary thereof, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit, or inspect such records and to make copies, compilations, abstracts, or summaries. A specification shall be in sufficient detail to permit the interrogating party to locate and to identify, as readily as can by the party served, the records from which the answer may be ascertained.

§ 26.22 Requests for admissions.

(a) Any party may serve upon any other party a written request for the admission of the genuineness of any relevant documents described in the request or of the truth of any relevant matters of fact. Copies of documents shall be delivered with the request unless copies have already been furnished. Each requested admission shall be considered admitted, unless within 30 days after service of the request, or within such other time as the parties may agree, or the hearing officer determines, the party from whom the admission is sought serves upon the party making the request either:

(1) A statement that:

(i) Denies specifically the relevant matters for which an admission is requested, or sets forth in detail the reasons why the party can neither truthfully admit nor deny them;

(ii) Fairly meets the substance of the requested admission and, when good faith requires that a party qualify an answer or deny only a part of the matter of which an admission is requested, specifies as much of it as is true and qualifies or denies the remainder; and

(iii) Does not assert lack of information or knowledge as a reason for failure to admit or deny, unless the party states that the party has made reasonable inquiry, and that the information known or readily obtainable by the party is insufficient to enable the party to admit or deny; or

(2) Written objections to a requested admission that:

(i) State the grounds for the objection; and

(ii) Object to a requested admission, if necessary, either in whole or in part, on the basis of privilege or relevance.

(b) Responses to the request for admission on matters to which objections have been made may be deferred until the objection is ruled upon, but if written objections are made only to a part of a request, a response to the remainder of the request shall be provided.

(c) Any matter admitted under this rule is conclusively established unless the hearing officer, on motion, permits

withdrawal or amendment of the admission. Admissions obtained pursuant to this procedure may be used in evidence only for the purposes of the pending action. The use of obtained admissions as evidence is permitted to the same extent and subject to the same objections as other evidence.

HEARINGS

§ 26.23 Public nature and timing of hearings; transcripts.

(a) *Public hearings.* All hearings in adjudicative proceedings shall be public.

(b) *Conduct of hearing.* Hearings shall proceed with all reasonable speed. The hearing officer may order recesses for good cause, stated on the record. The hearing officer may, for convenience of the parties or witnesses, or in the interests of justice, order that hearings be conducted outside of Washington, DC, and, if necessary, in more than one location.

(c) *Transcripts.* Hearings shall be recorded and transcribed only by a reporter designated by the Department under the supervision of the hearing officer. The original transcript shall be a part of the record and shall constitute the sole official transcript. Any party or a member of the public, at his own expense, may obtain copies of transcripts from the reporter.

§ 26.24 Rules of evidence.

(a) *Evidence.* Every party shall have the right to present its case or defense by oral and documentary evidence, unless otherwise limited by law or regulation, to conduct such cross-examination and to submit rebuttal evidence as may be required for a full and true disclosure of the facts. Irrelevant, immaterial, privileged, or unduly repetitious evidence shall be excluded. Unless otherwise provided for in this part, the Federal Rules of Evidence shall provide guidance to the hearing officer in the conduct of proceedings under this part, but shall not be binding. Parties may object to clearly irrelevant material, but technical and hearsay objections to testimony as used in a court of law will not be sustained.

(b) *Testimony under oath or affirmation.* All witnesses shall testify under oath or affirmation.

(c) *Objections.* Objections to the admission or exclusion of evidence shall be in short form, stating the grounds of objections. Rulings on objections shall be a part of the transcript. Failure to object to admission or exclusion of evidence or to any evidentiary ruling shall be considered a waiver of objection, but no exception to a ruling on an objection is necessary in order to preserve it for appeal.

(d) *Authenticity of documents.* Unless specifically challenged, it shall be presumed that all relevant documents are authentic. An objection to the authenticity of a document shall not be sustained merely on the basis that it is not the original.

(e) *Stipulations.* The parties may stipulate as to any relevant matters of fact. Stipulations may be received in evidence at a hearing, and when received shall be binding on the parties with respect to the matters stipulated. The parties are encouraged to enter into stipulations of fact whenever possible.

(f) *Official notice.* All matters officially noticed by the hearing officer shall appear on the record.

(g) *Burden of proof.* The burden of proof shall be upon the proponent of an action or affirmative defense, including, where applicable, mitigating factors, unless otherwise provided by law or regulation.

§ 26.25 Hearing officer's determination and order.

(a) *Scope of review.* The hearing officer shall conduct a de novo review of the administrative action to determine whether it is supported by a preponderance of the evidence, unless a different standard of proof is required by law or regulation. Each and every charge alleged by the Department need not be proven to support the administrative action. The hearing officer may modify or vacate the administrative action under review only upon a particularized finding of facts that justifies a deviation from the administrative action.

(b) *Closing of hearing.* At the discretion of the hearing officer, the closing of the record may be postponed in order to permit the admission of other evidence into the record. In the event further evidence is admitted, each

party shall be given an opportunity to respond to such evidence.

(c) *Briefs.* Upon conclusion of the hearing, the hearing officer may request the parties to file proposed findings of fact and legal briefs. The hearing officer shall make a written determination and order based upon evidence and arguments presented by the parties. The determination shall be founded upon reliable and probative evidence. This determination and order shall be served upon all parties.

(d) *Bench decisions.* Where the parties agree and where appropriate in the judgment of the hearing officer, a bench decision will be issued.

(e) *Time period for issuance of decision.* The hearing officer shall endeavor to issue a determination within 60 days from the date of the closing of the record.

(f) *Finality of determination.* The determination and order shall be final unless a party timely appeals the determination in accordance with § 26.26. The determination shall inform the parties that, if provided for and consistent with Departmental regulations, any party may request, in writing, Secretarial review of the determination within 30 days after the hearing officer issues the determination, in accordance with § 26.26 of this part. The determination shall include the mailing address, facsimile number, and electronic submission information to which the request for Secretarial review should be sent. A request for Secretarial review may be made by mail, delivery, facsimile, or electronic submission.

SECRETARIAL REVIEW

§ 26.26 Review of determination of hearing officers.

(a) Except in matters arising under 2 CFR part 2424, any party may file with the Secretary an appeal within 30 days after the date that the hearing officer issues a determination or order. The Secretary or designee may extend the 30-day period, in the Secretary's sole discretion, for good cause.

(b) *Brief in support of appeal.* The appeal shall be accompanied by a written brief, not to exceed 15 pages, setting forth the party's specific objections to the determination or order of the hearing officer and the party's supporting reasons for any objections. The appealing party may request leave to file a brief in excess of 15 pages for good cause shown. Alternative proposed findings and conclusions, if any, may be appended as an exhibit.

(c) *Briefs in opposition.* Any opposing party may submit a brief in opposition to the appeal, not to exceed 15 pages, within 20 days of receiving a copy of the appeal and accompanying brief. The opposing party may request leave to file a brief in excess of 15 pages for good cause shown. The brief in opposition shall specifically state the opposing party's reasons for supporting the hearing officer's determination, or for objecting to any part of the hearing officer's determination.

(d) *Service.* The appeal and all briefs shall be served on all parties and on the Docket Clerk.

(e) *Forwarding of the record.* Upon request by the Office of the Secretary, the hearing officer shall forward the record of the proceeding to the Secretary or the Secretary's designee.

(f) *Time extensions.* The Secretary, or designee, in his or her sole discretion, may extend the deadlines or page limitations set forth in paragraphs (b) and (c) of this section. The Secretary or designee may also permit the filing of additional briefs, in his or her sole discretion.

(g) *Personal appearance.* There is no right to appear personally before the Secretary or designee.

(h) *Interlocutory rulings.* There is no right to appeal any interlocutory ruling by the hearing officer, except as provided for in § 26.27.

(i) *Objection not raised before hearing officer.* In reviewing the determination or order, the Secretary, or designee, shall not consider any objection that was not raised before the hearing officer unless a demonstration is made of extraordinary circumstances causing the failure to raise the objection.

(j) *Evidence in the record.* The Secretary or designee shall consider only evidence contained in the record forwarded by the hearing officer. However, if any party demonstrates to the satisfaction of the Secretary or designee that additional evidence not presented at the hearing is material, and

that there were reasonable grounds for the failure to present such evidence at the hearing, the Secretary or designee shall remand the matter to the hearing officer for reconsideration in light of the additional evidence.

(k) *Ex parte communications.* The prohibitions of ex parte communications in § 26.3 shall apply to contacts with the Secretary or the Secretary's designee.

(l) *Determination.* The Secretary or designee may affirm, modify, reverse, remand, reduce, compromise, or settle any determination made or action ordered in the initial determination or order. The Secretary or designee shall consider, and include in any final determination, such factors as may be set forth in applicable statutes or regulations.

(m) *Written determination.* Where a request for Secretarial review has been timely made, the Secretary, or designee, shall issue a written determination within 30 days after receipt of the request for review, and shall serve it upon the parties to the hearing and the hearing officer. The Secretary, or designee, may extend the time in which a written determination must be issued by an additional 60 days for good cause shown in a written justification issued to the parties. The written determination of the Secretary shall be final. If the Secretary, or designee, does not act upon the request for review of a determination within 90 days of service of the request, then the initial determination shall be the final agency action.

§ 26.27 Interlocutory rulings.

(a) *Interlocutory rulings by the hearing officer.* A party seeking review of an interlocutory ruling shall file a motion with the hearing officer within 10 days of the ruling requesting certification of the ruling for review by the Secretary, or in cases arising under 2 CFR part 2424, with the Debarring Official. Certification may be granted if the hearing officer believes that:

(1) It involves an important issue of law or policy as to which there is substantial ground for difference of opinion; and

(2) An immediate appeal from the order may materially advance the ultimate termination of the litigation.

(b) *Petition for review.* Any party may file a petition for review of an interlocutory ruling within 10 days of the hearing officer's determination regarding certification.

(c) *Secretarial review.* The Secretary, or designee, or Debarring Official shall review a certified ruling. The Secretary, designee, or Debarring Official has the discretion to grant or deny a petition for review from an uncertified ruling.

(d) *Continuation of hearing.* Unless otherwise ordered by the hearing officer or the Secretary, designee, or Debarring Official, the hearing shall proceed pending the determination of any interlocutory appeal, and the order or ruling of the hearing officer shall be effective pending review.

Subpart B—Hearings Pursuant to the Administrative Procedure Act

§ 26.28 Purpose and scope.

Unless otherwise specified in this title, the rules in this subpart B of this part apply to hearings that HUD is required by statute to conduct pursuant to the Administrative Procedure Act (5 U.S.C. 554 *et seq.*)

§ 26.29 Definitions.

The following definitions apply to subpart B of this part:

Complaint means the notice from HUD alleging violations of a HUD statute and/or regulation, citing the legal authority upon which it is issued, stating the relief HUD seeks, and informing a respondent of his or her right to submit a response to a designated office and to request an opportunity for a hearing before an Administrative Law Judge.

Docket Clerk means the Docket Clerk of the Office of Hearings and Appeals, located at the following address—409 Third Street, SW., Second Floor, Washington, DC 20024; mailing address is 451 7th Street, SW., Room B–133, Washington, DC 20410.

Respondent, unless otherwise identified by other governing statute, rule, or regulation, is the party against whom the administrative action is taken.

Response means the written response to a complaint, admitting or denying

the allegations in the complaint and setting forth any affirmative defense and any mitigating factors or extenuating circumstances. The response shall be submitted to the division of the Office of General Counsel that initiates the complaint or to such other office as may be designated in the complaint. A response is deemed a request for a hearing.

[73 FR 76833, Dec. 17, 2008, as amended at 87 FR 8197, Feb. 14, 2022]

§ 26.30 Service and filing.

(a) *Filing.* Unless otherwise provided by statute, rule, or regulation, all documents shall be filed with the Docket Clerk. Filing may be by delivery, first-class mail, overnight delivery, facsimile transmission, or electronic means; however, the ALJ may place reasonable limits on filing by facsimile transmission or electronic means. All documents shall clearly designate the docket number and title of the proceeding. Duplicate copies are not required unless ordered by the ALJ.

(b) *Service.* One copy of all documents filed with the Docket Clerk shall be served upon each party by the persons filing them and shall be accompanied by a certificate of service stating how and when such service has been made. Service may be made by delivery, first-class mail, overnight delivery, facsimile transmission, or electronic means; however, the ALJ may place reasonable limits on service by facsimile transmission or electronic means. Documents shall be served upon a party's address of residence or principal place of business, or, if the party is represented by counsel, upon counsel of record at the address of counsel. Service is complete when handed to the person or delivered to the person's office or residence and deposited in a conspicuous place. If service is by first-class mail, overnight delivery, facsimile transmission, or electronic means, service is complete upon deposit in the mail or upon electronic transmission.

§ 26.31 Time computations.

(a) *General.* In computing any period of time under subpart B of this part, the time period begins the day following the act, event, or default, and includes the last day of the period, unless the last day is a Saturday, Sunday, or legal holiday observed by the Federal Government, in which case the time period includes the next business day. When the prescribed time period is 7 days or less, intermediate Saturdays, Sundays, and legal holidays shall be excluded from the computation.

(b) *Entry of orders.* In computing any time period involving the date of the issuance of an order or decision by an Administrative Law Judge, the date of issuance is the date the order or decision is served by the Docket Clerk.

(c) *Service by mail.* If a document is served by mail, 3 days shall be added to the time permitted for a response.

ADMINISTRATIVE LAW JUDGE

§ 26.32 Powers and duties of the Administrative Law Judge (ALJ).

The ALJ shall conduct a fair and impartial hearing, avoid delay, maintain order, and ensure that a record of the proceeding is made. The ALJ is authorized to:

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

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

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

(d) Administer oaths and affirmations;

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

(f) Rule on motions and other procedural matters;

(g) Regulate the scope and timing of discovery;

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

(i) Examine witnesses;

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

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

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

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

(n) Upon motion, except where mandated by statute, extend the time within which any act required by these rules must be performed where necessary to avoid prejudicing the public interest or the rights of the parties, or upon showing of good cause; and

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

§ 26.33 Ex parte communications.

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

§ 26.34 Sanctions.

(a) The ALJ may sanction a person, including any party or representative, for failing to comply with an order, rule, or procedure governing the proceeding; failing to prosecute or defend an action; or engaging in other misconduct that interferes with the speedy, orderly, or fair conduct of the hearing.

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

(c) When a party fails to comply with an order, including an order compelling discovery, the ALJ may impose an appropriate sanction for such noncompliance, including, but not limited to, the following:

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

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

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

(4) Striking any part of the pleadings or other submissions of the party failing to comply with the order.

(d) If a party fails to prosecute or defend an action brought under subpart B of this part, the ALJ may dismiss the action or may issue a decision against the non-prosecuting or defending party. Such decision of the ALJ shall constitute final agency action and shall not be appealable to the Secretary under § 26.52 of this part.

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

§ 26.35 Disqualification of ALJ.

(a) An ALJ in a particular case may disqualify himself or herself.

(b) A party may file with the ALJ a motion for the ALJ's disqualification. The motion shall be accompanied by an affidavit alleging the grounds for disqualification.

(c) Upon the filing of a motion and affidavit, the ALJ shall proceed no further in the case until the matter of disqualification is resolved.

(d) If the ALJ does not withdraw from the proceedings, a written statement of his or her reasons for electing not to withdraw shall be incorporated into the record and the hearing shall proceed.

PARTIES

§ 26.36 Parties to the hearing.

(a) *General.* The parties to the hearing shall be the respondent and HUD.

(b) *Rights of parties.* Except as otherwise limited by subpart B of this part, all parties may:

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

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

(3) Conduct discovery;

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

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

(6) Present and cross-examine witnesses;

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

(8) Submit written briefs and proposed findings of fact and conclusions of law after the hearing, as permitted by the ALJ.

§ 26.37 Separation of functions.

No officer, employee, or agent of the Federal Government engaged in the performance of investigative, conciliatory, or prosecutorial functions in connection with the proceeding shall, in that proceeding or any factually related proceeding under subpart B of this part, participate or advise in the decision of the Administrative Law Judge, except as a witness or counsel during the proceeding, or in its appellate review.

PREHEARING PROCEDURES

§ 26.38 Commencement of action.

Proceedings under subpart B of this part shall commence with the Government's filing of a complaint, as that term is defined in § 26.29, with the Docket Clerk. The respondent's response to the complaint shall be timely filed with the Docket Clerk and served upon the Government in accordance with the procedures set forth in the complaint. If the respondent fails to submit a response to the Docket Clerk, then the Government may file a motion for a default judgment in accordance with § 26.41.

§ 26.39 Prehearing conferences.

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

(b) Upon the motion of any party or *sua sponte*, the ALJ may schedule a prehearing conference at a reasonable time in advance of the hearing.

(c) The ALJ may consider the following at a prehearing conference:

(1) Simplification of the issues;

(2) Stipulations of fact and of the authenticity, accuracy, and admissibility of documents;

(3) Submission of the case on briefs in lieu of an oral hearing;

(4) Limitation of the number of witnesses;

(5) The exchange of witness lists and of proposed exhibits;

(6) Discovery;

(7) The time and place for the hearing; and

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

§ 26.40 Motions.

(a) *General.* All motions shall state the specific relief requested and the basis therefore and, except during a conference or the hearing, shall be in writing. Written motions shall be filed and served in accordance with § 26.30. Either party may submit a proposed order with any motion.

(b) *Response to motions.* Unless otherwise ordered by the ALJ, a response to a written motion may be filed within 10 days after service of the motion. A party failing to respond timely to a motion may be deemed to have waived any objection to the granting of the motion.

(c) *Motions for extensions.* Either party may file a motion for extension. At the discretion of the ALJ, a motion for an extension of time may be granted for good cause at any time, notwithstanding an objection or any reply to the motion, consistent with § 26.32(f). The ALJ may waive the requirements of this section as to motions for extensions of time or any page limits.

(d) *Right to reply.* The moving party shall have no right to reply, except as permitted by the ALJ.

(e) *Oral Argument.* Either party may request oral argument on any motion, but such argument shall be available at the sole discretion of the ALJ.

(f) *Motions for summary judgment.* (1) A party claiming relief or a party against whom relief is sought may timely move, with or without supporting affidavits, for summary judgment on all or part of the claim.

(2) Objections in the consideration of summary judgment motions or answers thereto based upon a failure to strictly comply with the provisions of Rule 56 of the Federal Rules of Civil Procedure may, at the discretion of the ALJ, be overruled.

(g) *Motions for dismissal.* When a motion to dismiss the proceeding is granted, the ALJ shall make and file a determination and order in accordance with the provisions of § 26.50.

§ 26.41 Default.

(a) *General.* The respondent may be found in default, upon motion, for failure to file a timely response to the Government's complaint. The motion shall include a copy of the complaint and a proposed default order, and shall be served upon all parties. The respondent shall have 10 days from such service to respond to the motion.

(b) *Default order.* The ALJ shall issue a decision on the motion within 15 days after the expiration of the time for filing a response to the default motion. If a default order is issued, it shall constitute the final agency action.

(c) *Effect of default.* A default shall constitute an admission of all facts alleged in the Government's complaint and a waiver of respondent's right to a hearing on such allegations. The penalty proposed in the complaint shall be set forth in the default order and shall be immediately due and payable by respondent without further proceedings.

DISCOVERY

§ 26.42 Discovery.

(a) *General.* The parties are encouraged to engage in voluntary discovery procedures, which may commence at any time after an answer has been filed. Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. For good cause, the ALJ may order discovery of any matter relevant to the subject matter of the action. To be relevant, information need not be admissible at the hearing, if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. Each party shall bear its own expenses associated with discovery.

(b) *Discovery in Program Fraud Civil Remedies Actions.* (1) Upon receipt of a complaint, the defendant may, upon written request to the Office of General Counsel, review any relevant and material nonprivileged documents, including any exculpatory documents, that relate to the allegations set out in the complaint. Exculpatory information that is contained in a privileged document must be disclosed; however, the privileged document need not be provided.

(2) With the exception of the limited discovery permitted under paragraph (b)(1) of this section, unless agreed to by the parties, discovery shall be available only as ordered by the ALJ. The ALJ shall order only that discovery that he or she determines is necessary for the expeditious, fair, and reasonable consideration of the issues, is not unduly costly or burdensome, and will not unduly delay the proceeding. Discovery of privileged information shall not be permitted. The request for approval sent to the Attorney General from the General Counsel or designee, as described in 31 U.S.C. § 3803(a)(2), is not discoverable under any circumstances. The ALJ may grant discovery subject to a protective order under § 26.44.

(c) *Authorized discovery.* The following types of discovery are authorized:

(1) *Requests for production of documents.* (i) Any party may serve upon any other party a written request to produce and permit the party making the request, or someone acting on the requestor's behalf, to inspect, copy, test, or sample any designated documents or electronically stored information—including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations stored in any medium from which information can be obtained—translated, if necessary, by the respondent into reasonably usable form, or to inspect, copy, test, or sample any designated tangible things that constitute or contain matters within the scope of § 26.42(a) and which are in the possession, custody, or control of the party upon whom the request is served.

(ii) The request shall set forth, either by individual item or by category, the items to be inspected, and describe each with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts. The request may specify the form or forms in which electronically stored information is to be produced.

(iii) The party upon whom the request is served shall serve a written response within 20 days after the service of the request. A shorter or longer time may be directed by the ALJ or, in the absence of such an order, agreed to in a written document by the parties, which shall be submitted to the ALJ in a timely manner. The response shall state, with respect to each item or category, whether inspection and related activities will be permitted as requested. If there are any objections to any requests, including objections to the requested form or forms for producing electronically stored information, the response shall state the reasons for such objections. If objection is made to part of an item or category, the part shall be specified and inspection permitted of the remaining parts. If objection is made to the requested format for producing electronically stored information—or if no format was specified in the request—the responding party must state the format it intends to use. The party submitting the request may move for an order under paragraph (e) of this section with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

(iv) Unless the parties otherwise agree, or the ALJ otherwise orders:

(A) A party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request;

(B) If a request does not specify the form or forms for producing electronically stored information, a responding party must produce the information in a format in which it is ordinarily maintained or in a format that is reasonably usable; and

(C) A party need not produce the same electronically stored information in more than one form.

(2) *Requests for admissions.* Any party may serve upon any other party a written request for the admission of the genuineness of any documents described in the request or of the truth of any relevant matters of fact. Copies of documents shall be delivered with the request unless copies have already been furnished. Each requested admission shall be considered admitted, unless, within 30 days after service of the request, or within such other time as the parties may agree to or the ALJ determines, the party from whom the admission is sought serves upon the party making the request either:

(i) A statement, which:

(A) Denies specifically the relevant matters for which an admission is requested, or sets forth in detail the reasons why the party can neither truthfully admit nor deny them;

(B) Fairly meets the substance of the requested admission, and when good faith requires that a party qualify an answer or deny only a part of the matter of which an admission is requested, the party specifies as much of it as is true and qualifies or denies the remainder; and

(C) Does not assert lack of information or knowledge as a reason for failure to admit or deny, unless the party states that the party has made reasonable inquiry, and that the information known or readily obtainable by the party is insufficient to enable the party to admit or deny; or

(ii) Written objections to a requested admission, which state the grounds for the objection and which object to a requested admission, if necessary, either in whole or in part, on the basis of privilege or relevance. Responses to the request for admission on matters to which objections have been made may be deferred until each objection is ruled upon, but if written objections are made only to a part of a request, a response to the remainder of the request shall be provided.

(iii) Any matter admitted under this rule is conclusively established unless the ALJ, on motion, permits withdrawal or amendment of the admission. Admissions obtained pursuant to this procedure may be used in evidence only for the purposes of the pending action. The use of obtained admissions as evidence is permitted to the same extent and subject to the same objections as other evidence.

(3) *Written interrogatories*—(i) *Service of written interrogatories.* Any party may serve upon any other party written interrogatories, not exceeding 25 in

number, including all discrete subparts, unless additional interrogatories are agreed to by the parties or leave to serve additional interrogatories is granted by the ALJ.

(ii) *Response to interrogatories.* Within 20 days after service of the request, the party upon whom the interrogatories are served shall serve a written response, unless the parties agree in a written document submitted to the ALJ or the ALJ determines that a shorter or longer period is appropriate under the circumstances. The response shall specifically answer each interrogatory separately and fully in writing, unless it is objected to, in which event the objecting party shall state the reasons for objection with specificity. Any ground not stated in a timely objection is waived unless the party's failure to object is excused by the ALJ for good cause shown. If objection is made to only part of an interrogatory, the objectionable part shall be specified and the party shall answer to the extent the interrogatory is not objectionable.

(iii) *Option to produce business records.* Where the answer to an interrogatory may be derived or ascertained from the business records, including electronically stored information, of the party upon whom the interrogatory has been served or from an examination, audit, or inspection of such business records, including a compilation, abstract, or summary thereof, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit, or inspect such records and to make copies, compilations, abstracts, or summaries. A specification shall be in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained.

(4) *Depositions.* (i) A party may take the oral deposition of any person. Reasonable written notice of deposition shall be served upon the opposing party and the deponent. The attendance of a deponent may be compelled by subpoena where authorized by law or other order by the ALJ.

(ii) Each person testifying on oral deposition shall be placed under oath by the person before whom the deposition is taken. The deponent may be examined and cross-examined. The questions and the answers, together with all objections made, shall be recorded by the person before whom the deposition is to be taken or under that person's direction.

(iii) *Objections.* Objection may be made to questions or answers for any reason that would require the exclusion of the testimony under § 26.47 as if the witness were present and testifying at hearing. Objections shall be in short form, stating every ground for objection. Failure to object to any question or answer shall be considered a waiver of objection, unless the parties agree otherwise. Rulings on any objections shall be made by the ALJ at hearing, or at such other time as is requested by motion. The examination shall proceed, with the testimony being taken subject to the objections; a person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation directed by the ALJ, or to present a motion under § 26.44.

(iv) *Submission to deponent.* A transcript of the deposition shall be submitted to the deponent for examination and signature, unless submission is waived by the deponent and the parties. Any changes in form or substance that the deponent desires to make shall be entered upon the transcript by the person before whom the deposition was taken, with a statement of reasons given by the deponent for making them. The transcript shall then be signed by the deponent, unless the parties by stipulation waive the signing or the deponent is ill, cannot be found, or refuses to sign. If the transcript is not signed, the person before whom the deposition was taken shall sign it and state on the record the reason that it is not signed by the deponent.

(v) *Certification and filing.* The person before whom the deposition was taken shall make a certification on the transcript as to its accuracy. Interested

parties shall make their own arrangements with the person recording the testimony for copies of the testimony and the exhibits.

(vi) *Deposition as evidence.* Subject to appropriate rulings by the ALJ on objections, the deposition or any part may be introduced into evidence for any purpose if the deponent is unavailable. Only that part of a deposition that is received in evidence at hearing shall constitute a part of the record in the proceeding upon which a decision may be based. Nothing in this rule is intended to limit the use of a deposition for impeachment purposes.

(vii) *Payment of fees.* Fees shall be paid by the person upon whose application the deposition is taken.

(d) *Supplementation of responses.* A party who has responded to a request for discovery by providing a response is under a duty to timely amend any prior response to an interrogatory, request for production, or request for admission if so ordered by the ALJ, or if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to all other parties during the discovery process or in writing.

(e) *Motions to compel.* (1) In connection with any discovery procedure, by motion addressed to the ALJ and upon a showing of a good faith attempt to resolve the issue without the ALJ's intervention, either party may file a motion to compel a response with respect to any objection or other failure to respond to the discovery requested or to any part thereof, or any failure to respond as specifically requested. An evasive or incomplete answer to a request for discovery is treated as a failure to answer.

(2) The motion shall describe the information sought, cite the opposing party's objection, and provide arguments supporting the motion.

(3) The opposing party may file a response to the motion, including a request for a protective order in accordance with § 26.44.

(4) Orders compelling discovery shall be issued only where such discovery will not compel the disclosure of privileged information, unduly delay the hearing, or result in prejudice to the public interest or the rights of the parties, and upon a showing of good cause.

(5) A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the ALJ may nonetheless order discovery from such sources if the requesting party shows good cause or, when the party's refusal to provide the information sought is solely due to undue expense, the party seeking the discovery agrees to bear the expense associated with the request.

(f) *Refusal to honor discovery order.* When a party refuses to honor a discovery order, the ALJ may issue such orders in regard to the refusal as justice shall require, including the imposition of sanctions pursuant to § 26.34.

§ 26.43 Subpoenas.

(a) *General.* Upon written request of a party, the ALJ may issue a subpoena requiring the attendance of a witness at a deposition or hearing, and/or the production of documents. The request shall specify any documents to be produced and shall list the names and addresses of the witnesses.

(b) *Time of request.* A request for a subpoena in aid of discovery shall be filed in time to permit the conclusion of discovery 15 days before the date fixed for the hearing. A request for a subpoena to testify at the hearing shall be filed at least 3 days prior to the hearing, unless otherwise allowed by the ALJ for good cause shown.

(c) *Content.* The subpoena shall specify the time and place at which the witness is to appear and any documents the witness is to produce.

(d) *Service and fees.* Subpoenas shall be served, and fees and costs paid to subpoenaed witnesses, in accordance with Rule 45(b)(1) of the Federal Rules of Civil Procedure.

(e) *Motion to quash.* The individual to whom the subpoena is directed or a party may file a motion to quash the subpoena within 10 days after service,

or on or before the time specified in the subpoena for compliance if it is less than 10 days after service.

§ 26.44 Protective orders.

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

(b) Protective orders may be issued by an ALJ if the ALJ determines such an order is necessary to protect a party or other person from annoyance, embarrassment, oppression, or undue burden or expense because:

(1) The discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;

(2) The party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or

(3) The burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.

HEARINGS

§ 26.45 General.

(a) *Time of hearing.* The hearing shall commence not later than 90 days following the date of the Government's filing of the complaint and response with the Docket Clerk under § 26.38, unless the time is extended for good cause. The ALJ shall provide written notice to all parties of the reasons for any extension of time.

(b) *Location of hearing.* The hearing shall be held in a place most convenient for the respondent and witnesses, or in such other place as may be agreed upon by the parties and the ALJ.

(c) *Notice of hearing.* The ALJ shall issue a notice of hearing to all parties specifying the time and location of the hearing, the matters of fact and law to be heard, the legal authority under which the hearing is to be held, a description of the procedures for the conduct of the hearing, and such other matters as the ALJ determines to be appropriate.

(d) *Exceptions for Program Fraud Civil Remedies Act matters.* For Program Fraud Civil Remedies actions, the hearing is commenced by the issuance of a notice of hearing and order by the ALJ, as set forth in 31 U.S.C. 3803(d)(2)(B). Hearings for Program Fraud Civil Remedies Act matters shall be located in accordance with 31 U.S.C. 3803(g)(4).

(e) *Burden and standard of proof.* HUD shall prove the respondent's liability and any aggravating factors by a preponderance of the evidence. Respondent shall prove any affirmative defenses and any mitigating factors by a preponderance of the evidence.

(f) *Public hearings.* Unless otherwise ordered by the ALJ for good cause shown, the hearing shall be open to the public.

§ 26.46 Witnesses.

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

(b) At the discretion of the ALJ, testimony may be admitted in the form of a written statement or deposition. In order to be admissible, any written statement must be provided to all other parties along with the last known address of the witness, in a manner that allows sufficient time for other parties to subpoena the witness for cross-examination at the hearing.

§ 26.47 Evidence.

The ALJ shall admit any relevant oral or documentary evidence that is not privileged. Unless otherwise provided for in this part, the Federal Rules of Evidence shall provide guidance to the ALJ's evidentiary ruling, but shall not be binding. Parties may object to clearly irrelevant material, but technical and hearsay objections to testimony as used in a court of law will not be sustained. The ALJ may, however, exclude evidence if its probative value is substantially outweighed by confusion of the issues, or by considerations of undue delay, waste of time, or

needless presentation of cumulative evidence.

§ 26.48 Posthearing briefs.

Posthearing briefs shall be filed only upon order by the ALJ.

§ 26.49 The record.

The hearing will be recorded and transcribed by a reporter designated by the Department under the supervision of the ALJ. The parties and the public, at their own expense, may obtain copies of transcripts from the reporter. A copy of the transcript shall be made available at cost to the parties upon request. The transcript of testimony, exhibits, and other evidence admitted at the hearing and all papers and requests filed in the proceeding constitute the record for the decision by the ALJ and the Secretary or designee.

§ 26.50 Initial decision.

(a) The ALJ shall issue an initial decision based only on the record, which shall contain findings of fact, conclusions of law, and the relief granted. The ALJ's initial decision shall not become effective unless it becomes or is incorporated into final agency action in accordance with § 26.50(c) or § 26.52(l).

(b) The ALJ shall serve the initial decision on all parties within 60 days after either the close of the record or the expiration of time permitted for submission of posthearing briefs, whichever is later. The ALJ may extend the 60-day period for serving the initial decision in writing for good cause. The initial decision shall inform the parties that, if provided for and consistent with Departmental regulations, any party may request, in writing, Secretarial review of the determination within 30 days after the ALJ issues the initial decision, in accordance with § 26.52 of this part. The determination shall include the mailing address, facsimile number, and electronic submission information to which the request for Secretarial review should be sent. A request for Secretarial review may be made by mail, delivery, facsimile, or electronic submission.

(c) If no appeal is timely filed with the Secretary or designee, the initial decision shall become the final agency action.

§ 26.51 Interlocutory rulings.

(a) *Interlocutory rulings by the ALJ.* A party seeking review of an interlocutory ruling shall file a motion with the ALJ within 10 days of the ruling requesting certification of the ruling for review by the Secretary. Certification may be granted if the ALJ believes that:

(1) It involves an important issue of law or policy as to which there is substantial ground for difference of opinion; and

(2) An immediate appeal from the order may materially advance the ultimate termination of the litigation.

(b) *Petition for review.* Any party may file a petition for review of an interlocutory ruling within 10 days of the ALJ's determination regarding certification.

(c) *Secretarial review.* The Secretary, or designee, shall review a certified ruling. The Secretary, or designee, has the discretion to grant or deny a petition for review from an uncertified ruling.

(d) *Continuation of hearing.* Unless otherwise ordered by the ALJ or the Secretary, or designee, the hearing shall proceed pending the determination of any interlocutory appeal, and the order or ruling of the ALJ shall be effective pending review.

§ 26.52 Appeal to the Secretary.

(a) *General.* Either party may file with the Secretary an appeal within 30 days after the date that the ALJ issues an initial decision. The Secretary or the Secretary's designee may extend the 30-day period in his or her sole discretion, for good cause.

(b) *Brief in support of appeal.* The appeal shall be accompanied by a written brief, not to exceed 15 pages, specifically identifying the party's objections to the initial decision or order of the ALJ and the party's supporting reasons for any objections. The appealing party may request leave to file a brief in excess of 15 pages for good cause shown. Alternative proposed findings and conclusions, if any, may be appended as an exhibit.

(c) *Briefs in opposition.* Any opposing party may submit a brief in opposition to the appeal, not to exceed 15 pages, within 20 days of the date a copy of the

appeal and accompanying brief were received. The opposing party may request leave to file a brief in excess of 15 pages for good cause shown. The brief in opposition shall specifically state the opposing party's reasons for supporting the ALJ's determination or taking exceptions to any part of the ALJ's determination.

(d) *Extensions and additional briefs.* The Secretary or Secretary's designee may extend the deadlines or page limitations set forth in paragraphs (b), (c), and (d) of this section, in his or her sole discretion. The Secretary may also permit the filing of additional briefs, in his or her sole discretion.

(e) *Forwarding of the record.* Upon request by the Office of the Secretary, the ALJ shall forward the record of the proceeding to the Secretary or designee.

(f) *Personal appearance.* There is no right to appear personally before the Secretary or designee.

(g) *ALJ decisions upon failure to prosecute or defend.* There is no right to appeal any decision issued by an ALJ in accordance with § 26.37(d) of this part.

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

(i) *Evidence considered.* The Secretary or designee shall consider only evidence contained in the record forwarded by the ALJ. However, if any party demonstrates to the satisfaction of the Secretary or designee that additional evidence not presented at the hearing is material and that there were reasonable grounds for the failure to present such evidence at the hearing, the Secretary or designee shall remand the matter to the ALJ for reconsideration in light of the additional evidence.

(j) *Ex parte communications.* The prohibitions of ex parte communications in § 26.33 shall apply to contacts with the Secretary or designee.

(k) *Relief.* The Secretary or designee may affirm, modify, reduce, reverse, compromise, remand, or settle any relief granted in the initial decision. The Secretary or designee shall consider, and include in any final determination, such factors as may be set forth in applicable statutes or regulations.

(l) *Decision*—(1) *Generally.* Where a Secretarial appeal has been timely made, the Secretary, or designee, shall issue a written determination within 30 days after receipt of the brief in opposition, if any, and shall serve it upon the parties to the hearing. The Secretary, or designee, may extend the time in which a written determination must be issued by an additional 60 days for good cause shown in a written justification issued to the parties. The written decision of the Secretary shall be the final agency action. If the Secretary, or designee, does not act upon the appeal of an initial decision within 90 days of service of the appeal, then the initial determination shall be the final agency action.

(2) *Exception for cases brought under the Program Fraud Civil Remedies Act.* Where a Secretarial appeal has been timely made in a case brought under the Program Fraud Civil Remedies Act, the Secretary, or designee, shall issue a written determination within 30 days after receipt of appeal and shall serve it upon the parties to the hearing. The written decision of the Secretary shall be the final agency action. If the Secretary, or designee, does not act upon the appeal of an initial decision within 30 days of service of the appeal, the initial decision shall become final and the Respondent will be served with a statement describing the right to seek judicial review, if any.

§ 26.53 Exhaustion of administrative remedies.

In order to fulfill the requirement of exhausting administrative remedies, a party must seek Secretarial review under § 26.52 prior to seeking judicial review of any initial decision issued under subpart B of this part.

§ 26.54 Judicial review.

Judicial review shall be available in accordance with applicable statutory procedures and the procedures of the appropriate federal court.

§ 26.55 Collection of civil penalties and assessments.

Collection of civil penalties and assessments shall be in accordance with applicable statutory provisions.

§ 26.56 Right to administrative offset.

The amount of any penalty or assessment that has become final under § 26.50 or § 26.52, or for which a judgment has been entered after action under § 26.54 or § 26.55, or agreed upon in a compromise or settlement among the parties, may be collected by administrative offset under 31 U.S.C. 3716 or other applicable law. In Program Fraud Civil Remedies Act matters, an administrative offset may not be collected against a refund of an overpayment of federal taxes then or later owing by the United States to the Respondent.

PART 27—NONJUDICIAL FORECLOSURE OF MULTIFAMILY AND SINGLE FAMILY MORTGAGES

Subpart A—Nonjudicial Foreclosure of Multifamily Mortgages

Sec.

Subpart B—Nonjudicial Foreclosure of Single Family Mortgages

AUTHORITY: 12 U.S.C. 1715b, 3701–3717, 3751–3768; 42 U.S.C. 1452b, 3535(d).

SOURCE: 61 FR 48548, Sept. 13, 1996, unless otherwise noted.

Subpart A—Nonjudicial Foreclosure of Multifamily Mortgages

§ 27.1 Purpose.

The purpose of this subpart is to implement requirements for the administration of the Multifamily Mortgage Foreclosure Act of 1981 (the Act) (12 U.S.C. 3701–3717), that clarify, or are in addition to, the requirements contained in the Act, which are not republished here and must be consulted in conjunction with the requirements of this subpart. The Act creates a uniform Federal remedy for foreclosure of multifamily mortgages. Under a delegation of authority published on February 5, 1982 (47 FR 5468), the Secretary has delegated to the HUD General Counsel his powers under the Act to appoint a foreclosure commissioner or commissioners and to substitute therefor, to fix the compensation of commissioners, and to promulgate implementing regulations.

§ 27.2 Scope and applicability.

(a) Under the Act and this subpart, the Secretary may foreclose on any defaulted Secretary-held multifamily mortgage encumbering real estate in any State. The Secretary may use the provisions of these regulations to foreclose on any multifamily mortgage regardless of when the mortgage was executed.

(b) The Secretary may, at the Secretary's option, use other procedures to foreclose defaulted multifamily mortgages, including judicial foreclosure in Federal court and nonjudicial foreclosure under State law. This subpart applies only to foreclosure procedures authorized by the Act and not to any other foreclosure procedures the Secretary may use.