authorize disclosure of any exempt record or testimony by a current or former member, officer, employee, agent of the ASC, or third party, sought in connection with any civil or criminal hearing, proceeding or investigation without the service of a judicial subpoena, or other legal process requiring such disclosure or testimony. If he or she determines that the records or testimony are relevant to the hearing, proceeding or investigation and that disclosure is in the best interests of justice and not otherwise prohibited by Federal statute. Where the Executive Director or designee authorizes a current or former member, officer, director, empl9oyee or agent of the ASC to testify or disclose exempt records pursuant to this paragraph (b)(1), he or she may, in his or her discretion, limit the authorization to so much of the record or testimony as is relevant to the issues at such hearing, proceeding or investigation, and he or she shall give authorization only upon fulfillment of such conditions as he or she deems necessary and practicable to protect the confidential nature of such records or testimony.

(2) *Authorization for disclosure by the Chairman of the ASC.* Except where expressly prohibited by law, the Chairman of the ASC may, in his or her discretion, authorize the disclosure of any ASC records. Except where disclosure is required by law, the Chairman may direct any current or former member, officer, director, employee or agent of the ASC to refuse to disclose any record or to give testimony if the Chairman determines, in his or her discretion, that refusal to permit such disclosure is in the public interest.

(3) *Limitations on disclosure.* All steps practicable shall be taken to protect the confidentiality of exempt records and information. Any disclosure permitted by paragraph (b) of this section is discretionary and nothing in paragraph (b) of this section shall be construed as requiring the disclosure of information. Further, nothing in paragrah (b) of this section shall be construed as restricting, in any manner, the authority of the ASC, the Chairman of the ASC, the Executive Director, the ASC General Counsel, or their designees, in their discretion and in light of the facts and circumstances attendant in any given case, to require conditions upon, and to limit, the form, manner, and extent of any disclosure permitted by this section. Wherever practicable, disclosure of exempt records shall be made pursuant to a protective order and redacted to exclude all irrelevant or non-responsive exempt information.

10. Section 1102.310 is added as follows:

§ 1102.310 Service of process.

(a) *Service.* Any subpoena or other legal process to obtain information maintained by the ASC shall be duly issued by a court having jurisdiction over the ASC, and served upon the Chairman ASC; 2000 K Street, NW, Suite 310; Washington, DC 20006. Where the ASC is named as a party, service of process shall be made pursuant to the Federal Rules of Civil Procedure upon the Chairman at the above address. The Chairman shall immediately forward any subpoena, court order or legal process to the General Counsel. If consistent with the terms of the subpoena, court order or legal process, the ASC may require the payment of fees, in accordance with the fee schedule referred to in § 1102.306(e) prior to the release of any records requested pursuant to any subpoena or other legal process.

(b) *Notification by person served.* If any current or former member, officer, employee or agent of the ASC, or any other person who has custody of records belonging to the ASC, is served with a subpoena, court order, or other process requiring that person's attendance as a witness concerning any matter related to official duties, or the production of any exempt record of the ASC, such person shall promptly advise the Executive Director of such service, the testimony and records described in the subpoena, and all relevant facts that may assist the Executive Director, in consultation with the ASC General Counsel, in determining whether the individual in question should be authorized to testify or the records should be produced. Such person also should inform the court or tribunal that issued the process and the attorney for the party upon whose application the process was issued, if known, of the substance of this section.

(c) *Appearance by person served.* Absent the written authorization of the Executive Director or designee to disclose the requested information, any current or former member, officer, employee, or agent of the ASC, and any other person having custody of records of the ASC, who is required to respond to a subpoena or other legal process, shall attend at the time and place therein specified and respectfully decline to produce any such record or give any testimony with respect thereto, basing such refusal on this section.

By the Appraisal Subcommittee of the Federal Financial Institutions Examination Counsel.

Dated: December 20, 1999.

Herbert S. Yolles,

Chairman.

[FR Doc. 99–33476 Filed 12–27–99; 8:45 am]

BILLING CODE 6201–01–M

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of Federal Housing Enterprise Oversight

12 CFR Part 1780

RIN 2550–AA04

Rules of Practice and Procedure

AGENCY: Office of Federal Housing Enterprise Oversight, HUD.

ACTION: Final rule.

SUMMARY: The Office of Federal Housing Enterprise Oversight (OFHEO) is issuing a final rule that establishes the rules of procedure to be followed when OFHEO conducts hearings on the record and rules of practice before OFHEO. The rule implements the provisions of title XIII of the Housing and Community Development Act of 1992, known as the Federal Housing Enterprises Financial Safety and Soundness Act of 1992, regarding hearings on the record in certain enforcement actions against the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, or directors or executive officers of the Enterprises. The rule provides OFHEO personnel, the Enterprises, the Enterprises' directors and executive officers, and other interested parties with the guidance necessary to prepare for and participate in such hearings.

EFFECTIVE DATE: January 27, 2000.

FOR FURTHER INFORMATION CONTACT: David A. Felt, Associate General Counsel, Office of Federal Housing Enterprise Oversight, 1700 G Street, NW., Fourth Floor, Washington, DC 20552, telephone (202) 414–3829 (not a toll-free number). The telephone number for the Telecommunications Device for the Deaf is: (800) 877–8339.

SUPPLEMENTARY INFORMATION: The Supplementary Information is organized according to this table of contents:

I. Background

Title XIII of the Housing and Community Development Act of 1992, Pub. L. No. 102–550, known as the Federal Housing Enterprises Financial

Safety and Soundness Act of 1992 (1992 Act), established OFHEO as an independent office within the Department of Housing and Urban Development (HUD) to ensure that the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac) (collectively, the Enterprises) are capitalized adequately and operated in a safe and sound manner. Subsection 1313(b) of the 1992 Act refers to certain authorities that the Director of OFHEO (Director) may exercise exclusive of the Secretary of HUD (Secretary) [1] and other authorities that are subject to review and approval by the Secretary.[2] The Secretary's roles, duties, and responsibilities may be delegated to the Director. Among the exclusive authorities of the director is the authority to issue regulations to carry out the duties of the Director under Subtitle C of the Act.[3] Prior to issuing a cease-and-desist order, OFHEO must conduct hearings on the record and provide the subjects of the order with notice and the opportunity to participate in such hearings.[4] Prior to imposing civil money penalties, OFHEO must provide notice and the opportunity for a hearing to the persons subject to the penalties.[5] This final rule provides the rules of practice and procedure that will be applied in these hearings and any other hearings on the record that may be conducted by the Director.

Fannie Mae and Freddie Mac are Government-sponsored enterprises with important public purposes. These purposes include providing liquidity to the residential mortgage market and increasing the availability of mortgage credit benefiting low- and moderate-income families, rural areas, central cities, and areas that are underserved by lending institutions. The Enterprises engage in two principal businesses: investing in residential mortgages and guaranteeing residential mortgage securities. The securities they guarantee and the debt instruments they issue are not backed by the full faith and credit of the United States.[6] Despite the absence of such Federal backing, prices of Enterprise debt securities reflect a market perception that the U.S. Government has a strong interest in preventing a default by either Enterprise. This perception principally arises from the public purposes of the Enterprises, their Federal charters, their potential access to a U.S. Treasury line of credit and the statutory exemptions of their debt and mortgage-backed securities from otherwise mandatory investor protection provisions.[7] This perception is bolstered by concern that the insolvency of either Enterprise would have serious consequences for the nation's housing markets and financial system.

On September 24, 1998 (63 FR 51031), OFHEO published a Notice of Proposed Rulemaking (NPR) that included proposed Rules of Practice and Procedure. The NPR proposed rules of procedure for hearings on the record before OFHEO and rules of practice governing individuals who practice before OFHEO. The comment period closed December 23, 1998.

OFHEO received comments from each Enterprise in response to the proposed rulemaking. A discussion of those comments follows.

II. Comments on the Proposed Rules of Practice and Procedure

General Comments

Fannie Mae fully supported OFHEO's efforts to formalize the rules of practice and procedure governing the conduct of hearings on the record. Fannie Mae stated its belief that any such hearing in the future would occur only in the most extraordinary of circumstances and emphasized its commitment to working with OFHEO in a good faith, constructive relationship. Fannie Mae offered various comments and recommended a number of changes that Fannie Mae asserts would make the rules more consistent with the Administrative Procedure Act (APA) [8] and with the practices in place at the Federal banking agencies. Although, as explained below, OFHEO does not share the view that anything in the proposed rule was inconsistent with the APA, OFHEO found that some of the recommended changes added clarity to the rule and has incorporated them. Each of the recommendations is discussed in detail below.

Freddie Mac expected that administrative enforcement proceedings would occur rarely, if ever, and that OFHEO would not consider initiating such a proceeding until both sides have sought cooperatively to resolve the matters at issue through alternative means. Freddie Mac stated that if OFHEO were to initiate a hearing on the record, the rules of practice and procedure should conform with OFHEO's statutory enforcement authority and be suited to the potential issues and parties to such a proceeding. In this regard, Freddie Mac recommended a number of changes that would, in its view, improve the rules by fostering early resolution, streamlining the provisions addressing sanctions to limit sanctions against individuals to those necessary to conduct an adjudicatory hearing or related proceedings, and ensuring fairness and due process. As explained below, OFHEO has considered each of these recommendations and, in response to some of them, has made changes in the final rule.

Utilize Pre-Filing Submissions To Foster Early Resolution

Freddie Mac's comments encouraged OFHEO to adopt a procedure that would allow a potential respondent to submit a written statement of its position, prior to filing a formal notice of charges. Freddie Mac felt that a prior submission could provide the agency with additional facts, allow prompt and early correction of any miscommunication and point out weaknesses in the agency's preliminary position. In these and other ways, Freddie Mac suggests, the submission would assist OFHEO in making a well-reasoned decision about whether to pursue an alternative resolution or initiate a formal enforcement action. Freddie Mac cited a statement by the Securities and Exchange Commission (SEC) as an example of successful use of such prior submissions, which that agency has used for more than 20 years to help determine whether to file or otherwise initiate a formal proceeding.[9]

OFHEO shares Freddie Mac's desire to foster early resolution of enforcement matters and to ensure well-reasoned decision-making in determining whether to pursue formal enforcement actions. OFHEO has reviewed the cited SEC release and the practices of other

[1] 12 U.S.C. 4513(b).

[2] Any determinations, actions or functions of the Director that are not referred to in subsection 1313(b) are subject to the review and approval of the Secretary. 1992 Act, section 1313(c) (12 U.S.C. 4513(c)).

[3] 1992 Act, section 1313(b) (12 U.S.C. 4513(b)).

[4] 1992 Act, section 1371 (12 U.S.C. 4631).

[5] 1992 Act, section 1376 (12 U.S.C. 4636).

[6] Federal Home Loan Mortgage Corporation act, sections 301(4) and 306(h)(2), (12 U.S.C. 1451 *note* (b)(3)–(4), 12 U.S.C. 1455(h)(2)); Federal National Mortgage Association Charter Act, sections 301(4) and 304(b) (12 U.S.C. 1716(3)–(4), 12 U.S.C. 1719(b)); and 1992 Act, section 1302(4) (12 U.S.C. 4501(4)).

[7] *See, e.g.,* 12 U.S.C. 24 (authorizing unlimited investment by national banks in obligations of, or issued by, the Enterprises); 12 U.S.C. 1455(g), 1719(d) and 1723c (exempting Enterprise securities from oversight from Federal regulators); 15 U.S.C. 77r–l(a) (preempting State law that would treat Enterprise securities differently from obligations of the United States for investment purposes); and 15 U.S.C. 77r–l(c) (exempting Enterprise securities from State securities laws).

[8] 5 U.S.C. 500–559.

[9] Securities Act Release No. 5310, 38 FR 5457, Mar. 1, 1973.

agencies. None of those agencies has published a regulation providing for submissions prior to a notice of charges. OFHEO will permit persons involved in an investigation to present a statement to OFHEO setting forth their interests and position. However, OFHEO cannot put itself in a position where, as a result of the establishment of formal procedural requirements, it would lose its ability to respond timely to actionable activities or conditions. Accordingly, OFHEO will not include among its procedural regulations a requirement that OFHEO obtain or solicit views or statements from persons against which notices of charges are soon to be issued.

Section 1780.1 Scope

Fannie Mae recommended that the term ''director of any Enterprise'' at § 1780.1(b) be defined in order to ''clarify that the term 'directors' means members of the board of directors.'' The term, as used in this section of the final rule, refers to sections 1371 and 1376 of the 1992 Act and is intended to have the same meaning as the same term in the Act. Accordingly, OFHEO found it unnecessary to define the term in the final rule.

Freddie Mac recommended that § 1780.1 be amended to list civil money penalty hearings under section 102 of the Flood Disaster Protection Act of 1973, as amended, 42 U.S.C. 4012a, among the hearings subject to the regulation. Although, as Freddie Mac noted, such hearings would be covered by the catchall provision in the section, OFHEO has incorporated the recommended change to make that coverage explicit.

Section 1780.3 Definitions

Both Enterprises commented about proposed § 1780.3(h), which defined the term ''presiding officer'' to be ''an administrative law judge or any other person designated by the Director to conduct a hearing.'' Fannie Mae recommended that OFHEO specify that only an ALJ should be permitted to conduct administrative hearings. Fannie Mae included a description of the administrative law judge (ALJ) program and opined that the APA does not contemplate that an agency head appoint ''any person'' to preside over hearings conducted on the record. Fannie Mae stated that the rule does ''not set forth any justification for OFHEO's departure from the commonly understood rules of the APA or from the practice of other safety and soundness regulators.'' Fannie Mae asserts that allowing persons other than ALJs to preside over hearings under the APA is inconsistent with accepted APA principles and with the uniform practice of the Federal banking agencies and HUD.

The use of the term ''any other person'' in § 1780.3(h) of the proposed rules was not intended to suggest that the Director might ignore the APA or other applicable law in appointing presiding officers. It was intended as a recognition that the APA includes exceptions to the general rule that the agency (in the case of boards or commissions), the agency head or an ALJ shall preside at a hearing.[10] For example, the regulations of the United States Office of Personnel Management relating to ALJs also allow temporary appointment of qualified Federal annuitants, described as ''senior administrative law judges'' under certain circumstances.[11] However, in addressing Fannie Mae's comment, OFHEO has modified the language permitting persons other than ALJs to act as presiding officers, as discussed below.

The use of the term ''any other person'' was not intended to imply that the circumstances that would require these other types of presiding officers are likely to occur in OFHEO enforcement proceedings. Neither was it intended to take a legal position that OFHEO did not consider its hearings to be governed by the APA or other applicable laws (such as those listed at § 1780.1). However, because these rules are intended to have broad applicability to any hearings that are required to be on the record, including any that might be added by future legislation, OFHEO chose to provide maximum flexibility under whatever law is applicable, now or in the future. To clarify this point, OFHEO has replaced the phrase ''designated by the Director'' with ''appointed by the Director under applicable law.''

OFHEO agrees that the practice of the agencies cited by Fannie Mae is to utilize ALJs. That would generally be OFHEO's practice also. However, in drafting the definition of presiding officer, OFHEO looked to the Uniform Rules of the Federal bank and thrift regulators. The Uniform Rules, which use the term ''administrative law judge'' where the OFHEO rules use ''presiding officer,'' define ''administrative law judge'' to mean ''one who presides at an administrative hearing under authority set forth at 5 U.S.C. 556.'' As explained above, that person or body of persons need not always be an administrative law judge. OFHEO has followed the same general approach, allowing for persons other than an administrative law judge to preside, but only where they can be appointed under applicable law.

Freddie Mac recommended that, to help ensure the fairness and impartiality of administrative proceedings, the rule be changed to insert the word ''neutral'' to describe the ALJ or other person. OFHEO concurs with the Enterprises that any presiding officer should be impartial and fair. However, OFHEO disagrees with Freddie Mac that adding the word ''neutral'' to the regulation would further this goal. The provisions of the APA that govern selection of presiding officers and the conduct of hearings apply to proceedings under this final rule and are sufficient to insure impartiality and fairness.

Sections 1780.5 Authority of the Presiding Officer and 1780.6 Public Hearings

Each Enterprise commented that § 1780.6(c) should be modified to allow any party to request that documents be filed under seal. Fannie Mae explained its view that confidentiality goes to the heart of the fairness of a hearing and that allowing an agency, but not the other parties, to file confidential documents is unfair. Freddie Mac also felt that a change to allow all parties to request that a document be filed under seal was necessary to ensure fairness to all parties.

OFHEO concurs with the need to ensure confidentiality of some documents and testimony in adjudicatory proceedings and agrees that all parties should be able to request confidentiality. Moreover, OFHEO believes that the authority to order documents to be filed under seal is among the inherent powers of the presiding officer under § 1780.5 to conduct a hearing and to rule on motions or procedural matters. However, in response to the comments, OFHEO has included some additional language in the final rule. This language, which is drawn from the Uniform Rules of the Federal financial institution regulatory agencies, emphasizes the authority of the presiding officer to maintain confidentiality of documents where appropriate. Specifically, § 1780.5(b)(5) now includes expressly the authority to issue protective orders and § 1780.5(b)(15) now includes expressly the authority to establish time, place and manner limitations on the attendance of the public and the media for any public hearing. These changes clarify that the presiding officer may issue a protective order to maintain

[10] 12 U.S.C. 556(a).

[11] 5 CFR 930.216.

confidentiality of documents a party seeks to file or is required to disclose in discovery. Further, these changes make explicit the authority of the presiding officer to maintain confidentiality of those documents by excluding the public from portions of a hearing where those documents may be introduced or discussed.

Section 1780.10 Service of Papers

The Enterprises each commented upon proposed § 1780.10. Freddie Mac recommended that OFHEO customize the language of this section to the Enterprises by requiring service by OFHEO upon the Enterprises or other respondents at a designated office within each Enterprise. Freddie Mac suggested that language in the rule that allows service by delivery to a person of suitable age and discretion at the physical location where the individual resides or works was unnecessary, because service of all such individuals could be made at the designated office of the appropriate Enterprise. Freddie Mac further recommended that OFHEO designate a hearing clerk to receive and log in papers in situations where a presiding officer has not yet been assigned. Fannie Mae asked that OFHEO clarify proposed § 1780.10(f), asserting that the following language was confusing: ''Failure to make proof of service shall not affect the validity of service. The presiding officer may allow the proof to be amended or supplied, unless to do so would result in material prejudice to a party.'' Fannie Mae asked why it was necessary to supply proof of service at all if failure to do so does not affect validity of service.

OFHEO does not believe it necessary to adopt the service rules recommended by Freddie Mac. OFHEO retains discretion to determine how best to serve a notice of charges against an Enterprise under particular circumstances. After initial service, OFHEO anticipates that counsel for the Enterprise would enter an appearance and service of all documents would be upon counsel. With respect to service upon individuals against whom charges are brought, the service rules are tailored to make reasonably certain that the individual receives notice of the documents served. OFHEO's enforcement authorities are not limited to current Enterprise employees and the service rules must reach all possible recipients of documents in an enforcement action, including those who might seek to avoid service. Moreover, OFHEO does not wish to preclude service by various reasonable means should circumstances require it. Therefore, OFHEO has not modified the language in the final rule to allow the Enterprises to designate a particular office for service upon the Enterprise and individuals.

OFHEO finds it unnecessary to specify by rule an individual or an office within OFHEO for service or filing of documents related to a hearing. In enforcement proceedings, the Director will be represented by enforcement counsel upon whom service may be made. If a presiding officer is not named in the notice of charges, an appropriate address for filing of an answer to the notice will be provided in the notice.

OFHEO concurs with Fannie Mae that § 1780.10(f) of the proposed rules could be clarified. The final rule, therefore, makes clear that a party may contest service only by claiming that actual service was not made. The term ''proof of service'' is used to mean an affidavit by a nonattorney or a declaration of counsel, filed and served with the pleading or other document, stating when and by what means the document was served. Such an affidavit or declaration establishes prima facie that service was made and shifts the burden to a party contesting service to come forward with evidence that service did not occur. The failure of a party to include a proof of service with the document would not alone be sufficient to prove lack of service or cause the filing of such a document to be ineffective. Service could, if necessary, be proven by other means. However, a proof of service must be filed before the presiding officer can take action upon a filing, such as a motion, that seeks such action. This rule prevents action being taken without notice being provided to the nonmoving parties.

Section 1780.15 OFHEO's Right To Conduct Examinations

Freddie Mac recommended that § 1780.15 be revised to provide that OFHEO's examination authority not be used for after-the-fact gathering of evidence to support a notice of charges that has already been issued. Freddie Mac stated that the Director must have reasonable cause to believe that grounds exist for initiating an action by the time the Director serves the notice.

OFHEO decided not to accept Freddie Mac's recommendation to modify § 1780.15 for a number of reasons. First, it would be inappropriate and unprecedented for a Federal financial institution regulatory agency to prevent itself from using the most recent factual information available. The language in § 1780.15 is drawn directly from the Uniform Rules of the bank and thrift regulators and reflects normal examination and enforcement practices. As a matter of practice, Federal financial institution regulatory agencies generally do not issue notices of charges until a supporting factual record is adequately developed. In this regard, OFHEO would be no different from these other regulatory agencies. However, OFHEO does not consider it unfair or improper to allow relevant information to be introduced at hearing that may have come to light from an examination conducted after the notice of charges. Any such information would be available to all parties through discovery. OFHEO's rules anticipate that additional facts may come to light during the prehearing phase and the rules allow for liberal amendments to notices of charges and answers to reflect those newly discovered facts.

Further, because the purpose of cease and desist orders is largely remedial, it is especially important in fashioning such an order that the presiding officer and the Director understand any steps an Enterprise may have undertaken (or not undertaken) to deal with the problems at issue since the filing of the notice of charges. Current practices at an Enterprise could also be relevant in determining the appropriateness and size of civil money penalties. Examinations are an important means of providing current information.

OFHEO is also concerned that any rule that limits the use of current examination findings at hearing could tend to chill the examination process. Examiners might be reluctant to examine areas at issue in the hearing out of concern that their work might raise issues about whether facts introduced at hearing were discovered after service of the notice of charges. The result could be that OFHEO would be hindered in its ability to examine those areas that were experiencing the worst problems at the Enterprise.

Finally, a rule such as Freddie Mac suggests would require discovery and collateral hearings to determine the source of much of OFHEO's evidence. In OFHEO's view, such collateral proceedings would be inappropriate, because the proper issue is whether parties have had sufficient time to consider new evidence, not whether OFHEO obtained it in an examination after a notice of charges was filed. Further, the appropriate remedy in the event that there has been insufficient time is to extend the hearing date, not to exclude the evidence.

Section 1780.20 Commencement of Proceeding and Contents of Notice of Charges

Fannie Mae and Freddie Mac each recommended that OFHEO modify § 1780.20(b) to delete the proposed language requiring the notice of charges to state ''the matters of fact or law showing that OFHEO is entitled to relief'' and replace it with a requirement that the notice of charges include ''a statement of the facts constituting the alleged conduct or violation.'' Fannie Mae stated that the recommended language, which is drawn directly from the 1992 Act, 12 U.S.C. 4631(c), would require greater specificity in the initial notice, ensure more fairness, and better enable the respondent to answer the charges.

OFHEO decided not to modify the language of § 1780.20(b). This NPR language is virtually identical to the Uniform Rules of the Federal bank and thrift regulators.[12] The governing statute for those regulatory agencies, 12 U.S.C. 1818(b)(1), uses language identical in relevant part to that of the 1992 Act. OFHEO intends its procedures in regard to notices of charges to be the same as those of the Federal bank and thrift regulators and, accordingly, is utilizing the same language to describe the requirements for those notices.

Further, OFHEO does not understand the language of § 1780.20(b) to be narrower than the statutory language. The regulatory language merely clarifies a level of specificity that is adequate to meet the statutory requirement. The notice of charges is not intended to provide a full and complete factual explication of the case against a respondent. Respondents may use discovery to obtain additional details. The notice of charges is intended simply to place respondents on notice of the nature of the charges against them, with sufficient specificity to allow them to prepare an answer and frame discovery requests. More complex and technical pleading requirements would, in OFHEO's view, add unnecessary and inefficient burden to the hearing process.

Fannie Mae recommended that § 1780.20(d) be amended to include language from section 1373(a)(2) of the 1992 Act (12 U.S.C. 4633(a)(2)) that requires hearings on cease and desist orders to be fixed for a date not earlier than 30 days nor later than 60 days after service of notice of charges. OFHEO disagrees with this recommendation. Like the Uniform Rules, OFHEO's rule covers proceedings that arise under various statutory provisions. It is not the purpose of this rule to catalogue the requirements of all these statutes. It would also be inappropriate, and potentially misleading, to include the requirements of only one.The language of § 1780.20(d) is virtually identical to that of the Uniform Rules. That language does not negate section 1373(a)(2) of the 1992 Act any more than the Uniform Rules negate identical requirements in 12 U.S.C. 1818(b)(1), which govern cease and desist proceedings involving banks and thrifts.

Section 1780.22 Amended Pleadings

Fannie Mae recommended that certain language from the Uniform Rules be added to the second sentence in § 1780.22(b). However, OFHEO modified the language of the Uniform Rules [13] by splitting one long sentence into two sentences. No language from the Uniform Rules has been dropped in this modification. OFHEO did not intend to change the meaning of the Uniform Rules, but to clarify that the presiding officer will admit evidence freely if it will assist in the adjudication of the merits and will not prejudice an objecting party's action or defense on the merits.

Accordingly, OFHEO found it unnecessary to change the language in the proposed rule.

Section 1780.26 Discovery

Both Enterprises recommended that OFHEO modify the rule to provide for interrogatories and discovery depositions, in addition to document discovery. Freddie Mac pointed out that there is a split among the regulations of the Federal financial institution regulatory agencies on the availability of these discovery tools. Fannie Mae believes that discovery depositions of experts and factual witnesses would promote efficiency in any hearing, improve fact finding and lead to earlier resolution of complex matters.

OFHEO recognizes that some regulatory agencies allow for discovery depositions and interrogatories and some do not. The experiences of the Office of the Comptroller of the Currency (OCC), the Office of Thrift Supervision (OTS) and the Board of Governors of the Federal Reserve System (Board of Governors) led those agencies to find that discovery depositions served a useful purpose by promoting fact finding and encouraging settlements. However, even at those agencies, discovery depositions are limited to witnesses that have factual, direct and personal knowledge of matters at issue and expert witnesses. The Federal Deposit Insurance Corporation (FDIC) and the National Credit Union Administration (NCUA) determined that the interests of respondents in further pretrial disclosure were satisfied by the availability of extensive document discovery that complements the document intensive nature of those agencies' proceedings.[14]

OFHEO considered carefully the scope of discovery that would be permitted under its regulations. OFHEO has determined that broad document discovery should be permitted, but has recognized that there is no constitutional right to prehearing discovery, including deposition discovery, in Federal administrative proceedings.[15] Further, the APA contains no provisions for prehearing discovery, and the discovery provisions of the Federal Rules of Civil Procedure are inapplicable to administrative proceedings.[16] Instead, each agency determines the extent of discovery to which a party in an administrative hearing is entitled.[17]

OFHEO's regulations strike a balance between the due process interest of respondents in obtaining pretrial disclosure, including discovery depositions, and OFHEO's need for swift adjudication while preserving its limited resources. Further, OFHEO believes that, like the FDIC and the NCUA, its enforcement actions generally would be document-intensive and that respondents could, therefore, obtain sufficient discovery through document requests.

Section 1780.28 Document Subpoenas to Nonparties

Fannie Mae commented that § 1780.28(a)(3) gives too much discretion to the presiding officer to refuse to issue or to modify a document subpoena. That provision governs applications for subpoenas that do not set forth a valid basis for the issuance of a subpoena or that request subpoenas with terms that are unreasonable, oppressive, excessive in scope, or unduly burdensome. If presented with such an application, the presiding

[12] *See* 12 CFR 19.18(b)(2).

[13] *See* 12 CFR 19.20(b).

[14] *See* 56 FR 37969, Aug. 9, 1991.

[15] *Sims* v. *National Transportation Safety Board,* 662 F.2d 668, 671 (10th Cir. 1981); *P.S.C. Resources, Inc.* v. *N.L.R.B.,* 576 F.2d 380, 386 (1st Cir. 1978); *Silverman* v. *Commodity Futures Trading Comm.,* 549 F.2d 28, 33 (7th Cir. 1977).

[16] *Kenwich Petrochemicals, Inc.* v. *N.L.R.B.,* 893 F.2d 1468, 1484 (3d Cir. 1990); *N.L.R.B.* v. *Valley Mold Co., Inc.,* 503 F.2d 693, 695 (6th Cir. 1976); *Frillette* v. *Kimberlin,* 508 F.2d 205 (3d Cir. 1974) *cert. denied,* 421 U.S. 980 (1975).

[17] McClelland v. *Andrus,* 606 F.2d 1278, 1285 (D.C. Cir. 1979).

officer may refuse to issue the subpoena or may issue it in a modified form upon such conditions ''as may be determined by the presiding officer.'' Fannie Mae preferred the language of the Uniform Rules, which is virtually identical except that, in lieu of the quoted language, they state ''as may be consistent with the Uniform Rules.'' In a subsequent telephone conversation initiated by OFHEO to seek clarification of this comment, Fannie Mae explained that it hoped that OFHEO rules could go farther than the Uniform Rules and provide more specific standards governing the modification of or refusal to issue subpoenas.

OFHEO declines to modify the language. Although OFHEO does not intend any meaning different from the Uniform Rules, OFHEO does not find a general reference to the practice and procedure rules to be helpful. Any ruling by the presiding officer should be consistent with the practice and procedure rules. The wording chosen by OFHEO clarifies that the presiding officer has discretion under the rule to make modifications to a subpoena and to place conditions upon its issuance. The language in the rule does not grant unlimited discretion to the presiding officer, but conditions action upon a determination that no valid basis for the subpoena has been set forth or that the terms of the subpoena are unreasonable, oppressive, excessive in scope or unduly burdensome. To OFHEO's knowledge this language has not led to unreasonable suppression of discovery requests in hearings conducted by other Federal financial institution regulatory agencies. For these reasons, OFHEO sees no need to add additional conditions or requirements to guide the rulings of presiding officers.

Section 1780.30 Interlocutory Review

Fannie Mae commented that the sentence in § 1780.30(c) that expressly allows the presiding officer to indicate an opinion about the appropriateness of interlocutory review is highly prejudicial. Fannie Mae stated that it is equivalent to allowing a trial court to express an opinion to an appellate court on the arguments of a party that brings an interlocutory appeal during a trial. Fannie Mae asserted that the Federal financial institution regulatory agencies and HUD do not allow presiding officers to comment upon the appropriateness of interlocutory review.

OFHEO finds nothing prejudicial about allowing the presiding officer to comment upon whether a motion for interlocutory appeal meets the standards for such review. Except in a very narrow class of interlocutory appeals,[18] interlocutory appeals are available in the Federal courts (and most State courts): (1) only at the discretion of the appellate court and (2) *only* if the trial judge is of the opinion that such an appeal is appropriate[19] and so certifies in an order.[20] The purpose of this requirement is to prevent piecemeal review of actions. OFHEO's rules do not go this far, but merely allow the presiding officer to opine as to whether an interlocutory appeal is appropriate. Unlike in the Federal courts, parties are free to request interlocutory review even if the presiding officer believes the review would not be appropriate.

OFHEO disagrees with Fannie Mae's view that the Uniform Rules prohibit an administrative law judge from opining upon the appropriateness of a motion for interlocutory review. Nothing in those rules can be read to prohibit such an opinion. As in OFHEO's rules, under the Uniform Rules, parties file their motions and responses for interlocutory review with the ALJ, who ''refers'' them to the agency head. The ALJ may use this referral as an opportunity to state views upon whether particular issues merit that review.

It is important to distinguish between the presiding officer's opining on the appealability of a matter and opining on its merits. Parties seeking interlocutory review are appealing from a matter on which the presiding officer has ruled and, presumably, placed an opinion on the record. Section 1780.30(c) provides the Director discretion to consider the matter prior to the review of the entire hearing if (1) the ruling involves a controlling question of law or policy as to which substantial grounds exist for a difference of opinion, (2) immediate review of the ruling may materially advance the ultimate termination of the proceeding, (3) subsequent modification of the ruling at the conclusion of the proceeding would be an inadequate remedy, or (4) subsequent modification of the ruling would cause unusual delay or expense. The presiding official is in an excellent position to advise the Director on whether these grounds for interlocutory review are met and it is no more prejudicial to allow him to express an opinion than for judges in the courts to do so. The fact that a presiding officer has decided an issue against a particular party does not mean that the presiding officer will feel that the issue does not warrant interlocutory review. Where a novel legal issue is involved or a final decision on the matter could clearly expedite the resolution of the entire case, the presiding officer could have a strong interest in supporting interlocutory review.

Fannie Mae also requested that the text of § 1780.30(c) be clarified to indicate that a party opposing a motion for interlocutory review may file a response to such a motion. In OFHEO's view, such clarification is unnecessary, because § 1780.25(d), which governs motions generally, applies. Section 1780.25(d) provides for responses to all motions, except as otherwise provided. Section 1780.30 does not contain an exception to § 1780.25(d).

Section 1780.50 Conduct of Hearings

Freddie Mac commented that OFHEO should include a reference to either the 1992 Act or, more generally, to applicable law in the rules for conduct of hearings in § 1780.50. Freddie Mac observed that laws other than the APA may govern the conduct of hearings under the rules.

OFHEO concurs with this comment and has therefore added a reference to ''other applicable law'' at § 1780.50(a).

Subpart D—General Comments

Both Enterprises provided detailed comments regarding subpart D—Rules of Practice Before the Office of Federal Housing Enterprise Oversight. This subpart contains rules governing practice by parties or their representatives before OFHEO. These rules include sanctions that may be imposed in the course of an adjudicatory proceeding and censure, suspension, and disbarment proceedings that may be brought against individual practitioners.

Fannie Mae recognized and supported OFHEO's need to conduct orderly hearings on the record. However, Fannie Mae felt that most of the provisions of subpart D are outside the scope of OFHEO's authority to conduct orderly hearings on the record. In addition, Fannie Mae commented that many provisions were vague and confusing and that OFHEO had not provided any ''legal explanation'' for this subpart. For these reasons, Fannie Mae believes that subpart D ''is fraught with potential for abuse and misunderstanding.'' Fannie Mae requested that OFHEO clarify the scope of the subpart's applicability, provide specific definitions for certain unspecified terms in the subpart and provide an analysis of the statutory justification for the provisions in the subpart, in particular those that do not relate to enforcement proceedings under the 1992 Act. Fannie Mae believed that ''virtually any conduct'' could be characterized by a presiding officer as

[18] 28 U.S.C. 1292(a).

[19] 28 U.S.C. 1292(b).

[20] Fed. R. Civ. P. 5(a).

''contemptuous'' and that a presiding officer could find any sanction ''appropriate'' under this regulation.

Freddie Mac stated that the presiding officer must be able to maintain order to accomplish the purposes of an adjudicatory hearing and related proceedings. Freddie Mac agreed with the subpart in the sense that the existence of sanctions would be helpful to accomplishing those purposes. However, Freddie Mac stated that the scope of the subpart should be limited to adjudicatory hearings and related proceedings and to conduct by the parties and their representatives in those hearings. Freddie Mac also recommended that lack of competence be eliminated as a ground for sanctions and that the definition of ''practice before OFHEO'' be deleted.

Fannie Mae's comment suggests that OFHEO may lack authority to issue rules governing practice beyond those necessary to control the conduct of adjudicatory proceedings. OFHEO disagrees. OFHEO has an interest in ensuring that individuals that it permits to represent the interests of others before it can do so ethically and competently. The authority to do so is incident to the authority of any agency to control its internal operations, to insure that issues that must be resolved by the agency are presented competently, that facts and law are represented accurately, and that persons purporting to represent others have appropriate authority. Further, OFHEO has chosen to allow persons to practice before it who are not attorneys or other licensed professionals subject to professional codes of conduct. Particularly as to such individuals, who could not be referred to a licensing authority for sanctions, OFHEO needs a means to ensure that their conduct and competence meets normal professional standards.

OFHEO does not share the view of the Enterprises that the rules of practice are too vague and too broad. OFHEO based its rules of practice on those of the other Federal financial institution regulatory agencies. Sections 1780.72 and 1780.73, which govern appearance and practice in adjudicatory proceedings and conflicts of interest, are modeled upon the Uniform Rules. The Enterprises raised no objection to these sections. However, the Uniform Rules do not address expressly the subjects of sanctions ordered in the course of a hearing or of censure, suspension and disbarment. Each of the Federal financial institution regulatory agencies that is subject to the Uniform Rules found it necessary to address these subjects in separate Local Rules. Most of these rules are similar to §§ 1780.74 and 1780.75 of OFHEO's rules of practice.[21] Likewise, the Local Rules of most of these regulators define the term ''practice,'' which OFHEO defines at § 1780.71.[22]

Although it is difficult to draw bright lines to describe what conduct is contemptuous and what level of competence is sufficient, OFHEO believes that the rule provides sufficient guidance in these areas. If it should be necessary to impose sanctions under subpart D, OFHEO will look to case law and the practices of other Federal agencies, as well as any of OFHEO's own precedents that may exist, in determining the appropriateness of particular sanctions.

Section 1780.70 Scope

Freddie Mac recommended that OFHEO limit the scope of subpart D to practice in adjudicatory proceedings. Fannie Mae likewise commented that parts of subpart D are outside the scope of OFHEO's authority to conduct orderly hearings on the record. Freddie Mac suggested deleting the phrase ''any other matters connected with presentations to OFHEO relating to a client's or other principal's rights, privileges, or liabilities'' in describing the scope of the subpart. Freddie Mac also commented that the rules lack a bright line to determine what matters are covered by subpart D.

OFHEO disagrees that its rules of practice should be more limited. The quoted language is typical of that used by other Federal financial institution regulatory agencies to describe the scope of their practice rules.[23] OFHEO chose the language in recognition of the fact that counsel and other professionals frequently represent clients before regulatory agencies in numerous types of matters. These matters include rulemakings, investigations, and review of executive compensation matters. OFHEO has an interest in insuring that the individuals with whom it deals on such matters, in addition to formal adjudications, meet minimal professional standards of competency and conduct. Moreover, the conduct of individuals in these other types of proceedings is relevant to their fitness to practice before OFHEO in formal adjudications. Accordingly, OFHEO has not changed the scope of subpart D. Although a ''bright line'' test, such as limiting the scope to adjudications, might be simpler to administer, it would be, in OFHEO's view, too narrow and rigid. Therefore, OFHEO prefers to define the scope more broadly, to encompass various types of matters and various types of representation.

Section 1780.71 Definitions

Freddie Mac stated that ''the expansive definition of 'practice before OFHEO' contained in Subpart D * * * is unclear.'' This statement was made in the context of Freddie Mac's broader comment that the scope of subpart D is overbroad and unclear and that the NPR ''fails to address the potential problems that this expanded scope is best suited to address.'' Freddie Mac suggested that OFHEO may seek to test every presenter for the presence of adequate qualifications or subject every presenter to potential sanctions based upon his character. Freddie Mac states that such a process ''would serve no useful purpose and could tend to impair what has been an open cooperative working relationship between Freddie Mac and OFHEO.''

OFHEO likewise seeks open, cooperative working relationships with the Enterprises, but does not interpret subpart D in a way that would impair such relationships. It is not OFHEO's intention to require everyone who conducts a presentation to OFHEO personnel to demonstrate adequate qualifications. Rather, OFHEO intends to apply its practice regulations in a manner similar to the practices of other Federal financial institution regulatory agencies. Accordingly, OFHEO has made no changes to § 1780.71.

Section 1780.74 Sanctions

Fannie Mae stated that the conduct and sanctions specified in proposed § 1780.75(g) appeared redundant to similar conduct and sanctions in proposed § 1780.74. The provisions are not intended to be redundant. Proposed § 1780.75(g) specified that representatives or individuals representing themselves who engage in contemptuous conduct could be summarily suspended from a proceeding or subjected to any other appropriate sanction. By contrast, proposed § 1780.74 provided for sanctions that would be imposed after a hearing. However, OFHEO found that the two provisions were better placed in the same section, because they dealt with sanctions imposed by a presiding

[21] Rules of practice for these agencies are found at 12 CFR 19.190–19.201 (OCC); 12 CFR 263.90–263.99 (Board of Governors); 12 CRF 308.108–308.109 (FDIC); 12 CFR 513.1–513.7 (OTS); 12 CFR 747.302 (NCUA—limited to certain suspension and prohibition proceedings).

[22] 12 CFR 19.191(a) (OCC); 12 CFR 263.92(b)(1) (Board of Governors); 12 CFR 308.109(e) (FDIC); 12 CFR 513.2(e) (OTS). NCUA does not define ''practice'' in its regulations.

[23] See 12 CFR 19.190 (OCC); 12 CFR 263.90, 253.92(b)(1) (Board of Governors); 12 CFR 513.1 (OTS).

officer during the course of an adjudicatory proceeding. Therefore, in response to the comment, OFHEO has clarified the purposes of the two provisions by combining them, incorporating the language from § 1780.75(g) into §§ 1780.74(a)(1) and 1780.74(d).

Fannie Mae recommended that the summary procedure be eliminated altogether and Freddie Mac recommended that any summary sanction occur only after a written finding by the presiding officer that the particular sanction is necessary. OFHEO believes that the authority to expel individuals summarily from a hearing is inherent in and necessary to the role and duties of presiding officer. Contemptuous conduct may undermine the ability of the presiding officer to conduct a hearing. To be effective, a presiding officer must have the ability to sanction immediately anyone who engages in such conduct. Section 1780.74(d), therefore, makes explicit an authority that is implicit in any event. Requiring prior written findings by a presiding officer is inconsistent with this type of authority, because these sanctions ordinarily would be imposed immediately upon the occurrence of the contemptuous conduct. Moreover, written findings may be unnecessary because hearings ordinarily would be transcribed.

Section 1780.75 Censure, Suspension, Disbarment and Reinstatement

Freddie Mac recommended that OFHEO eliminate character and incompetence as grounds for censure, suspension or disbarment. Freddie Mac commented further that OFHEO should limit the scope of § 1780.75 to adjudicatory hearings and related proceedings and to conduct by the parties and their representatives in those hearings. Freddie Mac explained:

> As drafted, § 1780.75 of the Proposed Rules would provide for censure, suspension or disbarment of an individual based on a wide variety of failings or prior conduct without any showing that the underlying failing or conduct had resulted in, or would be likely to result in, any adverse impact to an OFHEO adjudicatory hearing or related proceeding. As such, it goes well beyond the disciplinary authority that is a necessary incident to the authority to conduct adjudicatory hearings and related proceedings (unnecessary sanctions are simply punishment), and the exercise of that authority would likely create a substantial burden [on] the proceedings and OFHEO.

OFHEO disagrees with Freddie Mac that character and prior conduct of an individual is not relevant to that person's fitness to practice. OFHEO has a major interest in ensuring that individuals who represent others before it are honest and competent and have proper authority. Moreover, as explained above, ''practice'' before OFHEO encompasses more than appearances in adjudicatory proceedings. OFHEO can see no reason to limit sanctions to conduct that impacts a specific adjudicatory proceeding, as suggested by Freddie Mac. OFHEO should not be required to review the same issues each time an individual whose conduct warrants a suspension or disbarment appears. For these reasons, OFHEO has chosen the approach of most other Federal financial institution regulatory agencies and adopted a procedure that allows persons who appear before OFHEO to be censured, suspended or disbarred.

Freddie Mac agreed with OFHEO that individuals appearing in an adjudicatory hearing or related proceedings should be competent. However Freddie Mac recommended that OFHEO rely upon the qualifications requirements in § 1780.72 to ensure competency, rather than allowing incompetent representatives to be sanctioned. OFHEO has not accepted this recommendation, because that section provides no effective means to regulate the competence of individuals who appear. Section 1780.72 is intended primarily to ensure that individuals purporting to represent other persons before OFHEO have the requisite authority. It includes no requirement that representatives be competent nor any means to deal with representatives who are incompetent.

Freddie Mac also argues that sanctions such as censure, suspension and disbarment ''could effectively impose punishment beyond that authorized by Congress for [violations of an Enterprise charter, the 1992 Act or any other law or regulation governing Enterprise operations].'' According to Freddie Mac, because Congress gave OFHEO authority to bring civil money penalties only against directors and executive officers, OFHEO lacks authority to levy sanctions upon other individuals. Under this theory, preventing an individual from practice before OFHEO amounts to ''severe substantive punishment'' that goes beyond actions necessary to control a particular hearing.

OFHEO disagrees with this interpretation of the 1992 Act. Incident to the authority to manage its operations, any Federal agency has the inherent authority to regulate reasonably the authority, qualifications and competence of individuals who represent other persons before the agency. As to adjudicatory proceedings involving individuals representing themselves, the authority to maintain order and integrity in those proceedings is inherent in the agency and the presiding officer. This authority necessarily includes the authority to levy appropriate sanctions. There is no legal basis to assert that these authorities may only be used on a case by case basis. If the evidence is sufficient to convince the Director that an individual should be suspended from practice for a period of time or disbarred permanently from appearing before OFHEO, the Director has the same inherent authority to prevent that individual from practicing before OFHEO on future matters as to suspend the individual from a current proceeding.

III. Synopsis of the Final Rule

The 1992 Act [24] requires OFHEO to conduct its hearings pertaining to cease-and-desist orders and civil money penalties in accordance with the APA.[25] Thus, the rules of practice and procedure supplement the APA provisions governing agency adjudications and include provisions unique to OFHEO's mission. These rules apply not only to enforcement hearings, but also to any other adjudication required by statute to be determined by the Director on the record after opportunity for hearing.

The final rule includes provisions relating to prehearing procedures and activities, the conduct of the hearing itself, and the qualifications and disciplinary rules for practice before OFHEO. The rule establishes that hearings are open to the public unless the Director determines that a public hearing would be contrary to the public interest. The disciplinary rules of practice in subpart D apply not only to adjudicatory hearings under the APA, but also to all matters that involve representation of others before OFHEO. The rules also define important terms and describe the authority of the Director and the presiding officer.

Under subparts A, B, and C of this part, the Director commences the hearing process by issuing and serving a notice of charges on a respondent. A presiding officer, appointed by the Director, presides over the course of the hearing from the time of the appointment until the presiding officer files a recommended decision and order, along with the hearing record, with the Director for a final decision. During the course of the hearing, the

[24] 1992 Act, section 1373(a)(3) (42 U.S.C. 4633(a)(3)).

[25] 5 U.S.C. 500–559.

presiding officer controls virtually all aspects of the proceeding. The presiding officer: determines the hearing schedule; presides over any prehearing conferences; rules on motions, discovery, and evidentiary issues; and ensures that the proceeding is fair, equitable, and impartial. The presiding officer does not, however, have the authority to make a ruling that disposes of the proceeding. Only the Director has the authority to dismiss the proceeding or to make a final determination of the merits of the proceeding.

Under this rule, the parties to the proceeding have the right to present evidence and witnesses at the hearing and to examine and cross-examine the witnesses. At the completion of the hearing, the parties may submit proposed findings of fact and conclusions of law and a proposed order. The presiding officer then submits the complete record to the Director for consideration and action. The record includes the presiding officer's recommended decision, recommended findings of fact and conclusions of law, and proposed order. The record also includes all prehearing and hearing transcripts, exhibits, rulings, motions, briefs and memoranda, and all supporting papers filed in connection with the hearing. The Director shall issue a final ruling within 90 days of the date the Director serves notice on the parties that the record is complete and the case has been submitted for final decision.

Subpart D of this rule contains rules governing practice by parties or their representatives before OFHEO. This subpart addresses the imposition of sanctions by the presiding officer or the Director against parties or their representatives in an adjudicatory proceeding under this part. This subpart also covers other disciplinary sanctions—censure, suspension or disbarment—against individuals who appear before OFHEO in a representational capacity either in an adjudicatory proceeding under part 1780 or in any other matters connected with presentations to OFHEO relating to a client's or other principal's rights, privileges, or liabilities. This representation includes, but is not limited to, the practice of attorneys and accountants. Employees of OFHEO are not subject to disciplinary proceedings under this subpart.

The final rule incorporates certain changes from the proposed regulation. Section 1780.1 has been modified to include, among the examples of proceedings covered by the rule, civil money penalty assessment proceedings under section 102 of the Flood Disaster Protection Act of 1973. The definition of ''presiding officer'' at § 1780.3(h) has been clarified in response to a comment discussed above. Section 1780.5 has been modified to list among the express authorities of the presiding officer, the authority to issue protective orders and regulate public and media access to hearings. Section 1780.10(f) has been modified to clarify the purpose of a proof of service declaration or affidavit. Section 1780.50 was modified to clarify that hearings would be conducted not only in accordance with the APA, but also any other applicable law. Section 1780.74 was modified to incorporate the provisions of § 1780.75(g) and to clarify that the presiding officer may decide what notice and responses are appropriate where sanctions are at issue in an adjudicatory proceeding. Slight modifications were made to the language of § 1780.75(a) to clarify which individuals may be subject to sanctions under the section. Section 1780.75(g) was deleted and its provisions incorporated into § 1780.74. In addition, the final rule includes a number of minor corrections that create no substantive change in the rule.

IV. Regulatory Impact

Executive Order 13132, Federalism

Executive Order 13132 requires that Executive departments and agencies identify regulatory actions that have significant federalism implications. ''Federalism implications'' is defined to specify regulations or actions that have substantial, direct effects on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities between Federal and State Government. OFHEO has determined that this final rule has no federalism implications that warrant the preparation of a Federalism Assessment in accordance with Executive Order 13132.

Executive Order 12866, Regulatory Planning and Review

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

Executive Order 12988, Civil Justice Reform

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

Unfunded Mandates Reform Act of 1995

This rule does not include a Federal mandate that may result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more (adjusted annually for inflation) in any one year. Consequently, the final rule does not warrant the preparation of an assessment statement in accordance with the Unfunded Mandates Reform Act of 1995.

Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires that a regulation that has a significant economic impact on a substantial number of small entities must include a regulatory flexibility analysis describing the rule's impact on small entities. Such an analysis need not be undertaken if the agency head certifies that the rule will not have a significant economic impact on a substantial number of small entities. 5 U.S.C. 605(b).

OFHEO has considered the impacts of the rule under the Regulatory Flexibility Act. The rule does not have a significant economic impact on a substantial number of small entities, because it is applicable only to the Enterprises, which are not small entities. Therefore, OFHEO's General Counsel, acting under delegated authority, has certified that the rule would not have a significant economic impact on a substantial number of small entities.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35) requires that regulations involving the collection of information receive clearance from OMB. This rule contains no such collection of information requiring OMB approval under the Paperwork Reduction Act. Consequently, no information has been submitted to OMB for review.

List of Subjects in 12 CFR Part 1780

Administrative practice and procedure, Penalties.

Accordingly, for the reasons set forth in the preamble, OFHEO is amending 12 CFR part 1780 as follows:

PART 1780—RULES OF PRACTICE AND PROCEDURE

1. Revise the heading for part 1780 to read as set forth above.

2. Revise the authority citation for part 1780 to read as follows:

Authority: 12 U.S.C. 4513, 4631–4641.

Subpart E also issued under 28 U.S.C. 2461 *note.*

Subpart E—[Amended]

3. Redesignate §§ 1780.70 and 1780.71 as §§ 1780.80 and 1780.81, respectively.

4. Add subparts A through D to part 1780 to read as follows:

Subpart A—General Rules

Subpart B—Prehearing Proceedings

Subpart C—Hearing and Posthearing Proceedings

Subpart D—Rules of Practice Before the Office of Federal Housing Enterprise Oversight

Subpart A—General Rules

§ 1780.1 Scope.

This subpart prescribes rules of practice and procedure applicable to the following adjudicatory proceedings:

(a) Cease and desist proceedings under sections 1371 and 1373, title XIII of the Housing and Community Development Act of 1992, Pub. L. No. 102–550, known as the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (1992 Act) (12 U.S.C. 4631, 4633).

(b) Civil money penalty assessment proceedings against the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation (collectively, the Enterprises), or any executive officer or director of any Enterprise under sections 1373 and 1376 of the 1992 Act (12 U.S.C. 4633, 4636).

(c) Civil money penalty assessment proceedings under section 102 of the Flood Disaster Protection Act of 1973, as amended, 42 U.S.C. 4012a.

(d) All other adjudications required by statute to be determined on the record after opportunity for hearing, except to the extent otherwise provided in the regulations specifically governing such an adjudication.

§ 1780.2 Rules of construction.

For purposes of this part—

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

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

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

§ 1780.3 Definitions.

For purposes of this part, unless explicitly stated to the contrary—

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

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

(c) *Director* means the Director of OFHEO.

(d) *Enterprise* means the Federal National Mortgage Association and any affiliate thereof and the Federal Home Loan Mortgage Corporation and any affiliate thereof.

(e) *OFHEO* means the Office of Federal Housing Enterprise Oversight of the Department of Housing and Urban Development.

(f) *Party* means OFHEO and any person named as a party in any notice.

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

(h) *Presiding officer* means an administrative law judge or any other person appointed by the Director under applicable law to conduct a hearing.

(i) *Representative of record* means an individual who is authorized to represent a person or is representing himself and who has filed a notice of appearance in accordance with § 1780.72.

(j) *Respondent* means any party other than OFHEO.

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

(l) The *1992 Act* is title XIII of the Housing and Community Development Act of 1992, Pub. L. No. 102–550, known as the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (1992 Act) (12 U.S.C. 4501–4641).

§ 1780.4 Authority of the Director.

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

§ 1780.5 Authority of the presiding officer.

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

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

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

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

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

(4) Administer oaths and affirmations;

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

(6) Take and preserve testimony under oath;

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

(8) Regulate the scope and timing of discovery;

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

(10) Examine witnesses;

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

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

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

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

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

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

§ 1780.6 Public hearings.

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

(b) *Motion for closed hearing.* Within 20 days of service of the notice of charges, any party may file with the presiding officer a motion for a private hearing and any party may file a pleading in reply to the motion. The presiding officer shall forward the motion and any reply, together with a recommended decision on the motion, to the Director, who shall make a final determination. Such motions and replies are governed by § 1780.25.

(c) *Filing documents under seal.* OFHEO's counsel of record, in his discretion, may file any document or part of a document under seal if such counsel makes a written determination that disclosure of the document would be contrary to the public interest. The presiding officer shall take all appropriate steps to preserve the confidentiality of such documents or parts thereof, including closing portions of the hearing to the public.

§ 1780.7 Good faith certification.

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

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

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

(ii) To the best of his knowledge, information and belief formed after reasonable inquiry, the filing or submission of record is well-grounded in fact and is warranted by existing law or a good faith, nonfrivolous argument for the extension, modification, or reversal of existing law; and

(iii) The filing or submission of record is not made for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

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

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

§ 1780.8 Ex parte communications.

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

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

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

(2) A communication that does not concern the merits of an adjudicatory proceeding, such as a request for status of the proceeding, does not constitute an ex parte communication.

(b) *Prohibition of ex parte communications.* From the time the notice commencing the proceeding is issued by the Director until the date that the Director issues his final decision pursuant to § 1780.55, no person referred to in paragraph (a)(1)(i) of this section shall knowingly make or cause to be made an ex parte communication. The Director, presiding officer, or a decisional employee shall not knowingly make or cause to be made an ex parte communication.

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

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

(e) *Consultations by presiding officer.* Except to the extent required for the disposition of ex parte matters as authorized by law, the presiding officer may not consult a person or party on any matter relevant to the merits of the adjudication, unless on notice and opportunity for all parties to participate.

(f) *Separation of functions.* An employee or agent engaged in the performance of investigative or prosecuting functions for OFHEO in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or Director review under § 1780.55 of the recommended decision, except as witness or counsel in public proceedings.

§ 1780.9 Filing of papers.

(a) *Filing.* Any papers required to be filed shall be addressed to the presiding officer and filed with OFHEO, 1700 G Street, NW., Fourth Floor, Washington, DC 20552.

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

(1) Personal service;

(2) Delivery to the U.S. Postal Service or to a reliable commercial delivery service for same day or overnight delivery;

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

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

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

(2) *Signature.* All papers must be dated and signed as provided in § 1780.7.

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

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

§ 1780.10 Service of papers.

(a) *By the parties.* Except as otherwise provided, a party filing papers or serving a subpoena shall serve a copy upon the representative of record for each party to the proceeding so represented and upon any party not so represented.

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

(1) Personal service;

(2) Delivery to the U.S. Postal Service or to a reliable commercial delivery service for same day or overnight delivery;

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

(4) Transmission by electronic media, only if the parties mutually agree. Any papers served by electronic media shall also concurrently be served in accordance with the requirements of § 1780.9(c).

(c) *By the Director or the presiding officer.* (1) All papers required to be served by the Director or the presiding officer upon a party who has appeared in the proceeding in accordance with § 1780.72 shall be served by any means specified in paragraph (b) of this section.

(2) If a notice of appearance has not been filed in the proceeding for a party in accordance with § 1780.72, the Director or the presiding officer shall make service upon the party by any of the following methods:

(i) By personal service;

(ii) If the person to be served is an individual, by delivery to a person of suitable age and discretion at the physical location where the individual resides or works;

(iii) If the person to be served is a corporation or other association, by delivery to an officer, managing or general agent, or to any other agent authorized by appointment or by law to receive service and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the party;

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

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

(d) *Subpoenas.* Service of a subpoena may be made:

(1) By personal service;

(2) If the person to be served is an individual, by delivery to a person of suitable age and discretion at the physical location where the individual resides or works;

(3) If the person to be served is a corporation or other association, by delivery to an officer, managing or general agent, or to any other agent authorized by appointment or by law to receive service and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the party; or

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

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

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

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

§ 1780.11 Computing time.

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

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

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

(ii) In the case of U.S. Postal Service or reliable commercial overnight delivery service, or first class, registered, or certified mail, upon

deposit in or delivery to an appropriate point of collection; or

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

(2) The effective filing and service dates specified in paragraph (b)(1) of this section may be modified by the Director or the presiding officer in the case of filing or by agreement of the parties in the case of service.

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

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

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

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

§ 1780.12 Change of time limits.

Except as otherwise provided by law, the presiding officer may, for good cause shown, extend the time limits prescribed above or prescribed by any notice or order issued in the proceedings. After the referral of the case to the Director pursuant to § 1780.53, the Director may grant extensions of the time limits for good cause shown. Extensions may be granted on the motion of a party after notice and opportunity to respond is afforded all nonmoving parties, or on the Director's or the presiding officer's own motion.

§ 1780.13 Witness fees and expenses.

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

§ 1780.14 Opportunity for informal settlement.

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

§ 1780.15 OFHEO's right to conduct examination.

Nothing contained in this part limits in any manner the right of OFHEO to conduct any examination, inspection, or visitation of any Enterprise or affiliate, or the right of OFHEO to conduct or continue any form of investigation authorized by law.

§ 1780.16 Collateral attacks on adjudicatory proceeding.

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

Subpart B—Prehearing Proceedings

§ 1780.20 Commencement of proceeding and contents of notice of charges.

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

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

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

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

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

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

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

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

§ 1780.21 Answer.

(a) *When.* Unless otherwise specified by the Director in the notice, respondent shall file an answer within 20 days of service of the notice.

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

(c) *Default.* Failure of a respondent to file an answer required by this section within the time provided constitutes a waiver of such respondent's right to appear and contest the allegations in the notice. If no timely answer is filed, OFHEO's counsel of record may file a motion for entry of an order of default. Upon a finding that no good cause has been shown for the failure to file a timely answer, the presiding officer shall file with the Director a recommended decision containing the findings and the relief sought in the notice. Any final order issued by the Director based upon a respondent's failure to answer is deemed to be an order issued upon consent.

§ 1780.22 Amended pleadings.

(a) *Amendments.* The notice or answer may be amended or supplemented at any stage of the proceeding. The respondent must answer an amended notice within the time remaining for the respondent's answer to the original notice, or within ten days after service of the amended notice, whichever period is longer,

unless the Director or presiding officer orders otherwise for good cause shown.

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

§ 1780.23 Failure to appear.

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

§ 1780.24 Consolidation and severance of actions.

(a) *Consolidation.* On the motion of any party, or on the presiding officer's own motion, the presiding officer may consolidate, for some or all purposes, any two or more proceedings, if each such proceeding involves or arises out of the same transaction, occurrence or series of transactions or occurrences, or involves at least one common respondent or a material common question of law or fact, unless such consolidation would cause unreasonable delay or injustice. In the event of consolidation under this section, appropriate adjustment to the prehearing schedule must be made to avoid unnecessary expense, inconvenience, or delay.

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

§ 1780.25 Motions.

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

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

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

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

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

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

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

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

(f) *Dispositive motions.* Dispositive motions are governed by §§ 1780.31 and 1780.32.

§ 1780.26 Discovery.

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

(b) *Relevance.* A party may obtain document discovery regarding any matter not privileged that has material relevance to the merits of the pending action. Any request to produce documents that calls for irrelevant material, that is unreasonable, oppressive, excessive in scope, unduly burdensome, or repetitive of previous requests, or that seeks to obtain privileged documents will be denied or modified. A request is unreasonable, oppressive, excessive in scope, or unduly burdensome if, among other things, it fails to include justifiable limitations on the time period covered and the geographic locations to be searched, the time provided to respond in the request is inadequate, or the request calls for copies of documents to be delivered to the requesting party and fails to include the requestor's written agreement to pay in advance for the copying, in accordance with § 1780.27.

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

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

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

§ 1780.27 Request for document discovery from parties.

(a) *General rule.* Any party may serve on any other party a request to produce for inspection any discoverable documents that are in the possession, custody, or control of the party upon whom the request is served. Copies of the request shall be served on all other parties. The request must identify the documents to be produced either by individual item or by category and must

describe each item and category with reasonable particularity. Documents must be produced as they are kept in the usual course of business or they shall be labeled and organized to correspond with the categories in the request.

(b) *Production or copying.* The request must specify a reasonable time, place and manner for production and performing any related acts. In lieu of inspecting the documents, the requesting party may specify that all or some of the responsive documents be copied and the copies delivered to the requesting party. If copying of fewer than 250 pages is requested, the party to whom the request is addressed shall bear the cost of copying and shipping charges. If a party requests more than 250 pages of copying, the requesting party shall pay for copying and shipping charges. Copying charges are at the current rate per page imposed by OFHEO at § 1710.22(b)(2) of this chapter for requests for documents filed under the Freedom of Information Act, 12 U.S.C. 552. The party to whom the request is addressed may require payment in advance before producing the documents.

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

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

(2) The additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

(d) *Motions to strike or limit discovery requests.* (1) Any party that objects to a discovery request may, within ten days of being served with such request, file a motion in accordance with the provisions of § 1780.25 to strike or otherwise limit the request. If an objection is made to only a portion of an item or category in a request, the objection shall specify that portion. Any objections not made in accordance with this paragraph and § 1780.25 are waived.

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

(e) *Privilege.* At the time other documents are produced, all documents withheld on the grounds of privilege must be reasonably identified, together with a statement of the basis for the assertion of privilege. When similar documents that are protected by deliberative process, attorney work-product, or attorney-client privilege are voluminous, these documents may be identified by category instead of by individual document. The presiding officer has discretion to determine when the identification by category is insufficient.

(f) *Motions to compel production.* (1) If a party withholds any documents as privileged or fails to comply fully with a discovery request, the requesting party may, within ten days of the assertion of privilege or of the time the failure to comply becomes known to the requesting party, file a motion in accordance with the provisions of § 1780.25 for the issuance of a subpoena compelling production.

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

(g) *Ruling on motions.* After the time for filing responses to motions pursuant to this section has expired, the presiding officer shall rule promptly on all such motions. If the presiding officer determines that a discovery request or any of its terms calls for irrelevant material, is unreasonable, oppressive, excessive in scope, unduly burdensome, or repetitive of previous requests, or seeks to obtain privileged documents, he may deny or modify the request and may issue appropriate protective orders, upon such conditions as justice may require. The pendency of a motion to strike or limit discovery or to compel production shall not be a basis for staying or continuing the proceeding, unless otherwise ordered by the presiding officer. Notwithstanding any other provision in this part, the presiding officer may not release, or order a party to produce, documents withheld on grounds of privilege if the party has stated to the presiding officer its intention to file a timely motion for interlocutory review of the presiding officer's order to produce the documents, until the motion for interlocutory review has been decided.

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

§ 1780.28 Document subpoenas to nonparties.

(a) *General rules.* (1) Any party may apply to the presiding officer for the issuance of a document discovery subpoena addressed to any person who is not a party to the proceeding. The application must contain a proposed document subpoena and a brief statement showing the general relevance and reasonableness of the scope of documents sought. The subpoenaing party shall specify a reasonable time, place, and manner for production in response to the subpoena.

(2) A party shall only apply for a document subpoena under this section within the time period during which such party could serve a discovery request under § 1780.27. The party obtaining the document subpoena is responsible for serving it on the subpoenaed person and for serving copies on all parties. Document subpoenas may be served in any State, territory, or possession of the United States, the District of Columbia, or as otherwise provided by law.

(3) The presiding officer shall issue promptly any document subpoena applied for under this section; except that, if the presiding officer determines that the application does not set forth a valid basis for the issuance of the subpoena, or that any of its terms are unreasonable, oppressive, excessive in scope, or unduly burdensome, he may refuse to issue the subpoena or may issue it in a modified form upon such conditions as may be determined by the presiding officer.

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

(2) Any motion to quash or modify a document subpoena must be filed on the same basis, including the assertion of privilege, upon which a party could object to a discovery request under § 1780.27 and during the same time limits during which such an objection could be filed.

(c) *Enforcing document subpoenas.* If a subpoenaed person fails to comply with any subpoena issued pursuant to this section or any order of the presiding officer that directs compliance with all or any portion of a document subpoena, the subpoenaing party or any other

aggrieved party may, to the extent authorized by applicable law, apply to an appropriate United States district court for an order requiring compliance with the subpoena. A party's right to seek court enforcement of a document subpoena shall in no way limit the sanctions that may be imposed by the presiding officer on a party who induces a failure to comply with subpoenas issued under this section.

§ 1780.29 Deposition of witness unavailable for hearing.

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

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

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

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

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

(2) The application must contain a proposed deposition subpoena and a brief statement of the reasons for the issuance of the subpoena. The subpoena must name the witness whose deposition is to be taken and specify the time and place for taking the deposition. A deposition subpoena may require the witness to be deposed anywhere within the United States and its possessions and territories in which that witness resides or has a regular place of employment or such other convenient place as the presiding officer shall fix.

(3) Subpoenas must be issued promptly upon request, unless the presiding officer determines that the request fails to set forth a valid basis under this section for its issuance. Before making a determination that there is no valid basis for issuing the subpoena, the presiding officer shall require a written response from the party requesting the subpoena or require attendance at a conference to determine whether there is a valid basis upon which to issue the requested subpoena.

(4) The party obtaining a deposition subpoena is responsible for serving it on the witness and for serving copies on all parties. Unless the presiding officer orders otherwise, no deposition under this section shall be taken on fewer than 10 days' notice to the witness and all parties. Deposition subpoenas may be served anywhere within the United States or its possessions or territories on any person doing business anywhere within the United States or its possessions or territories, or as otherwise permitted by law.

(b) *Objections to deposition subpoenas.* (1) The witness and any party who has not had an opportunity to oppose a deposition subpoena issued under this section may file a motion under § 1780.25 with the presiding officer to quash or modify the subpoena prior to the time for compliance specified in the subpoena, but not more than 10 days after service of the subpoena.

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

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

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

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

(d) *Enforcing subpoenas.* If a subpoenaed person fails to comply with any subpoena issued pursuant to this section or with any order of the presiding officer made upon motion under paragraph (c)(2) of this section, the subpoenaing party or other aggrieved party may, to the extent authorized by applicable law, apply to an appropriate United States district court for an order requiring compliance with the portions of the subpoena that the presiding officer has ordered enforced. A party's right to seek court enforcement of a deposition subpoena in no way limits the sanctions that may be imposed by the presiding officer on a party who fails to comply with or induces a failure to comply with a subpoena issued under this section.

§ 1780.30 Interlocutory review.

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

(b) *Scope of review.* The Director may exercise interlocutory review of a ruling of the presiding officer if the Director finds that—

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

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

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

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

(c) *Procedure.* Any motion for interlocutory review shall be filed by a party with the presiding officer within ten days of his ruling. Upon the expiration of the time for filing all responses, the presiding officer shall refer the matter to the Director for final disposition. In referring the matter to the Director, the presiding officer may indicate agreement or disagreement with the asserted grounds for interlocutory review of the ruling in question.

(d) *Suspension of proceeding.* Neither a request for interlocutory review nor any disposition of such a request by the Director under this section suspends or stays the proceeding unless otherwise ordered by the presiding officer or the Director.

§ 1780.31 Summary disposition.

(a) *In general.* The presiding officer shall recommend that the Director issue a final order granting a motion for summary disposition if the undisputed pleaded facts, admissions, affidavits, stipulations, documentary evidence, matters as to which official notice may be taken and any other evidentiary materials properly submitted in

connection with a motion for summary disposition show that—

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

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

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

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

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

(d) *Decision on motion.* Following receipt of a motion for summary disposition and all responses thereto, the presiding officer shall determine whether the movant is entitled to summary disposition. If the presiding officer determines that summary disposition is warranted, the presiding officer shall submit a recommended decision to that effect to the Director, under § 1780.53. If the presiding officer finds that the moving party is not entitled to summary disposition, the presiding officer shall make a ruling denying the motion.

§ 1780.32 Partial summary disposition.

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

§ 1780.33 Scheduling and prehearing conferences.

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

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

(1) Simplification and clarification of the issues;

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

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

(4) Limitation of the number of witnesses;

(5) Summary disposition of any or all issues;

(6) Resolution of discovery issues or disputes;

(7) Amendments to pleadings; and

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

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

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

§ 1780.34 Prehearing submissions.

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

(1) Prehearing statement;

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

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

(4) Stipulations of fact, if any.

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

§ 1780.35 Hearing subpoenas.

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

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

(3) The presiding officer shall promptly issue any hearing subpoena applied for under this section; except that, if the presiding officer determines that the application does not set forth a valid basis for the issuance of the subpoena, or that any of its terms are

unreasonable, oppressive, excessive in scope, or unduly burdensome, he may refuse to issue the subpoena or may issue the subpoena in a modified form upon any conditions consistent with this subpart. Upon issuance by the presiding officer, the party making the application shall serve the subpoena on the person named in the subpoena and on each party.

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

(2) Any motion to quash or modify a hearing subpoena must be filed prior to the time specified in the subpoena for compliance, but no more than 10 days after the date of service of the subpoena upon the movant.

(c) *Enforcing subpoenas.* If a subpoenaed person fails to comply with any subpoena issued pursuant to this section or any order of the presiding officer that directs compliance with all or any portion of a hearing subpoena, the subpoenaing party or any other aggrieved party may seek enforcement of the subpoena pursuant to § 1780.28(c). A party's right to seek court enforcement of a hearing subpoena shall in no way limit the sanctions that may be imposed by the presiding officer on a party who induces a failure to comply with subpoenas issued under this section.

Subpart C—Hearing and Posthearing Proceedings

§ 1780.50 Conduct of hearings.

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

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

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

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

(b) *Transcript.* The hearing shall be recorded and transcribed. The transcript shall be made available to any party upon payment of the cost thereof. The presiding officer shall have authority to order the record corrected, either upon motion to correct, upon stipulation of the parties, or following notice to the parties upon the presiding officer's own motion.

§ 1780.51 Evidence.

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

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

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

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

(2) All matters officially noticed by the presiding officer or the Director shall appear on the record.

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

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

(2) Subject to the requirements of paragraph (a)(1) of this section, any document, including a report of examination, oversight activity, inspection, or visitation, prepared by OFHEO or by another Federal or State financial institutions regulatory agency is admissible either with or without a sponsoring witness.

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

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

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

(3) The presiding officer shall retain rejected exhibits, adequately marked for identification, for the record and transmit such exhibits to the Director.

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

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

(f) *Depositions of unavailable witnesses.* (1) If a witness is unavailable to testify at a hearing and that witness has testified in a deposition in accordance with § 1780.29, a party may offer as evidence all or any part of the transcript of the deposition, including deposition exhibits, if any.

(2) Such deposition transcript is admissible to the same extent that testimony would have been admissible had that person testified at the hearing, provided that if a witness refused to answer proper questions during the

depositions, the presiding officer may, on that basis, limit the admissibility of the deposition in any manner that justice requires.

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

§ 1780.52 Post hearing filings.

(a) *Proposed findings and conclusions and supporting briefs.* (1) Using the same method of service for each party, the presiding officer shall serve notice upon each party that the certified transcript, together with all hearing exhibits and exhibits introduced but not admitted into evidence at the hearing, has been filed. Any party may file with the presiding officer proposed findings of fact, proposed conclusions of law and a proposed order within 30 days after the parties have received notice that the transcript has been filed with the presiding officer, unless otherwise ordered by the presiding officer.

(2) Proposed findings and conclusions must be supported by citation to any relevant authorities and by page references to any relevant portions of the record. A posthearing brief may be filed in support of proposed findings and conclusions, either as part of the same document or in a separate document.

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

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

(c) *Simultaneous filing required.* The presiding officer shall not order the filing by any party of any brief or reply brief supporting proposed findings and conclusions in advance of the other party's filing of its brief.

§ 1780.53 Recommended decision and filing of record.

(a) *Filing of recommended decision and record.* Within 45 days after expiration of the time allowed for filing reply briefs under § 1780.52(b), the presiding officer shall file with and certify to the Director, for decision, the record of the proceeding. The record must include the presiding officer's recommended decision, recommended findings of fact and conclusions of law, and proposed order; all prehearing and hearing transcripts, exhibits and rulings; and the motions, briefs, memoranda and other supporting papers filed in connection with the hearing. The presiding officer shall serve upon each party the recommended decision, recommended findings and conclusions, and proposed order.

(b) *Filing of index.* At the same time the presiding officer files with and certifies to the Director, for final determination, the record of the proceeding, the presiding officer shall furnish to the Director a certified index of the entire record of the proceeding. The certified index shall include, at a minimum, an entry for each paper, document or motion filed with the presiding officer in the proceeding, the date of the filing, and the identity of the filer. The certified index shall also include an exhibit index containing, at a minimum, an entry consisting of exhibit number and title or description for: Each exhibit introduced and admitted into evidence at the hearing; each exhibit introduced but not admitted into evidence at the hearing; each exhibit introduced and admitted into evidence after the completion of the hearing; and each exhibit introduced but not admitted into evidence after the completion of the hearing.

§ 1780.54 Exceptions to recommended decision.

(a) *Filing exceptions.* Within 30 days after service of the recommended decision, recommended findings and conclusions, and proposed order under § 1780.53, a party may file with the Director written exceptions to the presiding officer's recommended decision, recommended findings and conclusions, or proposed order; to the admission or exclusion of evidence; or to the failure of the presiding officer to make a ruling proposed by a party. A supporting brief may be filed at the time the exceptions are filed, either as part of the same document or in a separate document.

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

(2) No exception need be considered by the Director if the party taking exception had an opportunity to raise the same objection, issue, or argument before the presiding officer and failed to do so.

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

(2) All exceptions and briefs in support of exceptions must set forth page or paragraph references to the specific parts of the presiding officer's recommendations to which exception is taken, the page or paragraph references to those portions of the record relied upon to support each exception and the legal authority relied upon to support each exception. Exceptions and briefs in support shall not exceed a total of 30 pages, except by leave of the Director on motion.

(3) One reply brief may be submitted by each party within ten days of service of exceptions and briefs in support of exceptions. Reply briefs shall not exceed 15 pages, except by leave of the Director on motion.

§ 1780.55 Review by Director.

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

(b) *Oral argument before the Director.* Upon the initiative of the Director or on the written request of any party filed with the Director within the time for filing exceptions under § 1780.54, the Director may order and hear oral argument on the recommended findings, conclusions, decision and order of the presiding officer. A written request by a party must show good cause for oral argument and state reasons why arguments cannot be presented adequately in writing. A denial of a request for oral argument may be set forth in the Director's final decision. Oral argument before the Director must be transcribed.

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

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

to the proceeding and upon other persons required by statute.

§ 1780.56 Exhaustion of administrative remedies.

To exhaust administrative remedies as to any issue on which a party disagrees with the presiding officer's recommendations, a party must file exceptions with the Director under § 1780.54. A party must exhaust administrative remedies as a precondition to seeking judicial review of any decision issued under this subpart.

§ 1780.57 Stays pending judicial review.

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

Subpart D—Rules of Practice Before the Office of Federal Housing Enterprise Oversight

§ 1780.70 Scope.

This subpart contains rules governing practice by parties or their representatives before OFHEO.

This subpart addresses the imposition of sanctions by the presiding officer or the Director against parties or their representatives in an adjudicatory proceeding under this part. This subpart also covers other disciplinary sanctions—censure, suspension or disbarment—against individuals who appear before OFHEO in a representational capacity either in an adjudicatory proceeding under this part or in any other matters connected with presentations to OFHEO relating to a client's or other principal's rights, privileges, or liabilities. This representation includes, but is not limited to, the practice of attorneys and accountants. Employees of OFHEO are not subject to disciplinary proceedings under this subpart.

§ 1780.71 Definitions.

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

§ 1780.72 Appearance and practice in adjudicatory proceedings.

(a) *Appearance before OFHEO or a presiding officer.* (1) *By attorneys.* A party may be represented by an attorney who is a member in good standing of the bar of the highest court of any State, commonwealth, possession, territory of the United States, or the District of Columbia and who is not currently suspended or disbarred from practice before OFHEO.

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

(b) *Notice of appearance.* Any person appearing in a representative capacity on behalf of a party, including OFHEO, shall execute and file a notice of appearance with the presiding officer at or before the time such person submits papers or otherwise appears on behalf of a party in the adjudicatory proceeding. Such notice of appearance shall include a written declaration that the individual is currently qualified as provided in paragraphs (a)(1) or (a)(2) of this section and is authorized to represent the particular party. By filing a notice of appearance on behalf of a party in an adjudicatory proceeding, the representative thereby agrees and represents that he is authorized to accept service on behalf of the represented party and that, in the event of withdrawal from representation, he or she will, if required by the presiding officer, continue to accept service until a new representative has filed a notice of appearance or until the represented party indicates that he or she will proceed on a pro se basis. Unless the representative filing the notice is an attorney, the notice of appearance shall also be executed by the person represented or, if the person is not an individual, by the chief executive officer, or duly authorized officer of that person.

§ 1780.73 Conflicts of interest.

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

(b) *Certification and waiver.* If any person appearing as counsel or other representative represents two or more parties to an adjudicatory proceeding or also represents a nonparty on a matter relevant to an issue in the proceeding, that representative must certify in writing at the time of filing the notice of appearance required by § 1780.72—

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

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

§ 1780.74 Sanctions.

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

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

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

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

(4) Has delayed the proceeding unduly.

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

(1) Issuing an order against a party;

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

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

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

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

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

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

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

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

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

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

§ 1780.75 Censure, suspension, disbarment and reinstatement.

(a) *Discretionary censure, suspension and disbarment.* (1) The Director may censure any individual who practices or attempts to practice before OFHEO or suspend or revoke the privilege to appear or practice before OFHEO of such individual if, after notice of and opportunity for hearing in the matter, that individual is found by the Director—

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

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

(iii) To have caused unfair and material injury or prejudice to another party, such as prejudicial delay or unnecessary expenses including attorney's fees;

(iv) To have engaged in, or aided and abetted, a material and knowing violation of the 1992 Act, the Federal Home Loan Mortgage Corporation Act, the Federal National Mortgage Association Charter Act or the rules or regulations issued under those statutes or any other law or regulation governing Enterprise operations;

(v) To have engaged in contemptuous conduct before OFHEO;

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

(vii) Within the last 10 years, to have been convicted of an offense involving moral turpitude, dishonesty or breach of trust, if the conviction has not been reversed on appeal. A conviction within the meaning of this paragraph shall be deemed to have occurred when the convicting court enters its judgment or order, regardless of whether an appeal is pending or could be taken and includes a judgment or an order on a plea of *nolo contendere* or on consent, regardless of whether a violation is admitted in the consent.

(2) Suspension or revocation on the grounds set forth in paragraphs (a)(1)(ii), (iii), (iv), (v), (vi) and (vii) of this section shall only be ordered upon a further finding that the individual's conduct or character was sufficiently egregious as to justify suspension or revocation. Suspension or disbarment under this paragraph shall continue until the applicant has been reinstated by the Director for good cause shown or until, in the case of a suspension, the suspension period has expired.

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

(b) *Mandatory suspension and disbarment.* (1) Any counsel who has been and remains suspended or disbarred by a court of the United States or of any State, commonwealth, possession, territory of the United States or the District of Columbia; any accountant or other licensed expert whose license to practice has been revoked in any State, commonwealth, possession, territory of the United States or the District of Columbia; any person who has been and remains suspended or barred from practice before the Department of Housing and Urban Development, the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Office of Thrift Supervision, the Federal Deposit Insurance Corporation, the National Credit Union Administration, the Federal Housing Finance Board, the Farm Credit Administration, the Securities and Exchange Commission, or the Commodity Futures Trading Commission is also suspended automatically from appearing or practicing before OFHEO. A disbarment or suspension within the meaning of this paragraph shall be deemed to have occurred when the disbarring or suspending agency or tribunal enters its judgment or order, regardless of whether an appeal is pending or could be taken and regardless of whether a violation is admitted in the consent.

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

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

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

together with any related opinion or statement of the court involved.

(d) *Reinstatement.* (1) Unless otherwise ordered by the Director, an application for reinstatement for good cause may be made in writing by a person suspended or disbarred under paragraph (a)(1) of this section at any time more than three years after the effective date of the suspension or disbarment and, thereafter, at any time more than one year after the person's most recent application for reinstatement. An applicant for reinstatement under this paragraph (d)(1) may, in the Director's sole discretion, be afforded a hearing.

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

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

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

(f) *Hearings under this section.* Hearings conducted under this section shall be conducted in substantially the same manner as other hearings under this part, provided that in proceedings to terminate an existing OFHEO suspension or disbarment order, the person seeking the termination of the order shall bear the burden of going forward with an application and with proof and that the Director may, in the Director's sole discretion, direct that any proceeding to terminate an existing suspension or disbarment by OFHEO be limited to written submissions. All hearings held under this section shall be closed to the public unless the Director, on the Director's own motion or upon the request of a party, otherwise directs.

Dated: December 21, 1999.

Armando Falcon, Jr.,

Director, Office of Federal Housing Enterprise Oversight.

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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 98–NM–331–AD; Amendment 39–11454; AD 99–25–11]

RIN 2120–AA64

Airworthiness Directives; British Aerospace Model BAe 146 and Avro 146–RJ Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD), applicable to all British Aerospace Model BAe 146 series airplanes and certain British Aerospace Model Avro 146–RJ series airplanes, that requires repetitive eddy current inspections to detect fatigue cracking along the face of the retraction attachment boss in the nose landing gear sidewall; and corrective action, if necessary. This amendment is prompted by issuance of mandatory continuing airworthiness information by a foreign civil aviation authority. The actions specified by this AD are intended to detect and correct fatigue cracking along the face of the retraction attachment boss in the nose landing gear sidewall, which could result in premature extension of the nose landing gear or depressurization of the airplane.

DATES: Effective February 1, 2000.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of February 1, 2000.

ADDRESSES: The service information referenced in this AD may be obtained from British Aerospace Regional Aircraft American Support, 13850 Mclearen Road, Herndon, Virginia 20171. This information may be examined at the Federal Aviation Administration (FAA), Transport Airplane Directorate, Rules Docket, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the **Federal Register**, 800 North Capitol Street, NW., suite 700, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Norman B. Martenson, Manager, International Branch, ANM–116, FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 227–2110; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION: A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an airworthiness directive (AD) that is applicable to all British Aerospace Model BAe 146 series airplanes and certain British Aerospace Model Avro 146–RJ series airplanes was published in the **Federal Register** on June 28, 1999 (64 FR 34586). That action proposed to require repetitive eddy current inspections to detect fatigue cracking along the face of the retraction attachment boss in the nose landing gear sidewall; and corrective action, if necessary.

Comments

Interested persons have been afforded an opportunity to participate in the making of this amendment. Due consideration has been given to the comments received.

Request To Change the Statement of Unsafe Condition

One commenter states that the description of the unsafe condition, as stated in the notice of proposed rulemaking (NPRM), is incorrect. The commenter requests that, instead of stating ''such fatigue cracking, if not corrected, could result in failure of the nose landing gear during take-off and landing,'' the consequence of such fatigue cracking should be stated as ''premature extension of the nose landing gear and/or * * * a depressurization of the aircraft.''

The FAA concurs with the commenter's request. Therefore, the statement of unsafe condition has been revised in the summary and the body of the final rule to correctly state the unsafe condition.

Request To Allow Contact of Manufacturer if Cracks Are Found

One commenter requests that the final rule be revised to state, ''If cracks are found, before further flight[,] either[;]