DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

12 CFR Part 19

[Docket No. 95–11]

RIN 1557–AB43

FEDERAL RESERVE SYSTEM

12 CFR Part 263

[Docket No. R–0878]

RIN 7100–AB23

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 308

RIN 3064–AB49

DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

12 CFR Part 509

[Docket No. 95–116]

RIN 1550–AA79

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Part 747

Uniform Rules of Practice and Procedure

AGENCIES: Office of the Comptroller of the Currency, Treasury; Board of Governors of the Federal Reserve System; Federal Deposit Insurance Corporation; Office of Thrift Supervision, Treasury; and National Credit Union Administration.

ACTION: Joint notice of proposed rulemaking.

SUMMARY: The Comptroller of the Currency (OCC), Board of Governors of the Federal Reserve System (Board of Governors), Federal Deposit Insurance Corporation (FDIC), Office of Thrift Supervision (OTS), and National Credit Union Administration (NCUA) are proposing changes to the Uniform Rules of Practice and Procedure for Administrative Hearings (Uniform Rules) and to their agency specific rules of administrative practice and procedure (Local Rules).

The proposal is intended to clarify certain provisions and to increase the efficiency and fairness of administrative hearings.

DATES: Comments must be received by August 22, 1995.

ADDRESSES: Comments should be directed to: *OCC:* Communications Division, Office of the Comptroller of the Currency, 250 E Street SW., Washington, DC 20219, Attention: Docket No. 95–11. Comments may be inspected and photocopied at the same location.

Board of Governors: Mr. William Wiles, Secretary of the Board, Board of Governors of the Federal Reserve System, 20th and Constitution Avenue NW., Washington, DC 20551, Attention: Docket No. R–0878 or delivered to Room B–2222, Eccles Building, between 8:45 a.m. and 5:15 p.m. Comments may be inspected in Room MP–500 of the Martin Building between 9 a.m. and 5 p.m. weekdays, except as provided in 12 CFR 261.8 of the Board of Governor's rules regarding availability of information.

FDIC: Robert Feldman, Acting Executive Secretary, Attention: Room F–402, Federal Deposit Insurance Corporation, 550 17th, Street NW., Washington, DC 20429. Comments may be delivered to Room F–400, 1776 F Street NW., Washington, DC 20429, on business days between 8:30 a.m. and 5 p.m.; sent by facsimile transmission to FAX number 202–898–3838; or sent by Internet E-mail to Comments@Fdic.gov. Comments will be available for inspection and photocopying in Room 7118, 550 17th Street NW., Washington, DC between 8:30 a.m. and 5 p.m. on business days.

OTS: Chief, Dissemination Branch, Records Management and Information Policy, Office of Thrift Supervision, 1700 G Street NW., Washington, DC 20552, Attention Docket No. 95–116. These submissions may be hand delivered to 1700 G Street NW., from 9 a.m. to 5 p.m. on business days; they may be sent by facsimile transmission to FAX number 202–906–7755. Comments will be available for inspection at 1700 G Street NW., from 1 p.m. until 4 p.m. on business days.

NCUA: Becky Baker, Secretary of the Board, National Credit Union Administration, 1775 Duke Street, Alexandria, VA, 22314–3428. Comments will be available for inspection at the same location.

FOR FURTHER INFORMATION CONTACT:

OCC: Daniel Stipano, Director, Enforcement and Compliance Division 202–874–4800, or Daniel Cooke, Attorney, Legislative and Regulatory Activities Division 202–874–5090.

Board of Governors: Douglas Jordan, Senior Attorney, Legal Division 202–452–3787, Ann Marie Kohlligian, Senior Counsel, Division of Banking Supervision and Regulation 202–452–3528, or Katherine Wheatley, Assistant General Counsel 202–452–3779. For the hearing impaired *only*, Telecommunication Device for the Deaf (TDD), Dorothea Thompson 202–452–3544.

FDIC: Nancy Alper, Counsel, Legal Division 202–898–3720 or Andrea Winkler, Counsel, Legal Division 202–898–3764.

OTS: Eliot Goldstein, Counsel, Division of Enforcement 202–906–7162; or Karen Osterloh, Counsel, Banking and Finance, Regulations and Legislation Division, Chief Counsel's Office 202–906–6639.

NCUA: Steven Widerman, Attorney, Office of General Counsel 703–518–6557.

SUPPLEMENTARY INFORMATION:

A. Background

Section 916 of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA), Pub. L. 101–73, 103 Stat. 183 (1989), required the OCC, Board of Governors, FDIC, OTS, and NCUA (agencies) to develop uniform rules and procedures for administrative hearings. The agencies each adopted final Uniform Rules in August, 1991.[1] Based on their experience since then, the agencies have identified sections of the Uniform Rules that should be modified. Amendments to those provisions are proposed today.

Each agency also has local rules of administrative adjudication (Local Rules) that are distinct from the Uniform Rules and unique to the individual agency. The OCC and OTS propose to amend certain sections of their Local Rules that they believe should be improved and clarified. The FDIC, Board of Governors, and NCUA are not proposing to amend their Local Rules at this time.

B. Uniform Rules

While most elements of the proposal are technical modifications or clarifications, two of the proposed changes are more substantive: (1) Proposed § ____.24, which clarifies the scope of document discovery; and (2) proposed § ____.35, which prohibits multiple counsel from examining a single witness.

The agencies invite comments on all aspects of this joint proposed rule.

[1] The agencies issued a joint notice of proposed rulemaking on Monday, June 17, 1991 (56 FR 27790). The agencies promulgated their final rules on the following dates: OCC on August 9, 1991 (56 FR 38024); Board of Governors on August 9, 1991 (56 FR 38052); FDIC on August 9, 1991 (56 FR 37975); OTS on August 12, 1991 (56 FR 38317); and NCUA on August 8, 1991 (56 FR 37767).

C. Local Rules

The OCC's and OTS's proposed changes to their Local Rules are discussed in separate section-by-section analyses. Comments on Local Rules should be sent only to the appropriate agency.

D. Section-by-Section Summary and Discussion of Amendments to the Uniform Rules

Section ____.1 Scope.

The proposal adds two statutory provisions to the list of civil money penalty provisions to which the Uniform Rules apply. These two provisions were enacted by the Riegle Community Development and Regulatory Improvement Act of 1994 (CDRI), Pub. L. 103–325, 108 Stat. 2160.

The first provision, CDRI section 406, amends the Bank Secrecy Act (BSA) (31 U.S.C. 5321) to require the Secretary of the Treasury to delegate authority to the Federal banking agencies (as defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813)) to impose civil money penalties for BSA violations.

The second, CDRI section 525, amends section 102 the Flood Disaster Protection Act of 1973 (FDPA) (42 U.S.C. 4012a) to give each ''Federal entity for lending regulation'' authority to assess civil money penalties under the FDPA. Under the FDPA, the term ''Federal entity for lending regulation'' includes the agencies and the Farm Credit Administration.

Section ____.6 Appearance and practice in adjudicatory proceedings.

The proposal seeks to ensure that counsel is always available to accept service of process for a party even if that counsel withdraws from representation. The proposed change clarifies that counsel who withdraws after filing a notice of appearance on behalf of a party may be required by the administrative law judge (ALJ) to accept service of process for that party until a new counsel has filed a notice of appearance or until the party indicates that he or she will proceed on a *pro se* basis.

Section ____.8 Conflicts of interest.

Under the current Uniform Rules, counsel representing two or more parties to a proceeding or a party and an institution to which notice of the proceeding must be given must certify that: (1) Counsel has discussed the possibility of conflicts of interest with each party or institution; and (2) the parties and institution have advised counsel that there are no material or anticipated conflicts of interest and have waived the right to assert conflicts of interest. The proposal makes two changes to this provision.

First, the proposal expands the situations in which counsel must obtain a waiver and provide certification. The current Uniform Rules recognize the potential for conflicts for non-party institutions ''to which notice of the proceedings must be given.'' Notice must be given to a non-party institution only in very limited circumstances.[2]

Thus, many situations involving institutions as to which a genuine potential for conflict exist are excluded from the certification and waiver process. The proposal addresses these situations by requiring counsel to obtain a waiver from, and provide certification for, any non-party that counsel represents on a matter relevant to an issue in the proceeding.

The agencies do not intend the proposal to supersede any state rules of professional responsibility that impose more stringent ethical standards.

Second, the proposal removes current § ____.8(b)(2), which requires that counsel certify that each party or institution has advised counsel that there are no material conflicts. The current Uniform Rules require counsel to certify both that each client has asserted that there are no conflicts and that each client has waived any conflict. The agencies believe that the provision that requires counsel to certify that each client has asserted that there are no material conflicts is superfluous because the responsibility for identifying potential conflicts resides with counsel not with counsel's client.

Section ____.11 Service of papers.

The current Uniform Rules permit parties, agency heads, and ALJs to serve a subpoena by delivering the subpoena to a person of suitable age and discretion at the subpoenaed person's residence and by any other manner reasonably calculated to give actual notice. The current Uniform Rules do not explicitly permit service to be made by delivery to the person's place of work.

The proposal expressly permits service by delivery to a person's place of work. The proposal adds the words ''or place of work'' after the word ''residence'' each time it appears, thereby clarifying that delivery to a person of suitable age and discretion at the subpoenaed person's place of work is reasonably calculated to give actual notice of service. The agencies believe that permitting service at a person's place of work is a more practical and efficient means of serving the individual.

Section ____.12 Construction of time limits.

Under the current Uniform Rules, intermediate Saturdays, Sundays, and Federal holidays are not counted in the computation of time when the time period within which a party must perform an act is ten days or less. The current Uniform Rules also allow additional time when a party serves papers by mail, delivery service, or electronic media transmission. There has, however, been some confusion regarding whether this additional time counts for purposes of determining whether the time period within which a party must perform an act comes within the ten-day threshold.

The proposal clarifies that the additional time allotted for responding to papers served by mail, delivery service, or electronic media transmission under § ____.12(c) is not counted in determining whether an act is required to be performed within ten days.

In some instances, parties have also been unsure whether they must count Saturdays, Sundays, and holidays in the calculation of the additional time allotted for responding to papers served by mail, delivery service, or electronic media transmission under § ____.12(c). The proposal clarifies that the additional time in § ____.12(c) is in calendar days and, therefore, a party must count Saturdays, Sundays, and holidays.

Section ____.20 Amended pleadings.

Under the current Uniform Rules, a party is required to obtain leave of the ALJ to amend a notice or answer. In addition, if a party objects to the admission of certain evidence on the ground that the evidence is not within the issues raised in the notice or answer, the party seeking admission of the evidence must obtain leave of the ALJ to amend the notice or answer. The agencies believe that a motion to amend a notice or answer unnecessarily delays the administrative proceeding because, while these motions are generally granted, the opposing party takes time to respond to the motion and the ALJ takes time to rule on the motion.

The proposal permits a party to amend its pleadings without leave of the ALJ. It also permits the ALJ to admit

[2] *See, e.g.*, 12 U.S.C. 1818(e) (requiring the appropriate Federal banking agency to serve a copy of a suspension order when an institution-affiliated party is suspended for engaging in unsafe and unsound practices, for a breach of fiduciary duty, or by reason of violation of a law or regulation, cease-and-desist order, imposed condition, or written agreement).

evidence over the objection of counsel that the evidence does not fall directly within the scope of the issues raised by a notice or answer. If the ALJ determines that the evidence is likely to assist in adjudicating the merits of the action and does not unfairly prejudice the opposing party's action or defense, the ALJ may admit the evidence.

The proposal is intended to expedite administrative hearings by precluding the need to amend notices and answers and to eliminate unnecessary delay. The agencies do not believe the proposal represents a significant change in practice because the ALJs, under the current Uniform Rules, grant leave to amend a notice or answer freely.

Section ____.24 Scope of document discovery.

The proposal clarifies the prohibition on the use of interrogatories in discovery and focuses the scope of document discovery.

The current Uniform Rules are silent on the use of interrogatories. The proposal expressly prohibits parties from using interrogatories. The agencies believe that discovery tools other than interrogatories are more efficient and less burdensome.

In the past, certain agencies have been burdened by overly broad document discovery requests. The proposal is intended to focus document discovery requests so that they are not unreasonable, oppressive, excessive in scope, or unduly burdensome to any of the parties.

The proposal continues to limit document discovery to documents that have material relevance. However, the proposal clarifies that a request should be considered 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 § ____.25. Under the proposal, the scope of permissible document discovery is not as broad as that allowed under Federal Rule of Civil Procedure 26(b) (28 U.S.C. app.). Historically, given the specialized nature of enforcement proceedings in regulated industries, discovery in administrative proceedings has not been as expansive as it is in civil litigation.

The Uniform Rules do not address how parties should obtain materials that are publicly available from the agencies. Materials that are either publicly distributed by the agencies on request, available for public inspection and copying at the agencies, or available by request under the Freedom of Information Act (5 U.S.C. 552) (FOIA) should be obtained pursuant to those procedures before resorting to discovery mechanisms under the Uniform Rules.

Section ____.25 Request for document discovery from parties.

The proposal revises the document discovery provisions to reduce unnecessary burden and to expedite the discovery process.

The current Uniform Rules require a party to respond to document requests: (1) By producing documents as they are kept in the course of business; and (2) by organizing them to correspond with the categories in the document request. The agencies believe that these two requirements may sometimes conflict. Proposed paragraph (a) resolves this potential for conflict by permitting a party either to produce documents as they are kept or to organize them to correspond to the categories in the request.

Proposed paragraph (b) permits parties to require payment in advance for the costs of copying and shipping requested documents. The current Uniform Rules do not contain a like authorization. The agencies, on occasion, have faced difficulties in obtaining payments after having produced copies of requested documents.

Proposed paragraph (e) reduces the logistical burdens placed on the parties by voluminous document requests. Under the current rule, § ____.25(e) could be read to require a party to produce a privilege list that identifies each individual document withheld on a claim of privilege. Under the proposal, when similar documents that are protected by the deliberative process, attorney-client, or attorney-work-product privilege are voluminous, a party may identify them by category. However, the agencies intend the ALJ to retain discretion to determine when it is not appropriate for a party to identify documents by category or when a party's category description lacks adequate detail.

Proposed paragraph (g) clarifies that documents subject to an assertion of privilege may not be released or disclosed to the requesting party until the issue of privilege has been finally resolved. The current Uniform Rules are silent on this matter, with the result that, in past proceedings, some documents have been released prior to the ultimate determination of whether the documents are privileged. Specifically, the proposal amends the current Uniform Rules by providing that, even when an ALJ rules that the documents in question are not privileged, the documents cannot be released to the requesting party if the party asserting the privilege has stated an intention to file a motion for interlocutory review of that ruling. In such a case, the documents in question cannot be released until the motion for interlocutory review is decided.

The proposal also makes a technical change that is intended to conform proposed § ____.25(g) with proposed § ____.24(b). Proposed § ____.25(g) uses the same language as proposed § ____.24(b) to describe the standard for denial or modification of discovery requests, e.g., ''[a request that] calls for irrelevant material, is unreasonable, oppressive, excessive in scope, unduly burdensome, repetitive of previous requests, or seeks to obtain privileged documents.'' The agencies intend this change to make clear that there is no difference in the standards prescribed by § ____.24 and § ____.25.

The proposal makes an additional technical change to § ____.25 that is intended to identify more precisely motions to stop document discovery. The current Uniform Rules use the phrase ''motion to revoke'' discovery. The proposal changes the word ''revoke'' to ''strike'' because the agencies believe it more accurately describes a motion to stop document discovery.

Section ____.27 Deposition of witness unavailable for hearing.

Under the current Uniform Rules, some confusion has arisen as to whether service of a deposition subpoena on a witness who is unavailable for a hearing is satisfied by service on an authorized representative of the witness. The current Uniform Rules do not specifically address this issue. Under the proposal, a party may serve a deposition subpoena on a witness who is unavailable by serving the subpoena on the witness's authorized representative.

Section ____.33 Public hearings.

Under the current Uniform Rules, it is unclear whether a party must file a motion for a private hearing with the agency head or the ALJ. The Uniform Rules provide that a party requesting a private hearing may file with the agency head, but also states that public hearing requests are governed by § ____.23, which requires parties to file motions with the ALJ.

The proposal revises this section to specify that a party must file a motion for a private hearing with the agency head and not the ALJ, since the agency has sole discretion to rule on a motion for a private hearing. The proposal also clarifies that a party must serve the ALJ with a copy of a motion for a private hearing.

Section ____.34 Hearing subpoenas.

The proposal revises the treatment of hearing subpoenas to: (1) Ensure that each party receives a copy of each subpoena issued and each motion to quash a subpoena; and (2) give each party the ability to move to quash any hearing subpoena.

The current Uniform Rules do not specifically require that a party inform all other parties when a subpoena to a non-party is issued. The proposal requires that, after a hearing subpoena is issued by the ALJ, the party that applied for the subpoena must serve a copy of it on each party. Any party may move to quash any hearing subpoena and must serve the motion on each other party. The changes to this section are intended to keep all parties informed of the issuance of a hearing subpoena and to permit any party to move to quash any hearing subpoena once it has been issued.

Section ____.35 Conduct of hearings.

The proposal limits the number of counsel permitted to examine a witness, clarifies that hearing transcripts may be obtained only from the court reporter, and clarifies that the same method of service must be used to notify each party that a transcript has been filed. The current Uniform Rules are silent on these issues.

The agencies have found that witnesses are sometimes subject to cross-examination by multiple counsel representing a single party. When more than one attorney conducts a cross-examination, the cross-examination often becomes repetitive and unreasonably stressful and intimidating for the witness.

The proposal conforms with the local rules of many courts by permitting only one counsel for each party to examine a witness, except in the case of extensive direct examination. In the case of extensive direct examination, the ALJ may permit more than one counsel for the party presenting the witness to conduct the examination. In addition, a party may have a different counsel conduct the direct and re-direct examination of a witness or the cross and re-cross examination of a witness.

The proposal also clarifies that parties may obtain copies of a hearing transcript only from the reporter. This change ensures that each party bears the cost of its own copy of the transcript.

Finally, as discussed below, the proposal removes certain requirements in § ____.35(b) and inserts them at proposed § ____.37(a).

Section ____.37 Post hearing filings.

The proposal changes the title of this section from ''Proposed findings and conclusions'' to ''Post hearing filings'' in order to describe more accurately the content of the section.

Under the current Uniform Rules, § ____.35(b) requires the ALJ to serve each party with notice that the certified transcript of the hearing, together with all hearing exhibits and exhibits introduced but not admitted into evidence at the hearing, has been filed. The proposal moves this provision to proposed § ____.37(a). The agencies believe that the provision more directly relates to § ____.37(a) because § ____.37 uses the ALJ's notice as the start date for a time limit. Under § ____.37, the party is permitted 30 days, after the party is served with the ALJ's notice, to file proposed findings of fact, proposed conclusions of law, and a proposed order.

In addition, under the current Uniform Rules, there is no express requirement that notice of the ALJ's filing of the certified transcript be served on each party by the same method. The proposal requires that the same method of service be used for each party to serve notice that a transcript, together with all hearing exhibits and exhibits introduced but not admitted into evidence at the hearing, has been filed. This change eliminates the inequities that can arise when different methods of service are used.

The current Uniform Rules suggest, but do not explicitly state, that the ALJ may order a longer period of time for parties to file proposed findings of fact and conclusions of law. It provides that parties must file within 30 days ''unless otherwise ordered by the administrative law judge.''

The proposal clearly states that the ALJ may, when appropriate, permit parties more than the allotted 30 days to file proposed findings of fact, proposed conclusions of law, and a proposed order.

Section ____.38 Recommended decision and filing of record.

Under the current Uniform Rules, when the ALJ files the record with the agency head, an index of the record is not always provided to the agency head. As a result, if a document is missing from the record, the agency head has no means of knowing that the document exists. The proposal requires that an index be filed with the record. The proposal also reorganizes this section to improve its clarity.

E. Section-by-Section Summary and Discussion of Proposed Amendments to the Local Rules of Each Agency

1. Proposed Amendments to the OCC Local Rules

Section 19.100 Filing Documents.

The proposal changes the heading of this section from ''Scope'' to ''Filing documents'', which more accurately describes the content of the section.

The proposal clarifies that ALJs will file the administrative record of a removal or prohibition case with the Board of Governors. The current OCC Local Rules state that all materials should be filed with the Hearing Clerk of the OCC and provide for no exception for removal and prohibition cases. Unlike all other OCC administrative actions, which are decided by the Comptroller, removal and prohibition cases are decided by the Board of Governors. ALJs, therefore, file hearing records with the Board of Governors in removal and prohibition cases.

Section 19.112 Informal Hearing.

The proposal changes § 19.112(b) to conform the informal hearing initiation provisions so that the same OCC official who sets the date, time, and place for an informal hearing also appoints the presiding officer. Under the current OCC Local Rules, the appropriate District Administrator or the Deputy Comptroller for Multinational Banking fixes the date, time, and place for a hearing, but the Comptroller appoints the presiding officer.

The OCC believes that it is more efficient for the same OCC official who sets the date, time, and place for a hearing to appoint the presiding officer. Under the proposal, the District Deputy Comptroller or Administrator, the Deputy Comptroller for Multinational, or the Deputy Comptroller or Director for Special Supervision, whoever is appropriate, fixes the date, time, and place for the hearing and chooses the presiding officer.

Proposed paragraph (c) makes clear that, if a petitioner waives the opportunity to present an oral argument at a hearing, the OCC may file written response submissions with the presiding officer no later than the date on which the hearing was to be held. The proposal also requires a petitioner who chooses to waive the opportunity to present oral argument to submit that waiver at the same time the petitioner

requests a hearing. The current OCC Local Rules are silent on these issues.

The OCC believes that the agency would be unfairly prejudiced if it is not given advance notice of whether the party will proceed with an oral argument or solely on written submissions.

Proposed paragraph (d) clarifies that, when a petitioner does not waive an oral hearing, both the petitioner and the OCC must make all filings of affidavits, memoranda, or other written material with the presiding officer at least ten days prior to the hearing or within a shorter time period if permitted by the presiding officer. Current § 19.112(d) could be interpreted to require only the petitioner to make all filings at least ten days prior to the hearing. The proposal makes clear that the requirement applies to both the petitioner and the OCC.

Unlike proposed paragraph (c), which permits the OCC an additional ten days to respond to the petitioner's written submissions, proposed paragraph (d) requires the OCC to file written submissions at the same time as the petitioner must file submissions. Under these proposed OCC Local Rules, the petitioner has the unilateral ability to waive an oral hearing. Therefore, the OCC believes that the OCC should have an additional ten days to file its submissions when a petitioner chooses to waive a hearing. The OCC will need to prepare its submissions as a response to the petitioner's submissions because the OCC will not have an opportunity to give oral argument. This system parallels the submission of briefs in appellate argument.

Section 19.113 Recommended and Final Decisions.

Under the OCC Local Rules, the Comptroller must issue a final decision in a removal, suspension, or prohibition case, within 60 days of the hearing or within 60 days of receiving the petitioner's written submission. Section 8(g)(3) of the Federal Deposit Insurance Act (12 U.S.C. 1818(g)(3)) requires the Comptroller, within 60 days of the hearing, to notify a petitioner of the Comptroller's final decision. Section 8(g)(3) does not state that the Comptroller may use the date of receipt of the petitioner's written submission as the start date of the 60-day time limitation.

The proposal clarifies that the OCC Local Rules conform to section 8(g)(3) by requiring the Comptroller to issue a final decision on a removal, suspension, or prohibition case within 60 days of the hearing and regardless of when the Comptroller received the petitioner's written submission.

To ensure that the Comptroller is able to meet this 60-day deadline, the proposal imposes a clear time deadline on the presiding officer to issue a recommended decision. The current OCC Local Rules do not contain a deadline for the presiding officer. The proposal requires the presiding officer to issue a recommended decision within 20 days from the hearing.

Section 19.160 Scope.

The proposal conforms this provision to a change the OCC proposed to make to 12 CFR 5.50(f)(5). *See* 59 FR 61034 (November 29, 1994). Both proposals clarify the time permitted the OCC to communicate its disapproval of a change-in-control notice to the proposed acquiring party (filer). Current § 19.160 suggests that the OCC must give written notice to a filer of the OCC's disapproval within three days of the decision. Because first class mail can take three days, the OCC would have little time to issue a notice before the regulatory deadline expired if the rule were interpreted to mean that written notice must be received within three days of a decision.

The proposal requires the OCC to mail the written notice within three days of making a disapproval decision.

Section 19.161 Notice of Disapproval and Hearing Initiation.

The proposal changes the title of this section from ''Hearing request and answer'' to ''Notice of disapproval and hearing initiation'' in order to describe more accurately the content of the section.

The proposal changes the initiation procedures for change-in-control proceedings. Under the current OCC Local Rules, the OCC's notice of disapproval is both a licensing communication and the initial pleading in the action. With the proposal, the OCC intends to make the procedure clearer by severing these functions.

Under the proposal, the notice of disapproval no longer serves as the OCC's initial pleading. Instead, when the Comptroller receives a notice of a request for a hearing in response to a notice of disapproval, the Comptroller will issue a hearing order. The hearing order serves as the OCC's pleading document and states the legal authority for the proceeding, the OCC's jurisdiction over the proceeding, and the matters of fact or law upon which the disapproval is based. The hearing order also states that a filer who seeks a hearing must file an answer to the hearing order with the Office of Financial Institution Adjudication (OFIA) within 20 days after service of the order on the filer.

The proposal also makes a technical correction by removing the phrase ''in civil money penalty proceedings'' from the title of former paragraph (c)(2).

Section 19.170 Discovery Depositions.

Under the current OCC Local Rules, it is unclear which methods may be used to record deposition testimony and under what conditions the parties must agree to have the court recorder use a particular method.

The proposal allows a party to have the court reporter record deposition testimony with a stenotype machine or an electronic sound recording device. The proposal also allows a party, for good cause and with leave of the ALJ or upon agreement of the parties, to have the court reporter use any other method to record the deposition testimony.

The proposal specifies that a written record of the witness's testimony must be made unless the parties agree otherwise. The proposal is intended to eliminate any confusion concerning when the parties must agree to transcribe the proceedings. The proposal also expressly provides that all parties are entitled to receive a transcript of the witness's testimony.

The proposal also requires that the party taking the deposition bear the cost of the recording and the transcription of that recording. The current OCC Local Rules are silent on who bears the cost of recording and transcription. The proposed change is the common practice in agency proceedings.

Section 19.171 Deposition Subpoenas.

The proposal changes the methods of service of a subpoena that a party may use for discovery depositions. The current rule only permits a party to serve the person named in the subpoena or that person's counsel by personal service, service by certified mail, or service by overnight delivery service.

The proposal adds to these methods of service the methods used in the Uniform Rules, § 19.11(c)(2) and (d). The Uniform Rules permit the following additional methods of service: service by delivery to an agent, by delivery to a person of suitable age and discretion at the subpoenaed person's residence (and, as amended by the proposal, at the subpoenaed person's place of work), by registered or certified mail to the person's last known address, or in such other manner as is reasonably calculated to give actual notice. The OCC believes the current rule is too narrow and that making additional methods of service available will reduce burden.

Section 19.184 Service of Subpoena and Payment of Witness Fees.

The proposal changes the methods of service of a subpoena that may be used in formal investigations under subpart J. The current rule only permits personal service or service by certified mail.

The proposal adopts the methods of service used in the Uniform Rules, § 19.11(c)(2) and (d). The Uniform Rules permit additional methods of service. They are service by delivery to an agent, by delivery to a person of suitable age and discretion at the subpoenaed person's residence (and, as amended by the proposal, at the subpoenaed person's place of work), by registered or certified mail to the person's last known address, or in such other manner as is reasonably calculated to give actual notice. The OCC believes the current rule is too narrow and that making additional methods of service available will reduce burden.

2. Proposed Amendments to the OTS Local Rules

Section 509.102 Discovery.

The OTS proposes to revise its local rule governing the service of discovery deposition subpoenas. The OTS would amend § 509.102(g)(2) to permit parties to serve deposition subpoenas by the methods listed in proposed Uniform Rule § ____.11(d). The current rule permits service by personal service, certified mail, or overnight delivery service. As noted above, proposed Uniform Rule § ____.11(d) would permit service by personal service, by delivery to an agent, by delivery to a person of suitable age and discretion at the subpoenaed person's residence or place of work, by registered or certified mail to the person's last known address, or in such other manner as is reasonably calculated to give actual notice.

The proposed rule also clarifies that subpoenas may be served on the person named in the subpoena *or* on that person's counsel. The current rule appears to require service of a copy of the subpoena on counsel, even when service is made on the person named in the subpoena. This proposed change would conform the OTS local rule to OCC local rule § 19.171 in this regard.

Section 509.104 Additional Procedures.

Under proposed Uniform Rule § ____.38(b), the ALJ is required to file an index of the record when he or she certifies the record to the Director. OTS local rule § 509.104(h) duplicates the proposed Uniform Rule and would be deleted.

F. Regulatory Flexibility Act

Pursuant to section 605(b) of the Regulatory Flexibility Act, the OCC, Board of Governors, FDIC, OTS, and NCUA, hereby independently certify that this joint proposed rule will not have a significant economic impact on a substantial number of small entities. Accordingly, a regulatory flexibility analysis is not required.

This joint proposed rule improves the Uniform Rules of Practice and Procedure required by section 916 of FIRREA and facilitates the orderly determination of administrative proceedings. The agencies already have in place uniform rules of practice and procedure as well as Local Rules. The changes in this joint proposed rule are primarily clarifications and do not impose additional burdens on regulated institutions.

G. OCC AND OTS Executive Order 12866 Statement

The OCC and the OTS have independently determined that this joint proposed rule is not a significant regulatory action as defined in Executive Order 12866.

H. OCC and OTS Unfunded Mandates Act of 1995 Statement

Section 202 of the Unfunded Mandates Reform Act of 1995, Pub. L. 104–4 (Unfunded Mandates Act) (signed into law on March 22, 1995) requires that an agency prepare a budgetary impact statement before promulgating a rule that includes a Federal mandate that may result in expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year. If a budgetary impact statement is required, Section 205 of the Unfunded Mandates Act also requires an agency to identify and consider a reasonable number of regulatory alternatives before promulgating a rule. As discussed in the preamble, this final rule is limited in application to procedural amendments to the rules of administrative practice before the OCC and OTS. The OCC and OTS have therefore determined that the final rule will not result in expenditures by State, local, or tribal governments or by the private sector of more than $100 million. Accordingly, the OCC and OTS have not prepared a budgetary impact statement or specifically addressed the regulatory alternatives considered.

I. NCUA Executive Order 12612 Statement

This joint proposed rule, like the current part 747 it is replacing, will apply to all Federally insured credit unions. The NCUA Board, pursuant to Executive Order 12612, has determined, however, that this joint proposed rule will not have a substantial direct effect on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among various levels of government. Further, this joint proposed rule will not preempt provisions of state law or regulations.

Text of Proposed Uniform Rules (All Agencies)

The text of the proposed amendments to the Uniform Rules appears below:

Subpart A—Uniform Rules of Practice and Procedure

1. In § ____.1, paragraph (e)(9) is amended by removing ''and'' after the semicolon; and new paragraphs (e)(____) and (e)(____)[1] are added to read as follows:

§ ____.1 Scope.

* * * * *

(e) * * *

(____) Section 102 of the Flood Disaster Protection Act of 1973 (42 U.S.C. 4012a) or any order or regulation issued thereunder; and

(____) Any provision of law referenced in 31 U.S.C. 5321 or any order or regulation issued thereunder; and

* * * * *

2. In § ____.6, paragraph (a)(3) is revised to read as follows:

§ ____.6 Appearance and practice in adjudicatory proceedings.

(a) * * *

(3) *Notice of appearance.* Any individual acting as counsel on behalf of a party, including the [Agency head], shall file a notice of appearance with OFIA at or before the time that individual submits papers or otherwise appears on behalf of a party in the adjudicatory proceeding. The notice of appearance must include a written declaration that the individual is currently qualified as provided in paragraph (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 counsel agrees and represents that he or she 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

[1] The new paragraphs are not identified by number in the proposal because the number of paragraphs in each agency's scope section differs depending on the agency's particular statutory authority.

required by the administrative law judge, continue to accept service of process until new counsel has filed a notice of appearance or until the represented party indicates that he or she will proceed on a *pro se* basis.

* * * * *

3. In § ____.8, paragraph (b) is revised to read as follows:

§ ____.8 Conflicts of interest.

* * * * *

(b) *Certification and waiver.* If any person appearing as counsel represents two or more parties to an adjudicatory proceeding or also represents a non-party on a matter relevant to an issue in the proceeding, counsel must certify in writing at the time of filing the notice of appearance required by § ____.6(a):

(1) That the counsel has personally and fully discussed the possibility of conflicts of interest with each such party or non-party; and

(2) That each such party or non-party 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.

4. In § ____.11, paragraphs (c)(2) and (d) are revised to read as follows:

§ ____.11 Service of papers.

* * * * *

(c) * * *

(2) If a party has not appeared in the proceeding in accordance with § ____.6, the [Agency head] or the administrative law judge shall make service by any of the following methods:

(i) By personal service;

(ii) By delivery to a person of suitable age and discretion at the party's residence or place of work;

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

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

(d) *Subpoenas.* Service of a subpoenas may be made by personal service, by delivery to an agent, by delivery to a person of suitable age and discretion at the subpoenaed person's residence or place of work, by registered or certified mail addressed to the person's last known address, or in such other manner as is reasonably calculated to give actual notice.

* * * * *

5. In § ____.12, paragraphs (a) and (c)(1), (c)(2), and (c)(3) are revised to read as follows:

§ ____.12 Construction of time limits.

(a) *General rule.* In computing any period of time prescribed 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 runs until the end of the next day that is not a Saturday, Sunday, or Federal holiday. Intermediate Saturdays, Sundays, and Federal holidays are included in the computation of time. However, when the time period within which an act is to be performed is ten days or less, not including any additional time allowed for service by mail, delivery service, or electronic media transmission in § ____.12(c), intermediate Saturdays, Sundays, and Federal holidays are not included.

* * * * *

(c) * * *

(1) If service is made by first class, registered, or certified mail, add three calendar days to the prescribed period;

(2) If service is made by express mail or overnight delivery service, add one calendar day to the prescribed period; or

(3) If service is made by electronic media transmission, add one calendar day to the prescribed period, unless otherwise determined by the [Agency head] or the administrative law judge in the case of filing, or by agreement among the parties in the case of service.

6. Section ____.20 is revised to read as follows:

§ ____.20 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 [Agency head] or administrative law judge orders otherwise for good cause.

(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 administrative law judge may admit the evidence when admission is likely to assist in adjudicating the merits of the action and the objecting party fails to satisfy the administrative law judge that the admission of such evidence would unfairly prejudice that party's action or defense upon the merits. The administrative law judge may grant a continuance to enable the objecting party to meet such evidence.

7. In § ____.24, paragraphs (a)(1), (a)(2), and (b) are revised and paragraph (a)(3) is added to read as follows:

§ ____.24 Scope of document discovery.

(a) *Limits on discovery.* (1) Subject to the limitations set out in paragraphs (b), (c), and (d) 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.

(2) Discovery by use of deposition is governed by subpart [insert appropriate subpart] of this part.

(3) Discovery by use of interrogatories is not permitted.

(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 § ____.25.

* * * * *

8. In § ____.25, paragraphs (a), (b), (e), and (g) are revised to read as follows:

§ ____.25 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. 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 must be 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 250 pages or more of copying, the requesting party shall pay for the copying and shipping charges. Copying charges are the current per-page copying rate imposed by part ____ of this chapter implementing the Freedom of Information Act (5 U.S.C. 552a). The party to whom the request is addressed may require payment in advance before producing the documents.

* * * * *

(e) *Privilege.* At the time other documents are produced, the producing party must reasonably identify all documents withheld on the grounds of privilege and must produce 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 administrative law judge retains discretion to determine when the identification by category is insufficient.

* * * * *

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

* * * * *

9. In § ____.27, paragraph (a)(4) is revised to read as follows:

§ ____.27 Deposition of witness unavailable for hearing.

(a) * * *

(4) The party obtaining a deposition subpoena must serve the subpoena on the witness or an authorized representative of the witness and a copy of the subpoena on each party. Unless the administrative law judge orders otherwise, a party may not take a deposition under this section on fewer than ten days notice to the witness and all parties. A party may serve a deposition subpoena in any state, territory, possession of the United States, or the District of Columbia, on any person or company doing business in any state, territory, possession of the United States, or the District of Columbia, or as otherwise permitted by law.

* * * * *

10. In § ____.33, paragraph (a) is revised to read as follows:

§ ____.33 Public hearings.

(a) *General rule.* All hearings shall be open to the public, unless the [Agency head], in [Agency Head's or its] discretion, determines that holding an open hearing would be contrary to the public interest. Within 20 days of service of the notice or, in the case of change-in-control proceedings under section 7(j)(4) of the FDIA (12 U.S.C. 1817(j)(4)), within 20 days from service of the hearing order, any respondent may file with the [Agency head] a request for a private hearing, and any party may file a reply to such a request. A party must serve on the administrative law judge a copy of any request or reply the party files with the agency head. The form of, and procedure for, these requests and replies are governed by § ____.23. A party's failure to file a request or a reply constitutes a waiver of any objections regarding whether the hearing will be public or private.

* * * * *

11. In § ____.34, paragraphs (a) and (b)(1) are revised to read as follows:

§ ____.34 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 administrative law judge 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 the 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, territory, or possession of the United States, 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 a hearing. During a hearing, a party may make an application for a subpoena orally on the record before the administrative law judge.

(3) The administrative law judge shall promptly issue any hearing subpoena requested pursuant to this section. If the administrative law judge 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 or she may refuse to issue the subpoena or may issue it in a modified form upon any conditions consistent with this subpart. Upon issuance by the administrative law judge, 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 the 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.

* * * * *

12. In § ____.35, paragraph (a)(3) is redesignated as paragraph (a)(4), a new paragraph (a)(3) is added, and paragraph (b) is revised to read as follows:

§ ____.35 Conduct of hearings.

(a) * * *

(3) Examination of witnesses. Only one counsel for each party may conduct an examination of a witness, except that

in the case of extensive direct examination, the administrative law judge may permit more than one counsel for the party presenting the witness to conduct the examination. A party may have one counsel conduct the direct examination and another counsel conduct re-direct examination of a witness, or may have one counsel conduct the cross examination of a witness and another counsel conduct the re-cross examination of a witness.

* * * * *

(b) *Transcript.* The hearing must be recorded and transcribed. The reporter will make the transcript available to any party upon payment by that party to the reporter of the cost of the transcript. The administrative law judge may order the record corrected, either upon motion to correct, upon stipulation of the parties, or following notice to the parties upon the administrative law judge's own motion.

13. In § ____.37, the section heading and paragraph (a)(1) are revised to read as follows:

§ ____.37 Post hearing filings.

(a) *Proposed findings and conclusions and supporting briefs.* (1) Using the same method of service for each party, the administrative law judge 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 administrative law judge proposed findings of fact, proposed conclusions of law, and a proposed order within 30 days following service of this notice by the administrative law judge, unless the administrative law judge orders a longer period.

* * * * *

14. Section ____.38 is revised to read as follows:

§ ____.38 Recommended decision and filing of record.

(a) *Filing of recommended decision and record.* Within 45 days after expiration of the time allowed for filing reply briefs under § ____.37(b), the administrative law judge shall file with and certify to the [Agency head] for decision the record of the proceeding. The record must include the administrative law judge's recommended decision, recommended findings of fact, recommended conclusions of law, and proposed order; all prehearing and hearing transcripts, exhibits, and rulings; and the motions, briefs, memoranda, and other supporting papers filed in connection with the hearing. The administrative law judge shall serve upon each party the recommended decision, findings, conclusions, and proposed order.

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

Proposed Adoption of Uniform Rules

The agency-specific adoptions of the amendments to the Uniform Rules, which appear at the end of the common preamble, appear below:

OFFICE OF THE COMPTROLLER OF THE CURRENCY

12 CFR Part 19

List of Subjects in 12 CFR Part 19

Administrative practice and procedure, Crime, Investigations, National banks, Penalties, Securities.

Authority and Issuance

For the reasons set out in the preamble, part 19 of chapter I of title 12 of the Code of Federal Regulations is proposed to be amended as set forth below:

PART 19—RULES OF PRACTICE AND PROCEDURE

1. The authority citation for part 19 is revised to read as follows:

Authority: 5 U.S.C. 504, 554–557; 12 U.S.C. 93(b), 164, 505, 1817, 1818, 1820, 1831o, 1972, 3102, 3108(a), 3909, and 4717; 15 U.S.C. 78 (h) and (i), 78o–4(c), 78o–5, 78q–1, 78u, 78u–2, 78u–3, and 78w; 31 U.S.C. 330 and 5321; and 42 U.S.C. 4012a.

Subpart A—[Amended]

2. Subpart A of part 19 is amended as set forth at the end of the common preamble.

Subpart B—[Amended]

3. Section 19.100 is revised to read as follows:

§ 19.100 Filing documents.

All materials required to be filed with or referred to the Comptroller or the administrative law judge in any proceeding under this part must be filed with the Hearing Clerk, Office of the Comptroller of the Currency, 250 E Street, SW, Washington, DC 20219. Filings to be made with the Hearing Clerk include the notice and answer; motions and responses to motions; briefs; the record filed by the administrative law judge after the issuance of a recommended decision; the recommended decision filed by the administrative law judge following a motion for summary disposition (except that in removal and prohibition cases, the administrative law judge will file the record and the recommended decision with the Board of Governors of the Federal Reserve System); referrals by the administrative law judge of motions for interlocutory review; exceptions and requests for oral argument; and any other papers required to be filed with the Comptroller or the administrative law judge under this part.

Subpart C—[Amended]

4. In § 19.112, paragraphs (a), (b), (c) and (d)(3)(i) are revised to read as follows:

§ 19.112 Informal hearing.

(a) *Issuance of hearing order.* After receipt of a request for hearing, the District Deputy Comptroller or Administrator, the Deputy Comptroller for Multinational Banking, or the Deputy Comptroller or Director for Special Supervision, whichever is appropriate, must notify the petitioner requesting the hearing, the OCC's Enforcement and Compliance Division, and the appropriate OCC District Counsel of the date, time, and place fixed for the hearing. The hearing must be scheduled to be held not later than 30 days from the date when a request for hearing is received unless the time is extended at the written request of the petitioner. The District Deputy Comptroller or Administrator, the Deputy Comptroller for Multinational Banking, or the Deputy Comptroller or Director for Special Supervision, whichever is appropriate, may extend the hearing date only for a specific period of time and must take appropriate action to ensure that the hearing is not unduly delayed.

(b) *Appointment of presiding officer.* The District Deputy Comptroller or

Administrator, Deputy Comptroller for Multinational Banking, or the Deputy Comptroller or Director for Special Supervision, as appropriate, must appoint one or more OCC employees as the presiding officer to conduct the hearing. The presiding officer(s) may not have been involved in the proceeding, a factually related proceeding, or the underlying enforcement action in a prosecutorial or investigative role.

(c) *Waiver of oral hearing.*—(1) *Petitioner.* When the petitioner requests a hearing, the petitioner may elect to have the matter determined by the presiding officer solely on the basis of written submissions by serving on the District Deputy Comptroller or Administrator, Deputy Comptroller for Multinational Banking, or the Deputy Comptroller or Director for Special Supervision, whichever is appropriate, and all parties, a signed document waiving the statutory right to appear and make oral argument. The petitioner must present the written submissions to the presiding officer, and serve the other parties, not later than ten days prior to the date fixed for the hearing, or within such shorter time period as the presiding officer may permit.

(2) *OCC.* The OCC may respond to the petitioner's submissions by presenting the hearing officer with a written response, and by serving the other parties, not later than the date fixed for the hearing, or within such other time period as the presiding officer may require.

(d) * * *

(3) *Presentation.* (i) The OCC may appear and the petitioner may appear personally or through counsel at the hearing to present relevant written materials and oral argument. Except as permitted in paragraph (c) of this section, each party, including the OCC, must file a copy of any affidavit, memorandum, or other written material to be presented at the hearing with the presiding officer and must serve the other parties not later than ten days prior to the hearing or within such shorter time period as permitted by the presiding officer.

* * * * *

5. In § 19.113, paragraphs (a) and (b) are revised, paragraphs (c), (d), and (e) are redesignated as paragraphs (d), (e), and (f), respectively, and new paragraph (c) is added, to read as follows:

§ 19.113 Recommended and final decisions.

(a) The presiding officer must issue a recommended decision to the Comptroller within 20 days from the hearing or, when the petitioner waived an oral hearing, within 20 days from the date fixed for the hearing. The presiding officer must serve promptly a copy of the recommended decision on the parties to the proceeding. The decision must include a summary of the facts and arguments of the parties.

(b) Each party may, within ten days of being served with the presiding officer's recommended decision, submit to the Comptroller comments on the recommended decision.

(c) Within 60 days following the hearing or, when the petitioner waived an oral hearing within 60 days from the date fixed for the hearing, the Comptroller must notify the petitioner by registered mail as to whether the suspension or removal from office, and prohibition from participation in any manner in the affairs of the bank, will be affirmed, terminated, or modified. The Comptroller's decision must include a statement of reasons supporting the decision. The Comptroller's decision is a final and unappealable order.

* * * * *

Subpart H—[Amended]

§ 19.160 [Amended]

6. In § 19.160, paragraph (a) is amended in the second sentence by revising the phrase ''notify the acquiring party in writing'' to read ''mail a written notification to the proposed acquiring person''.

7. Section 19.161 is revised to read as follows:

§ 19.161 Notice of disapproval and hearing initiation.

(a) *Notice of disapproval.* The OCC's written disapproval of a proposed acquisition of control of a national bank must:

(1) Contain a statement of the basis for the disapproval; and

(2) Indicate that the filer may request a hearing.

(b) *Hearing request.* Following receipt of a notice of disapproval, a filer may request a hearing on the proposed acquisition. A hearing request must:

(1) Be in writing; and

(2) Be filed with the hearing clerk of the OCC within ten days after service on the filer of the notice of disapproval. If a filer fails to request a hearing with a timely written request, the notice of disapproval constitutes a final and unappealable order.

(c) *Hearing order.* Following receipt of a hearing request, the Comptroller issues, within 20 days, an order that sets forth:

(1) The legal authority for the proceeding and for the OCC's jurisdiction over the proceeding;

(2) The matters of fact or law upon which the disapproval is based; and

(3) The requirement for filing an answer to the hearing notice with OFIA within 20 days after service of the hearing order.

(d) *Answer.* An answer to a hearing order must specifically deny those portions of the order that are disputed. Those portions of the order that the filer does not specifically deny are deemed admitted by the filer. Any hearing under this subpart is limited to those portions of the order that are specifically denied.

(e) *Effect of failure to answer.* Failure of a filer to file an answer within 20 days after service of the hearing order constitutes a waiver of the filer's right to appear and contest the allegations in the hearing order. If a filer does not file a timely answer, enforcement counsel 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 administrative law judge shall file with the Comptroller a recommended decision containing the findings and the relief sought in the hearing order. Any final order issued by the Comptroller based upon a filer's failure to answer is deemed to be an order issued upon consent and is a final and unappealable order.

§ 19.162 [Removed]

8. Section 19.162 is removed.

Subpart I—[Amended]

9. In § 19.170, paragraph (d) is revised, paragraphs (e) and (f) are redesignated as paragraphs (f) and (g), respectively, and a new paragraph (e) is added to read as follows:

§ 19.170 Discovery depositions.

* * * * *

(d) *Conduct of the deposition.* The witness must be duly sworn, and each party will have the right to examine the witness with respect to all non-privileged, relevant, and material matters of which the witness has factual, direct, and personal knowledge. Objections to questions or exhibits must be in short form and must state the grounds for the objection. Failure to object to questions or exhibits is not a waiver except where the grounds for the objection might have been avoided if the objection had been timely presented.

(e) *Recording the testimony.*—(1) *Generally.* The party taking the deposition must have a certified court reporter record the witness's testimony:

(i) By stenotype machine or electronic sound recording device;

(ii) Upon agreement of the parties, by any other method; or

(iii) For good cause and with leave of the administrative law judge, by any other method.

(2) *Cost.* The party taking the deposition must bear the cost of the recording and transcribing the witness's testimony.

(3) *Transcript.* Unless the parties agree that a transcription is not necessary, the court reporter must provide a transcript of the witness's testimony to the party taking the deposition and must make copies of the transcript available to all parties upon payment of cost to the appropriate court reporting service.

* * * * *

10. In § 19.171, paragraph (b) is revised to read as follows:

§ 19.171 Deposition subpoenas.

* * * * *

(b) *Service.* The party requesting the subpoena must serve it on the person named therein, or on that person's counsel, by personal service, by delivery to an agent, by delivery to a person of suitable age and discretion at the subpoenaed person's residence or place of work, by registered or certified mail addressed to the person's last known address, or in such other manner as is reasonably calculated to give actual notice. The party serving the subpoena must file proof of service with the administrative law judge.

* * * * *

Subpart J—[Amended]

11. Section 19.184 is revised to read as follows:

§ 19.184 Service of subpoena and payment of witness fees.

Service of a subpoena may be made by personal service, by delivery to an agent, by delivery to a person of suitable age and discretion at the subpoenaed person's residence or place of work, by registered or certified mail addressed to the person's last known address, or in such other manner as is reasonably calculated to give actual notice. A witness who is subpoenaed will be paid the same expenses in the same manner as witnesses in the district courts of the United States. The expenses need not be tendered at the time a subpoena is served.

Dated: April 13, 1995.

Eugene A. Ludwig,

Comptroller of the Currency.

FEDERAL RESERVE SYSTEM

12 CFR Part 263

List of Subjects in 12 CFR Part 263

Administrative practice and procedure, Claims, Crime, Equal access to justice, Federal Reserve System, Lawyers, Penalties.

Authority and Issuance

For the reasons set out in the preamble, part 263 of chapter II of title 12 of the Code of Federal Regulations, is proposed to be amended as set forth below:

PART 263—RULES OF PRACTICE FOR HEARINGS

1. The authority citation for part 263 is revised to read as follows:

Authority: 5 U.S.C. 504, 554–557; 12 U.S.C. 248, 324, 504, 505, 1817(j), 1818, 1828(c), 1847(b), 1847(d), 1884(b), 1972(2)(F), 3105, 3107, 3108, 3907, 3909, and 4717; 15 U.S.C. 21, 78o–4, 78o–5, and 78u–2; 31 U.S.C. 5321; 42 U.S.C. 4012a.

Subpart A—[Amended]

2. Subpart A of part 263 is amended as set forth at the end of the common preamble.

By order of the Board of Governors of the Federal Reserve System, May 9, 1995.

William W. Wiles,

Secretary of the Board.

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 308

List of Subjects in 12 CFR Part 308

Administrative practice and procedure, Banks, banking, Claims, Equal access to justice, Ex parte communications, Hearing procedure, Penalties, State nonmember banks.

Authority and Issuance

For the reasons set out in the preamble, part 308 of chapter III of title 12 of the Code of Federal Regulations is proposed to be amended as set forth below:

PART 308—RULES OF PRACTICE AND PROCEDURE

1. The authority citation for part 308 is revised to read as follows:

Authority: 5 U.S.C. 554–557; 12 U.S.C. 1815(e) 1817 (a) and (j), 1818, 1820, 1828(j), 1829, 1831l, 1972(2)(F), 3108, 3909, 3349, 4717; 15 U.S.C. 78l(h), 78m, 78n(a), 78n(c), 78n(d), 78n(f), 78o–4(c)(5), 78p, 78q, 78q–1, 78s, 78u–2; 31 U.S.C. 5321; 42 U.S.C. 4012a.

Subpart A—[Amended]

2. Subpart A of part 308 is amended as set forth at the end of the common preamble.

Dated: May 30, 1995.

Robert E. Feldman,

Acting Executive Secretary, Federal Deposit Insurance Corporation.

OFFICE OF THRIFT SUPERVISION

12 CFR Part 509

List of Subjects in 12 CFR Part 509

Administrative Practice and Procedure, Penalties.

Authority and Issuance

For the reasons set out in the preamble, part 509 of subchapter A of chapter V of title 12 of the Code of Federal Regulations is proposed to be amended as set forth below:

PART 509—RULES OF PRACTICE AND PROCEDURE IN ADJUDICATORY PROCEEDINGS

1. The authority citation for part 509 is revised to read as follows:

Authority: 5 U.S.C. 554–557; 12 U.S.C. 1464, 1467, 1467a, 1468, 1817(j), 1818, 3349, 4717; 15 U.S.C. 78l, 78o–5, 78u–2; 31 U.S.C. 5321; 42 U.S.C. 4012a.

Subpart A—[Amended]

2. Subpart A of part 509 is amended as set forth at the end of the common preamble.

Subpart B—[Amended]

3. In § 509.102, paragraph (g)(2) is revised to read as follows:

§ 509.102 Discovery.

* * * * *

(g) * * *

(2) *Service.* The party requesting the subpoena shall serve it on the person named therein in accordance with § 509.11(d). The party serving the subpoena shall file proof of service with the administrative law judge.

* * * * *

§ 509.104 [Amended]

4. In § 509.104, paragraph (h) is removed and paragraph (i) is redesignated as paragraph (h).

Dated: May 26, 1995.

Jonathan L. Fiechter,

Acting Director, Office of Thrift Supervision.

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Part 747

List of Subjects in 12 CFR Part 747

Administrative practice and procedure, Bank deposit insurance, Claims, Credit unions, Equal access to justice, Investigations, Lawyers, Penalties.

Authority and Issuance

For the reasons set out in the preamble, part 747 of chapter VII of title 12 of the Code of Federal Regulations, is proposed to be amended as set forth below:

PART 747—ADMINISTRATIVE ACTIONS, ADJUDICATIVE HEARINGS, RULES OF PRACTICE AND PROCEDURE, AND INVESTIGATIONS

1. The authority citation for part 747 is revised to read as follows:

Authority: 12 U.S.C. 1766, 1784, 1786, 1787; 42 U.S.C. 4012a.

Subpart A—[Amended]

2. Subpart A of part 747 is amended as set forth at the end of the common preamble.

Dated: June 9, 1995.

Becky Baker,

Secretary of the Board, National Credit Union Administration.

[FR Doc. 95–15059 Filed 6–22–95; 8:45 am]

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