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Bureau of Consumer Financial Protection

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Rules of Practice for Adjudication Proceedings

BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Part 1081

[Docket No. CFPB–2011–0006]

RIN 3170–AA05

Rules of Practice for Adjudication Proceedings

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Final rule.

SUMMARY: The Dodd-Frank Wall Street Reform and Consumer Protection Act requires the Bureau of Consumer Financial Protection (Bureau) to prescribe rules establishing procedures for the conduct of adjudication proceedings. On July 28, 2011, the Bureau published an interim final rule establishing these procedures with a request for comment. This final rule responds to the comments received by the Bureau and amends the Bureau's regulations accordingly.

DATES: This final rule is effective on June 29, 2012.

FOR FURTHER INFORMATION CONTACT: John R. Coleman, Office of the General Counsel, Consumer Financial Protection Bureau, 1700 G Street NW., Washington, DC 20552, (202) 435–5724.

SUPPLEMENTARY INFORMATION:

I. Background

The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act) was signed into law on July 21, 2010. Title X of the Dodd-Frank Act established the Bureau to regulate the offering and provision of consumer financial products or services under the Federal consumer financial laws. On July 28, 2011, the Bureau promulgated its Rules of Practice Governing Adjudication Proceedings (Interim Final Rule), pursuant to section 1053(e) of the Dodd-Frank Act, 12 U.S.C. 5563(e). The Bureau promulgated the Interim Final Rule with a request for comment at 76 FR 45338. The comment period on the Interim Final Rule ended on September 26, 2011. After reviewing and considering the issues raised by the comments, the Bureau is now promulgating, in final form, its Rules of Practice Governing Adjudication Proceedings (Final Rule) establishing procedures for the conduct of adjudication proceedings conducted pursuant to section 1053 of the Dodd-Frank Act. 12 U.S.C. 5563.

Section 1053 of the Dodd-Frank Act authorizes the Bureau to conduct administrative adjudications to ensure or enforce compliance with (a) the provisions of Title X of the Dodd-Frank Act, (b) the rules prescribed by the Bureau under Title X of the Dodd-Frank Act, and (c) any other Federal law or regulation that the Bureau is authorized to enforce. 12 U.S.C. 5563(a). The Final Rule does not apply to proceedings governing the issuance of a temporary order to cease and desist pursuant to section 1053(c) of the Dodd-Frank Act. 12 U.S.C. 5563(c). As discussed in greater detail below, the Bureau currently intends to address such proceedings in a future rulemaking.

II. Summary of the Final Rule

Like the Interim Final Rule, the Final Rule is modeled on the uniform rules and procedures for administrative hearings adopted by the prudential regulators pursuant to section 916 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, 56 FR 38024 (Aug. 9, 1991) (Uniform Rules); [1] the Rules of Practice for Adjudicative Proceedings adopted by the Federal Trade Commission, 16 CFR part 3 (FTC Rules); and the Rules of Practice adopted by the Securities and Exchange Commission (SEC), 17 CFR part 201 (SEC Rules). The Bureau also considered the Model Adjudication Rules (MARs) prepared by the Administrative Conference of the United States. *See* Michael P. Cox, The Model Adjudication Rules (MARs), 11 T.M. Cooley L. Rev. 75 (1994).

In drafting the Final Rule, the Bureau endeavored to create an adjudicatory process that provides for the expeditious resolution of claims while ensuring that parties who appear before the Bureau receive a fair hearing. Notably, in the last several decades, both the SEC and the FTC revised their rules of practice relating to administrative proceedings to make the adjudicatory process more efficient. In 1990, the SEC created a task force ''to review the rules and procedures relating to [SEC] administrative proceedings, to identify sources of delay in those proceedings and to recommend steps to make the adjudicatory process more efficient and effective.'' 60 FR 32738 (June 23, 1995). The result was a comprehensive revision of the SEC Rules in 1995. *See id.* Similarly, when the FTC proposed revisions to the FTC Rules in 2008, the FTC's Notice of Proposed Rulemaking stated: ''In particular, the [FTC's] Part 3 adjudicatory process has long been criticized as being too protracted * * *. The [FTC] believes that these comprehensive proposed rule revisions would strike an appropriate balance between the need for fair process and quality decision-making, the desire for efficient and speedy resolution of matters, and the potential costs imposed on the Commission and the parties.'' 73 FR 58832–58833 (Oct. 7, 2008).

In drafting the Final Rule, the Bureau considered and attempted to improve upon these and other agencies' efforts to streamline their processes while protecting parties' rights to fair and impartial proceedings. The following discussion outlines some significant aspects of the Final Rule.

Like the Interim Final Rule, the Final Rule adopts a decision-making procedure that incorporates elements of the SEC Rules, the FTC Rules, and the Uniform Rules. The Final Rule implements a procedure, like that in the Uniform Rules, whereby a hearing officer will issue a recommended decision in each administrative adjudication. Like the FTC Rules, the Final Rule provides any party the right to contest the recommended decision by filing a notice of appeal and perfecting the appeal by later filing an opening brief. In the event a party fails to timely file a notice of appeal or perfect an appeal, the Director may either adopt the recommended decision as the Bureau's final decision or order further briefing with respect to any findings of fact or conclusions of law contained in the recommended decision. The Bureau believes this approach best balances the need for expeditious decision-making with the parties' right to ultimate consideration of a matter by the Director.

In keeping with this approach, the Final Rule also provides that the hearing officer will decide dispositive motions in the first instance, subject to the same right of review provided for recommended decisions in the event that the ruling upon such a motion disposes of the case. Again, the Bureau has adopted this model because it provides for the most expeditious resolution of matters while preserving all parties' rights to review by the Director.

The Final Rule sets deadlines for both the recommended decision of the hearing officer and the final decision of the Director. The Bureau has adopted an approach, similar to that used by the SEC, wherein the hearing officer is

[1] The ''prudential regulators'' are defined by section 1002(24) of the Dodd-Frank Act as the Office of the Comptroller of the Currency (OCC), the Board of Governors of the Federal Reserve System (Board), the Federal Deposit Insurance Corporation (FDIC), the former Office of Thrift Supervision (OTS), and the National Credit Union Administration (NCUA). 12 U.S.C. 5481(24). For ease of reference, citations to the Uniform Rules herein are to the Uniform Rules as adopted by the OCC, which are codified at 12 CFR part 19, subpart A.

permitted a specified period of time—300 days from service of the notice of charges or 90 days after briefing is complete—to issue a recommended decision. The Final Rule also requires the hearing officer to convene a scheduling conference soon after the respondent files its answer to craft a schedule appropriate to the particular proceeding. This construct gives the hearing officer considerable discretion in conducting proceedings and flexibility to respond to the nuances of individual matters while ensuring that each case concludes within a fixed number of days. The Final Rule permits the hearing officer to request an extension of the 300-day deadline, but the Bureau's intent is that such extensions will be requested by hearing officers and granted by the Director only in rare circumstances.

The section of the Final Rule governing the timing of the Director's decision on appeal or review is consistent with the language of section 1053 of the Dodd-Frank Act. If a recommended decision is appealed to the Director, or the Director orders additional briefing regarding the recommended decision, the Final Rule provides that the Office of Administrative Adjudication must notify the parties that the case has been submitted for final Bureau decision at the expiration of the time permitted for filing reply briefs with the Director. The Director then must issue his or her final decision within 90 days. *See* 12 U.S.C. 5563(b)(3). To further the goal of providing for the expeditious resolution of claims, the Final Rule also adopts the SEC's standard governing extensions of time, which makes clear that such extensions are generally disfavored.

The Bureau has adopted the SEC's affirmative disclosure approach to fact discovery in administrative adjudications. *See* 17 CFR 201.230. Thus, the Final Rule provides that the Office of Enforcement will provide any party in an adjudication proceeding an opportunity to inspect and copy certain categories of documents obtained by the Office of Enforcement from persons not employed by the Bureau, as that term is defined in the Final Rule, in connection with the investigation leading to the institution of the proceedings, and certain categories of documents created by the Bureau, provided such material is not privileged or otherwise protected from disclosure. The Office of Enforcement's obligation under the Final Rule relates only to documents obtained by the Office of Enforcement; documents located only in the files of other divisions or offices of the Bureau are beyond the scope of the affirmative disclosure obligation. As set forth in greater detail in the section-by-section analysis below, the Bureau has modified the SEC Rules slightly by eliminating any reference to *Brady* v. *Maryland* while retaining a general obligation to turn over material exculpatory information in the Office of Enforcement's possession, by providing that nothing in paragraph (a) of § 1081.206 shall require the Office of Enforcement to provide reports of examination to parties if they are not the subject of the report, and by providing an exception for information provided by another government agency upon condition that it not be disclosed.

The goal in adopting the SEC's basic approach is to ensure that respondents have prompt access to the non-privileged documents underlying enforcement counsel's decision to commence enforcement proceedings, while eliminating much of the expense and delay often associated with pre-trial discovery in civil matters. Recognizing that administrative adjudications will take place after a Bureau investigation intended to gather relevant evidence, and in light of the affirmative obligation that the Final Rule places on enforcement counsel to provide access to materials gathered in the course of the investigation, the Final Rule does not provide for certain other traditional forms of pre-trial discovery, such as interrogatories and discovery depositions. The Final Rule does provide for the deposition of witnesses unavailable for trial, the use of subpoenas to compel the production of documentary or tangible evidence, and in appropriate cases, expert discovery, thus ensuring that respondents have an adequate opportunity to marshal evidence in support of their defense. The Bureau believes this approach will promote the fair and speedy resolution of claims while ensuring that parties have access to the information necessary to prepare a defense.

III. Public Comment on the Interim Final Rule

In response to the Interim Final Rule, the Bureau received seven comment letters. Four letters were received from trade associations representing sectors of the financial industry, one letter was received from a mortgage company, and two letters were received from individual consumers.

Trade associations' comments generally fell into several categories. Several comments suggested that the Bureau revisit the deadlines contained in the Interim Final Rule. Two trade association comment letters objected to the affirmative disclosure approach to discovery, and requested that the Bureau allow respondents to conduct additional forms of traditional civil discovery. Two trade associations requested that the Bureau adopt a process to notify potential respondents that the Bureau is contemplating an enforcement action, similar to the Wells Notice process used by the SEC. One trade association commenter expressed concern about the confidentiality of adjudication proceedings and filings. Trade associations made other specific comments as well, all of which are addressed in part V below in connection with the section of the Interim Final Rule to which they pertain.

The comment letter received from the mortgage company related to the Rules Relating to Investigations, *see* 12 CFR part 1080, not the Interim Final Rule. The comment letter is addressed in the Final Rule establishing part 1080.

The comment letters from consumers did not contain any specific comments or suggestions pertaining to the Interim Final Rule.

In part IV of this preamble, the Bureau addresses general comments that were not directly related to particular sections of the Interim Final Rule. In part V, the Bureau describes each section of the Interim Final Rule, responds to significant issues raised by the comments pertaining to each section, and explains any changes made to the Interim Final Rule that are reflected in the Final Rule. Many sections of the Interim Final Rule received no comment and, as noted, are being finalized without change.

IV. General Comments

The Bureau received several comments that were not directed at specific sections of the Interim Final Rule. Those comments are addressed here.

Two commenters suggested that the Bureau adopt a process for a prospective respondent to be given the opportunity to respond to the Bureau's allegations before an action is filed or a notice of charges is issued, similar to the Wells Process adopted by the SEC.

The Bureau announced on November 7, 2011 that it has adopted a process similar to the Wells Process.[2] The process will allow the subject of an investigation, in most cases, to respond to any potential legal violations that Bureau enforcement counsel believe have been committed before the Bureau decides whether to initiate an

[2] See *www.consumerfinance.gov/pressrelease/consumer-financial-protection-bureau-plans-to-provide-early-warning-of-possible-enforcement-actions.*

enforcement proceeding. The Bureau's process for providing advance notice of a possible legal action is not required by law, but the Bureau believes it will promote even-handed enforcement of Federal consumer financial law.

The Bureau received several comments raising concern about the disclosure of confidential material contained in administrative filings.

The Final Rule provides that filings containing confidential information subject to a protective order or a pending motion for a protective order may not be published or otherwise disclosed. In addition, the Bureau will adopt a policy providing for a ten-day delay before publishing filings, in order to allow any party an opportunity to object to the disclosure of allegedly confidential information contained within such filings. This policy is intended to protect confidential information from inadvertent disclosure in public documents. The comments regarding the Bureau's treatment of confidential information are addressed in more detail below in connection with the specific rules to which they were directed.

One commenter asked the Bureau to identify the official authorized to initiate enforcement proceedings in the absence of a Bureau Director. This commenter also suggested that once a Director is in place, only the Director should be authorized to initiate enforcement proceedings.

The President appointed a Director to the Bureau on January 4, 2012. The Director, or any official to whom the Director has delegated his authority pursuant to section 1012 of the Dodd-Frank Act, 12 U.S.C. 5492(b), will authorize the initiation of enforcement proceedings through the issuance of a notice of charges.

One commenter asserted that section 1052(c)(1) of the Dodd-Frank Act prohibits the Bureau from issuing civil investigative demands after the institution of any proceedings under a Federal consumer financial law, including proceedings initiated by a State or a private party. 12 U.S.C. 5562(c)(1). The commenter argued that a civil investigative demand should be accompanied by a certification that the demand will have no bearing on any proceeding then in process.

Section 1052(c)(1) provides, in relevant part, that ''the Bureau may, before the institution of any proceedings under the Federal consumer financial law, issue in writing, and cause to be served upon such person, a civil investigative demand.'' The language ''before the institution of any proceeding under Federal consumer financial law'' refers to the institution of proceedings by the Bureau related to the investigation that results in the proceeding. It does not limit the Bureau's authority to issue civil investigative demands based upon the commencement of a proceeding by other parties, such as a State or a private party. Nor does it limit the Bureau's authority to issue civil investigative demands to investigate potential violations of Federal consumer law not at issue in a pending proceeding.

In addition, the Bureau notes that any limitations placed upon it by section 1052(c)(1) of the Dodd-Frank Act are incorporated in 12 CFR 1080.6, which provides that civil investigative demands will be issued in accordance with section 1052(c) of the Dodd-Frank Act, 12 U.S.C. 5562(c).

One commenter argued the Right to Financial Privacy Act (RFPA), 12 U.S.C. 3401 *et seq.,* limits the Bureau's ability to bring administrative enforcement proceedings without a Director. The commenter contended RFPA restricts the Bureau's authority to share information protected under RFPA with the Secretary of the Treasury. The commenter therefore recommended that the Bureau revise the Interim Final Rule to provide that, until the Bureau has a Director, the Bureau will not commence or continue adjudication proceedings in cases where material information includes information that RFPA purportedly does not permit to be disclosed to the Secretary of the Treasury.

As noted above, the President appointed a Director to the Bureau on January 4, 2012. The Bureau will comply with RFPA, but the commenters' particular concern about the sharing of information with the Secretary of the Treasury is moot.

V. Section-by-Section Analysis

Subpart A—General Rules

Section 1081.100 Scope of the Rules of Practice

This section of the Interim Final Rule sets forth the scope of the Interim Final Rule and states that it applies to adjudication proceedings brought under section 1053 of the Dodd-Frank Act. The Interim Final Rule does not apply to Bureau investigations, rulemakings, or other proceedings. As drafted and pursuant to the definition of the term ''*adjudication proceeding''* in § 1081.103, the Interim Final Rule does not apply to the issuance, pursuant to section 1053(c) of the Dodd-Frank Act, of a temporary order to cease-and-desist pending completion of the underlying cease-and-desist proceedings.

The Bureau invited comments as to whether special rules governing such proceedings are necessary and, if so, what the rules should provide. One commenter recommended that the Bureau undertake a new rulemaking to promulgate rules governing temporary cease-and-desist proceedings initiated pursuant to section 1053(c) of the Dodd-Frank Act and suggested that such proceedings should be based on findings made on specific criteria. The commenter pointed to the Federal Deposit Insurance Corporation's rules governing temporary cease-and-desist proceedings, 12 CFR 308.131, as an example of such rules.

The Bureau agrees that there should be specific rules governing temporary cease-and-desist proceedings initiated pursuant to section 1053(c) of the Dodd-Frank Act, and currently intends to issue separate rules governing such proceedings.

One commenter also sought clarification as to whether the Interim Final Rule was intended to apply to proceedings in which the Bureau is seeking civil money penalties available under section 1055(c) of the Dodd-Frank Act. 12 U.S.C. 5565(c). The commenter noted that in many instances, the Bureau is likely to seek both an order to cease-and-desist and a civil money penalty based on the same facts. The commenter stated it would be more efficient to have both hearings combined into one hearing on the record.

To provide further guidance to covered persons, the Bureau clarifies that it will rely on the Final Rule when seeking civil money penalties in adjudication proceedings. The Bureau agrees with the commenter that there will be many instances where the Bureau will simultaneously seek civil money penalties, a cease-and-desist order, and potentially other available remedies. The Bureau will periodically be reviewing its experience under the Final Rule to consider whether additional changes may be warranted, including whether additional rules governing the imposition of civil money penalties pursuant to section 1055(c) of the Dodd-Frank Act would be beneficial.

With the exception of a technical change in the citation to the Dodd-Frank Act, the Bureau adopts § 1081.100 of the Interim Final Rule without change in the Final Rule.

Section 1081.101 Expedition and Fairness of Proceedings

This section of the Interim Final Rule, which is modeled on the FTC Rules, 16 CFR 3.1, sets forth the Bureau's policy

to avoid delays in any stage of an adjudication proceeding while still ensuring fairness to all parties. It permits the hearing officer or the Director to shorten time periods established by the Interim Final Rule with the parties' consent. This authority could be used in proceedings where expedited hearings would serve the public interest or where the issues do not require expert discovery or extended evidentiary hearings.

One commenter noted its strong support for fair and impartial adjudication proceedings, but indicated that whether such proceedings should also be ''expeditious'' depends on the meaning of that term, and on the facts and circumstances of individual cases. The Bureau notes that expeditious proceedings are contemplated under section 1053(b) of the Dodd-Frank Act, 12 U.S.C. 5563(b), which requires that the hearing be held no earlier than 30 days nor later than 60 days after the date of service of the notice of charges, unless an earlier or later date is set by the Bureau at the request of any party so served. The Bureau believes that, in drafting the Interim Final Rule, it created a process that simultaneously provides for the prompt and efficient resolution of claims and ensures that parties who appear before the Bureau receive a fair hearing.

The Bureau adopts § 1081.101 of the Interim Final Rule without change in the Final Rule.

Section 1081.102 Rules of Construction

This section of the Interim Final Rule, drawn from the Uniform Rules, 12 CFR 19.2, makes clear that the use of any term in the Interim Final Rule includes either its singular or plural form, as appropriate, and that the use of the masculine, feminine, or neuter gender shall, if appropriate, be read to encompass all three. This section also explicitly states that, unless otherwise indicated, any action required to be taken by a party to a proceeding may be taken by the party's counsel. Finally, this section to the Final Rule provides that terms not otherwise defined by § 1081.103 should be defined in accordance with section 1002 of the Dodd-Frank Act, 12 U.S.C. 5481; the Interim Final Rule did not specifically reference section 1002.

The Bureau adopts § 1081.102 of the Interim Final Rule with the changes discussed above.

Section 1081.103 Definitions

This section of the Interim Final Rule sets forth definitions of certain terms used in the Interim Final Rule.

This section defines ''*adjudication proceeding*'' to include any proceeding conducted pursuant to section 1053 of the Dodd-Frank Act, except for proceedings related to the issuance of a temporary order to cease and desist pursuant to section 1053(c) of the Dodd-Frank Act. As previously noted, the Bureau currently intends to issue rules governing the issuance of temporary orders to cease and desist in the future.

The Bureau intends for the term ''*counsel*'' to include any individual representing a party, including, as appropriate, an individual representing himself or herself. The term ''*Director*'' has been defined to include the Director, as well as any person authorized to perform the functions of the Director in accordance with the law. This is intended to allow the Deputy Director, or a delegee of the Director, as appropriate, to perform the functions of the Director. The term ''*person employed by the Bureau*'' is defined to include Bureau employees and contractors as well as others working under the direction of Bureau personnel, and is intended to encompass, among other things, consulting experts.

On its own initiative, the Bureau replaced the defined term ''*Act,*'' which had been defined as the Consumer Financial Protection Act of 2010, with the defined term ''*Dodd-Frank Act*'' and defined ''*Dodd-Frank Act*'' to mean the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010.

On its own initiative, the Bureau has included a new definition in the Final Rule for the ''*Office of Administrative Adjudication*.'' The Interim Final Rule provided that the receipt of filings and certain other administrative tasks related to the Director's review of recommended decisions would be performed by the Bureau's Executive Secretary. After publication of the Interim Final Rule, the Bureau formed an Office of Administrative Adjudication to perform these functions. The Final Rule has been amended to reflect the creation of the Office of Administrative Adjudication and the transfer of the Executive Secretary's duties in adjudication proceedings to this Office. The defined term ''*Executive Secretary*'' has been removed from § 1081.103 as unnecessary.

On its own initiative, the Bureau also amended the definitions of ''*party*'' and ''*respondent*'' to account for persons that intervene in a proceeding for the limited purpose of seeking a protective order pursuant to amended § 1081.119(a).

Finally, the Bureau changed the term ''*Division of Enforcement*'' to ''*Office of Enforcement*'' to accurately reflect the Bureau's organizational nomenclature.

The Bureau adopts § 1081.103 of the Interim Final Rule with the changes discussed above.

Section 1081.104 Authority of the Hearing Officer

This section of the Interim Final Rule enumerates powers granted to the hearing officer subsequent to appointment. The hearing officer has the powers specifically enumerated in paragraph (b) of this section, as well as the power to take any other action necessary and appropriate to discharge the duties of a presiding officer. All powers granted by this provision are intended to further the Bureau's goal of an expeditious, fair, and impartial hearing process. The powers set forth in this section are generally drawn from the Administrative Procedure Act (APA), 5 U.S.C. 556, 557, and are similar to the powers granted to hearing officers and administrative law judges under the Uniform Rules, the SEC Rules, and the FTC Rules.

This section provides the hearing officer with the explicit authority to issue sanctions against parties or their counsel as may be necessary to deter sanctionable conduct, provided that any person to be sanctioned first has an opportunity to show cause as to why no sanction should issue. The Bureau believes such authority is included within the hearing officer's authority to regulate the course of the hearing, 5 U.S.C. 556(c)(5), but considers it appropriate to explicitly authorize the exercise of such authority in the Final Rule. The Bureau notes that the MARs provide adjudicators with the authority ''to impose appropriate sanctions against any party or person failing to obey her/his order, refusing to adhere to reasonable standards of orderly and ethical conduct, or refusing to act in good faith.'' *See* MARs, 11 T. M. Cooley L. Rev. at 83.

One commenter recommended that this section be revised to make clear that the hearing officer has the authority to provide a person requesting confidential treatment of information the time to come into compliance with applicable requirements before making a determination regarding confidentiality. The commenter expressed concern that the section as drafted authorized the hearing officer to immediately make public purportedly confidential material if the applicable requirements were not met.

The Bureau believes that the section as drafted adequately addresses this

circumstance. The hearing officer is authorized to ''deny confidential status to documents and testimony *without prejudice* until a party complies with all relevant rules'' (emphasis added). The inclusion of the ''without prejudice'' language authorizes the hearing officer to treat material as confidential while the party attempts to comply with the relevant rules. It also provides the hearing officer the authority to deny confidential status to documents when appropriate; for example, if a party repeatedly and/or willfully fails to comply with the requirements of the Final Rule.

The section permits the hearing officer to deny confidential status without prejudice until a party complies with ''all relevant rules.'' The commenter stated that the reference to ''all relevant rules'' is vague because the adjudication proceeding could be based on a respondent's alleged noncompliance with other rules. The commenter questioned whether the respondent would have to comply with those other rules before the hearing officer will treat material as confidential for the purposes of the adjudication proceeding.

The Bureau does not anticipate that the hearing officer will confuse the substantive rules the respondent is alleged to have violated with the procedural rules governing the treatment of purportedly confidential material. In light of this comment, however, and in the interest of providing covered persons additional guidance, the Bureau directs parties to §§ 1081.111, 1081.112, and 1081.119, as well as any applicable orders of the Director or hearing officer and any guidance issued by the Office of Administrative Adjudication, as the relevant rules with which persons seeking confidential treatment of material must comply.

Finally, the commenter stated that the hearing officer's authority to ''reject written submissions that fail to comply with the requirements of this part, and to deny confidential status to documents and testimony without prejudice until a party complies with all relevant rules'' was unclear. The commenter suggested that the hearing officer should only be permitted to reject filings that ''materially'' fail to comply with applicable requirements, so as not to elevate form over substance.

The Bureau has revised the Interim Final Rule to address this comment. Rejection of submissions merely because they fail to comply with this part in an immaterial fashion would be inconsistent with the Bureau's policy of encouraging fair and expeditious proceedings. Accordingly, the Bureau has revised § 1081.104(b)(6). The Final Rule provides that the hearing officer has the authority to ''reject written submissions that materially fail to comply with the requirements of this part.'' The Bureau adopts § 1081.104 of the Interim Final Rule with the changes discussed above.

Section 1081.105 Assignment, Substitution, Performance, Disqualification of Hearing Officer

This section of the Interim Final Rule is modeled on the FTC and the SEC Rules setting forth the process for assigning hearing officers in the event that more than one hearing officer is available to the Bureau. *See* 16 CFR 3.42(b), (e); 17 CFR 201.110, 201.112, 201.120. Consistent with 5 U.S.C. 3105, hearing officers will be ''assigned to cases in rotation so far as practicable.'' This section also sets forth the process by which hearing officers may be disqualified from presiding over an adjudication proceeding. The APA, 5 U.S.C. 556(b), provides that a hearing officer may disqualify himself or herself at any time. The standard for making a motion to disqualify requires that the movant have a reasonable, good faith basis for the motion. This standard is intended to emphasize that there must be an objective reason to seek a disqualification, not just a subjective, though sincerely held, belief. If a hearing officer does not withdraw in response to a motion for withdrawal, the motion is certified to the Director for his or her review in accordance with the Interim Final Rule's interlocutory review provision. Finally, this section provides the procedure for reassignment of a proceeding in the event a hearing officer becomes unavailable.

No comments were received specifically relating to this section, but commenters strongly supported a policy that adjudications should be fair and impartial. To that end, the Bureau has amended § 1081.201 of the Interim Final Rule by adding a new paragraph (e), which will require respondents, nongovernmental amici, and nongovernmental intervenors under § 1081.119(a) to file a disclosure statement and notification of financial interest. This disclosure statement and notification, discussed in more detail below, will provide the hearing officer and the parties with information to determine actual or potential bases for financial disqualification of the hearing officer early in the proceeding.

The Bureau adopts § 1081.105 of the Interim Final Rule without change in the Final Rule.

Section 1081.106 Deadlines

This section of the Interim Final Rule provides that deadlines for action by the hearing officer established by the Interim Final Rule do not confer any substantive rights on respondents. The SEC Rules, 17 CFR 201.360(a)(2), contain similar language regarding the timelines set out for certain hearing officer actions in SEC proceedings.

The Bureau received no comment on § 1081.106 of the Interim Final Rule and adopts it without change in the Final Rule.

Section 1081.107 Appearance and Practice in Adjudication Proceedings

This section of the Interim Final Rule is largely based on the Uniform Rules, 12 CFR 19.6, and prescribes who may act in a representative capacity for parties in adjudication proceedings. A notice of appearance is required to be filed by an individual representing any party, including an individual representing the Bureau, simultaneously with or before the submission of papers or other act of representation on behalf of a party. Any counsel filing a notice of appearance is deemed to represent that he or she agrees and is authorized to accept service on behalf of the represented party. The section also sets forth the standards of conduct expected of attorneys and others practicing before the Bureau. It provides that counsel may be excluded or suspended from proceedings, or disbarred from practicing before the Bureau, for engaging in sanctionable conduct during any phase of the adjudication proceeding.

The Bureau received no comments on § 1081.107, and the Final Rule is substantially similar to the Interim Final Rule. On the Bureau's own initiative, however, the Bureau amended § 1081.107(a)(1) to clarify that an attorney who is currently suspended or debarred from practicing in any jurisdiction may not appear before the Bureau or a hearing officer. This clarification is consistent with the SEC Rules, 17 CFR 201.102(e)(2), which provide for the suspension of any attorney who has been suspended or debarred by a court of the United States or of any State, and is designed to prohibit the appearance before the Bureau by a person who is authorized to practice in one State, but has been debarred or suspended in another jurisdiction.

The Bureau adopts § 1081.107 of the Interim Final Rule with the changes discussed above.

Section 1081.108 Good Faith Certification

This section of the Interim Final Rule is based on the Uniform Rules, 12 CFR 19.7, and requires that all filings and submissions be signed by at least one counsel of record, or the party if appearing on his or her own behalf. This section provides that, by signing a filing or submission, the counsel or party certifies and attests that the document has been read by the signer, and, to the best of his or her knowledge, is well grounded in fact and is supported by existing law or a good faith argument for the extension or modification of the existing law. In addition, the certification attests that the filing or submission is not for purposes of unnecessary delay or any improper purpose. Oral motions or arguments are also subject to the good faith certification: The act of making the oral motion or argument constitutes the required certification. Finally, this section makes clear that a violation of the good faith certification requirement would be grounds for sanctions under § 1081.104(b)(13). This section, which also mirrors the requirements of Federal Rule of Civil Procedure 11, is intended to ensure that parties and their counsel do not abuse the administrative process by making filings that are factually or legally unfounded or intended simply to delay or obstruct the proceeding.

The Bureau received no comment on § 1081.108 of the Interim Final Rule and adopts it without change in the Final Rule.

Section 1081.109 Conflict of Interest

This section of the Interim Final Rule provides that, in general, conflicts of interest in representing parties to adjudication proceedings are prohibited. The hearing officer is empowered to take corrective steps to eliminate such conflicts. If counsel represents more than one party to a proceeding, counsel is required to file at the time he or she files his or her notice of appearance a certification that: (1) The potential for possible conflicts of interest has been fully discussed with each such party; and (2) the parties individually waive any right to assert any conflicts of interest during the proceeding. This approach is modeled after the Uniform Rules, 12 CFR 19.8, which were based upon the Model Code of Conduct for attorneys and the District of Columbia Ethics Rule. *See* 56 FR 27790, 27793 (June 17, 1991).

The Bureau received no comment on § 1081.109 of the Interim Final Rule and adopts it without change in the Final Rule.

Section 1081.110 Ex Parte Communication

This section of the Interim Final Rule implements the APA's prohibition on ex parte communications. *See* 5 U.S.C. 554(d)(1), 557(d)(1). Paragraphs (a)(1), (a)(2), and (b) are based on the Uniform Rules, 12 CFR 19.9(a), (b), and prohibit an ex parte communication relevant to the merits of an adjudication proceeding between a person not employed by the Bureau and the Director, hearing officer, or any decisional employee during the pendency of an adjudication proceeding. Paragraph (a)(3) defines the term ''*pendency of an adjudication proceeding,*'' and provides that if the person responsible for the communication has knowledge that a notice of charges will or is likely to be issued, the pendency of an adjudication shall be deemed to have commenced at the time of his or her acquisition of such knowledge. This provision implements 5 U.S.C. 557(d)(1)(E).

Consistent with the MARs and the practice of other agencies, communications regarding the status of the proceeding are expressly excluded from the definition of ex parte communications. *See* MARs, 11 T.M. Cooley L. Rev. at 87; 12 CFR 19.9(a)(2); 16 CFR 4.7(a). If an ex parte communication does occur, the document itself, or if oral, a memorandum describing the substance of the communication must be placed in the record. All other parties to the proceeding may have the opportunity to respond to the prohibited communication, and such response may include a recommendation for sanctions. The hearing officer or the Director, as appropriate, may determine whether sanctions are appropriate.

Finally, paragraph (e) of this section provides that the hearing officer is not permitted to consult an interested person or a party on any matter relevant to the merits of the adjudication, except to the extent required for the disposition of ex parte matters. Consistent with 5 U.S.C. 554(d), this paragraph also provides that Bureau employees engaged in an investigational or prosecutorial function, other than the Director, may not participate in the decision-making function in the same or a factually related matter.

The Bureau received several comments regarding this section. One commenter expressed the concern that it may be difficult to determine whether a notice of charges ''will be'' or is ''likely to be'' issued for the purpose of determining when the prohibition on ex parte communications begins. The commentator stated that, because an individual makes the final decision to issue a notice of charges and the individual's thinking could change unexpectedly, anything short of respondent's actual knowledge that a notice of charges has actually been issued should be insufficient to begin the prohibition on ex parte communications. The commentator stated that it would not be appropriate to sanction someone for an ex parte communication when the person does not know whether a notice of charges has been issued. The commenter proposed that the Bureau revise this section of the Interim Final Rule to begin the ban on ex parte communications upon notice of actual issuance and service of a notice of charges, regardless of whether the person has knowledge that a notice of charges will be issued. Similarly, in cases in which a court has vacated a final decision and order and remanded a matter for further adjudication proceedings, the commenter proposed that this section of the Interim Final Rule be revised to prohibit ex parte communications after remand beginning when the party actually knows the Bureau will not file an appeal because the time for filing an appeal has lapsed and the party has not been served with a notice of appeal.

The Bureau has revised the section after considering these comments. The APA provides that the prohibition on ex parte communications ''shall apply beginning at such time as the agency may designate, but in no case shall they begin to apply later than the time at which a proceeding is noticed for hearing unless the person responsible for the communication has knowledge that it will be noticed, in which case the prohibitions shall apply beginning at the time of his acquisition of such knowledge.'' 5 U.S.C. 557(d)(1)(E). The APA does not, however, prohibit ex parte communications from the time a party knows a proceeding ''is likely to be'' issued. Accordingly, the Bureau has struck the phrase ''is likely to be'' from § 1081.110(a)(3).

The Bureau has also revised § 1081.110(a)(3) with respect to the timing of the respondent's knowledge of whether the Bureau will file an appeal. The Final Rule removes that provision of the Interim Final Rule stating that ''an order of remand by a court of competent jurisdiction shall be deemed to become effective when the Bureau determines not to file an appeal or a petition for a writ of certiorari,'' and slightly revises the rest of the section to reflect the fact that review of an appellate court's decision may only be had upon the grant of a petition for rehearing by the

panel or an en banc panel, or the grant of a petition for a writ of certiorari. This amendment responds to the commenter's concern that a respondent will not know whether the Bureau intends to appeal until the Bureau provides notice of its intention.

Finally, paragraph (e) provides that Bureau employees engaged in an investigational or prosecutorial function, other than the Director, may not participate in the decision-making function in the same or a factually related matter. The commenter expressed concern that this section would permit the Director to engage in ex parte communications with Bureau enforcement counsel regarding the decision, recommended decision, or agency review of the recommended decision in the same or factually related case. The commenter therefore recommended that this section be revised to prohibit enforcement counsel from communicating with the Director under these circumstances.

The Bureau notes that, while this section of the Interim Final Rule does not bar enforcement counsel from communicating with the Director regarding matters unrelated to the Director's adjudicatory functions, this section expressly prohibits enforcement counsel from participating or advising in the decision, recommended decision, or agency review of the recommended decision, except as witness or counsel in a public proceeding. The Bureau believes that these prohibitions are consistent with the separation of functions provision of the APA, 5 U.S.C. 554(d), and address the commenter's concern. Accordingly, the Bureau declines to revise paragraph (e).

The Bureau adopts § 1081.110 of the Interim Final Rule with the changes discussed above.

Section 1081.111 Filing of Papers

This section of the Interim Final Rule requires the filing of papers in an adjudication proceeding. It specifies the papers that must be filed and addresses the time and manner of filing. The Bureau received no comments regarding this section. In the interest of clarity and to provide further guidance to parties, however, the Bureau has amended the Interim Final Rule in several respects.

First, the Final Rule makes technical revisions to paragraph (a) to require the filing of the disclosure statement and notification of financial interest required under the new § 1081.201(e). The Final Rule also includes a slight revision to paragraph (a) intended to clarify that the Bureau must file the proof of service of the notice of charges. Among other things, the filing of the proof of service will provide notice of the beginning of the ten-day period after which the Bureau will publish the notice of charges under § 1081.200(c).

The Final Rule makes non-substantive changes to paragraph (b) of the Interim Final Rule to make uniform the references to the United States Postal Service and the different mail services. The Bureau also revised paragraph (b) to reflect the transfer of certain authorities to the newly-created Office of Administrative Adjudication. As a result, the section provides for filing by electronic transmission upon the conditions specified by the Office of Administrative Adjudication, recognizing that while the Bureau anticipates the development of an electronic filing system, it may adopt other means of electronic filing in the interim (*e.g.,* email transmission). The section authorizes other methods of filing if a respondent demonstrates, in accordance with guidance issued by the Office of Administrative Adjudication, that filing via electronic transmission is not practical.

Finally, the Bureau added a new paragraph (c), providing that unless otherwise ordered by the Bureau or the hearing officer, or in the absence of a pending motion seeking such an order, all papers filed in connection with an adjudication proceeding are presumed to be open to the public. This paragraph is consistent with the Bureau's commitment to making adjudication proceedings as transparent as reasonably possible, as reflected in §§ 1081.119(c) and 1081.300, which both recognize a presumption that documents and testimony in adjudication hearings are public.

The Bureau adopts § 1081.111 of the Interim Final Rule with the changes discussed above.

Section 1081.112 Formal Requirements as to Papers Filed

This section of the Interim Final Rule sets forth the formal requirements for papers filed in adjudication proceedings. It sets forth formatting requirements, requires that all documents be signed in accordance with § 1081.108, and requires the redaction of sensitive personal information from filings where the filing party determines that such information is not relevant or otherwise necessary for the conduct of the proceeding. This section also sets forth the method of filing documents containing information for which confidential treatment has been granted or is sought, and requires that in addition to filing the confidential information under seal, an expurgated copy of the filing be made on the public record. Section 1081.119 governs the filing of motions seeking confidential treatment of information and sets forth the standard to be applied by the hearing officer in determining whether to grant such treatment.

One commenter suggested that the Bureau remove the requirement in paragraph (e) that sensitive personal information be redacted from filings. The commenter believed that this requirement was not workable because the Interim Final Rule did not define ''sensitive personal information'' and only provided examples of such information. The commenter also pointed out that the Uniform Rules and the SEC Rules do not require the redaction of sensitive personal information.

The Bureau declines to omit the requirement that sensitive personal information be redacted from filings. The Bureau continues to believe that it is improper to file Social Security numbers, financial account numbers, and other sensitive personal information in an adjudication proceeding where the information is not relevant or otherwise necessary for the conduct of the proceeding. The Bureau notes that this section is modeled on the FTC Rules, 16 CFR 3.45(b), and is also similar to Federal Rule of Civil Procedure 5.2, which require filers to redact certain personal information, including Social Security numbers and financial account numbers, from filings. The Bureau agrees, however, that the term ''sensitive personal information'' should be defined and has therefore revised paragraph (e) to define that term.

The commenter also recommended the removal of paragraph (f)(2), which requires a party seeking confidential treatment of information in a filing to file an expurgated copy of the filing with the allegedly confidential material redacted. Specifically, the commenter stated that paragraph (f)(2)'s requirement that the redacted version show the size and location of the redactions could, in effect, disclose what was redacted and may be impractical when redactions are made electronically. The commenter stated that the SEC Rules and Uniform Rules do not include this requirement. The Bureau notes that paragraph (f)(2) is modeled on the FTC Rules, 16 CFR 3.45(e), and that the commenter did not identify how this redaction requirement could disclose confidential information or would be impractical. Accordingly, the Bureau declines to omit this requirement.

Section 1081.112(e) has been revised to include a definition of sensitive personal information, and to clarify the

obligations of a party filing a document containing sensitive personal information. Section 1081.112(f) has been revised to clarify the obligation of parties to comply with any applicable order of the hearing officer or the Director when seeking confidential treatment of information in a filing.

The Bureau adopts § 1081.112 of the Interim Final Rule with the changes discussed above.

Section 1081.113 Service of Papers

This section of the Interim Final Rule requires that every paper filed in a proceeding be served on all other parties to the proceeding in the manner set forth in this section. Service by electronic transmission is encouraged, but is conditioned upon the consent of the parties. The section also sets forth specific methods for the Bureau to serve notices of charges, as well as recommended decisions and final orders. In this regard, the section provides that such service cannot be made by First Class mail, but also provides that service may be made on authorized agents for service of process.

The section also provides that the Bureau may serve persons at the most recent business address provided to the Bureau in connection with a person's registration with the Bureau. Although no such registration requirements currently exist, the Bureau has included this provision to account for any such requirements in the future. In the event that a party is required to register with the Bureau and maintain the accuracy of such registration information, the Bureau should be entitled to rely upon such information for service of process. This provision is modeled on the SEC Rules, 17 CFR 201.141(a)(2)(iii).

The Bureau did not receive comments specifically related to § 1081.113. However, the Bureau made technical revisions to clarify and make this section of the Final Rule consistent with other sections of the Final Rule. The Bureau revised paragraph (d)(1)(v), which requires the Bureau to maintain a record of service of the notice of charges on parties, to also require the Bureau to file the certificate of service consistent with revised § 1081.111(a) to give notice of the beginning of the ten-day period after which the Bureau will publish the notice of charges under § 1081.200(c).

In addition, the Bureau revised paragraph (a) of this section to make it clear that the parties must comply with any applicable order of the hearing officer or the Director governing the service of papers.

Finally, as it did with § 1081.111(b), the Bureau made non-substantive changes to paragraphs (c) and (d) to make uniform the references to the United States Postal Service and the different mail services.

The Bureau adopts § 1081.113 of the Interim Final Rule with the changes discussed above.

Section 1081.114 Construction of Time Limits

This section of the Interim Final Rule provides for the manner of computing time limits, taking into account the effect of weekends and holidays on time periods that are ten days or less. This section also sets forth when filing or service is effective. With regard to time limits for responsive pleadings or papers, this section incorporates a three-day extension for mail service, similar to the Federal Rules of Civil Procedure, and a one-day extension for overnight delivery, as contained in some agencies' existing rules. A one-day extension for service by electronic transmission is consistent with the Uniform Rules and reflects that electronic transmission may result in delays in actual receipt by the person served.

Although the Bureau did not receive comments specifically related to § 1081.114, the Bureau made technical, non-substantive revisions to this section. As it did with §§ 1081.111 and 1081.113, the Bureau made non-substantive changes to make uniform the references to the United States Postal Service and the different mail services.

The Bureau adopts § 1081.114 of the Interim Final Rule with the changes discussed above.

Section 1081.115 Change of Time Limits

This section of the Interim Final Rule is modeled on the SEC Rules, 17 CFR 201.161, and is intended to limit extensions of time to those necessary to prevent substantial prejudice. The section is intended to further the Bureau's goal of ensuring the timely conclusion of adjudication proceedings. The section generally provides the hearing officer and the Director the authority to extend the time limits prescribed by the Interim Final Rule in certain defined circumstances. In keeping with the goal of expeditious resolution of proceedings, this section provides that motions for extension of time are strongly disfavored and may only be granted after consideration of various enumerated factors, provided that the requesting party makes a strong showing that denial of the motion would substantially prejudice its case. The section also provides that any extension of time shall not exceed 21 days unless the hearing officer or Director, as appropriate, states on the record or in a written order the reasons why a longer extension of time is necessary. Finally, the section provides that the granting of a motion for an extension of time does not affect the deadline for the recommended decision of the hearing officer, which must be filed no later than the earlier of 300 days after the filing of the notice or charges or 90 days after the end of post-hearing briefing (unless separately extended by the Director as provided for in § 1081.400).

Commenters expressed concern over paragraph (b) of this section, which sets forth a policy strongly disfavoring motions for extensions of time. The commenters recommended that the Bureau delete paragraph (b).

The Bureau believes the policy reflected in paragraph (b) ensures fairness to both the parties and the hearing officer by allowing an administrative matter to proceed within the timeframes provided by the Interim Final Rule, which were designed to provide sufficient time to both the litigants and the hearing officer. The Bureau believes that mandatory deadlines for the completion of certain stages of administrative proceedings, and a policy strongly disfavoring extensions, postponements or adjournments, is necessary to ensure that these proceedings are expeditious and fair.

The Bureau notes that the SEC amended its rules in 2003 to improve the timeliness of its administrative proceedings. The SEC Rules, 17 CFR 201.161, on which this section is modeled, were revised in 2003 to incorporate a policy strongly disfavoring extensions, postponements or adjournments except in circumstances where the requesting party makes a strong showing that the denial of the request or motion would substantially prejudice its case. The SEC stated that this provision was necessary in light of another amendment to the SEC Rules that changed the suggested guidelines for completion of administrative matters to mandatory deadlines. *See* 68 FR 35787 (June 17, 2003). The Bureau finds the SEC's experience instructive, and declines to delete paragraph (b) of this section.

The Bureau adopts § 1081.115 of the Interim Final Rule without change in the Final Rule.

Section 1081.116 Witness Fees and Expenses

This section of the Interim Final Rule provides that fees and expenses for non-party witnesses subpoenaed pursuant to

the Interim Final Rule shall be the same as for witnesses in United States district courts.

The Bureau received no comment on § 1081.116 of the Interim Final Rule and adopts it without change in the Final Rule.

Section 1081.117 Bureau's Right To Conduct Examination, Collect Information

This section of the Interim Final Rule, which is modeled on the Uniform Rules, 12 CFR 19.16, states that nothing contained in the Interim Final Rule shall be construed to limit the right of the Bureau to conduct examinations or visitations of any person, or the right of the Bureau to conduct any form of investigation authorized by law, or to take other actions the Bureau is authorized to take outside the context of conducting adjudication proceedings. This section is intended to clarify that the pendency of an adjudication proceeding with respect to a person shall not affect the Bureau's authority to exercise any of its powers with respect to that person.

One commenter asserted that section 1052(c)(1) of the Dodd-Frank Act prohibits the Bureau from issuing civil investigative demands after the institution of any proceedings under Federal consumer financial law, including proceedings initiated by a State law enforcement agency or a private party. The commenter asked the Bureau to amend the Interim Final Rule to require every civil investigative demand to be accompanied by a certification that the demand will have no bearing on any proceeding then in process.

This comment arguably should have been directed to the Rules of Investigation, 12 CFR part 1080, but the Bureau addresses it here. The Bureau notes that this section of the Interim Final Rule did not purport to implement or interpret section 1052(c)(1) of the Dodd-Frank Act. Rather, it states that nothing within ''this part'' (*i.e.,* the Interim Final Rule) should be construed as limiting the Bureau's supervisory, investigatory, or other authority to gather information in accordance with law. The Bureau does not agree with the commenter's interpretation of section 1052(c)(1) of the Dodd-Frank Act, but notes that any limitations placed upon it by that section are incorporated in 12 CFR 1080.6, which provides that civil investigative demands will be issued in accordance with section 1052(c) of the Dodd-Frank Act.

The Bureau adopts § 1081.117 of the Interim Final Rule without change in the Final Rule.

Section 1081.118 Collateral Attacks on Adjudication Proceedings

This section of the Interim Final Rule, which is modeled on the Uniform Rules, 12 CFR 19.17, is intended to preclude the use of collateral attacks to circumvent or delay the administrative process.

The Bureau received no comment on § 1081.118 of the Interim Final Rule and adopts it without change in the Final Rule.

Section 1081.119 Confidential Information; Protective Orders

This section of the Interim Final Rule sets forth the means by which a party or another person may seek a protective order shielding confidential information. While generally modeled on the SEC Rules, 17 CFR 201.322, this section of the Interim Final Rule adopts the substantive standard set forth in the FTC Rules, 16 CFR 3.45(b), which provides that the hearing officer may grant a protective order only upon a finding that public disclosure will likely result in a clearly defined, serious injury to the person requesting confidential treatment, or after finding that the material constitutes sensitive personal information. The Bureau adopted the FTC's standard in order to provide as much transparency in the adjudicative process as possible, while also protecting confidential business information or other sensitive information of parties appearing before the Bureau or third parties whose information may be introduced into evidence. The Bureau expects that the standard set forth in this section will be met in cases where the disclosure of trade secrets or other information to the public or to parties is likely to result in harm, but that the standard will not be met simply because the information at issue is deemed ''confidential'' or ''proprietary'' by the movant. To the extent that a movant can identify a clearly defined, serious injury likely to result from the disclosure of such particular information, it will be protected; generalized claims of competitive or other injury generally will not suffice. This section provides that documents subject to a motion for confidential treatment will be maintained under seal until the motion is decided.

One commenter expressed concern that the Interim Final Rule may not accommodate a situation where the person seeking confidential treatment is not the same as the person who would be harmed by the disclosure of the material. In order to clarify the rights of third parties whose confidential information may be disclosed during the adjudicative process, the Bureau added a new paragraph (a), providing that a party may not disclose confidential information obtained from a third party without providing the third party at least ten days notice prior to the disclosure. In response to this notice, the third party has the option to consent to the disclosure of such information, which may be conditioned on the entry of a protective order, or may intervene in the proceeding for the limited purpose of moving for a protective order pursuant to this section. The new paragraph (a) further provides that a party must certify that proper notice was provided for any written filing or oral motion or argument that contains confidential information obtained from a third party.

In order to streamline the process for disclosing confidential information obtained from third parties, the Bureau revised paragraph (b) of the Interim Final Rule (paragraph (c) of the Final Rule) to provide for the mandatory entry of a stipulated protective order that has been agreed to by all parties, including third parties to the extent their information is at issue. However, the Office of Enforcement reserves the right to refuse to stipulate to a protective order that does not meet the substantive standards set forth in this section.

One commenter recommended that the Bureau adopt the SEC's standard for granting a protective order and revise paragraph (b) of the Interim Final Rule to provide that a ''motion for a protective order shall be granted only upon a finding that the harm resulting from disclosure would outweigh the benefits of disclosure.''

As noted above, the Bureau considered the SEC's standard, but ultimately decided to adopt the FTC's standard because it comports with the Bureau's goals of providing transparency in the adjudicative process while also protecting confidential business information or other sensitive information. The Bureau believes the standard it adopts in this section serves the public interest by balancing the need for a public understanding of the Bureau's adjudication proceedings with the interests of respondents in avoiding competitive injury from public disclosure of information. *See In re Gen. Foods Corp.,* 95 F.T.C. 352 (1980).

The commenter raised a number of specific concerns regarding the Bureau's adoption of the FTC's standard. First, the commenter stated that the standard prevents a financial institution from seeking confidential treatment of its customers' personal information. However, the Interim Final Rule

provides that a protective order shall be issued after finding that the material constitutes sensitive personal information. There is no prohibition on persons seeking confidential treatment of sensitive personal information of other persons. On the contrary, the Bureau contemplates that the sensitive personal information of consumers will regularly be protected under §§ 1081.112(e) and 1081.119(b), whether because of a motion for a protective order filed by a person other than the consumer or stipulated to by the parties, or because of the requirement that sensitive personal information generally be redacted under § 1081.112(e).

The commenter also objected to this standard because it does not define the terms ''serious injury,'' ''likely,'' or ''clearly defined.'' The commenter identified the unpredictable possibility of identity theft as a possibility of injury that may not be ''likely.'' The Bureau believes that the commenter's concerns regarding potential identity theft should be addressed by § 1081.112(e), which generally requires the redaction of sensitive personal information. The Bureau reiterates that it anticipates that sensitive personal information of consumers will regularly be protected from public disclosure. The Bureau again notes that § 1081.112(e) is based on the FTC Rules, 16 CFR 3.45(b), and that the FTC has significant experience applying these standards in many types of cases. The Bureau believes leaving these terms undefined provides the hearing officer with the necessary flexibility to address confidentiality concerns on a case-by-case basis based on the relevant facts and circumstances. At the same time, this standard is consistent with the Bureau's goal of transparency and avoids granting confidential status based on unsupported and generalized claims of competitive or other injury.

The commenter also stated that the Interim Final Rule does not accommodate the possibility that the public disclosure of information may be illegal under laws unrelated to the adjudication proceeding. The Bureau agrees and has therefore revised paragraph (b) of this section (now paragraph (c)) to break up the bases for issuance of protective orders into subsections and to include a new subsection making clear that the hearing officer shall grant a protective order where public disclosure is prohibited by law.

Finally, consistent with the Bureau's commitment to transparency and open government, the Bureau clarified paragraph (b) of the Interim Rule (paragraph (c) of the Final Rule) to recognize that documents and testimony filed in connection with an adjudication proceeding are presumed to be public. This clarification is consistent with § 1081.300 and the revised § 1081.111(c), both of which recognize a presumption that documents, testimony, and hearings are public.

The Bureau adopts § 1081.119 of the Interim Final Rule with the changes discussed above.

Section 1081.120 Settlement

This section of the Interim Final Rule is based on the SEC Rules, 17 CFR 201.240. The Bureau on its own initiative revised this section to make it consistent with § 1081.100 of this part regarding the scope of the Interim Final Rule. Section 1081.100 makes clear that the Interim Final Rule applies only to adjudication proceedings authorized by section 1053 of the Dodd-Frank Act and not to Bureau investigations, investigational hearings or other proceedings that do not arise from proceedings after the issuance of a notice of charges. As revised, this section governs only offers of settlement made after the institution of adjudication proceedings under this part. Under this section, any respondent in a proceeding may make an offer of settlement in writing at any time. Any settlement offer shall be presented to the Director with a recommendation, except that, if the recommendation is unfavorable, the offer shall not be presented to the Director unless the person making the offer so requests.

The section requires that each offer of settlement recite or incorporate as part of the offer the provisions of paragraphs (c)(3) and (4). Because certain facts necessary for the Director to make a reasoned judgment as to whether a particular settlement offer is in the public interest will often be available only to the Bureau employee that negotiated the proposed settlement, paragraph (c)(4)(i) requires waiver of any provisions, under the Interim Final Rule or otherwise, that may be construed to prohibit ex parte communications regarding the settlement offer between the Director and Bureau employee involved in litigating the proceeding. Paragraph (c)(4)(ii) requires waiver of any right to claim bias or prejudgment by the Director arising from the Director's consideration or discussions concerning settlement of all or any part of the proceeding. If the Director rejects the offer of settlement, the person making the offer shall be notified of the Director's action. The rejection of the offer of settlement shall not affect the continued validity of the waivers pursuant to paragraph (c)(4).

The Bureau also revised this section to include a new paragraph (d) governing the content of stipulations and consent orders and providing a process for resolving an adjudication proceeding through a consent order. This process requires the respondent and the Bureau to reduce the terms of any settlement into a written stipulation and consent order memorializing the terms of the settlement and including certain required provisions. The Bureau will then issue an order with the consent of the respondent.

The Bureau adopts § 1081.120 of the Interim Final Rule with the changes discussed above.

Section 1081.121 Cooperation With Other Agencies

This section of the Interim Final Rule sets forth the Bureau's policy to cooperate with other governmental agencies to avoid unnecessary overlapping or duplication of regulatory functions.

The Bureau received no comment on § 1081.121 of the Interim Final Rule and adopts it without change in the Final Rule.

Subpart B—Initiation of Proceedings and Prehearing Rules

Section 1081.200 Commencement of Proceedings and Contents of Notice of Charges

This section of the Interim Final Rule, similar to the comparable section of the Uniform Rules, 12 CFR 19.18, contains the requirements relating to the initiation of adjudication proceedings, including the required content of a notice of charges initiating a hearing. In provisions modeled on the MARs and the Federal Rules of Civil Procedure, *see* MARs, 11 T.M. Cooley L. Rev. at 96; Fed. R. Civ. P. 41(a), this section also sets forth the circumstances under which the Bureau may voluntarily dismiss an adjudication proceeding, either on its own motion before the respondent(s) serve an answer, or by filing a stipulation of dismissal signed by all parties who have appeared. Unless the notice or stipulation of dismissal states otherwise, a dismissal pursuant to this section is without prejudice. In keeping with the principle that Bureau proceedings are presumed to be public, this section also provides that a notice of charges shall be released to the public after affording the respondent or others an opportunity to seek a protective order to shield confidential information.

On its own initiative, the Bureau amended this section to include a new

paragraph (d) to conform with the revisions made to § 1081.120 and to provide a procedural mechanism to commence an adjudication proceeding to effectuate a settlement agreed to before the filing of a notice of charges. As noted above, § 1081.120 has been revised to clarify that the settlement procedure laid out in that section applies only after a notice of charges has been issued. The Bureau recognizes, however, that settlement negotiations may commence prior to the filing of a notice of charges. In those circumstances, the Bureau may determine that an adjudication proceeding—rather than litigation elsewhere—is the most appropriate forum in which to enter a consent order. New paragraph (d) therefore provides that, where the parties agree to settlement before the filing of a notice of charges, a proceeding may be commenced by filing a stipulation and a consent order concluding the proceeding. Paragraph (d) also requires that certain information be included in the stipulation, tracking the information required under § 1081.120(d). Finally, in the interest of transparency, paragraph (d) requires that the consent order set forth the legal authority for the proceeding and for the Bureau's jurisdiction over the proceeding, and a statement of the matters of fact and law showing that the Bureau is entitled to relief. *See* § 1081.200(b)(1) and (2).

The Bureau adopts § 1081.200 of the Interim Final Rule with the changes discussed above.

Section 1081.201 Answer and Disclosure Statement and Notification of Financial Interest

This section of the Interim Final Rule requires a respondent to file an answer in all cases. The Bureau considered, but rejected, the approach set forth in the SEC Rules, 17 CFR 201.220(a), whereby an answer is required only if specified in the notice of charges. The Bureau believes that an answer can help focus and narrow the matters at issue.

Pursuant to paragraph (a) of this section, respondents must file an answer within 14 days of service of the notice of charges. The 14-day time period is adopted from the FTC Rules, 16 CFR 3.12. Two commenters requested that paragraph (a) of this section be amended to provide 20 days from service of the notice of charges, rather than 14 days, to file an answer. One commenter stated that it takes a considerable amount of time to review the notice of charges, investigate the factual and legal allegations, determine the appropriate response, and draft an answer. That commenter also stated that more than 14 days will be necessary to prepare an answer because the Bureau is not required to provide affirmative disclosures pursuant to § 1081.206(d) until seven days after service of the notice of charges. Both commenters note that the Federal banking agencies and the SEC allow 20 days to file an answer. Finally, one commentator stated that the 14-day requirement may cause respondents to answer with repeated assertions that they lack information, leading to fewer stipulations, and undercutting the Bureau's goal of timely adjudications.

The Bureau declines to amend the Interim Final Rule as requested. The statutory requirement that a hearing be held between 30 to 60 days after the service of the notice of charges, unless an earlier date is set at the request of any party so served, necessitates a compressed timeline for litigating adjudication proceedings. The Bureau is not alone in setting a 14-day deadline for an answer. As noted above, the FTC requires respondents in administrative proceedings to file an answer within 14 days of service of the complaint.

Further, as noted above, the Bureau has adopted a policy pursuant to which it will generally provide advance notice of a possible enforcement action to prospective respondents before filing a notice of charges. Recipients of such notices will have an opportunity to submit a response in writing. As a result, many respondents will have considered and responded to most or all of the Bureau's allegations before receiving the notice of charges. The advance notice will also give respondents a prior opportunity to identify facts to which they may stipulate, addressing the expressed concern that a 14-day deadline to answer may lead to fewer factual stipulations.

Likewise, the Bureau is not persuaded that respondents need additional time to answer after receiving the Bureau's affirmative disclosure documents. In typical civil litigation, and in administrative proceedings before the prudential regulators and the FTC, respondents file an answer before conducting any discovery. The Bureau's affirmative disclosure obligation will be triggered before a respondent's answer is due. Thus, respondents will have access to more information prior to filing an answer than is available to most respondents in other civil and administrative proceedings.

Finally, pursuant to § 1081.115, a respondent may ask for an extension of time to file an answer. While such extensions are strongly disfavored, they may be granted if the respondent makes a strong showing that the denial of its motion for an extension of time would substantially prejudice its case. For all of these reasons, the Bureau declines to amend the deadline for filing an answer contained in paragraph (a) of § 1081.201 of the Interim Final Rule.

As in the Uniform Rules, 12 CFR 19.19(c), paragraph (d) of this section provides that failure to file a timely answer is deemed to be a waiver of the right to appear and a consent to the entry of an order granting the relief sought by the Bureau in the notice of charges. This section provides that in the case of default, the hearing officer is authorized, without further proceedings, to find the facts to be as alleged in the notice of charges and to enter a recommended decision containing appropriate findings and conclusions.

Paragraph (d)(2) of this section adopts the procedure from the SEC Rules for a motion to set aside a default, 17 CFR 201.155. It also provides that the hearing officer, prior to the filing of the recommended decision, or the Director, at any time, may set aside a default for good cause shown.

In the discussion of § 1081.105 above, the Bureau noted the addition of a new § 1081.201(e) requiring the filing of a disclosure statement and notification of financial interest. Consistent with the Bureau's goal of an expeditious, fair, and impartial hearing process, the Bureau seeks to provide the parties and the hearing officer with information to identify potential or actual bases for disqualification early in the process. Section 1081.201(e) is modeled on the disclosure statements required under Federal Rule of Civil Procedure 7.1, Federal Rule of Appellate Procedure 26.1, Third Circuit Local Appellate Rule 26.1.1, and Sixth Circuit Rule 26.1. This disclosure is calculated to reach a majority of the circumstances that are likely to call for disqualification on the basis of financial information that a hearing officer may not know or recollect; however, the disclosure does not cover all of the circumstances that may call for disqualification. In addition to requiring a respondent, a nongovernmental amicus, or a nongovernmental intervenor to identify any parent corporation or any publicly owned corporation owning 10% or more of its stock, § 1081.201(e) also requires the identification of ''any publicly owned corporation not a party to the proceeding that has a financial interest in the outcome of the proceeding and the nature of that interest.'' The types of financial interests that must be disclosed under this section include, for example, insurance, franchise, or indemnity agreements giving a publicly

owned corporation a financial interest in the outcome of the proceeding. *See, e.g.,* Sixth Circuit Rule 26.1(b)(2).

The Bureau adopts § 1081.201 of the Interim Final Rule with the changes discussed above.

Section 1081.202 Amended Pleadings

This section of the Interim Final Rule provides that a notice of charges or an answer may be amended or supplemented as a matter of course at any stage of the proceeding.

The Bureau did not receive comment on § 1081.202, but the Bureau has amended paragraph (a) of this section on its own initiative to require a party who wishes to amend a pleading to obtain the consent of the other party or leave of the hearing officer. By requiring written consent or leave of the hearing officer to amend pleadings, the revised section encourages parties to plead their case fully, as opposed to reserving claims and defenses for last minute amendments. This section continues to reflect a liberal standard of permitting amendments of pleadings, but implements an appropriate limit for amendments that are unduly prejudicial.

The Bureau adopts paragraph (b) of § 1081.202 of the Interim Final Rule without change. As a result, when a party seeks to introduce evidence at a hearing that is outside the scope of matters raised in the notice of charges or answer, the hearing officer may admit the evidence when admission is likely to assist in adjudicating the merits of the action unless the objecting party demonstrates that admission of such evidence would unfairly prejudice that party's action or defense upon the merits.

The Bureau adopts § 1081.202 of the Interim Final Rule with the changes discussed above.

Section 1081.203 Scheduling Conference

Section 1081.203 of the Interim Final Rule sets forth the requirements related to scheduling conferences. Paragraph (a) of this section requires the parties to meet before the initial scheduling conference to discuss the nature and basis of their claims and defenses, the possibilities for a prompt settlement or resolution of the case, and other matters to be determined at the scheduling conference.

Paragraph (b) of § 1081.203 of the Interim Final Rule provides that within 20 days of the service of the notice of charges, or at another time if the parties agree, the hearing officer and the parties are to have a scheduling conference. The Bureau revised paragraph (b) to clarify that a scheduling conference is to be held, not just scheduled, within 20 days of service of the notice of charges. This clarification is intended to reflect the Bureau's original intent with respect to the timing of the scheduling conference.

Paragraph (b) of this section also sets forth the issues to be discussed at the scheduling conference. These issues are drawn from those the parties are required to discuss at scheduling and prehearing conferences under the Uniform Rules, 12 CFR 19.31, the SEC Rules, 17 CFR 201.221, and the FTC Rules, 16 CFR 3.21. Paragraph (b)(1) provides that the parties shall be prepared to address the determination of hearing dates and location, and whether, in proceedings under section 1053(b) of the Dodd-Frank Act, the hearing should commence later than 60 days after service of the notice of charges. This provision is intended to account for the requirement in section 1053(b) of the Dodd-Frank Act that the hearing be held no earlier than 30 days nor later than 60 days after the date of service of the notice of charges, unless an earlier or later date is set by the Bureau at the request of any party so served. It is expected that the parties will discuss a hearing date at the scheduling conference, and that this would afford respondents the opportunity to request a hearing date outside the 30-to-60 day timeframe.

It is also expected that at or before the scheduling conference, the parties will discuss any issues related to the production of documents pursuant to § 1081.206, any anticipated motions for witness statements pursuant to § 1081.207, whether either party intends to issue documentary subpoenas, and whether either party believes that depositions will be necessary to preserve the testimony of witnesses who will be unavailable for the hearing. The parties are also expected to discuss the need and a schedule for any expert discovery.

Pursuant to paragraph (d) of § 1081.203, the hearing officer is required to issue a scheduling order at or within five days of the conclusion of the scheduling hearing, setting forth the date and location of the hearing, as well as other procedural determinations made. It is expected that the hearing officer will establish any dates for expert discovery in the scheduling order, or else expressly find that such discovery is not necessary or reasonable in a particular case. This scheduling order will govern the course of the proceedings, unless later modified by the hearing officer.

Provision for a prompt scheduling conference followed by prompt issuance of a scheduling order is necessary in order to allow for the orderly course of proceedings on the timeline set forth elsewhere in the Interim Final Rule. Particularly in cases brought pursuant to section 1053(b) of the Dodd-Frank Act in which the respondent does not request a hearing date outside the 30-to-60 day timeframe set forth in the statute, it is essential that the hearing officer and the parties have a clear understanding of the applicable schedule at the earliest possible date.

As provided for in the SEC Rules, 17 CFR 201.221(f), paragraph (e) of this section provides that any person named as a respondent in a notice of charges who fails to appear at a scheduling conference may be deemed in default pursuant to § 1081.201(d)(1). Finally, like the FTC Rules, 16 CFR 3.21(g), this section provides that scheduling conferences are presumptively public unless the hearing officer determines otherwise based on the standard set forth in § 1081.119(c).

The Bureau received no comment on § 1081.203 of the Interim Final Rule and adopts it with the single clarification discussed above in the Final Rule.

Section 1081.204 Consolidation and Severance of Actions

This section of the Interim Final Rule, modeled after the Uniform Rules, 12 CFR 19.22, allows the consolidation of actions if the proceedings arise out of the same transaction, occurrence, or series of transactions or occurrences or if the proceedings involve at least one common respondent or a material common question of law or fact. Proceedings are not to be consolidated if doing so would unreasonably delay the proceeding or cause injustice.

Severance, on the other hand, may be granted by the hearing officer only if he or she determines that undue prejudice or injustice would result from a consolidated proceeding and if such prejudice or injustice would outweigh the interests of judicial economy and speed in the adjudication of actions. This is a higher standard than is required for the consolidation of actions.

The Bureau received no comments on § 1081.204 of the Interim Final Rule and adopts it without change in the Final Rule.

Section 1081.205 Non-Dispositive Motions

This section of the Interim Final Rule governs all motions other than motions to dismiss or motions for summary disposition, which are governed by

§ 1081.212. The section generally sets forth the requirements for filing a non-dispositive motion, and requires that all such motions must be in writing, state with particularity the relief sought, and include a proposed order. This section also makes clear that motions filed pursuant to sections that impose different requirements should follow those requirements, and the requirements of § 1081.205 to the extent they are not inconsistent. For example, § 1081.208(g) of the Interim Final Rule (paragraph (h) of the Final Rule), which relates to motions to quash subpoenas, provides for a shorter time period for the filing of a responsive brief and prohibits the filing of a reply unless requested by the hearing officer. These conditions govern motions to quash, but such motions are still subject to other provisions of § 1081.205, including, *inter alia,* the need to meet and confer, deadlines for the hearing officer's ruling, and length limitations of the briefs.

Like the Uniform Rules and the FTC Rules, 12 CFR 19.23(d)(1); 16 CFR 3.22(d), this section gives a party ten days after service of a non-dispositive motion to respond to such a motion in writing. It also provides for reply briefs, which must be filed within three days after service of the response. A party's failure to respond to a motion shall waive that party's right to oppose such motion and constitutes consent to the entry of an order substantially in the form of the order accompanying that motion. This section adopts the SEC's 15-page length limitation for non-dispositive motions and oppositions, 17 CFR 201.154(c), and a six page length limitation for reply briefs. The Bureau has adopted these time and length limitations because they provide parties ample opportunity to express their views on matters that do not concern the ultimate disposition of the action.

This section also requires parties to make a good faith effort to meet and confer prior to the filing of a non-dispositive motion in an effort to resolve the controversy by agreement. The Bureau has included the meet-and-confer requirement because it believes such conferences can help obviate the need for, or narrow the scope of, disputed motions, thus saving both the parties and the hearing officer time and resources.

This section provides that the hearing officer shall rule on a non-dispositive motion within 14 days after the expiration of the time for filing of all motions papers authorized by this section, and that the pendency of a motion shall not stay proceedings. This time limitation is based on the FTC Rules, 16 CFR 3.22(e), and is intended to ensure the timely resolution of disputes so that the proceeding as a whole can conclude in a fair and expeditious manner. As noted above, both the FTC and the SEC have revised their rules of practice to provide for the more expeditious resolution of administrative adjudications, and the incorporation of a time period in which the hearing officer must rule on a non-dispositive motion is, in the view of the Bureau, a critical part of that effort. *See* 73 FR 58832, 58836 (Oct. 7, 2008) (FTC expects that provision requiring ALJs to decide motions within 14 days will expedite cases).

The Bureau received no comment on § 1081.205 of the Interim Final Rule and adopts it without change in the Final Rule.

Section 1081.206 Availability of Documents for Inspection and Copying

Modeled primarily after the SEC Rules, 17 CFR 201.230, this section of the Interim Final Rule adopts the SEC's affirmative disclosure approach to fact discovery in administrative adjudications. Generally, this section requires that the Office of Enforcement make available for inspection and copying certain categories of documents obtained by the Office of Enforcement prior to the institution of proceedings from persons not employed by the Bureau, in connection with the investigation leading to the institution of proceedings, and certain categories of documents produced by persons employed by the Bureau.

The Bureau received several comments requesting amendment to this section. Before addressing each specific comment, the Bureau sets forth its understanding of this provision in order to provide guidance to both the public and future respondents regarding how it intends to comply with the affirmative disclosure obligations of § 1081.206.

As the Bureau stated when it issued the Interim Final Rule, this section is intended to promote the fair and efficient resolution of adjudicatory proceedings. A respondent has an automatic right to inspect and copy documents under this section at the outset of the proceeding. The respondent is not required to make a formal request or wait until after the scheduling conference to gain access to documents underlying the Bureau's decision to initiate proceedings. Instead, the Bureau will provide the respondent with access to, in effect, the documents they would likely seek and obtain in the course of a protracted discovery period soon after service of the notice of charges.

This approach has several advantages. By automatically providing respondents with the factual information gathered by the Office of Enforcement in the course of the investigation leading to the institution of proceedings, this provision helps ensure that respondents have a complete understanding of the factual basis for the Bureau's action and can more accurately and efficiently determine the nature of their defenses or whether they wish to seek settlement. Because this approach renders traditional document discovery largely unnecessary, it will lead to a faster and more efficient resolution of Bureau administrative proceedings, saving both the Bureau and respondents the resources typically expended in the civil discovery process.

Section 1081.206 adopts most of the procedures and conditions set forth in the SEC Rules, as discussed below.

Pursuant to paragraph (a)(1), the Office of Enforcement's obligation under this section relates to documents obtained by the Office of Enforcement. Documents located only in the files of other divisions or offices of the Bureau are beyond the scope of paragraph (a). The term ''*documents*'' has been defined in the same manner as the term ''*documentary material*'' in section 1051(4) of the Dodd-Frank Act, 12 U.S.C. 5561(4), and encompasses, among other things, electronic files or other data or data compilations stored in any medium.

Paragraph (a)(1) also provides that the Office of Enforcement will make the documents available for inspection and copying. This provision is modeled after the SEC Rules and the Federal Rules of Civil Procedure. The Bureau anticipates that in most cases it will simply provide either paper or electronic copies of the material at issue to respondents, but has adopted the formulation in this section to preserve flexibility and the Office of Enforcement's right to require inspection and copying in appropriate cases.

Paragraphs (a)(1)(i), (ii), and (iii) describe the types of documents that are subject to the disclosure requirement of paragraph (a)(1). The Bureau interprets its obligation under paragraph (a)(1)(iii) to include both records obtained by the Office of Enforcement directly from persons not employed by the Bureau, as well as documents obtained by the Office of Enforcement indirectly from persons not employed by the Bureau. For example, if the Office of Enforcement obtains information from the Bureau's supervisory staff in connection with an investigation that the supervisory staff obtained from persons not employed by the Bureau,

the Office of Enforcement will disclose such information, provided it is not privileged or otherwise protected from disclosure.

Paragraph (a)(2) provides that the Office of Enforcement shall also make available each civil investigative demand or other written request to provide documents or to be interviewed issued by the Office of Enforcement in connection with the investigation leading to the institution of proceedings. The Office of Enforcement shall also make available any final examination or inspection reports prepared by any other office of the Bureau if the Office of Enforcement either intends to introduce any such report into evidence or to use any such report to refresh the recollection of, or impeach, any witness. The provisions of paragraph (a)(2) are included in the SEC Rules, but have been broken out into a separate paragraph of this section because they do not comprise documents that the Office of Enforcement obtained from persons not employed by the Bureau, and thus do not technically fall within the scope of paragraph (a)(1).

Pursuant to § 1081.208, a respondent may seek production of other documents pursuant to subpoena. Paragraph (a)(3) is intended to make clear that the affirmative disclosure obligation set forth in paragraphs (a)(1) and (a)(2) does not preclude the availability of subpoenas as separately provided by § 1081.208.

Paragraph (a)(4) provides that this section does not require the Office of Enforcement to produce a final examination or inspection report prepared by any other Office of the Bureau to a respondent who is not the subject of that report. The Bureau has included this provision, which does not appear in the SEC Rules, out of concern for the privileged and confidential nature of examination and inspection reports and to make clear that respondents cannot rely upon the Bureau's affirmative disclosure obligation to require the production of supervision or examination reports concerning other persons. Although the disclosure obligation as drafted would not require the production of such reports, the Bureau included this provision to remove any question regarding the issue.

Paragraph (a)(4) of the Interim Final Rule did not explicitly apply to final inspection or examination reports obtained from other government agencies. The Final Rule has been amended to clarify that such reports, to which the confidentiality and privilege concerns discussed above apply equally, are also excluded from the Bureau's disclosure obligation.

Paragraph (b)(1) of the Interim Final Rule permitted the Office of Enforcement to withhold documents that would otherwise be produced under paragraph (a) under five exceptions. The Final Rule retains these exceptions and adds an additional exception, paragraph (b)(1)(iii), as described below.

The first exception, in paragraph (b)(1)(i) shields information subject to a claim of privilege. The second exception, in paragraph (b)(1)(ii), protects as work product internal documents prepared by persons employed by the Bureau, including consulting experts, which will not be offered in evidence. Work product includes any notes, working papers, memoranda or other similar materials, prepared by an attorney or under an attorney's direction in anticipation of litigation. *See Hickman* v. *Taylor,* 329 U.S. 495 (1947); *see also* Fed. R. Civ. P. 26(b)(3) and (b)(5). Accountants, paralegals, investigators, and consulting experts who work on an investigation do so at the direction of the Director, an associate director, or another supervisory attorney, and their work product is therefore not subject to the affirmative disclosure obligation. Although such material would not fall within the purview of paragraphs (a)(1) and (a)(2), the Bureau has retained this provision of the SEC Rules to make clear that such work product is not subject to the affirmative disclosure obligation. An examination or inspection report prepared by one of the Bureau's supervision offices, which the Office of Enforcement intends to introduce into evidence or to use to refresh the recollection of, or impeach, a witness, is explicitly excluded from the materials that may be withheld pursuant to this exception.

The third exception, contained in paragraph (b)(1)(iii), is added to the Final Rule. Modeled upon a similar provision in the Rules of Practice of the Commodity Futures Trading Commission, 17 CFR 10.42, this paragraph protects documents obtained from other governmental entities that are either not relevant to the proceeding or were provided to the Bureau on the condition that the information not be disclosed. The Bureau has added this provision to accommodate any agreements limiting the disclosure of documents received from other governmental entities. To the extent the Bureau withholds documents pursuant to this exception, it will not rely upon those documents at the hearing.

The fourth exception, contained in paragraph (b)(1)(iv) of the Final Rule, protects the identity of a confidential source. *See* 5 U.S.C. 552(b)(7)(C) and (D). The fifth exception, contained in paragraph (b)(1)(v) of the Final Rule, provides that documents need not be produced where applicable law prohibits their production. The final exception protects any other document or category of documents that the hearing officer determines may be withheld as not relevant to the subject matter of the proceeding, or otherwise for good cause shown. This exception is intended to provide the hearing officer with the flexibility to adjust the Bureau's affirmative disclosure obligation to the particular contours of a proceeding. For example, this exception could be used in a situation where a single investigation involves other industry participants that are related only indirectly, or not at all, to the recommendations ultimately made to the Director with respect to the particular respondents in a specific proceeding. To require that documents not relevant to the proceeding be made available, simply because they were obtained as part of a broad investigation, burdens the respondent as well as the Office of Enforcement with unnecessary costs and delay.

Paragraph (b)(2) of this section provides that paragraph (b) does not authorize the Office of Enforcement to withhold material exculpatory evidence in the possession of the Office of Enforcement that would otherwise be subject to disclosure pursuant to paragraph (a). Pursuant to this section, the Office of Enforcement will provide respondents with material exculpatory evidence it has obtained from persons not employed by the Bureau even if such evidence is contained in documents that the Office of Enforcement is otherwise permitted to withhold pursuant to paragraph (b)(1).

The Bureau declines to adopt the SEC Rules' explicit reference to *Brady* v. *Maryland,* 373 U.S. 83 (1963) in this context. Proceedings under this part are civil in nature, not criminal, and the requirements of *Brady* are therefore inapplicable. The Office of Enforcement will turn over information from its investigatory file obtained from persons not employed by the Bureau as part of the investigation resulting in the Bureau's decision to institute proceedings, including any material exculpatory evidence so obtained. The Bureau understands this approach to be consistent with that provided for in the SEC Rules.

The Bureau also adds the clause ''that would otherwise be required to be

produced pursuant to paragraph (a) of this section'' to paragraph (b) to make clear that the material exculpatory evidence provision works in concert with paragraph (a). Paragraph (b) does not impose a separate, free-standing obligation to disclose exculpatory evidence that is not otherwise within the scope of paragraph (a).

Paragraph (c) provides that the hearing officer may require the Office of Enforcement to submit a withheld document list, and may order that a withheld document be made available for inspection and copying. Paragraph (c) has been amended to incorporate a provision from the Rules of Practice of the Commodity Futures Trading Commission, 17 CFR 10.42. This provision limits the disclosures that the Bureau will make with respect to documents withheld pursuant to paragraph (b)(1)(iii). The Bureau will inform the other parties of the fact that such documents are being withheld, but will not make further disclosures regarding those documents. Like paragraph (b)(1)(iii), this provision was added to enable the Bureau to comply with agreements limiting the disclosure of documents received from other governmental entities.

Pursuant to paragraph (d), the Office of Enforcement is required to make the material governed by this section available for inspection and copying no later than seven days after service of the notice of charges unless otherwise ordered by the hearing officer. The Bureau has considered requiring production of the covered material at the time the notice of charges is served, but has decided against such an approach. A provision for a delay of no more than seven days will allow parties to move for any appropriate protective orders and is consistent with the SEC's approach in this regard. *See* 17 CFR 201.230(d). The Bureau notes that, if seven days after the service of a notice of charges a motion for a protective order is pending but has not yet been ruled upon, production of the documents that are the subject of the motion could be delayed. The hearing officer could order temporary remedies where appropriate, such as the production of redacted copies pending a decision on the motion for a protective order. It is the Bureau's expectation that the Office of Enforcement will make the material available as soon as possible in every case.

Paragraphs (e) and (f) set forth the procedure to obtain copies of documents and the costs of such copies. As noted above, the Bureau anticipates providing electronic copies of the documents to respondents in most cases, and paragraph (f) accounts for such a provision of electronic documents. In order to preserve the discretion of the Office of Enforcement, however, this paragraph includes provisions governing the inspection and copying of documents. In order to provide for the safekeeping of documents subject to inspection, and to control costs associated with the implementation of this section, paragraph (e) provides that documents shall be made available for inspection and copying at the Bureau office where they are ordinarily maintained, or at such other place as the parties may agree. In cases in which electronic production is unwarranted, this process appears more likely to result in prompt access to documents obtained by the Office of Enforcement that are the basis of the allegations contained in the notice of charges.

Paragraph (g) of this section imposes upon the Office of Enforcement a duty to supplement its disclosures under paragraph (a)(1) of this section if it acquires information after making its disclosures that it intends to rely upon at a hearing. Although the SEC Rules do not include an analogous provision, the Bureau believes that imposing a duty to supplement will reduce the need for unnecessary discovery requests.

Like the SEC Rules, 17 CFR 201.230(h), paragraph (h) provides for a ''harmless error'' standard in the event the Office of Enforcement fails to make available to a respondent a document required to be made available by this section.

Finally, paragraph (i) is modeled on the FTC Rules, 16 CFR 3.31(g), and provides a ''claw back'' mechanism whereby inadvertent disclosure of privileged or protected information or communications shall not constitute a waiver of the privilege or protection, provided that the party took reasonable steps to prevent disclosure and promptly took reasonable steps to rectify the error. Furthermore, paragraph (i) provides that disclosure of privileged or protected information or communications shall waive the privilege only if the waiver was intentional and that the scope of such waiver is limited to the undisclosed information or communications concerning the same subject matter, which in fairness ought to be considered together with the disclosed information or communications. Paragraph (i) expressly applies to disclosures made by any party during an adjudication proceeding.

The Bureau received several comments to this section, and will address them in turn.

Comment: One commenter asserted that the ''affirmative disclosure'' approach puts respondents at a significant disadvantage to the Bureau, because the Bureau, unlike the respondent, will have already gathered all of the information it needs to prepare for the hearing through examinations and investigation proceedings as well as through its ability to collect consumer complaints and collect information from covered persons.

Response: While the Bureau will have already conducted an investigation prior to filing its notice of charges, the ''affirmative disclosure'' approach will give a respondent automatic access to the vast majority of the documents gathered as part of that investigation. Production to respondents will include any consumer complaints or documents from covered persons that enforcement counsel obtained in connection with the investigation, provided that production of those documents would not reveal the identity of a confidential source or otherwise fall within the scope of one of the relevant exceptions.

This approach will provide respondents automatic access to the factual information gathered by the Office of Enforcement in the course of the investigation leading to the institution of proceedings. As a result, the process will help ensure that respondents have a complete understanding of the basis for the Bureau's action, and can assess their defenses accordingly. If necessary, respondents may seek to obtain additional information through subpoena.

Furthermore, the exceptions to the Bureau's affirmative disclosure obligation do not disadvantage respondents as compared to traditional civil discovery because the exceptions protect documents that often would be protected in traditional civil discovery. When producing documents in traditional discovery, litigants routinely seek protection for documents that (i) are privileged; (ii) constitute work product; (iii) are irrelevant or required to be kept confidential; (iv) would reveal the identity of a confidential source; [3] (v) are prohibited from production by applicable law; or (vi) are deemed by the hearing officer or judge to be not relevant to the subject matter or otherwise not subject to production for good cause shown.

[3] As discussed below, information provided by a confidential source, and in some cases even that source's identity, will be made available to the extent the Bureau plans to call that source as a witness, rely upon information he or she provided, or to the extent the information is exculpatory.

In short, the Bureau believes the affirmative disclosure process will promote a fair and efficient resolution of administrative proceedings without placing the respondent at an unfair disadvantage.

Comment: Respondents should be permitted to (a) depose third parties who have direct knowledge of relevant matters; (b) issue and enforce subpoenas for documents and testimony, and (c) serve third parties with interrogatories.

Response: The Bureau declines to make these changes. The Bureau considered allowing third-party depositions or interrogatories but declined to do so because the need for these third-party discovery tools will likely be met through the discovery mechanisms that are available under the Final Rule, and because of the potential for third-party depositions and interrogatories to delay the proceedings.

Even without third-party discovery depositions, respondents will be able to present testimony of third-parties with knowledge of relevant matters at the hearing to support their defense. Pursuant to § 1081.208, respondents may request the issuance of a subpoena for the attendance and testimony of a witness at the hearing. If a witness is unavailable for the hearing, a respondent may take that witness's deposition and introduce that testimony on the record at a hearing.

The Bureau believes that the marginal benefit of permitting third-party interrogatories is not justified in light of the likelihood that disputes over interrogatories may delay the proceedings. The Bureau notes that neither the SEC's Rules nor the Uniform Rules permit prehearing discovery depositions or interrogatories.

As drafted, § 1081.208 requires a party to request the issuance of a subpoena from the hearing officer, and generally requires the Bureau to seek judicial enforcement of subpoenas. The Bureau considered whether to permit parties to issue subpoenas. The Bureau declined to do so because a hearing officer can help ensure that subpoenas are not ''unreasonable, oppressive, excessive in scope, or unduly burdensome.'' The commenter requested that respondents be permitted to enforce subpoenas, but the Dodd-Frank Act requires the Bureau to do so. 12 U.S.C. 5562(b)(2). The Bureau's General Counsel will enforce subpoenas on relation of a respondent, provided such enforcement is consistent with the law and the policies of the Dodd-Frank Act.

The third-party discovery permitted by the Interim Final Rule is consistent with the practice of the SEC, which shares a common approach to discovery with the Bureau. *See* 17 CFR 201.230–234. It is also consistent with the Uniform Rules, which, like the Interim Final Rule, allow third-party depositions only when a witness is unavailable for hearing, *see* 12 CFR 19.27, and require parties to apply to the administrative law judge for a third-party document subpoena, which may be granted only if the administrative law judge determines the subpoena is not ''unreasonable, oppressive, excessive in scope, or unduly burdensome.'' *See* 12 CFR 19.26. Like the SEC, the Bureau will make documents available to respondents through the affirmative disclosure process. As a result, traditional discovery is limited, and it is appropriate to require parties to request issuance of a subpoena in order to ensure that the Bureau's subpoena power is exercised appropriately and not for purposes of delay or obstruction.

This practice is also appropriate considering that respondents must demonstrate that a witness is unavailable for the hearing in order to obtain a deposition subpoena. This standard is more easily enforced if a party has to request, and a hearing officer has to issue, those subpoenas. The SEC and the Uniform Rules both restrict depositions to circumstances when a witness will not be available for the hearing, and both require parties to request or apply for a deposition subpoena.

Comment: It is unclear whether the affirmative disclosure process limits the right of respondents to seek other documents from the Bureau through subpoena. Respondents may be prevented from seeking certain documents through subpoena on the grounds that it could physically inspect and copy those same documents through the affirmative disclosure process.

Response: Section 1081.208 permits a respondent to seek other documents from the Bureau through subpoena. Such a subpoena would presumably not be necessary if the documents sought by the respondent were included in the affirmative disclosure production, but the existence of that process does not negate a respondent's right to request a subpoena for other relevant documents in the possession of the Bureau, as the Interim Final Rule makes clear in paragraph (a)(3) of § 1081.206.

Comment: The affirmative disclosure process covers documents that are ''obtained by the Office of Enforcement.'' Whether documents are relevant and should be discoverable is unrelated to who at the Bureau ''obtained'' the documents. This could lead to protracted litigation over who ''obtained'' a document that a Bureau employee sees and reads but does not touch.

Response: The affirmative disclosure process outlined in § 1081.206 is based upon the SEC's affirmative disclosure approach to fact discovery in administrative adjudications. The ''obtained by'' the Office of Enforcement language is taken directly from the SEC Rules. Section 1081.206 is intended to give respondents access to the material facts underlying enforcement counsel's decision to recommend the commencement of enforcement proceedings. It is not intended to create an obligation for enforcement counsel to search the files of other divisions or offices in the Bureau. As explained above, the Bureau will include in its affirmative disclosure documents obtained by other elements of the Bureau from persons not employed by the Bureau and later provided to the Office of Enforcement for its use ''in connection with the investigation leading to the institution of proceedings.'' § 1081.206(a)(1).

Comment: Disclosure should not be limited to documents obtained ''in connection with the investigation.'' The Bureau might have come across relevant, discoverable information without an investigation. For example, a State may conduct an investigation and turn its findings over to the Bureau and the Bureau could bring charges based on the State's findings. Or the Bureau may issue a notice of charges based upon examination findings without an investigation.

Response: The Office of Enforcement will not interpret the phrase ''in connection with the investigation'' in the manner contemplated by this commenter. Through the affirmative disclosure process, the Office of Enforcement will turn over the documents that informed its decision to recommend the institution of proceedings, except to the extent those documents meet an exception outlined in § 1081.206. In the first example offered by this commenter, the Office of Enforcement would consider documents turned over by a State that formed the basis for the Office's recommendation to bring charges against a respondent to have been obtained ''in connection with the investigation.'' The Bureau would disclose those documents to the respondent unless they were provided to the Bureau on the condition that they not be disclosed, *see* § 1081.206(b)(1)(iii), or unless the State obtained a protective order to prevent their disclosure, *see* § 1081.119(a). If documents were withheld from the respondent for either of these reasons,

the Bureau would not rely upon those documents in the proceeding.

Likewise, the Bureau would consider information obtained by the Office of Enforcement through the Bureau's supervisory channels to be obtained ''in connection with the investigation'' if such information formed the factual basis of an enforcement action.

Comment: The section excludes from discovery, in all cases, final examination ''or inspection'' reports to respondents who are not the subject of the report. Such an absolute limit on discovery, regardless of the significance of the information, is not appropriate. Further, the term ''inspection'' could mean almost anything, such as notes a Bureau employee takes when asking anyone a question about a covered person.

Response: Paragraph (a)(4) is intended to make clear that respondents have no automatic right to examination or inspection reports related to other entities. Nothing in the Interim Final Rule prevents a respondent from seeking a final examination or inspection report regarding another entity through subpoena, although given the confidential nature of such reports the Bureau would anticipate that such subpoena requests would generally be denied. Finally, the Bureau does not intend for the term ''inspection report'' to cover interview notes, for purposes of this section.

Comment: The Interim Final Rule requires the Bureau to turn over documents ''obtained'' by the Bureau's Office of Enforcement before the notice of charges issued. When the Bureau obtained documents is not relevant to whether they should be discoverable.

Response: The Bureau agrees that relevant documents upon which the Bureau intends to rely should be made available to the respondent even if they are obtained after the issuance of a notice of charges. Paragraph (g) obligates the Bureau to supplement its disclosures with any additional information that it intends to rely upon at the hearing.

Comment: The Interim Final Rule creates an incentive for Bureau employees to withhold material exculpatory evidence from the Office of Enforcement because delivering it could make it discoverable.

Response: The Bureau has no independent legal obligation to produce material exculpatory evidence *sua sponte*. Section 1081.206 of the Interim Final Rule provides for such production, but does so in a manner that is workable and practical. It is intended to ensure that respondents are in possession of material exculpatory information obtained from persons not employed by the Bureau that enforcement counsel has considered in its determination to recommend enforcement action. Extending the scope of the Interim Final Rule to cover exculpatory evidence that is not in the Office of Enforcement's possession would impose an unworkable and legally unfounded obligation on enforcement counsel and the rest of the Bureau. Furthermore, § 1081.208 enables respondents to subpoena additional documents that they believe are relevant to their defense.

Comment: This section is based upon the SEC Rules, but the SEC does not examine all of the institutions it regulates so does not necessarily have relevant, nonpublic materials outside of the Office of Enforcement. The Bureau should not be able to declare all of these materials to be per se beyond the scope of discovery without allowing respondent to seek a determination as to whether any of the materials are relevant.

Response: The Bureau does not believe that its supervisory powers require further amendment of this section. Aside from privileged internal notes and working papers generated by Bureau employees, the documents obtained by the Bureau through the exercise of its supervisory authority will come almost exclusively from the institution itself. The institution will have provided the documents to the Bureau, and cannot claim to be deprived of access to such documents in discovery. The purpose of affirmative disclosure is to give the respondent access to all of the material evidence underlying enforcement counsel's decision to commence enforcement proceedings. Rather than provide the respondent with access to all of the documents that in any way relate to it or its business—including many completely unrelated to the proceeding—enforcement counsel will turn over those documents that enforcement counsel obtained or considered in its decision to proceed in the particular action.

In addition, respondents will have the ability to conduct some limited discovery, including document subpoenas, depositions of third-parties who are unavailable for the hearing, and, in some circumstances, limited expert discovery.

Comment: This section permits the Bureau to withhold documents that ''would disclose the identity of a confidential source,'' which is inappropriate and not based upon the Uniform Rules or the SEC Rules. The respondent should be permitted to impeach the credibility of all witnesses. This section should be deleted, and in its place the Bureau should be required to produce ''a list identifying all persons or entities that have made allegations or accusations relevant to any matters being heard.'' If the person or entity is not sufficiently identified to be called as a witness, all evidence relating to or derived from the allegations or accusations is inadmissible.

Response: The commenter is incorrect in asserting that this exception to the affirmative disclosure obligation is not based upon the SEC Rules—the language is identical to the SEC Rules. *See* 17 CFR 201.230(b)(1)(iii). A respondent's ability to impeach the credibility of a witness will not be impacted by this exception to the affirmative disclosure obligation. The Bureau will identify any individual on whose testimony the Bureau intends to rely at the hearing, whether or not that individual came to the Bureau as a confidential source. The Bureau must prove all of its assertions at the hearing, and the respondent will have the ability to challenge all evidence offered.

Comment: The Office of Enforcement should be required to produce relevant materials without the hearing officer ordering production, and the Interim Final Rule should be revised to require the Office of Enforcement to produce a detailed log of the bases for withholding any privileged materials.

Response: The Office of Enforcement is required by § 1081.206 to disclose the documents described in the section without a separate order from the hearing officer. The Bureau does not believe that the affirmative disclosure obligation, which is based upon and substantively the same as that found in the SEC Rules, should be broadened further. The material subject to affirmative disclosure will provide respondents with access to all, or nearly all, of the information obtained by enforcement counsel in the investigation leading to the institution of proceedings. With respect to privilege logs, the Bureau adopts language from the SEC Rules, 17 CFR 201. 230(c). The hearing officer may require that the Office of Enforcement submit a list of documents or categories of documents withheld pursuant to paragraphs (b)(1)(i) and (ii) and (iv) through (vi), and the hearing officer may so order when appropriate. (As discussed above, with respect to documents withheld pursuant to paragraph (b)(1)(iii), the Bureau must inform respondent that such documents are being withheld, but no further disclosure is required.) To require the Bureau to produce a withheld document list in all cases,

even when not deemed appropriate by the hearing officer, would be unnecessary and unduly burdensome.

Comment: The Bureau should complete, rather than commence, production of the affirmative disclosure documents within seven days.

Response: The Bureau fully intends to supply all affirmative disclosure documents to respondents within seven days except in extraordinary circumstances (such as when a motion for protective order is pending on the seventh day). The Bureau adopted the language of this section from the SEC Rules, and has decided to retain the language in order to allow flexibility in those rare circumstances where a full production within seven days is not feasible, such as when a motion for a protective order is pending with respect to some of the documents. The Bureau expects these situations to arise very infrequently if at all, and expects to complete production within seven days in most cases.

Comment: The Bureau should be required to produce all documents electronically. Photocopying should not be required.

Response: The Bureau adopted the language regarding photocopying from the SEC Rules, but as indicated in the preamble to § 1081.206, the Bureau anticipates providing electronic copies of documents to respondents in most cases. The Bureau is retaining the language regarding photocopying in order to retain its discretion, particularly in cases where the safekeeping of documents subject to inspection and the cost of production may be of particular concern. The Bureau expects these cases to be rare.

The Bureau adopts § 1081.206 of the Interim Final Rule with the changes discussed above.

Section 1081.207 Production of Witness Statements

Modeled after the SEC Rules, 17 CFR 201.231, this section of the Interim Final Rule provides that a respondent may request for inspection and copying any statement of a witness to be called by the Office of Enforcement that (1) pertains to or is expected to pertain to his or her direct testimony; and (2) would be required to be produced pursuant to the Jencks Act, 18 U.S.C. 3500, if the adjudication proceeding were a criminal proceeding. This section is intended to promote the principles of transparency and efficiency discussed with respect to § 1081.206. Note, however, that the respondent is required to move for the production of these statements. The Bureau notes that the requirements set forth in paragraph (a) of this section do not overcome the limitations on discovery related to expert communications set forth in § 1081.210(e).

The Jencks Act does not require production of a witness's prior statement until the witness takes the stand. The Bureau expects that in most cases, the Office of Enforcement will provide prehearing production voluntarily. Submission of a witness's prior statement, however, may provide a motive for intimidation of that witness or improper contact by a respondent with the witness. This section provides, therefore, that the time for delivery of witness statements is to be determined by the hearing officer, so that a case-specific determination of such risks can be made if necessary. Upon a showing that there is substantial risk of improper use of a witness's prior statement, the hearing officer may take appropriate steps. For example, a hearing officer may delay production of a prior statement, or prohibit parties from communicating with particular witnesses.

Like § 1081.206 and the SEC Rules, this section provides for a ''harmless error'' standard in the event the Office of Enforcement fails to make available a statement required to be made available by this section.

The Bureau received no comment on § 1081.207 of the Interim Final Rule and adopts it without change in the Final Rule.

Section 1081.208 Subpoenas

This section of the Interim Final Rule is modeled after the SEC Rules, 17 CFR 201.232, and provides that, in connection with a hearing, a party may request the issuance of a subpoena for the attendance and testimony of a witness or the production of documents. The availability of subpoenas for witnesses and documents ensures that respondents have available to them the necessary tools to adduce evidence in support of their defenses. A subpoena may only be issued by the hearing officer (as opposed to counsel) and the section sets forth procedures to prevent the issuance of subpoenas that may be unreasonable, oppressive, excessive in scope, or unduly burdensome. The section also sets forth procedures and standards applicable to a motion to quash or modify a subpoena.

Paragraph (i) (which was paragraph (h) in the Interim Final Rule) of this section also provides that, if a subpoenaed person fails to comply, the Bureau, on its own motion or on the motion of the party at whose request the subpoena was issued, may seek a judicial order requiring compliance. In accordance with section 1052(b)(2) of the Dodd-Frank Act, which authorizes the Bureau or a Bureau investigator to seek enforcement of a subpoena, paragraph (i) only authorizes the Bureau—and not the party at whose request the subpoena was issued—to seek judicial enforcement of the subpoena. *Compare* 12 U.S.C. 1818(n) (authorizing any party to proceedings brought pursuant to 1818 to bring an action to enforce a subpoena issued in connection with the proceeding); 12 CFR 19.26(c) (authorizing the ''subpoenaing party or any other aggrieved party'' to seek judicial enforcement). In a provision added by the Bureau, this section also sets forth that failure to request that the Bureau seek enforcement of a subpoena constitutes waiver of any claim of prejudice predicated upon the unavailability of the testimony or evidence sought. This provision was added to prevent a respondent from declining to request that the Bureau seek to enforce the subpoena of a witness who fails to comply, and later claiming that his or her defense was prejudiced based upon the unavailability of that witness. The Bureau amended § 1081.208(h) of the Interim Final Rule (which is paragraph (i) in the Final Rule) to clarify that the General Counsel will initiate actions to enforce subpoenas on behalf of respondents, with the expectation that respondents will intervene to litigate on their own behalf. This will prevent conflicts that could arise were enforcement counsel required to enforce a subpoena sought by respondents in a proceeding.

One commenter asserted that respondents should be permitted to issue and enforce subpoenas. The Bureau's substantive response to this comment is discussed above in the context of a similar comment addressing § 1081.206.

Another commenter stated that the hearing officer should not be permitted to delegate the manual signing of deposition subpoenas, as there needs to be a basic check on the issuance of subpoenas, such as review by the hearing officer. This section provides that a hearing officer must issue a subpoena only upon the request of a party, which includes either respondents or the Bureau, and only if the hearing officer determines that the subpoena is not ''unreasonable, oppressive, excessive in scope, or unduly burdensome.''

Paragraph (c) of the Interim Final Rule permitted the hearing officer to delegate the manual signing of the subpoena to

''any other person authorized to issue subpoenas,'' which includes enforcement counsel. The Bureau has revised paragraph (c) to provide that the hearing officer may delegate the manual signing of the subpoena ''to any other person.'' This will give the hearing officer, in the interests of efficiency, the option of allowing counsel for either party to manually sign subpoenas after they have been issued by the hearing officer. But this delegation, should it occur, does not permit the issuance of subpoenas without the hearing officer's independent review and consent.

The Bureau on its own initiative added new paragraph (g) to § 1081.208. This paragraph requires a person responding to a subpoena for documentary material to file a sworn certificate of compliance with the subpoena response. This is intended to confirm that all of the documentary material required by the subpoena and in the possession, custody, or control of the person to whom the subpoena is directed has been produced and made available to the custodian.

The Bureau adopts § 1081.208 of the Interim Final Rule with the changes discussed above.

Section 1081.209 Deposition of Witness Unavailable for Hearing

This section of the Interim Final Rule, generally modeled after the Uniform Rules, 12 CFR 19.27, and the SEC Rules, 17 CFR 201.233, provides that parties may seek to depose material witnesses unavailable for the hearing upon application to the hearing officer for a deposition subpoena. The application must state that the witness is expected to be unavailable due to age, illness, infirmity or other reason and that the petitioning party was not the cause of the witness's unavailability. The Bureau has adopted the Uniform Rules' formulation of this standard, which provides for such depositions when the witness is ''otherwise unavailable,'' to account for the possible unavailability of witnesses for reasons other than those specified in the SEC Rules.

Paragraph (a)(2) requires a party seeking to record a deposition by audio-visual means to so note in the request for a deposition subpoena. This provision is modeled on Federal Rule of Civil Procedure 30(b)(3). Paragraph (a)(4) also provides that a deposition cannot be taken on less than 14 days' notice to the witness and all parties, absent an order to the contrary from the hearing officer.

Paragraph (g) incorporates several provisions from the SEC Rules. It provides that the witness being deposed may have an attorney present during the deposition; that objections to questions of evidence shall be noted by the deposition officer, but that only the hearing officer shall have the power to decide on the competency, materiality, or relevance of evidence; and that transcripts shall be available to the deponent and each party for purchase. Paragraph (g) of the Final Rule was amended slightly to provide that the deposition shall be filed with the Office of Administrative Adjudication (as opposed to the Executive Secretary as set forth in the Interim Final Rule).

Paragraph (h) of this section also incorporates certain procedures from § 1081.208 of the Interim Final Rule pertaining to subpoenas. Those procedures are intended to protect against deposition requests that may be unreasonable, oppressive, excessive in scope, or unduly burdensome, and to provide a mechanism for signing and service of a deposition subpoena, the filing of a motion to quash, and for enforcing subpoenas. This paragraph was amended slightly to conform to the amendments to § 1081.208.

One commenter suggested that respondents should be permitted to conduct pre-hearing depositions of third parties with relevant information, even if such witnesses will be available for the hearing. In promulgating the Interim Final Rule, the Bureau considered whether respondents should be allowed to issue subpoenas for the purpose of compelling prehearing discovery depositions as is allowed in actions under the Federal Rules of Civil Procedure. The Bureau believes expanding the scope of prehearing discovery to permit discovery depositions is not warranted for several reasons.

First, the Bureau believes that even if limitations were placed on the availability of discovery depositions, there remains a significant potential for extensive collateral litigation over their use. Second, use of discovery depositions is in tension with the statutory timetable for hearings in cease-and-desist proceedings under section 1053(b) of the Dodd-Frank Act. Indeed, in part for these reasons, the Final Rule, like the Interim Final Rule, allows the hearing officer to decide whether and to what extent to permit expert discovery in adjudication proceedings. Allowing prehearing depositions would present extreme scheduling difficulties in those cases in which respondents did not request hearing dates outside the 30-to-60 day timeframe set forth in the Dodd-Frank Act.

Finally, the Final Rule includes three provisions that address in significant part a respondent's interest in obtaining discovery prior to the start of the hearing. Section 1081.206 mandates that the Office of Enforcement generally make available not only transcripts of testimony, but documents obtained from persons not employed by the Bureau during the investigation leading to the initiation of the proceeding, as well as certain documents of the Bureau. Section 1081.208 authorizes the issuance of subpoenas *duces tecum* for the production of documents returnable at any designated time or place. In addition, § 1081.210 provides for expert discovery in appropriate cases. Given these discovery mechanisms, the ability to subpoena witnesses to testify at the hearing, the ability to take the deposition of material witnesses unavailable for hearing, and the ability of respondents to conduct informal discovery, the Bureau continues to believe that the marginal benefits of prehearing depositions are not justified by their likely cost in time, expense, collateral disputes and scheduling complexities.

The Bureau adopts § 1081.209 of the Interim Final Rule with the changes discussed above.

Section 1081.210 Expert Discovery

This section of the Interim Final Rule is modeled after the FTC Rules, 16 CFR 3.31A. Neither the Uniform Rules nor the SEC Rules provide for expert discovery. The Bureau has provided for expert discovery in appropriate cases so that the parties may fully understand the other side's position prior to the hearing, which will enable a clearer and more efficient airing of the issues at the hearing, and which may also clarify the issues for a possible prehearing settlement. It will also enable the parties to identify rebuttal expert witnesses, if needed, prior to the hearing.

Paragraph (a) provides that the hearing officer shall establish a date for the exchange of expert reports in the scheduling order. This provision is intended to allow flexibility in scheduling expert discovery depending on the complexity of the case and the date of the hearing.

Like the FTC Rules, 16 CFR 3.31A, paragraph (b) limits parties to five expert witnesses, including any rebuttal or surrebuttal experts, except in extraordinary circumstances. The Bureau believes this limitation will provide the parties with a sufficient opportunity to present expert testimony without unduly delaying the proceedings. Paragraph (b) also provides that no party may call an expert witness unless that witness has been identified and has provided a report in accordance with this section, unless the hearing

officer provides otherwise at a scheduling conference. The last clause is intended to reflect a hearing officer's discretion, at a scheduling conference, to dispense with or otherwise limit expert discovery in a particular case (as expressly provided for in paragraph (e) of this section).

Paragraph (c) sets forth the required contents of an expert report. This section is based upon the corresponding provisions of the FTC Rules.

Paragraph (d) provides for expert depositions, which are not to exceed eight hours absent agreement of the parties or an order by the hearing officer. These limitations are intended to provide adequate time to prepare for expert testimony without unduly delaying the proceedings. Paragraph (d) also provides that expert depositions shall be conducted pursuant to the procedures set forth in § 1081.209. Finally, paragraph (d) provides that an expert's deposition shall be conducted after submission of the expert's report but no later than seven days prior to the deadline for submission of rebuttal expert reports. This provision is intended to allow parties to rely upon the deposition of an opposing party's expert in the preparation of a rebuttal expert report. Because, pursuant to paragraph (a), rebuttal reports are due 28 days after the exchange of expert reports, expert depositions will need to take place within that 28-day period.

Finally, paragraph (e) (paragraph (f) of the Final Rule) authorizes the hearing officer to dispense with expert discovery in appropriate cases. For example, the Bureau envisions hearing officers relying on this provision in cease-and-desist proceedings brought pursuant to section 1053(b) of the Dodd-Frank Act, where the respondent has not requested a hearing date outside the statutory 30-to-60 day timeframe. In such cases, it may be appropriate to dispense with expert discovery for timing reasons, while allowing the parties to call expert witnesses.

After the Bureau promulgated the Interim Final Rule, the FTC amended its rule governing expert discovery. *See* 76 FR 52249 (Aug. 22, 2011). The FTC added a new paragraph to its expert discovery rule regarding materials that the parties cannot discover, including language nearly identical to language recently added to Federal Rule of Civil Procedure 26(b)(4)(B) and (C). The Bureau has similarly revised § 1081.210 to adopt these recent enhancements to the FTC Rules and the Federal Rules of Civil Procedure. The Bureau is therefore adding a new paragraph (e) to § 1081.210 and renumbering former paragraph (e) as paragraph (f). Under new paragraph (e), parties may not discover drafts of any report required by this section, regardless of the form in which the draft is recorded. In addition, the new language prohibits parties from discovering any communications, regardless of form, between another party's attorney and any of its expert witnesses, unless the communication: (1) Relates to the testifying expert's compensation for the study or testimony; (2) identifies facts or data provided by the party's attorney and considered by the testifying expert in forming the opinions to be expressed; or (3) identifies assumptions provided by the party's attorney and relied on by the testifying expert in forming the opinions to be expressed. The Bureau has also adopted the portion of the FTC Rules providing that a party may not discover facts known or opinions held by an expert who has been retained or specifically employed by another party in anticipation of litigation or preparation for the hearing and who is not listed as a witness for the hearing. The Bureau believes this section, which is consistent with Federal Rule of Civil Procedure 26(b)(4)(D), appropriately limits the ability of parties to discover opinions held by experts who will not offer opinions at the hearing.

The Bureau did not receive comments on § 1081.210 of the Interim Final Rule, and with exception to the changes discussed above, adopts it without change in the Final Rule.

Section 1081.211 Interlocutory Review

This section of the Interim Final Rule sets forth the procedure and standards applicable to interlocutory review by the Director of a ruling or order of the hearing officer.

Paragraph (a) of this section provides that the Director may take up a matter on his or her own motion at any time, even if a hearing officer does not certify it for interlocutory review, and that this section is the exclusive means for reviewing a hearing officer's ruling prior to the issuance of a recommended decision by the hearing officer.

Paragraph (b) provides that any party may file a motion for certification of a ruling or order for interlocutory review within five days of service of the order or ruling. Responses to such motions are due within three days, and the hearing officer is required to rule upon such a motion within five days thereafter.

Paragraph (c) sets forth the permissible bases for certifying a ruling or order. Certification is appropriate if the hearing officer's ruling would compel testimony or production of documents from Bureau officers or employees, or officers or employees from another governmental agency. This is consistent with the SEC Rules, 17 CFR 201.400. Like the FTC Rules, 16 CFR 3.23(a)(1), however, this provision includes officers and employees from other governmental agencies, and not just the Bureau, in order to afford the same treatment to other government agencies. Paragraph (c) also provides for certification of rulings or orders where there is a substantial ground for difference of opinion and an immediate review may materially advance the completion of the proceeding or subsequent review will be an inadequate remedy. The hearing officer may also certify a ruling or order where the ruling or order involves a motion for disqualification of the hearing officer or the suspension of an individual from appearing before the Bureau.

Paragraph (d) provides that a party whose motion for certification is denied by the hearing officer may petition the Director directly for interlocutory review. This provision is intended to guard against a hearing officer's unwillingness to certify a ruling that appears to meet the standards set forth in the section. The Bureau expects such direct petitions to the Director to be used sparingly.

Paragraph (e) governs the Director's review of matters certified pursuant to paragraph (c) or for which review is sought pursuant to paragraph (d). It sets forth the policy of the Bureau that interlocutory review is disfavored and provides that the Director will grant such review only in extraordinary circumstances.

Paragraph (f) provides that proceedings will not be stayed by the filing of a motion for certification for interlocutory review or a grant of such review unless the hearing officer or the Director shall so order. This is intended to promote the expeditious resolution of proceedings and to deter frivolous motions for certification or review.

The Bureau did not receive comment on § 1081.211 of the Interim Final Rule and adopts it without change in the Final Rule.

Section 1081.212 Dispositive Motions

This section of the Interim Final Rule establishes the procedures and standards for motions to dismiss and motions for summary disposition. Section 1081.212 expressly provides for the filing of motions to dismiss, but makes clear that filing such a motion does not affect a party's obligation to file an answer or take any other action. This is intended to ensure that motions to dismiss do not delay the proceedings unnecessarily. The timelines for decisions on dispositive motions,

discussed below, should help ensure that a party ultimately determined to be entitled to dismissal is not required to engage in the adjudicative process for a lengthy period of time.

Paragraph (b) provides that a respondent may file a motion to dismiss asserting that, even assuming the truth of the facts alleged in the notice of charges, it is entitled to dismissal as a matter of law. Neither the SEC Rules, the FTC Rules, nor the Uniform Rules specifically set forth procedures or a standard applicable to motions to dismiss, although the FTC Rules and Uniform Rules appear to contemplate such motions. *See* 16 CFR 3.22(a) (referencing motions to dismiss); 12 CFR 19.5(b)(7) (same). The Bureau has determined that such motions are appropriate and should be provided for in the Rules, but should not serve to delay the proceedings.

Paragraphs (c) and (d) govern the filing of motions for summary disposition. They adopt standards similar to those set forth in the Uniform Rules, the SEC Rules, and the FTC Rules for such motions. Any party to a proceeding may file a motion for summary disposition of a proceeding or for partial summary disposition of a proceeding if: (1) There is no genuine issue as to any material fact; and (2) the moving party is entitled to a favorable decision as a matter of law. The motion, which may be filed after a respondent's answer has been filed and documents have been made available for inspection and copying pursuant to § 1081.206, must be accompanied by a statement of the uncontested material facts, a brief, and any documentary evidence in support of the motion.

Any party opposing such a motion must file a statement setting forth those material facts as to which he or she contends a genuine dispute exists, supported by the same type of evidence permitted with a motion for summary disposition, and a brief in support of the contention that summary disposition would be inappropriate. These paragraphs are modeled after the Uniform Rules, 12 CFR 19.29.

Pursuant to paragraphs (e), (f), and (g), motions to dismiss and for summary disposition are subject to a 35-page limit (modeled on the SEC Rules, 17 CFR 201.250(c)), responses to such motions are due within 20 days and are subject to a 35-page limit (modeled on the Uniform Rules, 12 CFR 19.29(b)(1)), and reply briefs are due within five days of the response and shall not exceed ten pages. Oral argument is permitted at the request of any party or by motion of the hearing officer.

Paragraph (h) provides that the hearing officer must decide a dispositive motion within 30 days of the expiration of the time for filing all oppositions and replies. The Uniform Rules do not set a deadline for a decision on dispositive motions. The FTC Rules provide for the Commission to decide substantive motions within 45 days, 16 CFR 3.22(a), and the SEC Rules state that motions for summary disposition are to be decided ''promptly'' by the hearing officer, 17 CFR 201.250(b). The Bureau has adopted the 30-day timeframe for decisions on dispositive motions in keeping with its emphasis on expeditious decision-making in administrative proceedings. The Bureau believes that 30 days affords sufficient time for the hearing officer to properly assess the merits of the motion and draft either a ruling denying the motion or a recommended decision granting it.

If the hearing officer finds that a party is not entitled to dismissal or summary disposition, he or she shall make a ruling denying that motion. This ruling would not be subject to interlocutory appeal unless such an appeal was granted pursuant to the procedures and standards set forth in § 1081.211. If the hearing officer determines that dismissal or summary adjudication is appropriate, he or she will issue a recommended decision to that effect. If a party, for good cause shown, cannot yet present facts essential to justify opposition to the motion, the hearing officer is to deny or defer the motion.

The Bureau received no comments on § 1081.212 of the Interim Final Rule and adopts it without change in the Final Rule.

Section 1081.213 Partial Summary Disposition

Section 1081.213 is modeled on the FTC Rules, 16 CFR 3.24(a)(5). It permits a hearing officer who denies summary adjudication of the whole case nevertheless to issue an order specifying the facts that appear without substantial controversy. Those facts will be deemed established in the proceeding. This section enables the hearing officer to narrow the dispute between the parties so that the hearing can proceed as efficiently as possible.

The Bureau received no comment on § 1081.213 of the Interim Final Rule and adopts it without change in the Final Rule.

Section 1081.214 Prehearing Conferences

This section of the Interim Final Rule sets forth the procedures for a prehearing conference, which the hearing officer may convene on his own motion or at the request of a party. It sets forth matters that may be discussed at a prehearing conference. As with a scheduling conference pursuant to § 1081.203, the conference is presumptively public unless the hearing officer determines otherwise under the standard set forth in § 1081.119.

The Bureau received no comment on § 1081.214 of the Interim Final Rule and adopts it without change in the Final Rule.

Section 1081.215 Prehearing Submissions

This section of the Interim Final Rule was modeled primarily after the Uniform Rules, 12 CFR 19.32, which provide for mandatory prehearing submissions by the parties. Section 1081.215 requires that the following documents be served upon the other parties no later than ten days prior to the start of the hearing: a prehearing statement; a final list of witnesses to be called to testify that includes a description of the expected testimony of each witness; any prior sworn statements that a party intends to admit into evidence pursuant to § 1081.303; a list of exhibits along with a copy of each exhibit; and any stipulations of fact or liability. The failure of a party to comply with this provision will preclude the party from presenting any witnesses or exhibits not listed in its prehearing submission at the hearing, except for good cause shown. To account for cases in which the hearing officer has dispensed with expert discovery, this section also requires that a statement of any expert's qualifications and other information concerning the expert be turned over if it has not been provided pursuant to § 1081.210.

The FTC Rules do not provide for a prehearing submission, and the SEC Rules, 17 CFR 201.222, do not make such a submission mandatory. The Bureau has followed the Uniform Rules' model as it believes that prehearing submissions will assist the parties in clarifying and narrowing the issues to be adjudicated at the hearing, which is especially important under the expedited hearing schedule provided for by section 1053(b) of the Dodd-Frank Act and this Final Rule.

The Bureau received no comment on § 1081.215 of the Interim Final Rule and adopts it without change in the Final Rule.

Section 1081.216 Amicus Participation

This section of the Interim Final Rule, based upon the SEC Rules, 17 CFR 201.210, allows for amicus briefs in proceedings under this part, but only

under certain circumstances. Specifically, under paragraph (a) of this section, an amicus brief may be allowed when a motion for leave to file the brief has been granted; the brief is accompanied by written consent of all parties; the brief is filed at the request of the Director or the hearing officer, as appropriate; or the brief is presented by the United States or an officer or agency thereof, or by a State, or a political subdivision thereof.

One commenter expressed concern that the authorization for governmental agencies to file amicus briefs without receiving prior permission will result in the filing of numerous amicus briefs. The Bureau believes that amicus briefs from governmental entities are likely to make a valuable contribution to the adjudicative process, and are unlikely to become overwhelming or detrimental. The Bureau will consider revisiting this section if this belief proves incorrect, but the Final Rule adopts paragraph (a) of the Interim Final Rule without change.

A motion to file an amicus brief is subject to the procedural requirements set forth in § 1081.205. An amicus will be granted oral argument only for extraordinary reasons. In order to provide additional guidance to parties seeking to file amicus briefs, § 1081.216(d) provides that amicus briefs shall be filed pursuant to § 1081.111 and shall comply with the requirements of § 1081.112. Amicus briefs shall also be subject to the length limitations set forth in § 1081.212(e). The Bureau received no comments regarding the rest of § 1081.216 of the Interim Final Rule, and adopts the remaining paragraphs without change in the Final Rule.

Subpart C—Hearings

Section 1081.300 Public Hearings

This section of the Interim Final Rule provides that hearings before the Bureau will be presumptively public, a practice that is consistent with the provisions of the FTC Rules, 16 CFR 3.41(a), the SEC Rules, 17 CFR 201.301, and the Uniform Rules, 12 CFR 19.33(a). Specifically, the Interim Final Rule provides that hearings will be public unless a confidentiality order is entered by the hearing officer according to the standard set forth in § 1081.119, or unless the Director otherwise orders a non-public hearing on the ground that holding an open hearing would be contrary to the public interest.

One commenter stated that the hearing officer needs greater flexibility in limiting the public nature of adjudication hearings. This commenter argued that allowing the hearing officer to limit the public nature of the proceeding in accordance with the standard set forth in § 1081.119 was problematic and advocated for the hearing officer to be permitted to establish time, place and manner limitations on the attendance of the public and the media for any public hearing. This commenter also recommended that the Director be permitted to close a hearing.

The Bureau has considered this comment but determined to retain its articulated standard and presumption of public hearings. Incorporating the standard set forth in § 1081.119 into the standard for limiting the public nature of a hearing provides meaningful guidance to the hearing officer as to the types of hearings that should not be public, and promotes consistency in adjudication proceedings. With respect to the commenter's recommendation that the Director have the authority to close a public hearing, this section as previously promulgated allows the Director to limit the public nature of an adjudication proceeding on the grounds that holding an open hearing would be contrary to the public interest.

The Bureau adopts § 1081.300 of the Interim Final Rule without change in the Final Rule.

Section 1081.301 Failure To Appear

This section of the Interim Final Rule is modeled after the Uniform Rules, 12 CFR 19.21. It provides that the failure of a respondent to appear in person or by duly authorized counsel at the hearing may constitute a waiver of the respondent's right to a hearing and may be deemed an admission of the facts alleged and a consent to the relief sought in the notice of charges. This section directs the hearing officer to file a recommended decision addressing the relief sought in the notice of charges, without further notice to the respondent, when respondents fail to appear at the hearing.

The Bureau received no comments on § 1081.301 of the Interim Final Rule and adopts it without change in the Final Rule.

Section 1081.302 Conduct of Hearings

This section of the Interim Final Rule provides general principles for the conduct of hearings and the order in which the parties are to present their cases. The first sentence emphasizing the goals of fairness, impartiality, expediency, and orderliness is drawn from the SEC Rules, 17 CFR 201.300. The remainder of the section, which governs the order in which the parties are to present their cases, is modeled after the Uniform Rules, 12 CFR 19.35.

The Bureau received no comment on § 1081.302 of the Interim Final Rule and adopts it without change in the Final Rule.

Section 1081.303 Evidence

This section of the Interim Final Rule sets forth the provisions governing the offering and admissibility of evidence at hearings, and adopts evidentiary standards similar to those set forth in the FTC Rules, the SEC Rules, and the Uniform Rules.

Paragraph (a) of this section provides that enforcement counsel shall bear the burden of proving the ultimate issue(s) of the Bureau's claims at the hearing. Consistent with general administrative practice, paragraph (b) of § 1081.303 provides that evidence that is relevant, material, reliable, and not unduly repetitive shall be admissible to the fullest extent authorized by the APA and other applicable law, and that evidence shall not be excluded solely on the basis of its being hearsay if it is otherwise admissible and bears satisfactory indicia of reliability. Paragraph (c) of this section provides that official notice may be taken of any material fact that is not subject to reasonable dispute in that it is either generally known or capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

Paragraph (d)(1) provides that duplicate copies of documents are admissible to the same extent as originals unless a genuine issue is raised about the veracity or legibility of a document. Paragraph (d)(2) of this section provides that, subject to paragraph (b), any document prepared by a prudential regulator or by a State regulatory agency is presumptively admissible either with or without a sponsoring witness. On its own initiative, the Bureau is revising paragraph (d)(2) of this section to add the Bureau to the list of regulators whose documents are presumptively admissible with or without a sponsoring witness. The Uniform Rules, 12 CFR 19.36(c)(2), on which this paragraph is modeled, is promulgated by each of the prudential regulators, and therefore the intent of this paragraph is, in part, for each regulator to have its own documents be deemed presumptively admissible. Consistent with the intended purpose of this paragraph, the Bureau adds itself as a regulator under paragraph (d)(2). Finally, paragraph (d)(4) of this section provides that documents generated by respondents that come from their own files are

presumed authentic and kept in the regular course of business. Respondents bear the burden of proof to introduce evidence to rebut this presumption.

Paragraph (e) of this section of the Interim Final Rule provides that objections to the admissibility of evidence must be timely made and that a failure to object to the admission of evidence shall constitute a waiver of the objection.

Pursuant to paragraph (f) of this section of the Interim Final Rule, parties may, at any stage of the proceeding, stipulate as to any relevant matters of fact or the authentication of any relevant documents. Such stipulations may be received in evidence at the hearing and are binding on the parties.

Paragraph (g) of this section of the Interim Final Rule provides that witnesses at a hearing are required to testify under oath or affirmation. Parties are entitled to present their cases or defenses by sworn oral testimony and documentary evidence, including through the testimony of a witness appearing via videoconference or teleconference.

Paragraph (h) of this section, which relates to the admissibility of prior sworn statements of witnesses, is modeled after the SEC Rules, 17 CFR 201.235. Under paragraph (h) prior sworn statements may be admitted if a witness is dead, outside of the United States, unable to attend because of age, sickness, infirmity, imprisonment or other disability, or if the party offering the sworn statement is unable to procure the attendance of the witness by subpoena. Even if these conditions are not met, a prior sworn statement may be introduced into the record at the discretion of the hearing officer.

The Bureau adopts § 1081.303 of the Interim Final Rule with the changes discussed above.

Section 1081.304 Record of the Hearing

Modeled on the FTC Rules, 16 CFR 3.44, this section of the Interim Final Rule provides that hearings will be stenographically reported and transcribed and that the original transcript shall be part of the record. It outlines the procedure by which a party may request correction of the transcript. Finally, it states that upon completion of the hearing, the hearing officer will issue an order closing the record after giving the parties three days to determine whether the record is complete or requires supplementation.

The Bureau received no comment on § 1081.304 of the Interim Final Rule and adopts it without change in the Final Rule.

Section 1081.305 Post-Hearing Filings

This section of the Interim Final Rule is drawn largely from the Uniform Rules, 12 CFR 19.37, and provides that the parties may file proposed findings of fact, proposed conclusions of law, and a proposed order within 30 days following service of a notice on the parties that the transcript has been properly filed or within such longer period as the hearing officer may order. Proposed findings and conclusions must be supported by citation to any relevant authorities, and by page references to any relevant portions of the record. Responsive briefs may be filed to these proposed findings and conclusions within 15 days after the deadline for the proposed findings and conclusions, provided that the party responding has filed its own proposed findings and conclusions. The hearing officer shall not order the filing by any party of any post-hearing brief or responsive brief in advance of the other party's filing of its post-hearing brief.

The Bureau received no comment on § 1081.305 of the Interim Final Rule and adopts it without change in the Final Rule.

Section 1081.306 Record in Proceedings Before Hearing Officer; Retention of Documents; Copies

This section of the Interim Final Rule, drawn from the SEC Rules, 17 CFR 201.350, lists the documents that comprise the record of a proceeding before the hearing officer. It provides that those documents excluded from evidence should be excluded from the record but retained until either a decision of the Bureau has become final, or the conclusion of any judicial review of the Director's final order. This section also states that a copy of a document in the record may be substituted for an original.

The Bureau has amended this section to reflect the transfer of certain functions to the Office of Administrative Adjudications.

The Bureau adopts § 1081.306 of the Interim Final Rule with the changes discussed above.

Subpart D—Decision and Appeal

Section 1081.400 Recommended Decision of the Hearing Officer

This section of the Interim Final Rule adopts the general framework of the SEC Rules, 17 CFR 201.360, governing decisions by the hearing officer. Section 1081.400 provides that the hearing officer will file a recommended decision in each case within a specified time frame. Unlike the SEC Rules, which provide that the hearing officer will issue an ''initial decision,'' this section provides that the hearing officer's decision will be a ''recommended decision'' to the Director.

This section also deviates from the analogous SEC Rules in that it provides for only one timeline, rather than multiple ''tracks'' or timelines. Paragraph (a) of this section provides that the hearing officer will file a recommended decision in each case no later than 90 days after the deadline for filing post-hearing responsive briefs and in no event later than 300 days after service of the notice of charges. The 300-day timeframe is taken from the SEC Rules, 17 CFR 201.360(a)(2), and the 90-day timeframe is modeled on the FTC Rules, 16 CFR 3.51(a).

Paragraph (b) of this section provides that requests by the hearing officer for extensions of this time frame must be made to the Director and will be granted only if the Director determines that additional time is necessary or appropriate in the public interest. The Bureau anticipates such requests and extensions to be rare. As noted above, this provision was adopted to ensure the timely resolution of adjudication proceedings in light of the experience of other agencies. The Bureau believes that the 90-day and 300-day timelines set forth in this section provide sufficient time for the hearing officer to conduct appropriate proceedings and issue an informed recommended decision.

Paragraph (c) of this section is modeled on the SEC Rules, 17 CFR 201.360(b), and sets forth the contents of the recommended decision, providing that the recommended decision shall include a statement of findings of fact and conclusions of law, as well as the reasons or basis therefore, and an appropriate order, sanction, relief or denial thereof. The recommended decision shall also state that a notice of appeal may be filed within ten days after service of the recommended decision, and shall include a statement that the Director may issue a final decision and order adopting the recommended decision, unless a party timely files and perfects a notice of appeal. The recommended decision shall be filed with the Office of Administrative Adjudication (as opposed to the Executive Secretary as set forth in the Interim Final Rule), which will promptly serve the recommended decision on the parties.

Drawing from the FTC Rules, 16 CFR 3.51(d), paragraph (d) of this section provides that the recommended decision shall be made by the hearing officer who presided over the hearing, except when he or she has become unavailable to the Bureau. In such

instances, the Bureau expects the matter to be reassigned pursuant to § 1081.105(d). Paragraph (e) of this section provides that the hearing officer may reopen proceedings for receipt of further evidence upon a showing of good cause until the close of the hearing record. With the exception of correcting clerical errors or addressing a remand from the Director, the hearing officer's jurisdiction terminates upon the filing of the recommended decision.

The Bureau received no comment on § 1081.400 of the Interim Final Rule and adopts it without change in the Final Rule.

Section 1081.401 Transmission of Documents to Director; Record Index; Certification

This section of the Interim Final Rule is modeled on the Uniform Rules, 12 CFR 19.38(b), and the SEC Rules, 17 CFR 201.351(c). It directs the hearing officer to furnish to the Director a certified index for the case at the same time that the hearing officer files the recommended decision. It also establishes the process by which the record is transmitted to the Director for review.

The Bureau received no comment relating to this section of the Interim Final Rule and adopts it without change in the Final Rule.

Section 1081.402 Notice of Appeal; Review by the Director

This section of the Interim Final Rule sets forth the process for review of a recommended decision by the Director.

Paragraph (a) of this section is drawn from the FTC Rules, 16 CFR 3.52(b), and states that any party may object to the recommended decision of the hearing officer by filing a notice of appeal to the Director within ten days of the recommended decision and perfecting that notice of appeal by filing an opening brief within 30 days of the recommended decision. Any party may respond to the opening brief by filing an answering brief within 30 days of service of the opening brief, and reply briefs may be filed within seven days after that. Appeals to the Director are available as of right in all cases where the hearing officer has issued a recommended decision.

A commenter noted that the ten-day deadline by which a party must file a notice of appeal is shorter than the 30-day deadline required by the prudential regulators, and urged the Bureau to extend its deadline to 30 days. The Bureau has considered this suggestion but has decided to keep the ten-day deadline. The burden on a party to file a proper notice of appeal is minimal. A party need only specify the party or parties against whom the appeal is taken, and designate the recommended decision or part thereof appealed from. The ten-day timeline provides adequate time to make these initial determinations. The more comprehensive document in the appeals process, the opening brief, is not due until 30 days from the service of the recommended decision. Moreover, an extension of the deadline for a notice of appeal would require extension of other deadlines in the appeal process, such as the Director's review in the absence of a notice of appeal.

This section also provides that within 40 days after the date of service of the recommended decision, the Director, on his or her own initiative, may order further briefing or argument with respect to any recommended decision or portion of any recommended decision or may issue a final decision and order adopting the recommended decision. The 40-day time period is intended to provide the Director with the benefit of knowing whether any party has filed and perfected an appeal before determining whether further briefing and argument regarding a recommended decision is necessary. Any such order shall set forth the scope of further review and the issues that will be considered and will provide for the filing of briefs if the Director deems briefing appropriate.

Finally, this section provides that, pursuant to 5 U.S.C. 704, a perfected appeal to the Director of a recommended decision is a prerequisite to the seeking of judicial review of a final decision and order, unless the Director issues a final decision and order that does not incorporate the recommended decision, in which case judicial review shall be limited to that portion of the Director's final decision and order that does not adopt the recommended decision.

The Bureau adopts § 1081.402 of the Interim Final Rule without change in the Final Rule.

Section 1081.403 Briefs Filed With the Director

This section of the Interim Final Rule outlines the requirements for briefs filed with the Director. Paragraph (a) of this section is modeled on the SEC Rules, 17 CFR 201.450(b), and governs the content of briefs. Paragraph (b) is also drawn from the SEC Rules, 17 CFR 201.450(c), and sets forth length limitations for briefs. Unlike the SEC and the FTC, the Bureau has placed page limits—rather than word limits—on briefs. This change is intended to simplify practice before the Director.

The Bureau received no comment on § 1081.403 of the Interim Final Rule and adopts it without change in the Final Rule.

Section 1081.404 Oral Argument Before the Director

This section of the Interim Final Rule adopts the SEC's policy for oral argument on appeal wherein the Director will consider appeals, motions, and other matters on the basis of the papers filed without oral argument unless the Director determines that the presentation of facts and legal arguments in the briefs and record and the decisional process would be significantly aided by oral argument. A party who seeks oral argument is directed to indicate such a request on the first page of its opening or answering brief. Oral argument shall be public unless otherwise ordered by the Director.

The Bureau received no comment on § 1081.404 of the Interim Final Rule and adopts it without change in the Final Rule.

Section 1081.405 Decision of the Director

This section of the Interim Final Rule sets forth the provisions regarding the final decision and order of the Director. Paragraph (a) provides for the scope of the Director's review and defines the record before the Director as consisting of all items that were part of the record below in accordance with § 1081.306; any notices of appeal or order directing review; all briefs, motions, submissions, and other papers filed on appeal or review; and the transcript of any oral argument held.

Paragraph (b) provides that the Director may have the advice and assistance of decisional employees in considering and disposing of a case. Paragraph (c) provides that the Director's final decision will affirm, adopt, modify, set aside, or remand for further proceedings the hearing officer's recommended decision and will include a statement of the reasons or basis for the Director's actions and the findings of fact relied upon.

In accordance with section 1053 of the Dodd-Frank Act, paragraph (d) of this section provides that, at the expiration of the time permitted for the filing of reply briefs with the Director, the Office of Administrative Adjudication will notify the parties that the case has been submitted for final Bureau decision by the Director. The Director will then issue a final decision and order within 90 days of such notification to the parties. This policy

ensures a timely final resolution to all administrative adjudications.

Paragraph (e) provides that copies of final decisions and orders by the Director will be served upon each party, upon other persons required by statute, and, if directed by the Director or required by statute, upon any appropriate State or Federal supervisory authority. The final decision and order will also be published on the Bureau's Web site or as otherwise deemed appropriate by the Bureau.

The Bureau received no comments on § 1081.405 of the Interim Final Rule and adopts it without change in the Final Rule.

Section 1081.406 Reconsideration

This section of the Interim Final Rule permits parties to file petitions for reconsideration of a final decision and order within 14 days after service of the decision and order. The Bureau adopts the practice set forth in the SEC Rules, 17 CFR 201.470, pursuant to which no response to a petition for reconsideration will be filed unless requested by the Director, and the Bureau adds a provision providing that the Director will request such a response before granting any motion for reconsideration. This is intended to lessen the burden on prevailing parties while preserving their opportunity to be heard if the Director is considering granting a motion for reconsideration.

The Bureau received no comments on § 1081.406 of the Interim Final Rule and adopts it without change in the Final Rule.

Section 1081.407 Effective Date; Stays Pending Judicial Review

Paragraph (a) of this section of the Interim Final Rule governs the effective date of the Director's final orders, other than consent orders. Consistent with section 1053(b) of the Dodd-Frank Act, orders to cease and desist and for other affirmative relief shall become effective 30 days after the date of service of the Director's final decision and order, unless stayed by the Director under paragraph (b) of this section.

Paragraph (b) of this section contains the procedures regarding stays of Bureau orders. Any party subject to a final order, other than a consent order, may apply to the Director for a stay of all or part of that order pending judicial review. Such a motion must be made within 30 days of service of the Director's final decision and order. A motion for a stay shall address the likelihood of the movant's success on appeal, whether the movant will suffer irreparable harm if a stay is not granted, the degree of injury to other parties if a stay is granted, and why the stay is in the public interest.

Finally, paragraph (d) of this section adopts the provision from the Uniform Rules, 12 CFR 19.41, providing that the commencement of proceedings for judicial review of a final decision and order of the Director does not, unless specifically ordered by the Director or a reviewing court, operate as a stay of any order issued by the Director.

The Bureau received no comments on § 1081.407 of the Interim Final Rule and adopts it in the Final Rule without change.

VI. Legal Authority

The Bureau promulgates the Final Rule pursuant to its authority to implement section 1053 of the Dodd-Frank Act, 12 U.S.C. 5563(e), as well as its general rulemaking authority to promulgate rules necessary or appropriate to carry out the Federal consumer financial laws, 12 U.S.C. 5512(b)(1).

VII. Section 1022(b)(2) Provisions

In developing the Final Rule, the Bureau has considered the potential benefits, costs, and impacts and has consulted or offered to consult with the prudential regulators, the Department of Housing and Urban Development, the SEC, the Department of Justice, and the FTC before and after issuing the Interim Final Rule, including with regard to consistency with any prudential, market, or systemic objectives administered by such agencies.[4]

The Dodd-Frank Act requires the Bureau to prescribe rules necessary to conduct hearings and adjudicatory proceedings. The Final Rule neither imposes obligations on consumers, nor is it expected to affect their access to consumer financial products or services.

The Final Rule is intended to provide an expeditious decision-making process, which will benefit both consumers and covered persons. The Final Rule adopts an affirmative disclosure approach to fact discovery, pursuant to which the Bureau will make available to respondents the information obtained by the Office of Enforcement from persons not employed by the Bureau prior to the institution of proceedings, in connection with the investigation leading to the institution of proceedings that is not otherwise privileged or protected from disclosure. This affirmative disclosure obligation substitutes for the traditional civil discovery process, which can be both time-consuming and expensive. This clear and efficient process for the conduct of adjudication proceedings benefits consumers by providing a systematic process for protecting them from unlawful behavior. At the same time, this process will afford covered persons with a cost-effective way to have their cases heard. The Final Rule is based upon, and drawn from, existing rules of the prudential regulators, the FTC, and the SEC. The Final Rule's similarity to existing rules should further reduce the expense of administrative adjudication for covered persons.

Further, the Final Rule has no unique impact on insured depository institutions or insured credit unions with less than $10 billion in assets described in section 1026(a) of the Dodd-Frank Act. Finally, the Final Rule does not have a unique impact on rural consumers.

A commenter stated that the four interim final rules that the Bureau promulgated together on July 28, 2011 failed to satisfy the rulemaking requirements under section 1022 of the Dodd-Frank Act. Specifically, the commenter stated that ''the CFPB's analysis of the costs and benefits of its rules does not recognize the significant costs the CFPB imposes on covered persons.'' The Bureau believes that it appropriately considered the benefits, costs, and impacts of the Interim Final Rule pursuant to section 1022 of the Dodd-Frank Act. Notably, the commenter did not identify any specific costs to covered persons imposed by the Rules of Practice for Adjudication Proceedings that are not discussed in Part C of the **SUPPLEMENTARY INFORMATION** to the Interim Final Rule.

VIII. Procedural Requirements

As noted in publishing the Interim Final Rule, under the Administrative Procedure Act, 5 U.S.C. 553(b), notice and comment is not required for rules of agency organization, procedure, or practice. As discussed in the preamble to the Interim Final Rule, the Bureau confirms its finding that this is a procedural rule for which notice and comment is not required. In addition,

[4] Section 1022(b)(2)(A) of the Dodd-Frank Act addresses the consideration of the potential benefits and costs of regulation to consumers and covered persons, including the potential reduction of access by consumers to consumer financial products or services; the impact on depository institutions and credit unions with $10 billion or less in total assets as described in section 1026 of the Dodd-Frank Act; and the impact on consumers in rural areas. Section 1022(b)(2)(B) addresses consultation between the Bureau and other Federal agencies during the rulemaking process. The manner and extent to which these provisions apply to procedural rules and benefits, costs and impacts that are compelled by statutory changes rather than discretionary Bureau action is unclear. Nevertheless, to inform this rulemaking more fully, the Bureau performed the described analyses and consultations.

because the Final Rule relates solely to agency procedure and practice, it is not subject to the 30-day delayed effective date for substantive rules under section 553(d) of the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*

Because no notice of proposed rulemaking is required, the requirements of the Regulatory Flexibility Act, 5 U.S.C. 601(2) do not apply. Finally, the Bureau has determined that this Final Rule does not impose any new recordkeeping, reporting, or disclosure requirements on covered entities or members of the public that would be collections of information requiring approval under 44 U.S.C. 3501 *et seq.*

List of Subjects in 12 CFR Part 1081

Administrative practice and procedure, Banking, Banks, Consumer protection, Credit, Credit unions, Law enforcement, National banks, Savings associations, Trade practices.

Authority and Issuance

For the reasons set forth above, the Bureau of Consumer Financial Protection revises part 1081 to 12 CFR chapter X to read as follows:

PART 1081—RULES OF PRACTICE FOR ADJUDICATION PROCEEDINGS

Subpart A—General Rules

Sec.
1081.100 Scope of the rules of practice.
1081.101 Expedition and fairness of proceedings.
1081.102 Rules of construction.
1081.103 Definitions.
1081.104 Authority of the hearing officer.
1081.105 Assignment, substitution, performance, disqualification of hearing officer.
1081.106 Deadlines.
1081.107 Appearance and practice in adjudication proceedings.
1081.108 Good faith certification.
1081.109 Conflict of interest.
1081.110 Ex parte communication.
1081.111 Filing of papers.
1081.112 Formal requirements as to papers filed.
1081.113 Service of papers.
1081.114 Construction of time limits.
1081.115 Change of time limits.
1081.116 Witness fees and expenses.
1081.117 Bureau's right to conduct examination, collect information.
1081.118 Collateral attacks on adjudication proceedings.
1081.119 Confidential information; protective orders.
1081.120 Settlement.
1081.121 Cooperation with other agencies.

Subpart B—Initiation of Proceedings and Prehearing Rules

Sec.
1081.200 Commencement of proceeding and contents of notice of charges.
1081.201 Answer and disclosure statement and notification of financial interest.
1081.202 Amended pleadings.
1081.203 Scheduling conference.
1081.204 Consolidation and severance of actions.
1081.205 Non-dispositive motions.
1081.206 Availability of documents for inspection and copying.
1081.207 Production of witness statements.
1081.208 Subpoenas.
1081.209 Deposition of witness unavailable for hearing.
1081.210 Expert discovery.
1081.211 Interlocutory review.
1081.212 Dispositive motions.
1081.213 Partial summary disposition.
1081.214 Prehearing conferences.
1081.215 Prehearing submissions.
1081.216 Amicus participation.

Subpart C—Hearings

Sec.
1081.300 Public hearings.
1081.301 Failure to appear.
1081.302 Conduct of hearings.
1081.303 Evidence.
1081.304 Record of the hearing.
1081.305 Post-hearing filings.
1081.306 Record in proceedings before hearing officer; retention of documents; copies.

Subpart D—Decision and Appeals

Sec.
1081.400 Recommended decision of the hearing officer.
1081.401 Transmission of documents to Director; record index; certification.
1081.402 Notice of appeal; review by the Director.
1081.403 Briefs filed with the Director.
1081.404 Oral argument before the Director.
1081.405 Decision of the Director.
1081.406 Reconsideration.
1081.407 Effective date; stays pending judicial review.

Authority: Pub. L. 111–203, Title X.

Subpart A—General Rules

§ 1081.100 Scope of the rules of practice.

This part prescribes rules of practice and procedure applicable to adjudication proceedings authorized by section 1053 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act) to ensure or enforce compliance with the provisions of Title X of the Dodd-Frank Act, rules prescribed by the Bureau under Title X of the Dodd-Frank Act, and any other Federal law or regulation that the Bureau is authorized to enforce. These rules of practice do not govern the conduct of Bureau investigations, investigational hearings or other proceedings that do not arise from proceedings after a notice of charges.

§ 1081.101 Expedition and fairness of proceedings.

To the extent practicable, consistent with requirements of law, the Bureau's policy is to conduct such adjudication proceedings fairly and expeditiously. In the conduct of such proceedings, the hearing officer and counsel for all parties shall make every effort at each stage of a proceeding to avoid delay. With the consent of the parties, the Director, at any time, or the hearing officer at any time prior to the filing of his or her recommended decision, may shorten any time limit prescribed by this part.

§ 1081.102 Rules of construction.

For the 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 neutral gender encompasses all three, if such use would be appropriate;

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

(d) To the extent this part uses terms defined by section 1002 of the Dodd-Frank Act, such terms shall have the same meaning as set forth therein, unless defined differently by § 1081.103.

§ 1081.103 Definitions.

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

Dodd-Frank Act means the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Public Law 111–203 (July 21, 2010).

Adjudication proceeding means a proceeding conducted pursuant to section 1053 of the Dodd-Frank Act and intended to lead to the formulation of a final order other than a temporary order to cease and desist issued pursuant to section 1053(c) of the Dodd-Frank Act.

Bureau means the Bureau of Consumer Financial Protection.

Chief hearing officer means the hearing officer charged with assigning hearing officers to specific proceedings, in the event there is more than one hearing officer available to the Bureau.

Counsel means any person representing a party pursuant to § 1081.107.

Decisional employee means any employee of the Bureau who has not engaged in an investigative or prosecutorial role in a proceeding and who may assist the Director or the hearing officer, respectively, in preparing orders, recommended decisions, decisions, and other documents under this part.

Director means the Director of the Bureau or a person authorized to perform the functions of the Director in accordance with the law.

Enforcement counsel means any individual who files a notice of appearance as counsel on behalf of the Bureau in an adjudication proceeding.

Final order means an order issued by the Bureau with or without the consent of the respondent, which has become final, without regard to the pendency of any petition for reconsideration or review.

General Counsel means the General Counsel of the Bureau or any Bureau employee to whom the General Counsel has delegated authority to act under this part.

Hearing officer means an administrative law judge or any other person duly authorized to preside at a hearing.

Notice of charges means the pleading that commences an adjudication proceeding, as described in § 1081.200, except that it does not include a stipulation and consent order under § 1081.200(d).

Office of Administrative Adjudication means the office of the Bureau responsible for conducting adjudication proceedings.

Office of Enforcement means the office of the Bureau responsible for enforcement of Federal consumer financial law.

Party means the Bureau, any person named as a party in any notice of charges issued pursuant to this part, and, to the extent applicable, any person who intervenes in the proceeding pursuant to § 1081.119(a) to seek a protective order.

Person means an individual, partnership, company, corporation, association (incorporated or unincorporated), trust, estate, cooperative organization, or other entity.

Person employed by the Bureau means Bureau employees, contractors, agents, and others acting for or on behalf of the Bureau, or at its direction, including consulting experts.

Respondent means the party named in the notice of charges.

State means any State, territory, or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, Guam, American Samoa, or the United States Virgin Islands or any federally recognized Indian tribe, as defined by the Secretary of the Interior under section 104(a) of the Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. 479a–1(a).

§ 1081.104 Authority of the hearing officer.

(a) *General Rule.* The hearing officer shall have all powers necessary to conduct a proceeding in a fair and impartial manner and to avoid unnecessary delay. No provision of this part shall be construed to limit the powers of the hearing officers provided by the Administrative Procedure Act, 5 U.S.C. 556, 557.

(b) *Powers.* The powers of the hearing officer include but are not limited to the power:

(1) To administer oaths and affirmations;

(2) To issue subpoenas, subpoenas *duces tecum,* and protective orders, as authorized by this part, and to quash or modify any such subpoenas or orders;

(3) To take depositions or cause depositions to be taken;

(4) To receive relevant evidence and to rule upon the admission of evidence and offers of proof;

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

(6) To reject written submissions that materially fail to comply with the requirements of this part, and to deny confidential status to documents and testimony without prejudice until a party complies with all relevant rules;

(7) To hold conferences for settlement, simplification of the issues, or any other proper purpose and require the attendance at any such conference of at least one representative of each party who has authority to negotiate concerning the resolution of issues in controversy;

(8) To inform the parties as to the availability of one or more alternative means of dispute resolution, and to encourage the use of such methods;

(9) To certify questions to the Director for his or her determination in accordance with the rules of this part;

(10) To consider and rule upon, as justice may require, all procedural and other motions appropriate in adjudication proceedings;

(11) To issue and file recommended decisions;

(12) To recuse himself or herself by motion made by a party or on his or her own motion;

(13) To issue such sanctions against parties or their counsel as may be necessary to deter repetition of sanctionable conduct or comparable conduct by others similarly situated, as provided for in this part or as otherwise necessary to the appropriate conduct of hearings and related proceedings, provided that no sanction shall be imposed before providing the sanctioned person an opportunity to show cause why no such sanction should issue; and

(14) To do all other things necessary and appropriate to discharge the duties of a presiding officer.

§ 1081.105 Assignment, substitution, performance, disqualification of hearing officer.

(a) *How assigned.* In the event that more than one hearing officer is available to the Bureau for the conduct of proceedings under this part, the presiding hearing officer shall be designated by the chief hearing officer, who shall notify the parties of the hearing officer designated.

(b) *Interference.* Hearing officers shall not be subject to the supervision or direction of, or responsible to, any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for the Bureau, and all direction by the Bureau to the hearing officer concerning any adjudication proceedings shall appear in and be made part of the record.

(c) *Disqualification of hearing officers.* (1) When a hearing officer deems himself or herself disqualified to preside in a particular proceeding, he or she shall issue a notice stating that he or she is withdrawing from the matter and setting forth the reasons therefore.

(2) Any party who has a reasonable, good faith basis to believe that a hearing officer has a personal bias, or is otherwise disqualified from hearing a case, may make a motion to the hearing officer that the hearing officer withdraw. The motion shall be accompanied by an affidavit setting forth the facts alleged to constitute grounds for disqualification. Such motion shall be filed at the earliest practicable time after the party learns, or could reasonably have learned, of the alleged grounds for disqualification. If the hearing officer does not disqualify himself or herself within ten days, he or she shall certify the motion to the Director pursuant to § 1081.211, together with any statement he or she may wish to have considered by the Director. The Director shall promptly determine the validity of the grounds alleged, either directly or on the report of another hearing officer appointed to conduct a hearing for that purpose, and shall either direct the reassignment of the matter or confirm the hearing officer's continued role in the matter.

(d) *Unavailability of hearing officer.* In the event that the hearing officer withdraws or is otherwise unable to perform the duties of the hearing officer, the chief hearing officer or the Director shall designate another hearing officer to serve.

§ 1081.106 Deadlines.

The deadlines for action by the hearing officer established by §§ 1081.203, 1081.205, 1081.211, 1081.212, and 1081.400, or elsewhere in this part, confer no substantive rights on respondents.

§ 1081.107 Appearance and practice in adjudication proceedings.

(a) *Appearance before the Bureau or a hearing officer.* (1) *By attorneys.* Any member in good standing of the bar of the highest court of any State may represent others before the Bureau if such attorney is not currently suspended or debarred from practice before the Bureau or by a court of the United States or of any State.

(2) *By non-attorneys.* So long as such individual is not currently suspended or debarred from practice before the Bureau:

(i) An individual may appear on his or her own behalf;

(ii) A member of a partnership may represent the partnership;

(iii) A duly authorized officer of a corporation, trust or association may represent the corporation, trust or association; and

(iv) A duly authorized officer or employee of any government unit, agency, or authority may represent that unit, agency, or authority.

(3) *Notice of appearance.* Any individual acting as counsel on behalf of a party, including the Bureau, shall file a notice of appearance at or before the time that the individual submits papers or otherwise appears on behalf of a party in the adjudication 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, and if applicable, must include the attorney's jurisdiction of admission or qualification, attorney identification number, and a statement by the appearing attorney attesting to his or her good standing within the legal profession. By filing a notice of appearance on behalf of a party in an adjudication 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 required by the hearing officer, continue to accept service until a 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. The notice of appearance shall provide the representative's email address, telephone number and business address and, if different from the representative's addresses, electronic or other address at which the represented party may be served.

(b) *Sanctions.* Dilatory, obstructionist, egregious, contemptuous or contumacious conduct at any phase of any adjudication proceeding may be grounds for exclusion or suspension of counsel from the proceeding. An order imposing a sanction must describe the sanctioned conduct and explain the basis for the sanction.

(c) *Standards of conduct; disbarment.* (1) All attorneys practicing before the Bureau shall conform to the standards of ethical conduct required by the bars of which the attorneys are members.

(2) If for good cause shown, the Director believes that any attorney is not conforming to such standards, or that an attorney or counsel to a party has otherwise engaged in conduct warranting disciplinary action, the Director may issue an order requiring such person to show cause why he should not be suspended or disbarred from practice before the Bureau. The alleged offender shall be granted due opportunity to be heard in his or her own defense and may be represented by counsel. Thereafter, if warranted by the facts, the Director may issue against the attorney or counsel an order of reprimand, suspension, or disbarment.

§ 1081.108 Good faith certification.

(a) *General requirement.* Every filing or submission of record following the issuance of a notice of charges shall be signed by at least one counsel of record in his or her individual name and shall state counsel's address, email address, and telephone number. A party who acts as his or her own counsel shall sign his or her individual name and state his or her address, email address, and telephone number on every filing or submission of record. Papers filed by electronic transmission may be signed with an ''/s/'' notation, which shall be deemed the signature of the party or representative whose name appears below the signature line.

(b) *Effect of signature.* (1) The signature of counsel or a party shall constitute a certification that: the counsel or party has read the filing or submission of record; to the best of his or her 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 argument for the extension, modification, or reversal of existing law; and 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 hearing officer shall strike the filing or submission of record, unless it is signed promptly after the omission is called to the attention of the filer.

(c) *Effect of making oral motion or argument.* The act of making any oral motion or oral argument by any counsel or party constitutes a certification that to the best of his or her knowledge, information, and belief formed after reasonable inquiry, his or her statements are well-grounded in fact and are warranted by existing law or a good faith 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.

(d) *Sanctions.* Counsel or a party that fails to abide by the requirements of this section may be subject to sanctions pursuant to § 1081.104(b)(13).

§ 1081.109 Conflict of interest.

(a) *Conflict of interest in representation.* No person shall appear as counsel for another person in an adjudication proceeding if it reasonably appears that such representation may be materially limited by that counsel's responsibilities to a third person or by the counsel's own interests. The hearing 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 represents two or more parties to an adjudication 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 § 1081.107(a)(3):

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

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

§ 1081.110 Ex parte communication.

(a) *Definitions.* (1) For purposes of this section, *ex parte communication* means any material oral or written

communication relevant to the merits of an adjudication proceeding that was neither on the record nor on reasonable prior notice to all parties that takes place between:

(i) An interested person not employed by the Bureau (including such person's counsel); and

(ii) The hearing officer handling the proceeding, the Director, or a decisional employee.

(2) *Exception.* A request for status of the proceeding does not constitute an ex parte communication.

(3) *Pendency of an adjudication proceeding* means the time from when the Bureau issues a notice of charges, unless the person responsible for the communication has knowledge that a notice of charges will be issued, in which case the pendency of an adjudication shall commence at the time of his or her acquisition of such knowledge, or from when an order by a court of competent jurisdiction remanding a Bureau decision and order for further proceedings becomes effective, until the time the Director enters his or her final decision and order in the proceeding and the time permitted to seek reconsideration of that decision and order has elapsed. For purposes of this section, an order of remand by a court of competent jurisdiction shall be deemed to become effective when the Bureau's right to petition for review or for a writ of certiorari has lapsed without a petition having been filed, or when such a petition has been denied. If a petition for reconsideration of a Bureau decision is filed pursuant to § 1081.406, the matter shall be considered to be a pending adjudication proceeding until the time the Bureau enters an order disposing of the petition.

(b) *Prohibited ex parte communications.* During the pendency of an adjudication proceeding, except to the extent required for the disposition of ex parte matters as authorized by law or as otherwise authorized by this part:

(1) No interested person not employed by the Bureau shall make or knowingly cause to be made to the Director, or to the hearing officer, or to any decisional employee, an ex parte communication; and

(2) The Director, the hearing officer, or any decisional employee shall not make or knowingly cause to be made to any interested person not employed by the Bureau any ex parte communication.

(c) *Procedure upon occurrence of ex parte communication.* If an ex parte communication prohibited by paragraph (b) of this section is received by the hearing officer, the Director, or any decisional employee, 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 other 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.* (1) *Adverse action on claim.* Upon receipt of an ex parte communication knowingly made or knowingly caused to be made by a party and prohibited by paragraph (b) of this section, the Director or hearing officer, as appropriate, may, to the extent consistent with the interests of justice and the policy of the underlying statutes, require the party to show cause why his claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation.

(2) *Discipline of persons practicing before the Bureau.* The Director may, to the extent not prohibited by law, censure, suspend, or revoke the privilege to practice before the Bureau of any person who makes, or solicits the making of, an unauthorized ex parte communication.

(e) *Separation of functions.* Except to the extent required for the disposition of ex parte matters as authorized by law, the hearing officer may not consult a person or party on any matter relevant to the merits of the adjudication, unless upon notice and opportunity for all parties to participate. An employee or agent engaged in the performance of investigative or prosecuting functions for the Bureau in a case, other than the Director, may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review of the recommended decision, except as witness or counsel in public proceedings.

§ 1081.111 Filing of papers.

(a) *Filing.* The following papers must be filed by parties in an adjudication proceeding: the notice of charges, proof of service of the notice of charges, notices of appearance, answer, the disclosure statement required under § 1081.201(e), motion, brief, request for issuance or enforcement of a subpoena, response, opposition, reply, notice of appeal, or petition for reconsideration. The hearing officer shall file all written orders, rulings, notices, or requests. Any papers required to be filed shall be filed with the Office of Administrative Adjudication, except as otherwise provided herein.

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

(1) Electronic transmission in accordance with guidance issued by the Office of Administrative Adjudication; or

(2) Any of the following methods if respondent demonstrates, in accordance with guidance issued by the Office of Administrative Adjudication, that electronic filing is not practicable:

(i) Personal delivery;

(ii) Delivery to a reliable commercial courier service or overnight delivery service; or

(iii) Mailing the papers through the U.S. Postal Service by First Class Mail, Registered Mail, Certified Mail or Express Mail.

(c) *Papers filed in an adjudication proceeding are presumed to be public.* Unless otherwise ordered by the Bureau or the hearing officer, all papers filed in connection with an adjudication proceeding are presumed to be open to the public. The Bureau may provide public access to and publish any papers filed in an adjudication proceeding except if there is a pending motion for a protective order filed pursuant to § 1081.119, or if there is an order from the Director, hearing officer, or a Federal court authorizing the confidential treatment of the papers filed.

§ 1081.112 Formal requirements as to papers filed.

(a) *Form.* All papers filed by parties must:

(1) Set forth the name, address, telephone number, and email address of the counsel or party making the filing;

(2) Be double-spaced (except for single-spaced footnotes and single-spaced indented quotations) and printed or typewritten on 8½ x 11 inch paper in 12-point or larger font;

(3) Include at the head of the paper, or on a title page, a caption setting forth the title of the case, the docket number of the proceeding, and a brief descriptive title indicating the purpose of the paper;

(4) Be paginated with margins at least one inch wide; and

(5) If filed by other than electronic means, be stapled, clipped or otherwise fastened in a manner that lies flat when opened.

(b) *Signature.* All papers must be dated and signed as provided in § 1081.108.

(c) *Number of copies.* Unless otherwise specified by the Director or the hearing officer, one copy of all

documents and papers shall be filed if filing is by electronic transmission. If filing is accomplished by any other means, an original and one copy of all documents and papers shall be filed, except that only one copy of transcripts of testimony and exhibits must be filed.

(d) *Authority to reject document for filing.* The Office of Administrative Adjudication or the hearing officer may reject a document for filing that materially fails to comply with these rules.

(e) *Sensitive personal information.* Sensitive personal information means an individual's Social Security number, taxpayer identification number, financial account number, credit card or debit card number, driver's license number, State-issued identification number, passport number, date of birth (other than year), and any sensitive health information identifiable by individual, such as an individual's medical records. Sensitive personal information shall not be included in, and must be redacted or omitted from, filings unless the person filing the paper determines that such information is relevant or otherwise necessary for the conduct of the proceeding. If the person filing a paper determines the sensitive personal information contained in the paper is relevant or necessary to the proceeding, the person shall file the paper in accordance with paragraph (f) of this section, including filing an expurgated copy of the paper with the sensitive personal information redacted.

(f) *Confidential treatment of information in certain filings.* A party seeking confidential treatment of information contained in a filing must contemporaneously file either a motion requesting such treatment in accordance with § 1081.119 or a copy of the order from the Director, hearing officer, or Federal court authorizing such confidential treatment. The filing must comply with any applicable order of the Director or hearing officer and must be accompanied by:

(1) A complete, sealed copy of the documents containing the materials as to which confidential treatment is sought, with the allegedly confidential material clearly marked as such, and with the first page of the document labeled ''Under Seal.'' If the movant seeks or has obtained a protective order against disclosure to other parties as well as the public, copies of the documents shall not be served on other parties; and

(2) An expurgated copy of the materials as to which confidential treatment is sought, with the allegedly confidential materials redacted. The redacted version shall indicate any omissions with brackets or ellipses, and its pagination and depiction of text on each page shall be identical to that of the sealed version.

(g) *Certificate of service.* Any papers filed in an adjudication proceeding shall contain proof of service on all other parties or their counsel in the form of a statement of the date and manner of service and of the names of the persons served, certified by the person who made service. The certificate of service must be affixed to the papers filed and signed in accordance with § 1081.108.

§ 1081.113 Service of papers.

(a) *When required.* In every adjudication proceeding, each paper required to be filed by § 1081.111 shall be served upon each party in the proceeding in accordance with the provisions of this section; provided, however, that absent an order to the contrary, no service shall be required for motions which are to be heard ex parte.

(b) *Upon a person represented by counsel.* Whenever service is required to be made upon a person represented by counsel who has filed a notice of appearance pursuant to § 1081.107(a)(3), service shall be made pursuant to paragraph (c) of this section upon counsel, unless service upon the person represented is ordered by the Director or the hearing officer, as appropriate.

(c) *Method of service.* Except as provided in paragraph (d) of this section or as otherwise ordered by the hearing officer or the Director, service shall be made by delivering a copy of the filing by one of the following methods:

(1) Transmitting the papers by electronic transmission where the persons so serving each other have consented to service by specified electronic transmission and provided the Bureau and the parties with notice of the means for service by electronic transmission (e.g., email address or facsimile number);

(2) Handing a copy to the person required to be served; or leaving a copy at the person's office with a clerk or other person in charge thereof, or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at the person's dwelling or usual place of abode with some person of suitable age and discretion then residing therein;

(3) Mailing the papers through the U.S. Postal Service by First Cass Mail, Registered Mail, Certified Mail or Express Mail delivery addressed to the person; or

(4) Sending the papers through a third-party commercial courier service or express delivery service.

(d) *Service of certain papers by the Bureau.* Service of the notice of charges, recommended decisions and final orders of the Bureau shall be effected as follows:

(1) *Service of a notice of charges.* (i) *To individuals.* Notice of a proceeding shall be made to an individual by delivering a copy of the notice of charges to the individual or to an agent authorized by appointment or by law to receive such notice. Delivery, for purposes of this paragraph, means handing a copy of the notice to the individual; or leaving a copy at the individual's office with a clerk or other person in charge thereof; or leaving a copy at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein; or sending a copy of the notice addressed to the individual through the U.S. Postal Service by Registered Mail, Certified Mail or Express Mail delivery, or by third-party commercial carrier, for overnight delivery and obtaining a confirmation of receipt.

(ii) *To corporations or entities.* Notice of a proceeding shall be made to a person other than a natural person by delivering a copy of the notice of charges to an officer, managing or general agent, or any other agent authorized by appointment or law to receive such notice, by any method specified in paragraph (d)(1)(i) of this section.

(iii) *Upon persons registered with the Bureau.* In addition to any other method of service specified in paragraph (d)(1)(i) or (ii) of this section, notice may be made to a person currently registered with the Bureau by sending a copy of the notice of charges addressed to the most recent business address shown on the person's registration form by U.S. Postal Service certified, registered or Express Mail and obtaining a confirmation of receipt or attempted delivery.

(iv) *Upon persons in a foreign country.* Notice of a proceeding to a person in a foreign country may be made by any method specified in paragraph (d)(1) of this section, or by any other method reasonably calculated to give notice, provided that the method of service used is not prohibited by the law of the foreign country.

(v) *Record of service.* The Bureau shall maintain and file a record of service of the notice of charges on parties, identifying the party given notice, the method of service, the date of service, the address to which service was made, and the person who made service. If service is made in person, the certificate of service shall state, if

available, the name of the individual to whom the notice of charges was given. If service is made by U.S. Postal Service Registered Mail, Certified Mail or Express Mail, the Bureau shall maintain the confirmation of receipt or attempted delivery. If service is made to an agent authorized by appointment to receive service, the certificate of service shall be accompanied by evidence of the appointment.

(vi) *Waiver of service.* In lieu of service as set forth in paragraph (d)(1)(i) or (d)(1)(ii) of this section, the party may be provided a copy of the notice of charges by First Class Mail or other reliable means if a waiver of service is obtained from the party and placed in the record.

(2) *Service of recommended decisions and final orders.* Recommended decisions issued by the hearing officer and final orders issued by the Bureau shall be served promptly on each party pursuant to any method of service authorized under paragraph (d)(1) of this section. Such decisions and orders may also be served by electronic transmission if the party to be served has agreed to accept such service in writing, signed by the party or its counsel, and has provided the Bureau with information concerning the manner of electronic transmission.

§ 1081.114 Construction of time limits.

(a) *General rule.* In computing any period of time prescribed by this part, by order of the Director or a hearing officer, or by any applicable statute, 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 as set forth in 5 U.S.C. 6103(a). 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, except when the time period within which an act is to be performed is ten days or less, not including any additional time allowed for in paragraph (c) of this section.

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

(1) In the case of personal service or same day commercial courier delivery, upon actual receipt by person served;

(2) In the case of overnight commercial delivery service, Express Mail delivery, First Class Mail, Registered Mail, or Certified Mail, upon deposit in or delivery to an appropriate point of collection; or

(3) In the case of electronic transmission, upon transmission.

(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 are calculated as follows:

(1) If service is made by First Class Mail, Registered Mail, 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 transmission, add one calendar day to the prescribed period.

§ 1081.115 Change of time limits.

(a) Except as otherwise provided by law, the hearing officer may, in any proceeding before him or her, for good cause shown, extend the time limits prescribed by this part or by any notice or order issued in the proceedings. After appeal to the Director pursuant to § 1081.402, 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 non-moving parties or on the Director's or the hearing officer's own motion, as appropriate.

(b) *Considerations in determining whether to extend time limits or grant postponements, adjournments and extensions.* In considering all motions for extensions of time filed pursuant to paragraph (a) of this section, the Director or the hearing officer should adhere to a policy of strongly disfavoring granting such motions, except in circumstances where the moving party makes a strong showing that the denial of the motion would substantially prejudice its case. In determining whether to grant any motions, the Director or hearing officer, as appropriate, shall consider, in addition to any other relevant factors:

(1) The length of the proceeding to date;

(2) The number of postponements, adjournments or extensions already granted;

(3) The stage of the proceedings at the time of the motion;

(4) The impact of the motion on the hearing officer's ability to complete the proceeding in the time specified by § 1081.400(a); and

(5) Any other matters as justice may require.

(c) *Time limit.* Postponements, adjournments, or extensions of time for filing papers shall not exceed 21 days unless the Director or the hearing officer, as appropriate, states on the record or sets forth in a written order the reasons why a longer period of time is necessary.

(d) *No effect on deadline for recommended decision.* The granting of any extension of time pursuant to this section shall not affect any deadlines set pursuant to § 1081.400(a).

§ 1081.116 Witness fees and expenses.

Respondents shall pay to witnesses subpoenaed for testimony or depositions on their behalf 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 deposition subpoena addressed to a party, no witness fees or mileage need be paid. Fees for witnesses shall be tendered in advance by any respondent requesting the issuance of a subpoena, except that fees and mileage need not be tendered in advance where the Bureau is the party requesting the subpoena. The Bureau shall pay to witnesses subpoenaed for testimony or depositions on behalf of the Office of Enforcement 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, but the Bureau need not tender such fees in advance.

§ 1081.117 Bureau's right to conduct examination, collect information.

Nothing contained in this part limits in any manner the right of the Bureau to conduct any examination, inspection, or visitation of any person, to conduct or continue any form of investigation authorized by law, to collect information in order to monitor the market for risks to consumers in the offering or provision of consumer financial products or services, or to otherwise gather information in accordance with law.

§ 1081.118 Collateral attacks on adjudication proceedings.

Unless a court of competent jurisdiction, or the Director for good cause, so directs, if an interlocutory appeal or collateral attack is brought in any court concerning all or any part of an adjudication proceeding, the challenged adjudication proceeding shall continue without regard to the pendency of that court proceeding. No default or other failure to act as directed in the adjudication proceeding within the times prescribed in this part shall be excused based on the pendency before any court of any interlocutory appeal or collateral attack.

§ 1081.119 Confidential information; protective orders.

(a) Rights of third parties. Any party that intends to disclose information obtained from a third party that is subject to a claim of confidentiality must provide notice to the third party at least ten days prior to the proposed disclosure of such information. In response to such notice, the third party may consent to the disclosure of such information, which may be conditioned on the entry of an appropriate protective order, or may intervene in the proceeding for the limited purpose of moving for a protective order pursuant to this section. Any written filing by a party that contains such confidential information must be accompanied by a certification that proper notice was provided. The act of making any oral motion or oral argument by any counsel or party which contains such confidential information constitutes a certification that proper notice was provided. A third party wishing to intervene for purposes of protecting its confidential information may file a single motion, in conformity with all applicable rules, setting forth the basis of both the third party's right to intervene and the basis for the protective order, in conformity with paragraph (b).

(b) *Procedure.* In any adjudication proceeding, a party, including a third party who has intervened pursuant to paragraph (a) of this section, may file a motion requesting a protective order to limit from disclosure to other parties or to the public documents or testimony that contain confidential information. The motion should include a general summary or extract of the documents or testimony without revealing confidential details, and a copy of the proposed protective order. A motion for confidential treatment of documents should be filed in accordance with § 1081.112(f), and all other applicable rules.

(c) *Basis for issuance.* Documents and testimony introduced in a public hearing, or filed in connection with an adjudication proceeding, are presumed to be public. A motion for a protective order shall be granted:

(1) Upon a finding that public disclosure will likely result in a clearly defined, serious injury to the party or third party requesting confidential treatment;

(2) After finding that the material constitutes sensitive personal information, as defined in § 1081.112(e);

(3) If all parties, including third parties to the extent their information is at issue, stipulate to the entry of a protective order; or

(4) Where public disclosure is prohibited by law.

(d) *Requests for additional information supporting confidentiality.* The hearing officer may require a movant under paragraph (b) of this section to furnish in writing additional information with respect to the grounds for confidentiality. Failure to supply the information so requested within five days from the date of receipt by the movant of a notice of the information required shall be deemed a waiver of the objection to public disclosure of that portion of the documents to which the additional information relates, unless the hearing officer shall otherwise order for good cause shown at or before the expiration of such five-day period.

(e) *Confidentiality of documents pending decision.* Pending a determination of a motion under this section, the documents as to which confidential treatment is sought and any other documents that would reveal the confidential information in those documents shall be maintained under seal and shall be disclosed only in accordance with orders of the hearing officer. Any order issued in connection with a motion under this section shall be public unless the order would disclose information as to which a protective order has been granted, in which case that portion of the order that would reveal the protected information shall be nonpublic.

§ 1081.120 Settlement.

(a) *Availability.* Any respondent in an adjudication proceeding instituted under this part, may, at any time, propose in writing an offer of settlement.

(b) *Procedure.* An offer of settlement shall state that it is made pursuant to this section; shall recite or incorporate as a part of the offer the provisions of paragraphs (c)(3) and (4) of this section; shall be signed by the person making the offer, not by counsel; and shall be submitted to enforcement counsel.

(c) *Consideration of offers of settlement.* (1) Offers of settlement shall be considered when time, the nature of the proceedings, and the public interest permit.

(2) Any settlement offer shall be presented to the Director with a recommendation, except that, if the recommendation is unfavorable, the offer shall not be presented to the Director unless the person making the offer so requests.

(3) By submitting an offer of settlement, the person making the offer waives, subject to acceptance of the offer:

(i) All hearings pursuant to the statutory provisions under which the proceeding has been instituted;

(ii) The filing of proposed findings of fact and conclusions of law;

(iii) Proceedings before, and a recommended decision by, a hearing officer;

(iv) All post-hearing procedures;

(v) Judicial review by any court; and

(vi) Any objection to the jurisdiction of the Bureau under section 1053 of the Dodd-Frank Act.

(4) By submitting an offer of settlement the person further waives:

(i) Such provisions of this part or other requirements of law as may be construed to prevent any Bureau employee from participating in the preparation of, or advising the Director as to, any order, opinion, finding of fact, or conclusion of law to be entered pursuant to the offer; and

(ii) Any right to claim bias or prejudgment by the Director based on the consideration of or discussions concerning settlement of all or any part of the proceeding.

(5) If the Director rejects the offer of settlement, the person making the offer shall be notified of the Director's action and the offer of settlement shall be deemed withdrawn. The rejected offer shall not constitute a part of the record in any proceeding against the person making the offer, provided, however, that rejection of an offer of settlement does not affect the continued validity of waivers pursuant to paragraph (c)(4) of this section with respect to any discussions concerning the rejected offer of settlement.

(d) *Consent orders.* If the Director accepts the offer of settlement, all terms and conditions of a settlement entered into under this section shall be recorded in a written stipulation signed by all settling parties, and a consent order concluding the proceeding. The stipulation and consent order shall be filed pursuant to § 1081.111, and shall recite or incorporate as a part of the stipulation the provisions of paragraphs (c)(3) and (4) of this section. The Director will then issue a consent order, which shall be a final order concluding the proceeding.

§ 1081.121 Cooperation with other agencies.

It is the policy of the Bureau to cooperate with other governmental agencies to avoid unnecessary overlap or duplication of regulatory functions.

Subpart B—Initiation of Proceedings and Prehearing Rules

§ 1081.200 Commencement of proceeding and contents of notice of charges.

(a) *Commencement of proceeding.* A proceeding governed by this part is commenced by filing of a notice of charges by the Bureau in accordance with § 1081.111. The notice of charges must be served by the Bureau upon the respondent in accordance with § 1081.113(d)(1).

(b) *Contents of a notice of charges.* The notice of charges must set forth:

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

(2) A statement of the matters of fact and law showing that the Bureau is entitled to relief;

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

(4) The time and place of the hearing as required by law or regulation;

(5) The time within which to file an answer as required by law or regulation;

(6) That the answer shall be filed and served in accordance with subpart A of this part; and

(7) The docket number for the adjudication proceeding.

(c) *Publication of notice of charges.* Unless otherwise ordered by the Bureau, the notice of charges shall be given general circulation by release to the public, by publication on the Bureau's Web site and, where directed by the hearing officer or the Director, by publication in the **Federal Register**. The Bureau may publish any notice of charges after ten days from the date of service except if there is a pending motion for a protective order filed pursuant to § 1081.119.

(d) *Commencement of proceeding through a consent order.* Notwithstanding paragraph (a) of this section, where the parties agree to settlement before the filing of a notice of charges, a proceeding may be commenced by filing a stipulation and consent order. The stipulation and consent order shall be filed pursuant to § 1081.111. The stipulation shall contain the information required under § 1081.120(d), and the consent order shall contain the information required under paragraphs (b)(1) through (b)(2) of this section. The proceeding shall be concluded upon issuance of the consent order by the Director.

(e) *Voluntary dismissal.* (1) *Without an order.* The Bureau may voluntarily dismiss an adjudication proceeding without an order entered by a hearing officer by filing either:

(i) A notice of dismissal before the respondent(s) serves an answer; or

(ii) A stipulation of dismissal signed by all parties who have appeared.

(2) *Effect.* Unless the notice or stipulation states otherwise, the dismissal is without prejudice, and does not operate as an adjudication on the merits.

§ 1081.201. Answer and disclosure statement and notification of financial interest.

(a) *Time to file answer.* Within 14 days of service of the notice of charges, respondent shall file an answer as designated in the notice of charges.

(b) *Content of answer.* An answer must specifically respond to each paragraph or allegation of fact contained in the notice of charges 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 of charges which is not denied in the answer shall be deemed admitted for purposes of the proceeding. A respondent is not required to respond to the portion of a notice of charges that constitutes the prayer for relief or proposed order. The answer must set forth affirmative defenses, if any, asserted by the respondent.

(c) *If the allegations of the complaint are admitted.* If the respondent elects not to contest the allegations of fact set forth in the notice of charges, the answer shall consist of a statement that the respondent admits all of the material allegations to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the notice of charges, and together with the notice of charges will provide a record basis on which the hearing officer shall issue a recommended decision containing appropriate findings and conclusions and a proposed order disposing of the proceeding. In such an answer, the respondent may, however, reserve the right to submit proposed findings of fact and conclusions of law under § 1081.305.

(d) *Default.* (1) Failure of a respondent to file an answer within the time provided shall be deemed to constitute a waiver of the respondent's right to appear and contest the allegations of the notice of charges and to authorize the hearing officer, without further notice to the respondent, to find the facts to be as alleged in the notice of charges and to enter a recommended decision containing appropriate findings and conclusions. In such cases, respondent shall have no right to appeal pursuant to § 1081.402, but must instead proceed pursuant to paragraph (d)(2) of this section.

(2) A motion to set aside a default shall be made within a reasonable time, state the reasons for the failure to appear or defend, and specify the nature of the proposed defense in the proceeding. In order to prevent injustice and on such conditions as may be appropriate, the hearing officer, at any time prior to the filing of the recommended decision, or the Director, at any time, may for good cause shown set aside a default.

(e) *Disclosure statement and notification of financial interest.* (1) *Who must file; contents.* A respondent, nongovernmental intervenor, or nongovernmental amicus must file a disclosure statement and notification of financial interest that:

(i) Identifies any parent corporation, any publicly owned corporation owning ten percent or more of its stock, and any publicly owned corporation not a party to the proceeding that has a financial interest in the outcome of the proceeding and the nature of that interest; or

(ii) States that there are no such corporations.

(2) *Time for filing; supplemental filing.* A respondent, nongovernmental intervenor, or nongovernmental amicus must:

(i) File the disclosure statement with its first appearance, pleading, motion, response, or other request addressed to the hearing officer or the Bureau; and

(ii) Promptly file a supplemental statement if any required information changes.

§ 1081.202 Amended pleadings.

(a) *Amendments before the hearing.* The notice of charges, answer, or any other pleading may be amended or supplemented only with the opposing party's written consent or leave of the hearing officer. The respondent must answer an amended notice of charges within the time remaining for the respondent's answer to the original notice of charges, or within ten days after service of the amended notice of charges, whichever is later, unless the hearing officer orders otherwise for good cause.

(b) *Amendments to conform to the evidence.* When issues not raised in the notice of charges 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 of charges 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 of charges or answer, the hearing officer 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 hearing officer that the admission of such evidence would unfairly prejudice that party's action or defense upon the merits. The hearing officer may grant a continuance to enable the objecting party to meet such evidence.

§ 1081.203 Scheduling conference.

(a) *Meeting of the parties before scheduling conference.* As early as practicable before the scheduling conference described in paragraph (b) of this section, counsel for the parties shall meet to discuss the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case. The parties shall also discuss and agree, if possible, on the matters set forth in paragraph (b) of this section.

(b) *Scheduling conference.* Within 20 days of service of the notice of charges or such other time as the parties and hearing officer may agree, counsel for all parties shall appear before the hearing officer in person at a specified time and place or by telephone for the purpose of scheduling the course and conduct of the proceeding. This meeting or telephone conference is called a *scheduling conference.* At the scheduling conference, counsel for the parties shall be prepared to address:

(1) Determination of the dates and location of the hearing, including, in proceedings under section 1053(b) of the Dodd-Frank Act, whether the hearing should commence later than 60 days after service of the notice of charges;

(2) Simplification and clarification of the issues;

(3) Amendments to pleadings;

(4) Settlement of any or all issues;

(5) Production of documents as set forth in § 1081.206 and of witness statements as set forth in § 1081.207, and prehearing production of documents in response to subpoenas *duces tecum* as set forth in § 1081.208;

(6) Whether or not the parties intend to move for summary disposition of any or all issues;

(7) Whether the parties intend to seek the deposition of witnesses pursuant to § 1081.209;

(8) A schedule for the exchange of expert reports and the taking of expert depositions, if any; and

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

(c) *Transcript.* The hearing officer, in his or her discretion, may require that a scheduling 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 his or her expense.

(d) *Scheduling order.* At or within five days following the conclusion of the scheduling conference, the hearing officer shall serve on each party an order setting forth the date and location of the hearing and any agreements reached and any procedural determinations made.

(e) *Failure to appear; default.* Any person who is named in a notice of charges as a person against whom findings may be made or sanctions imposed and who fails to appear, in person or through counsel, at a scheduling conference of which he or she has been duly notified may be deemed in default pursuant to § 1081.201(d)(1). A party may make a motion to set aside a default pursuant to § 1081.201(d)(2).

(f) *Public access.* The scheduling conference shall be public unless the hearing officer determines, based on the standard set forth in § 1081.119(c), that the conference (or any part thereof) shall be closed to the public.

§ 1081.204 Consolidation and severance of actions.

(a) *Consolidation.* (1) On the motion of any party, or on the hearing officer's own motion, the hearing 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.

(2) In the event of consolidation under paragraph (a)(1) of this section, appropriate adjustment to the prehearing schedule may be made to avoid unnecessary expense, inconvenience, or delay.

(b) *Severance.* The hearing officer may, upon the motion of any party, sever the proceeding for separate resolution of the matter as to any respondent only if the hearing officer finds that:

(1) Undue prejudice or injustice to the moving party would result from not severing the proceeding; and

(2) Such undue prejudice or injustice would outweigh the interests of judicial economy and expedition in the complete and final resolution of the proceeding.

§ 1081.205 Non-dispositive motions.

(a) *Scope.* This section applies to all motions except motions to dismiss and motions for summary disposition. A non-dispositive motion filed pursuant to another section of this part shall comply with any specific requirements of that section and this section to the extent these requirements are not inconsistent.

(b) *In writing.* (1) Unless made during a hearing or conference, 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 hearing officer. Written memoranda, briefs, affidavits or other relevant material or documents may be filed in support of or in opposition to a motion.

(c) *Oral motions.* The Director or the hearing officer, as appropriate, may order that an oral motion be submitted in writing.

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

(2) Reply briefs, if any, may be filed within three days after service of the response.

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

(e) *Length limitations.* No motion subject to this section (together with the brief in support of the motion) or brief in response to the motion shall exceed 15 pages in length, exclusive of pages containing the table of contents, table of authorities, and any addendum that consists solely of copies of applicable cases, pertinent legislative provisions or rules, and exhibits. No reply brief shall exceed six pages in length, exclusive of pages containing the table of contents, table of authorities, and any addendum that consists solely of copies of applicable cases, pertinent legislative

provisions or rules, and exhibits. Motions for leave to file motions and briefs in excess of these limitations are disfavored.

(f) *Meet and confer requirements.* Each motion filed under this section shall be accompanied by a signed statement representing that counsel for the moving party has conferred or made a good faith effort to confer with opposing counsel in a good faith effort to resolve by agreement the issues raised by the motion and has been unable to reach such an agreement. If some of the matters in controversy have been resolved by agreement, the statement shall specify the matters so resolved and the matters remaining unresolved.

(g) *Ruling on non-dispositive motions.* Unless otherwise provided by a relevant section of this part, a hearing officer shall rule on non-dispositive motions. Such ruling shall be issued within 14 days after the expiration of the time period allowed for the filing of all motion papers authorized by this section. The Director, for good cause, may extend the time allowed for a ruling.

(h) *Proceedings not stayed.* A motion under consideration by the Director or the hearing officer shall not stay proceedings before the hearing officer unless the Director or the hearing officer, as appropriate, so orders.

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

§ 1081.206 Availability of documents for inspection and copying.

For purposes of this section, the term *documents* shall include any book, document, record, report, memorandum, paper, communication, tabulation, chart, logs, electronic files, or other data or data compilations stored in any medium.

(a) *Documents to be available for inspection and copying.* (1) Unless otherwise provided by this section, or by order of the hearing officer, the Office of Enforcement shall make available for inspection and copying by any respondent documents obtained by the Office of Enforcement prior to the institution of proceedings, from persons not employed by the Bureau, in connection with the investigation leading to the institution of proceedings. Such documents shall include:

(i) Any documents turned over in response to civil investigative demands or other written requests to provide documents or to be interviewed issued by the Office of Enforcement;

(ii) All transcripts and transcript exhibits; and

(iii) Any other documents obtained from persons not employed by the Bureau.

(2) In addition, the Office of Enforcement shall make available for inspection and copying by any respondent:

(i) Each civil investigative demand or other written request to provide documents or to be interviewed issued by the Office of Enforcement in connection with the investigation leading to the institution of proceedings; and

(ii) Any final examination or inspection reports prepared by any other Office of the Bureau if the Office of Enforcement either intends to introduce any such report into evidence or to use any such report to refresh the recollection of, or impeach, any witness.

(3) Nothing in paragraph (a) of this section shall limit the right of the Office of Enforcement to make available any other document, or shall limit the right of a respondent to seek access to or production pursuant to subpoena of any other document, or shall limit the authority of the hearing officer to order the production of any document pursuant to subpoena.

(4) Nothing in paragraph (a) of this section shall require the Office of Enforcement to produce a final examination or inspection report prepared by any other Office of the Bureau or any other government agency to a respondent who is not the subject of that report.

(b) *Documents that may be withheld.* (1) The Office of Enforcement may withhold a document if:

(i) The document is privileged;

(ii) The document is an internal memorandum, note or writing prepared by a person employed by the Bureau or another government agency, other than an examination or supervision report as specified in paragraph (a)(2)(ii) of this section, or would otherwise be subject to the work product doctrine and will not be offered in evidence;

(iii) The document was obtained from a domestic or foreign governmental entity and is either not relevant to the resolution of the proceeding or was provided on condition that the information not be disclosed;

(iv) The document would disclose the identity of a confidential source;

(v) Applicable law prohibits the disclosure of the document; or

(vi) The hearing officer grants leave to withhold a document or category of documents as not relevant to the subject matter of the proceeding or otherwise, for good cause shown.

(2) Nothing in paragraph (b)(1) of this section authorizes the Office of Enforcement in connection with an adjudication proceeding to withhold material exculpatory evidence in the possession of the Office that would otherwise be required to be produced pursuant to paragraph (a) of this section.

(c) *Withheld document list.* The hearing officer may require the Office of Enforcement to produce a list of documents or categories of documents withheld pursuant to paragraphs (b)(1)(i) through (v) of this section or to submit to the hearing officer any document withheld, except for any documents that are being withheld pursuant to section (b)(1)(iii), in which case the Office of Enforcement shall inform the other parties of the fact that such documents are being withheld, but no further disclosures regarding those documents shall be required. The hearing officer may determine whether any withheld document should be made available for inspection and copying. When similar documents are withheld pursuant to paragraphs (b)(1)(i) through (v) of this section, those documents may be identified by category instead of by individual document. The hearing officer retains discretion to determine when an identification by category is insufficient.

(d) *Timing of inspection and copying.* Unless otherwise ordered by the hearing officer, the Office of Enforcement shall commence making documents available to a respondent for inspection and copying pursuant to this section no later than seven days after service of the notice of charges.

(e) *Place of inspection and copying.* Documents subject to inspection and copying pursuant to this section shall be made available to the respondent for inspection and copying at the Bureau office where they are ordinarily maintained, or at such other place as the parties, in writing, may agree. A respondent shall not be given custody of the documents or leave to remove the documents from the Bureau's offices pursuant to the requirements of this section other than by written agreement of the Office of Enforcement. Such agreement shall specify the documents subject to the agreement, the date they shall be returned and such other terms or conditions as are appropriate to provide for the safekeeping of the documents.

(f) *Copying costs and procedures.* The respondent may obtain a photocopy of any documents made available for inspection or, at the discretion of the Office of Enforcement, electronic copies of such documents. The respondent shall be responsible for the cost of photocopying. Unless otherwise ordered, charges for copies made by the

Office of Enforcement at the request of the respondent will be at the rate charged pursuant to part 1070. The respondent shall be given access to the documents at the Bureau's offices or such other place as the parties may agree during normal business hours for copying of documents at the respondent's expense.

(g) *Duty to supplement.* If the Office of Enforcement acquires information that it intends to rely upon at a hearing after making its disclosures under paragraph (a)(1) of this section, the Office of Enforcement shall supplement its disclosures to include such information.

(h) *Failure to make documents available—harmless error.* In the event that a document required to be made available to a respondent pursuant to this section is not made available by the Office of Enforcement, no rehearing or redecision of a proceeding already heard or decided shall be required unless the respondent establishes that the failure to make the document available was not harmless error.

(i) *Disclosure of privileged or protected information or communications; scope of waiver; obligations of receiving party.* (1) The disclosure of privileged or protected information or communications by any party during an adjudication proceeding shall not operate as a waiver if:

(i) The disclosure was inadvertent;

(ii) The holder of the privilege or protection took reasonable steps to prevent disclosure; and

(iii) The holder promptly took reasonable steps to rectify the error, including notifying any party that received the information or communication of the claim and the basis for it.

(2) After being notified, the receiving party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the hearing officer under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

(3) The disclosure of privileged or protected information or communications by any party during an adjudication proceeding shall waive the privilege or protection, with respect to other parties to the proceeding, as to undisclosed information or communications only if:

(i) The waiver is intentional;

(ii) The disclosed and undisclosed information or communications concern the same subject matter; and

(iii) They ought in fairness to be considered together.

§ 1081.207 Production of witness statements.

(a) *Availability.* Any respondent may move that the Office of Enforcement produce for inspection and copying any statement of any person called or to be called as a witness by the Office of Enforcement that pertains, or is expected to pertain, to his or her direct testimony and that would be required to be produced pursuant to the Jencks Act, 18 U.S.C. 3500, if the adjudication proceeding were a criminal proceeding. For purposes of this section, the term ''statement'' shall have the meaning set forth in 18 U.S.C. 3500(e). Such production shall be made at a time and place fixed by the hearing officer and shall be made available to any party, provided, however, that the production shall be made under conditions intended to preserve the items to be inspected or copied.

(b) *Failure to produce—harmless error.* In the event that a statement required to be made available to a respondent pursuant to this section is not made available by the Office of Enforcement, no rehearing or redecision of a proceeding already heard or decided shall be required unless the respondent establishes that the failure to make the statement available was not harmless error.

§ 1081.208 Subpoenas.

(a) *Availability.* In connection with any hearing ordered by the hearing officer, a party may request the issuance of one or more subpoenas requiring the attendance and testimony of witnesses at the designated time and place of the hearing, or the production of documentary or other tangible evidence returnable at any designated time or place.

(b) *Procedure.* Unless made on the record at a hearing, requests for issuance of a subpoena shall be made in writing, and filed and served on each party pursuant to subpart A of this part. The request must contain a proposed subpoena and a brief statement showing the general relevance and reasonableness of the scope of testimony or documents sought.

(c) *Signing may be delegated.* A hearing officer may authorize issuance of a subpoena, and may delegate the manual signing of the subpoena to any other person.

(d) *Standards for issuance.* The hearing officer shall promptly issue any subpoena requested pursuant to this section. However, where it appears to the hearing officer that the subpoena sought may be unreasonable, oppressive, excessive in scope, or unduly burdensome, he or she may, in his or her discretion, as a condition precedent to the issuance of the subpoena, require the person seeking the subpoena to show further the general relevance and reasonable scope of the testimony or other evidence sought. If after consideration of all the circumstances, the hearing officer determines that the subpoena or any of its terms is unreasonable, oppressive, excessive in scope, or unduly burdensome, he or she may refuse to issue the subpoena, or issue it only upon such conditions as fairness requires. In making the foregoing determination, the hearing officer may inquire of the other participants whether they will stipulate to the facts sought to be proved.

(e) *Service.* Upon issuance by the hearing officer, the party making the request shall serve the subpoena on the person named in the subpoena and on each party in accordance with § 1081.113(c). Subpoenas may be served 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.

(f) *Tender of fees required.* When a subpoena compelling the attendance of a person at a hearing is issued at the request of anyone other than an officer or agency of the United States, service is valid only if the subpoena is accompanied by a tender to the subpoenaed person of the fees for one day's attendance and mileage specified by § 1081.116.

(g) *Production of documentary material.* Production of documentary material in response to a subpoena shall be made under a sworn certificate, in such form as the subpoena designates, by the person to whom the subpoena is directed or, if not a natural person, by any person having knowledge of the facts and circumstances relating to such production, to the effect that all of the documentary material required by the subpoena and in the possession, custody, or control of the person to whom the subpoena is directed has been produced and made available to the custodian.

(h) *Motion to quash or modify.* (1) *Procedure.* Any person to whom a subpoena is directed, or who is an owner, creator, or the subject of the documents that are to be produced

pursuant to a subpoena, or any party may, prior to the time specified therein for compliance, but in no event more than ten days after the date of service of such subpoena, move that the subpoena be quashed or modified. Such motion shall be filed and served on all parties pursuant to subpart A of this part. Notwithstanding § 1081.205, the party on whose behalf the subpoena was issued or enforcement counsel may, within five days of service of the motion, file a response to the motion. Reply briefs are not permitted unless requested by the hearing officer. Filing a motion to modify a subpoena does not stay the movant's obligation to comply with those portions of the subpoena that the person has not sought to modify.

(2) *Standards governing motion to quash or modify.* If compliance with the subpoena would be unreasonable, oppressive, or unduly burdensome, the hearing officer shall quash or modify the subpoena, or may order return of the subpoena only upon specified conditions. These conditions may include but are not limited to a requirement that the party on whose behalf the subpoena was issued shall make reasonable compensation to the person to whom the subpoena was addressed for the cost of copying or transporting evidence to the place for return of the subpoena.

(i) *Enforcing subpoenas.* If a subpoenaed person fails to comply with any subpoena issued pursuant to this section or any order of the hearing officer which directs compliance with all or any portion of a subpoena, the Bureau's General Counsel may, on its own motion or at the request of the party on whose behalf the subpoena was issued, apply to an appropriate United States district court, in the name of the Bureau but on relation of such party, for an order requiring compliance with so much of the subpoena as the hearing officer has not quashed or modified, unless, in the judgment of the General Counsel, the enforcement of such subpoena would be inconsistent with law and the policies of Title X of the Dodd-Frank Act. Failure to request that the Bureau's General Counsel seek enforcement of a subpoena constitutes a waiver of any claim of prejudice predicated upon the unavailability of the testimony or evidence sought.

§ 1081.209 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's testimony for the record may request in accordance with the procedures set forth in this section that the hearing officer issue a subpoena, including a subpoena *duces tecum,* requiring the attendance of the witness at a deposition. The hearing 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 otherwise be unavailable;

(ii) The witness's unavailability was not procured 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) In addition to making a showing as required by paragraph (a)(1) of this section, the request for a deposition subpoena must contain a proposed deposition subpoena and a brief statement showing the general relevance and reasonableness of the scope of testimony and documents sought, and the time and place for taking the deposition. Any request to record the deposition by audio-visual means must be made in the request for a deposition subpoena.

(3) Any requested deposition subpoena that sets forth a valid basis for its issuance must be promptly issued, unless the hearing officer on his or her own motion requires a written response or requires attendance at a conference concerning whether the requested subpoena should be issued. However, where it appears to the hearing officer that the deposition subpoena sought may be unreasonable, oppressive, excessive in scope, or unduly burdensome, he or she may, in his or her discretion, as a condition precedent to the issuance of the deposition subpoena, require the person seeking the deposition subpoena to show further the general relevance and reasonable scope of the testimony or other evidence sought. If after consideration of all the circumstances, the hearing officer determines that the deposition subpoena or any of its terms is unreasonable, oppressive, excessive in scope, or unduly burdensome, he or she may refuse to issue the deposition subpoena, or issue it only upon such conditions as fairness requires. In making the foregoing determination, the hearing officer may inquire of the other participants whether they will stipulate to the facts sought to be proved.

(4) Unless the hearing officer orders otherwise, no deposition under this section shall be taken on fewer than 14 days' notice to the witness and all parties.

(b) *Procedure.* Unless made on the record at a hearing, requests for issuance of a deposition subpoena shall be made in writing, and filed and served on each party pursuant to subpart A of this part.

(c) *Signing may be delegated.* A hearing officer may authorize issuance of a deposition subpoena, and may delegate the manual signing of the deposition subpoena to any other person.

(d) *Service.* Upon issuance by the hearing officer, the party making the request shall serve the subpoena on the person named in the subpoena and on each party in accordance with § 1081.113(c). Deposition subpoenas may be served 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.

(e) *Tender of fees required.* When a subpoena compelling the attendance of a person at a deposition is issued at the request of anyone other than an officer or agency of the United States, service is valid only if the subpoena is accompanied by a tender to the subpoenaed person of the fees for one day's attendance and mileage specified by § 1081.116.

(f) *Motion to quash or modify.* (1) *Procedure.* Any person to whom a deposition subpoena is directed, or who is an owner, creator, or the subject of the documents that are to be produced pursuant to a deposition subpoena, or any party may, prior to the time specified therein for compliance, but in no event more than ten days after the date of service of such subpoena, move that the deposition subpoena be quashed or modified. Such motion must include a statement of the basis for the motion to quash or modify the deposition subpoena, and shall be filed and served on all parties pursuant to subpart A of this part. Notwithstanding § 1081.205, the party on whose behalf the deposition subpoena was issued or enforcement counsel may, within five days of service of the motion, file a response to the motion. Reply briefs are not permitted unless requested by the hearing officer.

(2) *Standards governing motion to quash or modify.* If compliance with the deposition subpoena would be unreasonable, oppressive or unduly burdensome, or the deposition subpoena does not meet the requirements set forth in paragraph (a)(1) of this section, the hearing officer shall quash or modify the deposition

subpoena, or may order return of the deposition subpoena only upon specified conditions. These conditions may include but are not limited to a requirement that the party on whose behalf the deposition subpoena was issued shall make reasonable compensation to the person to whom the deposition subpoena was addressed for the cost of copying or transporting evidence to the place for return of the deposition subpoena.

(g) *Procedure upon deposition.* (1) Depositions shall be taken before any person before whom a deposition may be taken pursuant to the Federal Rules of Civil Procedure (the ''deposition officer'').

(2) The witness being deposed may have an attorney present during the deposition.

(3) 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. Objections to questions of evidence shall be noted by the deposition officer upon the deposition, but a deposition officer other than the hearing officer shall not have the power to decide on the competency, materiality, or relevance of evidence. Failure to object to questions or documents is not deemed a waiver except where the ground for the objection might have been avoided if the objection had been timely presented. All questions, answers, and objections must be recorded.

(4) 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.

(5) The original deposition transcript and exhibits shall be filed with the Office of Administrative Adjudication. The cost of the transcript shall be paid by the party requesting the deposition. A copy of the deposition shall be available to the deponent and each party for purchase at prescribed rates.

(h) *Enforcing subpoenas.* Any party may move before the hearing officer for an order compelling the witness to answer any questions the witness has refused to answer or submit any evidence the witness has refused to submit during the deposition. If a subpoenaed person fails to comply with any order of the hearing officer which directs compliance with all or any portion of a deposition subpoena under this section, the Bureau's General Counsel may, on its own motion or at the request of the party on whose behalf the subpoena was issued, apply to an appropriate United States district court, in the name of the Bureau but on relation of such party, for an order requiring compliance with so much of the subpoena as the hearing officer has not quashed or modified, unless, in the judgment of the General Counsel, the enforcement of such subpoena would be inconsistent with law and the policies of Title X of the Dodd-Frank Act. Failure to request that the Bureau seek enforcement of a subpoena constitutes a waiver of any claim of prejudice predicated upon the unavailability of the testimony or evidence sought.

§ 1081.210 Expert discovery.

(a) At a date set by the hearing officer at the scheduling conference, each party shall serve the other with a report prepared by each of its expert witnesses. Each party shall serve the other parties with a list of any rebuttal expert witnesses and a rebuttal report prepared by each such witness not later than 28 days after the deadline for service of expert reports, unless another date is set by the hearing officer. A rebuttal report shall be limited to rebuttal of matters set forth in the expert report for which it is offered in rebuttal. If material outside the scope of fair rebuttal is presented, a party may file a motion not later than five days after the deadline for service of rebuttal reports, seeking appropriate relief with the hearing officer, including striking all or part of the report, leave to submit a surrebuttal report by the party's own experts, or leave to call a surrebuttal witness and to submit a surrebuttal report by that witness.

(b) No party may call an expert witness at the hearing unless he or she has been listed and has provided reports as required by this section, unless otherwise directed by the hearing officer at a scheduling conference. Each side will be limited to calling at the hearing five expert witnesses, including any rebuttal or surrebuttal expert witnesses. A party may file a motion seeking leave to call additional expert witnesses due to extraordinary circumstances.

(c) Each report shall be signed by the expert and contain a complete statement of all opinions to be expressed and the basis and reasons therefore; the data, materials, or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored or co-authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified or sought to testify as an expert at trial or hearing, or by deposition within the preceding four years. A rebuttal or surrebuttal report need not include any information already included in the initial report of the witness.

(d) A party may depose any person who has been identified as an expert whose opinions may be presented at trial. Unless otherwise ordered by the hearing officer, a deposition of any expert witness shall be conducted after the disclosure of a report prepared by the witness in accordance with paragraph (a) of this section, and at least seven days prior to the deadline for submission of rebuttal expert reports. A deposition of an expert witness shall be completed no later than 14 days before the hearing unless otherwise ordered by the hearing officer. No expert deposition shall exceed eight hours on the record, absent agreement of the parties or an order of the hearing officer for good cause shown. Expert depositions shall be conducted pursuant to the procedures set forth in § 1081.209(g).

(e) A party may not discover facts known or opinions held by an expert who has been retained or specifically employed by another party in anticipation of litigation or preparation for the hearing and who is not listed as a witness for the hearing. A party may not discover drafts of any report required by this section, regardless of the form in which the draft is recorded, or any communications between another party's attorney and any of that other party's experts, regardless of the form of the communications, except to the extent that the communications:

(1) Relate to compensation for the testifying expert's study or testimony;

(2) Identify facts or data that the other party's attorney provided and that the testifying expert considered in forming the opinions to be expressed; or

(3) Identify assumptions that the other party's attorney provided and that the testifying expert relied on in forming the opinions to be expressed.

(f) The hearing officer shall have the discretion to dispense with the requirement of expert discovery in appropriate cases.

§ 1081.211 Interlocutory review.

(a) *Availability.* The Director may, at any time, direct that any matter be submitted to him or her for review. Subject to paragraph (c) of this section, the hearing officer may, on his or her own motion or on the motion of any

party, certify any matter for interlocutory review by the Director. This section is the exclusive remedy for review of a hearing officer's ruling or order prior to the Director's consideration of the entire proceeding.

(b) *Procedure.* Any party's motion for certification of a ruling or order for interlocutory review shall be filed with the hearing officer within five days of service of the ruling or order, shall specify the ruling or order or parts thereof for which interlocutory review is sought, shall attach any other portions of the record on which the moving party relies, and shall otherwise comply with § 1081.205. Notwithstanding § 1081.205, any response to such a motion must be filed within three days of service of the motion. The hearing officer shall issue a ruling on the motion within five days of the deadline for filing a response.

(c) *Certification process.* Unless the Director directs otherwise, a ruling or order may not be submitted to the Director for interlocutory review unless the hearing officer, upon the hearing officer's motion or upon the motion of a party, certifies the ruling or order in writing. The hearing officer shall not certify a ruling or order unless:

(1) The ruling or order would compel testimony of Bureau officers or employees, or those from another governmental agency, or the production of documentary evidence in the custody of the Bureau or another governmental agency;

(2) The ruling or order involves a motion for disqualification of the hearing officer pursuant to § 1081.105(c)(2);

(3) The ruling or order suspended or barred an individual from appearing before the Bureau pursuant to § 1081.107(c); or

(4) Upon motion by a party, the hearing officer is of the opinion that:

(i) The ruling or order involves a controlling question of law as to which there is substantial ground for difference of opinion; and

(ii) An immediate review of the ruling or order is likely to materially advance the completion of the proceeding or subsequent review will be an inadequate remedy.

(d) *Interlocutory review.* A party whose motion for certification has been denied by the hearing officer may petition the Director for interlocutory review.

(e) *Director review.* The Director shall determine whether or not to review a ruling or order certified under this section or the subject of a petition for interlocutory review. Interlocutory review is disfavored, and the Director will grant a petition to review a hearing officer's ruling or order prior to his or her consideration of a recommended decision only in extraordinary circumstances. The Director may decline to review a ruling or order certified by a hearing officer pursuant to paragraph (c) of this section or the petition of a party who has been denied certification if he or she determines that interlocutory review is not warranted or appropriate under the circumstances, in which case he or she may summarily deny the petition. If the Director determines to grant the review, he or she will review the matter and issue his or her ruling and order in an expeditious fashion, consistent with the Bureau's other responsibilities.

(f) *Proceedings not stayed.* The filing of a motion requesting that the hearing officer certify any of his or her prior rulings or orders for interlocutory review or a petition for interlocutory review filed with the Director, and the grant of any such review, shall not stay proceedings before the hearing officer unless he or she, or the Director, shall so order. The Director will not consider a motion for a stay unless the motion shall have first been made to the hearing officer.

§ 1081.212 Dispositive motions.

(a) *Dispositive motions.* This section governs the filing of motions to dismiss and motions for summary disposition. The filing of any such motion does not obviate a party's obligation to file an answer or take any other action required by this part or by an order of the hearing officer, unless expressly so provided by the hearing officer.

(b) *Motions to dismiss.* A respondent may file a motion to dismiss asserting that, even assuming the truth of the facts alleged in the notice of charges, it is entitled to dismissal as a matter of law.

(c) *Motion for summary disposition.* A party may make a motion for summary disposition asserting that 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 moving party is entitled to a decision in its favor as a matter of law.

(d) *Filing of motions for summary disposition and responses.* (1) After a respondent's answer has been filed and documents have been made available to the respondent for inspection and copying pursuant to § 1081.206, any party may move for summary disposition in its favor of all or any part of the proceeding.

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

(3) Any affidavit or declaration submitted in support of or in opposition to a motion for summary disposition shall set forth such facts as would be admissible in evidence, shall show affirmatively that the affiant is competent to testify to the matters stated therein, and must be signed under oath and penalty of perjury.

(e) *Page limitations for dispositive motions.* A motion to dismiss or for summary disposition, together with any brief in support of the motion (exclusive of any declarations, affidavits, or attachments) shall not exceed 35 pages in length. Motions for extensions of this length limitation are disfavored.

(f) *Opposition and reply response time and page limitation.* Any party, within 20 days after service of a dispositive motion, or within such time period as allowed by the hearing officer, may file a response to such motion. The length limitations set forth in paragraph (e) of this section shall also apply to such responses. Any reply brief filed in response to an opposition to a dispositive motion shall be filed within five days after service of the opposition. Reply briefs shall not exceed ten pages.

(g) *Oral argument.* At the request of any party or on his or her own motion, the hearing officer may hear oral argument on a dispositive motion.

(h) *Decision on motion.* Within 30 days following the expiration of the time for filing all responses and replies to any dispositive motion, the hearing officer shall determine whether the motion shall be granted. If the hearing

officer determines that dismissal or summary disposition is warranted, he or she shall issue a recommended decision granting the motion. If the hearing officer finds that no party is entitled to dismissal or summary disposition, he or she shall make a ruling denying the motion. If it appears that a party, for good cause shown, cannot present by affidavit, prior to hearing, facts essential to justify opposition to the motion, the hearing officer shall deny or defer the motion.

§ 1081.213 Partial summary disposition.

If on a motion for summary disposition under § 1081.212 a decision is not rendered upon the whole case or for all the relief asked and a hearing is necessary, the hearing officer shall issue an order specifying the facts that appear without substantial controversy and directing further proceedings in the action. The facts so specified shall be deemed established.

§ 1081.214 Prehearing conferences.

(a) *Prehearing conferences.* The hearing officer may, in addition to the scheduling conference, on his or her own motion or at the request of any party, direct counsel for the parties to meet with him or her (in person or by telephone) at a prehearing conference for further discussion of the issues outlined in § 1081.203, or for discussion of any additional matters that in the view of the hearing officer will aid in an orderly disposition of the proceeding, including but not limited to:

(1) Identification of potential witnesses and limitation on the number of witnesses;

(2) The exchange of any prehearing materials including witness lists, statements of issues, exhibits, and any other materials;

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

(4) Matters of which official notice may be taken; and

(5) Whether the parties intend to introduce prior sworn statements of witnesses as set forth in § 1081.303(h).

(b) *Transcript.* The hearing officer, in his or her discretion, may require that a 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 his or her expense.

(c) *Public access.* Any prehearing conferences shall be public unless the hearing officer determines, based on the standard set forth in § 1081.119(c), that the conference (or any part thereof) shall be closed to the public.

§ 1081.215 Prehearing submissions.

(a) Within the time set by the hearing officer, but in no case later than ten days before the start of the hearing, each party shall serve on every other party:

(1) A prehearing statement, which shall include an outline or narrative summary of its case or defense, and the legal theories upon which it will rely;

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

(3) Any prior sworn statements that a party intends to admit into evidence pursuant to § 1081.303(h);

(4) A list of the exhibits to be introduced at the hearing along with a copy of each exhibit; and

(5) Any stipulations of fact or liability.

(b) *Expert witnesses.* Each party who intends to call an expert witness shall also serve, in addition to the information required by paragraph (a)(2) of this section, a statement of the expert's qualifications, a listing of other proceedings in which the expert has given or sought to give expert testimony at trial or hearing or by deposition within the preceding four years, and a list of publications authored or co-authored by the expert within the preceding ten years, to the extent such information has not already been provided pursuant to § 1081.210.

(c) *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.

§ 1081.216 Amicus participation.

(a) *Availability.* An amicus brief may be filed only if:

(1) A motion for leave to file the brief has been granted;

(2) The brief is accompanied by written consent of all parties;

(3) The brief is filed at the request of the Director or the hearing officer, as appropriate; or

(4) The brief is presented by the United States or an officer or agency thereof, or by a State or a political subdivision thereof.

(b) *Procedure.* An amicus brief may be filed conditionally with the motion for leave. The motion for leave shall identify the interest of the movant and shall state the reasons why a brief of an amicus curiae is desirable. Except as all parties otherwise consent, any amicus curiae shall file its brief within the time allowed the party whose position the amicus will support, unless the Director or hearing officer, as appropriate, for good cause shown, grants leave for a later filing. In the event that a later filing is allowed, the order granting leave to file shall specify when an opposing party may reply to the brief.

(c) *Motions.* A motion for leave to file an amicus brief shall be subject to § 1081.205.

(d) *Formal requirements as to amicus briefs.* Amicus briefs shall be filed pursuant to § 1081.111 and shall comply with the requirements of § 1081.112 and shall be subject to the length limitation set forth in § 1081.212(e).

(e) *Oral argument.* An amicus curiae may move to present oral argument at any hearing before the hearing officer, but such motions will be granted only for extraordinary reasons.

Subpart C—Hearings

§ 1081.300 Public hearings.

All hearings in adjudication proceedings shall be public unless a confidentiality order is entered by the hearing officer pursuant to § 1081.119 or unless otherwise ordered by the Director on the grounds that holding an open hearing would be contrary to the public interest.

§ 1081.301 Failure to appear.

Failure of a respondent to appear in person or by a duly authorized counsel at the hearing constitutes a waiver of respondent's right to a hearing and may be deemed an admission of the facts as alleged and consent to the relief sought in the notice of charges. Without further proceedings or notice to the respondent, the hearing officer shall file a recommended decision containing findings of fact and addressing the relief sought in the notice of charges.

§ 1081.302 Conduct of hearings.

All hearings shall be conducted in a fair, impartial, expeditious, and orderly manner. Enforcement counsel shall present its case-in-chief first, unless otherwise ordered by the hearing officer, or unless otherwise expressly specified by law or regulation. Enforcement counsel 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 of presentation of their cases, but if they do not agree, the hearing officer shall fix the order.

§ 1081.303 Evidence.

(a) *Burden of proof.* Enforcement counsel shall have the burden of proof of the ultimate issue(s) of the Bureau's claims at the hearing.

(b) *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. Irrelevant, immaterial, and unreliable evidence shall be excluded.

(2) Evidence, even if relevant, may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice or confusion of the issues; if the evidence would be misleading; or based on considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

(3) Evidence that constitutes hearsay may be admitted if it is relevant, material, and bears satisfactory indicia of reliability so that its use is fair. Hearsay is a statement, other than one made by the declarant while testifying at the hearing, offered in evidence to prove the truth of the matter asserted. If otherwise meeting the standards for admissibility described in this section, transcripts of depositions, investigational hearings, prior testimony in Bureau or other proceedings, and any other form of hearsay shall be admissible and shall not be excluded solely on the ground that they are or contain hearsay.

(4) Evidence that would be admissible under the Federal Rules of Evidence is admissible in a proceeding conducted pursuant to this part. 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 part solely on that basis.

(c) *Official notice.* Official notice may be taken of any material fact that is not subject to reasonable dispute in that it is either generally known or capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. If official notice is requested or is taken of a material fact not appearing in the evidence in the record, the parties, upon timely request, shall be afforded an opportunity to disprove such noticed fact.

(d) *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 (b) of this section, any document, including a report of examination, supervisory activity, inspection or visitation, prepared by the Bureau, a prudential regulator, as that term is defined in section 1002(24) of the Dodd-Frank Act, or by a State regulatory agency, is presumptively 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 hearing officer's discretion, be used with or without being admitted into evidence.

(4) As respondents are in the best position to determine the nature of documents generated by such respondents and which come from their own files, the burden of proof is on the respondent to introduce evidence to rebut a presumption that such documents are authentic and kept in the regular course of business.

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

(2) Whenever evidence is excluded from the record, the party offering such evidence may make an offer of proof, which shall be included in the record. Rejected exhibits, adequately marked for identification, shall be retained pursuant to § 1081.306(b) so as to be available for consideration by any reviewing authority.

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

(f) *Stipulations.* (1) The parties may, at any stage of the proceeding, 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.

(2) Unless the hearing officer directs otherwise, all stipulations of fact and law previously agreed upon by the parties, and all documents, the admissibility of which have been previously stipulated, will be admitted into evidence upon commencement of the hearing.

(g) *Presentation of evidence.* (1) A witness at a hearing for the purpose of taking evidence shall testify under oath or affirmation.

(2) A party is entitled to present its case or defense by sworn oral testimony and documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as, in the discretion of the hearing officer, may be required for a full and true disclosure of the facts.

(3) An adverse party, or an officer, agent, or employee thereof, and any witness who appears to be hostile, unwilling, or evasive, may be interrogated by leading questions and may also be contradicted and impeached by the party calling him or her.

(4) The hearing officer shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to:

(i) Make the interrogation and presentation effective for the ascertainment of the truth;

(ii) Avoid needless consumption of time; and

(iii) Protect witnesses from harassment or undue embarrassment.

(5) The hearing officer may permit a witness to appear at a hearing via video conference or telephone for good cause shown.

(h) *Introducing prior sworn statements of witnesses into the record.* At a hearing, any party wishing to introduce a prior, sworn statement of a witness, not a party, otherwise admissible in the proceeding, may make a motion setting forth the reasons therefore. If only part of a statement is offered in evidence, the hearing officer may require that all relevant portions of the statement be introduced. If all of a statement is offered in evidence, the hearing officer may require that portions not relevant to the proceeding be excluded. A motion to introduce a prior sworn statement may be granted if:

(1) The witness is dead;

(2) The witness is out of the United States, unless it appears that the absence of the witness was procured by the party offering the prior sworn statement;

(3) The witness is unable to attend or testify because of age, sickness, infirmity, imprisonment or other disability;

(4) The party offering the prior sworn statement has been unable to procure the attendance of the witness by subpoena; or

(5) In the discretion of the hearing officer, it would be desirable, in the interests of justice, to allow the prior sworn statement to be used. In making this determination, due regard shall be given to the presumption that witnesses will testify orally in an open hearing. If the parties have stipulated to accept a prior sworn statement in lieu of live testimony, consideration shall also be given to the convenience of the parties in avoiding unnecessary expense.

§ 1081.304 Record of the hearing.

(a) *Reporting and transcription.* Hearings shall be stenographically reported and transcribed under the supervision of the hearing officer, and the original transcript shall be a part of the record and the sole official transcript. The live oral testimony of each witness may be video recorded digitally, in which case the video recording and the written transcript of the testimony shall be made part of the record. Copies of transcripts shall be available from the reporter at prescribed rates.

(b) *Corrections.* Corrections of the official transcript may be made only when they involve errors affecting substance and then only in the manner herein provided. Corrections ordered by the hearing officer or agreed to in a written stipulation signed by all counsel and parties not represented by counsel, and approved by the hearing officer, shall be included in the record, and such stipulations, except to the extent they are capricious or without substance, shall be approved by the hearing officer. Corrections shall not be ordered by the hearing officer except upon notice and opportunity for the hearing of objections. Such corrections shall be made by the official reporter by furnishing substitute type pages, under the usual certificate of the reporter, for insertion in the official record. The original uncorrected pages shall be retained in the files of the Bureau.

(c) *Closing of the hearing record.* Upon completion of the hearing, the hearing officer shall issue an order closing the hearing record after giving the parties three days to determine if the record is complete or needs to be supplemented. The hearing officer shall retain the discretion to permit or order correction of the record as provided in paragraph (b) of this section.

§ 1081.305 Post-hearing filings.

(a) *Proposed findings and conclusions and supporting briefs.* (1) Using the same method of service for each party, the hearing 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 promptly after that filing. Any party may file with the hearing officer proposed findings of fact, proposed conclusions of law, and a proposed order within 30 days following service of this notice by the hearing officer or within such longer period as may be ordered by the hearing officer.

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

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

(c) *Order of filing.* The hearing officer shall not order the filing by any party of any post-hearing brief or responsive brief in advance of the other party's filing of its post-hearing brief or responsive brief.

§ 1081.306 Record in proceedings before hearing officer; retention of documents; copies.

(a) *Contents of the record.* The record of the proceeding shall consist of:

(1) The notice of charges, the answer, and any amendments thereto;

(2) Each motion, submission, or other paper filed in the proceedings, and any amendments and exceptions to or regarding them;

(3) Each stipulation, transcript of testimony, and any document or other item admitted into evidence;

(4) Any transcript of a conference or hearing before the hearing officer;

(5) Any amicus briefs filed pursuant to § 1081.216;

(6) With respect to a request to disqualify a hearing officer or to allow the hearing officer's withdrawal under § 1081.105(c), each affidavit or transcript of testimony taken and the decision made in connection with the request;

(7) All motions, briefs, and other papers filed on interlocutory appeal;

(8) All proposed findings and conclusions;

(9) Each written order issued by the hearing officer or Director; and

(10) Any other document or item accepted into the record by the hearing officer.

(b) *Retention of documents not admitted.* Any document offered into evidence but excluded shall not be considered part of the record. The Office of Administrative Adjudication shall retain any such document until the later of the date upon which an order by the Director ending the proceeding becomes final and not appealable, or upon the conclusion of any judicial review of the Director's order.

(c) *Substitution of copies.* A true copy of a document may be substituted for any document in the record or any document retained pursuant to paragraph (b) of this section.

Subpart D—Decision and Appeals

§ 1081.400 Recommended decision of the hearing officer.

(a) *Time period for filing recommended decision.* Subject to paragraph (b) of this section, the hearing officer shall file a recommended decision no later than 90 days after the deadline for filing post-hearing responsive briefs pursuant to § 1081.305(b) and in no event later than 300 days after filing of the notice of charges.

(b) *Extension of deadlines.* In the event the hearing officer presiding over the proceeding determines that it will not be possible to issue the recommended decision within the time periods specified in paragraph (a) of this section, the hearing officer shall submit a written request to the Director for an extension of the time period for filing the recommended decision. This request must be filed no later than 30 days prior to the expiration of the time for issuance of a recommended decision. The request will be served on all parties in the proceeding, who may file with the Director briefs in support of or in opposition to the request. Any such briefs must be filed within three days of service of the hearing officer's request and shall not exceed five pages. If the Director determines that additional time is necessary or appropriate in the public interest, the Director shall issue an order extending the time period for filing the recommended decision.

(c) *Content.* (1) A recommended decision shall be based on a consideration of the whole record relevant to the issues decided, and shall be supported by reliable, probative, and substantial evidence. The recommended decision shall include a statement of findings of fact (with specific page references to principal supporting items of evidence in the record) and conclusions of law, as well as the reasons or basis therefore, as to all the material issues of fact, law, or discretion presented on the record and the appropriate order, sanction, relief or denial thereof. The recommended decision shall also state that a notice of appeal may be filed within ten days after service of the recommended decision and include a statement that, unless a party timely files and perfects

a notice of appeal of the recommended decision, the Director may adopt the recommended decision as the final decision and order of the Bureau without further opportunity for briefing or argument.

(2) Consistent with paragraph (a) of this section, when more than one claim for relief is presented in an adjudication proceeding, or when multiple parties are involved, the hearing officer may direct the entry of a recommended decision as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of a recommended decision.

(d) *By whom made.* The recommended decision shall be made and filed by the hearing officer who presided over the hearings, except when he or she shall have become unavailable to the Bureau.

(e) *Reopening of proceeding by hearing officer; termination of jurisdiction.* (1) At any time from the close of the hearing record pursuant to § 1081.304(c) until the filing of his or her recommended decision, a hearing officer may reopen the proceeding for the receipt of further evidence for good cause shown.

(2) Except for the correction of clerical errors or pursuant to an order of remand from the Director, the jurisdiction of the hearing officer is terminated upon the filing of his or her recommended decision with respect to those issues decided pursuant to paragraph (c) of this section.

(f) *Filing, service, and publication.* Upon filing by the hearing officer of the recommended decision, the Office of Administrative Adjudication shall promptly transmit the recommended decision to the Director and serve the recommended decision upon the parties.

§ 1081.401 Transmission of documents to Director; record index; certification.

(a) *Filing of index.* At the same time the Office of Administrative Adjudication transmits the recommended decision to the Director, the hearing officer shall furnish to the Director a certified index of the entire record of the proceedings. The certified index shall include, at a minimum, an entry for each paper, document or motion filed 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 and each exhibit introduced but not admitted into evidence.

(b) *Retention of record items by the Office of Administrative Adjudication.* After the close of the hearing, the Office of Administrative Adjudication shall retain originals of any motions, exhibits or any other documents filed with, or accepted into evidence by, the hearing officer, or any other portions of the record that have not already been filed with the Office of Administrative Adjudication.

§ 1081.402 Notice of appeal; review by the Director.

(a) *Notice of appeal.* (1) *Filing.* Any party may file exceptions to the recommended decision of the hearing officer by filing a notice of appeal with the Office of Administrative Adjudication within ten days after service of the recommended decision. The notice shall specify the party or parties against whom the appeal is taken and shall designate the recommended decision or part thereof appealed from. If a timely notice of appeal is filed by a party, any other party may thereafter file a notice of appeal within five days after service of the first notice, or within ten days after service of the recommended decision, whichever period expires last.

(2) *Perfecting a notice of appeal.* Any party filing a notice of appeal must perfect its appeal by filing its opening appeal brief within 30 days of service of the recommended decision. Any party may respond to the opening appeal brief by filing an answering brief within 30 days of service of the opening brief. Any party may file a reply to an answering brief within seven days of service of the answering brief. These briefs must conform to the requirements of § 1081.403.

(b) *Director review other than pursuant to an appeal.* In the event no party perfects an appeal of the recommended decision, the Director shall, within 40 days after the date of service of the recommended decision, either issue a final decision and order adopting the recommended decision, or order further briefing regarding any portion of the recommended decision. The Director's order for further briefing shall set forth the scope of review and the issues that will be considered and will make provision for the filing of briefs in accordance with the timelines set forth in paragraph (a)(2) of this section (except that that opening briefs shall be due within 30 days of service of the order of review) if deemed appropriate by the Director.

(c) *Exhaustion of administrative remedies.* Pursuant to 5 U.S.C. 704, a perfected appeal to the Director of a recommended decision pursuant to paragraph (a) of this section is a prerequisite to the seeking of judicial review of a final decision and order, or portion of the final decision and order, adopting the recommended decision.

§ 1081.403 Briefs filed with the Director.

(a) *Contents of briefs.* Briefs shall be confined to the particular matters at issue. Each exception to the findings or conclusions being reviewed shall be stated succinctly. Exceptions shall be supported by citation to the relevant portions of the record, including references to the specific pages relied upon, and by concise argument including citation of such statutes, decisions, and other authorities as may be relevant. If the exception relates to the admission or exclusion of evidence, the substance of the evidence admitted or excluded shall be set forth in the brief, in an appendix thereto, or by citation to the record. Reply briefs shall be confined to matters in answering briefs of other parties.

(b) *Length limitation.* Except with leave of the Director, opening and answering briefs shall not exceed 30 pages, and reply briefs shall not exceed 15 pages, exclusive of pages containing the table of contents, table of authorities, and any addendum that consists solely of copies of applicable cases, pertinent legislative provisions or rules, and exhibits. Motions to file briefs in excess of these limitations are disfavored.

§ 1081.404 Oral argument before the Director.

(a) *Availability.* The Director will consider appeals, motions, and other matters properly before him or her on the basis of the papers filed by the parties without oral argument unless the Director determines that the presentation of facts and legal arguments in the briefs and record and decisional process would be significantly aided by oral argument, in which case the Director shall issue an order setting the date on which argument shall be held. A party seeking oral argument shall so indicate on the first page of its opening or answering brief.

(b) *Public arguments; transcription.* All oral arguments shall be public unless otherwise ordered by the Director. Oral arguments before the Director shall be reported stenographically, unless otherwise ordered by the Director. Motions to correct the transcript of oral argument shall be made according to the same procedure provided in § 1081.304(b).

§ 1081.405 Decision of the Director.

(a) Upon appeal from or upon further review of a recommended decision, the Director will consider such parts of the record as are cited or as may be necessary to resolve the issues presented and, in addition, will, to the extent necessary or desirable, exercise all powers which he or she could have exercised if he or she had made the recommended decision. In proceedings before the Director, the record shall consist of all items part of the record below in accordance with § 1081.306; any notices of appeal or order directing review; all briefs, motions, submissions, and other papers filed on appeal or review; and the transcript of any oral argument held. Review by the Director of a recommended decision may be limited to the issues specified in the notice(s) of appeal or the issues, if any, specified in the order directing further briefing. On notice to all parties, however, the Director may, at any time prior to issuance of his or her decision, raise and determine any other matters that he or she deems material, with opportunity for oral or written argument thereon by the parties.

(b) Decisional employees may advise and assist the Director in the consideration and disposition of the case.

(c) In rendering his or her decision, the Director will affirm, adopt, reverse, modify, set aside, or remand for further proceedings the recommended decision and will include in the decision a statement of the reasons or basis for his or her actions and the findings of fact upon which the decision is predicated.

(d) At the expiration of the time permitted for the filing of reply briefs with the Director, the Office of Administrative Adjudication will notify the parties that the case has been submitted for final Bureau decision. The Director will issue and the Office of Administrative Adjudication will serve the Director's final decision and order within 90 days after such notice, unless within that time the Director orders that the adjudication proceeding or any aspect thereof be remanded to the hearing officer for further proceedings.

(e) Copies of the final decision and order of the Director shall be served upon each party to the proceeding, upon other persons required by statute, and, if directed by the Director or required by statute, upon any appropriate State or Federal supervisory authority. The final decision and order will also be published on the Bureau's Web site or as otherwise deemed appropriate by the Bureau.

§ 1081.406 Reconsideration.

Within 14 days after service of the Director's final decision and order, any party may file with the Director a petition for reconsideration, briefly and specifically setting forth the relief desired and the grounds in support thereof. Any petition filed under this section must be confined to new questions raised by the final decision or final order and upon which the petitioner had no opportunity to argue, in writing or orally, before the Director. No response to a petition for reconsideration shall be filed unless requested by the Director, who will request such response before granting any petition for reconsideration. The filing of a petition for reconsideration shall not operate to stay the effective date of the final decision or order or to toll the running of any statutory period affecting such decision or order unless specifically so ordered by the Director.

§ 1081.407 Effective date; stays pending judicial review.

(a) Other than consent orders, which shall become effective at the time specified therein, an order to cease and desist or for other affirmative action under section 1053(b) of the Dodd-Frank Act becomes effective at the expiration of 30 days after the date of service pursuant to § 1081.113(d)(2), unless the Director agrees to stay the effectiveness of the order pursuant to this section.

(b) Any party subject to a final decision and order, other than a consent order, may apply to the Director for a stay of all or part of that order pending judicial review.

(c) A motion for stay shall state the reasons a stay is warranted and the facts relied upon, and shall include supporting affidavits or other sworn statements, and a copy of the relevant portions of the record. The motion shall address the likelihood of the movant's success on appeal, whether the movant will suffer irreparable harm if a stay is not granted, the degree of injury to other parties if a stay is granted, and why the stay is in the public interest.

(d) A motion for stay shall be filed within 30 days of service of the order on the party. Any party opposing the motion may file a response within five days after receipt of the motion. The movant may file a reply brief, limited to new matters raised by the response, within three days after receipt of the response.

(e) The commencement of proceedings for judicial review of a final decision and order of the Director does 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 or her discretion, and on such terms as he or she finds just, stay the effectiveness of all or any part of an order pending a final decision on a petition for judicial review of that order.

Dated: June 4, 2012.

Richard Cordray,

Director, Bureau of Consumer Financial Protection.

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BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Part 1080

[Docket No.: CFPB–2011–0007]

RIN 3170–AA03

Rules Relating to Investigations

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Final rule.

SUMMARY: After considering the public comments on its interim final rule for the Rules Relating to Investigations, the Bureau of Consumer Financial Protection (Bureau), pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act), is making revisions to its procedures for investigations under section 1052 of the Dodd-Frank Act.

DATES: The final rule is effective June 29, 2012.

FOR FURTHER INFORMATION CONTACT: Peter G. Wilson, Office of the General Counsel, Consumer Financial Protection Bureau, 1700 G Street NW., Washington, DC 20552, (202) 435–7585.

SUPPLEMENTARY INFORMATION:

I. Background

The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act) was signed into law on July 21, 2010. Title X of the Dodd-Frank Act established the Bureau of Consumer Financial Protection (Bureau) to regulate the offering and provision of consumer financial products or services under the Federal consumer financial laws. The Dodd-Frank Act transferred to the Bureau the consumer financial protection functions formerly carried out by the Federal banking agencies, as well as certain authorities formerly carried out by the Department of Housing and Urban Development (HUD) and the Federal Trade Commission (FTC). As required by section 1062 of the Dodd-Frank Act, 12 U.S.C. 5582, the Secretary of the Treasury selected a