

§ 908.22

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

(6) Take and preserve testimony under oath;

(7) Rule on motions and other procedural matters appropriate in a hearing, except that only the Board of Directors shall have the power to grant any motion to dismiss a cease and desist or civil money penalty proceeding or to make a final determination on the merits of such proceedings;

(8) Regulate the scope and timing of discovery;

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

(10) Examine witnesses;

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

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

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

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

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

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

§ 908.22 Public hearings.

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

(b) *Motion for closed hearing.* Within twenty (20) days of service of a notice, any party or respondent may file with the presiding officer a motion for a non-public hearing and any party may file a pleading in reply to the motion. The presiding officer shall forward the motion and any reply, together with a recommended decision on the motion, to the Board of Directors, who shall make a final determination. Such mo-

12 CFR Ch. IX (1-1-08 Edition)

tions and replies shall be governed by § 908.45.

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

§ 908.23 Good faith certification.

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

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

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

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

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

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

(c) *Effect of making oral motion or argument.* The act of making any oral motion or oral argument by any representative or party shall constitute a certification that to the best of her or his knowledge, information, and belief,

Federal Housing Finance Board

§ 908.25

formed after reasonable inquiry, such expressions or statements are well-grounded in fact and are warranted by existing law or a good faith, non-frivolous argument for the extension, modification, or reversal of existing law, regulation, or Finance Board policy or order, 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.

§ 908.24 *Ex parte* communications.

(a) *Definition.*(1) *Ex parte* communication means any material oral or written communication relevant to the merits of a cease and desist or civil money penalty proceeding under this part that was neither on the record nor on reasonable prior notice to all parties that takes place between—

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

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

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

(b) *Prohibition of ex parte communications.* From the time that a notice commencing a proceeding under this part is issued by the Finance Board until the date that the Board of Directors issues its final decision pursuant to § 908.65, no person referred to in paragraph (a)(1)(i) of this section shall knowingly make or cause to be made an *ex parte* communication. The Board of Directors, any member thereof individually, the presiding officer, or an employee of the Finance Board, shall not knowingly make or cause to be made an *ex parte* communication.

(c) *Procedure upon occurrence of ex parte communication.* If an *ex parte* communication is received by any person identified in paragraph (a) of this section, that person promptly shall cause all such written communications (or, if the communication is oral, a memo-

randum stating the substance of the communication) to be placed on the record of the proceeding and served on all parties. All parties to the proceeding shall have an opportunity, within ten days of receipt of service of the *ex parte* communication or the written record of an oral communication, to file responses thereto and to recommend any sanctions, in accordance with paragraph (d) of this section, that they believe to be appropriate under the circumstances.

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

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

(f) *Separation of functions.* An employee or agent engaged in the performance of investigative or prosecuting functions for the Finance Board in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or Board of Directors' review of the recommended decision under § 908.65, except as a witness or counsel in a hearing.

§ 908.25 Filing of papers.

(a) *Filing.* Any papers required to be filed shall be addressed to the presiding officer and filed with the Finance Board, 1777 F Street, NW., Washington, DC 20006.

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

(1) Personal service;

(2) Delivery to the U.S. Postal Service or to a reliable commercial delivery