

C. Local Rules

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

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

Section _____.1 Scope.

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

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

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

Section _____.6 Appearance and practice in adjudicatory proceedings.

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

Section _____.8 Conflicts of interest.

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

have waived the right to assert conflicts of interest. The proposal makes two changes to this provision.

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

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

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

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

Section _____.11 Service of papers.

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

The proposal expressly permits service by delivery to a person's place of work. The proposal adds the words "or place of work" after the word "residence" each time it appears, thereby clarifying that delivery to a

person of suitable age and discretion at the subpoenaed person's place of work is reasonably calculated to give actual notice of service. The agencies believe that permitting service at a person's place of work is a more practical and efficient means of serving the individual.

Section _____.12 Construction of time limits.

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

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

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

Section _____.20 Amended pleadings.

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

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

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