

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

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

#### Section \_\_\_\_\_.24 Scope of document discovery.

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

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

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

The proposal continues to limit document discovery to documents that have material relevance. However, the proposal clarifies that a request should be considered unreasonable, oppressive, excessive in scope, or unduly burdensome if, among other things, it fails to include justifiable limitations on the time period covered and the geographic locations to be searched, the time provided to respond in the request is inadequate, or the request calls for copies of documents to be delivered to the requesting party and fails to include the requestor's written agreement to pay in advance for the copying, in accordance with § \_\_\_\_\_.25. Under the proposal, the scope of permissible document discovery is not as broad as that allowed under Federal Rule of Civil Procedure 26(b) (28 U.S.C. app.). Historically, given the specialized nature of enforcement proceedings in regulated industries, discovery in administrative proceedings has not been as expansive as it is in civil litigation.

The Uniform Rules do not address how parties should obtain materials that are publicly available from the agencies.

Materials that are either publicly distributed by the agencies on request, available for public inspection and copying at the agencies, or available by request under the Freedom of Information Act (5 U.S.C. 552) (FOIA) should be obtained pursuant to those procedures before resorting to discovery mechanisms under the Uniform Rules.

#### Section \_\_\_\_\_.25 Request for document discovery from parties.

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

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

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

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

Proposed paragraph (g) clarifies that documents subject to an assertion of privilege may not be released or disclosed to the requesting party until the issue of privilege has been finally resolved. The current Uniform Rules are silent on this matter, with the result that, in past proceedings, some documents have been released prior to the ultimate determination of whether

the documents are privileged.

Specifically, the proposal amends the current Uniform Rules by providing that, even when an ALJ rules that the documents in question are not privileged, the documents cannot be released to the requesting party if the party asserting the privilege has stated an intention to file a motion for interlocutory review of that ruling. In such a case, the documents in question cannot be released until the motion for interlocutory review is decided.

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

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

#### Section \_\_\_\_\_.27 Deposition of witness unavailable for hearing.

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

#### Section \_\_\_\_\_.33 Public hearings.

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