

The proposed rule adopted by incorporation the requirements of 24 CFR 30.425(c)(3) governing how service is to be made. The final rule has been revised to accept the GSEs' suggestion and to model the rule governing service after the provisions in the Uniform Rules of Practice and Procedure that have been adopted by the Federal financial regulators.

Closed Proceedings

Freddie Mac requested that the final rule provide explicitly for motions by the GSE to close a hearing, with any ALJ determination on that question to be made reviewable by the Secretary on an interlocutory basis. Freddie Mac argued that the affected GSE is more likely than the ALJ to appreciate how an open hearing would affect its employees, shareholders, customers and borrowers, and its ability to perform its public mission. Freddie Mac proposed that the motion first be made before the ALJ, with discretionary review by the Secretary during an established, brief time period before the hearing is permitted to continue.

FHEFSSA permits the Secretary to determine that a hearing should be closed to the public, or that a document or part of a document should be sealed. The proposed rule implemented this authority in §§ 81.84(h) and 81.85(c), but did not provide additional procedures, beyond those available under the statute or part 30, subpart E, as incorporated.

Under 24 CFR part 30, subpart E, a GSE may move for an order from the ALJ providing for a closed hearing or sealed document. In response to Freddie Mac's comment, the final rule also provides an additional mechanism for interlocutory review by the Secretary of an ALJ's decision in both of these situations. Section 81.84(h) allows a GSE to request the Secretary to review an ALJ's denial of a timely motion for a closed hearing. The hearing is stayed while the Secretary makes a determination on the need to close the hearing. Section 81.85(c) provides that a party may request immediate review by the Secretary of an ALJ's denial of a protective order relating to documents for which disclosure would be contrary to the public interest. However, unless request for protection of the documentary evidence meets specific timing requirements or the Secretary directs otherwise, the obligation to produce the documents at a hearing will not be affected by the request for review by the Secretary of the ALJ's decision on disclosure.

Appeal-Related Issues

Freddie Mac urged that provisions in the final rule "conform to statutory requirements" limiting the Secretary to 90 days to decide an appeal of an ALJ ruling. Proposed § 81.84(k) allowed the Secretary an additional 30 days, at his or her discretion, in addition to the statutory 90-day period set out in section 1342(b)(1). Additionally, Freddie Mac objected to the provision in § 81.84(l), permitting remand of a case to an ALJ for additional proceedings, to the extent that remand might have the effect of extending the 90-day time provision established for a final decision. Freddie Mac asked that the Secretary's authority to remand to an ALJ be limited, unless the parties consent to any remand that extends the time for an ultimate decision. The final rule eliminates any reference to a discretionary extension of time triggered by written notice to the parties. However, under the final rule the Secretary's remand of a case to an ALJ for additional proceedings is a "decision" within the meaning of FHEFSSA. This approach is consistent with recent case law.¹⁰³

Freddie Mac also commented on the proposed rule's procedural provisions on time-to-file and page limitations on appeals. Freddie Mac stated that procedures set out in § 30.910 for the Secretary's review of ALJ decisions were inadequate in cases involving the GSEs, because of the complex, fact-intensive nature of anticipated cases and the broad public policy implications likely to be involved. Freddie Mac requested that the rule make clear that provisions of § 30.910, including 15-day time and 10-page statement limits for appeals, may be waived by the Secretary upon the motion of a party. Although Freddie Mac agreed that expeditiousness and simplicity are "generally desirable," it asserted that such limits may not be appropriate in cases involving national housing policies.

As a general matter the Secretary has authority to waive HUD regulations, including those provisions to which Freddie Mac has raised objection, as well as other procedural rules from 24 CFR part 30 that are incorporated by reference. Nevertheless, the page-limit, and, in some cases, the time-limit, provisions set out in § 30.910 might be inadequate in cases arising under this rule. For that reason, the final rule

makes waiver of those specific provisions easier, by providing that any such waiver of the part 30 page- and time-limits for notices of appeal or any other waivers under this subpart will not trigger publication requirements for general waivers. Waiver requests, when reasonable in light of the subject matter of a particular proceeding and other factors, can be expected to be dealt with suitably by an ALJ or the Secretary.

Freddie Mac asked that, because of the importance of these decisions, the Secretary provide for oral argument on appeal at the request of a GSE. Predicting that cases arising under FHEFSSA will be rare, Freddie Mac argued that providing for oral argument by right would not impose a significant burden on the Secretary.

Nothing in the proposed rule would prevent the Secretary from granting a right to oral argument in connection with a particular appeal of an ALJ decision. A GSE may petition for such an opportunity and the Secretary may, in an appropriate case, agree to it. However, it is unnecessary to provide in the regulation for additional mandatory procedural rights that may be provided in the Secretary's discretion, when necessary.

Freddie Mac commented that the rule need not repeat FHEFSSA's provisions governing judicial review of HUD enforcement actions. For example, Freddie Mac criticized the provisions of proposed § 81.83(e), which detailed the procedures through which the Secretary could seek the aid of the U.S. District Court to collect a civil money penalty. Provisions that only detail functions of the reviewing court have been stricken in the final rule. The final rule now cross-references statutory provisions governing judicial procedures.

Fannie Mae asked for clarification on an "apparent inconsistency" between FHEFSSA and the proposed rule concerning who is responsible for filing the record of an administrative proceeding with the appellate court. The statute says the Secretary shall file, while the proposed rule stated the Office of Administrative Law Judges shall file. The provision Fannie Mae questioned is an intentional delegation to the Office of Administrative Law Judges, in the interest of efficiency, and is unchanged in the final rule.

Commenting on § 81.86 of the proposed rule, Freddie Mac said that the rule ignored the fact that FHEFSSA treats enforcement of cease-and-desist orders and civil money penalties orders differently. Freddie Mac argued that the two enforcement actions had been dealt with differently in FHEFSSA to reflect a congressional judgment that fact

¹⁰³ *Mountain Side Mobile Estates Partnership v. Secretary of HUD*, 56 F.3d 1243, 1248 (10th Cir. 1993). Furthermore, under the rule, if a decision is remanded for further proceedings, the ALJ is required to issue an initial decision on remand within 60 days of the date of issuance of the final decision, unless it is impractical to do so.