

## § 1209.12

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

(13) Recuse himself upon his own motion or upon motion made by a party;

(14) Prepare and present to the Director 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 or appropriate to discharge the duties of a presiding officer.

### § 1209.12 Public hearings; closed hearings.

(a) *General rule.* As provided in section 1379B(b) of the Safety and Soundness Act (12 U.S.C. 4639(b)), all hearings shall be open to the public, except that the Director, in his discretion, may determine that holding an open hearing would be contrary to the public interest. The Director may make such determination *sua sponte* at any time by written notice to all parties, or as provided in paragraphs (b) and (c) of this section.

(b) *Motion for closed hearing.* Within 20 days of service of the notice of charges, any party may file with the presiding officer a motion for a private 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 Director, who shall make a final determination. Such motions and replies are governed by §1209.28 of this part. A determination under this section is committed to the discretion of the Director and is not a reviewable final agency action.

(c) *Filing documents under seal.* FHFA counsel of record, in his discretion, may file or require the filing of any document or part of a document under seal, if such counsel makes a written determination that disclosure of the document would be contrary to the public interest. The presiding officer shall issue an order to govern confidentiality of such documents in whole or in part, including closing any portion of a hearing to the public or issuing a

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protective order under such terms as may be acceptable to FHFA counsel of record.

(d) *Procedures for closed hearing.* An evidentiary hearing, or any part thereof, that is closed for the purpose of offering into evidence testimony or documents filed under seal as provided in paragraph (c) of this section shall be conducted under procedures that may include: prior notification to the submitter of confidential information; provisions for sealing portions of the record, briefs, and decisions; *in camera* arguments, offers of proof, and testimony; and limitations on representatives of record or other participants, as the presiding officer may designate. Additionally, at such proceedings the presiding officer may make an opening statement as to the confidentiality and limitations and deliver an oath to the parties, representatives of record, or other approved participants as to the confidentiality of the proceedings.

### § 1209.13 Good faith certification.

(a) *General requirement.* Every filing or submission of record following the issuance of a notice of charges by the Director shall be signed by at least one representative of record in his individual name and shall state that representative's business contact information, which shall include his address, electronic mail 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, a representative of record or party appearing *pro se* certifies that:

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

(ii) To the best of 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 FHFA order or policy; 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 his knowledge, information, and belief, formed after reasonable inquiry, his 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 FHFA order or policy, and are not made for any improper purpose, such as to harass or to cause unnecessary delay or to needlessly increase litigation-related costs.

#### § 1209.14 Ex parte communications.

(a) *Definition.* (1) *Ex parte* communication means any material oral or written communication relevant to an adjudication of the merits of any proceeding under this subpart that was neither on the record nor on reasonable prior notice to all parties that takes place between:

(i) An interested person outside FHFA (including the person's representative of record); and

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

(2) A communication that is procedural in that it does not concern the merits of an adjudicatory proceeding, 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 a notice of charges commencing a proceeding under this part is issued by the Director until the date that the Director issues his final decision pursuant to § 1209.55 of this part, no person referred to in paragraph (a)(1)(i) of this section shall knowingly make or cause to be

made an *ex parte* communication with the Director or the presiding officer. The Director, presiding officer, or a decisional employee 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 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 parties to the proceeding shall have an opportunity within 10 days of receipt of service of the *ex parte* communication to file responses thereto, and to recommend sanctions that they believe to be appropriate under the circumstances, in accordance with paragraph (d) of this section.

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

(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 the adjudication, unless upon notice to and opportunity for all parties to participate.

(f) *Separation of functions.* An employee or agent engaged in the performance of any investigative or prosecuting function for FHFA in a case may not, in that or in a factually related case, participate or advise in the recommended decision, the Director's review under § 1209.55 of the recommended decision, or the Director's final determination on the merits