



Pre-Hearing Stakeholder Meeting Materials

**PROPOSED AMENDMENTS TO
WASHINGTON STATE DEPARTMENT OF FINANCIAL INSTITUTION'S
ADMINISTRATIVE ADJUDICATIVE PROCEDURES**

**CHAPTER 208-08, WASHINGTON ADMINISTRATIVE CODE
(CH. 208-08 WAC)**

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MISSION OF THE DEPARTMENT OF FINANCIAL INSTITUTIONS (“DFI”)

The mission of the Department of Financial Institutions (“DFI”) is to protect and educate the public and promote economic vitality through the regulation of financial services. DFI’s four regulatory Divisions – *Division of Banks*, *Division of Consumer Services*, *Division of Credit Unions*, and *Division of Securities* – approach this mission through various means:

Chartering & Licensing – Applicants for institutional charters and licenses are thoroughly investigated to ensure that they meet the regulatory requirements for participation in their intended industry.

Examination – Chartered institutions and licensees are regularly examined to ensure compliance with the laws and rules regulating their respective industries.

Enforcement – DFI investigates consumer complaints, licensing eligibility, unlicensed activity, serious and/or repetitive violations, criminal activity, and other issues. Most enforcement activity is resolved informally or by agreement, but many cases must be resolved by administrative litigation pursuant to the Administrative Procedures Act, Chapter 34.05 RCW and related Rules.

Outreach – DFI provides education and outreach to protect consumers from financial harm. The Department also provides education and outreach to the regulated industries through interpretive statements, webinars, small business assistance, and other forms of guidance

INTRODUCTION TO PROPOSED AMENDMENTS TO DFI ADJUDICATIVE PROCEDURES

Pursuant to the Washington Administrative Procedures Act,¹ DFI adopted rules for Adjudicative Procedures in 1996² supplementing the Model Administrative Rules.³ However, DFI’s Administrative Procedures have not been amended since they were originally adopted. As a result, the DFI’s adjudicative rules may not address amendments to the Washington Administrative Procedures Act and the Model Administrative Rules occurring after 1996. Additionally, DFI has observed over the years several areas of the adjudicative process which have caused concern. These include:

- Different interpretations of the same rule by different presiding officers;
- Questions by presiding officers about the extent of their authority;
- Gaps in authority which lead to abusive practices and unnecessary expense and delay;
- Absence of a process for even limited, non-dispositive interlocutory review; and
- Lack of clarity regarding discovery issues.

¹ Chapter 34.05 RCW, specifically RCW 34.05.205.

² Chapter 208-08 WAC.

³ Chapter 10-08 WAC.

In an effort to address these concerns and others, DFI has proposed amendments to its Adjudicative Procedures. These proposed amendments will streamline the adjudicative process by providing clearer guidance for all participants while preserving the due process rights of Respondents.

DFI AUTHORITY TO PROMULGATE AMENDMENTS

DFI has authority to amend its present Adjudicative Procedures by reason of DFI's Enabling Act⁴ and the Washington Administrative Procedures Act.⁵

DFI RULEMAKING PROCESS

DFI's usual process for rulemaking with *broad* applicability (as is the case here) is to:

- Perform extensive collaborative research, deliberation, drafting, editing, consultation with third parties, and re-drafting prior to submitting a proposed rule to either the *pre*-hearing stakeholder involvement or the formal statutory process of hearing and adoption;
- File a Preproposal Statement of Inquiry (CR-101), which gives the public notice that DFI is considering developing a new rule, amending an existing rule, or repealing an entire rule or sections of a rule, at such time as DFI believes that it will likely engage stakeholders as to the feasibility of the proposal;
- Conduct a *pre*-hearing stakeholder meeting after giving initial notice of intent to consider rulemaking but prior to statutory hearing;
- Endeavor to resolve any stakeholder issues obtained at the *pre*-hearing stakeholder meeting but prior to the formal statutory hearing;
- Give notice of and conduct a formal statutory hearing only after extensive stakeholder comment has been solicited and received;
- Furnish the Notice of Proposed Rule Making (CR-102), which is the formal announcement to the public of proposed rulemaking and notice of the date and time for statutory hearing;
- Thoroughly evaluate all comments received on, before, or after the statutory hearing, even though extensive *pre*-hearing stakeholder work may already have been done;
- Make revisions to the proposed rulemaking as DFI determines is appropriate (if at all);
- Issue a Rule Making Order (CR-103 form), which is used to adopt the proposed rule text that was filed using the CR-102 form; and
- Adopt the proposed rule when the DFIU Director has signed the CR-103 form and caused it to be filed with the Office of the Code Reviser; and
- Put the adopted rule into practice on or after its effective date, which is 31 days after filing of the Rule Making Order (CR-103).

⁴ Chapter 43.320.040 RCW.

⁵ RCW 34.05.250, which declare: "The chief administrative law judge shall adopt model rules of procedure appropriate for use by as many agencies as possible. The model rules shall deal with all general functions and duties performed in common by the various agencies. *Each agency shall adopt as much of the model rules as is reasonable under its circumstances. Any agency adopting a rule of procedure that differs from the model rules shall include in the order of adoption a finding stating the reasons for variance.*" [Emphasis added.]

DFI's approach, as outlined above, is in excess of the minimum rulemaking process required of Washington State agencies⁶ and one which DFI has found is best suited to achieving rulemaking that meets the intended objectives of DFI while being fair and accommodative of stakeholders and overall industry goals.

DFI's review and revision of its Adjudicative Procedures began in early 2014. In September 2014, a workgroup of six Financial Legal Examiners and Supervisors from the Division of Consumer Services ("Workgroup") was formed. Initial review focused on the Washington Administrative Procedure Act, Model Administrative Rules, and DFI's Adjudicative Procedures in relationship to challenges and problems DFI perceived it was experiencing in the hearing process. Assistant Attorneys General from Office of Attorney General's Government Compliance and Enforcement Division were contacted for extensive input at this stage. Members of the Workgroup also reviewed the administrative hearing rules of several other agencies. These other agencies included the Departments of Agriculture, Ecology, Employment Security, Health, Licensing, Social and Health Services, the Office of the Insurance Commissioner, the Public Disclosure Commission, and the Health Care Authority. Workgroup members also reviewed the Civil Rules for Superior Court and Rules of Practice of the Securities and Exchange Commission. Ideas were compiled, and members of the Workgroup were assigned various sections of the existing Adjudicative Procedures for detailed review and revision. Additionally, desired new provisions were identified and assigned for drafting. Regular meetings were held to discuss and revise draft language.

In about May 2015, a first draft was forwarded to Joseph M. Vincent⁷ for review and comment. Further editing took place, and then in July 2015 the draft was forwarded to DFI's Division of Securities for review.

On July 27, 2015, DFI filed with the Washington State Register its official Preproposal Statement of Inquiry (CR-101) in relation to the proposed rulemaking,⁸ thereby giving formal statutory notice of initiation of the rulemaking process.

In August 2015, Steven Sherman,⁹ the Workgroup's chair, and other Workgroup members met with Suzanne Sarason¹⁰ and other key members of the Division of Securities to discuss any concerns presented by Division of Securities. Based on extensive input from the Division of Securities, further edits were made following that meeting.

In September 2015, the most recent version was forwarded to Mr. Vincent, who forwarded it to the Chief Administrative Judge¹¹ for the Office of Administrative Hearings ("OAH") and her deputy¹² for comments. Comments provided by OAH were reviewed in

⁶ For a general overview of the statutory rulemaking process, the page entitled, "Washington's Rule Making Process," at the Website for the Governor's Office for Regulatory Innovation and Assistance, is a helpful resource. See http://www.oria.wa.gov/site/alias_oria/448/default.aspx.

⁷ DFI's Director of Regulatory & Legal Affairs (DFI Executive Team Member).

⁸ See WSR 15-16-027. See <http://dfi.wa.gov/documents/rulemaking/adjudicative-procedures/2015/adjudicative-procedures-cr-101.pdf>.

⁹ Enforcement Chief, DFI Division of Consumer Services.

¹⁰ Enforcement Chief, DFI Division of Securities.

¹¹ Chief Administrative Law Judge, Lorraine Lee.

¹² Deputy Chief Administrative Law Judge, Edward Pesik.

January 2016 and additional edits were made.¹³ In July 2016, Mr. Vincent and Mr. Sherman met with OAH to discuss a second *revised* draft of the proposed amendments to DFI's Adjudicative Procedures. Based upon this meeting with OAH, final edits were made resulting in the present version of these proposed amendments to DFI's Adjudicative Procedures ("Proposed Amendments").

In August 2016, Mr. Vincent and Mr. Sherman met with the DFI Director, Scott Jarvis, for his review of Proposed Amendments and permission to go forward with the rulemaking process. After review, Mr. Jarvis gave his approval to proceed.

DFI then furnished notice to stakeholders, evidenced by these materials, of a *pre*-hearing Stakeholder Meeting set for Tuesday, November 15, 2016, from 10:00 A.M. to 12:00 Noon, at Tukwila Community Center, attendance of which will also be possible through Skype for Business (as set forth in the notice or by follow-up communication).

Unlike other DFI rulemaking, the proposed amendments to the Adjudicative Procedures will have an effect on all of DFI's regulatory divisions. Therefore, a potentially much wider group of stakeholders could either be affected or have a perception of being affected by the adoption of the intended rulemaking. Accordingly, notice of this pre-hearing stakeholder meeting has been given not only to all of the financial institutions and licensees which DFI regulates and to their respective trade association representatives. Notice has also been communicated to the Washington State Bar Association ("WSBA") and its Administrative Law Committee, to attorneys who have regularly practiced before DFI in administrative matters, the Washington Association for Justice,¹⁴ and to other persons and entities the Division of Consumer Services and Division of Securities has designated as important to receive notice.

SECTION-BY-SECTION ANALYSIS OF PROPOSED AMENDMENTS

WAC 208-08-020

The proposed amendment in subsection (1) clarifies that the adoption of the Model Rules includes past and future amendments. For clarification, the proposed amendment in subsection (2)(b) replaces the session law citation with the statutory citation.

WAC 208-08-021

The proposed new section provides guidance for implementation of RCW 34.05.434(5) to allow for electronic service.

¹³ In addition, Mr. Vincent added an additional provision setting forth in rule the existing statutory provisions for special adjudication of bank and trust institution enforcement matters, credit union enforcement matters, and miscellaneous enforcement matter under the jurisdiction of the Division of Banks, consistent with the Washington Commercial Bank Act (Title 30A RCW), Washington Trust Institutions Act (Title 30B RCW), Washington Savings Bank Act (Title 32 RCW), Washington Savings Association Act (Title 33 RCW), Washington Credit Union Act (Chapter 31.12 RCW), Washington Business Development Company Act (Chapter 31.24 RCW), Washington Agricultural Lenders Act (Chapter 31.35 RCW), and Washington Guaranteed SBA Lenders Act (Chapter 31.40 RCW).

¹⁴ Formerly known as the Washington Trial Lawyers Association.

WAC 208-08-030

The proposed amendment to subsections (1)-(2) makes the language consistent with the Washington Rules of Professional Conduct (“RPC”) and related comments. The proposed new language in subsection (3) establishes (affirms) that the basic standard of professionalism in practicing before DFI and its adjudicative agent, OAH, is the RPC. The proposed new language in subsection (4) clarifies the role of DFI employees who maintain a WSBA license. The proposed new language in subsection (5) provides the presiding officer with authority to impose a sanction for a violation of subsection (3).

WAC 208-08-040

The proposed amendments in subsections (1) and (2) clarify notice requirements similar to, but more detailed than as set forth in the Washington Civil Rules¹⁵. The added requirements will make it easier to determine who represents which respondent when a matter has multiple respondents. They will assist being able to contact a respondent after his/her representative has withdrawn.

WAC 208-08-050

The proposed amendment in subsections (2) and (3) creates consistency of terms within the section and incorporates a reference to a proposed new section (WAC 208-08-021).

WAC 208-08-051

This proposed new section facilitates more efficient and timely resolution of matters by requiring additional information early on in the process. It is consistent with requiring an answer to a civil complaint and also in many cases will reduce the number of issues left to adjudicate at the hearing stage, resulting in shorter hearings.

WAC 208-08-052

This proposed new section was created to provide tools, guidance, and clarification to administrative law judges (“ALJs”) as to their authority.

WAC 208-08-060

The proposed amendment in subsection (1) establishes the rules of discovery that apply in DFI adjudicative proceedings. The proposed amendment in subsection (2) clarifies that, *for purposes of discovery*, the “presiding officer” is not the agency head. The proposed amendment in subsection (3)(a) creates a rule for determining when a motion for discovery will be heard and addressed. In the event of discovery disputes or additional related motions, an ALJ is necessary for rulings. The proposed amendment in subsection (4) establishes limitation on what is discoverable based upon lack of relevance and/or privileged communications. The proposed amendment in subsection (7) clarifies the ALJ’s authority to make negative inferences based

¹⁵ CR 71.

upon discovery violations. The proposed amendment in subsection (8) clarifies that discovery is a stage of the proceeding subject to default, pursuant to RCW 34.05.440(2). The proposed amendment in subsection (9) provides for interlocutory appeal of discovery issues.

WAC 208-08-070

The proposed amendment in subsection (2) creates a requirement for documenting what documents have been provided by DFI and provides guidance for the safekeeping of sensitive or protected information.

WAC 208-08-080

The amendment of the first subsection heading is made to more accurately reflect the content of subsection (1).

WAC 208-08-081

This proposed new section codifies and clarifies the authenticity of documents produced in discovery and creates a procedure and standards for challenging authenticity.

WAC 208-08-082

The proposed new section authorizes the usage of unsworn declarations consistent with Washington General Rule 13 (GR 13) and current practice.

WAC 208-08-090

The proposed amendments create subsections with headings for clarity.

WAC 208-08-110

The proposed amendments clarify what *good cause* must be shown.

WAC 208-08-120

The proposed amendment delineates who is authorized from DFI to address settlements. This streamlines the settlement process to ensure that only those who are authorized to participate are involved in the communications.

WAC 208-08-150

This proposed new section creates rules governing the amending of initiating documents to minimize undue surprise and provide due process.

WAC 208-08-160

This proposed new section creates protocol to address interlocutory appeals. Current rules are silent as to dealing with interlocutory issues, which has caused uncertainty. Having rules that may only allow *final* decisions to be appealed results in matters going forward on the merits when there are unresolved, underlying issues.

WAC 208-08-170

For clarification purposes, this proposed new section reiterates the existing *statutory* authority of the Division of Banks¹⁶ and Division of Credit Unions¹⁷ to elect to adjudicate *within DFI* charges against banks, savings banks, credit unions, or charges against directors, officers,, and employees of those same institutions, *without* referring those matters to ALJs at OAH, provided that procedures are put in place to assure that no one from the prosecuting division acts as presiding officer. The proposed new section also clarifies that notice of charges against savings associations, business development companies, agricultural lenders and federally guaranteed SBA lenders may be adjudicated inside DFI but only to the extent permitted by statute.

TEXT OF PROPOSED AMENDMENTS TO CH. 208-08 WAC

WAC 208-08-020 Adoption of rules of procedure.

(1) **Model rules.** The department adopts the model rules of procedure as set forth in WAC 10-08-035 through 10-08-230, as amended. If there is a conflict between the model rules and this chapter, the rules in this chapter shall govern. Wherever the term "agency" appears in the model rules it means the department of financial institutions.

(2) **Brief adjudicative proceedings.** (a) **Adoption of related APA provisions.** The department specifically adopts the criteria and procedures for brief adjudicative proceedings contained in RCW 34.05.482 through 34.05.494.

(b) **When used.** The department will use this procedure in any proceeding initiated pursuant to RCW 18.44.460 (~~(under chapter 293, Laws of 1996, regarding the suspension of escrow agent licenses for nonpayment of student loans)~~).

NEW SECTION. WAC 208-08-021 Electronic service.

(1) Any party may elect to be served by electronic transmission (fax or email) upon waiver of service by other lawful means.

¹⁶ RCW 30A.04.470(1); RCW 30B.10.060; RCW 32.04.290(1); RCW 33.04.052(1); RCW 33.16.040.

¹⁷ RCW 31.12.625.

(2) As used in this chapter, "fax" means electronic telefacsimile transmission.

(3) The waiver must be in writing, filed with all parties and the presiding officer, and provide the fax number or email address to be used for service. The waiver shall not preclude any party from effecting service by other lawful means, and can be revoked upon written notice to all parties and the presiding officer. A party agreeing to accept service by email must utilize an email program that generates a delivery receipt for proof of service.

(4) The waiver permits the other parties and the presiding officer to serve via electronic transmission as described in this section in lieu of the means of service set forth in WAC 10-08-110(2)(b).

(5) Service by fax is complete upon production by the fax machine of confirmation of transmission. Proof of service by fax is the successful "confirmation of transmission" or similar document showing successful transmission to the fax number provided with the waiver.

(6) Service by email is complete upon transmission to the email address provided with the waiver. Proof of service by email is successful upon the sender receiving a delivery receipt or similar document showing successful transmission to the email address provided with the waiver.

(7) Should the transmitting party receive notification within twenty-four hours that an email or fax was not delivered, the waiver is void, and service shall be made pursuant to WAC 10-08-110(2)(b).

WAC 208-08-030 Appearance and practice before the department.

(1) Only the following persons may appear in a representative capacity before the department or (~~its designated~~) presiding officer:

(a) Attorneys (~~at law~~) entitled to practice before the supreme court of the state of Washington.

(b) Attorneys (~~at law~~) entitled to practice before the highest court of record of another state, United States territory, or the District of Columbia, if attorneys (~~at law~~) are permitted to appear in a representative capacity before administrative agencies of that state, United States territory, or the District of Columbia, and if not otherwise prohibited by the laws of this state.

(c) A bona fide officer, partner, or full-time employee of an individual firm, association, partnership, or corporation who appears for such individual firm, association, partnership, or corporation.

(2) The presiding officer may allow other forms of representation if he or she deems the representation satisfactory.

(3) All attorneys appearing in proceedings before the department or its presiding officer, whether on their own behalf or in a representative capacity, shall comply with the Washington rules of professional conduct.

(4) Employees of the department who are entitled to practice law in any court of record, including but not limited to Financial Legal Examiners and Financial Legal Examiner Supervisors, do not appear in proceedings before the department or its presiding officer in a capacity as legal representative and are not "attorneys" for the purpose of this chapter unless the department employee files a Notice of Appearance pursuant to WAC 208-08-040.

(5) The presiding officer may disqualify an attorney appearing in a representative capacity to prevent a violation of the Washington rules of professional conduct.

WAC 208-08-040 Notice of appearance or withdrawal.

(1) **Appearance.** Each attorney or other representative shall file a written notice of appearance with the department and the presiding officer and shall serve a notice of appearance on all attorneys and representatives then of record and on all unrepresented parties. The notice shall contain the name, address and telephone number of the attorney or representative and the name, address, and telephone number of each party represented.

(2) **Withdrawal.** Any attorney or representative who withdraws from representing a party shall file a written notice of withdrawal with the department and the presiding officer and shall serve the notice of withdrawal on all attorneys and representatives then of record and on all unrepresented parties. The notice shall contain the effective date of the withdrawal, the current name, address, and telephone number of each party who will no longer be represented, and, if known, the name of the person who will represent the party from that time forward. Withdrawal of a party's attorney or representative after the service of a notice of hearing shall not be grounds for the continuance of the hearing unless good cause is shown.

WAC 208-08-050 Requests for adjudicative hearing.

(1) **Where filed; Form.** All requests that the department conduct an adjudicative hearing shall be filed with the department on the form provided by the department or on a form that is substantially similar.

(2) **Time limits for request.** The department must receive the request for an adjudicative hearing no later than twenty calendar days after the department serves the ~~((applicant))~~ respondent with a written notice of an opportunity to request a hearing upon department action or contemplated department action. Service upon the ~~((applicant))~~ respondent is completed when made in accordance with RCW 34.05.010 (19), WAC 10-08-110 (2) and (3), WAC 208-08-021, or as provided by the statute under which the department initiated the action. If the statute under which the department initiated the action specifically provides for a different time limit, the time limit in that statute shall apply unless it has been superseded by the Administrative Procedure Act, chapter 34.05 RCW, but in no case shall the time limit for requesting an adjudicative hearing be less than twenty calendar days.

(3) **Failure to request hearing.** Failure of ~~((an applicant))~~ a respondent to file an application for an adjudicative hearing within the time limit set forth in subsection (2) of this section constitutes a default and results in the loss of the ~~((applicant's))~~ respondent's right to an adjudicative hearing. When ~~((an applicant))~~ a respondent defaults, the department may proceed to resolve the case pursuant to RCW 34.05.440(1).

NEW SECTION. WAC 208-08-051 Submission of an answer to the department.

(1) **Answer to statement of charges.** Each respondent is required to file an answer to the department's statement of charges with the department no later than sixty days after the application for adjudicative hearing is filed with the department, unless the parties agree in writing to a longer period for answer.

(2) **Contents of answer.** The answer shall state whether each of the factual allegations in the statement of charges is admitted, denied, or not contested, and shall include a summary of the party's position on each factual allegation denied.

(3) **Effect of admission or no contest.** When a factual allegation is admitted or not contested, it shall be deemed to be conclusive for all further proceedings between the department and the respondent filing the answer in regard to the statement

of charges admitted or not contested; and no proof of the allegation need be submitted.

(4) **Failure to file answer.** Failure of a respondent to file an answer within the time limit set forth constitutes a default and, upon motion of the Department, shall result in the loss of the respondent's right to an adjudicative hearing on the statement of charges.

(5) **Curing of default.** A respondent may cure the default by filing and serving an answer prior to the hearing on the motion for default. When a respondent defaults, the department may proceed to resolve the case as to that respondent pursuant to RCW 34.05.440(2).

NEW SECTION. WAC 208-08-052 Authority of Administrative Law Judge.

(1) In addition to the authority provided under (~~WAC~~) chapter 10-08 WAC, the administrative law judge has the following authority:

- (a) To make negative inferences based upon discovery violations;
- (b) To schedule hearings on temporary orders to cease and desist within fourteen days of receipt of such request by the department;
- (c) To determine whether the applicable statutes or rules authorize the imposition of punitive or remedial sanctions by the director; and
- (d) To determine whether the applicable statutes or rules authorize the imposition of fines, costs, or fees by the director.

(2) The administrative law judge shall not have the authority to:

- (a) Modify punitive or remedial sanctions intended to be ordered by the director in accordance with and authorized by statute or rule;
- (b) Modify fines, costs, or fees intended to be ordered by the director in accordance with and authorized by statute or rule; and
- (c) Schedule hearings on motions for summary judgment to be heard within thirty days of the hearing on the merits of the department's action.

WAC 208-08-060 Discovery.

(1) **Application of Superior Court Civil Rules.** Insofar as applicable and not in conflict with this rule, rules 26 through

36 of the Washington State Superior Court Civil Rules shall be used.

(2) Presiding officer. For purposes of discovery, the presiding officer is the Administrative Law Judge assigned by the Office of Administrative Hearings.

(3) Motion required.

(a) Any motion for discovery served upon any party prior to the assignment of an Administrative Law Judge shall be stayed until such time as an Administrative Law Judge is assigned and the motion for discovery can be heard at the pre-hearing conference as provided in WAC 208-08-110.

~~((1))~~ (b) Unless discovery is included in the prehearing order as provided in WAC 208-08-110, a party wishing to make discovery must file a motion for discovery with the presiding officer. The party must also serve the discovery motion on all other parties to the proceeding. Any party opposing or otherwise responding to the motion must file a response with the presiding officer and serve all parties within ten ~~(10)~~ calendar days after service of the motion.

(4) Limitation on discovery. In addition to limitations on discovery set forth in any other applicable law, regulation, or rule, discovery shall not include:

(a) Information or documents from the personnel file of any department employee;

(b) Information or documents relating to any investigation conducted by the department against unrelated parties;

(c) Information or documents relating to any action brought by the department against unrelated parties;

(d) Information or documents relating to any examination conducted by the department of unrelated parties;

(e) Information or documents relating to any license applications or determinations made by the department of unrelated parties; or

(f) Deposition of the agency director or assistant directors.

~~((2))~~ (5) Hearing on discovery motion. Any party may request a hearing on a discovery motion. If the presiding officer determines that a hearing on the motion is warranted, he or she shall give all parties ~~((at least three business days))~~ notice of the time and place for the hearing.

~~((3))~~ (6) Decision on motion. The presiding officer may determine the extent and conditions of discovery in any adjudicative proceeding, considering the criteria set forth in RCW 34.05.446(3) and WAC 208-08-070 and 208-08-080. The presiding officer shall rule upon the motion only after all parties have responded or the time for response has passed.

(7) Spoliation. Upon proof by a preponderance of the evidence, when a party alters, destroys, suppresses, or withholds without

a motion to the presiding officer records or information subject to discovery, the presiding officer may presume the evidence would have been unfavorable to that party's position.

(8) **Failure to comply with discovery.** Failure to comply with a lawful discovery request is grounds for default under RCW 34.05.440(2).

(9) **Appeal of discovery decision.** All decisions regarding discovery are subject to the process set forth in WAC 208-08-160 in the event of an interlocutory appeal as set forth in that section.

WAC 208-08-070 Production of documents to parties.

(1) **Place of production.** When production of documents is allowed, they shall be produced for inspection and copying at the department's headquarters, at such other place as the parties may agree in writing, or as the presiding officer orders.

(2) **Removal from Department's headquarters by agreement.** In the case of documents produced by the department, a party may not remove the documents from the department's offices other than by written agreement of the department. This agreement shall specify the document subject to the agreement, the date for return of the document, and any other terms or conditions as are appropriate to provide for the safe keeping of the documents.

(3) ~~((2))~~ **Copying procedures and charges.** The party requesting production may photocopy any documents produced. The requesting party is responsible for the cost of photocopying. The documents produced by the department may be copied at the department's offices or such other places as the parties may agree. Charges for copies made by the department for a requesting party will be at a rate agreed upon by the parties, or as ordered by the presiding officer.

WAC 208-08-080 Depositions upon oral examination.

(1) **Recording, signing and filing of ((Filing)) transcripts.** If a deposition is allowed, it shall be recorded, including all questions and objections. If one of the parties orders a transcript, the testimony shall be transcribed verbatim under the direction of the court reporter, who shall certify the transcript. The witness shall sign the transcript or waive signature. If a deposition is transcribed, the court reporter shall file the original transcript and any exhibits to it with the presiding officer. The witness and any party may purchase a copy of the transcript from the court reporter.

(2) **Cost.** The party requesting the deposition shall pay the cost of the deposition, including any sitting or facility fee. A party ordering a copy of a transcript must make appropriate arrangements to pay the court reporter.

(3) **Videotaping of depositions.** If a videotaped deposition is allowed, Superior Court Civil Rule 30(b)(8) shall apply.

NEW SECTION. WAC 208-08-081 Authentication of evidence.

(1) **Production of documents - self-authenticating.** A party's production of a document in response to written discovery or other legal process authenticates the document for use against that party in any prehearing proceeding or at hearing unless, within ten days after the producing party has actual notice that the document may be used, the party objects to the authenticity of the document, or any part of it, stating the specific basis for objection.

(2) **Objection.** An objection must be either on the record or in writing and must have a good faith factual and legal basis. An objection made to the authenticity of only part of a document does not affect the authenticity of the remainder. If objection is made, the party attempting to use the document should be given a reasonable opportunity to establish its authenticity.

NEW SECTION WAC 208-08-082 Validity of unsworn declaration.

(1) If a law of this state requires or permits use of a sworn declaration, an unsworn declaration meeting the requirements below has the same effect as a sworn declaration if it:

- (a) Recites that it is certified or declared by the person to be true under penalty of perjury;
- (b) Is subscribed by the person;
- (c) States the date and place of its execution; and
- (d) States that it is so certified or declared under the laws of the state of Washington.

(2) The certification or declaration may be in substantially the following form:

"I certify (or declare)
under penalty of perjury under
the laws of the State of
Washington that the foregoing is
true and correct":

.
.

(Date and Place) (Signature)

- (3) This section does not apply to:
- (a) A deposition;
 - (b) An oath of office;
 - (c) An oath required to be given before a specified official other than a notary public;
 - (d) A declaration to be recorded pursuant to Title 64 or 65 RCW; or
 - (e) An oath required by RCW 11.20.020.
- (6) As used in this section:
- (a) "Sworn declaration" means a declaration in a signed record given under oath. The term includes a sworn statement, verification, certificate, or affidavit; and
 - (b) "Unsworn declaration" means a declaration in a signed record that is not given under oath, but is given under penalty of perjury.

WAC 208-08-090 Submission on stipulated facts.

(1) **Department's agreement.** With the agreement of the department, a party may waive a hearing and submit its case upon stipulated facts and briefs.

(2) **Sufficiency of evidence required.** Submission of a case without a hearing does not relieve the parties from providing sufficient evidence proving the facts supporting their allegations or defenses.

(3) **Review by presiding officer.** The presiding officer shall review the submissions of the parties and shall enter a proposed order, including findings of fact and conclusions of law.

(4) **Submission to Director or designee.** If the parties agree, they may submit the stipulated facts to the director or designee for a final order, bypassing the presiding officer.

WAC 208-08-110 Prehearing conferences.

The department encourages the use of prehearing conferences. If a party requests a prehearing conference, the presiding officer shall grant the request unless good cause is shown for not holding one. WAC 10-08-130 governs the conduct of prehearing conferences.

The department encourages informal settlement of matters before the agency. Any ~~((person))~~ party who believes ~~((his or her))~~ their interest in an adjudicative proceeding may be settled informally may contact the ~~((department))~~ department's designated representative and shall communicate their settlement proposal to the designated representative. After assignment of a presiding officer, the department may appoint an Assistant Attorney General as its designated representative. The department specifically adopts WAC 10-08-230 setting forth procedures for informal settlements.

NEW SECTION. WAC 208-08-150 Amending initiating document.

(1) Prior to the assignment of a presiding officer the initiating document may be amended at any time.

(2) After the assignment of a presiding officer the initiating document may be amended upon motion filed by the department and service to all parties. Such motion shall be granted unless the presiding officer finds a party will be unduly prejudiced or burdened.

(3) When the initiating document is a statement of charges, a party shall have thirty days to submit an answer to the amended initiating document.

(4) The presiding officer may delay all or part of the hearing if necessary to afford a party the opportunity to respond or prepare.

NEW SECTION. WAC 208-08-160 Interlocutory decision; discretionary review.

(1) **Definitions.** Unless the context indicates otherwise, as used in this chapter, the following terms mean:

(a) **"Interlocutory decision"** means any initial decision or order of the presiding officer that does not terminate or fully resolve the matter before the presiding officer.

(b) **"Motion for discretionary review"** means a motion to the director for discretionary review of an interlocutory decision by the presiding officer and does not mean a petition for review under RCW 34.05.464.

(c) **"Petition for reconsideration"** means a petition before the presiding officer for reconsideration of an interlocutory decision and does not mean a petition for review under RCW 34.05.464 or a petition for reconsideration under RCW 34.05.470.

(2) **What may be reviewed?** A party may seek discretionary review by the director of any interlocutory decision, including procedural or substantive decisions or orders.

(3) **Exhaustion of administrative remedies.**

(a) **Petition for reconsideration – when filed?** Prior to filing a motion for discretionary review, the party must file a petition for reconsideration with the presiding officer within ten days of service of the interlocutory decision.

(b) **Service.** Copies of the petition for reconsideration shall be served upon all other parties or their representatives at the time the petition is filed.

(c) **Before whom is the petition for reconsideration heard?** The petition for reconsideration shall be considered and disposed of by the presiding officer who entered the interlocutory decision, if reasonably available.

(d) **Requirement of a written order.** The disposition shall be in the form of a written order pursuant to WAC 10-08-210.

(e) An order denying reconsideration is not subject to judicial review prior to final order by the director in relation to a respondent as to all matters in a case.

(4) **Motion for discretionary review.**

(a) **Who may file?** Any party to an adjudicative proceeding may file a motion for discretionary review of a written order disposing of a petition for reconsideration.

(b) **Filing with director.** The motion for discretionary review shall be filed with the office of the director within ten days of the date of service of the written order disposing of the petition for reconsideration stating the specific grounds upon which relief is requested.

(c) **Service.** Copies of the motion for discretionary review shall be served upon all other parties or their representatives at the time the motion for discretionary review is filed. Filing of the motion for discretionary review with the director shall be caused by delivering a copy of the motion for discretionary review to the office of the director at the principal office of the agency. For purposes of this section, service upon the attorney of record of any agency or party of record constitutes service upon the agency or party of record.

(d) **Contents of motion.** The motion for discretionary review shall specify the portions of the interlocutory decision to which exception is taken and shall refer to the evidence of record which is relied upon to support the motion for discretionary review.

(e) **Reply to motion.** Any party may file a reply to a motion for discretionary review. The reply shall be served in the same manner as the motion for discretionary review within ten days of the date of service of the motion for discretionary review, and

copies of the reply shall be served upon all other parties or their representatives at the time the reply is filed.

(f) **Considerations governing acceptance of discretionary review.** Discretionary review of an interlocutory decision by the presiding officer will be accepted by the director only:

(i) If the presiding officer has committed an obvious error which would render further proceedings useless; or

(ii) If the presiding officer has committed probable error and the decision of the presiding officer substantially alters the status quo or substantially limits the freedom of a party to act; or

(iii) If the presiding officer has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of review jurisdiction by the director.

(g) **Scope of review.** Unless the motion for discretionary review is deemed denied under subsection (h), the motion for discretionary review shall be considered and disposed of by the director. The disposition shall be in the form of a written order. The director will review only the issues raised in the motion for discretionary review.

(h) **No oral argument; exception.** In the manner of a petition for review under RCW 34.05.464 or a petition for reconsideration under RCW 34.05.470, the director will not hear oral argument on a motion for discretionary review of an interlocutory decision unless (i) the issue before the director on motion for discretionary review is procedural in nature and (ii) the director notifies the parties in writing of the date, time, and manner for hearing oral argument, which may include a scheduled teleconference. If the director elects to have oral argument on the motion for discretionary review, the director may designate a neutral officer of the department to hear such oral argument and confer with the director prior to the director issuing an order on the motion.

(i) **Suspension of proceeding.** Neither a motion for discretionary review nor any disposition of such motion suspends or stays the proceeding or effectiveness of the interlocutory order unless otherwise ordered by the director.

(j) **Denial.** The director is deemed to have denied the motion for discretionary review, if within twenty days from the date the motion for discretionary review is filed, the director does not either dispose of the motion for discretionary review or serve the parties with a written notice specifying the date by which the director will act on the motion for discretionary review. Denial of the motion for discretionary review of an interlocutory decision does not affect the rights of a party to obtain later review of the presiding officer's decision or the issues included in that decision.

(k) **Judicial review of director's decision on motion for discretionary review.** Judicial review of the director's decision on motion for discretionary review may occur only after final order by the director in relation to a respondent as to all matters in a case.

NEW SECTION. WAC 208-08-170 Administrative hearings involving persons subject to the enforcement jurisdiction of the Division of Banks and Division of Credit Unions.

(1) **Conduct of administrative hearings when the Division of Banks or Division of Credit Unions is the charging authority.**

An administrative hearing involving a notice of charges against a Washington state-chartered commercial bank under Title 30A RCW, savings bank under Title 32 RCW, trust company under title 30B RCW, credit union under chapter 31.12 RCW, the holding company of such commercial bank, savings bank, or savings association, a present or former director, officer, or employee of such commercial bank, savings bank, savings association, or credit union, or any other person subject to the jurisdiction of chapter 31.12 RCW, Title 30A RCW, Title 30B RCW, or Title 32 RCW, may be held at a place designated by the director and conducted by the department of financial institutions in accordance with chapter 34.05 RCW, the model rules of procedures and this chapter but without referral to the office of administrative hearings. To the extent the requirements of chapter 31.12 RCW, Title 30A RCW, Title 30B RCW, or Title 32 RCW, as applicable, are inconsistent with chapter 34.05 RCW, then chapter 31.12 RCW, Title 30A RCW, Title 30B RCW, or Title 32 RCW, as applicable, will govern.

(2) **Conduct of administrative hearings involving miscellaneous non-depository entities when the Division of Banks is the charging authority.**

In the case of an administrative hearing involving a notice of charges against a Washington State-chartered savings association or Washington State-chartered or -licensed business development company under chapter 31.24 RCW, agricultural lender under chapter 31.35 RCW, or federally guaranteed small business lender under chapter 31.40 RCW, or an administrative hearing involving a notice of charges against a director, officer, or employee of the same, the requirements of Title 33 RCW, and chapters 31.24, 31.35 and 31.40 RCW, respectively, shall govern only to the extent of any inconsistency with chapter 34.05 RCW.

(3) **Director's appointment of independent hearing officer.** If the department elects to conduct an administrative hearing as permitted by this section, the director shall appoint a hearing officer from outside the division of the department bringing the

notice of charges, who may be either an employee from another division or an independent contractor. The director may elect to either retain review jurisdiction or delegate authority for issuance of a final order to the appointed hearing officer.

(4) **Referral to office of administrative hearings permitted.** Nothing in this section shall be construed to prevent the director from exercising whatever option he or she has to refer a notice of charges under chapter 31.12 RCW, chapter 31.24 RCW, chapter 31.35 RCW, chapter 31.40 RCW, Title 30A RCW, Title 30B RCW, Title 32 RCW, or Title 33 RCW to the office of administrative hearings for administrative hearing.

EXISTING DFI ADMINISTRATIVE ADJUDICATIVE PROCEDURES (CH. 208-08 WAC)

See <http://app.leg.wa.gov/WAC/default.aspx?cite=208-08&full=true>.

RULEMAKING CONTACT INFORMATION

See Webpage for 2015 Adjudicative Procedures Rulemaking
<http://dfi.wa.gov/rulemaking/2015-adjudicative-procedures-rulemaking>.

There is a place on this Webpage for you to sign up for email updates.

Throughout this rulemaking process, you may provide comments in any of the following methods:

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