

The Commonwealth of Massachusetts Commission Against Discrimination

THE JOHN W. MCCORMACK BUILDING

1 ASHBURTON PLACE • ROOM 601 • BOSTON, MA 02108-1524



CHARLES D. BAKER
GOVERNOR

KARYN E. POLITO
LIEUTENANT GOVERNOR

SUNILA THOMAS GEORGE
CHAIRWOMAN

SHEILA A. HUBBARD
COMMISSIONER

MONSERRATE QUIÑONES
COMMISSIONER

January 14, 2019

Re: 2019 Procedural Regulations Draft Available for Comment

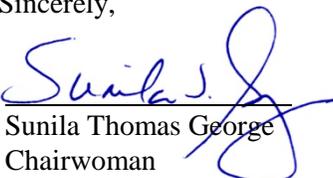
The Commission is pleased to provide an early opportunity for the public to review its draft of the amended Procedural Regulations at 804 CMR 1.00 et seq. prior to the formal comment/public hearing process. These draft regulations reflect significant time and effort by MCAD personnel who evaluated Commission practices, prior revision efforts and procedural rules from other forums. The working group reviewed and considered public comments and questions about the existing regulations issued in 1999, in reaching the determination that the public and practitioners before the agency would benefit from these revisions. The Commission also used this opportunity to evaluate internal processes in an effort to better effectuate efficiency in the agency's operations and to further the agency's mission to eradicate discrimination. An overriding goal of this process was to develop procedural regulations which accurately reflect the agency's practices and procedures and which are intended to be more easily comprehended by parties and practitioners appearing before the agency.

The regulations were drafted consistently with the current regulations guidelines promulgated by the Massachusetts Secretary of the State. A definition section has been added to the regulations to promote better understanding. Similarly, the regulations have been reordered so that they more closely mirror chronological timelines governing investigation, prosecution and adjudication at the agency.

The working group also incorporated into the regulations a number of ad hoc practices which have developed over the nearly twenty years since the procedural regulations were last issued, as well as rules intended to promote efficiency. For example, this draft specifically identifies the ability of a party to file a rebuttal statement in an investigation. It also identifies where certain motions should be addressed, decreasing time associated with decisions on motions. This draft simplifies and clarifies the process by which complaints and position statements are amended at the Commission. In addition, the amended procedural regulations now include specific timelines to be followed in the investigative process for housing discrimination complaints dual-filed with HUD. The proposed regulations also expand the timeline permitted for filing motions to reconsider probable cause findings, and provide new service rules applicable to the Commission. These examples are a sample of changes reflected in the draft. A review of the entire draft will reveal other intended improvements in the Commission's procedural regulations.

We look forward to your comments and constructive suggestions. These comments should be addressed to: MCADProRegs@mass.gov. Please include your contact information if you are available for follow up questions.

Sincerely,


Sunila Thomas George
Chairwoman


Sheila A. Hubbard
Commissioner


Monserrate Quiñones
Commissioner

804 CMR 1.00 et seq.

Massachusetts Commission Against Discrimination

Draft Procedural Regulations 1/14/2019

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1.01: Scope and Purpose

804 CMR 1.00 establishes rules for procedure and practice before the Massachusetts Commission Against Discrimination. The purpose of 804 CMR 1.00 is to achieve a just, speedy and fair determination of matters before the Commission in the service of the public interest. In the interests of justice, the Commission, through its individual Commissioners, may exercise its discretion and relax the application of 804 CMR 1.00.

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1.02: Definitions

As used in 804 CMR 1.00:

Commission refers to the Massachusetts Commission Against Discrimination (aka the MCAD).

Commissioner mean One of three members of the Commission appointed by the Governor of the Commonwealth of Massachusetts in accordance with M.G.L. c.6, §56, which includes a Chairperson of the Commission.

Complainant means any person who files a verified complaint with the Commission.

Complaint means any complaint filed with the Commission alleging discrimination and includes HUD housing complaints absent a special rule or exception.

Designee means an employee or agent of the Commission who has been designated by a Commissioner or the General Counsel to perform a particular function.

Document means any paper document or electronically stored information, including writings, drawings, graphs, charts, photographs, sound recordings, images and other data or data compilations, stored in any medium from which information can be obtained either directly or, if necessary, after translation into a reasonably usable form.

Duly Authorized Representative means any legal surrogate designated in accordance with the laws of the Commonwealth, including an attorney in good standing who has filed a notice of appearance in a matter before the Commission.

Ex parte means “without notice to or argument from the adverse party.”

Hearing Commissioner means the Commissioner designated by the Chairperson of the Commission to adjudicate Complaints of Discrimination.

Hearing Officer means a person designated by the Chairperson of the Commission to adjudicate Complaints of Discrimination.

HUD Housing Complaint means any complaint alleging discrimination in housing under M.G.L. c. 151B which is dual filed with the U.S. Department of Housing and Urban Development.

Investigating Commissioner means the Commissioner designated by the Chairperson of the Commission to investigate a Complaint of Discrimination.

Investigative Disposition means the official document issued by the Commission upon conclusion of the investigation containing the determination of the Investigating Commissioner.

Investigator means the Commission employee or agent designated by the Investigating Commissioner to conduct an investigation of alleged unlawful discriminatory practices.

Moving party means the party who files a written motion with the Commission, or moves for relief verbally at public hearing.

Order means a direction or decision of an Investigating Commissioner, Hearing Commissioner, Hearing Officer, General Counsel, or the Full Commission, including designees.

Party means the complainant, respondent and any person permitted to intervene in a Commission proceeding; after a complaint is certified to public hearing, the Commission also becomes a party to the proceeding.

Person means any natural person, corporation, trust, partnership, incorporated or unincorporated association, limited liability company, and any other legal entity.

Personal service means actual delivery of the notice or process to the person to whom it is directed, which, in the case of a natural person means either by delivery in hand or by leaving copies at the last and usual place of abode of such person, and, in the case of a legal entity, means delivering notice or process in hand to an officer, managing or general agent or person in charge of the business at the principal place of business.

Post-Determination means the period of time beginning with the issuance of an investigative disposition.

Pre-Determination means the period of time between the filing of a complaint and the issuance of an investigative disposition.

Preliminary Hearing means an informal appeal hearing held at the Commission upon written request of a complainant or their attorney within ten days of service of an adverse investigative disposition.

Probable Cause means sufficient evidence exists upon which a fact-finder could form a reasonable belief that it is more probable than not that a respondent committed an unlawful practice.

Pro Hac Vice means “admission of an attorney to practice at the Commission for a particular case only.”

Pro Se means “A person appearing on their own behalf who is not represented by an attorney.”

Public Hearing means the adjudicatory hearing held at the Commission pursuant to M.G.L. c.151B, §5 in which the respondent answers the charges of the complaint certified to hearing by the Investigating Commissioner.

Respondent means the person, employer, labor organization or employment agency alleged to have committed an unlawful practice.

Sua Sponte means “An action taken by the Commission of its own accord which does not require prompting or suggestion by a party.”

Subpoena Duces Tecum means “An order commanding the production of evidence including specified books, documents, or records; such command may be included in a subpoena commanding testimony or it may be issued independent of, or in lieu of testimony.”

1.03: Commissioner Authority

In all matters involving the administration of complaints filed pursuant to M.G.L. c. 151B, and unless otherwise specifically noted in 804 CMR 1.00, one Commissioner may act for the Commission.

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1.04: Complaint Filing, Amendment and Withdrawal

- (1) Who May File. A complaint alleging violations of the statutes enforced by the Commission may be filed at the Commission by any of the following complainants:
 - (a) A person claiming to be aggrieved by the alleged violation(s);
 - (b) The duly authorized representative of a person claiming to be aggrieved by the alleged violation(s);
 - (c) An organization whose purpose includes the elimination of the unlawful practice(s) which is the subject of the complaint and whose members include one or more persons claiming to be aggrieved by the alleged violations, provided that the injured person(s) shall be named if the complaint seeks victim-specific relief;
 - (d) The Attorney General or their authorized representative provided that the injured person shall be named if the complaint seeks victim-specific relief; or
 - (e) The Commission, pursuant to 804 CMR 1.18.
- (2) Manner of Filing.
 - (a) By Delivery. A complaint may be filed by delivering a copy in person during regular Commission business hours or by U.S. mail to any of the Commission's offices.
 - (b) By Intake. A complaint may be filed at any of the Commission's offices by participating in the intake process with a Commission representative and signing the complaint. A complainant who, because of a disability, is unable to visit a Commission office may request an accommodation to conduct the intake process by telephone, and may return the signed complaint to the Commission by U.S. mail.
- (3) Time of Filing. A complaint shall be filed within 300 days after the alleged unlawful conduct; provided, however, that a complaint alleging violations of M.G.L. c. 151C shall be filed within six months of the alleged unlawful conduct.
- (4) Exceptions to Time of Filing. A complaint may be filed beyond the time limits within 804 CMR 1.04(3) only under the following circumstances:
 - (a) Collective Bargaining Agreement Grievance. When a grievance on behalf of an individual is filed pursuant to a collective bargaining agreement, the individual may file a complaint based on the same facts within 300 days of when they first knew or should have known that the matters raised in the grievance would support a claim of discrimination. The Commission may stay its investigation until any such grievance proceedings have concluded.
 - (b) Continuing Violation. When facts are alleged which indicate unlawful conduct is of a continuing nature and part of an ongoing pattern of discrimination, the complaint may include actions outside of the statutory filing period so long as the last discriminatory act in the pattern occurred within the statutory filing period.
 - (c) Mediation Prior to Filing of Complaint. When an aggrieved person enters into an agreement to voluntarily mediate the alleged discriminatory acts prior to filing a complaint at the Commission but within the statutory filing period, the time for filing may be tolled subject to the following conditions:

1. The parties are represented by counsel;
 2. The parties execute an agreement, signed by the parties, their attorneys, and the mediator, which states the nature of the dispute, the intent to mediate the dispute, a request to toll the statutory filing deadline to pursue mediation, a commitment by the attorneys and mediator to conduct the mediation within 90 days, and an agreement to promptly report the outcome of the mediation to the Clerk of the Commission;
 3. The parties submit the agreement executed pursuant to 804 CMR 1.04(4)(c)(2) to the Clerk of the Commission in Boston, within the statutory filing deadline (300 days or, if a violation of M.G.L. c.151C, six months) of the alleged unlawful conduct;
 4. The Commission shall toll the statutory filing deadline for 90 days from the date the agreement is submitted to the Clerk of the Commission, or until the mediator and parties have reported that they are unable to resolve the matter through mediation, whichever date is sooner; and
 5. If the parties are unable to resolve the matter through mediation the person claiming to be aggrieved by the alleged violation shall file a complaint within 21 days of reporting that the mediation was unsuccessful. The filing date shall be deemed to be the date the agreement to mediate was filed with the Commission.
- (d) Equitable Tolling. The statute of limitations for filing a complaint may be equitably tolled in those cases where the complainant is excusably ignorant of their rights or of facts giving rise to a claim within the Commission's jurisdiction, or where complainant has been misled, either by the Commission or the respondent, as determined by the Investigating Commissioner.
- (5) Form. The complaint shall be in writing, and shall be signed and verified by the complainant. Verification consists of a signed statement, under the pains and penalties of perjury, by the complainant that they have read the complaint and that the allegations contained therein are true to the best of their knowledge.
- (6) Content. The complaint shall contain:
- (a) The date(s) on which the unlawful discriminatory acts occurred; or, when the acts are of a continuing nature, the period of time during which acts occurred and the specific date of the last discriminatory act;
 - (b) A concise statement of the alleged discriminatory acts; sufficient to enable the Commission to investigate the claims, and provide notice to the respondent of potential liability;
 - (c) If appropriate, a statement indicating that the complaint is on behalf of a proposed class based on the criteria provided in 804 CMR 1.15(4)(a).
 - (d) Appropriate identification of the complainant(s) and the person(s) alleged to have committed unlawful discriminatory acts, unless proceeding by use of pseudonym pursuant to 804 CMR 1.04(7); and
 - (e) Factual allegations sufficient to support the claim.
- (7) Use of Pseudonym. The Investigating Commissioner may determine *sua sponte*, or upon the filing of a motion, that the public interest requires allowing one or more complainants to proceed before the Commission under a pseudonym, which shall not impact the Commission's ability to issue protective

orders under 804 CMR 1.05(12). The following process applies to the use of pseudonym complaints, if the approved by the Investigating Commissioner:

- (a) The Commission shall take two complaints and assign the same docket number;
- (b) One complaint shall include the full name and address of the complainant and be placed under a protective order along with the motion requesting the pseudonym;
- (c) One complaint shall be identical to the first, except that a pseudonym shall be substituted for the name of the complainant and complainant's address and other information likely to identify complainant shall be removed;
- (d) The Commission shall serve a copy of the pseudonym complaint upon every respondent named therein; and
- (e) Service of a pseudonym complaint shall be accompanied by a notice informing the respondent that, upon review of the complaint, if the respondent is unable to identify with sufficient assurance the identity of the person filing the complaint or the person on whose behalf the complaint is filed, the respondent shall notify the Commission in writing within ten days of the date the complaint is served, and the Commission may provide further information, including the identity of the complainant, to permit the respondent to file an answer.

(8) Amendments to the Complaint in General.

- (a) How Made. A complaint may be amended at any time, either by motion from the complainant, *sua sponte* by the Commission or in response to an order for a more definite statement in accordance with 804 CMR 1.05(11).
- (b) Amended Content. A complaint or any part thereof may be amended to cure technical defects or omissions, including failure to swear to the complaint, to clarify and amplify allegations made therein, to add respondents, or to allege additional acts constituting unlawful discriminatory practices related to or arising out of the subject matter of the original complaint. Regardless of how made, amendments shall relate back to the original filing date of the complaint.

(9) Procedure for Amending Complaint.

- (a) Sua sponte Amendments by the Commission. Amendments may be made by the Investigating Commissioner at any time prior to certification to public hearing and by a Hearing Commissioner or Hearing Officer at any time after certification to public hearing. In each instance prior to public hearing, the amendment(s) or order permitting the amendments shall be served by the Commission upon each party.
- (b) Amendments by Motion from Complainant. Motions to amend the complaint are governed by 804 CMR 1.13, and shall include a copy of a proposed amended complaint for filing and service.
- (c) Amendments to HUD Housing Complaints. An amended HUD housing complaint shall be filed within 45 days of the initial filing of the complaint or no later than five days after service of the position statement, whichever is later, unless good cause is shown to enlarge the time. HUD housing complaints may only be amended once. Events occurring after amending a HUD housing complaint may be the subject of a new complaint.

- (d) Response to Order for a More Definite Statement. A complainant shall amend the complaint in accordance with an order by the Investigating Commissioner issued pursuant to 804 CMR 1.05(11) within ten days of receipt of the order.
- (e) Response to Amendments. The Investigating Commissioner, Hearing Commissioner or Hearing Officer may request a response to an amendment from any named or proposed party.
1. Pre-determination amendments. If a position statement has already been filed, the respondent may amend the position statement within 14 days of receipt of amendments to the complaint. Where no position statement has yet been filed, respondent shall file a position statement in response to amendments in accordance with 804 CMR 1.05(8).
 2. Post-determination amendments. Unless otherwise ordered by the Commission, the respondent may not amend the position statement post-determination, although they may oppose a post-determination motion to amend the complaint in accordance with 804 CMR 1.13 or by request from the Commission.
- (10) Standard for Allowance of Amendments After Certification to Public Hearing. Motions to amend a complaint after certification to public hearing may be granted if the amendment arises out of the subject matter of the initial complaint and there is no undue prejudice to a party or individual. Nothing herein limits the discretion of the Hearing Commissioner or Hearing Officer to amend the complaint to conform to the evidence adduced at hearing.
- (11) Notice to the Parties. The Commission shall serve a copy of the original complaint upon complainant and respondent except where the Investigating Commissioner dismisses the complaint pursuant to 804 CMR 1.05(2).
- (12) Withdrawal of Complaint. Withdrawal of a complaint for any reason is subject to the following provisions:
- (a) The complainant may request withdrawal of the complaint for the purpose of removing it to court pursuant to M.G.L. c. 151B, §9 or for other reason within the first 90 days of filing a complaint, and such request shall be in writing and shall set forth the reasons therefor.
 - (b) The Investigating Commissioner may grant or deny in writing a request to withdraw within the first 90 days of filing a complaint as the public interest requires.
 - (c) After 90 days of filing the complaint, the complainant may withdraw the complaint as of right for any reason, including removal to court pursuant to M.G.L. c. 151B, §9 upon written notice to the Commission.
 - (d) If a complainant files a complaint in court pursuant to M.G.L. c. 151B, §9 without first withdrawing the complaint pursuant to 804 1.04(12)(a) or (c), the Commission may consider the complaint withdrawn as of the court filing date.
 - (e) Withdrawal of a complaint at any time shall not affect the Commission's right to initiate a complaint based upon the same allegations, and such Commission initiated complaint shall relate back to the date of filing of the individual complaint.
- (13) Additional Requirements for Withdrawal of Complaint by Removal to Court. The following conditions apply whenever a complainant withdraws a complaint by removal to court regardless of when the complaint is withdrawn:

- (a) Any person who has withdrawn a complaint before the Commission to file an action in any court of the Commonwealth or in any federal court, which includes a claim under M.G.L. c. 151B, 151C, or c. 272, §§ 92A, 98, or 98A, shall promptly provide the General Counsel of the Commission with a copy of the complaint filed in court.
- (b) In any matter originally filed with this Commission pursuant to M.G.L. c. 151B, 151C, or c. 272, §§ 92A, 98, or 98A, where any final order of the Superior Court or Federal District Court is issued, the prevailing party shall promptly provide a copy of such final order to the General Counsel of the Commission.
- (c) In any appeal to the Massachusetts Court of Appeals, Supreme Judicial Court or Circuit Court of Appeals for the federal court of a matter originally filed with this Commission, in which an issue is raised under M.G.L. c. 151B, c. 151C or c. 272, §§ 92A, 98, or 98A, the party raising the issue shall promptly provide notice of appeal to the General Counsel.

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1.05: Investigation and Answer of Complaint

- (1) Preservation of Evidence. Upon notice of the complaint, parties shall preserve all manner and forms of information and documents that are or may lead to evidence relevant to the charge of discrimination. Failure to so preserve may result in a rebuttable presumption concerning the evidence against the party failing to make such preservation. The Commission may issue sanctions pursuant to 804 CMR 1.22 related to the failure to preserve evidence.
- (2) Review and Authorization. The Commission may undertake a preliminary review of a complaint to determine if further investigation would serve the public interest, and may dismiss a complaint at such stage subject to the following provisions:
 - (a) Grounds for Dismissal. The Commission may determine that further investigation is unwarranted due to a lack of standing, lack of jurisdiction, untimeliness, failure to state a claim of discrimination, frivolous claims, or where allegations are facially implausible or incapable of verification.
 - (b) Notice of Dismissal. If the Commission determines that further investigation would not serve the public interest, the Commission shall state the reasons for the determination in a dismissal notice served upon complainant only. Such dismissal notice shall constitute authorization to the complainant under 804 CMR 1.04(12)(b) to pursue a civil action pursuant to M.G.L. c. 151B, § 9.
 - (c) Appeal of Dismissal. The complainant may appeal a dismissal issued pursuant to 804 CMR 1.05(2)(b) by filing with the Clerk of the Commission a written request for a preliminary hearing pursuant to 804 CMR 1.08(3)(b).
- (3) Notice of Authorized Investigation. Upon the authorization of a formal investigation, the Commission shall notify complainant and respondent of the filing of the complaint. Notice to respondent shall include a copy of the complaint and notice of their procedural rights and obligation to respond.
- (4) Manner of Investigation.
 - (a) Upon authorization pursuant to 804 CMR 1.05(3), the Investigating Commissioner, or designee, may undertake investigation of the complaint by field visit, written or oral inquiry, review of evidence submitted, conference, or any other method deemed suitable, none of which shall be subject to 804 CMR 1.10. Such investigation may include:
 1. Witness interviews;
 2. Requests for production or inspection of documents, papers and other tangible things;
 3. Issuance of subpoenas requiring the attendance of persons or the production for examination of documents and other tangible things in accordance with 804 CMR 1.14.
 4. Service of interrogatories on either party;
 5. Conducting depositions; and
 6. Considering the input of the parties in developing its requests for information. Accordingly, parties may request that the Commission seek certain information or conduct an investigative conference as part of its investigation.

(5) Prompt Investigation.

- (a) HUD Housing Complaints. The investigation of a complaint alleging discrimination in housing dual filed with HUD shall be completed in no more than 100 days after receipt of the complaint, unless it is impracticable to do so.
- (b) Complaints Other Than HUD Housing Complaints. The investigation of a complaint alleging discrimination in all areas within the jurisdiction of the Commission other than housing complaints dual filed with HUD shall be completed in no more than 18 months following receipt of the complaint, unless it is impracticable to do so.
- (c) Notification of Delay. The Commission shall notify the parties if it is unable to complete the investigation within the time periods in 804 CMR 1.05(a) and (b).

(6) Commission's Right to Investigate. No waiver or other agreement signed by any individual shall affect the Commission's right to investigate any complaint filed before it or to initiate a complaint to enforce the Commonwealth's anti-discrimination statutes.

(7) Deferral of Investigation. Whenever the Investigating Commissioner has reason to believe that another forum, having jurisdiction over the parties and subject matter contained in a complaint filed with the Commission, is conducting a prompt and thorough investigation of such complaint in a manner consistent with the requirements and standards of the Commission, the Investigating Commissioner may defer the investigation of the complaint until such other forum has completed its investigation or resolved the complaint, subject to the following provisions:

- (a) The Commission shall notify the parties in writing of any decision to defer investigation of a complaint until after investigation or resolution of such complaint by another forum.
- (b) Upon the conclusion of the investigation or resolution of the complaint by another forum, the Investigating Commissioner shall make a determination in accordance with 804 CMR 1.08(1)(a).

(8) Answer to the Complaint: Position Statement

- (a) Form and Timing. Each respondent shall file an original answer to the complaint in the form of a position statement as follows:
 - 1. Complaints Other Than HUD Housing Complaints. The position statement shall be filed either within 21 days of receipt of the notice of authorized investigation or within 21 days of receipt of an amended complaint filed pursuant to 804 CMR 1.04(9)(d) if the amended complaint is received before the filing of the position statement. Upon written request by the respondent, and for good cause shown, the Commission may grant an extension in which to file the position statement not to exceed 21 days absent exceptional circumstances.
 - 2. HUD Housing Complaints.
 - (A) A respondent in a housing discrimination case dual filed with HUD shall file a position statement within 14 days of receipt of the notice of authorized investigation.
 - (B) Due to the 100 day period in which to investigate HUD housing complaints under 804 CMR 1.05(5)(a), respondents to HUD housing complaints are strongly

discouraged from requesting extensions of time in which to file position statements. Upon written request by the respondent, and for good cause shown, the Commission may grant an extension of not more than seven days in which to file the position statement.

(C) A respondent who fails to file a position statement in accordance with 804 CMR 1.05(8)(a)(2)(A) or within an extension of time granted pursuant to 1.05(8)(a)(2)(B) remains obligated to file the position statement pursuant to 804 CMR 1.06(2)(b).

(b) Failure to File. Upon failure to provide a position statement the Commission may issue a notice of consequences in accordance with 804 CMR 1.07(1).

(c) Service. Each respondent shall serve the position statement upon the Commission, the complainant, and any attorney of record for a complainant.

(d) Content. The position statement shall assert all jurisdictional and other defenses which the respondent wishes to raise and shall also contain a full and complete description of the respondent's positions in response to all allegations of the complaint. The position statement shall be signed and affirmed by the respondent. Signature and affirmation shall include:

1. A signature under oath before a notary public by the respondent, a principal of respondent, or a person, other than its attorney, authorized to act for the respondent; and
2. If a respondent is represented by an attorney, the position statement shall also be signed by respondent's attorney.

(e) Amendments. A position statement may only be amended in accordance with 804 CMR 1.04(9)(e).

(9) Rebuttal to the Position Statement.

(a) Rebuttal Encouraged. Rebuttals to the position statement are not required, but are strongly encouraged and may be requested by the Commission to assist in the investigation of the complaint.

(b) Form and Timing.

1. Rebuttals to Position Statements for Complaints Other Than HUD Housing Complaints. Within 21 days of service of a position statement or a request for rebuttal from the Commission, a complainant may file a rebuttal to the respondent's position statement. Rebuttals from represented complainants shall be in writing. *Pro se* complainants may be permitted by the Investigator to provide a verbal rebuttal. Upon written request of the complainant, and for good cause shown, the Investigator may grant an extension of not more than 21 days to file the rebuttal absent exceptional circumstances.
2. Rebuttals to Position Statement for HUD Housing Complaints. Rebuttals to the position statement may be made in writing or verbally but shall be made within five days of service of the position statement or request by the Commission. Upon request of the complainant, and for good cause shown, the Investigator may grant an extension of not more than 5 days.

- (c) Service. A represented complainant shall serve a copy of the rebuttal on respondent or respondent's attorney.

(10) Investigative Conference.

- (a) Notice. The Commission may convene an investigative conference for the purpose of obtaining evidence, identifying issues in dispute, ascertaining the positions of the parties, and exploring the possibility of settlement. Notice of the investigative conference shall be provided to all parties at least 14 days prior thereto and may identify the individuals requested to attend on behalf of a party.
- (b) Rescheduling. Parties may request to reschedule the investigative conference for good cause by submitting a written request to the Investigating Commissioner, which shall be granted at the discretion of the Investigating Commissioner.
- (c) Participants. A party may be accompanied at an investigative conference by an attorney or other duly authorized representative. An attorney for a party not previously having entered an appearance shall do so at the beginning of the investigative conference. Parties who have witnesses available to testify on their behalf may prepare a list of such witnesses, showing the name, address, e-mail address, phone number(s), and a summary of what the witness knows about the dispute. Said list shall be provided to the Commission at the investigative conference.
- (d) Conduct. The Investigator or other designee of the Investigating Commissioner shall conduct the investigative conference and control the proceedings. Parties or their representatives may be questioned by the Investigator about the issues under investigation, and may be permitted to make a brief statement. No audio, visual, digital, or other verbatim recording of the conference may be made. The Investigator shall decide who shall be heard and the order in which they are heard. The Investigator may exclude witnesses and other persons from the investigative conference.
- (e) Failure to Attend. The failure of a complainant to attend the investigative conference after due notice may result in an adverse disposition in accordance with 804 CMR 1.08. The failure of a respondent to attend the investigative conference after due notice may result in investigative default in accordance with 804 CMR 1.07. The Commission may sanction any party failing to attend or requesting more than one continuance as provided for in 804 CMR 1.22.

- (11) Motion for More Definite Statement. If a complaint is so vague or ambiguous that the respondent cannot reasonably be expected to take an informed legal position concerning the relevance of evidence sought, the Investigating Commissioner may *sua sponte*, or upon motion, order a more definite statement. A motion for a more definite statement is subject to 804 CMR 1.13 and shall be filed within ten days of receipt of the complaint. Such motion shall describe the defects complained of and details desired. The complainant's response to an order for a more definite statement is governed by 804 CMR 1.04(9)(d).

- (12) Motion for Protective Order. A party may move for a protective order to prevent the disclosure of information provided during the investigation for good cause shown, and the Investigating Commissioner may allow such motion if the public interest and other circumstances warrant such order. The Investigating Commissioner may seek a response from the non-moving party. Information that is subject to a protective order shall not be disclosed during the investigation of the matter, but,

unless otherwise provided, may be subject to discovery by the parties after an investigative disposition.

(13) Pre-Determination Discovery Conducted by the Parties. The parties do not have a right to conduct discovery during the investigation of the complaint. If both parties are represented by counsel, they may be permitted to conduct discovery by *sua sponte* Order of the Investigating Commissioner or upon motion by a party. Any such discovery shall focus solely on the allegations of the complaint and any defenses thereto, and shall be conducted in accordance with 804 CMR 1.10, subject to the following limitations and additional provisions:

(a) Limited Discovery.

1. Absent a specific contrary order of the Investigating Commissioner, discovery by each party shall be limited to 15 interrogatories including subparts, 15 requests for production of documents, and six hours of deposition by each side;
2. Parties shall respond to interrogatories and requests for production of documents within 30 days of service;
3. Notice of depositions shall be served at least 14 days prior to the date of deposition;
4. Unless a different time frame is granted, discovery shall be completed within six months of issuance of discovery order;
5. The parties may not alter the limitations in 804 CMR 1.05(13)(a) by agreement under 804 1.10(9).

(b) Failure to Conduct Discovery. Failure to conduct pre-determination discovery in good faith, when ordered by the Investigating Commissioner, may be deemed cause for:

1. Administrative closure of the matter pursuant to 804 CMR 1.08(1)(d) for unreasonable refusal by complainant to cooperate with the processing of the matter;
2. Investigative default pursuant to 804 CMR 1.07 for unreasonable refusal by respondent to appear and cooperate with the processing of the matter; and
3. The Investigating Commissioner may order the party failing to conduct discovery in good faith, or the attorney advising him or her, or both, to pay the requesting party's reasonable expenses, including attorney's fees and costs, and the Commission's expenses caused by the failure.

(c) Discovery Submission. Parties permitted to conduct pre-determination discovery shall file with the Commission and serve each other party with a memorandum describing facts relevant to a causal determination, including any agreed upon facts. The memorandum shall not exceed 15 double-spaced pages, and shall be filed within 30 days of the end of the discovery period. Upon request by the Investigator, the party shall provide copies of answers to interrogatories, relevant documents produced and deposition transcript testimony which support the facts relevant to the determination.

1.06: Mediation

- (1) Mediation. The Commission may offer the parties mediation aimed at resolution of the complaint prior to the issuance of an investigative disposition or a final decision. Mediation offered to the parties by the Commission is subject to M.G.L. c. 233, §23C, and the following conditions:
- (a) The Commission mediator is at all times a designee of the Investigating Commissioner.
 - (b) The Commission does not abrogate its obligation to vindicate the public interest by offering mediation to the parties.
 - (c) Pursuant to 1.06(1)(a) and (b), the confidentiality required by M.G.L. c. 233, §23C applies to the Commission as a whole, and it does not prohibit a Commission mediator from providing details of a mediation to the Investigating Commissioner or other Commission employees when the public interest or administrative necessity so dictates. Such details remain confidential within the Commission and confidential mediation communications and materials not otherwise discoverable shall not be disclosed in any judicial or administrative proceeding, including public hearings held pursuant to 804 CMR 1.12, 1.18 or 1.19.
 - (d) The Commission may cancel or terminate its efforts to mediate a complaint if: the respondent fails or refuses to confer with the Commission; the complainant or the respondent fail to make a good faith effort to resolve any dispute; the mediation shall not serve to vindicate the public interest; or the Commission finds, for any reason, that voluntary agreement is not likely to result.
 - (e) All parties shall attend mediation with authority to settle the matter.
- (2) Mediation of HUD Housing Complaints. The Commission encourages the parties to resolve HUD housing complaints through voluntary settlement prior to the issuance of an investigative disposition through mediation, subject to the following provisions:
- (a) The Investigator shall seek the parties' voluntary participation in pre-determination mediation at the Commission within 30 days of the filing of the complaint, unless impracticable to do so.
 - (b) The position statement shall be filed prior to the pre-determination mediation as required by 804 CMR 1.05(8)(a)(1), and in any event shall be due within ten days of an unsuccessful pre-determination mediation.
 - (c) Any party who declines to participate or seeks postponement of a pre-determination mediation shall provide written notice thereof to the Investigator within 48 hours of the scheduled conciliation date. Failure to provide such notice without good cause may result in sanctions against the party failing to give notice.

1.07: Investigative Default Procedure

- (1) Notice of Consequences for Failure to Answer or Participate. If a respondent fails to answer a verified complaint or otherwise fails to participate in the investigation, the Investigating Commissioner may serve upon respondent a notice of consequences. The notice of consequences shall list available sanctions for failing to answer or participate, which include, but are not limited to:
 - (a) The issuance of a probable cause determination in accordance with the allegations of the complaint; and
 - (b) A waiver of respondent's right to pursue reconsideration of the probable cause determination pursuant to 804 CMR 1.08(3)(a).
- (2) Response to Notice of Consequences. The respondent shall file a position statement with the Commission within ten days of receipt of the notice of consequences to avoid an order and entry of default imposing sanctions pursuant to 804 CMR 1.07(3).
- (3) Order and Entry of Investigative Default.
 - (a) If respondent fails to respond to the notice of consequences as required by 804 CMR 1.07(2), the Investigating Commissioner may issue an order and entry of investigative default, imposing one or more of the sanctions available under 804 CMR 1.07(1).
 - (b) If sanctions are imposed, the Investigating Commissioner may also order the payment of reasonable costs and attorney's fees associated with the failure to cooperate, to be paid by the defaulting party to the Commission and other parties.
 - (c) After the imposition of sanctions, the Investigating Commissioner may take the following additional actions:
 1. Order that a matter be processed pursuant to 804 CMR 1.19;
 2. Seek relief in the Superior Court for a violation of M.G.L. c. 151B, § 8, pursuant to M.G.L. c. 214, §3 (12) or (13); and
 3. Any other relief against the parties or counsel as is necessary and appropriate to enforce the provisions of M.G.L. c. 151B, § 5.
- (4) Removal of Default. Within 14 days of the order and entry of investigative default, the respondent may petition the Investigating Commissioner for the removal of investigative default, for good cause shown. The respondent's assertion of good cause shall be in affidavit form and shall include all information sought by the Commission. The respondent shall include a position statement in the petition to remove default.

1.08: Investigative Dispositions, Complaint Closures and Appeal

- (1) Types of Investigative Dispositions. The Commission may close the investigation of a complaint as follows:
- (a) Substantial Weight Granted to Investigation by Another Forum. After deferral of an investigation pursuant to 804 CMR 1.05(7), if it appears that the Commission's requirements and standards have been met, the Commission may accord substantial weight to the findings or resolution of the other forum and close the investigation or prosecute the complaint pursuant to 804 CMR 1.08(1)(f)(1) or (3).
 - (b) Withdrawal of Complaint. The Commission shall close a complaint properly withdrawn pursuant to 804 CMR 1.04(12) and (13), although it may decide to file a Commission initiated complaint based on the same allegations pursuant to 804 CMR 1.18.
 - (c) Lack of Jurisdiction. Whenever the Investigating Commissioner determines that the Commission lacks jurisdiction over the parties or subject matter of the complaint, the Investigating Commissioner shall dismiss the complaint and shall notify the parties in writing, stating the reasons therefor.
 - (d) Administrative Closure. If the public interest so requires, the Investigating Commissioner may administratively close a complaint for reasons including, but not limited to, bankruptcy, death of a party, inability to locate a party, adjudication by another forum, unreasonable refusal by complainant to cooperate with processing the case, failure to participate, or an unreasonable refusal to accept a proposed pre-determination settlement pursuant to the criteria of 804 CMR 1.09(11). Administrative closure shall be subject to the following provisions:
 - 1. Before closing a matter because of inability to locate a party, the Commission shall provide notice to the party stating that the matter shall be closed if a response is not received within 30 days. Such notice shall be provided to the last address reported to the Commission by the party. The Investigating Commissioner shall allow 30 days for response before administratively closing the matter.
 - 2. Unreasonable refusal by complainant to cooperate with processing of the case may include, but is not limited to, failure to provide information, materials or responses which are necessary for investigation of the complaint, or failure to comply with an order issued by the Investigating Commissioner.
 - 3. When practicable, in any matter administratively closed, written notice shall be provided to the complainant, including the reasons for the closure.
 - 4. An administrative closure shall not constitute a final order for purposes of exercising rights provided under M.G.L. c. 151B, § 6 or M.G.L. c. 30A.
 - 5. The Investigating Commissioner may reopen an administratively closed case for good cause shown.
 - (e) Settlement. The Commission may close its investigation due to settlement of the complaint under the following conditions:

1. Notification to Commission. Parties shall promptly notify the Commission in writing upon reaching a settlement.
2. Review and Availability of Settlement Terms.
 - (A) The Investigating Commissioner may require the parties to submit the terms of such settlement in writing to the Commission.
 - (B) Except in HUD housing complaints, the Commission may keep settlement terms confidential at the request of the parties.
 - (C) If it appears from the facts of the complaint and the terms of settlement that the public interest has been served, the Investigating Commissioner may dismiss the complaint without a determination as to whether probable cause existed to credit the allegations of the complaint, and shall so notify the parties in writing.

(f) Causal Determinations.

1. Probable Cause. A determination of probable cause shall be made when the Investigating Commissioner concludes after investigation of the complaint that there is sufficient evidence upon which a fact-finder could form a reasonable belief that it is more probable than not that respondent committed an unlawful practice. Disputes involving genuine issues of material fact shall be reserved for a fact-finder at public hearing.
 2. Lack of Probable Cause. If the Investigating Commissioner determines after investigation of the complaint that there is insufficient evidence to support a determination of probable cause to credit the allegations of the complaint, a lack of probable cause determination shall be issued and the complaint shall be dismissed. Notice of a lack of probable cause determination shall be issued within ten days from such determination.
 3. Multiple Determinations. Where the complaint contains claims of more than one unlawful practice, the Investigating Commissioner shall make a determination of probable cause or lack of probable cause with respect to each claim.
- (2) Complaint Closures After Investigative Disposition. The Commission may close a complaint utilizing the procedures within 1.08(1)(b), (c), (d) or (e) at any time after the issuance of a probable cause determination issued pursuant to 804 CMR 1.08(1)(f)(1) and (3).
- (3) Notice of Investigative Disposition. The Commission shall provide written notice of the investigative disposition to the parties, including whether the complaint has been closed or remains open and subject to further process.
- (4) Reconsideration or Appeal of Investigative Disposition.
- (a) Motion for Reconsideration of Probable Cause Determination.
 1. A respondent may move for reconsideration of a probable cause determination for good cause at any time prior to the certification conference scheduled pursuant to 804 CMR 1.11(3) or within 45 days of certification to public hearing pursuant to 804 CMR 1.12 if no certification conference is held .
 2. Motions for reconsideration shall be served in accordance with 804 CMR 1.05 and additionally be copied to the Chief of Investigations.

3. The Investigating Commissioner shall render a decision on the motion for reconsideration, as soon as reasonably practicable.
 4. The Investigating Commissioner may issue an order reversing the probable cause determination, reopening the matter for further investigation, modifying the probable cause determination, or taking such other action as is deemed necessary in the interests of justice.
 5. Upon reversal or modification of a probable cause determination, complainant does not have a right to a preliminary hearing pursuant to 804 CMR 1.08(4)(b) or a right to review under M.G.L. c. 151B, §6 or M.G.L. c. 30A.
- (b) Appeal of Disposition: Preliminary Hearing. The complainant may appeal an investigative disposition entered under 804 CMR 1.08(1)(c) and (f)(2) and (3) as well as a dismissal pursuant to 804 CMR 1.05(2) by filing a written request for a preliminary hearing with the Clerk of the Commission within ten days after receipt of the notice of investigative disposition or dismissal. The Clerk of the Commission shall schedule a hearing and, except for appeals filed pursuant to 804 CMR 1.05(2), shall notify all other parties of the appeal. The following provisions apply to all preliminary hearings:
1. The hearing may be held in person or in writing at the discretion of the Investigating Commissioner.
 2. The hearing shall not be subject to the requirements of M.G.L. c. 30A and the determination shall not be subject to Full Commission or judicial review under M.G.L. c. 151B, §6 or M.G.L. c. 30A.
 3. The Investigating Commissioner or a designee shall preside at the hearing and may permit the complainant to present oral or written reasons why the determination is in error, and present supporting evidence as appropriate. Except for appeals filed pursuant to 804 CMR 1.05(2), the respondent may also be permitted to present oral or written reasons why the determination should be sustained along with supporting evidence as appropriate.
 4. The Investigating Commissioner may request additional information and evidence at or following the preliminary hearing.
 5. The Investigating Commissioner may, upon review of evidence presented:
 - (A) affirm the disposition or dismissal;
 - (B) reverse the disposition or dismissal and issue a probable cause determination;
 - (C) reopen the case for further investigation;
 - (D) modify the disposition or dismissal; or
 - (E) take such other action as deemed necessary in the interest of justice.

1.09: Conciliation

- (1) Conciliation Required after Determining Probable Cause. Upon a determination of probable cause pursuant to 804 CMR 1.08(1)(f)(1) or (3), the Investigating Commissioner or a designee shall endeavor to eliminate the unlawful practice complained of through conference, conciliation and persuasion in accordance with M.G.L. c. 151B, §5. In conciliating a complaint, the Commission shall attempt to achieve a just resolution of the complaint and to obtain assurances that the respondent shall satisfactorily remedy any violations of the rights of the aggrieved person, and take such action as shall assure the elimination of discriminatory practices, or the prevention of their occurrence in the future.
- (2) Party Obligations.
 - (a) Attendance at a scheduled conciliation is mandatory, and all parties shall attend conciliation with authority to settle the matter.
 - (b) The case in support of the complaint at conciliation shall be presented either by private counsel retained by complainant or by counsel for the Commission. A complainant may not proceed *pro se* at conciliation. A complainant's failure to retain counsel or cooperate with Commission Counsel shall be grounds for closing the matter.
 - (c) At least ten days prior to the conciliation, counsel for complainant or Commission Counsel shall send a written settlement proposal to respondent.
 - (d) At least five days prior to the conciliation, the parties shall hold preliminary settlement discussions for the purpose of making a good faith effort to resolve the complaint.
- (3) Continuances. Continuances shall not be granted except upon written motion filed in accordance with 804 CMR 1.13 demonstrating good cause.
- (4) Consequences for Failing to Attend Conciliation. Failure to attend conciliation may result in the imposition of sanctions for costs incurred by the Commission or the opposing party. A respondent's failure to attend may result in the immediate certification to public hearing pursuant to 804 CMR 1.11, and complainant's failure to attend may result in the administrative closure of the complaint pursuant to 804 CMR 1.08(1)(d).
- (5) Provisions Sought for the Public Interest. The provisions which may be sought for the vindication of the public interest, include:
 - (a) Elimination of the discriminatory practice;
 - (b) Prevention of future discriminatory practices;
 - (c) Remedial affirmative activities to overcome discriminatory practices;
 - (d) Apologies;
 - (e) Reporting requirements;
 - (f) Monitoring and enforcement activities;
 - (g) Consent orders or decrees; and

- (h) Educational and training efforts.
- (6) Relief Sought for Aggrieved Persons. The relief sought for aggrieved persons in conciliation may include:
- (a) Monetary relief in the form of compensatory damages for back pay, front pay, and emotional distress, and attorney fees and costs;
 - (b) Equitable relief including, but not limited to, reinstatement to employment, promotion, letters of recommendation or reference, access to the dwelling at issue (or to a comparable dwelling), the provision of services or facilities, an apology and a promise to refrain from engaging in the same or similar discriminatory conduct, reasonable accommodation, or other specific relief; and
 - (c) Injunctive relief appropriate to the elimination of discriminatory practices effecting the aggrieved person or persons.
- (7) Termination of Conciliation Efforts. The Commission may terminate its efforts to conciliate a complaint if the respondent fails or refuses to confer with the Commission; the complainant or the respondent fail to make a good faith effort to resolve any dispute; or the Commission finds, for any reason, that voluntary agreement is not likely to result.
- (8) Information Obtained During Conciliation. Nothing that is said or done in the course of conciliation can be used as evidence in a subsequent public hearing held pursuant to 804 CMR 1.12 or in civil actions under M.G.L. c. 151B, § 9.
- (9) Review of Compliance with Conciliation Agreements. The Commission, through its individual Commissioners, from time to time, may review compliance with the terms of any conciliation agreement. Whenever the Commission has reasonable cause to believe that a respondent has breached a conciliation agreement, the General Counsel may take appropriate action, including reopening of the matter before the Commission, and the filing of a civil action for enforcement of the terms of the conciliation agreement and seeking appropriate sanctions under M.G.L. c. 151B, § 8.
- (10) Conciliation Agreement. A conciliation agreement shall be an agreement between the respondent and the complainant and shall be subject to the approval of the Commission. It may include any or all remedies available under 801 CMR 1.00. Such agreement shall be in writing, shall set forth the terms of the agreement, and shall be signed by the parties. In accordance with M.G.L. c. 151B, §5, the Commission may make public the terms of conciliation when the complaint has been so disposed of.
- (11) Failure to Accept Reasonable Settlement Offer. When a formal offer of settlement by a respondent is acceptable to the Commission but not to the complainant, the Commission may close the complaint and, if timely, the complainant may proceed in the appropriate court of competent jurisdiction under M.G.L. c. 151B, § 9. In making this determination, offers of settlement by a respondent shall be reviewed by the Investigating Commissioner to determine whether the public interest would be served by the continuation of the proceedings. The Investigating Commissioner may consider the following non-exhaustive criteria in making this determination:
- (a) Probability of success after public hearing;
 - (b) Reasonableness of offer;
 - (c) Reasonableness of complainant's refusal, if any;

- (d) The amount of the complainant's economic loss, and respondent's degree of responsibility thereof;
- (e) Evidence of any emotional distress suffered by the complainant, and respondent's degree of responsibility;
- (f) The egregiousness of the discrimination charged; and
- (g) Whether the time for filing a civil action, under M.G.L. c. 151B, § 9, has elapsed.

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1.10: Discovery

- (1) When allowed. Discovery may only be conducted pursuant to a discovery order from the Commission. Discovery orders may issue pre-determination pursuant to 804 CMR 1.05(13), and discovery orders may issue post-determination if a matter does not resolve at conciliation conducted pursuant to 804 CMR 1.09.
- (2) Contents of Discovery Order. A discovery order shall set forth the time period in which all discovery shall be served. Permitted discovery may include, but is not limited to, interrogatories to parties, requests for the production of documents, papers and other tangible things, depositions, subpoenas, requests for site examination, and requests for admissions.
- (3) Scope of Discovery. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter in the complaint, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not grounds for objection that the information sought shall be inadmissible at a public hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.
- (4) Interrogatories.
 - (a) No party shall serve upon any other party as of right more than 30 interrogatories, including interrogatories subsidiary or incidental to, or dependent upon, other interrogatories, however grouped or combined; but the interrogatories may be served in two or more sets, as long as the total number of interrogatories served does not exceed 30. All interrogatories shall be numbered consecutively.
 - (b) Each interrogatory shall be answered separately and fully in writing under the pains and penalties of perjury, unless it is specifically objected to, in which event the reasons for objection shall be stated in lieu of the answer; each answer or objection shall be preceded by the interrogatory to which it responds.
 - (c) The answers are to be signed by the person making them, the objections by the person or attorney making them.
 - (d) The party upon whom the interrogatories have been served shall serve answers and objections, if any, within 45 days after the service of the interrogatories.
- (5) Requests for Production or Inspection of Documents, Papers and Other Tangible Things. The party upon whom the request is served shall serve a written response within 30 days after the service of the request. The response shall state, with respect to each item or category, that inspection and related activities shall be permitted as requested, unless the request is objected to, in which event the reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be specified.
- (6) Depositions.

- (a) A party desiring to take the deposition of any person upon oral examination shall include in the notice the time and place for taking the deposition, the name and address of each person to be examined and the manner in which the deposition shall be recorded.
 - (b) The notice of deposition shall be served at least 14 days prior to the date of the deposition, and the parties shall receive the same notice for third party depositions.
 - (c) The parties shall be given 14 days' notice, and an opportunity to quash, prior to the service of a third-party subpoena.
 - (d) A party may name as a deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. The named organization shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which they shall testify. The persons so designated shall testify as to matters known or reasonably available to the organization. If the corporation, partnership or association does business in Massachusetts, it must produce its designee(s) for deposition in Massachusetts.
 - (e) If a subpoena *duces tecum* is to be served on a person to be examined, the designation of the material to be produced as set forth in the subpoena, shall be attached to the notice.
 - (f) The party requesting a deposition shall make all necessary arrangements for the taking and recording of depositions, including the cost thereof.
 - (g) The testimony at a deposition may be recorded by other than stenographic means. The party conducting the deposition shall ensure that the recorded testimony is accurate and trustworthy.
 - (h) All objections made at the time of the deposition shall be noted by the person taking the deposition. Evidence objected to shall be taken subject to the objection. Counsel for a witness or a party may not instruct a deponent not to answer except where necessary to assert or preserve a privilege or protection against disclosure, to enforce a limitation on evidence directed by the Commission or stipulated in writing by the parties, or to suspend the deposition for the purpose of bringing a motion to terminate or limit the examination where it is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party.
 - (i) Subject to valid objections to admissibility, depositions or any part thereof may be used for any purpose with respect to witnesses who are unavailable at the hearing or to contradict or impeach the credibility of witnesses who are available to testify at Public Hearing.
 - (j) The Investigating Commissioner may order the filing of any deposition transcript with the Commission.
- (7) Protective Orders. Upon motion by a party or by a person from whom discovery is sought, and for good cause shown, the Commission may issue a protective order limiting discovery as justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense. If the motion for a protective order is denied, the Commission may order that any party shall comply with the discovery requests.
- (8) Failure to Comply with Discovery. A party shall not be excused from complying with discovery on the grounds that the discovery sought is objectionable unless the non-complying party has moved for a

protective order or moved to vacate or modify a subpoena. Failure to comply with discovery may result in any of the following orders from the Commission upon motion from a party:

- (a) An order to comply with discovery containing consequences for further non-compliance;
 - (b) An order that matters upon which discovery is sought or any other designated facts shall be taken to be established for the purpose of supporting a claim or defense of the party seeking discovery;
 - (c) An order refusing to allow the non-complying party to support or oppose designated claims or defenses, or prohibiting them from introducing designated matters in evidence;
 - (d) An order dismissing the action or rendering a judgment by default;
 - (e) In lieu of any of the foregoing orders or in addition thereto, an order requiring the non-complying party or the attorney advising the non-complying party or both to pay monetary sanctions and reasonable expenses, including attorney fees and Commission expenses caused by the non-compliance.
- (9) Stipulations Regarding Discovery Procedure. Unless the Commission orders otherwise, after the issuance of a discovery order pursuant to 804 CMR 1.10(1), the parties may by written stipulation and agreement modify the procedures provided by 804 CMR 1.10.

1.11: Certification of Issues to Public Hearing

- (1) Certification. When the Investigating Commissioner determines that the public interest requires a certification of issues to public hearing, the Investigating Commissioner shall issue a certification order in the name of the Commission pursuant to M.G.L. c. 151B, §5
- (2) Certification Process. The Investigating Commissioner may issue a certification order *sua sponte* or upon notification that discovery is complete, or, if circumstances so warrant, the Investigating Commissioner may schedule a conference pursuant to 804 CMR 1.11(3) prior to issuance of such order to determine which issues, if any, shall be certified to public hearing.
- (3) Certification Conference. The Investigating Commissioner shall serve notice of the certification conference upon all parties and counsel of record. The Investigating Commissioner may issue an order requiring written submissions by the parties in advance of the certification conference, and failure to provide all written submissions as ordered shall be cause for sanctions. The written submissions shall contain the following:
 - (a) List of proposed issues to be certified to public hearing;
 - (b) Affirmative defenses;
 - (c) Parties, including definition of proposed classes;
 - (d) Pending motions (e.g. discovery issues, motions for certification, motions for reconsideration of probable cause);
 - (e) All relief sought, including any equitable relief and description of the bases on which damages are calculated;
 - (f) Settlement efforts; and
 - (g) Any other matter which in the judgment of the Investigating Commissioner is likely to expedite the preparation and presentation of the case.
- (4) Certification Order. The certification order shall be in writing, served upon all parties and counsel of record and may provide the following:
 - (a) Certification of issues to be considered at a public hearing before a Hearing Commissioner or Hearing Officer;
 - (b) Certification of one or more questions of law to the Full Commission; and
 - (c) Address any other matters the Investigating Commissioner deems appropriate in the public interest, including a denial of certification and reversal of the probable cause determination.

1.12: Public Hearings

- (1) Who May Adjudicate. The public hearing shall be governed by M.G.L. 151B, § 5 and 804 CMR 1.12, and may be conducted by any of the following persons:
 - (a) a Commissioner other than the Investigating Commissioner designated by the Chairperson; or
 - (b) a person found to be qualified by the Commission as a Hearing Officer.

- (2) Substitution of Hearing Commissioner or Hearing Officer.

In the event of the unavailability of the Hearing Commissioner or Hearing Officer to issue a written decision pursuant to 804 CMR 1.12(19) the Chairperson shall assign another Commissioner or Hearing Officer to hear any remaining evidence and to review the record including the hearing transcript, resulting in one of the following outcomes:

- (a) In the event the resolution of disputed issues of material fact rests on findings of witness credibility, and a decision cannot be rendered without such findings, the case shall be reassigned for a new hearing. Prior to scheduling a new hearing, the Commission shall hold a status conference with the parties and make good faith efforts at resolving the matter.
 - (b) In cases where the decision does not rest on credibility findings a substitute Commissioner or Hearing Officer may render the decision. The parties may make written requests for proposed findings of fact, conclusions of law and an order, prior to issuance of a final decision and shall be afforded a reasonable opportunity to file objections thereto.
- (3) Waiver Required. M.G.L. c. 151B, § 9 makes available to the complainant a trial in court as an alternative to public hearing before the Commission. Accordingly, the complainant shall waive the right to remove the complaint prior to the commencement of the public hearing.
- (4) Conduct. All parties, witnesses, counsel and others present at a public hearing shall conduct themselves in a manner consistent with the standards of decorum commonly observed in the courts of the Commonwealth. Where such standards are not observed, the Commission may take such action as it deems appropriate, including assessing monetary sanctions against a non-complying person and adjourning the proceedings.
- (5) Request for Clarification. The Hearing Commissioner or Hearing Officer, upon written request of a party or *sua sponte*, may seek clarification of the complaint and certification order. In the event there remains a dispute about which issues are certified to hearing, the Hearing Commissioner or Hearing Officer may proceed to hear evidence on any and all claims presented and may amend the complaint to conform to the evidence as established at the hearing.
- (6) Continuance. Any party requesting a continuance shall make such request in writing to the Hearing Commissioner or Hearing Officer by motion pursuant to 804 CMR 1.13. Continuances shall be granted only upon a showing of changed circumstances or good cause. In any instance in which a continuance results in fees or costs to the Commission or another party, the party requesting the continuance may be required by the Commission to incur such costs.

- (7) Settlement After Commencement of Public Hearing. If after the commencement of a public hearing the matter in dispute before the Commission is settled between the parties and the settlement is acceptable to the Commission, the Hearing Commissioner or the Hearing Officer shall dismiss the matter.
- (8) Ex parte Communications. In any proceeding held pursuant to 804 CMR 1.12 or in any appeal therefrom, neither a party nor a party's authorized representative shall communicate *ex parte* with the Hearing Commissioner or Hearing Officer for any reason on any matter related to the proceeding prior to the issuance of a hearing decision.
- (9) Protective Orders. A party may move for a protective order to prevent the public disclosure of information at public hearing or within the record of public hearing for good cause shown, and the Hearing Commissioner or Hearing Officer may allow such motion if it is in the public interest. A protective order may provide for the exclusion, limitation, redacting or impounding of documentary or testimonial evidence at public hearing or within the public hearing record.
- (10) Public Hearing Default Rules.
- (a) Entry of Default. Whenever any party duly notified of the time and place of a public hearing fails to appear at the hearing either in person or by appearance of counsel, the Hearing Commissioner or Hearing Officer shall enter the party's default on the record. Written notice of the entry of default and of the consequences shall be served upon the defaulting party within ten days of the entry of the default.
 - (b) Consequences of Default. If the party in default is the complainant, the Hearing Commissioner or Hearing Officer shall dismiss the complaint, for which there shall be no remedy other than a petition for removal of default. If the party in default is the respondent, the Hearing Commissioner or Hearing Officer shall conduct a default hearing on the date scheduled for the public hearing.
 - (c) Default Hearing. At a default hearing, the Hearing Commissioner or Hearing Officer shall receive any relevant evidence proffered by the complainant and shall determine the amount of any damages or other relief to be ordered. After the default hearing, the Hearing Commissioner or Hearing Officer shall enter a final decision and order.
 - (d) Removal of Default. Within ten days of receipt of the notice of entry of the default, the party in default may petition the Hearing Commissioner or Hearing Officer to vacate the entry of default, remove the consequences of the default and reopen the case for good cause shown. The assertion of good cause of the party in default shall be in affidavit form under the pains and penalties of perjury. In any instance in which a case is reopened after entry of default, the party in default may be ordered to bear the reasonable costs incurred as a result of the default.
- (11) Transcript and Record. The record shall consist of either an electronic recording or a transcript of the hearing, as well as the exhibits in evidence including, if submitted, the certification to public hearing, complaint, stipulations, motions and the dispositions thereof. Testimony offered at a public hearing shall be either transcribed by stenographer retained by a party or parties or electronically recorded by the Commission, subject to the following provisions:

- (a) If a party arranges to have a stenographer present at the public hearing, the Commission and the parties shall agree that the stenographic record shall be the official record of the proceedings and that the Commission shall not create an electronic recording.
 - (b) The party arranging for the stenographer shall furnish the Commission with a certified copy of the transcript within 10 days of receipt of the transcript from the stenographer.
 - (c) In the case of an electronically recorded hearing, a party desiring a copy of the recording shall make a request in writing to the Clerk of the Commission and agree to pay the cost thereof.
 - (d) Any transcription of the electronic record made by a party subsequent to the hearing shall be filed with the Commission and may be cited if the Commission and all parties agree to accept the transcription as the official record. A party waives any objection to the accuracy of such transcript if not made within 20 days of its filing with the Commission.
- (12) Stipulations. Written stipulations may be introduced in evidence, if signed by the persons sought to be bound thereby, or by their authorized representatives. Oral stipulations may be made on the record during the course of a public hearing.
- (13) Evidence. The Commission shall not be bound by the rules of evidence observed by courts except for the rules of privilege. The Commission may permit the admission of records, reports, statements or data compilations of public agencies setting forth factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information indicate lack of trustworthiness. Evidence unrelated to the issues certified to public hearing may be deemed irrelevant or not probative of the issues to be decided and, therefore, inadmissible.
- (14) Administrative Notice. The Hearing Commissioner or Hearing Officer may take administrative notice of matters as might be judicially noticed by the courts of the United States or of the Commonwealth, and of technical or general facts within its specialized areas of knowledge.
- (15) Oral Argument. The Hearing Commissioner or Hearing Officer may allow a reasonable time to the parties for oral argument.
- (16) Briefs and Proposed Findings of Fact. Briefs and proposed findings of fact may be filed by parties or by any interested person before or during the course of a hearing, or within such time thereafter as the Hearing Commissioner or Hearing Officer may designate. Any brief or proposed findings of fact shall be submitted in paper and electronic form unless otherwise ordered by the Hearing Commissioner or Hearing Officer.
- (17) Other Submissions. The Hearing Commissioner or Hearing Officer may allow the parties, after a showing of good cause, to file additional evidentiary documents or exhibits within a reasonable time subsequent to the completion of the hearing. If a request for such filing is granted, on or before the date set for filing, the requesting party shall send copies of all documents or exhibits to all other parties. If providing copies is impracticable, the Hearing Commissioner or Hearing Officer may, in the alternative, allow reasonable inspection of the original by all parties. The Hearing Commissioner or Hearing Officer may also require that the parties file additional evidentiary documents or exhibits, including stipulations concerning damages, subsequent to the completion of the hearing.
- (18) Finding and Order. The Hearing Commissioner or Hearing Officer shall issue a decision in writing which shall contain all findings of fact and conclusions of law necessary to address each and every issue certified to public hearing or addressed at the public hearing. The parties shall be notified in

writing of their rights to appeal such decision. A copy of the decision shall be served upon each party, the attorneys of record, and the Attorney General.

- (19) Request for Award of Attorneys' Fees and Costs. Where the complainant prevails at public hearing, the complainant may, within 15 days of receipt of the hearing decision, petition the Hearing Commissioner or Hearing Officer for an award of reasonable attorneys' fees and costs. Such petition shall include detailed, contemporaneous time records and a supporting affidavit. A respondent may file a written opposition within 15 days of receipt of said petition. The Hearing Commissioner or Hearing Officer shall decide the matter if there has been no appeal of the underlying hearing decision to the Full Commission pursuant to 804 CMR 1.23(1)(a). A Hearing Commissioner or Hearing Officer decision on a request for award of attorneys' fees and costs is a final decision appealable to the Full Commission pursuant to 804 CMR 1.23(1)(a) regardless of whether a party has appealed the underlying hearing decision to the Full Commission.

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1.13: Motions

- (1) Motions in General. Motions shall be made in writing, state with particularity the grounds therefor, set forth the relief sought, and include a proposed order. Motions shall contain a statement of the reasons, including supporting authorities, why the motion should be granted and may include a request for a hearing. Motions shall contain affidavits and other documents setting forth or evidencing facts on which a motion is based.
- (2) Format and Length for Motions, Oppositions, Replies and Memoranda. All motions, oppositions, replies, memoranda and other documents, except for exhibits, shall be filed on 8 ½" by 11" paper, when not filed electronically, and be typed in no less than 12-point type and double spaced, provided that the case caption, footnotes and quotations may be single spaced. The title of each document shall appear on the first page thereof. Unless leave of the Commission is provided in advance, all motions, oppositions, and memoranda shall not exceed 20 pages, and any reply or sur-reply shall not exceed ten pages.
- (3) Motions at Public Hearing. Motions made during the public hearing may be stated orally on the record. The Hearing Commissioner or Hearing Officer may require oral or written supplementation if deemed necessary.
- (4) Parties Required to Confer Prior to Filing. When the parties are represented by counsel or Commission Counsel is prosecuting the matter, prior to any motions being filed, the parties are required to confer in good faith to attempt to reach resolution of the issues raised and relief being sought. The moving party shall be responsible for arranging said conference. Conferences may be conducted by telephone or other electronic means. All motions filed shall contain a certificate affirming compliance with the requirement to confer. Motions unaccompanied by such a certificate may be denied without prejudice to renew when accompanied by the required certificate.
- (5) Procedure for Serving and Filing Motions, Oppositions and Replies.
 - (a) Original Motion. Where both parties are represented by counsel, the moving party shall first serve a copy of the motion and the other supporting documents on every other party or counsel, including Commission Counsel who has entered an appearance.
 - (b) Opposition to Motions. A party opposing a motion may serve the moving party with a memorandum in opposition within 14 days of service of the motion. The memorandum in opposition shall include a statement, with any supporting authorities, why the motion should not be allowed. Affidavits and other documents setting forth or evidencing facts on which the opposition is based shall be served with the opposition. Opposing parties shall serve on the moving party an original and a copy of the opposition, and serve a copy on every other party.
 - (c) Reply and Sur-reply. Following receipt of the memorandum in opposition, the moving party may serve a reply within seven days of service, following which any opposing party may serve a sur-reply within seven days of service. Reply and sur-reply memoranda shall be limited to addressing matters raised in the opposition or the reply that were not, and could not have been, addressed previously.
 - (d) Filing of Motion Packet.

1. Upon receipt of the opposition or a sur-reply, if one is made, the moving party shall attach the original opposition and any reply and sur-reply to the original motion and shall file with the Commission the combined documents and a document listing the title of each paper in the motion packet within ten days of service of the opposition or, if a reply was served, within ten days of service deadline for sur-reply, unless the moving party has notified all parties that the motion has been withdrawn within ten days of service of the opposition or sur-reply.
2. If the moving party does not receive an opposition within three business days after expiration of the time permitted for service of an opposition, the moving party shall file the motion with the Commission and include an affidavit reciting compliance with 804 CMR 1.13(5)(a) and no receipt of a timely opposition.
3. The moving party shall give prompt notice of the filing of the motion to all other parties by serving a notice of filing accompanied by the document listing the title of each paper filed and the date the motion packet is filed with the Commission. Motions, oppositions and replies shall include the attorney's name, address, telephone number and an email address.
 - (e) Service. Motions, oppositions and replies may be served electronically, by U.S. mail or via personal service. If a motion, opposition, reply or sur-reply is served by mail, any time period identified in 804 CMR 1.13(5) shall be increased by three days.
- (6) Sanction for Noncompliance. The Commission need not act on any motion that fails to comply with the requirements of 804 CMR 1.13.
- (7) Motion Conferences. In the event the Commission determines that a conference is necessary or shall aid in the disposition of a motion, the Commission may order the parties to appear to answer questions and present oral argument in support of their respective positions.
- (8) Certificates of Service. The final page of every document served in accordance with 803 CMR 1.13 shall contain a certificate of service noting the date of service and the manner in which service was made on every party. The statement may be in the following form:

I hereby certify that a true copy of the above document was served upon (each party appearing pro se and) the attorney of record for each (other) party (and Commission Counsel) (by hand)(by email)(by mail) on (date). (Signature).
- (9) Special Requirements/ Exceptions from Filing Requirements.
 - (a) Pro se Parties. When one or more parties is unrepresented, all parties are exempt from the motion packet requirements of 804 CMR 1.13(5) and the requirement to confer in advance of filing a motion as provided in 804 CMR 1.13(4). *Pro se* parties are encouraged to respond in writing to any motion they oppose, and shall:
 1. Serve all motions, oppositions, replies and sur-replies on opposing parties;
 2. File oppositions within 14 days of service of the original motion;
 3. Limit replies and sur-replies to matters raised in the opposition; and
 4. File replies within seven days of service of the opposition and sur-replies within seven days of service of the reply.

- (b) Pre-determination Motions. Motions seeking an order from the Investigating Commissioner prior to the issuance of an investigative disposition shall be filed with the Investigator assigned to the matter.
 - 1. Motions to amend a complaint pursuant to 804 CMR 1.04(9)(b) and motions for extensions of time pursuant to 804 CMR 1.17(2)(a) filed prior to an investigative disposition need not comply with 804 CMR 1.13(4) or (5) except such motions shall be served upon any opposing party.
 - 2. Motions for protective orders pursuant to 804 CMR 1.05(12) seeking to prevent disclosure to a party of information submitted during the investigation need not comply with 804 CMR 1.13(4) or (5) except such motions shall be served upon any opposing party.
 - 3. Generally, investigation of a complaint shall not be not stayed pending the ruling on a motion. However, where the Commission's jurisdiction or authority to proceed is challenged by a motion filed with the Commission, the Investigating Commissioner may stay investigation of the merits of the charge pending a ruling on the motion.
- (c) Post-determination, Pre-Certification Motions. Motions to the Investigating Commissioner filed after an investigative disposition has issued but prior to the certification to public hearing, shall be filed with the Clerk of the Commission in Boston.
- (d) Post-Certification Motions. Motions seeking an order from the Hearing Commissioner or Hearing Officer following certification to public hearing shall be filed with the Clerk of the Commission in Boston.

(10) Appeal of Order Granting or Denying a Motion.

- (a) Appeal to Full Commission. The Full Commission may entertain an interlocutory appeal of a ruling by the Hearing Commissioner or Hearing Officer if such appeal is related to the jurisdiction of the Commission or its authority to proceed on a matter. Prior to the issuance of a hearing decision, an appeal to the Full Commission is not available for any other rulings by the Hearing Commissioner or Hearing Officer or for any rulings made by the Investigating Commissioner. Requests for relief addressed to the Full Commission shall be filed with the Clerk of the Commission in Boston. An order of the Full Commission issued in accordance with 804 CMR 1.13(11)(a) is not a final order of the Commission and is not subject to judicial review pursuant to M.G.L. c. 151B, § 6 or M.G.L. c. 30A.
- (b) Motion for Reconsideration of an Order by a Hearing Commissioner or Hearing Officer. In the absence of new evidence proffered, motions for reconsideration by a Hearing Commissioner or Hearing Officer of an order shall be denied.

(11) Emergency Motions.

- (a) Motions for emergency relief shall contain a cover page bearing the heading "Emergency Motion" in large, bold type. Such motions shall be filed with the Investigator prior to issuance of an investigative disposition, and with the Clerk of the Commission thereafter.
- (b) Motions for emergency relief shall set forth the facts showing the existence and nature of immediate and irreparable harm.

- (c) The moving party shall serve a copy of the motion seeking emergency relief on all other parties, counsel and Commission Counsel, simultaneous with the filing at the Commission. Such motions are exempt from 804 CMR 1.13(5).
- (d) Emergency motions are exempt from 804 CMR 1.13(4) although the Commission encourages all counsel of record to confer in good faith prior to filing any such motion in order to narrow or obtain agreement upon the relief sought.

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1.14: Subpoenas

- (1) General Provisions. Subpoenas shall be issued in the name of the Commission and in accordance with M.G.L. c. 151B, §3 and M.G.L. c. 30A, §12, subject to the following provisions:
 - (a) Subpoenas may require the attendance and testimony of witnesses and the production, copying, and photographing of any evidence, including, but not limited to, books, records, correspondence documents or electronically stored information.
 - (b) A subpoena may be served by any person who is not a party and who is 18 years of age or older.
 - (c) Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person, or by exhibiting it and reading it to him, or by leaving a copy at his place of abode.
 - (d) When a subpoena is issued at the request of a party other than the Commission, the cost of the service as well as witness and mileage fees shall be those as in civil cases before the courts and shall be borne by the moving party.
 - (e) Upon a showing of economic hardship and in the interest of justice a party may move that a subpoena be issued by the Commission. Any such motion is exempt from 804 CMR 1.13(4) and (5) although it shall be served on counsel for all other parties to the proceeding before the Commission, including but not limited to Commission Counsel.
 - (f) Any party issuing a subpoena to a nonparty shall give 14 days' notice to the Commission and all parties prior to service.
- (2) Prior to Certification to Public Hearing. The Investigating Commissioner or a designee may issue subpoenas relating to any matter under investigation or in question before them. Any party may move for the issuance of a subpoena from the Investigating Commissioner by serving notice upon all other parties. The Investigating Commissioner may, through a discovery order, delegate the authority to issue subpoenas to counsel for the parties.
- (3) Following Certification to Public Hearing. Following certification to public hearing, counsel for any party may issue subpoenas compelling the attendance and testimony of witnesses and the production of documents at public hearing. The subpoena shall identify the name and address of the party at whose request the subpoena was issued.
- (4) Vacation or Modification of Subpoenas. Any non-party subject to subpoena, counsel for any party to the proceeding, or Commission Counsel may move to vacate or modify a subpoena in accordance with 804 CMR 1.13, except that non-parties are exempt from 804 CMR 1.13(5). The Investigating Commissioner or, in the event the complaint has been certified to public hearing, the Hearing Commissioner or Hearing Officer, shall review the subpoena to determine whether it should be vacated or otherwise modified and issue a decision forthwith.
- (5) Enforcement of Subpoenas. Upon the failure of any person to comply with a subpoena issued pursuant to 804 CMR 1.14 and not subsequently vacated or modified by the Commission, the General Counsel, or Commission Counsel or private counsel designated by the General Counsel, may, in the name of the Commission, apply to the Superior Court for an order requiring compliance with the subpoena pursuant to M.G.L. c. 30A, § 12(5) and M.G.L. c. 151B, § 6. Counsel may seek an order for

costs and attorney fees from the Superior Court when enforcing subpoenas pursuant to this provision, as well as appropriate sanctions under M.G.L. c. 151B, § 8.

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1.15: Parties and Counsel

- (1) **Intervention.** Any person or organization not originally a party to a complaint may move to intervene in a complaint if, in the judgment of the Commission, that person or organization has a material interest in the outcome of the complaint, and asserts a claim or defense which has common questions of law or fact with the complaint.
- (2) **Substitution, Joinder, or Amendment of Parties.** The Commission may *sua sponte*, or upon motion of any party, make such substitution, joinder, or amendment of parties as justice or convenience may require. All parties shall be notified of any amendment.
- (3) **Consolidation.** The Commission may *sua sponte*, or upon motion of a party, order complaints involving a common question of law or fact to be consolidated for investigation, conciliation or public hearing.
- (4) **Class Action.**
 - (a) The Investigating Commissioner may grant permission or *sua sponte* determine that a case shall proceed as an authorized class action at any time after a probable cause determination pursuant to 804 CMR 1.08(1)(f)(1) or (3) and prior to certification to public hearing pursuant to 804 CMR 1.11 if the following prerequisites are met:
 1. The class is so numerous that joinder of all members is impracticable;
 2. There are questions of law or fact common to the class;
 3. The claims or defenses of the representative parties are typical of the claims or defenses of the class;
 4. The representative parties shall fairly and adequately protect the interests of the class;
and
 5. The public interest is served by a class proceeding.
 - (b) The Investigating Commissioner may require such review and impose such terms as shall fairly and adequately protect the interests of the class on whose behalf the complaint is brought or defended. Whenever the representative party appears to the Investigating Commissioner inadequate to fairly protect the interests of absent individuals who may be bound by any Commission order, the Investigating Commissioner may, at any time prior to entry of the order certifying the class, amend the complaint to eliminate any reference to representation of absent persons. The Investigating Commissioner shall enter an order in such form as to affect only the parties to the action and those adequately represented.
 - (c) Respondent(s) or any person whose rights may be affected by the resolution of an authorized class action may challenge the class nature of the complaint before or within ten days' notice of certification to public hearing pursuant to 804 CMR 1.11 through a motion submitted to the Investigating Commissioner for a hearing concerning the validity of the class. The respondent or person challenging the authorized class action shall have the burden of showing by a preponderance of the evidence that the proposed class fails to satisfy the requirements of 804 CMR 1.15(4).

- (d) An authorized class action shall not be withdrawn or modified without the approval of the Investigating Commissioner.
- (5) Counsel Required Following Probable Cause. Following a probable cause determination pursuant to 804 CMR 1.08(1)(f)(1) or (3), the case in support of the complaint shall be presented before the Commission by an attorney. Such attorney may either be a Commission attorney, or, at the discretion of the Commission, an attorney retained by the complainant. The determination whether to assign Commission Counsel to a pending matter shall be made at the discretion of the General Counsel in consideration of the public interest.
- (6) Private Representation. A complainant has a right to private counsel notwithstanding the assignment of Commission Counsel to a case, although in such case Commission Counsel has exclusive authority to present the case in support of the complaint and represent the public interest.
- (7) Attorney Withdrawal.
 - (a) Prior to a probable cause determination pursuant to 804 CMR 1.08(1)(f)(1) or (3), an attorney may, without leave of the Commission, withdraw from a matter by filing a written notice of withdrawal together with proof of service on their client and all other parties.
 - (b) Following a probable cause determination pursuant to 804 CMR 1.08(1)(f)(1) or (3), an attorney may, without leave of the Commission, withdraw from a matter by filing a written notice of withdrawal which includes an appearance of successor counsel or a limited representation agreement. Absent such notice, an attorney shall obtain leave of the General Counsel to withdraw from a case. In deciding whether to allow the withdrawal of an attorney, the General Counsel's considerations may include, but are not limited to, the impact of a withdrawal on the timely, fair and efficient adjudication of the case.
 - (c) Unless there is appearance by successor counsel, every notice of withdrawal or request to withdraw filed under 804 CMR 1.15(7)(a) or (b) shall include current contact information for the party for whom representation is being withdrawn, including home and business address, email address and telephone number(s).
- (8) Enforcement by Private Counsel. The General Counsel has discretion to grant a motion by complainant's counsel to be the designated agent of the Commission for purposes of enforcement of a settlement agreement, consent order, subpoena or final order of the Commission provided that the interest of the complainant and the interest of the Commission are not in conflict. Designation of private counsel as agent of the Commission for purposes of enforcement shall be made in writing by the General Counsel.
- (9) Attorney Signature.
 - (a) Every pleading, motion or document submitted by a party represented by counsel shall be signed by at least one attorney of record, in the individual attorney's name and shall include the attorney's address, electronic mail address and Board of Bar Overseers or Bar Registration number.
 - (b) The signature of an attorney constitutes certification that the signer has read the pleading, motion, or document; that based on the signer's knowledge, information and belief, it is grounded in fact and warranted by existing law or constitutes a good faith argument for the

extension, modification, or revision of existing law; and is not interposed for any improper purpose, such as to harass or cause unnecessary delay or increase in the cost of the proceedings.

- (c) Any pleading, motion or document submitted by counsel that is unsigned shall be stricken unless it is signed promptly after the omission is brought to the attention of the attorney who submitted the document.
- (d) If a pleading, motion, or other document submitted to the Commission fails to comply with the requirements within 804 CMR 1.15(9), the Investigating Commissioner, Hearing Commissioner or Hearing Officer assigned to the case may impose sanctions upon the attorney, the represented party, or both, including an order to pay reasonable expenses and attorney's fees incurred by the opposing party or the Commission as a result of the non-compliant document.

(10) Notice of Appearance and *Pro Hac Vice* Notice. Attorneys representing clients at the Commission shall be a member in good standing of the bar of the Commonwealth of Massachusetts. If an attorney is not a member of the Massachusetts bar, in order to be admitted to represent a client *pro hac vice*, a motion for admission shall be filed in conformance with the following:

- (a) The motion shall be signed and filed by a member in good standing of the Massachusetts bar on behalf of the attorney seeking admission *pro hac vice*.
- (b) The Massachusetts attorney shall verify the bar admission status of the attorney being sponsored for admission *pro hac vice* prior to filing the motion.
- (c) The motion shall be accompanied by an affidavit stating that the out of state attorney is a member of the bar in good standing in every jurisdiction where admitted to practice; there are no disciplinary proceedings pending; and the attorney is familiar with the Commission's regulations and the Massachusetts anti-discrimination laws.

1.16: Service by the Commission

In the absence of a specific rule of service in 804 CMR 1.00, the Commission may serve any paper in a manner reasonably calculated to ensure receipt, including but not limited to service by U.S. Mail, personal service, or service via electronic mail.

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1.17: Time

(1) Computation.

- (a) In computing any period of time prescribed or allowed by 804 CMR 1.00 or by order of the Commission, the day of the act or event, including default, after which the designated period of time begins to run shall not be included.
- (b) The last day of the period being computed shall be included, unless it is a Saturday, Sunday, or a legal holiday, in which event the period runs to the end of the next day which is not a Saturday, a Sunday, or a legal holiday.
- (c) When the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays, and legal holidays shall be excluded from the computation.
- (d) A legal holiday for the purposes of 804 CMR 1.17(b) includes those days specified by M.G.L. c. 4, § 7 and any other day appointed as a holiday by the President or the Congress of the United States, or designated by the Laws of Massachusetts.

(2) Extensions.

- (a) Prior to Investigative Disposition. During any stage of the investigation, upon written request and for good cause shown, any party may request an extension of time. The request shall be addressed to the Investigator and state the extension of time being requested and the reason(s) for the extension. Pursuant to 804 CMR 1.13(9)(b)(1), extension requests are exempt from motion practice and conference requirements.
- (b) Following Investigative Disposition. After an investigative disposition has issued, any request for an extension shall be made to the Clerk of the Commission in Boston and shall be subject to motion practice and other requirements within 804 CMR 1.13.

1.18: Proceedings on Commission Initiated Complaints

(1) General Provisions.

- (a) All complaints initiated by the Commission pursuant to M.G.L. c. 151B, § 5 and 804 CMR 1.04(e) shall be processed under 804 CMR 1.18, unless otherwise ordered by the Commission.
- (b) Such matters shall be investigated, heard and determined by the Commission as expeditiously as possible.
- (c) Upon a Commission initiated complaint, the procedures of 804 CMR 1.00 shall be suspended, with the exception of proceedings pursuant to 804 CMR 1.23, 804 CMR 1.24 and 804 CMR 1.25.

(2) Service and Investigation.

- (a) The Commission shall serve a Commission initiated complaint on each of the parties via personal service. Such service shall include a notice requiring each respondent to file a position statement as described in 804 1.05(8) within 21 days of service.
- (b) The Commission may serve subpoenas via personal service as it deems necessary to investigate the matter.
- (c) The Commission shall, within 30 calendar days of service of the Commission initiated complaint, convene an investigative conference, as described in 804 CMR 1.05(10), except that the Commission may provide less than 14 days' notice of the conference. Notice of the date, time, and place of the conference shall be served upon the parties. The investigative conference shall result in one of the following outcomes:
 - 1. The Investigating Commissioner may determine that a lack of probable cause exists for crediting the allegations of the complaint, and shall notify the parties of such determination. Such determination shall be the final order of the Investigating Commissioner, and is not subject to preliminary hearing pursuant to 804 CMR 1.08(3)(b) or Full Commission or judicial review pursuant to M.G.L. c. 151B, §6 or M.G.L. c. 30A.
 - 2. The Investigating Commissioner may determine that probable cause exists for crediting the allegations of the complaint, in which case the Investigating Commissioner shall immediately endeavor to eliminate the unlawful practice complained of by conference, conciliation and persuasion.
 - (A) If the Investigating Commissioner finds probable cause to credit the allegations of any housing complaint, including those dual filed with HUD , the Investigating Commissioner shall immediately serve notice upon the respondent of the right to elect judicial determination of the complaint.

(3) Certification to Public Hearing.

- (a) The Investigating Commissioner may certify the issues for public hearing if the matter is not settled through conciliation. In any matter certified for public hearing the Commission may seek all remedies available pursuant to M.G.L. c. 151B.

(b) The Investigating Commissioner shall serve a written notice requiring respondent to answer the charges of the complaint at a public hearing before the Commission, at a time and place to be specified in the notice. Requests to continue shall be granted only upon a showing of good cause.

(4) Public Hearing.

(a) The public hearing should, if at all practicable, occur within 60 days of the investigative conference described in 804 CMR 1.18(2)(c).

(b) The case in support of the complaint shall be presented before the Commission by the General Counsel or a designee.

(c) The respondent shall appear at the public hearing in person, with or without an attorney, and may submit evidence to rebut the charges in the complaint.

(d) Public hearings shall be heard by a Hearing Commissioner or Hearing Officer, who shall not be the Commissioner who previously investigated the matter and issued the complaint.

(5) Hearing Decision. The Commission, should, if at all practicable, issue a final order within 60 days from the conclusion of a public hearing pursuant to 804 CMR 1.18(4).

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1.19. Emergency Proceedings

(1) General Provisions.

- (a) The Investigating Commissioner may upon motion demonstrating necessity, or *sua sponte*, order that any matter under his or her jurisdiction be processed as an emergency proceeding. The Commission may seek all remedies available pursuant to M.G.L. c. 151B.
- (b) Such matters shall be investigated, heard and determined by the Commission as expeditiously as possible.
- (c) Upon an order that a matter be set for emergency proceedings, the procedures of 804 CMR 1.00 shall be suspended, with the exception of 804 CMR 1.23, 804 CMR 1.24 and 804 CMR 1.25.

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1.20: Language Assistance Services

- (1) Basis for Services. Parties who require language assistance services to ensure meaningful access to, participation in and understanding of Commission proceedings, programs or services, shall be provided such services.
- (2) Request Required. Language and interpreter assistance services may be provided if the individual in need or his or her representative makes a written or verbal request for such services in advance of the proceeding, or if the Commission determines there is a need for said services. The Commission retains discretion to determine when such services are needed and shall make the determination as to when such services are needed.
- (3) Type of Services. The services to be provided, whether telephonic interpretation, professional interpretation services, or interpretation by a competent bilingual staff member or other bilingual individual, or other language assistance service, shall be determined by the Commission.
- (4) Adequate Notice Required. Parties requiring language assistance services shall make every effort to give adequate notice to the Commission of the need for such services. If the Commission determines that such services are required and inadequate notice has been provided to secure such services, a proceeding may be continued until such time as the services may be secured.
- (5) Sanctions. The Commission may impose sanctions against a party who has requested language assistance services and fails to cooperate or appear for a scheduled proceeding when those services have been procured.
- (6) Request for a Specific Interpreter. Whether to allow a party's request for interpretation services from a particular individual is entirely within the discretion of the Commission.

1.21: Access to Commission Materials and Restrictions to Personal Data

- (1) Case Information Available to the Public. The complaint and the investigative file in every charge under investigation shall be confidential and exempt from public disclosure pursuant to M.G.L. c.151B §5 and M.G.L. c. 4 §7 cl. 26(f). Post-determination, the complaint, the investigative disposition and the official record following issuance of the hearing decision shall be available to the public, subject to 804 CMR 1.21(3).
- (2) Additional Case Information Available to the Parties. Upon request to the Records Access Officer post-determination, the parties to a complaint shall be allowed access to the investigative file except that all records described in 804 CMR 1.21(3) shall be unavailable.
- (3) Unavailable Information. Privileged information, attorney work product, information exempt from disclosure pursuant to the public records law or other laws, information withheld or redacted pursuant to 804 CMR 1.21(4), and information placed under a pseudonym or protective order by the Commission pursuant to 804 CMR 1.04(7), 804 CMR 1.05(12) or 804 CMR 1.12(9) is not available to the public or to the parties.
- (4) Restrictions on Personal Data Identifiers in Filings. To protect personal privacy, parties and counsel shall refrain from including, or shall partially redact where inclusion is necessary, the following personal data identifiers from all filings and exhibits submitted to the Commission, whether filed electronically or in paper, unless otherwise ordered by the Commission:
 - (a) Social Security, taxpayer identification, driver's license, state-issued identification card or passport numbers. If any such individual numbers shall be included in a filing, only the last four digits of that number should be used.
 - (b) Names of minor children. If the involvement of a minor child shall be included in a filing, only the initials of that child should be used.
 - (c) Dates of birth. If an individual's date of birth shall be included in a filing, only the year should be used.
 - (d) Financial account, credit or debit card numbers. If any such financial account numbers shall be included in a filing, only the last four digits of these numbers should be used.
 - (e) Medical record numbers. If any such medical record numbers shall be included in a filing, only the last four digits of these numbers should be used.
 - (f) Mother's maiden name. If a person's mother's maiden name is identified as such, only the first initial of the maiden name shall be used.
- (5) Responsibility for Redaction and Availability of Original. The responsibility for redacting personal data identifiers rests solely with parties and counsel. The Commission shall not review each filing for compliance with 804 CMR 1.21(4). The parties and counsel shall keep a complete copy of any document redacted containing the complete personal data identifier and shall furnish it to the Commission promptly upon request by the Commission to produce an un-redacted version of the document.

1.22: Remedies and Sanctions

- (1) Scope. The Commission shall issue such orders and fashion such relief as shall effectuate the purposes of the statutes enforced by the Commission.
- (2) Applicability to Class Actions. In any case brought as a class action, the Commission may, when appropriate, order that all remedies shall apply to member(s) of the class.
- (3) Failure to comply. Failure by any participant in Commission investigations and proceedings to comply with Commission orders, requirements or procedures may result in the imposition of sanctions against a participant or counsel, including without limitation the award of attorneys' fees and costs to other parties or the Commission.
- (4) Assessment of Reasonable Attorneys' Fees and Costs. Attorneys' fees and costs may be assessed by the Commission with respect to investigative default, the issuance and service of subpoenas, discovery, continuances, settlement after commencement of public hearing, and public hearing default.

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1.23: Full Commission Review

(1) Review of Decision of a Hearing Commissioner or Hearing Officer.

- (a) Time Period for Request. Any party aggrieved by a final decision of a Hearing Commissioner or Hearing Officer may, within ten days of receipt of the decision, file a notice of appeal with the Commission.
- (b) Petition for Review. Within thirty days of receipt of the decision, the appellant shall file with the Commission a petition for review setting forth:
 1. A statement of the issues presented for review;
 2. A succinct statement of facts relevant to the issue(s) presented for review with appropriate citation references to the record upon which the appellant relies to support the appeal;
 3. Any findings of fact which the appellant claims are not supported by substantial evidence and unwarranted by the facts in the record;
 4. Any alleged error of law, including citations to the authorities, statutes and parts of the record relied on;
 5. All other matters on which the appellant relies to support the appeal; and
 6. The relief to which the appellant claims they are entitled, which relief may be requested in the alternative.
- (c) Service. The party filing a notice of appeal or petition for review of a decision of the Hearing Commissioner or Hearing Officer shall serve a copy of the notice and petition upon all parties to the proceeding.

(2) Intervention in the Review.

- (a) Any party to the proceeding before the Hearing Commissioner or Hearing Officer shall have the right to intervene in the review proceeding by filing a notice of intervention stating the party's interest and the position taken with respect to the decision under appeal.
- (b) The Commission may in its discretion permit other interested persons to intervene in the review proceeding, if such persons are substantially and specifically affected by the proceedings.
- (c) The notice of intervention shall be filed within ten days of receipt of the petition for review and shall be served on all parties by the intervener.
- (d) An intervener may file a brief in reply to the petition for review addressing the appellant's arguments within thirty days of receipt of the petition for review, which shall be served on all parties by the intervener.

(3) Form of Petition for Review and Intervener's Brief. Except by permission of the Commission, a petition for review and any intervener's brief shall not exceed 30 pages. The text shall be double spaced, and typeface shall be of 12 point or larger size and not exceed 10.5 characters per inch. The margins shall be at least one inch.

- (4) Citation of Supplemental Authorities. When pertinent and significant authorities come to the attention of a party after the petition for review or intervener's brief has been filed, a party may promptly advise the Commission, by letter, with a copy to all parties, setting forth the citations.
- (5) Stay of Order. The filing of a petition for review of the decision of the Hearing Commissioner or Hearing Officer shall operate as a stay of execution of the Order of the Hearing Commissioner or Hearing Officer, unless ordered otherwise by the Commission.
- (6) Full Commission Members. The Investigating Commissioner shall not participate in the deliberations of the Commission except when necessary to create a quorum of the Commission. The Hearing Commissioner shall participate in the review of their decision unless such participation is impracticable.
- (7) Oral Argument. The Commission may, in its discretion, order oral argument on a petition for review.
- (8) Record of Review. The petition for review shall be confined to the record presented at the public hearing.
- (9) Additional Evidence. If application is made to the Commission for leave to present additional evidence, and it is shown to the satisfaction of the Commission that the additional evidence is material to the issues in the case, and that there was good reason for failure to present it in the proceeding before the Hearing Commissioner or Hearing Officer, the Commission may order that the additional evidence be taken before the Hearing Commissioner or Hearing Officer upon such conditions as the Commission deems proper.
- (10) Full Commission Decision. After review of the decision of the Hearing Commissioner or Hearing Officer, the Commission may affirm the decision, or remand the matter for further proceedings before the Hearing Commissioner or Hearing Officer; or set aside or modify the decision, if it determines that the substantial rights of any party may have been prejudiced because the decision is:
 - (a) In violation of constitutional provisions; or
 - (b) In excess of the statutory authority or jurisdiction of the Commission; or
 - (c) Based on an error of law; or
 - (d) Made on unlawful procedure; or
 - (e) Unsupported by substantial evidence; or
 - (f) Arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with law or the order of the Investigating Commissioner certifying the issues to public hearing.
- (11) Commission Initiated Review of Hearing Decisions. The Full Commission may review the final decision of a Hearing Commissioner or Hearing Officer *sua sponte*. In addition, the Investigating Commissioner, on the advice of the General Counsel, may request the Full Commission to review a hearing decision. In such event, the Commission may order oral argument, or order the parties or the General Counsel to submit memoranda of law or fact.
- (12) Request for Award of Attorneys' Fees and Costs After Issuance of Full Commission Decision. Where the complainant prevails in an appeal to the Full Commission, the complainant may, within 15 days of receipt of the Full Commission decision issued pursuant to 804 CMR 1.23(10) or (11), petition for an award of reasonable attorneys' fees and costs subject to the following provisions:

- (a) The petition shall include detailed, contemporaneous time records and a supporting affidavit;
- (b) If complainant is the appellant, the petition may contain a request for fees and costs incurred prior to the appeal as well as those incurred as a result of litigating the appeal;
- (c) If complainant is the appellee, the petition may contain only a request for supplemental fees and costs incurred as a result of litigating the appeal, as the costs incurred in prior proceedings before the Commission shall have been requested in accordance with 804 CMR 1.12(20);
- (d) A respondent may file an opposition within 15 days of receipt of said petition; and
- (e) The decision by the Full Commission on the petition for the award of attorney's fees and costs, together with the Full Commission decision issued pursuant to 804 CMR 1.23(10) or (11), shall constitute the final order of the Commission for the purpose of judicial review pursuant to M.G.L. c. 151B, §6 and M.G.L. c. 30A.

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1.24: Judicial Review

- (1) Definition of Final Commission Order. For the purpose of judicial review pursuant to M.G.L. c. 151B, §6 and M.G.L. c. 30A, only the decision of the Full Commission pursuant to 804 CMR 1.23(10), or (12) shall constitute the final order of the Commission.
- (2) Who May Obtain Judicial Review of a Final Commission Order. Judicial review of a final Commission order may be obtained by the complainant, respondent or other person aggrieved by such order pursuant to M.G.L. c. 151B, §6.

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1.25: Judicial Enforcement

- (1) Definition of Final Commission Order. Where no party files a timely appeal to the Full Commission, the hearing decision shall constitute the final order of the Commission for the purposes of judicial enforcement. If an appeal to the Full Commission is timely filed, or the decision is reviewed *sua sponte*, the Full Commission decision shall constitute the final order of the Commission for purposes of judicial enforcement. Consent orders entered into by the Commission may constitute final orders of the Commission for the purposes of judicial enforcement.
- (2) Who May Obtain Judicial Enforcement of a Final Commission Order. A party to a consent order or a person affected by a final decision and order of the Commission may request that the Commission initiate an action for enforcement. The Commission may obtain enforcement by filing a petition in the appropriate state court pursuant to M.G.L. c. 151B, § 6. The Commission may appear in court at enforcement proceedings through one of its attorneys, or it may designate counsel for the party aggrieved by the alleged violation as agent of the Commission for the purpose of obtaining enforcement, in a writing signed by the General Counsel.
- (3) Method of Enforcement. The Commission may seek to enforce the provisions of M.G.L. c. 151B, c. 151C, or c. 272, §§ 92A, 98, or 98A, or 804 CMR 1.00 by utilization of the procedures set forth in M.G.L. c. 151B, §§ 5, 8, M.G.L. c. 214 § 3 (12) or (13) or any other lawful means as the interests of justice demand.