



FEDERAL RESERVE BANK  
OF DALLAS

January 24, 2003

DALLAS, TEXAS  
75265-5906

**Notice 03-01**

**TO:** The Chief Executive Officer of each  
financial institution and others concerned  
in the Eleventh Federal Reserve District

**SUBJECT**

**Requests for Comment Regarding Removal,  
Suspension, and Debarment of Accountants From  
Performing Audit Services**

**DETAILS**

The Board of Governors, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, and the Office of Thrift Supervision have requested comment on a proposal to revise their respective rules of practice pursuant to Section 36 of the Federal Deposit Insurance Act (FDIA) (12 U.S.C. 1831m).

Congress gave the agencies authority to remove, suspend, or debar accountants from performing the audit services required by Section 36 if there is good cause to do so. This proposal would amend the agencies' rules to establish rules of practice and procedure for the removal, suspension, and debarment of accountants and their firms from performing Section 36 audit services for insured depository institutions. The proposal reflects the agencies' increasing concern with the quality of audits and internal controls for financial reporting at insured depository institutions.

Although there have been few bank and thrift failures in recent years, the circumstances of the failures that have occurred illustrate the importance of maintaining high quality in the audits of the financial position and attestations of management assessments of insured depository institutions. The proposed regulations enhance the agencies' ability to address misconduct by accountants who perform annual audit and attestation services.

The Board must receive comments by March 10, 2003. Please address comments to Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution

Avenue, N.W., Washington, DC 20551. Also, you may mail comments electronically to [regs.comments@federalreserve.gov](mailto:regs.comments@federalreserve.gov). All comments should refer to Docket No. R-1139.

#### **ATTACHMENT**

A copy of the agencies' notice as it appears on pages 1116–30, Vol. 68, No. 5 of the *Federal Register* dated January 8, 2003, is attached.

#### **MORE INFORMATION**

For more information, please contact Gayle Teague, Banking Supervision Department, (214) 922-6151. Paper copies of this notice or previous Federal Reserve Bank notices can be printed from our web site at <http://www.dallasfed.org/banking/notices/index.html>.



# Federal Register

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Wednesday,  
January 8, 2003

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## Part III

### Department of the Treasury

Office of the Comptroller of the  
Currency

12 CFR Part 19

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### Board of Governors of the Federal Reserve System

12 CFR Part 263

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### Federal Deposit Insurance Corporation

12 CFR Part 308

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### Department of the Treasury

Office of Thrift Supervision

12 CFR Part 513

Removal, Suspension, and Debarment of  
Accountants From Performing Audit  
Services; Proposed Rule

**DEPARTMENT OF THE TREASURY****Office of the Comptroller of the Currency****12 CFR Part 19**

[Docket No. 02-15]

RIN 1557-AB43

**BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM****12 CFR Part 263**

[Docket No. R-1139]

**FEDERAL DEPOSIT INSURANCE CORPORATION****12 CFR Part 308**

RIN 3064-AC57

**DEPARTMENT OF THE TREASURY****Office of Thrift Supervision****12 CFR Part 513**

[No. 2002-58]

RIN 1550-AB53

**Removal, Suspension, and Debarment of Accountants From Performing Audit Services**

**AGENCIES:** Office of the Comptroller of the Currency (OCC), Treasury; Board of Governors of the Federal Reserve System (Board); Federal Deposit Insurance Corporation (FDIC); and Office of Thrift Supervision (OTS), Treasury.

**ACTION:** Joint notice of proposed rulemaking.

**SUMMARY:** The OCC, Board, FDIC, and OTS (each an Agency, and collectively, the Agencies) propose to revise their respective rules of practice pursuant to section 36 of the Federal Deposit Insurance Act (FDIA) (12 U.S.C. 1831m). Section 36, as implemented by 12 CFR part 363, requires that each insured depository institution with total assets of \$500 million or more produce an annual report containing the institution's financial statements and certain management assessments. The depository institution must provide the report to the FDIC, the appropriate Federal banking agency, and any appropriate state bank supervisor. Section 36 also requires that the depository institution obtain an audit of its financial statements and an attestation on management's assertions concerning internal controls over financial reporting by an independent

public accountant (accountant) and include the accountant's audit and attestation reports in its annual report.

Congress gave the Agencies authority to remove, suspend, or debar accountants from performing the audit services required by section 36 if there is good cause to do so. This proposal would amend the Agencies' rules to establish rules of practice and procedure for the removal, suspension, and debarment of accountants and their firms from performing section 36 audit services for insured depository institutions. The proposal reflects the Agencies' increasing concern with the quality of audits and internal controls for financial reporting at insured depository institutions. Although there have been few bank and thrift failures in recent years, the circumstances of the failures that have occurred illustrate the importance of maintaining high quality in the audits of the financial position and attestations of management assessments of insured depository institutions. The proposed regulations enhance the Agencies' ability to address misconduct by accountants who perform annual audit and attestation services.

**DATES:** Comments must be received by March 10, 2003.

**ADDRESSES:**

**OCC:** Please direct comments to: Public Information Room, Office of the Comptroller of the Currency, 250 E Street, SW, Mailstop 1-5, Washington, DC 20219, Attention Docket No. 02-15. Comments are available for inspection and photocopying at that address. You can make an appointment to inspect the comments by calling (202) 874-5043. In addition, comments may be sent by facsimile transmission to (202) 874-4448, or by electronic mail to [regs.comments@occ.treas.gov](mailto:regs.comments@occ.treas.gov). Due to delays in paper mail delivery in the Washington area, commenters are encouraged to use fax or e-mail delivery, if possible.

**Board:** Comments should refer to Docket No. R-1139 and may be mailed to Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue, NW., Washington, DC 20551; sent by FAX to (202) 452-3819 or (202) 452-3102; or sent by e-mail to [regs.comments@federalreserve.gov](mailto:regs.comments@federalreserve.gov). Members of the public may inspect comments in Room MP-500 between 9 a.m. and 5 p.m. on weekdays pursuant to section 261.12 (except as provided in section 261.14) of the Board's Rules Regarding Availability of Information, 12 CFR 261.12 and 261.14.

**FDIC:** Written comments should be addressed to Robert E. Feldman, Executive Secretary, Attention: Comments, Federal Deposit Insurance Corporation, 550 17th Street, NW, Washington, DC 20429. Commenters are encouraged to submit comments by facsimile transmission to FAX number (202) 898-3838 or by electronic mail to [Comments@FDIC.gov](mailto:Comments@FDIC.gov). Comments also may be hand delivered to the guard station at the rear of the 550 17th Street Building (located on F Street), on business days between 8:30 a.m. and 5 p.m. Comments may be inspected and photocopied in the FDIC Public Information Center, Room 100, 801 17th Street, NW, Washington, DC, between 9 a.m. and 4:30 p.m. on business days.

**OTS: Mail:** Send comments to Regulation Comments, Chief Counsel's Office, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552, Attention No. 2002-58.

**Delivery:** Hand deliver comments to the Guard's Desk, East Lobby Entrance, 1700 G Street, N.W. from 9 a.m. to 4 p.m. on business days, Attention: Regulation Comments, Chief Counsel's Office, Attention No. 2002-58.

**Facsimiles:** Send facsimile transmissions to FAX Number (202) 906-6518, Attention Docket No. 2002-58.

**E-mail:** Send e-mails to [regs.comments@ots.treas.gov](mailto:regs.comments@ots.treas.gov), Attention Docket No. 2002-58 and include your name and telephone number. Due to temporary disruptions in mail service in the Washington, D.C. area, commenters are encouraged to send comments by fax or e-mail if possible.

**Public Inspection:** Interested persons may inspect comments at the Public Reading Room, 1700 G St. NW., from 10 a.m. until 4 p.m. on business days by appointment or obtain comments and/or an index of comments by facsimile by telephoning the Public Reading Room at (202) 906-5922 from 9 a.m. until 5 p.m. on business days. Comments and the related index will also be posted on the OTS Internet site at <http://www.ots.treas.gov>.

**FOR FURTHER INFORMATION CONTACT:**

OCC: Mitchell Plave, Counsel, Legislative and Regulatory Activities Division, (202) 874-5090; Richard Shack, Senior Accountant, Office of the Chief Accountant, (202) 874-4911; and Karen Besser, National Bank Examiner, Special Supervision/Fraud, (202) 874-4464.

**Board:** Richard Ashton, Associate General Counsel, (202) 452-3750; Nina Nichols, Counsel, (202) 452-2961; Arthur Lindo, Project Manager, (202)

452–2695; and Salome Tinker, Senior Financial Analyst, (202) 452–3034, Division of Banking Supervision and Regulation; for users of Telecommunication Devices for the Deaf (TDD) only, contact (202) 263–4869.

*FDIC:* Richard Bogue, Counsel, Enforcement Unit, (202) 898–3726; Robert F. Storch, Chief, Accounting and Securities Disclosure Section, (202) 898–8906.

*OTS:* Christine A. Smith, Project Manager, (202) 906–5740, Supervision Policy; Teresa A. Scott, Counsel (Banking & Finance), (202) 906–6478, Regulations and Legislation Division, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552.

#### SUPPLEMENTARY INFORMATION:

##### I. Background

Section 36 of the FDIA, as implemented by FDIC regulations, requires every large insured depository institution to submit an annual report containing its financial statements and certain management assessments to the FDIC, the appropriate Federal banking agency, and any appropriate state bank supervisor.<sup>1</sup> Section 36 of the FDIA also requires that an independent public accountant audit such insured depository institution's annual financial statements to determine whether those statements are presented fairly in accordance with generally accepted accounting principles (GAAP) and with the accounting objectives, standards, and requirements described in section 37 of the FDIA.

Under section 37, the accounting principles applicable to financial statements required to be filed with the Agencies must be uniform and consistent with GAAP.<sup>2</sup> In addition, the accountant must attest to and report on management's assertions concerning internal controls over financial reporting.<sup>3</sup> The institution's annual report also must contain the accountant's audit and attestation reports.<sup>4</sup> Section 36 of the FDIA gives

the Agencies the authority to remove, suspend, or bar an accountant from performing the audit services required under section 36 for good cause.<sup>5</sup> This authority is in addition to the enforcement tools the Agencies have under section 8 of the FDIA, which enable the Agencies to remove or prohibit an institution-affiliated party (IAP), including an accountant, from further participation in the affairs of an insured depository institution for certain types of misconduct.<sup>6</sup> Section 36 authority is also distinct from the Agency's capability to remove, suspend, or debar from practice before the Agency parties, such as accountants, who represent others.<sup>7</sup>

Section 36 does not define good cause, but authorizes the Agencies to implement section 36 through the joint issuance of rules of practice.<sup>8</sup> A removal, suspension, or debarment under section 36 would limit an accountant's or accounting firm's eligibility to provide audit services to insured depository institutions with total assets of \$500 million or more. A section 36 action would not restrict the ability of accountants and firms to provide audit services to financial institutions with less than \$500 million in total assets, however, or to provide other types of services to all financial institutions.

The Agencies have jointly prepared proposed rules of practice to implement the provisions of section 36. The texts of the Agencies' proposed regulations are substantively identical and differ with respect to conforming changes each Agency is making to its existing rules. These proposed rules do not create independent professional standards or obligations for accountants or firms. Rather, they are consistent with an accountant's existing responsibility to adhere to applicable professional standards such as generally accepted auditing standards and generally accepted standards for attestation engagements. The proposed rules are also consistent with the Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley Act),<sup>9</sup> which, among other things, provides for significant reforms in the oversight of the accounting industry. The discussion that follows refers more specifically to the provisions of the Sarbanes-Oxley Act that are relevant to this proposal.

##### II. Discussion of the Proposal and Request for Comment

The proposal would amend the Agencies' rules of practice by adding provisions for removal, suspension, or debarment of accountants or accounting firms from performing the audit services required by section 36 of the FDIA. The proposed rules would define "good cause" to remove, suspend, or debar an accountant or firm from performing audit services and establish procedures for removal, suspension, or debarment of accountants or firms if the "good cause" standards are satisfied.

The first part of the discussion that follows describes the common elements of the proposed rules. The second part explains proposed technical and conforming changes to the existing rules of the OCC, Board, and FDIC. The Agencies invite comment on all aspects of the proposed rules.

###### A. Proposed Additions to the Rules of All the Agencies

###### 1. Audit Services

The proposed rules define "audit services" as any service required to be performed under section 36 of the FDIA (12 U.S.C. 1831m) and 12 CFR part 363, including attestation services.<sup>10</sup>

###### 2. Good Cause for Agency Action

The proposed rules define good cause for removal, suspension, or debarment of accountants from providing audit services required by section 36. Under the proposal, the Agencies would have "good cause" if the accountant does not possess the requisite qualifications to perform audit services; engages in knowing or reckless conduct that results in a violation of applicable professional standards, including those standards and conflicts of interest provisions applicable to accountants through the Sarbanes-Oxley Act and developed by the Public Company Accounting Oversight Board (Accounting Oversight Board) and the Securities and Exchange Commission (SEC), as such standards and provisions become effective;<sup>11</sup>

<sup>10</sup>For the Board and OTS, "audit services" also includes services provided to a bank holding company or thrift holding company that satisfy the audit requirements under section 36 of a subsidiary bank or thrift of that holding company.

<sup>11</sup>The FDIC's Guidelines and Interpretations concerning annual independent audits and reporting requirements, see 12 CFR part 363 app. A, at para. 14, call for accountants who perform audit and attestation services to comply with the American Institute of Certified Public Accountants' *Code of Professional Conduct* and meet the independence requirements and interpretations of the SEC and its staff. Title II of the Sarbanes-Oxley Act amended the Securities and Exchange Act of 1934 by adding new auditor independence provisions.

Continued

<sup>1</sup> 12 U.S.C. 1831m, 1831m(j)(2); see also 12 CFR part 363 (describing the requirements for independent audits and reporting for all insured depository institutions). The statute gives the FDIC Board of Directors the discretion to establish the threshold asset size at which a section 36 annual report is required. That amount is currently set at \$500 million. See 12 CFR 363.1(a). While a section 36 audit is not required of financial institutions with less than \$500 million in total assets, the Agencies encourage every insured depository institution, regardless of its size or character, to have an annual audit of its financial statements performed by an independent public accountant. See 12 CFR part 363 App. A (Introduction).

<sup>2</sup> 12 U.S.C. 1831m(d), 1831n.

<sup>3</sup> *Id.* 1831m(c); see also 12 CFR part 363 (independent audit and reporting requirements).

<sup>4</sup> 12 U.S.C. 1831m(a)(1) and (2).

<sup>5</sup> *Id.* 1831m(g)(4)(A).

<sup>6</sup> *Id.* 1813(u)(4), 1818(e)(1).

<sup>7</sup> See 12 CFR part 19, subpart K; 12 CFR part 263, subpart F; and 12 CFR part 513.

<sup>8</sup> 12 U.S.C. 1831m(g)(4)(B).

<sup>9</sup> The Sarbanes-Oxley Act of 2002, Pub. L. 107–204, 116 Stat 745 (2002).

in a single instance of highly unreasonable conduct that results in a violation of applicable professional standards in circumstances in which an accountant knows, or should know, that heightened scrutiny is warranted; or engages in repeated instances of unreasonable conduct, each resulting in a violation of applicable standards, that indicate a lack of competence to perform annual audit services.

Good cause also includes knowingly or recklessly giving false or misleading information to the Agencies with respect to any matter before the Agency; knowingly or recklessly materially violating any provision of the Federal banking or securities laws or regulations, or any other law, including the Sarbanes-Oxley Act; and removal, suspension, or debarment from practice before any Federal or state agency regulating the banking, insurance, or securities industries on grounds relevant to the provision of audit services, other than those actions that result in automatic removal, suspension, and debarment under the proposed rules.

Conduct giving rise to good cause under the proposed rules does not have to occur in connection with the provision of audit services or in connection with services provided to depository institutions. Any actions or failures to act by an independent public accountant or accounting firm that meet the criteria for good cause set forth in the regulation, whether or not related to the banking industry, could constitute good cause for Agency action. The standards in the proposed rules for removal, suspension, and debarment are drawn principally from the Agencies' existing practice rules and from the practice rules of the SEC.<sup>12</sup> The proposal thus promotes consistency

Title II also requires that the SEC promulgate regulations, within 180 days after enactment of the Act, or by January 23, 2003, to implement these provisions. See Sarbanes-Oxley Act, section 208. Most of the provisions, however, are not effective until after an accountant is required to register with the Accounting Oversight Board created by this legislation. This requirement will not be effective until later in 2003. Therefore, accountants who perform section 36 annual audits and attestation services for insured depository institutions, regardless of whether the institution or its holding company is an issuer directly subject to the Sarbanes-Oxley Act, must comply with the SEC's upcoming regulations on auditor independence, once those regulations become effective for registered public accounts under the Sarbanes-Oxley Act.

<sup>12</sup> See 17 CFR 201.102(e) (SEC's rules on suspension and debarment of those who practice before the Commission, including accountants). Congress recently codified the SEC's suspension and debarment rules in section 602 of the Sarbanes-Oxley Act.

with respect to professional standards for accountants.

### 3. Removal, Suspension, or Debarment of Accounting Firms or Offices of Firms

The proposed rules provide for the removal, suspension, or debarment of accounting firms as a whole and identify factors the Agencies may consider in determining the appropriate remedy. Under current regulations governing practice before the Agencies, the Agencies generally can remove, suspend, or debar a firm by naming each member of the firm or office in the order of suspension or debarment. The proposal retains this flexibility and provides guidance on conduct that may result in a firm-wide sanction.

The proposed rules provide that, in considering whether to take action against a firm and the severity of the sanction against a firm, the Agencies may assess the gravity, scope, or repetition of the act or failure to act; the adequacy of and adherence to applicable policies, practices, or procedures for the firm's conduct of its business and the performance of audit services; the selection, training, supervision, and conduct of members or employees of the firm involved in the performance of audit services; the extent to which managing partners or senior officers of the firm participated, directly or indirectly through oversight or review, in the act or failure to act; and the extent to which the firm has, since the occurrence of the act or failure to act, implemented corrective internal controls to prevent its recurrence. This is not an exclusive list of factors the Agencies may consider, and circumstances may present other facts that the Agencies will take into account in determining whether to take an action against a firm.

The Agencies anticipate that there may be circumstances in which it will not be appropriate to remove, suspend, or debar an entire firm, but that action should be taken against a particular office or offices of a firm. The proposed rules permit that more limited action.

### 4. Removal, Suspension, and Debarment Procedures

Under the proposed rules, the Agencies would hold hearings on removals, suspensions, and debarments under rules that are consistent with the Agencies' Uniform Rules of Practice and Procedure (Uniform Rules).<sup>13</sup> The Uniform Rules provide, among other things, for written notice to the

<sup>13</sup> See 12 CFR part 19, subpart A (OCC); 12 CFR part 263, subpart A (Board); 12 CFR part 308, subpart A (FDIC); 12 CFR 509, subpart A (OTS).

respondent of the intended Agency action and the opportunity for a public hearing before an administrative law judge. The administrative law judge would refer a recommended decision to the Agency, which would issue a final decision and order. Each Agency would have the discretion to limit an order of removal, suspension, or debarment from providing audit services to a limited number of insured depository institutions, rather than to all insured depository institutions supervised by the issuing Agency. This is referred to in the proposed regulations as a "limited scope order."<sup>14</sup>

The Agencies do not intend the proposed rules to create any new or different procedural mechanisms for Agency removal, suspension, or debarment of accountants. Rather, the Agencies generally intend to apply to these proceedings established rules and practices.

### 5. Immediate Suspensions

Section 36 of the FDIA provides that the appropriate Federal banking agency may "remove, suspend, or bar" an independent public accountant from performing audit services.<sup>15</sup> The proposed rules would implement the authority to suspend by providing that an Agency may issue a notice of immediate suspension when an Agency has a reasonable basis to believe that an accountant or accounting firm is engaged in conduct that would constitute grounds for an order of removal, suspension, or debarment and if immediate suspension is necessary for the protection of an insured depository institution, its depositors, or the depository system as a whole. The discretion to impose immediate suspensions can be critical to the safety and soundness of one or more insured depository institutions. For example, once misconduct is identified, immediate suspensions would prevent additional or escalating instances of misconduct.

Under the proposed rules, a notice of immediate suspension would remain in effect until the Agency dismisses the charges in the notice or issues a final order of removal, suspension, or debarment. The proposals establish a system for expedited review of a notice of immediate suspension. The accountant or accounting firm has the right to petition for a stay of a notice of immediate suspension within 10 calendar days after receiving service of

<sup>14</sup> The Agencies will also have the discretion to issue suspension orders where the duration of the suspension would be dependent on the satisfactory completion of remedial action.

<sup>15</sup> 12 U.S.C. 1831m(g)(4)(A).

the notice. A presiding officer appointed by the Agency would hold a hearing on the stay petition not more than 30 days after receipt of the petition. The presiding officer would be required to issue a decision within 30 days of the hearing. The presiding officer could grant a stay of an immediate suspension upon a demonstration that a substantial likelihood exists of the accountant's or firm's success on the issues raised by the notice and that, absent such relief, the accountant or firm would suffer immediate and irreparable injury, loss, or damage. Any party may appeal the presiding officer's decision to the Agency.

The Agencies modeled the procedures set out in the proposed rules for imposing an immediate suspension of an accountant or accounting firm pending completion of a formal removal, suspension, or debarment administrative hearing after the procedures that apply to other types of temporary suspensions by regulatory agencies. In particular, the proposed immediate suspension procedures are substantially the same as those in section 8(g) of the FDIA governing the suspension by a Federal banking agency of an institution-affiliated party who has been charged with a felony.<sup>16</sup> The courts have upheld the procedures established in section 8(g) as meeting constitutional due process requirements.<sup>17</sup> Nevertheless, the Agencies invite comment on whether additional procedures should be provided to ensure that parties have adequate due process protections when they are suspended prior to a hearing on the charges made by an Agency.

#### 6. Automatic Removal, Suspension, and Debarment

Under the proposed rules, an accountant or accounting firm that is subject to a final order of removal, suspension, or debarment issued by one Agency would be automatically precluded from performing audit services for insured depository institutions regulated by the other Agencies. In addition, automatic removal, suspension, or debarment would result from a final order of suspension or denial of the privilege of appearing or practicing before the Securities and Exchange Commission, a currently effective disciplinary sanction by the Accounting Oversight Board under sections 105(c)(4)(A) or (B) of the Sarbanes-Oxley Act,<sup>18</sup> or a suspension

or debarment from practice for cause by a state, possession, commonwealth, or District of Columbia licensing authority.

Each Agency would have the discretion to waive the automatic suspension on a case-by-case basis with respect to an institution it supervises by issuing written permission to the accountant or accounting firm. The Agencies intend that neither a limited scope order nor a notice of immediate suspension would bar an accountant or accounting firm from performing audit services for insured depository institutions outside the scope of that order or notice.

#### 7. Notice

The proposed rules would require the Agencies to make public any final order of removal, suspension, or debarment against an accountant or accounting firm and notify the other Agencies of such orders. This is consistent with the presumption in favor of public notice for enforcement actions in the FDIA.<sup>19</sup>

The rules also contain notification provisions for accountants and firms. The proposal would require that an accountant or accounting firm that performs section 36 audit services for any insured depository institution provide the Agencies with written notice of any currently effective disciplinary sanction against the accountant or firm issued by the Accounting Oversight Board under sections 105(c)(4)(A) or (B) of the Sarbanes-Oxley Act, relating to revocation of registration and association with a public accounting firm or issuer; any current suspension or denial of the privilege of appearing or practicing before the SEC; or any suspensions or debarments for cause from practice as an accountant by any duly constituted licensing authority of any state, possession, commonwealth, or the District of Columbia. Written notice is also required respecting any removal, suspension, or debarment from practice before any Federal or state agency regulating the banking, insurance, or securities industries on grounds relevant to the provision of audit services; and any action by the Accounting Oversight Board under sections 105(c)(4)(C) or (G) of the Sarbanes-Oxley Act, relating to limitations on the activities of accountants and accounting firms and any other appropriate sanction provided

the registration of an accounting firm for violation of the Act or other laws or regulations cited. Section 105(c)(4)(B) gives the Accounting Oversight Board authority to suspend or bar a person from further association with any registered public accounting firm.

<sup>19</sup> 12 U.S.C. 1818(u)(1).

in the rules of the Accounting Oversight Board. Written notice must be given no later than 15 calendar days following the effective date of an order or action, or 15 calendar days before an accountant or accounting firm accepts an engagement to provide audit services, whichever date is earlier.

#### 8. Reinstatement

The Agencies would have the discretion to grant an accountant's or accounting firm's request for reinstatement. Under the proposals, a removed, suspended, or debarred individual or firm would be able to request reinstatement by the Agency that issued the order. The individual or firm would be able to request reinstatement at any time more than one year after the effective date of the order and, thereafter, at any time more than one year after the most recent request for reinstatement.

#### B. Conforming and Technical Changes to the Rules of the Agencies

##### 1. OCC

The OCC proposes to add "recklessness" to its description of "disreputable conduct" that may lead to removal, suspension, or debarment of parties or their representatives who practice or appear before the OCC.<sup>20</sup> This change would conform the OCC's general rules of practice with the standards in the proposal for removal, suspension, or debarment of accountants from performance of section 36-required audit services, which in turn reflects the addition of the recklessness standard to the SEC's rules of practice by the Sarbanes-Oxley Act. The purpose of adding the recklessness standard is to clarify that conduct more culpable than incompetence, but less culpable than willful or knowing action, may form the basis for a suspension or debarment.

The OCC also proposes to broaden the scope of "disreputable conduct" to allow the OCC to consider suspensions or debarments of accountants—for any reason—by the other Agencies, the SEC, the Commodity Futures Trading Commission, or any other Federal agency. This change would remove the requirement in the current section 19.196(g) that suspensions by other agencies concern "matters relating to the supervisory responsibilities of the OCC." This change takes into account the possibility that a suspension of an accountant by another agency, relating to the professional conduct of an accountant, could be grounds for

<sup>20</sup> See 12 CFR 19.196 (describing disreputable conduct).

<sup>16</sup> *Id.* 1818(g).

<sup>17</sup> See *FDIC v. Mallen*, 486 U.S. 230 (1988).

<sup>18</sup> Section 105(c)(4)(A) of the Sarbanes-Oxley Act allows the Accounting Oversight Board to revoke

removal, suspension, or debarment by the OCC, even if the suspension by the other agency did not relate to a banking matter.

Unlike the other amendments in the proposal, which would address an accountant's or firm's ability to perform section 36-required audits, this part of the proposal concerns who may practice before the OCC in other capacities, such as in adjudications, or through preparation of documents for submission to the OCC.

The OCC would also revise a number of sections within part 19 to make conforming and technical changes to implement section 36 of the FDIA and bring procedural aspects of part 19 up to date.

## 2. Board

The Board proposes to amend its Rules of Practice Before the Board (12 CFR part 263, subpart F) to expand the type of conduct for which an individual may be censured, debarred, or suspended from practice before the Agency. In particular, the Board proposes to revise the description of the conduct that would warrant sanctions to include reckless violations, or reckless aiding and abetting violations, of specified laws and the reckless provision of false or misleading information, or reckless participation in the provision of false or misleading information, to the Board. The regulation currently provides for sanctions only for willful misconduct. The purpose of this proposed amendment is to clarify that conduct more culpable than incompetence, but less culpable than willful or knowing action, may form the basis for a suspension or debarment from practice before the Agency. This change also reflects the modification made to the SEC's rules of practice by the Sarbanes-Oxley Act.

## 3. FDIC

The FDIC proposes to make a clarifying and conforming amendment to 12 CFR 308.109, which deals with the suspension and disbarment of the right of any counsel to appear or practice before the FDIC, to specify that an application for reinstatement must comply with the general filing procedures established by part 303. The amendment would add a new sentence before the current last sentence of section 308.109(b)(3) to read as follows: "The application shall comply with the requirements of 12 CFR 303.3."

### C. Comment Solicitation

The Agencies ask for comment on all aspects of the proposed rules. Section

722 of the Gramm-Leach-Bliley Act, Pub. L. 106-102, sec. 722, 113 Stat. 1338, 1471 (Nov. 12, 1999), requires the Federal banking agencies to use plain language in all proposed and final rules published after January 1, 2000. We invite your comments on how to make this proposal easier to understand. For example:

- Have we organized the material to suit your needs? If not, how could this material be better organized?
- Are the requirements in the proposed regulation clearly stated? If not, how could the regulation be more clearly stated?
- Does the proposed regulation contain language or jargon that is not clear? If so, which language requires clarification?
- Would a different format (grouping and order of sections, use of headings, paragraphing) make the regulation easier to understand? If so, what changes to the format would make the regulation easier to understand?
- What else could we do to make the regulation easier to understand?

### D. Community Bank Comment Request

The Agencies invite comment on the impact of this proposal on community banks. The Agencies recognize that community banks operate with more limited resources than larger institutions and may present a different risk profile. Thus, we specifically request comments on the impact of this proposal on community banks' current resources and available personnel with the requisite expertise, and whether the goals of the proposed regulation could be achieved, for community banks, through an alternative approach.

### E. Regulatory Flexibility Act

*OCC:* Under section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* (RFA), the appropriate Federal banking agencies must either provide an Initial Regulatory Flexibility Analysis (IRFA) with a proposed rule or certify that the rule would not have a significant economic impact on a substantial number of small entities. For purposes of this Regulatory Flexibility Analysis and proposed regulation, the OCC defines "small entities" to be those national banks with less than \$150 million in total assets. For other entities that could be affected by this rule, such as accountants and accounting firms, a small entity is defined as an accounting office with \$7 million or less in annual receipts.

We have reviewed the impact this proposed rule will have on small banks. Based on that review, we certify that the proposed rule will not have a significant

economic impact on a substantial number of small entities. The basis for the certification is that the requirement for audits does not apply to national banks with less than \$500 million in total assets. In addition, only a limited number of small accounting firms provide section 36 audit services to national banks. For these reasons, the OCC does not anticipate that the proposal will affect a substantial number of small entities.

*Board:* Pursuant to section 605(b) of the Regulatory Flexibility Act (5 U.S.C. 605(b)), the Board certifies that the suspension and debarment amendments proposed in this rulemaking will not have a significant adverse economic impact on a substantial number of small entities. For purposes of this Regulatory Flexibility Analysis, the Board defines "small entity" as (1) any insured state member bank with less than \$150 million in total assets, or (2) any bank holding company with a subsidiary insured state member bank with less than \$150 million in total assets. For other entities that could be affected by this rule, such as accountants and accounting firms, a small entity is defined as an accounting office with \$7 million or less in annual receipts. The basis for the Board's certification is that the rule will not apply to state member banks that have less than \$500 million in total assets. In addition, only a limited number of small accounting firms provide section 36 audit services to institutions that are regulated by the Federal Reserve.

*FDIC:* The rule proposes and requests comment on amendments to the FDIC's rules of practice (12 CFR part 308). These amendments would add rules of practice and standards of conduct with regard to accountants and accounting firms engaged by State nonmember banks. The FDIC hereby certifies, pursuant to section 605(b) of the RFA, 5 U.S.C. 605(b), that the proposed suspension and debarment amendments will not, if promulgated through a final rule, have a significant economic impact on a substantial number of small entities. The basis for the certification is that the rule will not apply to insured depository institutions that have less than \$150 million in total assets. Furthermore, only a limited number of small accounting firms provide section 36 audit services to insured depository institutions for which the FDIC is the appropriate Federal banking agency.

*OTS:* Under the RFA, OTS must either provide an IRFA with this proposed rule, or certify that the rule would not have a significant economic impact on a substantial number of small entities. For purposes of this RFA analysis and



proposed regulation, the OTS defines "small banks" to be those savings associations with less than \$150 million in total assets.

Pursuant to section 605(b) of the RFA, OTS certifies that this proposed rule would not have a significant economic impact on a substantial number of small entities. The basis of this certification is that this rule does not apply to savings associations with less than \$500 million in assets.

#### F. Executive Order 12866

The OCC and OTS have determined that this proposal is not a significant regulatory action under Executive Order 12866.

#### G. Unfunded Mandates Reform Act of 1995

Section 202 of the Unfunded Mandates Reform Act of 1995, Pub. L. 104-4 (2 U.S.C. 1532) (Unfunded Mandates Act), requires that an agency prepare a budgetary impact statement before promulgating any rule likely to result in a Federal mandate that may result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector of \$100 million or more in any one year. If a budgetary impact statement is required, section 205 of the Unfunded Mandates Act also requires an agency to identify and consider a reasonable number of regulatory alternatives before promulgating a rule. The OCC and OTS have determined that the proposed rule will not result in expenditures by state, local, and tribal governments, or by the private sector, of \$100 million or more in any one year. Accordingly, this rulemaking requires no further analysis under the Unfunded Mandates Act.

#### H. Paperwork Reduction Act

The Agencies have determined that this proposed rule does not involve a collection of information pursuant to the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501, *et seq.*).

#### List of Subjects

##### 12 CFR Part 19

Administrative practice and procedure, Crime, Equal access to justice, Investigations, National banks, Penalties, Securities.

##### 12 CFR Part 263

Administrative practice and procedure, Claims, Crime, Equal access to justice, Federal Reserve System, Lawyers, Penalties.

##### 12 CFR Part 308

Administrative practice and procedure, Bank deposit insurance, Banks, banking, Claims, Crime, Equal access to justice, investigations, Lawyers, Penalties, State nonmember banks.

##### 12 CFR Part 513

Accountants, Administrative practice and procedure, Lawyers.

#### Department of the Treasury

#### Office of the Comptroller of the Currency

#### 12 CFR Chapter I

#### Authority and Issuance

For reasons set out in the joint preamble, the OCC proposes to amend part 19 of chapter I of title 12 of the Code of Federal Regulations to read as follows:

#### PART 19—RULES OF PRACTICE AND PROCEDURE

1. The authority citation for part 19 is amended to read as follows:

**Authority:** 5 U.S.C. 504, 554–557; 12 U.S.C. 93(b), 93a, 164, 505, 1817, 1818, 1820, 1831m, 1831o, 1972, 3102, 3108(a), 3909 and 4717; 15 U.S.C. 78(h) and (i), 78o–4(c), 78o–5, 78q–1, 78s, 78u, 78u–2, 78u–3, and 78w; 28 U.S.C. 2461 note; 31 U.S.C. 330, 5321; and 42 U.S.C. 4012a.

2. Section 19.100 of subpart B is revised to read as follows:

#### § 19.100 Filing documents.

All materials required to be filed with or referred to the Comptroller or the administrative law judge in any proceeding under this part must be filed with the Hearing Clerk, Office of the Comptroller of the Currency, 250 E Street, SW, Washington, DC 20219. Filings to be made with the Hearing Clerk include the notice and answer; motions and responses to motions; briefs; the record filed by the administrative law judge after the issuance of a recommended decision; the recommended decision filed by the administrative law judge following a motion for summary disposition (except that in removal and prohibition cases instituted pursuant to 12 U.S.C. 1818, the administrative law judge will file the record and the recommended decision with the Board of Governors of the Federal Reserve System); referrals by the administrative law judge of motions for interlocutory review; exceptions and requests for oral argument; and any other papers required to be filed with the Comptroller or the administrative law judge under this part.

3. In § 19.111 of subpart C, the section heading and the fourth and fifth sentences are revised to read as follows:

#### § 19.111 Suspension, removal, or prohibition.

\* \* \* The written request must be sent by certified mail to, or served personally with a signed receipt on, the District Deputy Comptroller in the OCC district in which the bank, accountant, or accounting firm in question is located, or, if the bank is supervised by the Large Bank Supervision Department, to the appropriate Deputy Comptroller for Large Bank Supervision for the Office of the Comptroller of the Currency, or if the bank is supervised by the Mid-Size/Community Banks Department, to the Deputy Comptroller for Mid-Size/Community Banks for Office of the Comptroller of the Currency, Washington, DC 20219. The request must state specifically the relief desired and the grounds on which that relief is based.

4. In § 19.196 of subpart K, the introductory text and paragraphs (a), (b), and (g) are revised to read as follows:

#### § 19.196 Disreputable conduct.

Disreputable conduct for which an individual may be censured, debarred, or suspended from practice before the OCC includes:

(a) Willfully or recklessly violating or willfully or recklessly aiding and abetting the violation of any provision of the Federal banking or applicable securities laws or the rules and regulations thereunder or conviction of any offense involving dishonesty or breach of trust;

(b) Knowingly or recklessly giving false or misleading information, or participating in any way in the giving of false information to the OCC or any officer or employee thereof, or to any tribunal authorized to pass upon matters administered by the OCC in connection with any matter pending or likely to be pending before it. The term "information" includes facts or other statements contained in testimony, financial statements, applications for enrollment, affidavits, declarations, or any other document or written or oral statement;

(g) Suspension, debarment or removal from practice before the Board of Governors, the FDIC, the OTS, the Securities and Exchange Commission, the Commodity Futures Trading Commission, or any other Federal or state agency; and

5. A new subpart P is added to read as follows:

**Subpart P—Removal, Suspension, and Debarment of Accountants From Performing Audit Services**

Sec.

- 19.241 Scope.
- 19.242 Definitions.
- 19.243 Removal, suspension, or debarment.
- 19.244 Automatic removal, suspension, or debarment.
- 19.245 Notice of removal, suspension, or debarment.
- 19.246 Petition for reinstatement.

**Subpart P—Removal, Suspension, and Debarment of Accountants From Performing Audit Services**

**§ 19.241 Scope.**

This subpart, which implements section 36(g)(4) of the Federal Deposit Insurance Act (FDIA) (12 U.S.C. 1831m(g)(4)), provides rules and procedures for the removal, suspension, or debarment of independent public accountants and their accounting firms from performing independent audit and attestation services required by section 36 of the FDIA (12 U.S.C. 1831m) for insured national banks, District of Columbia banks, and Federal branches and agencies of foreign banks.

**§ 19.242 Definitions.**

As used in this subpart, the following terms shall have the meaning given below unless the context requires otherwise:

- (a) *Accounting firm* means a corporation, proprietorship, partnership, or other business firm providing audit services.
- (b) *Audit services* means any service required to be performed by an independent public accountant by section 36 of the FDIA and 12 CFR part 363, including attestation services.
- (c) *Independent public accountant (accountant)* means any individual who performs or participates in providing audit services.

**§ 19.243 Removal, suspension, or debarment.**

(a) *Good cause for removal, suspension, or debarment—(1) Individuals.* The Comptroller may remove, suspend, or debar an independent public accountant from performing audit services for insured national banks that are subject to section 36 of the FDIA if, after service of a notice of intention and opportunity for hearing in the matter, the Comptroller finds that the accountant:

- (i) Lacks the requisite qualifications to perform audit services;
- (ii) Has knowingly or recklessly engaged in conduct that results in a violation of applicable professional standards, including those standards

and conflicts of interest provisions applicable to accountants through the Sarbanes-Oxley Act of 2002, Pub. L. 107–204, 116 Stat. 745 (2002) (Sarbanes-Oxley Act), and developed by the Public Company Accounting Oversight Board and the Securities and Exchange Commission;

(iii) Has engaged in negligent conduct in the form of:

(A) A single instance of highly unreasonable conduct that results in a violation of applicable professional standards in circumstances in which an accountant knows, or should know, that heightened scrutiny is warranted; or

(B) Repeated instances of unreasonable conduct, each resulting in a violation of applicable professional standards, that indicate a lack of competence to perform audit services;

(iv) Has knowingly or recklessly given false or misleading information, or knowingly or recklessly participated in any way in the giving of false or misleading information, to the OCC or any officer or employee of the OCC;

(v) Has engaged in, or aided and abetted, a material and knowing or reckless violation of any provision of the Federal banking or securities laws or the rules and regulations thereunder, or any other law;

(vi) Has been removed, suspended, or debarred from practice before any Federal or state agency regulating the banking, insurance, or securities industries, other than by an action listed in § 19.244, on grounds relevant to the provision of audit services.

(2) *Accounting firms.* If the Comptroller determines that there is good cause for the removal, suspension, or debarment of a member or employee of an accounting firm under paragraph (a)(1) of this section, the Comptroller also may remove, suspend, or debar such firm or one or more offices of such firm. In considering whether to remove, suspend, or debar a firm or an office thereof, and the term of any sanction against a firm under this section, the Comptroller may consider, for example:

(i) The gravity, scope, or repetition of the act or failure to act that constitutes good cause for the removal, suspension, or debarment;

(ii) The adequacy of, and adherence to, applicable policies, practices, or procedures for the accounting firm's conduct of its business and the performance of audit services;

(iii) The selection, training, supervision, and conduct of members or employees of the accounting firm involved in the performance of audit services;

(iv) The extent to which managing partners or senior officers of the

accounting firm have participated, directly, or indirectly through oversight or review, in the act or failure to act; and

(v) The extent to which the accounting firm has, since the occurrence of the act or failure to act, implemented corrective internal controls to prevent its recurrence.

(3) *Limited scope orders.* An order of removal, suspension (including an immediate suspension), or debarment may, at the discretion of the Comptroller, be made applicable to a particular national bank or class of national banks.

(4) *Remedies not exclusive.* The remedies provided in this subpart are in addition to any other remedies the OCC may have under any other applicable provisions of law, rule, or regulation.

(b) *Proceedings to remove, suspend, or debar—(1) Initiation of formal removal, suspension, or debarment proceedings.* The Comptroller may initiate a proceeding to remove, suspend, or debar an accountant or accounting firm from performing audit services by issuing a written notice of intention to take such action that names the individual or firm as a respondent and describes the nature of the conduct that constitutes good cause for such action.

(2) *Hearings under paragraph (b) of this section.* An accountant or firm named as a respondent in the notice issued under paragraph (b)(1) of this section may request a hearing on the allegations in the notice. Hearings conducted under this paragraph shall be conducted in the same manner as other hearings under the Uniform Rules of Practice and Procedure (12 CFR part 19, subpart A.)

(c) *Immediate suspension from performing audit services—(1) In general.* If the Comptroller serves a written notice of intention to remove, suspend, or debar an accountant or accounting firm from performing audit services, the Comptroller may, with due regard for the public interest and without a preliminary hearing, immediately suspend such accountant or firm from performing audit services for insured national banks, if the Comptroller:

(i) Has a reasonable basis to believe that the accountant or firm has engaged in conduct (specified in the notice served on the accountant or firm under paragraph (b) of this section) that would constitute grounds for removal, suspension, or debarment under paragraph (a) of this section;

(ii) Determines that immediate suspension is necessary for the protection of an insured depository

institution or its depositors or for the protection of the depository system as a whole; and

(iii) Serves such respondent with written notice of the immediate suspension.

(2) *Procedures.* An immediate suspension notice issued under this paragraph will become effective upon service. Such suspension will remain in effect until the date the Comptroller dismisses the charges contained in the notice of intention, or the effective date of a final order of removal, suspension, or debarment issued by the Comptroller to the respondent.

(3) *Petition for stay.* Any accountant or firm immediately suspended from performing audit services in accordance with paragraph (c)(1) of this section may, within 10 calendar days after service of the notice of immediate suspension, file with the Office of the Comptroller of the Currency, Washington, DC 20219 for a stay of such immediate suspension. If no petition is filed within 10 calendar days, the immediate suspension shall remain in effect.

(4) *Hearing on petition.* Upon receipt of a stay petition, the Comptroller will designate a presiding officer who shall fix a place and time (not more than 30 calendar days after receipt of the petition, unless extended at the request of petitioner) at which the immediately suspended party may appear, personally or through counsel, to submit written materials and oral argument. In the sole discretion of the presiding officer, upon a specific showing of compelling need, oral testimony of witnesses may also be presented. In hearings held pursuant to this paragraph there shall be no discovery and the provisions of §§ 19.6 through 19.12, 19.16, and 19.21 of this part shall apply.

(5) *Decision on petition.* Within 30 calendar days after the hearing, the presiding officer shall issue a decision. The presiding officer will grant a stay upon a demonstration that a substantial likelihood exists of the respondent's success on the issues raised by the notice of intention and that, absent such relief, the respondent will suffer immediate and irreparable injury, loss, or damage. In the absence of such a demonstration, the presiding officer will notify the parties that the immediate suspension will be continued pending the completion of the administrative proceedings pursuant to the notice.

(6) *Review of presiding officer's decision.* The parties may seek review of the presiding officer's decision by filing a petition for review with the presiding officer within 10 calendar days after

service of the decision. Replies must be filed within 10 calendar days after the petition filing date. Upon receipt of a petition for review and any reply, the presiding officer shall promptly certify the entire record to the Comptroller. Within 60 calendar days of the presiding officer's certification, the Comptroller shall issue an order notifying the affected party whether or not the immediate suspension should be continued or reinstated. The order shall state the basis of the Comptroller's decision.

#### **§ 19.244 Automatic removal, suspension, and debarment.**

(a) An independent public accountant or accounting firm may not perform audit services for insured national banks if the accountant or firm:

(1) Is subject to a final order of removal, suspension, or debarment (other than a limited scope order) issued by the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, or the Office of Thrift Supervision under section 36 of the FDIA.

(2) Is subject to a temporary suspension or permanent revocation of registration or a temporary or permanent suspension or bar from further association with any registered public accounting firm issued by the Public Company Accounting Oversight Board under sections 105(c)(4)(A) or (B) of the Sarbanes-Oxley Act (15 U.S.C. 7215(c)(4)(A) or (B));

(3) Is subject to an order of suspension or denial of the privilege of appearing or practicing before the Securities and Exchange Commission; or

(4) Is suspended or debarred for cause from practice as an accountant by any duly constituted licensing authority of any state, possession, commonwealth, or the District of Columbia.

(b) Upon written request, the Comptroller, for good cause shown, may grant written permission to such accountant or firm to perform audit services for national banks. The request shall contain a concise statement of the action requested. The Comptroller may require the applicant to submit additional information.

#### **§ 19.245 Notice of removal, suspension or debarment.**

(a) *Notice to the public.* Upon the issuance of a final order for removal, suspension, or debarment of an independent public accountant or accounting firm from providing audit services, the Comptroller shall make the order publicly available and provide

notice of the order to the other Federal banking agencies.

(b) *Notice to the Comptroller by accountants and firms.* An accountant or accounting firm that provides audit services to a national bank must provide the Comptroller with written notice of:

(1) Any currently effective order or other action described in § 19.243(a)(1)(vi) or §§ 19.244(a)(2) through (a)(4); or

(2) Any currently effective action by the Public Company Accounting Oversight Board under sections 105(c)(4)(C) or (G) of the Sarbanes-Oxley Act (15 U.S.C. 7215(c)(4)(C) or (G)).

(c) *Timing of notice.* Written notice required by this paragraph shall be given no later than 15 calendar days following the effective date of an order or action, or 15 calendar days before an accountant or firm accepts an engagement to provide audit services, whichever date is earlier.

#### **§ 19.246 Petition for reinstatement.**

(a) *Form of petition.* Unless otherwise ordered by the Comptroller, a petition for reinstatement by an independent public accountant or accounting firm removed, suspended, or debarred under § 19.243 may be made in writing at any time one year after the effective date of the order of removal, suspension, or debarment and, thereafter, at any time more than one year after the accountant's or firm's most recent petition for reinstatement. The request shall contain a concise statement of the action requested. The Comptroller may require the applicant to submit additional information.

(b) *Procedure.* A petitioner for reinstatement under this section may, in the sole discretion of the Comptroller, be afforded a hearing. The accountant or firm shall bear the burden of going forward with a petition and proving the grounds asserted in support of the petition. In reinstatement proceedings, the person seeking reinstatement shall bear the burden of going forward with an application and proving the grounds asserted in support of the application. The Comptroller may, in his sole discretion, direct that any reinstatement proceeding be limited to written submissions. The removal, suspension, or debarment shall continue until the Comptroller, for good cause shown, has reinstated the petitioner or until the suspension period has expired. The filing of a petition for reinstatement shall not stay the effectiveness of the removal, suspension, or debarment of an accountant or firm.

Dated: November 27, 2002.

John D. Hawke, Jr.,

Comptroller of the Currency.

## Federal Reserve System

### 12 CFR Chapter II

#### Authority and Issuance

For the reasons set out in the joint preamble, the Board proposes to amend part 263, chapter II, title 12 of the Code of Federal Regulations as follows:

### PART 263—RULES OF PRACTICE FOR HEARINGS

1. The authority citation for part 263 is revised to read as follows:

**Authority:** 5 U.S.C. 504; 12 U.S.C. 248, 324, 504, 506, 1817(j), 1818, 1828(c), 1831m, 1831o, 1831p-1, 1847(b), 1847(d), 1884(b), 1972(2)(F), 3105, 3107, 3108, 3907, 3909; 15 U.S.C. 21, 78o-4, 78o-5, 78u-2, 6801, 6805; and 28 U.S.C. 2461 note.

2. In § 263.94, paragraphs (a) and (b) are revised to read as follows:

#### § 263.94 Conduct warranting sanctions.

\* \* \* \* \*

(a) Willfully or recklessly violating or willfully or recklessly aiding and abetting the violation of any provision of the Federal banking or applicable securities laws or the rules and regulations thereunder or conviction of any offense involving dishonesty or breach of trust;

(b) Knowingly or recklessly giving false or misleading information, or participating in any way in the giving of false information to the Board or to any Board officer or employee, or to any tribunal authorized to pass upon matters administered by the Board in connection with any matter pending or likely to be pending before it. The term "information" includes facts or other statements contained in testimony, financial statements, applications, affidavits, declarations, or any other document or written or oral statement;

\* \* \* \* \*

3. A new subpart J is added as follows:

#### Subpart J—Removal, Suspension, and Debarment of Accountants From Performing Audit Services

Sec.

263.400 Scope.

263.401 Definitions.

263.402 Removal, suspension, or debarment.

263.403 Automatic removal, suspension, and debarment

263.404 Notice of removal, suspension, or debarment.

263.405 Petition for reinstatement.

#### Subpart J—Removal, Suspension, and Debarment of Accountants From Performing Audit Services

##### § 263.400 Scope.

This subpart, which implements section 36(g)(4) of the Federal Deposit Insurance Act (FDIA) (12 U.S.C. 1831m(g)(4)), provides rules and procedures for the removal, suspension, or debarment of independent public accountants and their accounting firms from performing independent audit and attestation services for insured state member banks and for bank holding companies required by section 36 of the FDIA (12 U.S.C. 1831m).

##### § 263.401 Definitions.

As used in this subpart, the following terms shall have the meaning given below unless the context requires otherwise:

(a) *Accounting firm* means a corporation, proprietorship, partnership, or other business firm providing audit services.

(b) *Audit services* means any service required to be performed by an independent public accountant by section 36 of the FDIA and 12 CFR part 363, including attestation services. Audit services include any service performed with respect to the holding company of an insured bank that is used to satisfy requirements imposed by section 36 or part 363 on that bank.

(c) *Banking organization* means an insured state member bank or a bank holding company that obtains audit services that are used to satisfy requirements imposed by section 36 or part 363 on an insured subsidiary bank of that holding company.

(d) *Independent public accountant* (accountant) means any individual who performs or participates in providing audit services.

##### § 263.402 Removal, suspension, or debarment.

(a) *Good cause for removal, suspension, or debarment—*

(1) *Individuals.* The Board may remove, suspend, or debar an independent public accountant from performing audit services for banking organizations that are subject to section 36 of the FDIA, if, after notice of and opportunity for hearing in the matter, the Board finds that the accountant:

(i) Lacks the requisite qualifications to perform audit services;

(ii) Has knowingly or recklessly engaged in conduct that results in a violation of applicable professional standards, including those standards and conflict of interest provisions applicable to accountants through the

Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002) (Sarbanes-Oxley Act), and developed by the Public Company Accounting Oversight Board and the Securities and Exchange Commission;

(iii) Has engaged in negligent conduct in the form of:

(A) A single instance of highly unreasonable conduct that results in a violation of applicable professional standards in circumstances in which an accountant knows, or should know, that heightened scrutiny is warranted; or

(B) Repeated instances of unreasonable conduct, each resulting in a violation of applicable professional standards, that indicate a lack of competence to perform audit services;

(iv) Has knowingly or recklessly given false or misleading information, or knowingly or recklessly participated in any way in the giving of false or misleading information, to the Board or any officer or employee of the Board;

(v) Has engaged in, or aided and abetted, a material and knowing or reckless violation of any provision of the Federal banking or securities laws or the rules and regulations thereunder, or any other law; or

(vi) Has been removed, suspended, or debarred from practice before any Federal or state agency regulating the banking, insurance, or securities industries, other than by an action listed in § 263.403, on grounds relevant to the provision of audit services.

(2) *Accounting firms.* If the Board determines that there is good cause for the removal, suspension, or debarment of a member or employee of an accounting firm under paragraph (a)(1) of this section, the Board also may remove, suspend, or debar such firm or one or more offices of such firm. In considering whether to remove, suspend or debar a firm or an office thereof, and the term of any sanction against a firm under this section, the Board may consider, for example:

(i) The gravity, scope, or repetition of the act or failure to act that constitutes good cause for removal, suspension, or debarment;

(ii) The adequacy of, and adherence to, applicable policies, practices, or procedures for the accounting firm's conduct of its business and the performance of audit services;

(iii) The selection, training, supervision, and conduct of members or employees of the accounting firm involved in the performance of audit services;

(iv) The extent to which managing partners or senior officers of the accounting firm have participated, directly, or indirectly through oversight

or review, in the act or failure to act; and

(v) The extent to which the accounting firm has, since the occurrence of the act or failure to act, implemented corrective internal controls to prevent its recurrence.

(3) *Limited scope orders.* An order of removal, suspension (including an immediate suspension), or debarment may, at the discretion of the Board, be made applicable to a particular banking organization or class of banking organizations.

(4) *Remedies not exclusive.* The remedies provided in this subpart are in addition to any other remedies the Board may have under any other applicable provisions of law, rule, or regulation.

(b) *Proceedings to remove, suspend, or debar—(1) Initiation of formal removal, suspension, or debarment proceedings.* The Board may initiate a proceeding to remove, suspend, or debar an accountant or accounting firm from performing audit services by issuing a written notice of intention to take such action that names the individual or firm as a respondent and describes the nature of the conduct that constitutes good cause for such action.

(2) *Hearing under paragraph (b) of this section.* An accountant or firm named as a respondent in the notice issued under paragraph (b)(2) of this section may request a hearing on the allegations in the notice. Hearings conducted under this paragraph shall be conducted in the same manner as other hearings under the Uniform Rules of Practice and Procedure (12 CFR part 263, subpart A).

(c) *Immediate suspension from performing audit services—(1) In general.* If the Board serves a written notice of intention to remove, suspend, or debar an accountant or accounting firm from performing audit services, the Board may, with due regard for the public interest and without a preliminary hearing, immediately suspend such accountant or firm from performing audit services for banking organizations, if the Board:

(i) Has a reasonable basis to believe that the accountant or firm has engaged in conduct (specified in the notice served on the accountant or firm under paragraph (b) of this section) that would constitute grounds for removal, suspension, or debarment under paragraph (a) of this section;

(ii) Determines that immediate suspension is necessary for the protection of an insured depository institution or its depositors or for the protection of the depository system as a whole; and

(iii) Serves such respondent with written notice of the immediate suspension.

(2) *Procedures.* An immediate suspension notice issued under this paragraph will become effective upon service. Such suspension will remain in effect until the date the Board dismisses the charges contained in the notice of intention, or the effective date of a final order of removal, suspension, or debarment issued by the Board to the respondent.

(3) *Petition to stay.* Any accountant or firm immediately suspended from performing audit services in accordance with paragraph (c)(1) of this section may, within 10 calendar days after service of the notice of immediate suspension, file with the Secretary, Board of Governors of the Federal Reserve System, Washington, DC 20551 for a stay of such immediate suspension. If no petition is filed within 10 calendar days, the immediate suspension shall remain in effect.

(4) *Hearing on petition.* Upon receipt of a stay petition, the Secretary will designate a presiding officer who shall fix a place and time (not more than 30 calendar days after receipt of the petition, unless extended at the request of petitioner) at which the immediately suspended party may appear, personally or through counsel, to submit written materials and oral argument. In the sole discretion of the presiding officer, upon a specific showing of compelling need, oral testimony of witnesses may also be presented. In hearings held pursuant to this paragraph there shall be no discovery and the provisions of §§ 263.6 through 263.12, 263.16, and 263.21 of this part shall apply.

(5) *Decision on petition.* Within 30 calendar days after the hearing, the presiding officer shall issue a decision. The presiding officer will grant a stay upon a demonstration that a substantial likelihood exists of the respondent's success on the issues raised by the notice of intention and that, absent such relief, the respondent will suffer immediate and irreparable injury, loss, or damage. In the absence of such a demonstration, the presiding officer will notify the parties that the immediate suspension will be continued pending the completion of the administrative proceedings pursuant to the notice.

(6) *Review of presiding officer's decision.* The parties may seek review of the presiding officer's decision by filing a petition for review with the presiding officer within 10 calendar days after service of the decision. Replies must be filed within 10 calendar days after the petition filing date. Upon receipt of a petition for review and any reply, the

presiding officer shall promptly certify the entire record to the Board. Within 60 calendar days of the presiding officer's certification, the Board shall issue an order notifying the affected party whether or not the immediate suspension should be continued or reinstated. The order shall state the basis of the Board's decision.

**§ 263.403 Automatic removal, suspension, and debarment.**

(a) An independent public accountant or accounting firm may not perform audit services for banking organizations if the accountant or firm:

(1) Is subject to a final order of removal, suspension, or debarment (other than a limited scope order) issued by the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, or the Office of Thrift Supervision under section 36 of the FDIA;

(2) Is subject to a temporary suspension or permanent revocation of registration or a temporary or permanent suspension or bar from further association with any registered public accounting firm issued by the Public Company Accounting Oversight Board under sections 105(c)(4)(A) or (B) of the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7215(c)(4)(A) or (B));

(3) Is subject to an order of suspension or denial of the privilege of appearing or practicing before the Securities and Exchange Commission; or

(4) Is suspended or debarred for cause from practice as an accountant by any duly constituted licensing authority of any state, possession, commonwealth, or the District of Columbia.

(b) Upon written request, the Board, for good cause shown, may grant written permission to such accountant or firm to perform audit services for banking organizations. The request shall contain a concise statement of the action requested. The Board may require the applicant to submit additional information.

**§ 263.404. Notice of removal, suspension, or debarment.**

(a) *Notice to the public.* Upon the issuance of a final order for removal, suspension, or debarment of an independent public accountant or accounting firm from providing audit services, the Board shall make the order publicly available and provide notice of the order to the other Federal banking agencies.

(b) *Notice to the Board by accountants and firms.* An accountant or accounting firm that provides audit services to a banking organization must provide the Board with written notice of:

(1) Any currently effective order or other action described in § 263.402(a)(1)(vi) or §§ 263.403(a)(2) through (a)(4); or

(2) Any currently effective action by the Public Company Accounting Oversight Board under sections 105(c)(4)(C) or (G) of the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7215(c)(4)(C) or (G)).

(c) *Timing of notice.* Written notice required by this paragraph shall be given no later than 15 calendar days following the effective date of an order or action, or 15 calendar days before an accountant or firm accepts an engagement to provide audit services, whichever date is earlier.

#### § 263.405 Petition for reinstatement.

(a) *Form of petition.* Unless otherwise ordered by the Board, a petition for reinstatement by an independent public accountant or accounting firm removed, suspended, or debarred under § 263.402 may be made in writing at any time one year after the effective date of the order of removal, suspension, or debarment and, thereafter, at any time more than one year after the accountant's or firm's most recent petition for reinstatement. The request shall contain a concise statement of the action requested. The Board may require the petitioner to submit additional information.

(b) *Procedure.* A petitioner for reinstatement under this section may, in the sole discretion of the Board, be afforded a hearing. The accountant or firm shall bear the burden of going forward with a petition and proving the grounds asserted in support of the petition. The Board may, in its sole discretion, direct that any reinstatement proceeding be limited to written submissions. The removal, suspension, or debarment shall continue until the Board, for good cause shown, has reinstated the petitioner or until the suspension period has expired. The filing of a petition for reinstatement shall not stay the effectiveness of the removal, suspension, or debarment of an accountant or firm.

By order of the Board of Governors of the Federal Reserve System, December 17, 2002.

**Jennifer J. Johnson,**  
*Secretary of the Board.*

#### Federal Deposit Insurance Corporation

### PART 308—RULES OF PRACTICE AND PROCEDURE

1. The authority citation for part 308 is revised to read as follows:

**Authority:** 5 U.S.C. 504, 554–557; 12 U.S.C. 93(b), 164, 505, 1815(e), 1817, 1818, 1820, 1828, 1829, 1829b, 1831i, 1831m(g)(4),

1831o, 1831p–1, 1832(c), 1884(b), 1972, 3102, 3108(a), 3349, 3909, 4717; 15 U.S.C. 78(h) and (i), 780–4(c), 780–5, 78q–1, 78s, 78u, 78u–2, 78u–3 and 78w, 6801(b), 6805(b)(1); 28 U.S.C. 2461 note; 31 U.S.C. 330, 5321; 42 U.S.C. 4012a; Sec. 3100(s), Pub. L. 104–134, 110 Stat. 1321–358.

2. Section 308.109(b)(3) is amended to add a new sentence before the last sentence to read as follows:

#### § 308.109 Suspension and disbarment

\* \* \* \* \*

(b) \* \* \*

(3) \* \* \* The application must comply with the requirements of § 303.3 of this chapter. \* \* \*

\* \* \* \* \*

3. A new Subpart U is added to read as follows:

#### Subpart U—Removal, Suspension, and Debarment of Accountants From Performing Audit Service

Sec.

308.600 Scope.

308.601 Definitions.

308.602 Removal, suspension, or debarment.

308.603 Automatic removal, suspension, and debarment.

308.604 Notice of removal, suspension, or debarment.

308.605 Application for reinstatement.

#### Subpart U—Removal, Suspension, and Debarment of Accountants From Performing Audit Service

##### § 308.600 Scope.

This subpart, which implements section 36(g)(4) of the FDIA (12 U.S.C. 1831m(g)(4)), provides rules and procedures for the removal, suspension, or debarment of independent public accountants and accounting firms from performing independent audit and attestation services required by section 36 of the FDIA (12 U.S.C. 1831m) for insured depository institutions for which the FDIC is the appropriate Federal banking agency.

##### § 308.601 Definitions.

As used in this subpart, the following terms shall have the meaning given below unless the context requires otherwise:

(a) *Accounting firm* means a corporation, proprietorship, partnership, or other business firm providing audit services.

(b) *Audit services* means any service required to be performed by an independent public accountant by section 36 of the FDIA and 12 CFR part 363, including attestation services.

(c) *Independent public accountant (accountant)* means any individual who performs or participates in providing audit services.

#### § 308.602 Removal, suspension, or debarment.

(a) *Good cause for removal, suspension, or debarment—(1) Individuals.* The Board of Directors may remove, suspend, or debar an independent public accountant from performing audit services for insured depository institutions for which the FDIC is the appropriate Federal banking agency under section 36 of the FDIA if, after service of a notice of intention and opportunity for hearing in the matter, the Board of Directors finds that the accountant:

(i) Lacks the requisite qualifications to perform audit services;

(ii) Has knowingly or recklessly engaged in conduct that results in a violation of applicable professional standards, including those standards and conflicts of interest provisions applicable to accountants through the Sarbanes-Oxley Act of 2002 (Pub. L. 107–204, 116 Stat. 745 (2002)) (Sarbanes-Oxley Act) and developed by the Public Company Accounting Oversight Board and the Securities and Exchange Commission;

(iii) Has engaged in negligent conduct in the form of:

(A) A single instance of highly unreasonable conduct that results in a violation of applicable professional standards in circumstances in which an accountant knows, or should know, that heightened scrutiny is warranted; or

(B) Repeated instances of unreasonable conduct, each resulting in a violation of applicable professional standards, that indicate a lack of competence to perform audit services;

(iv) Has knowingly or recklessly given false or misleading information, or knowingly or recklessly participated in any way in the giving of false or misleading information, to the FDIC or any officer or employee of the FDIC;

(v) Has engaged in, or aided and abetted, a material and knowing or reckless violation of any provision of the Federal banking or securities laws or the rules and regulations thereunder, or any other law; or

(vi) Has been removed, suspended, or debarred from practice before any Federal or state agency regulating the banking, insurance, or securities industries, other than by an action listed in § 308.603, on grounds relevant to the provision of audit services.

(2) *Accounting firms.* If the Board of Directors determines that there is good cause for the removal, suspension, or debarment of a member or employee of an accounting firm under paragraph

(a)(1) of this section, the Board of Directors also may remove, suspend, or debar such firm or one or more offices of such firm. In considering whether to remove, suspend, or debar an accounting firm or an office thereof, and the term of any sanction against an accounting firm under this section, the Board of Directors may consider, for example:

(i) The gravity, scope, or repetition of the act or failure to act that constitutes good cause for the removal, suspension, or debarment;

(ii) The adequacy of, and adherence to, applicable policies, practices, or procedures for the accounting firm's conduct of its business and the performance of audit services;

(iii) The selection, training, supervision, and conduct of members or employees of the accounting firm involved in the performance of audit services;

(iv) The extent to which managing partners or senior officers of the accounting firm have participated, directly, or indirectly through oversight or review, in the act or failure to act; and

(v) The extent to which the accounting firm has, since the occurrence of the act or failure to act, implemented corrective internal controls to prevent its recurrence.

(3) *Limited scope orders.* An order of removal, suspension (including an immediate suspension), or debarment may, at the discretion of the Board of Directors, be made applicable to a limited number of insured depository institutions for which the FDIC is the appropriate Federal banking agency.

(4) *Remedies not exclusive.* The remedies provided in this subpart are in addition to any other remedies the FDIC may have under any other applicable provision of law, rule, or regulation.

(b) *Proceedings to remove, suspend or debar—* (1) *Initiation of formal removal, suspension, or debarment proceedings.* The Board of Directors may initiate a proceeding to remove, suspend, or debar an accountant or accounting firm from performing audit services by issuing a written notice of intention to take such action that names the individual or firm as a respondent and describes the nature of the conduct that constitutes good cause for such action.

(2) *Hearings under paragraph (b) of this section.* An accountant or firm named as a respondent in the notice issued under paragraph (b)(1) of this section may request a hearing on the allegations contained in the notice. Hearings conducted under this paragraph shall be conducted in the same manner as other hearings under

the Uniform Rules of Practice and Procedure (12 CFR part 308, subpart A) (Uniform Rules).

(c) *Immediate suspension from performing audit service—* (1) *In general.* If the Board of Directors serves a written notice of intention to remove, suspend, or debar an accountant or accounting firm from performing audit services, the Board of Directors may, with due regard for the public interest and without a preliminary hearing, immediately suspend such accountant or firm from performing audit services for insured depository institutions for which the FDIC is the appropriate Federal banking agency if the Board of Directors:

(i) Has a reasonable basis to believe that the accountant or accounting firm has engaged in conduct (specified in the notice served upon the accountant or accounting firm under paragraph (b)(1) of this section) that would constitute grounds for removal, suspension, or debarment under paragraph (a) of this section;

(ii) Determines that immediate suspension is necessary for the protection of an insured depository institution or its depositors or for the protection of the depository system as a whole; and

(iii) Serves such respondent with written notice of the immediate suspension.

(2) *Procedures.* An immediate suspension notice issued under this paragraph will become effective upon service. Such suspension will remain in effect until the date the Board of Directors dismisses the charges contained in the notice of intention, or the effective date of a final order of removal, suspension, or debarment issued by the Board of Directors to the respondent.

(3) *Petition to stay.* Any accountant or accounting firm immediately suspended from performing audit services in accordance with paragraph (c)(1) of this section may, within 10 calendar days after service of the notice of immediate suspension, file a petition with the Executive Secretary for a stay of such immediate suspension. If no petition is filed within 10 calendar days, the immediate suspension will remain in effect.

(4) *Hearing on petition.* Upon receipt of a stay petition, the Executive Secretary will designate a presiding officer who will fix a place and time (not more than 30 calendar days after receipt of the petition, unless extended at the request of petitioner) at which the immediately suspended party may appear, personally or through counsel, to submit written materials and oral

argument. In the sole discretion of the presiding officer, upon a specific showing of compelling need, oral testimony of witnesses also may be presented. Enforcement counsel may represent the agency at the hearing. In hearings held pursuant to this paragraph there shall be no discovery, and the provisions of §§ 308.6 through 308.12, § 308.16, and § 308.21 of the Uniform Rules will apply.

(5) *Decision on petition.* Within 30 calendar days after the hearing, the presiding officer will issue a decision. The presiding officer will grant a stay upon a demonstration that a substantial likelihood exists of the respondent's success on the issues raised by the notice of intention and that, absent such relief, the respondent will suffer immediate and irreparable injury, loss, or damage. In the absence of such a demonstration, the presiding officer will notify the parties that the immediate suspension will be continued pending the completion of the administrative proceedings pursuant to the notice of intention. The presiding officer will serve a copy of the decision on, and simultaneously certify the record to, the Executive Secretary.

(6) *Review of presiding officer's decision.* The parties may seek review of the presiding officer's decision by filing a petition for review with the Executive Secretary within 10 calendar days after service of the decision. Replies must be filed within 10 calendar days after the petition filing date. Upon receipt of a petition for review and any reply, the Executive Secretary will promptly certify the entire record to the Board of Directors. Within 60 calendar days of the Executive Secretary's certification, the Board of Directors will issue an order notifying the affected party whether or not the immediate suspension should be continued or reinstated. The order will state the basis of the Board's decision.

**§ 308.603 Automatic removal, suspension, and debarment.**

(a) An independent public accountant or accounting firm may not perform audit services for insured depository institutions for which the FDIC is the appropriate Federal banking agency if the accountant or firm:

(1) Is subject to a final order of removal, suspension, or debarment (other than a limited scope order) issued by the Board of Governors of the Federal Reserve System, the Office of the Comptroller of the Currency, or the Office of Thrift Supervision under section 36 of the FDIA;

(2) Is subject to a temporary suspension or permanent revocation of



registration or a temporary or permanent suspension or bar from further association with any registered public accounting firm issued by the Public Company Accounting Oversight Board under sections 105(c)(4)(A) or (B) of the Sarbanes-Oxley Act (15 U.S.C. 7215(c)(4)(A) or (B));

(3) Is subject to an order of suspension or denial of the privilege of appearing or practicing before the Securities and Exchange Commission; or

(4) Is suspended or debarred for cause from practice as an accountant by any duly constituted licensing authority of any state, possession, commonwealth, or the District of Columbia.

(b) Upon written request, the FDIC, for good cause shown, may grant written permission to such accountant or firm to perform audit services for insured depository institutions for which the FDIC is the appropriate Federal banking agency. The written request must comply with the requirements of § 303.3 of this chapter.

**§ 308.604 Notice of removal, suspension, or debarment.**

(a) *Notice to the public.* Upon the issuance of a final order for removal, suspension, or debarment of an independent public accountant or accounting firm from providing audit services, the FDIC will make the order publicly available and provide notice of the order to the other Federal banking agencies.

(b) *Notice to the FDIC by accountants and firms.* An accountant or accounting firm that provides audit services to any insured depository institution for which the FDIC is the appropriate Federal banking agency must provide the FDIC with written notice of:

(1) any currently effective order or other action described in § 308.602(a)(1)(vi) or §§ 308.603(b) through (d); or

(2) any currently effective action by the Public Company Accounting Oversight Board under sections 105(c)(4)(C) or (G) of the Sarbanes-Oxley Act (15 U.S.C. 7215(c)(4)(C) or (G)).

(c) *Timing of Notice.* Written notice required by this paragraph shall be given no later than 15 calendar days following the effective date of an order or action, or 15 calendar days before an accountant or accounting firm accepts an engagement to provide audit services, whichever date is earlier.

**§ 308.605 Application for reinstatement.**

(a) *Form of petition.* Unless otherwise ordered by the Board of Directors, an application for reinstatement by an independent public accountant or accounting firm removed, suspended, or

debarred under § 308.602 may be made in writing at any time more than one year after the effective date of the removal, suspension, or debarment and, thereafter, at any time more than one year after the accountant's or accounting firm's most recent application for reinstatement. The application must comply with the requirements of § 303.3 of this chapter.

(b) *Procedure.* An applicant for reinstatement under this section may, in the sole discretion of the Board of Directors, be afforded a hearing. In reinstatement proceedings, the person seeking reinstatement shall bear the burden of going forward with an application and proving the grounds asserted in support of the application, and the Board of Directors may, in its sole discretion, direct that any reinstatement proceeding be limited to written submissions. The removal, suspension, or debarment shall continue until the Board of Directors, for good cause shown, has reinstated the applicant or until the suspension period has expired. The filing of an application for reinstatement will not stay the effectiveness of the removal, suspension, or debarment of an accountant or firm.

Dated: December 17, 2002.

By order of the Board of Directors of the Federal Deposit Insurance Corporation.

**Robert Feldman,**

*Executive Secretary.*

**Office of Thrift Supervision**

**12 CFR Chapter V**

**Authority and Issuance**

For the reasons set out in the preamble, the Office of Thrift Supervision proposes to amend part 513 of chapter V of title 12 of the Code of Federal Regulations as follows:

1. The authority citation for part 513 is revised to read as follows:

**Authority:** 12 U.S.C. 1462a, 1463, 1464, 1467a, 1813, 1831m, and 15 U.S.C. 78.

2. Add § 513.8 to read as follows:

**§ 513.8 Removal, suspension, or debarment of independent public accountants and accounting firms performing audit services.**

(a) *Scope.* This subpart, which implements section 36(g)(4) of the Federal Deposit Insurance Act (FDIA) (12 U.S.C. 1831m(g)(4)), provides rules and procedures for the removal, suspension, or debarment of independent public accountants and their accounting firms from performing independent audit and attestation services required by section 36 of the FDIA (12 U.S.C. 1831m) for insured

savings associations and savings and loan holding.

(b) *Definitions.* As used in this section, the following terms have the meaning given below unless the context requires otherwise:

(1) *Accounting firm.* The term *accounting firm* means a corporation, proprietorship, partnership, or other business firm providing audit services.

(2) *Audit services.* The term *audit services* means any service required to be performed by an independent public accountant by section 36 of the FDIA Act and 12 CFR part 363, including attestation services. Audit services include any service performed with respect to a savings and loan holding company of a savings association that is used to satisfy requirements imposed by section 36 or part 363 on that savings association.

(3) *Independent public accountant.* The term *independent public accountant* means any individual who performs or participates in providing audit services.

(c) *Removal, suspension, or debarment of independent public accountants.* The Office may remove, suspend, or debar an independent public accountant from performing audit services for savings associations that are subject to section 36 of the FDIA if, after service of a notice of intention and opportunity for hearing in the matter, the Office finds that the independent public accountant:

(1) Lacks the requisite qualifications to perform audit services;

(2) Has knowingly or recklessly engaged in conduct that results in a violation of applicable professional standards, including those standards and conflicts of interest provisions applicable to independent public accountants through the Sarbanes-Oxley Act of 2002, Pub. L. 107-204, 116 Stat. 745 (2002) (Sarbanes-Oxley Act), and developed by the Public Company Oversight Board and the Securities and Exchange Commission;

(3) Has engaged in negligent conduct in the form of:

(i) A single instance of highly unreasonable conduct that results in a violation of applicable professional standards in circumstances in which an independent public accountant knows, or should know, that heightened scrutiny is warranted; or

(ii) Repeated instances of highly unreasonable conduct, each resulting in a violation of applicable professional standards, that indicate a lack of competence to perform audit services;

(4) Has knowingly or recklessly given false or misleading information or knowingly or recklessly participated in



any way in the giving of false or misleading information to the Office or any officer or employee of the Office;

(5) Has engaged in, or aided and abetted, a material and knowing or reckless violation of any provision of the Federal banking or securities laws or the rules and regulations thereunder, or any other law; or

(6) Has been removed, suspended, or debarred from practice before any federal or state agency regulating the banking, insurance, or securities industries, other than by action listed in paragraph (j) of this section, on grounds relevant to the provision of audit services.

(d) *Removal, suspension or debarment of an accounting firm.* If the Office determines that there is good cause for the removal, suspension, or debarment of a member or employee of an accounting firm under paragraph (c) of this section, the Office also may remove, suspend, or debar such firm or one or more offices of such firm. In considering whether to remove, suspend, or debar an accounting firm or office thereof, and the term of any sanction against an accounting firm under this section, the Office may consider, for example:

(1) The gravity, scope, or repetition of the act or failure to act that constitutes good cause for the removal, suspension, or debarment;

(2) The adequacy of, and adherence to, applicable policies, practices, or procedures for the accounting firm's conduct of its business and the performance of audit services;

(3) The selection, training, supervision, and conduct of members or employees of the accounting firm involved in the performance of audit services;

(4) The extent to which managing partners or senior officers of the accounting firm have participated, directly or indirectly through oversight or review, in the act or failure to act; and

(5) The extent to which the accounting firm has, since the occurrence of the act or failure to act, implemented corrective internal controls to prevent its recurrence.

(e) *Remedies.* The remedies provided in this section are in addition to any other remedies the Office may have under any other applicable provisions of law, rule, or regulation.

(f) *Proceedings to remove, suspend, or debar.* (1) The Office may initiate a proceeding to remove, suspend, or debar an independent public accountant or accounting firm from performing audit services by issuing a written notice of intention to take such action that names

the individual or firm as a respondent and describes the nature of the conduct that constitutes good cause for such action.

(2) An independent public accountant or accounting firm named as a respondent in the notice issued under paragraph (f)(1) of this section may request a hearing on the allegations in the notice. Hearings conducted under this paragraph shall be conducted in the same manner as other hearings under the Uniform Rules of Practice and Procedure (12 CFR part 509).

(g) *Immediate suspension from performing audit services.* (1) If the Office serves written notice of intention to remove, suspend, or debar an independent public accountant or accounting firm from performing audit services, the Office may, with due regard for the public interest and without preliminary hearing, immediately suspend an independent public accountant or accounting firm from performing audit services for savings associations, if the Office:

(i) Has a reasonable basis to believe that the independent public accountant or accounting firm engaged in conduct (specified in the notice served upon the independent public accountant or accounting firm under paragraph (f) of this section) that would constitute grounds for removal, suspension, or debarment under paragraph (c) or (d) of this section;

(ii) Determines that immediate suspension is necessary for the protection of an insured depository institution or its depositors or for the protection of the depository system as a whole; and

(iii) Serves such independent public accountant or accounting firm with written notice of the immediate suspension.

(2) An immediate suspension notice issued under this paragraph will become effective upon service. Such suspension will remain in effect until the date the Office dismisses the charges contained in the notice of intention, or the effective date of a final order of removal, suspension, or debarment issued by the Office to the independent public accountant or accounting firm.

(h) *Petition to stay.* (1) Any independent public accountant or accounting firm immediately suspended from performing audit services in accordance with paragraph (g) of this section may, within 10 calendar days after service of the notice of immediate suspension, file a petition with the Office for a stay of such suspension. If no petition is filed within 10 calendar days, the immediate suspension will remain in effect.

(2) Upon receipt of a stay petition, the Office will designate a presiding officer who shall fix a place and time (not more than 30 calendar days after receipt of such petition, unless extended at the request of the petitioner), at which the immediately suspended party may appear, personally or through counsel, to submit written materials and oral argument. In the sole discretion of the presiding officer, upon a specific showing of compelling need, oral testimony of witnesses may also be presented. In hearings held pursuant to this paragraph, there will be no discovery and the provisions of §§ 509.6 through 509.12, 509.16, and 509.21 of the Uniform Rules will apply.

(3) Within 30 calendar days after the hearing, the presiding officer shall issue a decision. The presiding officer will grant a stay upon a demonstration that a substantial likelihood exists of the respondent's success on the issues raised by the notice of intention and that, absent such relief, the respondent will suffer immediate and irreparable injury, loss, or damage. In the absence of such a demonstration, the presiding officer will notify the parties that the immediate suspension will be continued pending the completion of the administrative proceedings pursuant to the notice.

(4) The parties may seek review of the presiding officer's decision by filing a petition for review with the presiding officer within 10 calendar days after service of the decision. Replies must be filed within 10 calendar days after the petition filing date. Upon receipt of a petition for review and any reply, the presiding officer must promptly certify the entire record to the Director. Within 60 calendar days of the presiding officer's certification, the Director shall issue an order notifying the affected party whether or not the immediate suspension should be continued or reinstated. The order shall state the basis of the Director's decision.

(i) *Scope of any order of removal, suspension, or debarment.* (1) Except as provided in paragraph (i)(2), any independent public accountant or accounting firm that has been removed, suspended (including an immediate suspension), or debarred from performing audit services by the Office may not, while such order is in effect, perform audit services for any savings association.

(2) An order of removal, suspension (including an immediate suspension), or debarment may, at the discretion of the Office, be made applicable to a limited number of savings associations or savings and loan holding companies (limited scope order).

(j) *Automatic removal, suspension, and debarment.* (1) An independent public accountant or accounting firm may not perform audit services for a savings association if the independent public accountant or accounting firm:

(i) Is subject to a final order of removal, suspension, or debarment (other than a limited scope order) issued by the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, or the Office of the Comptroller of the Currency under section 36 of the FDIA;

(ii) Is subject to a temporary suspension or permanent revocation of registration or a temporary or permanent suspension or bar from further association with any registered public accounting firm issued by the Public Company Accounting Oversight Board under sections 105(c)(4)(A) or (B) of the Sarbanes-Oxley Act (15 U.S.C. 7215(c)(4)(A) or (B));

(iii) Is subject to an order of suspension or denial of the privilege of appearing or practicing before the Securities and Exchange Commission; and

(iv) Is suspended or debarred for cause from practice as an accountant by any duly constituted licensing authority of any state, possession, commonwealth, or the District of Columbia.

(2) Upon written request, the Office, for good cause shown, may grant written permission to an independent public accountant or accounting firm to perform audit services for savings associations. The request must contain a

concise statement of action requested. The Office may require the applicant to submit additional information.

(k) *Notice of removal, suspension, or debarment.* (1) Upon issuance of a final order for removal, suspension, or debarment of an independent public accountant or accounting firm from providing audit services, the Office shall make the order publicly available and provide notice of the order to the other Federal banking agencies.

(2) An independent public accountant or accounting firm that provides audit services to a savings association must provide the Office with written notice of:

(i) Any currently effective order or other action described in paragraph (c)(6) or paragraphs (j)(1)(ii) through (j)(1)(iv) of this section; or

(ii) Any currently effective action by the Public Company Accounting Oversight Board under sections 105(c)(4)(C) or (G) of the Sarbanes-Oxley Act (15 U.S.C. 7215(c)(4)(C) or (G)).

(3) Written notice required by this paragraph shall be given no later than 15 calendar days following the effective date of an order or action or 15 calendar days before an independent public accountant or accounting firm accepts an engagement to provide audit services, whichever date is earlier.

(l) *Application for reinstatement.* (1) Unless otherwise ordered by the Office, an independent public accountant or accounting firm removed, suspended or debarred under this section may apply for reinstatement in writing at any time one year after the effective date of the

order of removal, suspension, or debarment and, thereafter, at any time more than one year after the independent public accountant's or accounting firm's most recent application for reinstatement. The request shall contain a concise statement of action requested. The Office may require the applicant to submit additional information.

(2) An applicant for reinstatement under paragraph (l)(1) of this section may, in the Office's sole discretion, be afforded a hearing. The independent public accountant or accounting firm shall bear the burden of going forward with an application and the burden of proving the grounds supporting the application. The Office may, in its sole discretion, direct that any reinstatement proceeding be limited to written submissions. The removal, suspension, or debarment shall continue until the Office, for good cause shown, has reinstated the applicant or until, in the case of a suspension, the suspension period has expired. The filing of a petition for reinstatement shall not stay the effectiveness of the removal, suspension, or debarment of an independent public accountant or accounting firm.

Dated: December 2, 2002.

By the Office of Thrift Supervision.

**James Gilleran,**

*Director.*

[FR Doc. 03-98 Filed 1-7-03; 8:45 am]

BILLING CODE 4810-33-P, 6210-01-P, 6714-01-P, 6720-01-P

**SUMMARY:** The Board is publishing a final rule amending the staff commentary that interprets the requirements of Regulation C (Home Mortgage Disclosure). The Board is required to adjust annually the asset-size exemption threshold for depository institutions based on the annual percentage change in the Consumer Price Index for Urban Wage Earners and Clerical Workers. The present adjustment reflects changes for the twelve-month period ending in November 2002. During this period, the index increased by 1.27 percent; as a result, the exemption threshold remains at \$32 million. Thus, depository institutions with assets of \$32 million or less as of December 31, 2002, are exempt from data collection in 2003.

**DATES:** Effective January 1, 2003. This rule applies to all data collection in 2003.

**FOR FURTHER INFORMATION CONTACT:** Dan S. Sokolov, Attorney, Division of Consumer and Community Affairs, at (202) 452-3667; for users of Telecommunications Device for the Deaf (TDD) only, contact (202) 263-4869.

**SUPPLEMENTARY INFORMATION:** The Home Mortgage Disclosure Act (HMDA; 12 U.S.C. 2801 *et seq.*) requires most mortgage lenders located in metropolitan areas to collect data about their housing-related lending activity. Annually, lenders must file reports with their federal supervisory agencies and make disclosures available to the public. The Board's Regulation C (12 CFR part 203) implements HMDA.

Provisions of the Economic Growth and Regulatory Paperwork Reduction Act of 1996 (codified at 12 U.S.C. 2808(b)) amended HMDA to expand the exemption for small depository institutions. Prior to 1997, HMDA exempted depository institutions with assets totaling \$10 million or less, as of the preceding year-end. The statutory amendment increased the asset-size exemption threshold by requiring a one-time adjustment of the \$10 million figure based on the percentage by which the Consumer Price Index for Urban Wage Earners and Clerical Workers (CPIW) for 1996 exceeded the CPIW for 1975, and provided for annual adjustments thereafter based on the annual percentage increase in the CPIW. The one-time adjustment increased the exemption threshold to \$28 million for 1997 data collection.

Section 203.3(a)(1)(ii) of Regulation C provides that the Board will adjust the threshold based on the year-to-year change in the average of the CPIW, not seasonally adjusted, for each twelve-month period ending in November,

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## FEDERAL RESERVE SYSTEM

### 12 CFR Part 203

[Regulation C; Docket No. R-1140]

#### Home Mortgage Disclosure

**AGENCY:** Board of Governors of the Federal Reserve System.

**ACTION:** Final rule; staff commentary.

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rounded to the nearest million. Pursuant to this section, the Board raised the threshold to \$29 million for 1998 data collection, raised it to \$30 million for 1999 data collection, and kept it at that level for data collection in 2000. The Board raised the threshold to \$31 million for data collection in 2001 and to \$32 million for data collected in 2002.

During the period ending November 2002, the CPIW increased by 1.27 percent. As a result, the exemption threshold remains at \$32 million. Thus, depository institutions with assets of \$32 million or less as of December 31, 2002, are exempt from data collection in 2003. An institution's exemption from collecting data in 2003 does not affect its responsibility to report the data it was required to collect in 2002.

The Board is amending comment 3(a)-2 of the staff commentary to implement the increase in the exemption threshold. Under the Administrative Procedure Act, notice and opportunity for public comment are not required if the Board finds that notice and public comment are unnecessary. 5 U.S.C. 553(b)(B). Regulation C establishes the formula for determining adjustments to the exemption threshold, if any, and the amendment to the staff commentary merely applies the formula. This amendment is technical and not subject to interpretation. For these reasons, the Board has determined that publishing a notice of proposed rulemaking and providing opportunity for public comment are unnecessary. Therefore, the amendment is adopted in final form.

#### List of Subjects in 12 CFR Part 203

Banks, Banking, Federal Reserve System, Mortgages, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, the Board amends 12 CFR part 203 as follows:

#### PART 203—HOME MORTGAGE DISCLOSURE (REGULATION C)

1. The authority citation for part 203 continues to read as follows:

**Authority:** 12 U.S.C. 2801-2810.

2. In Supplement I to part 203, under Section 203.3—Exempt Institutions, under 3(a) *Exemption based on location, asset size, or number of home-purchase loans*, paragraph 2 is revised to read as follows:

#### Supplement I to Part 203—Staff Commentary

\* \* \* \* \*

*Section 203.3—Exempt Institutions*

*3(a) Exemption based on location, asset size, or number of home-purchase loans.*

\* \* \* \* \*

*2. Adjustment of exemption threshold for depository institutions.* For data collection in 2003, the asset-size exemption threshold is \$32 million. Depository institutions with assets at or below \$32 million are exempt from collecting data for 2003.

\* \* \* \* \*

By order of the Board of Governors of the Federal Reserve System, acting through the Director of the Division of Consumer and Community Affairs under delegated authority, December 24, 2002.

**Jennifer J. Johnson,**

*Secretary of the Board.*

[FR Doc. 02-32948 Filed 12-30-02; 8:45 am]

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