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Administrator, Agricultural Marketing Service.

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## DEPARTMENT OF THE TREASURY

### Office of the Comptroller of the Currency

#### 12 CFR Part 19

[Docket No. 03-19]

RIN 1557-AC10

### 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. 2003-33]

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:** Final rule.

**SUMMARY:** The OCC, Board, FDIC, and OTS (each an Agency, and collectively, the Agencies) are jointly publishing final rules pursuant to section 36 of the Federal Deposit Insurance Act (FDIA). Section 36, as implemented by 12 CFR part 363, requires that each insured depository institution with total assets of \$500 million or more 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). The insured depository institution must include the accountant's audit and attestation reports in its annual report.

Section 36 authorizes the Agencies to remove, suspend, or debar accountants from performing the audit services required by section 36 if there is good cause to do so. The final rules establish rules of practice and procedure to implement this authority and reflect 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 final rules enhance the Agencies' ability to address misconduct by accountants who perform annual audit and attestation services.

**EFFECTIVE DATE:** October 1, 2003.

**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, Legal Division, (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; Harrison E. Greene, Jr., Senior Policy Analyst, Accounting and Securities Disclosure Section, Division of Supervision and Consumer Protection, (202) 898-8905.

OTS: Christine A. Smith, Project Manager, (202) 906-5740, Supervision Policy; Teresa A. Scott, Counsel (Banking & Finance), (202) 906-6478, Regulations and Legislation Division.

**SUPPLEMENTARY INFORMATION:**

#### I. Background

Section 36 of the FDIA (12 U.S.C. 1831m), 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>

<sup>1</sup> 12 U.S.C. 1831m, 1831m(j)(2); see also 12 CFR part 363 (describing the requirements for

Section 36 of the FDIA also requires that an independent public accountant audit the 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 Agencies' authority to remove, suspend, or debar from practice before an 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

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 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).

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.

## II. Proposed Rule and Comments Received

On January 8, 2003, the Agencies proposed amending their rules of practice by adding provisions for the removal, suspension, or debarment of accountants or accounting firms from performing the audit services required by section 36 of the FDIA.<sup>9</sup> The proposed rules defined "good cause" for such actions and established procedures for removal, suspension, or debarment of accountants. The proposals also contained conforming amendments to the existing practice rules of the OCC, Board, and FDIC.

The Agencies received six comments. One comment was from a major trade association for community banks; another was from four large accounting firms and a major professional association for the accounting industry; a third was from three accounting firms that provide audit services to publicly held and non-publicly held banks in one state; the fourth and fifth comments were from certified public accountants; and the final comment was from a banking, management, and economic consultant. The commenters generally stated their support for the underlying goals of section 36 and the proposal—to bolster the quality of audit services.

One commenter expressed concern about immediate suspensions. The commenter asked how an insured depository institution can meet the deadline for submitting section 36 audits if the institution's accountant is subject to an order of immediate suspension and requested guidance on the Agencies' expectations under these circumstances. Another commenter questioned why the Agencies are pursuing this rulemaking, given the role of the newly constituted Public Company Accounting Oversight Board (PCAOB) as a regulator of accountants. The commenter's more specific concern was with the level of due process associated with immediate and automatic suspensions. A third commenter questioned whether the Agencies have authority to use a negligence standard of any kind, given

the higher standards elsewhere in the FDIA for IAPs who are independent contractors. The commenter also questioned the authority of the Agencies to extend sanctions to accounting firms and offices.

In response to the comments, the Agencies have revised the proposal, as discussed in detail below.

## III. Final Rule

Below is a more detailed discussion of the issues raised in response to the proposal and the Agencies' responses thereto. Because each Agency is codifying the final rules using different section numbers, this discussion will follow the order of the proposal, using captions instead of section numbers for reference.

### Definitions

The proposal defined "accounting firm," "audit services," and "independent public accountant." Under the proposal, "accounting firm" means a corporation, proprietorship, partnership, or other business firm providing audit services. "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. "Independent public accountant" means any individual who performs or participates in providing audit services.

The Agencies did not receive any comments on the definitions. The final rule adopts the definitions as proposed.

### Removal, Suspension, or Debarment

*Good Cause for Removal, Suspension, or Debarment.* The proposed rules defined "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 of 2002 (Sarbanes-Oxley Act)<sup>10</sup> and developed by the

PCAOB and the Securities and Exchange Commission (SEC), as such standards and provisions become effective; engages 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.

Under the proposal, good cause also included knowingly or recklessly giving false or misleading information to the Agencies with respect to any matter before the Agency; knowingly or recklessly 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 industry 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.

One commenter expressed a variety of reservations about the good cause standard. The commenter's broadest suggestion was that the Agencies should refer all section 36 actions against accountants to the PCAOB and SEC, given the entities' new roles as regulators of accountants under the Sarbanes-Oxley Act.

This comment does not reflect the jurisdictional differences among the Agencies, PCAOB, and SEC. The Agencies have enforcement jurisdiction that is separate and distinct from the PCAOB's and the SEC's enforcement jurisdictions. Congress gave the Agencies discretion to suspend or debar accountants from performing annual audit services for good cause under section 36 of the FDIA. While an

Governance Initiatives to Non-Public Banking Organizations (May 5, 2003). See also FDIC Financial Institution Letter 17-2003 (Corporate Governance, Audits, and Reporting Requirements) (March 5, 2003).

<sup>9</sup> 68 FR 1116 (January 8, 2003); see also 68 FR 4967, 5075 (January 31, 2003) (technical corrections).

<sup>10</sup> Pub. L. 107-204, 116 Stat 745 (2002). For further guidance on the obligations of insured depository institutions under the Sarbanes-Oxley Act, see OCC Bulletin No. 2003-21, Application of Recent Corporate Governance Initiatives to Non-Public Banking Organizations (containing the Statement on Application of Recent Corporate Governance Initiatives to Non-Public Banking Organizations by the Board, OCC, and OTS (May 6, 2003)); Federal Reserve Board SR Letter 03-8, Statement on Application of Recent Corporate

enforcement action by the PCAOB or the SEC could provide good cause for section 36 actions, neither the PCAOB nor the SEC has statutory authority under the FDIA to suspend or debar an accountant from performing annual audit services. Even if the PCAOB or the SEC could accomplish this outcome indirectly, by barring an accountant from associating with an accounting firm, neither the PCAOB nor the SEC has authority to take action against an accountant who performs services for an institution that is not publicly held. Accordingly, the Agencies are not adopting the commenter's suggestion that all section 36 cases be referred to the PCAOB or the SEC.

The commenter further asserted that there might be potential inconsistencies between the good cause standards in the proposed rules and those the PCAOB may establish in the future. To address these potential problems, the commenter suggested that the Agencies should, as stated above, defer to the PCAOB and the SEC, or at a minimum coordinate with them before taking suspension or debarment actions against accountants.

The Agencies intend to coordinate with the PCAOB and the SEC in section 36 cases under appropriate circumstances. However, the Agencies do not believe that the proposed rule creates a conflict in professional or substantive standards for accountants among the Agencies, the PCAOB, and the SEC. The proposed rule did not suggest new standards for accountants. Rather, it incorporated accountants' existing responsibility to adhere to applicable professional standards, such as generally accepted auditing standards and generally accepted standards for attestation engagements, and existing SEC and Agency standards, into the definition of good cause. The proposed rules were also consistent with the Sarbanes-Oxley Act and anticipated future actions by the SEC and PCAOB to enforce standards set by those agencies. The proposed rules were also drafted to accommodate the new standards that will be adopted by the SEC and the PCAOB.

The commenter's next point concerned the possibility that conduct at non-depository institutions could provide the basis for an action against an accountant. The commenter questioned whether the Agencies have the capability to evaluate the relevance of suspensions and debarments of accountants in non-banking contexts, e.g., suspensions or debarments by regulators of different types of businesses. The commenter opposed using suspensions by non-banking

agencies to serve as good cause for suspensions or debarments in the banking industry.

The proposal was consistent with the Agencies' current authority under section 8(e)(1)(A)(ii) of the FDIA, which allows the Agencies to take into account unsafe business practices in connection not only with any insured depository institution, but more broadly, *any business institution*.<sup>11</sup> The Agencies continue to believe that there may be cases in which misconduct by accountants at non-depository institutions could raise serious questions about the ability of the accountant to provide audit services for an insured depository institution. Under the final rule, therefore, the Agencies can consider as "good cause" suspensions and debarments of accountants in non-depository institution contexts that come to the attention of the Agencies.

Another commenter questioned whether the Agencies have the authority to use negligence as a basis for a removal, suspension, or debarment of an accountant. The commenter argued that the negligence standard is not consistent with remedies available now to the Agencies against independent contractor IAPs under section 8 of the FDIA.<sup>12</sup>

In response, the Agencies note that section 36 of the FDIA broadly refers to "good cause" as grounds for section 36 enforcement actions. There is no limitation in the statute on the use of negligence as a basis for action, nor does section 36 tie "good cause" to existing section 8 standards. On the contrary, section 36 of the FDIA states that the good cause enforcement remedies are *in addition* to those available under section 8.<sup>13</sup> The commenter's position would essentially require this clause to be eliminated from section 36 of the statute. Also, the negligence standard is one the SEC has used for many years in its suspension and debarment actions against accountants. Congress recently codified this standard for the SEC in the Sarbanes-Oxley Act.

For the foregoing reasons, the Agencies are adopting in the final rules the good cause standard from the proposed rules.

*Removal, Suspension, or Debarment of Accounting Firms or Offices of Firms.* The proposed rules provided that if an Agency determines that there is good cause for the removal, suspension, or debarment of a member or an employee

of an accounting firm, the Agency "also may remove, suspend, or debar such firm or one or more offices of such firm." The proposed rule listed five illustrative factors that the Agency may consider when deciding (a) whether to remove, suspend, or debar a firm or one or more offices of such firm, and (b) the term of any sanction imposed.

Some of the commenters questioned the authority of the Agencies to take action against accounting firms or offices of firms. One commenter noted that section 36(g)(4) of the FDIA specifically permits removal, suspension, or debarment of "an independent public accountant." The commenter then asserted "[t]here is no mention in the statute of the possible extension of those sanctions to accounting firms or offices, or of extended or vicarious liability in any other way or of any kind." The commenter concluded that the Agencies lack authority to implement this aspect of their proposal.

Another commenter did not specifically question the authority of the Agencies to propose rules permitting the removal, suspension, or debarment of an accounting firm or office thereof. Rather, the commenter quoted a portion of the legislative history of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. 101-73, 103 Stat. 183 (1989), to the effect that enforcement actions should usually be limited to the individuals who participated in the wrongful action to "prevent unintended consequences or economic harm to innocent third parties."<sup>14</sup> The commenter argued that the rules should include an explicit presumption against taking action against an entire firm, that this sanction should only be available in the most egregious circumstances, specifically articulated in the rules, and that a sanction against a firm should only be permissible after the affected firm has had the opportunity for a meaningful hearing before an independent trier of fact.

The Agencies believe that the proposed rules, as they pertain to actions against accounting firms and offices, are well within the Agencies' statutory authority. As noted in the preamble to the proposed rule, under the current practice regulations, the Agencies may "remove, suspend, or debar a firm by naming each member of the firm or office in the order \* \* \*." Thus, the proposal also employed this scope and provided guidance on when a firm sanction might be appropriate. In

<sup>11</sup> 12 U.S.C. 1818(e)(1)(A)(ii); see also *Hendrickson v. FDIC*, 113 F.3d 98 (7th Cir. 1997).

<sup>12</sup> See 12 U.S.C. 1818, 1813(u)(4).

<sup>13</sup> *Id.* 1831m(g)(4).

<sup>14</sup> H.R. Rep. No. 54(I), 101st Cong., 1st Sess., at 467 (1989), reprinted in 1989 U.S.C.A.N. 86,263.

addition, there is no indication that in using the term "independent public accountant" Congress intended to restrict removals, suspensions, or debarments solely to natural persons. The term "independent public accountant" is used throughout section 36 and its implementing regulation, 12 CFR part 363, not just in the section 36(g)(4) provision relating to removal, suspension, or debarment. Indeed, section 36 specifically provides that all required audit services must be performed by an "independent public accountant" who has agreed to provide requested work papers and has received an acceptable peer review. All required audit and other reports are universally signed by accounting firms, not individual accountants,<sup>15</sup> and peer reviews are performed at the firm level. Thus, the Agencies believe that enforcement action at the firm level in appropriate circumstances is entirely consistent with the section 36 statutory scheme.<sup>16</sup>

With respect to the legislative history quoted by the commenter, we note that the history is from FIRREA, not the Federal Deposit Insurance Corporation Improvement Act of 1991 (FDICIA),<sup>17</sup> which added section 36 to the FDIA, so it is not directly relevant to our construction of section 36. Even if this legislative history were applicable to section 36, the commenter quoted only a portion of the relevant legislative history material—the section not quoted supports the view that, in extending Agency enforcement jurisdiction to independent contractors, including "any attorney, appraiser, or accountant,"<sup>18</sup> Congress intended such enforcement jurisdiction to extend to

business organizations under appropriate circumstances. In this regard, the House Banking Committee's Report on FIRREA, H.R. Rep. No. 54(I), at 466–67, states:

[T]he Committee strongly believes that the agencies should have the power to proceed against such entities (corporation, firm or partnership) if most or many of the managing partners or senior officers of the entity have participated in some way in the egregious misconduct. For example, a removal and prohibition order might be justified against the local office of a national accounting firm if it could be shown that a majority of the managing partners or senior supervisory staff participated directly or indirectly in the serious misconduct to an extent sufficient to give rise to an order. Such an order might well be inappropriate if it was taken against the entire national firm or other geographic units of the firm, unless the headquarters of these units were shown to have also participated, even if only in a reviewing capacity.

Accordingly, the similar reference in section 36 to "independent public accountant" can reasonably be read to reach firms as well.

The Agencies understand that severe economic consequences may result from action barring an accounting firm from performing section 36 audit services. The Agencies are also sensitive to the consequences that barring a firm might have on innocent third parties not directly involved in the misconduct at issue. While the Agencies have had the authority since FIRREA to pursue enforcement actions against entire firms of professionals, such authority has been used only a handful of times and only in the most egregious circumstances. In addition, the Agencies believe that the five factors specified in the proposed rule appropriately focus the inquiry on whether sufficient involvement of firm management is present to justify action against the entire firm. Accordingly, the Agencies see no reason to amend the proposal to include an explicit presumption against action at the firm or office level. The comment concerning the need for a prior hearing before action at the firm or office level will be addressed in the sections discussing automatic and immediate suspensions.

*Proceedings to Remove, Suspend, or Debar.* Under the proposed rules, the Agencies would hold formal hearings on removals, suspensions, and debarments under rules that are consistent with the Agencies' Uniform Rules of Practice and Procedure (Uniform Rules).<sup>19</sup> The Uniform Rules provide, among other

things, for written notice to the 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 so that it applied solely to audit services provided to specified insured depository institutions, rather than to all insured depository institutions supervised by the issuing Agency. This was referred to in the proposed rules as a "limited scope order."<sup>20</sup>

The procedures in the proposed rules for removal, suspension, and debarment were drawn principally from the Agencies' existing practice rules. The Agencies did not receive comment on these procedures. Therefore, the Agencies are adopting the procedures as proposed.

*Immediate Suspension from Performing Audit Services.* The proposed rule implemented the authority in section 36 to "suspend" an independent public accountant by providing that an Agency may issue a notice immediately suspending an accountant or a firm subject to a notice of intention to remove, suspend, or debar if the Agency determines that immediate suspension is necessary for the protection of an insured depository institution, or its depositors, or for the protection of the insured depository system as a whole. In making this proposal, the Agencies stated that the authority to immediately suspend an accountant or firm could prevent seriously harmful conduct relating to accounting matters at an insured depository institution from being repeated or escalating while the administrative proceedings relating to a permanent removal, suspension, or debarment order are pending.

One commenter asked for guidance to insured depository institutions on what to do if their accountant were suspended immediately, more specifically, how to meet the deadlines for filing annual audits. The commenter was concerned that there would not be sufficient time to complete the audit, given the time it would take for a new accountant to become familiar with the facts.

The Agencies understand that an immediate suspension may cause disruption to an institution and make it

<sup>15</sup> Section AU 508.08 of the AICPA's Professional Standards describes the basic elements of the auditor's standard report on audited financial statements. These elements include "i. The manual or printed signature of the auditor's firm." Similarly, Section AT 501.47 of these standards states that a practitioner's examination report on the effectiveness of an entity's internal control over financial reporting should include "j. The manual or printed signature of the practitioner's firm." In addition, Section AU 9339.06 of the Professional Standards presents an example of a letter that an auditor should consider submitting to a regulator prior to allowing the regulator access to audit work papers. This letter ends with "Firm signature."

<sup>16</sup> The Agencies realize that the final rule includes definitions of both independent public accountant (individuals who provide audit services) and accounting firm (business entities that provide auditing services). The dual definitions are required because of the additional criteria, beyond those applicable to individual accountants, that the Agencies may assess in determining whether to take action against a firm. The Agencies continue to believe that the statutory term independent public accountant encompasses both regulatory definitions.

<sup>17</sup> Pub. L. 102–242, 105 Stat. 2236 (1991).

<sup>18</sup> 12 U.S.C. 1813(u)(4).

<sup>19</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 part 509, subpart A (OTS).

<sup>20</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.

difficult to meet the deadlines for submitting annual audits. The Agencies expect that immediate suspensions would only be issued in compelling situations. In the case where an Agency head imposed an immediate suspension, the Agency will make appropriate adjustments to the filing deadlines, if warranted, at the institution's request.

Another commenter expressed a variety of objections to the proposed procedures for contesting an immediate suspension. The commenter generally stated that the proposed procedures do not comport with due process and suggested that the Agencies modify the proposed procedures in a number of areas to follow more closely those procedures governing issuance of temporary cease-and-desist orders by the SEC. Except for the modifications explained below, the Agencies do not believe that the proposed procedures should be conformed to the procedures applicable to temporary cease-and-desist orders issued under the securities laws. With regard to the protection of the nation's banking system, judicial decisions have recognized that there is a compelling governmental interest that can justify regulatory action with abbreviated procedures when necessary.<sup>21</sup> The Agencies expect that the immediate suspension remedy would be used only in circumstances where serious harm to a depository institution, its depositors, or to the depository system as a whole would occur unless immediate enforcement action is taken.

The commenter also had more specific suggestions for revisions to the proposal. First, the commenter stated that the Agencies' proposed procedures should allow for a quicker agency decisionmaking process. The commenter noted that, under the time frames contained in the proposed rules, an accountant or a firm that petitions the Agency to stay a notice of immediate suspension may not receive a decision with respect to the petition until 70 days after the immediate suspension becomes effective. The commenter noted that, under the SEC Rules of Practice, a final agency decision on a challenge to a temporary cease-and-desist order issued by the SEC without a prior hearing is required within 20 days.<sup>22</sup>

The Agencies believe that the proposed maximum time period permitted for an Agency decision on a stay petition is consistent with due

process requirements. The Agencies note that the Supreme Court has approved a procedural framework allowing up to 90 days for a final decision by the Agencies on a challenge to an *ex parte* suspension order issued by the Agencies against an IAP of a depository institution who has been indicted for certain types of crimes. *FDIC v. Mallen*, 486 U.S. 230 (1988).

The maximum time limits in the proposed rules were designed by the Agencies to permit a sufficient period for the creation of a meaningful record with regard to a stay petition and for careful and deliberate review of that record by the Agency decision maker, consistent with the recognized necessity for prompt administrative action on such a petition. As with the post-deprivation Agency hearing at issue in the *Mallen* decision, a stay petition could necessitate resolution of factual disputes that would require at least some examination of relevant evidence.

The Agencies intend that an administrative decision on a stay petition under the rules should be made at the earliest practicable time. Thus, the time limits imposed in the rules are intended to establish only the maximum period allowable for issuing a decision and a decision is expected to be made more promptly whenever feasible. Nevertheless, in order to further minimize concerns about undue delay in the decision on a stay petition, the Agencies believe that the date by which a hearing on a petition to stay is ordered can be shortened without unduly impairing the administrative decisionmaking process. Accordingly, the final rules require that an Agency must order a hearing on a petition to stay to be held 10 days after receipt of the petition, rather than within 30 days as proposed.

As the commenter pointed out, the Supreme Court's approval of a 90-day agency decisionmaking period in the *Mallen* decision depended in part on the fact that, under the statutory framework at issue, the suspension of an IAP may be issued only after the individual involved has been indicted by an independent entity, like a grand jury. According to the Court, the indictment serves to reduce the likelihood that the banking agency suspension is unjustified. Under the proposed rules, an immediate suspension notice may be issued by an Agency without any similar action by a third party. In the Agencies' view, however, the lack of an independent triggering event by a third party for accountant suspensions does not mean that the maximum time limits in the final rules would result in the denial of a prompt and meaningful

hearing before the Agency on the propriety of the suspension. The Agencies intend that, under the final rules, an immediate suspension could be issued only where there is probative evidence that substantial harm to an insured depository institution, its depositors, or to the depository system as a whole is likely to occur prior to completion of the proceedings on a permanent order of removal, suspension, or debarment. In addition, under the final rules, the maximum time period permitted for a decision on a stay petition (50 days) is only slightly longer than half the maximum time limit approved in the *Mallen* case for an agency decision on an indictment-triggered suspension. In the Agencies' judgment, the maximum time for decision in the final rules represents the shortest realistic period necessary for adequate consideration of the suspended party's opposition to the suspension.<sup>23</sup> As the Supreme Court noted in *Mallen*, the public has a strong interest in seeing that the ultimate agency decision with respect to a suspension is made in a "considered and deliberate manner."<sup>24</sup>

The commenter's second objection to the procedures was to the proposed provisions under which the decision on a petition to stay an immediate suspension is made by a presiding officer designated by the Agency. According to the commenter, the stay petition should be decided by an administrative law judge, who by statute has some independence from the agency whose cases the judge hears.

The Agencies do not believe that an administrative law judge must be designated as the decisionmaking official with regard to a petition to stay the immediate suspension of an accountant or firm. The Agencies note that under their existing rules of practice, a similar type of decision on an interim order, namely the decision with respect to whether a suspension of an IAP who has been indicted should be lifted pending completion of the criminal trial, is made by a presiding officer, not by an administrative law judge.<sup>25</sup> A court decision that prescribed the minimum procedures required by due process for these suspensions did not suggest that the agency decision on lifting the suspension had to be made by

<sup>23</sup> The proposed and final rules permit a suspended accountant or firm to elect to seek review of the presiding officer's decision on a stay petition by the Agency. However, the appeal to the Agency is not mandatory.

<sup>24</sup> 486 U.S. at 244.

<sup>25</sup> 12 CFR 19.112(b) (OCC); 12 CFR 263.73(a) (Board); 12 CFR 308.164(b) (FDIC); and 12 CFR 508.6(a) (OTS).

<sup>21</sup> See, e.g., *Fahey v. Mallonee*, 322 U.S. 245 (1947).

<sup>22</sup> 17 CFR 201.513(c).

an administrative law judge in order to meet constitutional requirements.<sup>26</sup>

The Agencies recognize, however, that it may be useful to clarify that the presiding officer who decides a petition to stay an immediate suspension must be insulated from the Agency staff responsible for prosecuting the charges against the suspended accountant or firm. The provisions of the proposed rules relating to the hearing on a stay petition are therefore being modified to add a new sentence, which follows the requirements of the Administrative Procedure Act<sup>27</sup> for formal agency adjudications. The final rules explicitly state that an Agency employee engaged in investigative or prosecuting functions for the Agency in a particular action against an accountant or a firm, or in a factually related action, may not serve as the presiding officer or otherwise participate or advise in the decision with respect to a petition to stay the immediate suspension.

The commenter's third suggestion was that the proposed immediate suspension provisions be modified to make clear that, except in unusual cases, an accountant or firm should be suspended immediately only after prior notice and opportunity for the party involved to contest the suspension. In the Agencies' judgment, the modification to the proposed procedures advocated by the commenter is neither necessary nor appropriate. There is nothing in section 36 that requires prior notice and opportunity for hearing before a suspension under that provision may be issued. Moreover, the courts have long recognized that the strong governmental interest in protecting depositors and preserving confidence in the financial system can justify immediate action by the regulatory agencies prior to notice and the opportunity for hearing.<sup>28</sup>

Fourth, the commenter asserted that, like the SEC Rules of Practice, the Agencies' procedures should require a showing that irreparable harm would result before authorizing an immediate suspension. Contrary to this comment, there is no requirement in section 36 that the Agencies show "irreparable harm." Nor are the agencies aware of any authority that requires a finding by the Government of irreparable harm in order to satisfy minimum constitutional standards of due process before immediate action can be taken. The Agencies further note that the suspension procedures in the proposed

rules and the finding that must be made by the Agencies to justify an immediate suspension are very similar to those prescribed in section 8(e)(3) of the FDIA, which govern the suspension of an IAP of an insured depository institution pending completion of administrative proceedings concerning a proposed permanent order of removal or prohibition.<sup>29</sup> Nevertheless, to better express the immediate suspension standard, the rule has been revised to require "immediate harm" to an insured depository institution, its depositors, or to the depository system as a whole.

The commenter's fifth criticism of the proposed rule was that it did not establish a procedure for judicial review of immediate suspensions imposed by the Agencies. However, section 36 contains no specific provision for review by the courts of any action taken by the Agencies under the authority of that provision. Administrative agencies have no authority to create a right to judicial review of agency action.<sup>30</sup> Any right to judicial review of an immediate suspension must be based on some statutory authority.

The commenter's sixth point concerned immediate suspensions of accounting firms. The commenter stated that the Agencies' authority under the proposal to immediately suspend a firm from providing audit services is too broad and subjective and any firm subject to an immediate suspension should have greater procedural protections than what is provided in the proposed rules.

The Agencies recognize that the immediate suspension of an entire firm could have a serious effect on the firm as well as on the insured depository institutions that may be relying on the firm for audit services. However, as explained above, the Agencies intend that the immediate suspension sanction would be applied to a firm only when clearly necessary to protect a depository institution or the depository system and when the factors specified in the rules for applying disciplinary action to a firm support such a regulatory response. Because the Agencies believe that these circumstances, though unusual, warrant disciplinary action against an entire accounting firm should they occur, the Agencies have retained that authority in the final rule. The procedural protections afforded an immediately suspended party in the final rules, whether an individual or a firm, represent an appropriate balance

between protecting the banking system and protecting the rights of affected parties.

*Automatic Removal, Suspension, and Debarment.* The proposed rule provided that accountants or firms subject to certain specified disciplinary actions would automatically be prohibited from providing audit services. No further proceedings or hearings by the Agency would be required in these instances. Under each Agency's proposed rule, the actions giving rise to such an automatic bar include: (1) A final order of removal, suspension, or debarment under section 36 (other than a limited scope order) issued by any of the other Agencies; (2) certain actions by the PCAOB (specifically, a temporary suspension or permanent revocation of registration or a temporary or permanent suspension or debarment from further association with a registered public accounting firm); (3) certain actions by the SEC (specifically, an order of suspension or a denial of the privilege of appearing or practicing before the SEC); and (4) suspension or debarment for cause from practice as an accountant by the licensing authority of any state, possession, commonwealth, or the District of Columbia.

Under the proposed rules, disciplinary actions not giving rise to an automatic bar could still serve as grounds for an Agency to take action against an accountant or a firm. In this respect, grounds for Agency action set forth in the proposal specifically include removal, suspension, or debarment by any Federal or state agency regulating the banking, insurance, or securities industries. If such an action were grounds for an Agency proceeding, however, the full array of hearings and procedures in the proposed rules would be required.

One commenter objected to the proposed rules' approach to the automatic bar, contending that it was too broad in scope because the reasons for an action by the SEC, PCAOB, or a state might be irrelevant to the provision of audit services under the rules. The commenter argued that, to prevent an unwarranted automatic bar, an accountant or a firm should in all cases have the opportunity for a hearing before an Agency considering removal, suspension, or debarment, and that the Agency should be required to conduct an independent analysis. The commenter also asserted that the SEC's automatic suspension provisions are more limited and generally require license revocation, criminal conviction, or prior action by the SEC. Finally, the commenter urged the Agencies to include in the final rule an expedited

<sup>26</sup> *Feinberg v. FDIC*, 420 F. Supp. 109, 120 (D.D.C. 1976).

<sup>27</sup> 5 U.S.C. 554.

<sup>28</sup> See, e.g., *Fahey v. Mallonee*, 332 U.S. at 253; *Mallen*, 486 U.S. at 240–41; *Feinberg*, 420 F. Supp. at 119.

<sup>29</sup> 12 U.S.C. 1818(e)(3).

<sup>30</sup> Final agency action would, however, be reviewable by a court under the Administrative Procedures Act.

review process for an automatic removal, suspension, or debarment.

The Agencies believe that the automatic bar provisions are generally appropriate, notwithstanding certain differences from the SEC's practice, and that the protections granted in the rule are adequate. In a case where another Agency has taken disciplinary action against an accountant or a firm under section 36, the Agency has resolved issues that are relevant to the provision of audit services throughout the banking system. If an accountant or a firm were entitled to a separate hearing before each Agency, four separate hearings would be required to prevent an accountant or firm from providing audit services under the rules, notwithstanding the similarity of the issues. Such a requirement would essentially result in duplicative proceedings to implement a single action, and the Agencies do not believe that the repetitive proceedings would result in any significant additional protection for the accountant or firm. The Agencies believe it is appropriate and within the statutory direction of section 36 for the joint rules to provide that each Agency will defer to the proceedings of the other federal banking supervisors.

It should be noted that the automatic bar resulting from an action by another Agency does not apply in a case where the other Agency has issued a limited scope order effective only with respect to audit services provided to one or more specified institutions. If another Agency sought to remove, suspend, or debar an accountant subject to a limited scope order, it would have to provide the accountant with the hearings and procedures set forth in the rule. Moreover, in the event that the particular facts and circumstances of a removal, suspension, or debarment justify an exception from the automatic, industry-wide bar, each Agency's proposed rule provided that the Agency has discretion to override the automatic bar with respect to the institutions it supervises. An accountant or firm would be entitled to make such a request in any case, and the Agency could grant written permission.

One commenter suggested that the Agencies should include in the rule substantive standards for when they will override the automatic bar. In response, we note that the general standard for suspension or debarment under section 36—"good cause"—would apply to the decision of whether or not to override an automatic bar. It is impossible to predict all the situations in which the facts will support an override of an automatic

suspension or debarment. A bright-line test could have the effect of limiting an Agency's flexibility to give the relief sought by the accountant or firm. Accordingly, the final rule retains the provision permitting the accountant or firm to request that an Agency grant an exception from the automatic bar.

With regard to SEC and PCAOB actions as a predicate for the automatic bar, the Agencies believe that the SEC's and PCAOB's expertise and jurisdiction in this area warrant recognition by the Agencies of their actions against an accountant or firm. While there are differences between insured depository institutions and institutions under the primary jurisdiction of the SEC, the conduct giving rise to suspension or debarment by the SEC is likely to be of equally significant concern to the banking regulators. In the rare case where an action by the SEC or the PCAOB is based on conduct that is unrelated to the provision of audit services to an insured institution, the Agencies retain override authority, and an accountant or firm would be able to request Agency permission to provide audit services notwithstanding SEC or PCAOB action.

The final trigger for an automatic bar in the proposed rule was suspension or debarment for cause by a state licensing authority. The Agencies have further considered the potential effects of this provision in light of the comments received and agree that there are likely to be instances in which a state's action is not relevant to the provision of audit services—there may be a wide range of "for cause" grounds for suspension or debarment under various state laws. In addition, the procedural protections afforded to accountants in state proceedings may not be as uniform and as broad as those provided by the Agencies, the SEC, and the PCAOB. Accordingly, the Agencies have determined that suspension or debarment of an accountant for cause by a state licensing authority should properly be treated as grounds for discretionary Agency removal, suspension, or debarment, rather than as a trigger for the automatic prohibition on the provision of audit services. The final rule amends both the automatic bar section and the section on grounds for Agency action to reflect this change.

One commenter raised a concern about whether the automatic bar provision of the proposed rule could violate an accountant's or a firm's right to due process by imposing a penalty without allowing opportunity for a hearing. As set forth above, the automatic bar only applies in instances where the accountant or a firm has

already received due process protections in proceedings before another Agency, the SEC, or the PCAOB. Moreover, an accountant or a firm may petition an Agency to perform audit services for a bank or savings association. The Agencies believe that these procedures will provide ample opportunity for an accountant or firm to obtain a fair hearing that comports with due process protections of the Constitution.

*Notice of Removal, Suspension, or Debarment.* The proposed rules required 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 was consistent with the presumption in favor of public notice for enforcement actions in the FDIA.<sup>31</sup> The proposed rules also contained notification provisions for accountants and firms.

The proposal required that an accountant or accounting firm performing section 36 audit services for any insured depository institution must provide the Agencies with written notice of any currently effective disciplinary sanction against the accountant or firm issued by the PCAOB 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 under the proposed rules is also required of any removal, suspension, or debarment from practice before any Federal or state (non-licensing) agency regulating the banking, insurance, or securities industry on grounds relevant to the provision of audit services; and any action by the PCAOB 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 in the rules of the PCAOB. 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.

The Agencies did not receive any comments on the notice provisions. The Agencies are therefore adopting the

<sup>31</sup> 12 U.S.C. 1818(u)(1).

provisions as proposed, although there are technical changes to accommodate changes to the good cause and automatic suspension provisions described above.

*Petition for Reinstatement.* Under the proposal, a removed, suspended, or debarred "independent public accountant or accounting firm" may 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.

One commenter asked that the Agencies revise the proposal to permit a firm to petition for reinstatement of individual offices that have been removed, suspended or debarred, in addition to permitting petitions for reinstatement of individual accountants or the firm as a whole. The Agencies did not intend in the proposed rule to prohibit offices of a firm that have been removed, suspended, or debarred from petitioning for reinstatement. The proposed reinstatement provision, therefore, has been revised in the final rule to clarify that a removed, suspended, or debarred office of a firm may petition for reinstatement.

Another commenter urged the Agencies to state factors that the Agencies would consider in evaluating a reinstatement request so that affected parties would know what type of information the Agencies need to make a decision. The Agencies understand that petitioners will wish to tailor their reinstatement requests in a manner that they believe will yield them success in obtaining the relief they seek. In the past and in other contexts, the Agencies have looked at various factors in reviewing reinstatement petitions. These factors included: (1) The nature, extent, and duration of the conduct that led to the issuance of the order; (2) the period of time that an order has been outstanding, as well as any prior requests made by the petitioner; (3) activities of the petitioner since the order was issued, including evidence of rehabilitation; (4) the nature of the position or proposed action the requestor is seeking, and the scope of relief sought; (5) the likelihood of future misconduct giving good cause for removing, suspending, or debarring the petitioner; and (6) the views and opinions of other Federal banking agencies, when applicable. The Agencies will include these factors in their evaluations of petitions for reinstatement.

Second, the commenter asserted that the Agencies failed to explain the

necessity for a one-year waiting period before a suspended, removed, or debarred party could seek reinstatement. The commenter argued in favor of a case-by-case approach. In addition, the commenter argued that the Agencies' requirement of a one-year period is inconsistent with the SEC's rules, which permit a petitioner to file for reinstatement at any time.

The Agencies believe that the proposed rule made room for a case-by-case approach to reinstatement by providing that, "unless otherwise ordered" by the appropriate agency decision maker, the one-year waiting period would apply. Under the proposed rule, if a petitioner believed that the circumstances merited review prior to the expiration of the one-year period, the petitioner could seek an order from the Agency decision maker permitting the petitioner to seek such earlier review. Given the Agencies' intention, as reflected in the proposed rule, that the one-year waiting period for reinstatement have some flexibility and considering the comments received, the Agencies have amended the final rule to permit persons, firms, and offices to petition for reinstatement at any time.

The proposal reflected the view of the Agencies that petitions for reinstatement filed close in time, either to the Agency's decision or the last petition for reinstatement, are unlikely to present new issues or bases for reinstatement and would waste Agency resources. Thus, although the final rule permits a petition for reinstatement at any time, it will be unusual for the Agencies to grant such relief within one year of a removal, suspension or debarment order.<sup>32</sup>

#### **IV. Conforming and Technical Changes to the Rules of the Agencies**

##### *OCC*

The OCC proposed adding "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>33</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

<sup>32</sup> Also, in the case of a suspension, it will be unusual for the Agencies to grant reinstatement prior to the expiration of the suspension period.

<sup>33</sup> See 12 CFR 19.196 (describing disreputable conduct).

recklessness standard was 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 proposed broadening 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 § 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 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 a firm's ability to perform section 36-required audits, this part of the proposal concerned who may practice before the OCC in other capacities, such as in adjudications, or through preparation of documents for submission to the OCC. Under the proposed rule, the OCC also revised 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.

The OCC did not receive any comments on these proposed changes. Accordingly, the conforming and technical changes are adopted in the final rule as proposed.

##### *Board*

The Board proposed to amend its Rules of Practice Before the Board (12 CFR 263, subpart F) to expand the type of conduct for which an individual may be censured, debarred, or suspended from practice before the Board. In particular, the Board proposed 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 was 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 Board. This change also reflected the modification made to the SEC's rules of practice by the Sarbanes-Oxley Act.

The Board did not receive any comments on these proposed changes. Accordingly, the conforming and technical changes are adopted in the final rule as proposed.

#### FDIC

The FDIC proposed making 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."

The FDIC did not receive any comments on these proposed changes. Accordingly, the conforming and technical changes are adopted in the final rule as proposed.

### V. Regulatory Analysis

#### A. Regulatory Flexibility Act

*OCC:* Under section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. 605(b) (RFA), the appropriate Federal banking agencies must either provide a Final Regulatory Flexibility Analysis for a final rule or certify that the rule will not have a significant economic impact on a substantial number of small entities. For purposes of this Regulatory Flexibility Analysis and final 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 final rule will have on small banks. Based on that review, we certify that the final 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 RFA, 5 U.S.C. 605(b), the Board certifies that the suspension and debarment amendments in this final 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 final 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 FDIC certifies, pursuant to section 605(b) of the RFA, 5 U.S.C. 605(b), that the final suspension and debarment amendments will not 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 a Final Regulatory Flexibility Analysis, or certify that the rule will not have a significant economic impact on a substantial number of small entities. For purposes of this RFA analysis, 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, 5 U.S.C. 605(b) certifies that this final rule will 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.

#### B. 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.*).

#### C. Executive Order 12866

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

#### D. 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 final 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.

#### 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, part 19 of chapter I of title 12

of the Code of Federal Regulations is amended to read as follows:

## PART 19—RULES OF PRACTICE AND PROCEDURE

■ 1. The authority citation for part 19 is revised 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.

### Subpart B—[Amended]

■ 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.

### Subpart C—[Amended]

■ 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 Large Bank Supervision, 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 Mid-Size/

Community Bank Supervision, to the Senior Deputy Comptroller for Mid-Size/Community Bank Supervision for the 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.

### Subpart K—[Amended]

■ 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.

#### § 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; or

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

(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 to avoid immediate harm to an insured depository institution or its depositors or to 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 10 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. Any OCC employee engaged in investigative or prosecuting functions for the OCC in a case may not, in that or a factually related case, serve as a presiding officer or participate or advise in the decision of the presiding officer or of the OCC, except as witness or counsel in the proceeding. 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 or the Securities and Exchange Commission under sections 105(c)(4)(A) or (B) of the Sarbanes-Oxley Act (15 U.S.C. 7215(c)(4)(A) or (B)); or

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

(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) through (a)(1)(vii) or §§ 19.244(a)(2) through (a)(3); and

(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, an accounting firm, or an office of a firm that was removed, suspended, or debarred under § 19.243 may be made in writing at any time. 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: July 23, 2003.

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, part 263, chapter II, title 12 of the Code of Federal Regulations is amended 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.

**Subpart F—[Amended]**

■ 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. 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;

(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; or

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

(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)(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 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 to avoid immediate harm to an insured depository institution or its depositors or to 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 10 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. Any Board employee engaged in investigative or prosecuting functions for the Board in a case may not, in that or a factually related case, serve as a presiding officer or participate or advise in the decision of the presiding officer or of the Board, except as witness or counsel in the proceeding. 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 or the Securities and Exchange Commission 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)); or

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

(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) through (a)(1)(vii) or §§ 263.403(a)(2) through (a)(3); and

(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, an accounting firm, or an office of a firm that was removed, suspended, or debarred under § 263.402 may be made in writing at any time. 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.

Dated: August 6, 2003.

Jennifer J. Johnson,  
Secretary of the Board.

**FEDERAL DEPOSIT INSURANCE CORPORATION**

**12 CFR Part 308**

**Authority and Issuance**

■ For the reasons set out in the joint preamble, part 308, chapter III, title 12 of the Code of Federal Regulations is amended as follows:

**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), 78o-4(c), 78o-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 Services**

- 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.

**§ 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 under section 36 of the FDIA from performing audit services for insured depository institutions for which the FDIC is the appropriate Federal banking agency 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;

(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; or

(vii) 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) *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 services.*

(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 to avoid immediate harm to an insured depository institution or its depositors or to 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 shall 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 10 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. Any FDIC employee engaged

in investigative or prosecuting functions for the FDIC in a case may not, in that or a factually related case, serve as a presiding officer or participate or advise in the decision of the presiding officer or of the FDIC, except as witness or counsel in the proceeding. 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 or the Securities and Exchange Commission under sections 105(c)(4)(A) or (B) of the Sarbanes-Oxley Act (15 U.S.C. 7215(c)(4)(A) or (B)); or

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

(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) through (a)(1)(vii) or §§ 308.603(a)(2) through (a)(3); and

(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, an accounting firm, or an office of a firm that was removed, suspended, or debarred under § 308.602 may be made in writing at any time. 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.

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

Dated: August 4, 2003.

Valerie J. Best,

Assistant Executive Secretary.

## OFFICE OF THRIFT SUPERVISION

### 12 CFR Chapter V

#### Authority and Issuance

#### PART 513—PRACTICE BEFORE THE OFFICE

■ For the reasons set out in the joint preamble, part 513 of chapter V of title 12 of the Code of Federal Regulations is amended 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 companies.

(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 Accounting 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 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;

(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; or

(7) 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.

(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 to avoid immediate harm to an insured depository institution or its depositors or to 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 shall 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 10 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. Any OTS employee engaged in investigative or prosecuting functions for the OTS in a case may not, in that or a factually related case, serve as a presiding officer or participate or advise in the decision of the presiding officer or of the OTS, except as witness or counsel in the proceeding. 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 or the Securities and Exchange Commission under sections 105(c)(4)(A) or (B) of the Sarbanes-Oxley Act (15 U.S.C. 7215(c)(4)(A) or (B)); or

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

(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 paragraphs (c)(6) through (c)(7) or paragraphs (j)(1)(ii) through (j)(1)(iii) of this section; and

(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.

(1) *Application for reinstatement.* (1) Unless otherwise ordered by the Office, an independent public accountant, accounting firm, or office of a firm that was removed, suspended or debarred under this section may apply for reinstatement in writing at any time. 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 (1)(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: August 5, 2003.

By the Office of Thrift Supervision.

**James Gilleran,**

*Director.*

[FR Doc. 03-20565 Filed 8-12-03; 8:45 am]

**BILLING CODE 4810-33-P; 6210-01-P; 6714-01-P; 6720-01-P**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### 14 CFR Part 39

[Docket No. 2003-NM-142-AD; Amendment 39-13272; AD 2003-16-19]

RIN 2120-AA64

#### Airworthiness Directives; Learjet Model 45 Airplanes

**AGENCY:** Federal Aviation Administration, DOT.

**ACTION:** Final rule; request for comments.

**SUMMARY:** This amendment adopts a new airworthiness directive (AD) that is applicable to all Learjet Model 45 airplanes. This action requires replacement of the horizontal stabilizer actuator assembly (HSAA) with a new HSAA. This action is necessary to prevent structural failure of the HSAA, which could result in possible loss of control of the airplane. This action is intended to address the identified unsafe condition.

**DATES:** Effective August 13, 2003.

Comments for inclusion in the Rules Docket must be received on or before October 14, 2003.

**ADDRESSES:** Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM-114, Attention: Rules Docket No. 2003-NM-142-AD, 1601 Lind Avenue, SW., Renton, Washington 98055-4056. Comments may be inspected at this location between 9 a.m. and 3 p.m., Monday through Friday, except Federal holidays. Comments may be submitted via fax to (425) 227-1232. Comments may also be sent via the Internet using the following address: *9-anm-iarcomment@faa.gov*. Comments sent via fax or the Internet must contain "Docket No. 2003-NM-142-AD" in the subject line and need not be submitted in triplicate. Comments sent via the Internet as attached electronic files must be formatted in Microsoft Word 97 or 2000 or ASCII text.

Information pertaining to this amendment may be examined at the FAA, Transport Airplane Directorate, Rules Docket, 1601 Lind Avenue, SW., Renton, Washington; or at the FAA, Wichita Aircraft Certification Office, 1801 Airport Road, Room 100, Mid-Continent Airport, Wichita, Kansas.

**FOR FURTHER INFORMATION CONTACT:** Greg Davied, Aerospace Engineer, Airframe and Propulsion Branch, ACE-118W, FAA, Wichita Aircraft Certification Office, 1801 Airport Road, Room 100,

Mid-Continent Airport, Wichita, Kansas 67209; telephone (316) 946-4128; fax (316) 946-4107.

#### SUPPLEMENTARY INFORMATION:

##### Background

On April 11, 2003, the FAA issued AD 2003-06-51, amendment 39-13121 (68 FR 19328, April 21, 2003), applicable to certain Learjet Model 45 airplanes, to require an inspection to determine the part number (P/N) of the horizontal stabilizer actuator assembly (A66) (HSAA), and replacement of any suspect HSAA (A66) having P/N 6627401000-001 or SA9200F with a new or serviceable HSAA (A66) having P/N 6627401000-005. That action was prompted by a report of severe vibration followed by a rapid nose down pitch change on a Learjet Model 45 airplane. The cause of the incident is attributed to brittle fracture material properties of certain components of the HSAA. The requirements of that AD are intended to prevent structural failure of the HSAA, which could result in possible loss of control of the airplane.

##### FAA's Determination Since Issuance of AD 2003-06-51

Since issuance of AD 2003-06-51, we have determined that the MPC Products Corporation acme screw having P/N 2A94568008 and nut having P/N 2A94567005 within the new HSAA having P/N 6627401000-005 installed per that AD are physically similar (not identical) to and have the same material as the suspect assembly having P/N 6627401000-001. Although the HSAA having P/N-005 is an improvement over the P/N-001, it was not manufactured per the type design data. A brittle fracture could occur on the acme screw and nut within the assembly having P/N-005, similar to that on the assembly having P/N-001. During our investigation of this problem, we determined that the configuration and quality controls over the production of these parts were so deficient that we do not have confidence that the airplane can be operated safely for any period of time. Therefore, this AD allows operation only for the purpose of positioning the airplane where the replacement required by this AD can be accomplished. The airplane manufacturer is currently substantiating the design data for the new replacement part. We anticipate that the new part will be available in the near future.

##### Explanation of the Requirements of the Rule

Since an unsafe condition has been identified that is likely to exist or develop on other airplanes of the same