

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

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

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

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

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

with respect to professional standards for accountants.

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

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

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

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

4. Removal, Suspension, and Debarment Procedures

Under the proposed rules, the Agencies would hold hearings on removals, suspensions, and debarments under rules that are consistent with the Agencies' Uniform Rules of Practice and Procedure (Uniform Rules).¹³ 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 from providing audit services to a limited number of insured depository institutions, rather than to all insured depository institutions supervised by the issuing Agency. This is referred to in the proposed regulations as a "limited scope order."¹⁴

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

5. Immediate Suspensions

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

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

¹⁴ 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.

¹⁵ 12 U.S.C. 1831m(g)(4)(A).

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