

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

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

6. Automatic Removal, Suspension, and Debarment

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

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

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

7. Notice

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

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

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

¹⁹ 12 U.S.C. 1818(u)(1).

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

8. Reinstatement

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

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

1. OCC

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

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

²⁰ See 12 CFR 19.196 (describing disreputable conduct).

¹⁶ *Id.* 1818(g).

¹⁷ See *FDIC v. Mallen*, 486 U.S. 230 (1988).

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