

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*.¹¹ 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.¹²

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 8.¹³ 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."¹⁴ 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

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

¹² See 12 U.S.C. 1818, 1813(u)(4).

¹³ *Id.* 1831m(g)(4).

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