

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,¹⁵ 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.¹⁶

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),¹⁷ 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,"¹⁸ 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).¹⁹ 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."²⁰

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

¹⁵ 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."

¹⁶ 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.

¹⁷ Pub. L. 102–242, 105 Stat. 2236 (1991).

¹⁸ 12 U.S.C. 1813(u)(4).

¹⁹ 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).

²⁰ 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.