

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.³¹ 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

³¹ 12 U.S.C. 1818(u)(1).