

§ 366.14 What information must I provide the FDIC?

You must:

(a) Certify in writing that you can perform services for us under § 366.3 and have no conflict of interest under § 366.10(a).

(b) Submit a list and description of any instance during the preceding five years in which you, any person that owns or controls you, or any entity you own or control, defaulted on a material obligation to an insured depository institution. A default on a material obligation occurs when a loan or advance with an outstanding balance of more than \$50,000 is or was delinquent for 90 days or more.

(c) Notify us within 10 business days after you become aware that you, or any person you employ to perform services for us, are not in compliance with this part. Your notice must include a detailed description of the facts of the situation and how you intend to resolve the matter.

(d) Agree in writing that you will employ only persons who meet the requirements of this part to perform services on our behalf.

(e) Comply with any request from us for information.

(f) Retain any information you prepare or rely upon regarding the provisions of this part for a period of three years following termination or expiration and final payment of the related contract for services whichever occurs last.

§ 366.15 What advice or determinations will the FDIC provide me on the applicability of this part?

(a) We are available to you for consultation on those determinations you are responsible for making under this part, including those with respect to any person you employ or engage to perform services for us.

(b) We will determine if this part prohibits you from performing services for us prior to contract award, after contract award, and during the performance of a contract.

(c) We may determine what corrective action you must take.

(d) We may grant you a waiver for good cause shown where provided for under this part.

§ 366.16 When may I seek a reconsideration or review of an FDIC determination?

(a) You may seek reconsideration or review of our initial determination by sending a written request to the individual who issued you the initial decision.

(b) You must provide new information or explain a change in circumstances for our reconsideration of an initial decision. The individual who issued you the initial decision may either make a new determination or refer your request to a higher authority for review.

(c) You must provide an explanation of how you perceive that we misapplied this part that sets forth the legal or factual errors for our review of an initial decision.

§ 366.17 What are the possible consequences for violating this part?

Depending on the circumstances, violations of this part may result in rescission or termination of a contract, as well as administrative, civil, or criminal sanctions.

PART 367—SUSPENSION AND EXCLUSION OF CONTRACTOR AND TERMINATION OF CONTRACTS

Sec.

367.1 Authority, purpose, scope and application.

367.2 Definitions.

367.3 Appropriate officials.

367.4 [Reserved]

367.5 Exclusions.

367.6 Causes for exclusion.

367.7 Suspensions.

367.8 Causes for suspension.

367.9 Imputation of causes.

367.10–67.11 [Reserved]

367.12 Procedures.

367.13 Notices.

367.14 Responses.

367.15 Additional proceedings as to disputed material facts.

367.16 Ethics Counselor decisions.

367.17 Duration of suspensions and exclusions.

367.18 Abrogation of contracts.

367.19 Exceptions to suspensions and exclusions.

367.20 Review and reconsideration of Ethics Counselor decisions.

AUTHORITY: 12 U.S.C. 1822(f) (4) and (5).

§ 367.1

SOURCE: 61 FR 68560, Dec. 30, 1996, unless otherwise noted.

§ 367.1 Authority, purpose, scope and application.

(a) *Authority.* This part is adopted pursuant to section 12(f) (4) and (5) of the Federal Deposit Insurance Act, 12 U.S.C. 1822(f) (4) and (5), and the rule-making authority of the Federal Deposit Insurance Corporation (FDIC) found at 12 U.S.C. 1819. Other regulations implementing these statutory directives appear at 12 CFR part 366.

(b) *Purpose.* This part is designed to inform contractors and subcontractors (including their affiliated business entities, key employees and management officials) regarding their rights to notice and an opportunity to be heard on FDIC actions involving suspension and exclusion from contracting and rescission of existing contracts. This part is in addition to, and not in lieu of, any other statute or regulation that may apply to such contractual activities.

(c) *Scope.* This part applies to:

(1) Contractors, other than attorneys or law firms providing legal services, submitting offers to provide services or entering into contracts to provide services to the FDIC acting in any capacity; and

(2) Subcontractors entering into contracts to perform services under a proposed or existing contract with the FDIC.

(d) *Application.* (1) This part will apply to entities that become contractors, as defined in § 367.2(f), on or after December 30, 1996. In addition, this part will apply to contractors as defined in § 367.2(f) that are performing contracts on December 30, 1996.

(2) This part will also apply to actions initiated on or after December 30, 1996 regardless of the date of the cause giving rise to the actions.

(3) Contracts entered into by the former Resolution Trust Corporation (RTC) that were transferred to the FDIC will be treated in the same manner as FDIC contracts under this part.

(4) RTC actions taken under the RTC regulations on or before December 31, 1995, will be honored as if taken by the FDIC. A contractor subject to an RTC exclusion or suspension will be precluded thereby from participation in

12 CFR Ch. III (1-1-09 Edition)

the FDIC's contracting program unless that exclusion or suspension is modified or terminated under the provisions of this part.

§ 367.2 Definitions.

(a) *Adequate evidence* means information sufficient to support the reasonable belief that a particular act or omission has occurred.

(b) *Affiliated business entity* means a company that is under the control of the contractor, is in control of the contractor, or is under common control with the contractor.

(c) *Civil judgment* means a judgment of a civil offense or liability by any court of competent jurisdiction in the United States.

(d) *Company* means any corporation, firm, partnership, society, joint venture, business trust, association, consortium or similar organization.

(e) *Conflict of interest* means a situation in which:

(1) A contractor; any management officials or affiliated business entities of a contractor; or any employees, agents, or subcontractors of a contractor who will perform services under a proposed or existing contract with the FDIC:

(i) Has one or more personal, business, or financial interests or relationships which would cause a reasonable individual with knowledge of the relevant facts to question the integrity or impartiality of those who are or will be acting under a proposed or existing FDIC contract;

(ii) Is an adverse party to the FDIC, RTC, the former Federal Savings and Loan Insurance Corporation (FSLIC), or their successors in a lawsuit; or

(iii) Has ever been suspended, excluded, or debarred from contracting with a federal entity or has ever had a contract with the FDIC, RTC, FSLIC or their successors rescinded or terminated prior to the contract's completion and which rescission or termination involved issues of conflicts of interest or ethical responsibilities; or

(2) Any other facts exist which the FDIC, in its sole discretion, determines may, through performance of a proposed or existing FDIC contract, provide a contractor with an unfair competitive advantage which favors the interests of the contractor or any person

Federal Deposit Insurance Corporation

§ 367.2

with whom the contractor has or is likely to have a personal or business relationship.

(f) *Contractor* means a person or company which has submitted an offer to perform services for the FDIC or has a contractual arrangement with the FDIC to perform services. For purposes of this part, contractor also includes:

(1) A contractor's affiliated business entities, key employees, and management officials of the contractor;

(2) Any subcontractor performing services for the FDIC and the management officials and key employees of such subcontractors; and

(3) Any entity or organization seeking to perform services for the FDIC as a minority or woman-owned business (MWOB).

(g) *Contract(s)* means agreement(s) between FDIC and a contractor, including, but not limited to, agreements identified as "Task Orders", for a contractor to provide services to FDIC. Contracts also mean contracts between a contractor and its subcontractor.

(h) *Control* means the power to vote, directly or indirectly, 25 percent or more of any class of the voting stock of a company; the ability to direct in any manner the election of a majority of a company's directors or trustees; or the ability to exercise a controlling influence over the company's management and policies. For purposes of this definition, a general partner of a limited partnership is presumed to be in control of that partnership.

(i) *Conviction* means a judgment or conviction of a criminal offense by any court of competent jurisdiction, whether entered upon a verdict or plea, and includes pleas of nolo contendere.

(j) *FDIC* means the Federal Deposit Insurance Corporation acting in its receivership and corporate capacities, and FDIC officials or committees acting under delegated authority.

(k) *Indictment* shall include an information or other filing by a competent authority charging a criminal offense.

(l) *Key employee* means an individual who participates personally and substantially in the negotiation of, performance of, and/or monitoring for compliance under a contract with the FDIC. Such participation is made through, but is not limited to, decision,

approval, disapproval, recommendation, or the rendering of advice under the contract.

(m) *Management official* means any shareholder, employee or partner who controls a company and any individual who directs the day-to-day operations of a company. With respect to a partnership, all partners are deemed to be management officials unless the partnership is governed by a management or executive committee with responsibility for the day-to-day operations. In partnerships with such committees, management official means only those partners who are a member of such a committee.

(n) *Material fact* means one that is necessary to determine the outcome of an issue or case and without which the case could not be supported.

(o) *Offer* means a proposal or other written or oral offer to provide services to FDIC.

(p) *Pattern or practice of defalcation regarding obligations* means two or more instances in which a loan or advance from an insured depository institution:

(1) Is in default for ninety (90) or more days as to payment of principal, interest, or a combination thereof, and there remains a legal obligation to pay an amount in excess of \$50,000; or

(2) Where there has been a failure to comply with the terms of a loan or advance to such an extent that the collateral securing the loan or advance was foreclosed upon, resulting in a loss in excess of \$50,000 to the insured depository institution.

(q) *Preponderance of the evidence* means proof by information that, compared with that opposing it, leads to the conclusion that the fact at issue is more probably true than not.

(r) *Subcontractor* means an entity or organization that enters into a contract with an FDIC contractor or another subcontractor to perform services under a proposed or existing contract with the FDIC.

(s) *Substantial loss to federal deposit insurance funds* means:

(1) A loan or advance from an insured depository institution, which is currently owed to the FDIC, RTC, FSLIC or their successors, or the former Bank Insurance Fund (BIF), the former Savings Association Insurance Fund

§ 367.3

(SAIF) or the Deposit Insurance Fund, the FSLIC Reserve Fund (FRF), or funds that were maintained by the RTC for the benefit of insured depositors, that is or has ever been delinquent for ninety (90) or more days as to payment of principal, interest, or a combination thereof and on which there remains a legal obligation to pay an amount in excess of \$50,000;

(2) An obligation to pay an outstanding, unsatisfied, final judgment in excess of \$50,000 in favor of the FDIC, RTC, FSLIC, or their successors, or the BIF, the SAIF, the FRF or the funds that were maintained by the RTC for the benefit of insured depositors; or

(3) A loan or advance from an insured depository institution which is currently owed to the FDIC, RTC, FSLIC or their successors, or the former BIF, the former SAIF, the Deposit Insurance Fund, the FRF or the funds that were maintained by the RTC for the benefit of insured depositors, where there has been a failure to comply with the terms to such an extent that the collateral securing the loan or advance was foreclosed upon, resulting in a loss in excess of \$50,000.

[61 FR 68560, Dec. 30, 1996, as amended at 71 FR 20527, Apr. 21, 2006]

§ 367.3 Appropriate officials.

(a) The *Ethics Counselor* is the Executive Secretary of the FDIC. The Ethics Counselor shall act as the official responsible for rendering suspension and exclusion decisions under this part. In addition to taking suspension and/or exclusion action under this part, the Ethics Counselor has authority to terminate exclusion and suspension proceedings. As used in this part, "Ethics Counselor" includes any official designated by the Ethics Counselor to act on the Ethics Counselor's behalf.

(b) The *Corporation Ethics Committee* is the Committee appointed by the Chairman of the FDIC, or Chairman's designee, which provides review of any suspension or exclusion decision rendered by the Ethics Counselor that is appealed by a contractor who has been suspended and/or excluded from FDIC contracting.

(c) Information concerning the possible existence of any cause for suspension or exclusion shall be reported to

12 CFR Ch. III (1-1-09 Edition)

the Office of the Executive Secretary (Ethics Section). This part does not modify the responsibility to report allegations of fraud, waste and abuse, including but not limited to criminal violations, to the Office of Inspector General.

§ 367.4 [Reserved]

§ 367.5 Exclusions.

(a) The Ethics Counselor may exclude a contractor from the FDIC contracting program for any of the causes set forth in § 367.6, using procedures established in this part.

(b) Exclusion is a serious action to be imposed when there exists a preponderance of the evidence that a contractor has violated one or more of the causes set forth in § 367.6. Contractors excluded from FDIC contracting programs are prohibited from entering into any new contracts with FDIC for the duration of the period of exclusion as determined pursuant to this part. The FDIC shall not solicit offers from, award contracts to, extend or modify existing contracts, award task orders under existing contracts, or consent to subcontracts with such contractors. Excluded contractors are also prohibited from conducting business with FDIC as agents or representatives of other contractors. *Provided however*, that these limitations do not become effective upon the notification of the contractor that there is a possible cause to exclude under § 367.13. Rather, they become effective only upon the Ethics Counselor's decision to exclude the contractor pursuant to § 367.16. *Provided further*, that the causes for exclusion set forth in § 367.6(a)(1) through (4) reflect statutorily established mandatory bars to contracting with the FDIC.

(c) Except when one or more of the statutorily established mandatory bars to contracting are shown to exist, the existence of a cause for exclusion does not necessarily require that the contractor be excluded; the seriousness of the contractor's acts or omissions and any mitigating or aggravating circumstances shall be considered in making any exclusion decision.

§ 367.6 Causes for exclusion.

The FDIC may exclude a contractor, in accordance with the procedures set forth in this part, upon a finding that:

(a) The contractor has been convicted of any felony;

(b) The contractor has been removed from, or prohibited from participating in the affairs of, any insured depository institution pursuant to any final enforcement action by the Office of the Comptroller of the Currency, the Office of Thrift Supervision, the Board of Governors of the Federal Reserve System, or the FDIC or their successors;

(c) The contractor has demonstrated a pattern or practice of defalcation;

(d) The contractor has caused a substantial loss to Deposit Insurance Fund (or any predecessor deposit insurance fund);

(e) The contractor has failed to disclose, pursuant to 12 CFR 366.6, a material fact to the FDIC;

(f) The contractor has failed to disclosed any material adverse change in the representations and certifications provided to FDIC under 12 CFR 366.6;

(g) The contractor has miscertified its status as a minority and/or woman owned business (MWOB);

(h) The contractor has a conflict of interest that was not waived by the Ethics Counselor or designee;

(i) The contractor has been subject to a final enforcement action by any federal financial institution regulatory agency, or has stipulated to such action;

(j) The contractor is debarred from participating in other federal programs;

(k) The contractor has been convicted of, or subject to a civil judgment for:

(1) Commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public or private agreement or transaction, or conspiracy to do the same;

(2) Violation of federal or state anti-trust statutes, including those proscribing price fixing between competitors, allocation of customers between competitors, and bid rigging, or conspiracy to do the same;

(3) Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false

statements, receiving stolen property, making false claims, obstructing of justice, or conspiracy to do the same;

(4) Commission of any other offense indicating a breach of trust, dishonesty or lack of integrity, or conspiracy to do the same;

(1) The contractor's performance under previous contract(s) with FDIC or RTC has resulted in:

(1) The FDIC or RTC declaring such contract(s) to be in default; or

(2) The termination of such contract(s) for poor performance; or

(3) A violation of the terms of a contract that would have resulted in a default or termination of the contract for poor performance if that violation had been discovered during the course of the contract; or

(m) The contractor has engaged in any conduct:

(1) Indicating a breach of trust, dishonesty, or lack of integrity that seriously and directly affects its ability to meet standards of present responsibility required of an FDIC contractor; or

(2) So serious or compelling in nature that it adversely affects the ability of a contractor to meet the minimum ethical standards required by 12 CFR part 366.

[61 FR 68560, Dec. 30, 1996, as amended at 71 FR 20528, Apr. 21, 2006]

§ 367.7 Suspensions.

(a) The Ethics Counselor may suspend a contractor for any of the causes in § 367.8 using the procedures established in this section.

(b) Suspension is an action to be imposed when there exists adequate evidence of one or more of the causes set out in § 367.8. This includes, but is not limited to, situations where immediate action is necessary to protect the integrity of the FDIC contracting program and/or the security of FDIC assets during the pendency of legal or investigative proceedings initiated by FDIC, any federal agency or any law enforcement authority.

(c) The duration of any suspension action shall be for a temporary period pending the completion of an investigation and such other legal proceedings as may ensue.

§ 367.8

(d) A suspension shall become effective immediately upon issuance of the notice specified in § 367.13(b).

(e) Contractors suspended from FDIC contracting programs are prohibited from entering into any new contracts with the FDIC for the duration of the period of suspension. The FDIC shall not solicit offers from, award contracts to, extend or modify existing contracts, award task orders under existing contracts, or consent to subcontracts with such contractors. Suspended contractors are also prohibited from conducting business with FDIC as agents or representatives of other contractors.

§ 367.8 Causes for suspension.

(a) Suspension may be imposed under the procedures set forth in this section upon adequate evidence:

(1) Of suspension by another federal agency;

(2) That a cause for exclusion under § 367.6 may exist;

(3) Of the commission of any other offense indicating a breach of trust, dishonesty, or lack of integrity that seriously and directly affects the minimum ethical standards required of an FDIC contractor; or

(4) Of any other cause so serious or compelling in nature that it adversely affects the ability of a contractor to meet the minimal ethical standards required by 12 CFR part 366.

(b) Indictment for any offense described in § 367.6 is adequate evidence to suspend a contractor.

(c) In assessing the adequacy of the evidence, FDIC will consider how much information is available, how credible it is given the circumstances, whether or not important allegations are corroborated and what inferences can reasonably be drawn as a result.

§ 367.9 Imputation of causes.

(a) Where there is cause to suspend and/or exclude any affiliated business entity of the contractor, that conduct may be imputed to the contractor if the conduct occurred in connection with the affiliated business entity's performance of duties for or on behalf of the contractor, or with the contractor's knowledge, approval, or acquiescence. The contractor's acceptance of

12 CFR Ch. III (1-1-09 Edition)

the benefits derived from the conduct shall be evidence of such knowledge, approval, or acquiescence.

(b) Where there is cause to suspend and/or exclude any contractor, that conduct may be imputed to any affiliated business entity, key employee, or management official of a contractor who participated in, knew of or had reason to know of the contractor's conduct.

(c) Where there is cause to suspend and/or exclude a key employee or management official of a contractor, that cause may be imputed to the contractor if the conduct occurred in connection with the key employee or management official's performance of duties for or on behalf of the contractor, or with the contractor's knowledge, approval, or acquiescence. The contractor's acceptance of the benefits derived from the conduct shall be evidence of such knowledge, approval, or acquiescence.

(d) Where there is cause to suspend and/or exclude one contractor participating in a joint venture or similar arrangement, that cause may be imputed to other participating contractors if the conduct occurred for or on behalf of the joint venture or similar arrangement, or with the knowledge, approval, or acquiescence of these contractors. Acceptance of the benefits derived from the conduct shall be evidence of such knowledge, approval, or acquiescence.

(e) Where there is cause to suspend and/or exclude a subcontractor, that cause may be imputed to the contractor for which the subcontractor performed services, if the conduct occurred for or on behalf of the contractor and with the contractor's knowledge, approval, or acquiescence. Acceptance of the benefits derived from the conduct shall be evidence of such knowledge, approval, or acquiescence.

§§ 367.10-367.11 [Reserved]

§ 367.12 Procedures.

(a) FDIC shall process suspension and exclusion actions as informally as practicable, consistent with its policy of providing contractors with adequate information on the grounds that give

Federal Deposit Insurance Corporation

§ 367.14

rise to the proposed action and affording contractors with a reasonable opportunity to respond.

(b) For purposes of determining filing dates for the pleadings required by this part, including responses, notices of appeal, appeals and requests for reconsideration, the provisions relating to the construction of time limits in 12 CFR 308.12 will control.

§ 367.13 Notices.

(a) *Exclusions.* Before excluding a contractor, the FDIC shall send it a written notice of possible cause to exclude. Such notice shall include:

(1) Notification that exclusion for a specified period of time is being considered based on the specified cause(s) in § 367.6 to be relied upon;

(2) Identification of the event(s), circumstance(s), or condition(s) that indicates that there is cause to believe a cause for exclusion exists, described in sufficient detail to put the contractor on notice of the conduct or transaction(s) upon which an exclusion proceeding is based;

(3) Notification that the contractor is not prohibited from contracting with the FDIC unless and until it is either suspended from FDIC contracting or the FDIC Ethics Counselor issues a decision excluding the contractor, *provided however*, in any case where the possible cause for exclusion would also be an impediment to the contractor's eligibility pursuant to 12 CFR part 366, the contractor's eligibility for any contract will be determined under that part; and

(4) Notification of the regulatory provisions governing the exclusion proceeding and the potential effect of a final exclusion decision.

(b) *Suspensions.* Before suspending a contractor, the FDIC shall send it notice, including:

(1) Notice that a suspension is being imposed based on specified causes in § 367.8;

(2) Identification of the event(s), circumstance(s), or condition(s) that indicate that there is adequate evidence to believe a cause for suspension exists, described in sufficient detail to put the contractor on notice of the basis for the suspension, recognizing that the conduct of ongoing investigations and

legal proceedings, including criminal proceedings, place limitations on the evidence that can be released;

(3) Notification that the suspension prohibits the contractor from contracting with the FDIC for a temporary period, pending the completion of an investigation or other legal proceedings; and

(4) Notification of the regulatory provisions governing the suspension proceeding.

(c) *Service of notices.* Notices will be sent to the contractor by first class mail, postage prepaid. For purposes of compliance with this section, notice shall be considered to have been received by the contractor if the notice is properly mailed to the last known address of such contractor. Whenever practical, a copy of the notice will also be transmitted to the contractor by facsimile. In the event the notice is not sent by facsimile, a copy will be sent by an overnight delivery service such as Express Mail or a commercial equivalent.

§ 367.14 Responses.

(a) The contractor will have 15 days from the date of the notice within which to respond.

(b) The response shall be in writing and may include: information and argument in opposition to the proposed exclusion and/or suspension, including any additional specific information pertaining to the possible causes for exclusion; and information and argument in mitigation of the proposed period of exclusion.

(c) The response may request a meeting with an FDIC official identified in the notice to permit the contractor to discuss issues of fact or law relating to the suspension and/or proposed exclusion or to otherwise resolve the pending matters.

(1) Any such meetings between a contractor and FDIC shall take such form as the FDIC deems appropriate.

(2) In cases of suspensions, no meeting will be held where a representative of the Department of Justice has advised in writing that the substantial interests of the Government would be prejudiced by such a meeting and the Ethics Counselor determines that a suspension is based on the same facts

§ 367.15

as pending or contemplated legal proceedings referenced by the representative of the Department of Justice.

(d) Failure to respond to the notice shall be deemed an admission of the existence of the cause(s) for suspension and/or exclusion set forth in the notice and an acceptance of the period of exclusion proposed therein. In such circumstances, the FDIC may proceed to a final decision without further proceedings.

(e) Where a contractor has received more than one notice, the FDIC may consolidate the pending proceedings, including the scheduling of any meetings, in accordance with this section.

§ 367.15 Additional proceedings as to disputed material facts.

(a) In actions not based upon a conviction or civil judgment, if the Ethics Counselor finds that the contractor's submission raises a genuine dispute over facts material to the proposed suspension and/or exclusion, the contractor shall be afforded an opportunity to appear (with counsel, if desired), submit documentary evidence, present witnesses, and confront any witnesses the FDIC presents.

(b) The Ethics Counselor may refer disputed material facts to another official for analysis and recommendation.

(c) If requested, a transcribed record of any additional proceedings shall be made available at cost to the contractor.

§ 367.16 Ethics Counselor decisions.

(a) Standard of proof:

(1) An exclusion must be based on a finding that the cause(s) for exclusion is established by a preponderance of the evidence in the administrative record of the case; and

(2) A suspension must be based on a finding that the cause(s) for suspension is established by adequate evidence in the administrative record of the case.

(b) The administrative record consists of the portion of any information, reports, documents or other evidence identified and relied upon in the Notice of Possible Cause to Exclude, the Notice of Suspension and/or supplemental notices, if any, together with any material portions of the contractor's response. When additional proceedings

12 CFR Ch. III (1-1-09 Edition)

are necessary to determine disputed material facts, the Ethics Counselor shall base the decision on the facts as found, together with any information and argument submitted by the contractor and any other information in the administrative record.

(c) In actions based upon a conviction, judgment, a final enforcement action by a federal financial institution regulatory agency, or in which all facts and circumstances material to the exclusion action have been finally adjudicated in another forum, the Ethics Counselor may exclude a contractor without regard to the procedures set out in §§ 367.13 and 367.14. Any such decisions will be subject to the review and reconsideration provisions of § 367.20.

(d) *Notice of decisions.* Contractors shall be given prompt notice of the Ethics Counselor's decision in the manner described in § 367.13(c). If the Ethics Counselor suspends a contractor or imposes a period of exclusion, the decision shall:

(1) Set forth the cause(s) for suspension and/or exclusion included in the notice that were found by a preponderance of the evidence with reference to the administrative record support for that finding;

(2) Set forth the effect of the exclusion action and the effective dates of that action;

(3) Refer the contractor to its procedural rights of review and reconsideration under § 367.20; and

(4) Inform the contractor that a copy of the exclusion decision shall be placed in the FDIC Public Reading Room.

(e) If the FDIC Ethics Counselor decides that a period of exclusion is not warranted, the Notice of Possible Cause to Exclude may be withdrawn or the proceeding may be otherwise terminated. A decision to terminate an exclusion proceeding may include the imposition of appropriate conditions on the contractor in their future dealings with the FDIC.

§ 367.17 Duration of suspensions and exclusions.

(a) *Suspensions.* (1) Suspensions shall be for a temporary period pending the

completion of an investigation or other legal or exclusion proceedings.

(2) If legal or administrative proceedings are not initiated within 12 months after the date of the suspension notice, the suspension shall be terminated unless a representative of the Department of Justice requests its extension in writing. In such cases, the suspension may be extended for an additional six months. In no event may a suspension be imposed for more than 18 months, unless such proceedings have been initiated within that period.

(3) FDIC shall notify the Department of Justice of an impending termination of a suspension at least 30 days before the 12-month period expires to give the Department of Justice an opportunity to request an extension.

(4) The time limitations for suspension in this section may be waived by the affected contractor.

(b) *Exclusions.* (1) Exclusions shall be for a period commensurate with the seriousness of the cause(s) after due consideration of mitigating evidence presented by the contractor.

(2) If a suspension precedes an exclusion, the suspension period shall be considered in determining the exclusion period.

(3) Exclusion for causes other than the mandatory bars in 12 CFR 366.4(a) generally should not exceed three years, but where circumstances warrant, a longer period of exclusion may be imposed.

(4) The Ethics Counselor may extend an existing exclusion for an additional period if the Ethics Counselor determines that an extension is necessary to protect the integrity of the FDIC contracting program and the public interest. However, an exclusion may not be extended solely on the basis of the facts and circumstances upon which the initial exclusion action was based. The standards and procedures in this part shall be applied in any proceeding to extend an exclusion.

§ 367.18 Abrogation of contracts.

(a) The FDIC may, in its discretion, rescind or terminate any contract in existence at the time a contractor is suspended or excluded.

(b) Any contract not rescinded or terminated shall continue in force in accordance with the terms thereof.

(c) The right to rescind or terminate a contract in existence is cumulative and in addition to any other remedies or rights the FDIC may have under the terms of the contract, at law, or otherwise.

§ 367.19 Exceptions to suspensions and exclusions.

(a) Exceptions to the effects of suspensions and exclusions may be available in unique circumstances, where there are compelling reasons to utilize a particular contractor for a specific task. Requests for such exceptions may be submitted only by the FDIC program office requesting the contract services.

(b) In the case of the modification or extension of an existing contract, the Ethics Counselor may except such a contracting action from the effects of suspension and/or exclusion upon a determination, in writing, that a compelling reason exists for utilization of the contractor in the particular instance. The Ethics Counselor's authority under this section shall not be delegated to any lower official.

(c) In the case of new contracts, the Corporation Ethics Committee may except a particular new contract from the effects of suspension and/or exclusion upon a determination in writing that a compelling reason exists for utilization of the contractor in the particular instance.

§ 367.20 Review and reconsideration of Ethics Counselor decisions.

(a) *Review.* (1) A suspended and/or excluded contractor may appeal the exclusion decision to the Corporation Ethics Committee.

(2) In order to avail itself of the right to appeal, a suspended and/or excluded contractor must file a written notice of intent to appeal within 5 days of the Ethics Counselor's decision.

(3) The appeal shall be filed in writing within 30 days of the decision.

(4) The Corporation Ethics Committee, at its discretion and after determining that it is in the best interests of the FDIC, may stay the effect of

the suspension and/or exclusion pending conclusion of its review of the matter.

(b) *Reconsideration.* (1) A suspended and/or excluded contractor may submit a request to the Ethics Counselor to reconsider the suspension and/or exclusion decision, reduce the period of exclusion or terminate the suspension and/or exclusion.

(2) Such requests shall be in writing and supported by documentation that the requested action is justified by:

(i) Reversal of the conviction or civil judgment upon which the suspension and/or exclusion was based;

(ii) Newly discovered material evidence;

(iii) Bona fide change in ownership or management;

(iv) Elimination of other causes for which the suspension and/or exclusion was imposed; or

(v) Other reasons the FDIC Ethics Counselor deems appropriate.

(3) A request for reconsideration based on the reversal of the conviction or civil judgment may be filed at any time.

(4) Requests for reconsideration based on other grounds may only be filed during the period commencing 60 days after the Ethics Counselor's decision imposing the suspension and/or exclusion. Only one such request may be filed in any twelve month period.

(5) The Ethics Counselor's decision on a request for reconsideration is subject to the review procedure set forth in paragraph (a) of this section.

PART 368—GOVERNMENT SECURITIES SALES PRACTICES

Sec.

368.1 Scope.

368.2 Definitions.

368.3 Business conduct.

368.4 Recommendations to customers.

368.5 Customer information.

368.100 Obligations concerning institutional customers.

AUTHORITY: 15 U.S.C. 78o-5.

SOURCE: 62 FR 13287, Mar. 19, 1997, unless otherwise noted.

§ 368.1 Scope.

This part is applicable to state non-member banks and insured state

branches of foreign banks that have filed notice as, or are required to file notice as, government securities brokers or dealers pursuant to section 15C of the Securities Exchange Act (15 U.S.C. 78o-5) and Department of the Treasury rules under section 15C (17 CFR 400.1(d) and part 401).

§ 368.2 Definitions.

(a) *Bank that is a government securities broker or dealer* means a state non-member bank or an insured state branch of a foreign bank that has filed notice, or is required to file notice, as a government securities broker or dealer pursuant to section 15C of the Securities Exchange Act (15 U.S.C. 78o-5) and Department of the Treasury rules under section 15C (17 CFR 400.1(d) and part 401).

(b) *Customer* does not include a broker or dealer or a government securities broker or dealer.

(c) *Government security* has the same meaning as this term has in section 3(a)(42) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(42)).

(d) *Non-institutional customer* means any customer other than:

(1) A bank, savings association, insurance company, or registered investment company;

(2) An investment adviser registered under section 203 of the Investment Advisers Act of 1940 (15 U.S.C. 80b-3); or

(3) Any entity (whether a natural person, corporation, partnership, trust, or otherwise) with total assets of at least \$50 million.

§ 368.3 Business conduct.

A bank that is a government securities broker or dealer shall observe high standards of commercial honor and just and equitable principles of trade in the conduct of its business as a government securities broker or dealer.

§ 368.4 Recommendations to customers.

In recommending to a customer the purchase, sale or exchange of a government security, a bank that is a government securities broker or dealer shall have reasonable grounds for believing that the recommendation is suitable for the customer upon the basis of the facts, if any, disclosed by the customer