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§ 366.4 When is there a pattern or practice of defalcation?

(a) You have a pattern or practice of defalcation under §366.3(c) when you, any person that owns or controls you, or any entity you own or control has a legal responsibility for the payment on at least two obligations that are:

(1) To one or more insured depository institutions;

(2) More than 90 days delinquent in the payment of principal, interest, or a combination thereof; and

(3) More than $50,000 each.

(b) The following are examples of when you have or do not have a pattern or practice of defalcation. These examples are not inclusive.

(1) You have five loans at insured depository institutions. Three of them are 90 days past due. Two of the three loans have outstanding balances of more than $50,000 each. You have a pattern or practice of defalcation.

(2) You have five loans at insured depository institutions. Two of them are 90 days past due. One of the two is with ABC Bank for $170,000. The other one is with XYZ bank for $60,000. You have a pattern or practice of defalcation.

(3) You have five loans at insured depository institutions. Three of them are 90 days past due. One of the three has an outstanding balance of more than $50,000. The other two have outstanding balances of less than $50,000. You do not have a pattern or practice of defalcation.

(4) You have five loans at insured depository institutions. Three of them have outstanding balances of more than $50,000. Two of those three were 90 days past due but are now current. You do not have a pattern or practice of defalcation.

§ 366.5 What causes a substantial loss to a federal deposit insurance fund?

You cause a substantial loss to the Deposit Insurance Fund (or any predecessor deposit insurance fund) under §366.3(d) when you, or any person that owns or controls you, or any entity you own or control has:

(a) An obligation to us that is delinquent for 90 days or more and on which there is an outstanding balance of principal, interest, or a combination thereof of more than $50,000;

(b) An unpaid final judgment in our favor that is in excess of $50,000, regardless of whether it becomes discharged in whole or in part in a bankruptcy proceeding;

(c) A deficiency balance following foreclosure of collateral on an obligation owed to us that is in excess of $50,000, regardless of whether it becomes discharged in whole or in part in a bankruptcy proceeding; or

(d) A loss to us that is in excess of $50,000 that we report on IRS Form 1099–C, Information Reporting for Discharge of Indebtedness.

[67 FR 69991, Nov. 20, 2002, as amended at 71 FR 20527, Apr. 21, 2006]

§ 366.6 How is my ownership or control determined?

(a) Your ownership or control is determined on a case-by-case basis. Your ownership or control depends on the specific facts of your situation and the particular industry and legal entity involved. You must provide documentation to us to use in determining your ownership or control.

(b) The interest of a spouse or other family member in the same organization is imputed to you in determining your ownership or control.

(c) The following are examples of when your ownership or control may or may not exist. These examples are not inclusive.

(1) You have control if you are the president or chief executive officer of an organization.

(2) You have ownership or control if you are a partner in a small law firm. You might not have ownership or control if you are a partner in a large national law firm.

(3) You have control if you are a general partner of a limited partnership. You have ownership or control if you have a limited partnership interest of 25 percent or more.

(4) You have ownership or control if you have the:

(i) Power to vote, directly or indirectly, 25% or more interest of any class of voting stock of a company;

(ii) Ability to direct in any manner the election of a majority of a company's directors or trustees; or

(iii) Ability to exercise a controlling influence over the company's management and policies.

§ 366.7 Will the FDIC waive the prohibitions under § 366.3?

We may waive the prohibitions for entities other than individuals for good cause shown at our discretion when our need to contract for your services outweighs all relevant factors. The statute does not allow us to waive the prohibitions for individuals.

§ 366.8 Who can grant a waiver of a prohibition or conflict of interest?

The FDIC's Board of Directors delegates to the Chairman, or his designee, authority to issue waivers and implement procedures for part 366.

§ 366.9 What other requirements could prevent me from performing contractual services for the FDIC?

You must avoid a conflict of interest, be ethically responsible, and maintain confidential information as described in §§ 366.10 through 366.13. You must also provide us with the information we require in § 366.14. Failure to meet these requirements may prevent you from contracting with us.

§ 366.10 When would I have a conflict of interest?

(a) You have a conflict of interest when you, any person that owns or controls you, or any entity you own or control:

(1) Has a personal, business, or financial interest or relationship that relates to the services you perform under the contract;

(2) Is a party to litigation against us, or represents a party that is;

(3) Submits an offer to acquire an asset from us for which services were performed during the past three years, unless the contract allows for the acquisition; or

(4) Engages in an activity that would cause us to question the integrity of the service you provided, are providing or offer to provide us, or impairs your independence.

(b) The following are examples of a conflict of interest. These examples are not inclusive.

(1) You submit an offer to perform property management services for us and you own or manage a competing property.

(2) You audit a business under a contract with us and you or a partner in your firm has an ownership interest in that business.

(3) You perform loan services on a pool of loans we are selling, and you submit a bid to purchase one or more of the loans in the pool.

(4) You audit your own work or provide nonaudit services that are significant or material to the subject matter of the audit.

§ 366.11 Will the FDIC waive a conflict of interest?

(a) We may waive a conflict of interest for good cause shown at our discretion when our need to contract for your services outweighs all relevant factors.

(b) The following are examples of when we may grant you a waiver for a conflict of interest. These examples are not inclusive.

(1) We may grant a waiver to an outside counsel who has a representational conflict. We will weigh all relevant facts and circumstances in making our determination.

(2) We may grant a waiver to allow a contractor to acquire an asset from us who is providing or has provided services on that asset. We will consider whether granting the waiver will adversely affect the fairness of the sale, the type of services provided, and other facts and circumstances relevant to the sale in making our determination.

§ 366.12 What are the FDIC's minimum standards of ethical responsibility?

(a) You and any person who performs services for us must not provide preferential treatment to any person in your dealings with the public on our behalf.

(b) You must ensure that any person you employ to perform services for us is informed about their responsibilities under this part.

(c) You must disclose to us waste, fraud, abuse or corruption. Contact the Inspector General at 1–800–964–FDIC or *Ighotline@fdic.gov*.

(d) You and any person who performs contract services to us must not: