

7 CFR Part 70

Food grades and standards, Food labeling, Poultry and poultry products, Rabbits and rabbit products, Reporting and recordkeeping requirements.

7 CFR Part 160

Administrative practice and procedure, Advertising, Forests and forest products, Labeling, Packaging and containers, Reporting and recordkeeping requirements.

Dated: February 29, 1996.

David N. Lewis,

Acting Administrator.

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FEDERAL DEPOSIT INSURANCE CORPORATION
12 CFR Part 366

RIN 3064-AB39

Contractor Conflicts of Interest

AGENCY: Federal Deposit Insurance Corporation.

ACTION: Interim final rule.

SUMMARY: The Board of Directors of the Federal Deposit Insurance Corporation (FDIC or Corporation), with the concurrence of the Office of Government Ethics (OGE), is adopting an interim final rule implementing certain provisions of section 19 of the Resolution Trust Corporation Completion Act (the Completion Act) and soliciting comments. Section 19 of the Completion Act amended section 12 of the Federal Deposit Insurance Act (FDI Act) and requires the Board of Directors to prescribe regulations to ensure that contractors meet minimum standards of competence, experience, integrity and fitness, and requires that these regulations establish prohibitions on the Corporation's ability to contract with or have certain entities provide services to the FDIC. Section 19 of the Completion Act also requires that the Board of Directors prescribe regulations governing conflicts of interest, ethical responsibilities, and the use of confidential information for those independent contractors who are not deemed under the FDI Act, as amended, to be employees of the Corporation for purposes of Title 18 of the United States Code. Pursuant to the authority granted to it under the Completion Act, the Board of Directors is making the regulations required under section 19 of the Completion Act applicable to any FDIC contracts for services and has

combined the required regulations in the interim final rule.

The Board determined that combining the prescribed regulations into one rule would provide the most consistent treatment of contractors and reduce confusion in the application of the regulations.

DATES: *Effective date.* April 10, 1996.

Comment period date. Comments must be received on or before May 10, 1996.

ADDRESSES: Send comments to Jerry L. Langley, Executive Secretary, FDIC, 550 17th Street, NW, Washington, DC 20429. Comments may be hand-delivered to room 400, 1776 F Street, NW, Washington, DC 20429 on business days between 8:30 a.m. and 5:00 p.m. [FAX number: (202) 898-3604; Internet: comments@FDIC.gov]. Comments will be available for inspection and photocopying at the FDIC's Reading Room, room 7118, 550 17th Street, NW, Washington, DC 20429, between 9:00 a.m. and 4:30 p.m. on business days.

FOR FURTHER INFORMATION CONTACT: James T. Lantelme, Assistant General Counsel, Regional Affairs Section, Legal Division, (202) 736-0120; or Richard M. Handy, Ethics Program Manager, Office of the Executive Secretary, (202) 898-7271, both at the FDIC.

SUPPLEMENTARY INFORMATION:**I. Background**

On June 24, 1994, the Corporation published for comment a proposed rule applicable to independent contractors designed to establish standards governing conflicts of interest, ethical responsibilities, and the use of confidential information and procedures for ensuring that independent contractors meet minimum standards of competence, experience, integrity, and fitness (59 FR 32661-32668). The proposed rule was published in response to the requirements of Section 19(a) of the Resolution Trust Corporation Completion Act, codified at 12 U.S.C. 1822(f), which requires that the Board of Directors prescribe regulations establishing procedures for ensuring that any individual who is performing any function or service on behalf of the Corporation meets minimum standards of competence, experience, integrity, and fitness and prohibiting any person who does not meet such standards from entering into contracts for services with or performing services on behalf of the Corporation. The Completion Act also requires the Board of Directors, with the concurrence of OGE, to prescribe regulations governing conflicts of interest, ethical responsibilities, and the use of

confidential information. The proposed rule prescribed a 60-day comment period and invited comments from all interested parties. The Corporation received six comment letters and, after careful consideration of each comment, has made appropriate modifications to the rule. In addition, OGE requested numerous changes which resulted in the reorganization and modification of some provisions. The Board determined that an interim final rule would be appropriate in order to allow interested parties to comment on the revised rule while providing for the prompt implementation of the rule to satisfy concerns relating to the merger of the RTC into the FDIC. The Corporation, with the concurrence of OGE, is now publishing, as an interim final rule, the Contractor Conflicts of Interest rule, to be codified in new part 366 of 12 CFR chapter III.

Pursuant to the Completion Act, OGE is providing its concurrence to those provisions of the interim final rule which govern conflicts of interest, ethical responsibilities, and the use of confidential information as applicable to independent contractors which are not deemed under 12 U.S.C. 1822(f)(1)(B) to be employees of the Corporation for purposes of Title 18 of the United States Code. Contractors who are deemed under 12 U.S.C. 1822(f)(1)(B) to be employees of the Corporation, are subject, in addition to the interim final rule, to Title 18 of the United States Code; the Standards of Ethical Conduct for Employees of the Executive Branch (5 CFR part 2635); the Supplemental Standards of Ethical Conduct for Employees of the Federal Deposit Insurance Corporation (5 CFR part 3201); the Executive Branch Financial Disclosure, Qualified Trusts, and Certificates of Divestiture regulations (5 CFR part 2634); and the Supplemental Financial Disclosure Requirements for Employees of the Federal Deposit Insurance Corporation (5 CFR part 3202).

II. Summary of the Comments

The Corporation received comments from four law firms and two corporations. The comments from the two corporations involved concerns over the administrative burden that might be imposed through compliance with the reporting requirements under § 366.6 of the proposed rule. The comments from the law firms raised a variety of issues including the potential effects of state privacy laws, changes in the treatment of law firms, concerns over threshold amount in the definition of *default on a material obligation*, the impact of the rule on the use of

subsidiaries, and the potential for former insiders of failed institutions to be involved in the liquidation of other failed institutions.

III. Analysis of the Comments and Changes to the Rule

Section 366.1 Authority, Purpose and Scope

Authority. Section 366.1(a) of the proposed rule was modified by adding section 12(f)(4) of the Federal Deposit Insurance Act to the list of authorities.

Purpose. Section 366.1(b) of the proposed rule was simplified by dividing the provision into its component parts and changing its language to be consistent with language used elsewhere in the rule.

Scope. One of the law firm commenters suggested that the scope of the rule be limited by adding a provision which would provide that the existing policies concerning outside counsel conflicts of interest remain unchanged after adoption of the rule. The Board declined to modify the scope of the rule with regard to law firms. Section 19(a) of the Completion Act, codified at 12 U.S.C. 1822(f), does not provide an exception to its application for legal services contracts. To date, the FDIC's Legal Division has applied the Resolution Trust Corporation's (RTC) rule, 12 CFR part 1606, entitled Qualification of, Ethical Standards for, and Restrictions on the Use of Confidential Information by Independent Contractors (part 1606), in its contract relationships with law firms. Part 1606 was promulgated by the RTC in response to requirements imposed upon it by the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA). The FDIC has substantially identical restrictions on the use of contractors imposed by the Completion Act. Thus, it is not expected that the FDIC's relationships with the law firms with which it contracts will substantially change after the promulgation of the interim final rule. However, in order to better clarify the scope of the rule, § 366.1(c)(1) of the proposed rule was reorganized and revised in order to (1) eliminate unnecessary language and simplify the provision, (2) clearly set forth that the rule is applicable to law firms, (3) clarify the application of the rule to subcontractors of FDIC contractors, and (4) at the request of the Board, remove Corporate leases of real property from coverage under the rule.

Section 366.1(c)(2) was not changed. Resolution Trust Corporation. Section 366.1(d) was simplified by eliminating unnecessary language.

Previous policies. Section 366.1(e) was eliminated as being unnecessary. Effective on April 10, 1996, this part supersedes and replaces the FDIC's "Statement of Policy on Contracting with Outside Firms", which was published in the Federal Register on May 17, 1993, at 58 FR 28866.

Section 366.2 Definitions

Affiliated business entity. Section 366.2(a), the definition of *affiliated business entity*, was modified at the request of OGE. The Office of Government Ethics believed that the discretionary aspect of the definition set forth in the proposed rule was too subjective and that FDIC concerns as to whether various types of relationships constitute affiliations are adequately addressed through the use of the defined term *control* in the *affiliated business entity* definition. Under the definition of *control*, the FDIC is able to determine that an entity is an affiliated business entity when such entity has the ability to exercise a controlling influence over a company's management and policies. Additionally, OGE suggested the deletion of the statement concerning when a subfranchiser would not be considered to be an affiliated business entity of its master franchiser on the basis that the remaining definition adequately addresses that issue.

Company. The definition of *company*, as set forth in § 366.2(b) of the proposed rule, was modified through the elimination of the term *individual* from such definition. The Office of Government Ethics disagreed with the proposed inclusion of the term *individual* since such term was not consistent with the remaining business enterprises listed under the definition and was contrary to the common meaning of such term. In making such change, it was determined to be unnecessary to separately define the term *individual* since its meaning is commonly understood. Revision of the definition of *company* also necessitated revision of the definitions of *contractor*, *management official*, and *person*.

Contractor. The definition of *contractor* was changed due to the impact of changes to other definitions. In § 366.2(e) of the proposed rule, a two-part definition was provided. Section 366.2(e)(1) provided that a contractor was a company which had submitted an offer to, or had a contractual arrangement with, the FDIC to perform services. Since the definition of *company* has been modified to exclude the term *individual*, the proposed rule was further modified by replacing the term *company* with *person* at § 366.2(d)

of the interim final rule in order to include individuals in the coverage of the definition of *contractor*. The second part of the definition of *contractor*, found at § 366.2(e)(2) of the proposed rule, involved subcontracting relationships. Section 366.2(o) of the interim final rule provides a separate definition of the term *subcontractor*.

Management official. The definition of the term *management official*, as set forth in § 366.2(m) of the proposed rule, was modified at OGE's request to provide greater guidance in the use of such term. In the proposed rule, *management official* was defined to mean an individual who controls a company. In § 366.2(i) of the interim final rule, *management official* is more specifically defined as a shareholder, employee, or partner who controls a company and any individual who directs the day-to-day operations of a company. For partnerships, all general partners are considered management officials, except when a partnership has a management or executive committee, in which case the members of such committees are considered management officials.

Person. The definition of *person*, found at § 366.2(q) of the proposed rule, was changed to be more compatible with its common meaning. One of the law firm commenters objected to the scope of the information that was required to be submitted by law firm employees under § 366.6(a) of the proposed rule due to the mistaken belief that a more common definition of the word *person* was applicable. Since the definition set forth in the proposed rule is inconsistent with the common meaning of *person* and would likely cause confusion among contractors and those FDIC employees charged with enforcement of the rule, its definition was changed in the interim final rule to include an individual or company. Such change satisfied similar concerns which had been raised by OGE.

Confidential information. The definition of *confidential information*, found at § 366.2(c) of the proposed rule, was moved to § 366.8(c) in the interim final rule and simplified by eliminating unnecessary language.

Conflict of interest. The definition of *conflict of interest*, found at § 366.2(d) of the proposed rule, was changed at the request of OGE and one of the corporate commenters in order to provide a more narrow definition and eliminate redundant language.

Section 366.2(d)(1) of the proposed rule had two subparts. The first subpart, concerning actual adverse impact on a contractor's ability to impartially provide services, was determined to be

included within the second subpart, which set forth that a conflict of interest would exist where a reasonable individual with knowledge of the relevant facts would question the contractor's ability to impartially provide services to the FDIC. Therefore, the first subpart was eliminated in the interim final rule and, with language changes to accommodate changes made to other definitions, the second subpart was rewritten to simplify the standard.

Sections 366.2(d)(2) and (4) of the proposed rule were combined in § 366.2(c)(4) of the interim final rule and their breadth reduced. Under the revised provision, the FDIC is able to determine that facts exist which would provide a contractor with an unfair competitive advantage which could benefit the contractor or any person with whom the contractor has or is likely to have a personal or business relationship. Such situations are likely to arise in situations where (1) a contractor or a person associated with the contractor intends to purchase assets held by the FDIC which were managed by the contractor; (2) information could be obtained by a contractor through the performance of an FDIC contract which would not be available to other bidders to a subsequent contract and which information could provide the contractor or a person associated with the contractor with an unfair competitive advantage in the preparation of its bid; and (3) confidential information could be obtained through the performance of an FDIC contract which would provide the contractor, or a person associated with the contractor, with information which could be utilized to obtain an advantage in the purchase of the securities of an insured depository institution. Such situations are not exclusive. OGE believed that the unintended advantage standard set forth in the original provision was vague and contractors would be unable to provide the requisite certifications for such standard. Additionally, the discretionary standard set forth in § 366.2(d)(4) of the proposed rule was more narrowly tailored, yet, for the most part, is retained in § 366.2(c)(4) of the interim final rule and allows the FDIC to review the myriad of possible factual scenarios to determine if performance under an FDIC contract has created a situation which would reduce competition in the marketplace.

Section 366.2(d)(3) of the proposed rule, which specifically provides that a conflict of interest exists where a contractor is an adverse party to the FDIC in a lawsuit, was retained in § 366.2(c)(2) of the interim final rule and the \$50,000 threshold was removed.

OGE questioned the need for such provision since such provision is a subset of the general standard set forth in § 366.2(c)(1) of the interim final rule. However, the FDIC has experienced situations in which contractors have certified that they have no conflicts of interest under current FDIC policies while being an adversary to the FDIC in a lawsuit. The rationale most often provided by contractors to justify their contention that there was no conflict was that the litigation involved matters or insured depository institutions which were unrelated to the contracts under consideration. In order to avoid such problem, the provision has been retained in the interim final rule.

Section 366.2(c)(3) of the interim final rule was added at the request of the Board in order to clearly state that a conflict of interest exists where a contractor has been suspended or debarred from contracting with other Federal entities. In planning the merger of the RTC into the FDIC, it was determined that it was appropriate for the FDIC to adopt a debarment program similar to that established by the RTC. To aid in properly administering such program, it was important that consideration of such program be included in the interim final rule.

Control. Section 366.2(f)(1) of the proposed rule was not changed in the interim final rule, but was renumbered as § 366.2(e). The Office of Government Ethics believed that § 366.2(f)(2) of the proposed rule was redundant and requested that it be deleted. In response, the FDIC has dropped that proposed paragraph from this interim final rule.

Default on a material obligation. At the suggestion of OGE, § 366.2(g) of the proposed rule was modified in § 366.2(f) of the interim final rule by clarifying FDIC's intent that if a qualifying default had ever occurred, it would be covered and by specifying that the determination of whether the \$50,000 threshold amount had been met to qualify a default as a default on a material obligation would be considered beginning on the 90th day after delinquency and thereafter.

One of the law firm commenters requested that the \$50,000 threshold amount be raised due to possible punitive effects of the rule on honest and hard working persons who could be precluded from providing services to the FDIC as contractors due to circumstances beyond their control. The Board does not agree with the commenter's contention. The FDIC, in its "Statement of Policy on Contracting with Outside Firms", which was published in the Federal Register on May 17, 1993 (58 FR 28866), utilized a

similar \$50,000 threshold amount and did not experience a lack of contractors willing to perform services for the FDIC. Additionally, the scope of the definition is limited to defaults on loans or advances from insured depository institutions, the institutions for which the FDIC has responsibility for providing deposit insurance and resolution in the event of a failure, and it would be inappropriate for the FDIC to contract with entities that have significantly contributed to losses incurred by such institutions.

Federal banking agency. The definition of *Federal banking agency* found at § 366.2(h) of the proposed rule was deleted. Other changes to the rule made the definition unnecessary.

The definition of *Federal deposit insurance fund*, found at § 366.2(i) of the proposed rule, was combined with the definition of *substantial loss to Federal deposit insurance funds*, found at § 366.2(t) of the proposed rule, and the revised rule set forth as the definition of *substantial loss to Federal deposit insurance funds*, found at § 366.2(o) of the interim final rule.

The definition of *FDIC* found at § 366.2(j) of the proposed rule was modified to include the statutory citations for the authority of the Corporation to act as conservator and operator of a bridge bank. The revised definition is found at § 366.2(g) of the interim final rule.

The definition of *insider* found at § 366.2(k) of the proposed rule was deleted. Other changes to the rule made the definition unnecessary.

The definition of *insured depository institution* found at § 366.2(l) of the proposed rule was not changed (see § 366.2(h) of the interim final rule).

The definition of *management official* found at 366.2(m) of the proposed rule was not changed (see 366.2(i) of the interim final rule).

The first sentence in the definition of *offer*, found at § 366.2(n) of the proposed rule, was simplified and an accommodation made for the removal of the definition of offeror. In the proposed version, an offer was defined to be a response submitted by an offeror to an FDIC solicitation. In the interim final rule, an offer is defined to be a proposal to provide services to the FDIC.

The definition of *offeror* found at § 366.2(o) of the proposed rule was deleted due to changes in the rule which made the use of such term unnecessary.

The definition of *pattern or practice of defalcation* found in § 366.2(p) of the proposed rule was not changed but the defined term was changed to *pattern or practice of defalcation regarding*

obligations to better track the statutory language. See § 366.2 (k).

The definition of *RTC* found in § 366.2(r) of the proposed rule was not changed (see § 366.2(m)).

The definition of *solicitation* found at § 366.2(s) of the proposed rule was deleted due to changes in the rule which made the use of such term unnecessary.

The definition of *subcontractor* found at § 366.2(n) of the interim final rule was added to accommodate the suggestion of one of the commenters for greater clarity in the application of the rule to subcontractors.

The definition of *substantial loss to Federal deposit insurance funds* found at 366.2(t) of the proposed rule was changed to delete 366.2(t)(3), concerning nonrecourse loans made to insiders from an insured depository institution. Persons causing a loss due to such loans will otherwise be barred under the remaining definitions of *substantial loss to Federal deposit insurance funds* and the other disqualifying conditions found at 366.4(a) of the interim final rule. The revised definition is found at 366.2(o) of the interim final rule.

Section 366.3 Qualification of Contractors

Since publication of the proposed rule, the FDIC has designated the FDIC Executive Secretary as the appropriate official to handle the matters which had been designated for the Contractor Fitness and Integrity Compliance Officer as referenced in § 366.3(a)(2) of the proposed rule. Additionally, the provisions relating to the officials responsible for administration of the rule were simplified and provided with their own distinct section. In § 366.3 of the interim final rule, entitled *appropriate officials*, the General Counsel and Executive Secretary, or their designees, are assigned responsibility for the administration of the rule with regard to law firms and other contractors, respectively. Section 366.3(b) of the proposed rule was moved to 366.4 of the interim final rule.

Section 366.4 Disqualification of Contractors

At the request of OGE, § 366.3(b) of the proposed rule, entitled *Qualification for service on behalf of the FDIC*, was moved to § 366.4(a) of the interim final rule and § 366.3(b)(5) was incorporated in § 366.5 of the interim final rule. Section 366.4 was simplified by incorporating only the mandatory prohibitions on the use of contractors which were imposed on the FDIC by Section 19(a) of the Completion Act, 12

U.S.C. 1822(f)(4)(E). OGE believed separating the mandatory provisions from the conflict of interest provisions would decrease the possibility of confusion about the variant authority pursuant to which the respective provisions were being promulgated and the degree of discretion the FDIC may have with respect to issues arising under the respective authorities. By distinguishing between the mandatory prohibitions imposed by the Completion Act and conflicts of interest generally, the certifications required to be made under § 366.6(a) of the interim final rule are more easily identified by contractors thereby simplifying the certification process. The separation of the mandatory bars from the conflict of interest provisions facilitates differentiation between those provisions requiring OGE concurrence and those not requiring such concurrence.

Section 366.4(a) and (b) of the proposed rule were consolidated and simplified in § 366.4(b) of the interim final rule. The terms *offeror*, *person*, and *company* were eliminated and replaced with the term *contractor* and unnecessary language was eliminated. Additionally, in order to avoid the significant administrative and contractual burdens which would be imposed by awarding a contract to a disqualified contractor, the 10 day requirement for reporting undisclosed disqualifying conditions was refined to be the earlier of 10 days after discovery or prior to award.

Section 366.4(c) of the proposed rule was simplified in of the interim final rule. Additionally, §§ 366.4(c)(2) and (3) of the interim final rule were moved from § 366.8 of the proposed rule in order to provide greater clarity in the application of the provision. The moved provisions, as revised, provide the FDIC with the option to require that corrective action be taken by the contractor, to immediately terminate any contracts with the contractor in default and order a transfer of duties, or to declare any contracts with such contractor in default and temporarily waive such default in order to protect the FDIC's interests in the orderly transition of matters to a new contractor.

Section 366.4(d) of the proposed rule was revised to provide for the possibility of a secondary review process apart from the appropriate official who originally rendered such decision. The secondary review would be based upon written application made to the Chairman of the FDIC, or the Chairman's designee.

Section 366.5 Contractor Conflicts of Interest and Ethical Responsibilities

One of the law firm commenters was concerned that the example set forth in § 366.5(a)(1) of the proposed rule could be construed as suggesting that an insider of an insured depository institution for which the FDIC or RTC has been appointed receiver would not have a conflict of interest with respect to a contract which involves services to an unrelated institution. The issue of whether a conflict of interest exists due to a person's former association with a failed institution would have to be determined on a case-by-case basis after review of the relationship of such person to the failed institution. However, in order to avoid inappropriate application of the standard, the examples were removed from the rule.

At the request of OGE, the first sentence in § 366.5(a) of the proposed rule was removed since it stated a matter which added no substance to the rule. The remainder of the provision was restated more succinctly and, as discussed above, the examples removed from the text. The rule, as restated, provides that the FDIC will not award contracts to contractors that have conflicts of interest associated with a particular contract or permit contractors to continue performance under existing contracts when such contractors have conflicts of interest, unless such conflicts are eliminated by the contractor or are waived by the appropriate FDIC official.

At the request of OGE, the standard of review for waiver requests as provided in § 366.5(b) and (c) of the proposed rule was consolidated in § 366.5(b) of the interim final rule and revised to clearly state that waivers will only be granted when the interests of the FDIC in the contractor's participation outweigh the concern that a reasonable person may question the integrity of the FDIC's operations. The standard set forth in the proposed rule provided that a waiver would be granted pursuant to the discretion of the appropriate official. The Office of Government Ethics stated that, in the interests of fairness to contractors, a discernable standard of review should be provided in the rule to be applied to all waiver requests.

The Office of Government Ethics also requested that § 366.5(b) and (c) of the proposed rule, which provided separate procedures for pre- and post-offer requests for review of conflicts, be consolidated into one time-frame. Section 366.5(c) of the interim final rule provides the consolidated provision.

The Office of Government Ethics requested that the separate treatment of contractors for legal services versus other services as provided in proposed § 366.5(b), (c), and (d) be explained in the preamble and consolidated in the text of the rule through the use of one paragraph covering pre-bid requests for review of conflicts of interest for contractors other than law firms and sole practitioner lawyers. The interim final rule, in § 366.5(c)(3), provides that requests for pre-bid review of conflicts for contractors other than law firms and sole practitioner attorneys will only be considered if the participation of the contractor in the bidding process is necessary to provide adequate competition. It is the FDIC's preference to do business only with contractors which do not have conflicts of interest. However, it is recognized that there may be situations in which there are few qualified contractors and the participation of contractors which have conflicts is important to encourage competition.

With regard to the different treatment accorded law firms and sole practitioner lawyers in the conflict review process, the regulation recognizes the additional responsibilities that are placed on law firms and sole practitioner lawyers providing services to the FDIC and also observes the separate contracting processes that exist in the Legal Division for the selection and retention of contractors.

Specifically, in addition to the conflicts of interest requirements imposed by this regulation, law firms and sole practitioner lawyers who are providing services to the FDIC are required to follow applicable provisions of their State Code of Professional Responsibility, the Model Rules of Professional Conduct and additional requirements set forth in the FDIC Legal Division's Guide for Outside Counsel and its Statement of Policies Concerning Outside Counsel Conflicts of Interest. Law firms and sole practitioner lawyers are also subject to a separate contracting process due to the close fiduciary relationship that a law firm or sole practitioner lawyer has when representing the FDIC. Law firms and sole practitioner lawyers are required to submit to the Legal Division an application to provide services which requires disclosure of any conflicts of interest existing under the broader requirements imposed upon lawyers. If the information submitted does not indicate the existence of any conditions that would bar retention, the law firm or sole practitioner lawyer is added to a list of available counsel. The list of available counsel provides the primary

source for identifying lawyers available for engagement on specific legal matters and, if so identified, additional disclosure and review are required concerning case-specific qualification criteria. Counsel are also required to enter into a Legal Services Agreement with the Legal Division which governs all engagements with the FDIC. The selection and retention process for law firms and sole practitioner lawyers is substantially different from the process utilized for other contractors, which typically includes the development of a procurement requisition, the preparation and issuance of a request for proposals, and the subsequent evaluation of bids or proposals received. The establishment of a separate procedure under § 366.5 for resolution or waiver of conflicts of interest for law firms and sole practitioner lawyers is an acknowledgement of relevant differences in type of services and the differing relationship that lawyers have with the FDIC as their client.

Proposed § 366.5(d) was also revised in the interim final rule to include the remedies available to the FDIC in the event a conflict of interest is discovered after contract award as was provided in proposed § 366.8(a).

Section 366.5(e) of the proposed rule was revised to provide for the possibility of a secondary review process apart from the appropriate official who originally rendered such decision. The secondary review would be based upon written application made to the Chairman of the FDIC, or the Chairman's designee. It also provides the FDIC with the discretion to stay corrective or other actions ordered by the appropriate official pending reconsideration of the decision.

Section 366.6 Information Required to be Submitted

At the request of OGE, in order to provide greater specificity to contractors with respect to the scope of required certifications, proposed § 366.6(a) was modified to specifically identify the Representations and Certifications Form to be submitted by all contractors with every offer. Also, the provision was altered to assure that FDIC would obtain the information the FDIC deems appropriate to make a determination with respect to disqualifying conditions and conflicts of interest. Additionally, the information to be included in the Representations and Certifications Form was tailored in § 366.6(a)(1) to accommodate the changes in the structure of §§ 366.4 and 366.5 of the interim final rule and reduced, at the request of one of the Corporate and law firm commenters to include only the

contractor; proposed § 366.6(a)(2) was reworked to accommodate the changes to the definitions and the required certifications reduced to include only the contractor or any company under the contractor's control; to accommodate the reductions in the certifications required under § 366.6(a)(1) and (2) of the proposed rule while not imposing a significant paperwork collection on the contractor and the FDIC, § 366.6(a)(3) in the interim final rule was added which requires that the contractor provide an agreement that it will not allow any employee, agent, or subcontractor to work on an FDIC contract unless it has first verified that such employee, agent, or subcontractor is not subject to disqualifying conditions or otherwise has a conflict of interest; and proposed § 366.6(a)(3) was moved to § 366.6(a)(4) of the interim final rule and the scope of the other information which can be requested narrowed to be dependent on the contract under consideration.

One of the law firm commenters stated that the FDIC had acted outside the scope of its authority in imposing the requirement in proposed § 366.6(a)(2) that a contractor provide a list and description of any defaults to insured depository institutions for the 10-year period preceding the submission of an offer. The Board disagrees with the commenter's contention. The Completion Act, at 12 U.S.C. 1822(f)(4)(C), requires the FDIC to obtain a list and description of any default to an insured depository institution for the 5-year period preceding the submission of an offer to the FDIC and any other information as the Board may prescribe by regulation. The Board determined that since the Completion Act provisions were extracted from FIRREA, which was promulgated in 1989, it was important that the FDIC be informed as to whether a contractor or any company under the contractor's control defaulted on a material obligation for the 10 year period preceding the offer.

A law firm commenter expressed concern that the information disclosure requirements contained in § 366.6(a) of the proposed rule might conflict with California state laws involving privacy rights. However, the Completion Act, at 12 U.S.C. 1822(f)(4)(D), requires certain information be collected by the contractor for persons to be employed by a contractor to perform services under an FDIC contract.

One of the law firm commenters objected to the scope of the disclosures to be made and was concerned that outside contractors of law firms would be required to make significant

disclosures to the law firm in order for the law firm to continue to use such entities and enter into contracts with the FDIC. Additionally, both of the corporate commenter's objected to the scope of the certifications to be obtained under the proposed rule as applied to large diversified corporations and their employees since certifications would need to be obtained from all affiliated business entities and the employees of the contractor. Consideration to the commenters' concerns was given in the revision of § 366.6 of the proposed rule. In § 366.6(a) of the interim final rule, certifications regarding disqualifying factors and conflicts of interest must be provided for the contractor; a list of defaults must be provided for the contractor and any company under the contractor's control; and the contractor must agree that it will not allow any employee, agent, or subcontractor to perform services under the FDIC contract unless it verifies that such employee, agent, or subcontractor does not have a disqualifying condition or a conflict of interest and has not defaulted on a material obligation. The scope of the required certifications and disclosures was thus limited to those entities which would be directly involved in the performance of the FDIC contract or which are under the contractor's control.

Section 366.6(b)(1) of the proposed rule was revised to reduce the reporting and review burden placed upon contractors and the FDIC. In the proposed rule, a contractor was required to obtain and submit certifications for all employees who were to provide services on any FDIC contract. Additionally, in § 366.6(b)(2), the FDIC could request the submission of such information at any time. In § 366.6(b) of the interim final rule, a contractor is required to obtain verification of the lack of disqualifying conditions and conflicts of interest for employees who will provide services on an FDIC contract and to provide the FDIC with immediate notification if the certifications provided in § 366.6(a) were incorrect at the time of submission or subsequently became incorrect.

At the request of OGE, § 366.6(c) of the proposed rule was simplified in the interim final rule and provides that a contractor which fails to provide information may be determined by the FDIC to be ineligible for the award of an FDIC contract or in default under an existing contract with the FDIC.

The Board was concerned that the reduction in the disclosures required to be submitted under the rule might provide an opportunity for abuse by contractors. In order to aid the FDIC in

obtaining compliance with the rule, the proposed rule was modified through the addition of § 366.6(d) which requires contractors to retain the records relied upon in making the requisite disclosures for three years after the expiration or termination of the relevant contract and to make such information available to the FDIC upon request.

The Board was also concerned unforeseeable circumstances might require immediate contracting in order to protect the assets or interests of the FDIC. In order to provide reasonable protection and allow the FDIC to act promptly in order to protect its interests, § 366.6(e) was added which provides that, in the event of an emergency, the FDIC may authorize delayed compliance with the rule. Delayed compliance is allowed only when it is necessary to protect FDIC personnel or property.

To clarify that, on a contract-by-contract basis, the FDIC may add additional contractual conditions or limitations on a contractor, § 366.6(f) was added. Part 366 establishes the minimum standards as required by the Completion Act and additional standards may be required as the FDIC deems appropriate.

Section 366.7 Minimum Ethical Standards for Independent Contractors

Section 366.7 was added to the interim final rule to comply with the portion of the Completion Act that requires the FDIC to establish minimum ethical standards for contractors. Section 366.7(a) provides that a contractor shall not improperly solicit favors, gifts, or other items of monetary value; improperly use FDIC property; use its status as an FDIC contractor for its benefit except as contemplated by the contract; or make unauthorized promises or commitments on behalf of the FDIC.

Section 366.7(b) and (c) identify potentially applicable criminal provisions to contractors that solicit or accept bribes or make false statements to the Government.

The penalties for violating the provisions of § 366.7 are provided in § 366.7(d).

Section 366.8 Confidentiality of Information

Section 366.7 of the proposed rule was modified at § 366.8 of the interim final rule. Section 366.8(a) was added to provide a general duty to be adhered to by contractors in protection of confidential information.

Section 366.8(b) sets forth the penalties for the failure to properly

protect confidential information as required under § 366.8(a).

Section 366.8(c) defines *confidential information* as information obtained from the FDIC or a third party in connection with an FDIC contract but does not include information generally available to the public provided such information was not made publicly available by the contractor without appropriate authorization.

Section 366.9 Liability for Rescission or Termination

Section 366.8(a) of the proposed rule set forth that the FDIC could rescind or terminate a contract with a contractor who violated the requirements of part 366. The termination provision has been set forth in each appropriate section of the interim final rule.

Section 366.8(b) of the proposed rule was revised to accommodate the revised structure of the interim final rule and is now set forth in § 366.9.

Section 366.10 Finality of Determination

Section 366.9 of the proposed rule is now set forth at § 366.10 of the interim final rule.

IV. Matters of Regulatory Procedure *Regulatory Flexibility Act*

The Board of Directors has concluded that the interim final rule will not impose a significant economic hardship on small institutions. Therefore, the Board of Directors hereby certifies pursuant to section 605 of the Regulatory Flexibility Act (5 U.S.C. 605) that the interim final rule will not have a significant economic impact on a substantial number of small business entities within the meaning of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

Paperwork Reduction Act

The FDIC's contract and procurement information requirements constitute a collection of information under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*). The collection pursuant to the proposed rule was reviewed and approved by the Office of Management and Budget (OMB) under control number 3064-0072. Any changes made to the Representations and Certifications forms resulting from the promulgation of this interim final rule will be submitted to OMB for review and approval pursuant to the Paperwork Reduction Act.

List of Subjects in 12 CFR Part 366

Conflict of interests, Government contracts, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, pursuant to its authority under section 19 of the Resolution Trust Corporation Completion Act, the Board of Directors of the FDIC, with the concurrence of OGE, amends title 12, Chapter III of the Code of Federal Regulations by adding part 366 to read as follows:

PART 366—CONTRACTOR CONFLICTS OF INTEREST

Sec.

- 366.1 Authority, purpose, and scope.
- 366.2 Definitions.
- 366.3 Appropriate officials.
- 366.4 Disqualification of contractors.
- 366.5 Contractor conflicts of interest.
- 366.6 Information required to be submitted.
- 366.7 Minimum ethical standards for independent contractors.
- 366.8 Confidentiality of information.
- 366.9 Liability for rescission or termination.
- 366.10 Finality of determination.

Authority: 12 U.S.C. 1819, 1822(f)(3) and (4).

§ 366.1 Authority, purpose, and scope.

(a) *Authority.* This part is adopted pursuant to section 12(f)(3) and (4) of the Federal Deposit Insurance Act, 12 U.S.C. 1822(f)(3) and (4), and the rule-making authority of the Federal Deposit Insurance Corporation (FDIC) found at 12 U.S.C. 1819. Pursuant to those sections and consistent with the goals and purposes of titles 18 and 41 of the U.S. Code, the FDIC is promulgating regulations in this part applicable to independent contractors governing conflicts of interest, ethical responsibilities, and the use of confidential information. The regulations in this part also establish procedures for ensuring that independent contractors meet minimum standards of competence, experience, integrity, and fitness. The FDIC will apply this part to contractual activities it undertakes, including situations in which it is acting as manager of the Federal Savings and Loan Insurance Corporation (FSLIC) Resolution Fund (FRF). This part is in addition to, and not in lieu of, any other statute or regulation which may apply to such contractual activities. This part does not apply to the FDIC when acting as a conservator of a failed financial institution or when operating a bridge bank.

(b) *Purpose.* Consistent with the goals and purposes of titles 18 and 41 of the U.S. Code, this part seeks to establish:

- (1) Minimum standards which govern conflicts of interest, ethical responsibilities, and the use of confidential information by contractors;
- (2) Procedures to ensure that independent contractors meet minimum

standards of competence, experience, integrity, and fitness; and

(3) Official written guidance to contracting personnel who award contracts for services and to contractors who bid on such contracts.

(c) *Scope.* (1) (i) This part applies to:

(A) Contractors, including law firms and other independent contractors, that are not deemed, under 12 U.S.C. 1822(f)(1)(B), to be employees of the FDIC, which submit offers to provide services to the FDIC or which enter into contracts for services with the FDIC; and

(B) Subcontractors which enter into contracts to perform services under a proposed or existing contract with the FDIC.

(ii) Contractors that are deemed under 12 U.S.C. 1822(f)(1)(B) to be employees of the Corporation are subject, in addition to this part, to Title 18 of the United States Code; the Standards of Ethical Conduct for Employees of the Executive Branch (5 CFR part 2635); the Supplemental Standards of Ethical Conduct for Employees of the Federal Deposit Insurance Corporation (5 CFR part 3201); the Executive Branch Financial Disclosure, Qualified Trusts, and Certificates of Divestiture regulations (5 CFR part 2634); and the Supplemental Financial Disclosure Requirements for Employees of the Federal Deposit Insurance Corporation (5 CFR part 3202).

(2) For all contractors subject to this part, the FDIC will apply this part to contracts which are entered into between the contractors and the FDIC on or after April 10, 1996. In addition, this part applies to contracts between contractors subject to this part and the FDIC which exist on April 10, 1996 for which a contractual action, such as a modification, extension, or exercise of an option, takes place on or after April 10, 1996.

(d) *Resolution Trust Corporation transition.* This part shall apply to all RTC contractors that provide services to the FDIC after the RTC's termination which occurred, by statute, December 31, 1995.

§ 366.2 Definitions.

As used in this part:

(a) *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.

(b) *Company* means any corporation, firm, partnership, society, joint venture, business trust, association or similar organization, or any other trust unless by its terms it must terminate within twenty-five years or not later than twenty-one years and ten months after

the death of individuals living on the effective date of the trust, or any other organization or institution, but shall not include any corporation the majority of the shares of which are owned by the United States, any state, or the District of Columbia.

(c) *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, 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; or

(2) 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, is an adverse party to the FDIC, RTC, FSLIC, or their successors in a lawsuit; or

(3) 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, 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

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

(d) *Contractor* means a person which has submitted an offer to perform services for the FDIC or has a contractual arrangement with the FDIC to perform services.

(e) *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.

(f) *Default on a material obligation* means a loan or advance from an insured depository institution which has ever been delinquent for 90 or more days as to payment of principal or interest, or a combination thereof, with a remaining balance of principal and accrued interest on the ninetieth day, or any time thereafter, in an amount in excess of \$50,000.

(g) *FDIC* means the Federal Deposit Insurance Corporation in its receivership and corporate capacities. It does not mean the FDIC in its conservatorship capacity or when it is operating a bridge bank as defined, respectively, in 12 U.S.C. 1821(c) and (n).

(h) *Insured depository institution* means any bank or savings association the deposits of which are insured by the FDIC.

(i) *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 whose management committee or executive committee has responsibility for the day-to-day operations of the partnership, management official means only a member of such committee but, if no such committee exists, management official means each of the general partners.

(j) *Offer* means a proposal to provide services to the FDIC. For law firms or sole practitioner lawyers, "offer" also means the application submitted by the law firm to the FDIC.

(k) *Pattern or practice of defalcation regarding obligations* means two or more instances in which:

(1) A loan or advance from an insured depository institution 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) A loan or advance from an insured depository institution 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 to the insured depository institution.

(l) *Person* means an individual or company.

(m) *RTC* means the former Resolution Trust Corporation in any of its capacities.

(n) *Subcontractor* means a person that enters into a contract with an FDIC

contractor to perform services under a proposed or existing contract with the FDIC.

(o) *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 Bank Insurance Fund (BIF), the Savings Association Insurance Fund (SAIF), the FRF, or funds 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 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 BIF, the SAIF, the FRF or the funds 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.

§ 366.3 Appropriate officials.

(a) The General Counsel of the FDIC, or the designee of the General Counsel, shall administer the provisions of this part with respect to contracts involving the provision of services by law firms or sole practitioner lawyers.

(b) The FDIC Executive Secretary, or the designee of the Executive Secretary, shall administer the provisions of this part with respect to all other contracts.

§ 366.4 Disqualification of contractors.

(a) *Disqualifying conditions.* No person shall perform services under an FDIC contract and no contractor shall enter into any contract with the FDIC if that person or contractor:

(1) Has been convicted of any felony;

(2) 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 Federal Deposit Insurance Corporation or their successors;

(3) Has demonstrated a pattern or practice of defalcation regarding obligations; or

(4) Has caused a substantial loss to Federal deposit insurance funds.

(b) *Contractors with disqualifying conditions arising prior to contract award.* (1) A contractor which has any of the disqualifying conditions identified in paragraph (a) of this section prior to the award of an FDIC contract is disqualified and is prohibited from entering into contracts with the FDIC.

(2) If after submitting an offer but prior to award, a contractor discovers that it has any of the disqualifying conditions identified in paragraph (a) of this section, it shall notify the FDIC in writing within 10 days or prior to award, whichever is earlier.

(c) *Disqualifying conditions that arise or are discovered after contract award.* A contractor must notify the FDIC in writing within 10 days after discovering that it or any person performing services under an FDIC contract has any of the disqualifying conditions identified in paragraph (a) of this section. Such notification shall contain a detailed description of the disqualifying condition and may include a statement of how the contractor intends to resolve such condition. The FDIC, after receipt of such notification or other discovery of the contractor's disqualifying condition, shall take such action as it determines is in the FDIC's best interests, including that:

(1) The FDIC may notify the contractor in writing of the corrective actions, if any, which the contractor must take to eliminate the disqualifying condition. Corrective actions must be completed by the contractor not later than 30 days after notification is mailed by the FDIC unless the FDIC, at its sole discretion, determines that it will be in the best interests of the FDIC to grant the contractor an extension of time in which to complete such corrective action;

(2) The FDIC may immediately declare any contracts with such contractor in default, terminate the contracts, and order an immediate transfer of duties and responsibilities under the contracts; or

(3) The FDIC may declare any contracts with such contractor in default and temporarily waive such default in order to allow an orderly transfer of duties and responsibilities under the contracts.

(d) *Reconsideration of decisions.* Decisions issued by the FDIC may be reconsidered upon application by an affected party to the Chairman or the Chairman's designee. Such requests

shall be in writing and contain the bases for the request. The FDIC, at its discretion and after determining that it is in its best interests, may stay any corrective or other actions ordered by it pending reconsideration of a decision.

§ 366.5 Contractor conflicts of interest.

(a) *General.* The FDIC will not award contracts to contractors that have conflicts of interest associated with a particular contract or permit contractors to continue performance under existing contracts when such contractors have conflicts of interest, unless such conflicts are eliminated by the contractor or are waived by the appropriate FDIC official.

(b) *Waivers.* Waivers of conflicts of interest will only be granted when, in light of all relevant circumstances, the interests of the FDIC in the contractor's participation outweigh the concern that a reasonable person may question the integrity of the FDIC's operations.

(c) *Conflicts of interest arising prior to contract award (1) Requests for review of conflicts of interest.* (i) A contractor, with its offer, may request a determination as to the existence of a conflict of interest, may request that the conflict of interest, if any, be waived in accordance with paragraph (b) of this section, or may propose how the contractor could eliminate the conflict.

(ii) If after submitting an offer, but prior to award, a contractor discovers that it has a conflict, it shall notify the FDIC in writing within 10 days or prior to award, whichever is earlier. The contractor, with its notice, may make such requests or proposals regarding the conflict or potential conflict as are described in paragraph (c)(1)(i) of this section.

(2) *Review by the FDIC.* (i) Subject to the restrictions set forth in paragraphs (c)(2)(ii) and (c)(3) of this section, the appropriate FDIC official, at his or her sole discretion, may determine whether a conflict of interest exists, may waive the conflict of interest in accordance with paragraph (b) of this section, or may approve in writing a contractor's proposal to eliminate a conflict of interest.

(ii) For contractors other than law firms and sole practitioner lawyers, the FDIC may consider a contractor's conflict or potential conflict of interest only if the FDIC first determines that the contractor's offer is the most advantageous of all received.

(3) *Pre-bid requests and pre-bid review for contractors other than law firms and sole practitioner lawyers.* A request for pre-bid review must be in writing and describe in detail the conflict or potential conflict of interest.

The request may provide a proposal for elimination of the conflict or request a waiver of the conflict. The FDIC may perform a pre-bid review of conflicts of interest only if it first determines, at its sole discretion, that the participation of the contractor in the bidding process is necessary to provide adequate competition.

(d) *Conflicts of interest that arise or are discovered after contract award.* A contractor shall notify the FDIC in writing within 10 days after discovering that it has a conflict of interest. Such notification shall contain a detailed description of the conflict of interest and state how the contractor intends to eliminate the conflict. The FDIC, after receipt of such notification or other discovery of the contractor's conflict or potential conflict of interest, shall take such action as it determines is in the FDIC's best interests, including that:

(1) The FDIC may notify the contractor in writing of its finding as to whether a conflict of interest exists and the basis for such determination; whether or not a waiver will be granted; or whether corrective actions may be taken in order to eliminate the conflict of interest. Corrective actions must be completed by the contractor not later than 30 days after notification is mailed by the FDIC unless the FDIC, at its sole discretion, determines that it is in the best interests of the FDIC to grant the contractor an extension in which to complete such corrective action;

(2) The FDIC may immediately declare any affected contracts with such contractor in default, terminate the contracts, and order an immediate transfer of duties and responsibilities under such contracts; or

(3) The FDIC may declare any affected contract with such contractor in default and temporarily waive such default in order to allow an orderly transfer of duties and responsibilities under such contract.

(e) *Reconsideration of decisions.* Decisions issued pursuant to this part may be reconsidered by the Chairman or the Chairman's designee upon application by the contractor. Such requests shall be in writing and shall contain the bases for the request. The FDIC, at its discretion and after determining that it is in its best interests, may stay any corrective or other actions ordered by the FDIC pending reconsideration of a decision.

§ 366.6 Information required to be submitted.

(a) *Initial submission.* Every offer submitted to the FDIC by any contractor shall include a completed Representations and Certifications Form

and such other information as the FDIC may deem appropriate to permit it to make a determination with respect to disqualifying conditions or conflicts of interest. The Representations and Certifications Form shall require that the contractor provide the following:

(1) Certifications that, to the best of the contractor's knowledge, the contractor is not disqualified from service on behalf of the FDIC because of the existence of any of the conditions identified in § 366.4(a), or conflicts of interest as defined in § 366.2(c)(1) through (3), subject to the contractor's request for waiver of a conflict of interest or proposal for elimination of a conflict of interest as described in § 366.5;

(2) A list and description of any instance during the ten (10) years preceding the submission of the offer in which the contractor or any company under the contractor's control defaulted on a material obligation to any insured depository institution;

(3) The contractor's agreement that it will not allow any employee, agent, or subcontractor to perform services under the proposed contract with the FDIC unless the contractor first verifies with each such employee, agent, or subcontractor that, to the best of such person's knowledge, such person:

(i) Is not disqualified from performing services under the FDIC contract because of the existence of any of the conditions identified in § 366.4(a);

(ii) Has no conflicts of interest as defined in § 366.2(c)(1) through (3), subject to a request by the contractor for a conflict of interest waiver or proposal for the elimination of a conflict of interest as set forth in § 366.5; and

(iii) Has not, during the ten (10) years preceding the submission of the offer, defaulted on a material obligation to any insured depository institution; and

(4) Any other information which the FDIC may deem appropriate, the scope of which will be dependent on the particular contract under consideration.

(b) *Subsequent submissions.* During the term of the contract, the contractor shall:

(1) Verify the information described in paragraph (a)(3) of this section for any employee, agent, or subcontractor who will perform services under the contract for whom such information has not been previously verified, prior to such employee, agent, or subcontractor performing services under the contract; and

(2) Immediately notify the FDIC if any of the information submitted pursuant to paragraph (a) of this section was incorrect at time of submission or has subsequently become incorrect.

(c) *Failure to provide information.* A contractor that fails to provide any required information or misstates a material fact may be determined by the FDIC to be ineligible for the award of the FDIC contract for which such information is required or to be in default with respect to any existing contract for which such information is required.

(d) *Retention of information.* A contractor shall retain the information upon which it relied in preparing its certification(s) during the term of the contract and for a period of three (3) years following the termination or expiration of the contract and shall make such information available for review by the FDIC upon request.

(e) *Delayed compliance in emergencies.* In emergencies, when unforeseeable circumstances make it necessary to contract immediately in order to protect FDIC personnel or property, the FDIC may authorize delayed compliance with this part.

(f) *Additional contractual requirements.* In addition to the provisions of this part, the FDIC may include in its contract provisions, conditions and limitations, including additional standards for contractor fitness and integrity.

§ 366.7 Minimum ethical standards for independent contractors.

(a) In connection with the performance of any contract and during the term of such contract, a contractor, shall not:

(1) Accept or solicit for itself or others favors, gifts, or other items of monetary value from any person the contractor knows is seeking official action from the FDIC in connection with the contract or has interests which may be substantially affected by the contractor's performance or nonperformance of duties to the FDIC;

(2) Use improperly or allow the improper use of FDIC property, or property over which the contractor has supervision or charge by reason of the contract;

(3) Use its status as an FDIC contractor for its personal, financial or business benefit or for the benefit of a third party, except as contemplated by the contract;

(4) Make any promise or commitment on behalf of the FDIC not authorized by the FDIC.

(b) Pursuant to 18 U.S.C. 201, whoever acts for or on behalf of the FDIC is deemed to be a public official and public officials are prohibited from soliciting or accepting anything of value in return for being influenced in the performance of official actions.

Violators are subject to criminal sanctions under Title 18 of the United States Code.

(c) Pursuant to 18 U.S.C. 1001, whoever knowingly and willingly falsifies a material fact, makes a false statement, or utilizes a false writing in connection with an FDIC contract is subject to criminal sanctions under Title 18 of the United States Code.

(d) A contractor that violates the provisions of this section may be determined by the FDIC to be ineligible for the award of an FDIC contract and the FDIC may determine that such contractor is in default under any existing FDIC contract.

§ 366.8 Confidentiality of information.

(a) A contractor has a duty to protect confidential information and shall not use or allow the use of confidential information to further a private interest other than as contemplated by the contract.

(b) If a contractor fails to comply with the provisions of this section, the FDIC may:

(1) Declare the contractor ineligible for the award of any FDIC contract not yet awarded; or

(2) Declare the contractor in default under any existing contract with the FDIC.

(c) As used in this section, "confidential information" means information that a contractor obtains from the FDIC or a third party in connection with an FDIC contract but does not include information generally available to the public unless the information becomes available to the public as a result of unauthorized disclosure by the contractor.

§ 366.9 Liability for rescission or termination.

The FDIC may seek its actual, direct, and consequential damages from a contractor whose disqualifying conditions, conflicts of interest, failure to comply with information submission or confidentiality requirements, or failure to comply with the minimum ethical standards for independent contractors were the basis for rescission or termination of a contract between the FDIC and the contractor. This right to terminate or rescind and these remedies are cumulative and in addition to any other remedies or rights the FDIC may have under the terms of the contract, at law, or otherwise.

§ 366.10 Finality of determination.

Any determination made by the FDIC pursuant to this part is at the FDIC's sole discretion and shall not be subject to further review.

By Order of the Board of Directors.

Dated at Washington, D.C. this 6th day of February 1996.

Federal Deposit Insurance Corporation.

Jerry L. Langley,

Executive Secretary.

Concurred in this 27th day of February 1996.

Stephen D. Potts,

Director, Office of Government Ethics.

[FR Doc. 96-5254 Filed 3-8-96; 8:45 am]

BILLING CODE 6714-01-P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 94-NM-72-AD; Amendment 39-9533; AD 96-05-07]

Airworthiness Directives; Boeing Model 757 Series Airplanes Equipped with Pratt & Whitney Engines

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment supersedes an existing airworthiness directive (AD), applicable to certain Boeing Model 757 series airplanes, that currently requires repetitive inspections to detect cracking in the midspar fuse pins and replacement of certain fuse pins. This amendment requires inspection of certain fuse pins, and replacement of certain fuse pins with certain other fuse pins. This amendment also requires inspections of refinished straight fuse pins and replacement of cracked refinished straight fuse pins with certain other straight fuse pins. This amendment is prompted by the development of new corrosion-resistant steel fuse pins. The actions specified by this AD are intended to prevent cracking of the midspar fuse pins, which may lead to separation of the strut and engine from the wing of the airplane.

DATES: Effective April 10, 1996.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of April 10, 1996.

ADDRESSES: The service information referenced in this AD may be obtained from Boeing Commercial Airplane Group, P.O. Box 3707, Seattle, Washington 98124-2207. This information may be examined at the Federal Aviation Administration (FAA), Transport Airplane Directorate, Rules Docket, 1601 Lind Avenue SW., Renton, Washington; or at the Office of the