

the environmental effect of the regulation being amended.

#### *Paperwork Reduction Act*

This rulemaking contains no reporting requirement that is subject to OMB approval under 5 CFR Part 1320, pursuant to the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 et seq.).

#### *Final Rulemaking*

As the foregoing discussion indicates, the Code of Federal Regulation subparts being removed are no longer necessary. Accordingly, the Department has determined, pursuant to 5 U.S.C. 553, that there is good cause to conclude that prior notice and opportunity for public comment is unnecessary and contrary to the public interest.

#### *Regulatory Flexibility Act*

The Regulatory Flexibility Act, 5 U.S.C. 601 et seq., directs agencies to prepare a regulatory flexibility analysis whenever an agency is required to publish a general notice of proposed rulemaking for a rule. As discussed above, the Department has determined, that prior notice and opportunity for public comment is unnecessary and contrary to the public interest. In accordance with 5 U.S.C. 604(a), no regulatory flexibility analysis has been prepared for today's rule.

#### *Congressional Notification*

The Small Business Regulatory Enforcement Fairness Act of 1996 requires agencies to report to Congress on the promulgation of certain rules prior to their effective dates. 5 U.S.C. 801. The Department is reporting today's rulemaking to Congress in accordance with 5 U.S.C. 801(a)(1)(A). The Office of Management and Budget has determined that this is not a major rule as defined in 5 U.S.C. 804(2)

#### List of Subjects

##### *10 CFR Part 205*

Administrative practice and procedure, Petroleum allocation, Petroleum price regulations.

##### *10 CFR Part 463*

Public utilities.

Issued in Washington, DC on June 28, 1996.

Robert R. Nordhaus,  
*General Counsel.*

For the reasons set forth in the preamble, title 10 of the Code of Federal Regulations is amended as set forth below:

## **PART 205—ADMINISTRATIVE PROCEDURES AND SANCTIONS**

1. The authority citation for part 205 continues to read as follows:

Authority: Emergency Petroleum Allocation Act of 1973, Pub. L. 93-159; Federal Energy Administration Act of 1974, Pub. L. 93-275 (88 Stat. 96; E.O. 11790, 39 FR 23185); 42 U.S.C. 7101 et seq., unless otherwise noted.

### **Subpart L and P—[Removed]**

2. Subparts L (§§ 205.160–205.162) and P (§§ 205.200–205.204) of part 205 are removed.

## **PART 463—ANNUAL REPORTS FROM STATES AND NONREGULATED UTILITIES ON PROGRESS IN CONSIDERING THE RATEMAKING AND OTHER REGULATORY STANDARDS UNDER THE PUBLIC UTILITY REGULATORY POLICIES ACT OF 1978 [REMOVED]**

3. Part 463 of 10 CFR is removed.

[FR Doc. 96-17116 Filed 7-3-96; 8:45 am]

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## **FEDERAL DEPOSIT INSURANCE CORPORATION**

### **12 CFR Part 367**

RIN 3064-AB76

### **Suspension and Exclusion of Contractors and Termination of Contracts**

**AGENCY:** Federal Deposit Insurance Corporation.

**ACTION:** Interim final rule; request for comments.

**SUMMARY:** The Board of Directors of the Federal Deposit Insurance Corporation (FDIC or Corporation) is adopting an interim final rule concerning suspension and exclusion of FDIC contractors and termination of contracts. The interim final rule is adopted pursuant to section 12(f) (4) and (5) of the Federal Deposit Insurance Act (FDI Act), and the rule-making authority of the FDIC found at section 9 of the Act. Additional provisions implementing these statutory directives appear in the FDIC's regulation, as published in the Federal Register on June 6, 1996, governing contractor conflicts of interest and the requirements that FDIC contractors meet minimum standards of competence, experience, fitness and integrity. This interim final rule is a companion to the conflict of interest regulation in that it sets forth procedures for the suspension and/or

exclusion of contractors that have violated the conflicts of interest regulations (and hence, fail to meet minimum standards of fitness and integrity), or have otherwise acted in a manner warranting such action. In addition to FDIC contractors, this interim final rule also applies to subcontractors, key employees, management officials and affiliated business entities of FDIC contractors (all such terms are defined herein), and is designed to inform such contractors regarding their rights to notice and an opportunity to be heard on FDIC suspension and exclusion actions.

**DATES:** Effective date. This interim final rule is effective July 5, 1996.

**Comment period date.** Comments must be received on or before September 3, 1996.

**ADDRESSES:** Send written 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 in the FDIC Public Information Center, room 100, 801 17th Street, NW., Washington, DC 20429, between 9:00 a.m. and 5:00 p.m. on business days.

**FOR FURTHER INFORMATION CONTACT:** Peter A. Ziebert, Counsel, Legal Division, (202) 736-0742; or Richard M. Handy, Assistant Executive Secretary (Ethics), Office of the Executive Secretary, (202) 898-7271.

#### **SUPPLEMENTARY INFORMATION:**

##### **I. Background**

This interim final rule sets forth standards and procedures governing suspension and exclusion of FDIC contractors, which includes subcontractors, management officials, key employees and affiliated business entities of such contractors, for violations of 12 CFR part 366, the FDIC's contractor conflict of interest regulation (61 FR 28725, June 6, 1996). This interim final rule also provides for the termination of awarded contracts of FDIC contractors. For the most part, this rule is modeled after the suspension and exclusion regulation used by the Resolution Trust Corporation (RTC) until RTC sunset on December 31, 1995, which had been codified at 12 CFR part 1618. This rule also bears similarity to the suspension and debarment procedures utilized by other federal entities, which have been developed after extensive public comment and

have withstood considerable judicial scrutiny. However, as discussed below, the rule departs in certain respects from the procedures used by other federal entities because the FDIC is not subject to the Federal Acquisition Regulation (FAR). The rule also revises the former RTC regulation in several ways as the FDIC now promulgates its own suspension and exclusion regulation.

Generally, this rule provides for more expedited and less formal procedures than are used by other federal agencies, while at the same time satisfying due process requirements regarding notice and an opportunity to be heard. These expedited procedures are necessary due to the urgent need to protect the FDIC and the public interest against further dissipation of assets now under FDIC control and previously under RTC control.

As noted above, FDIC has a statutory mandate to be vigilant in enforcing the highest ethical standards for its contractors. Accordingly, it is imperative that contractor suspension and exclusion proceedings be processed as expeditiously as possible consistent with due process requirements that affected contractors be afforded notice and an opportunity to be heard on such enforcement actions.

## II. Summary of the Interim Final Rule

The regulation is comprised of 20 sections. Section 367.1 covers the authority, purpose, scope and application of the regulation. It makes clear that the regulation applies to contractors other than attorneys or law firms that provide services or enter into contracts to provide services to the FDIC acting in any capacity. The regulation is effective as of the date of publication in the Federal Register for reasons set out in section III, below. Moreover, the regulation applies to actions initiated by the FDIC on or after the effective date regardless of the date of the cause giving rise to such actions. Finally, § 367.1 provides that this regulation supersedes and replaces the RTC suspension and exclusion regulation (12 CFR part 1618) and that RTC actions taken under that part will be honored as if taken by the FDIC.

Section 367.2 contains the definitions to be used in this part. The definitions are generally based on the commonly accepted definitions used in the FDIC's conflict of interest regulation (12 CFR part 366) or by other federal entities. Key terms that are defined here include affiliated business entity, conflict of interest, contract, contractor, control, key employee, management official, pattern or practice of defalcation,

subcontractor, and substantial loss to federal deposit insurance funds.

Section 367.3 identifies the appropriate officials in the FDIC suspension and debarment program. The FDIC "Ethics Counselor" (FDIC Executive Secretary) is the official responsible for rendering suspension and exclusion decisions. The "Corporation Ethics Committee" provides a review forum of any suspension or exclusion decision appealed by a contractor.

Section 367.4 is reserved.

Section 367.5 covers exclusions. Contractors excluded from FDIC contracting are prohibited from entering into any new contracts with FDIC for the duration of the exclusion period. 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 excluded contractors.

Section 367.5 (b)(1) sets forth a significant change in the regulation from the FAR-based debarment and suspension regulation, and from the former RTC regulation. FDIC exclusion actions will only become effective upon the Ethics Counselor's decision to exclude a contractor *after* the contractor has received written notice of a possible cause to exclude from FDIC and has had an opportunity to respond. In other words, a contractor's receipt of a notice of possible cause to exclude does not act as an exclusion from the FDIC contracting program. This provision provides contractors with ample due process as the exclusion matter is considered.

Section 367.6 sets forth 13 causes for exclusion, which generally parallel the former RTC regulations. There are four mandatory causes for exclusion set forth at § 367.6 (a) (1) through (4); the remainder are discretionary bases for which exclusion may be warranted if a violation is established by a preponderance of the evidence.

Section 367.7 covers suspensions. The same contracting prohibitions apply to suspended contractors as is the case with excluded contractors. An important distinction in the regulation, however, is that a suspension action shall become effective immediately upon issuance of a notice of suspension, which as noted above differs from the notice of possible cause to exclude. Suspensions will be used when 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 against a contractor.

Section 367.8 lists causes for suspension. Suspensions will be imposed upon a showing of adequate evidence of any of the causes listed in § 367.7.

Section 367.9 provides that causes to suspend and/or exclude a contractor can be imputed between a contractor and its affiliated business entities, key employees, management officials, joint venture partners, and subcontractors.

Sections 367.10-11 are reserved.

Section 367.12 states that FDIC suspension and exclusion actions shall be processed as informally as practicable, consistent with due process considerations.

Section 367.13 covers the issuance of the notice of possible cause to exclude, and notice of suspension, and the information that will be set forth therein.

Section 367.14 covers contractor responses to such notices and clearly states that the contractor shall have 15 days from the date of the notice within which to respond.

Section 367.15 addresses those situations where additional proceedings may be held, as determined by the Ethics Counselor, in situations where the contractor's response raises a genuine dispute over material facts. In such cases, the contractor shall be afforded the opportunity to appear (with counsel if desired) before the FDIC.

Section 367.16 covers the Ethics Counselor's decisions in suspension and exclusion matters. It sets forth the information that will be included in a suspension or exclusion decision and makes clear that any exclusion decision rendered pursuant to this provision shall include a period of exclusion.

Section 367.17 provides further information as to the period of suspension or exclusion.

Section 367.18 covers abrogation of contracts (i.e., termination or rescission) as an additional remedy for the FDIC.

Section 367.19 sets forth procedures regarding exceptions to suspensions and exclusions and makes clear that such exceptions are only available in unique circumstances when there is a compelling reason to utilize a particular contractor for a specific task.

Section 367.20 sets forth the procedures for the review and reconsideration of Ethics Counselor decisions to the Corporation Ethics Committee.

## III. Administrative Procedure Act

The FDIC is adopting this regulation as an interim final rule effective upon publication in the Federal Register without the usual notice-and-comment period or delayed effective date as

provided for under the Administrative Procedure Act, 5 U.S.C. 551, et seq. (APA). The APA requirements may be waived for "good cause."

Promulgation of the regulation on an expedited basis is necessary due to the urgent need to protect the FDIC and the public interest against further dissipation of the assets now under FDIC control, and formerly under RTC control, as a consequence of the resolution of hundreds of failed savings associations. Furthermore, many FDIC contractors have in their possession extremely valuable documents and legal instruments which can be readily converted to private gain.

The Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA) has imposed a duty on the FDIC to be vigilant and aggressive in enforcing the highest ethical standards for its independent contractors. Accordingly, it is imperative that a regulation be immediately adopted setting forth policies and procedures pertaining to the suspension or exclusion of FDIC contractors that have been found to have violated those standards. The cost of any delay in promulgating the regulation would ultimately be borne by the taxpaying public in terms of additional erosion in the value of the assets under FDIC control.

#### IV. Regulatory Flexibility Analysis

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.). Therefore, the provisions of that Act relating to an initial and final regulatory flexibility analysis do not apply.

#### V. Paperwork Reduction Act

No collections of information pursuant to the Paperwork Reduction Act are contained in this interim final rule. Therefore, no information has been submitted to the Office of Management and Budget (OMB) for review.

For the above reasons, the FDIC finds that the benefits to the public in adopting the interim rule outweigh any harm from the delay in seeking public comment. The FDIC actively solicits comments from the public and will carefully evaluate and act upon any such comments before adopting the rule

as final within 60 days after the close of the public comment period.

#### List of Subjects in 12 CFR Part 367

Administrative practice and procedure, Conflict of interest, Government contracts.

For the reasons set out in the preamble, FDIC adds part 367 to title 12, chapter III of the Code of Federal Regulations to read as follows:

### **PART 367—SUSPENSION AND EXCLUSION OF CONTRACTORS 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.
  - 367.10–367.11 [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 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.* (1) This part applies to:

(i) 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

(ii) 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 July 5, 1996. In addition, this part will apply to contractors as defined in § 367.2(f) that are performing contracts on July 5, 1996.

(2) This part will also apply to actions initiated on or after July 5, 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) This part supersedes and replaces the former RTC regulation relating to suspension and exclusion of registered contractors and rescission of contracts in effect through December 31, 1995. RTC actions taken under the RTC regulation 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 the FDIC's contracting program unless that exclusion or suspension is modified or terminated under the provision 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, 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 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 Bank Insurance Fund (BIF), the Savings Association Insurance Fund (SAIF), 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 BIF, the SAIF, 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.

### § 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 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 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.

(c) Exclusion actions 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.

(d) The causes for exclusion set forth in § 367.6(a)(1) through (4) reflect statutorily established mandatory bars to contracting with the FDIC.

(e) 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 Federal Deposit Insurance Corporation or their successors;

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

(d) The contractor has caused a substantial loss to Federal deposit insurance funds;

(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 disclose 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 antitrust 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;

(l) 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;

(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.

**§ 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.

(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 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 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 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 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 through 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.

By order of the Board of Directors.

Dated at Washington, D.C., this 17th day of June 1996.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

*Deputy Executive Secretary.*

[FR Doc. 96-16510 Filed 7-3-96; 8:45 am]

BILLING CODE 6714-01-P

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### 14 CFR Part 39

[Docket No. 94-NM-102-AD; Amendment 39-9679; AD 96-13-11]

RIN 2120-AA64

#### Airworthiness Directives; Airbus Model A300 B2 and B4 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

**SUMMARY:** This amendment supersedes an existing airworthiness directive (AD), applicable to all Airbus Model A300 B2, B4-100, and B4-200 series airplanes, that currently requires supplemental structural inspections to detect fatigue cracking, and repair of cracked structure. This amendment requires revising the supplemental structural inspection (SSID) program by changing some of the inspection techniques, changing some of the thresholds and intervals for inspections, expanding the area to be inspected for some of the inspections, and revising the Fleet Leader Program. This amendment is prompted by a review of recent service history and reports received from the current SSID program required by the existing AD. The actions specified by this AD are intended to prevent reduced structural integrity of these airplanes due to fatigue cracking.

**DATES:** Effective August 9, 1996.

The incorporation by reference of Airbus Industrie A300 Supplemental Structural Inspection Document (SSID), Revision 2, dated June 1994, as listed in the regulations is approved by the Director of the Federal Register as of August 9, 1996.

The incorporation by reference of Airbus Industrie A300 Supplemental Structural Inspection Document (SSID), dated September 1989, as listed in the regulations, was approved previously by the Director of the Federal Register as of March 9, 1993 (58 FR 6703, February 2, 1993).

**ADDRESSES:** The service information referenced in this AD may be obtained from Airbus Industrie, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France. 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 Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

**FOR FURTHER INFORMATION CONTACT:** Phil Forde, Aerospace Engineer, Standardization Branch, ANM-113, FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98055-4056; telephone (206) 227-2146; fax (206) 227-1149.

**SUPPLEMENTARY INFORMATION:** A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) by superseding AD 93-01-24, amendment 39-8478 (58 FR 6703, February 2, 1993), which is applicable to all Airbus Model A300 B2, B4-100, and B4-200 series airplanes, was published in the Federal Register on January 31, 1996 (61 FR 3343). The action proposed to continue to require supplemental structural inspections to detect fatigue cracking, and repair of cracked structure. The action also proposed to require revising the supplemental structural inspection program, including changing some of the inspection techniques, changing some of the thresholds and intervals for certain inspections, expanding the area to be inspected for some of the inspections, and revising the Fleet Leader Program.

Interested persons have been afforded an opportunity to participate in the making of this amendment. Due consideration has been given to the two comments received.

#### Support for the Proposal

Both commenters support the proposed rule.

#### Conclusion

After careful review of the available data, including the comment noted above, the FAA has determined that air safety and the public interest require the adoption of the rule as proposed.

#### Cost Impact

The FAA estimates that approximately 26 Model A300 series airplanes of U.S. registry will be affected by this AD.

The actions that are currently required by AD 93-01-24 take approximately 564 work hours per airplane to accomplish, at an average labor rate of \$60 per work hour. Based on these figures, the cost impact on U.S. operators of the actions required by AD 93-01-24 is estimated to be \$879,840, or \$33,840 per airplane.

Implementation of the inspections, repairs, and replacements specified in Revision 2 of the SSID into an operator's maintenance program is estimated to require approximately 597 work hours (including removal, inspection, and installation work hours) per airplane per year, at an average labor rate of \$60 per