

## Federal Deposit Insurance Corporation

## § 367.17

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 and 367.14. Any such decisions will be subject to the review and reconsideration provisions of § 367.20.

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

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

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

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

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

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Ethics Counselor decides that a period of exclusion is not warranted, the Notice of Possible Cause to Exclude may be withdrawn or the proceeding may be otherwise terminated.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

### **§ 367.17 Duration of suspensions and exclusions.**

(a) *Suspensions.* (1) Suspensions shall be for a temporary period pending the completion of an investigation or other legal or exclusion proceedings.

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

(3) FDIC shall notify the Department of Justice of an impending termination

of a suspension at least 30 days before the 12-month period expires to give the Department of Justice an opportunity to request an extension.

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

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

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

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

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

**§ 367.18 Abrogation of contracts.**

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

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

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

**§ 367.19 Exceptions to suspensions and exclusions.**

(a) Exceptions to the effects of suspensions and exclusions may be available in unique circumstances, where there are compelling reasons to utilize a particular contractor for a specific task. Requests for such exceptions may

be submitted only by the FDIC program office requesting the contract services.

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

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

**§ 367.20 Review and reconsideration of Ethics Counselor decisions.**

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

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

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

(4) The Corporation Ethics Committee, at its discretion and after determining that it is in the best interests of the FDIC, may stay the effect of the suspension and/or exclusion pending conclusion of its review of the matter.

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

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

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

(ii) Newly discovered material evidence;

(iii) Bona fide change in ownership or management;