

Chapter 6 – Removal, Prohibition, and Suspension Actions

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Removal, Prohibition, and Suspension Actions

Section 8(e) of the FDI Act authorizes the FDIC to issue orders removing individuals from state nonmember IDIs or prohibiting their participation in the conduct of the affairs of any IDI. The FDIC may also exercise such powers against IAPs of other IDIs, where the FDIC is not the primary federal regulator, through use of its authority under Section 8(t) of the FDI Act.

Removal or prohibition orders may be based upon conduct at the IDI of which the individual is an affiliated-party or upon conduct at another IDI or other business institution. Temporary suspension orders may be issued in extreme cases (e.g., immediate threat to an IDI) to remove individuals pending a hearing on an order of removal.

Section 8(g) of the FDI Act also authorizes the FDIC to take action against IAPs charged with violations of specific criminal statutes as well as crimes involving dishonesty or breach of trust that are punishable by imprisonment exceeding one year under state or federal law. Under certain conditions, the FDIC may issue a notice to suspend or prohibit an IAP from participating in the affairs of an IDI pending disposition of the criminal charges. A permanent removal or prohibition order may be required if an individual is convicted of or enters into a pretrial diversion or similar program for certain crimes. In other instances, issuance of a permanent order is discretionary.

Removal or Prohibition Actions

Under certain conditions, the FDIC has authority to order removal of an IAP (a director, officer, employee, controlling stockholder, independent contractor, or any other individual referenced in Section 3(u) of the FDI Act) from a state nonmember IDI. The FDIC may also prohibit an individual from participating in the conduct of the affairs of any IDI.

Statutory Authority

Section 8(e)(1) of the FDI Act authorizes the FDIC to issue removal or prohibition orders.

Grounds

The FDIC must establish three distinct and separate grounds to institute an action for removal or prohibition: *misconduct*, the *effect* of the misconduct, and *culpability* for the misconduct.

Misconduct constituting grounds for a removal or prohibition order is established when an IAP has:

- directly or indirectly violated any law or regulation, cease-and-desist order that has become final, written agreement between the IDI and the agency, or condition imposed in writing by a FBA in connection with granting any application or other request by the IDI; or
- engaged or participated in any unsafe or unsound banking practice in connection with any IDI or business institution; or
- committed or engaged in any act, omission, or practice that constitutes a breach of fiduciary duty.

In addition to the misconduct, the *effect* of the misconduct must be such that:

- the institution has suffered or will probably suffer financial loss or other damage; or
- the interests of the IDI's depositors have been or could be prejudiced; or
- the individual received financial gain or other benefit.

In addition to establishing the misconduct and effect described in the previous two paragraphs, the FDIC must establish the individual's *culpability* for the misconduct. Culpability is shown by demonstrating that the misconduct:

- involved personal dishonesty; or
- demonstrated willful or continuing disregard for the safety or soundness of the IDI or business institution.

Section 8(e) removal or prohibition action may be pursued when there is sufficient evidence to meet each statutory element: misconduct, effect, and culpability. For example, if the facts and documentation establish that an IAP violated a law, the violation resulted in financial loss to the institution, and this action involved personal dishonesty on the part of the IAP, then the three-part statutory test for a removal or prohibition action is met.

Evidence Required

The burden of proof in removal or prohibition actions at the administrative hearing rests with the FDIC to establish its charges by the preponderance of the evidence. The evidence must prove the actions or inactions that resulted in the recommendation for removal or prohibition. In some cases, a formal investigation authorized under Section 10(c) of the FDI Act (refer to Chapter 11 – Formal Investigations) may be conducted to obtain additional evidence.

Statute of Limitations

The applicable SOL for actions under Section 8 against IAPs is defined in chapter 1.

Jurisdiction over IAPs

Enforcement actions under Section 8 against IAPs must be brought within 6 years after a person ceases to qualify as an IAP. For example, the action must be brought within 6 years after a person's employment was terminated at an IDI. The personal jurisdiction statute is separate and distinct from the laws governing the statute of limitations, which are based upon dates of misconduct.

Other Issues to be Considered

Even if the case appears to meet the statutory criteria, the FDIC may choose not to pursue a Section 8(e) enforcement action depending on the circumstances surrounding the case. For example, in cases involving lower-level employees, the decision must be evaluated in light of the nature and effect of the misconduct, the resources involved in pursuing a case, the risks presented by the individual's continued participation in the affairs of an IDI, and any other relevant factors.

These cases are fact-specific, and actions must be determined on a case-by-case basis. The RO should consult with the WO if there is any question about existing policies and practices.

Removal or Prohibition Cases Based on “Willful or Continuing Disregard”

As previously noted, the FDIC has the authority to seek removal or prohibition from banking of IAPs of IDIs for certain statutorily defined misconduct, when the misconduct results in loss to the IDI, prejudice to depositors, or gain to the IAP, and the misconduct reflects a certain measure of “culpability” on the IAP’s part.

Most commonly, culpability is shown by the IAP’s personal dishonesty – deception, concealment, fraud, or theft. However, actual dishonesty is not an essential element of a removal or prohibition claim. Under Section 8(e), misconduct undertaken with “willful or continuing disregard for the safety or soundness” of the IDI is also sufficient.

“Willful disregard” generally involves misconduct in which an IAP has deliberately engaged, despite knowledge of abnormal risks of such conduct to the safety and soundness of the IDI. “Continuing disregard” describes misconduct, undertaken repeatedly or over time, notwithstanding the abnormal and obvious risks of such conduct. The standard has been described as akin to “recklessness.” “Willful disregard” and “continuing disregard” are alternative bases that can satisfy the “culpability” requirement. Accordingly, the FDIC may take action when the evidence establishes that the IAP’s conduct demonstrated either “willful disregard” or “continuing disregard.” The FDIC is not required to prove the conduct was both “willful” and “continuing.”

Assessing an IAP’s “willful or continuing disregard” for the IDI’s safety or soundness is fact-intensive, and depends on the totality of the circumstances. These cases, therefore, may require a more fact-intensive analysis.

Staff should consider the IAP’s position, role, and authority at the IDI. Directors and officers have different duties and different responsibilities. As the FDIC has publicly explained in its [Statement Concerning the Responsibilities of Bank Directors and Officers](#):

Directors are responsible for selecting, monitoring, and evaluating competent management; establishing business strategies and policies; monitoring and assessing the progress of business operations; establishing and monitoring adherence to policies and procedures required by statute, regulation, and principles of safety and soundness; and for making business decisions on the basis of fully informed and meaningful deliberation.

Officers are responsible for running the day-to-day operations of the institution in compliance with applicable laws, rules, regulations, and the principles of safety and soundness. This responsibility includes implementing appropriate policies and business objectives.

Directors must require and management must provide the directors with timely and ample information to discharge board responsibilities. Directors also are responsible for requiring management to respond promptly to supervisory criticism.

It is important to note that an IAP's title alone is insufficient to evaluate his or her culpability. For example, in some IDIs, certain officers may have substantial individual authority, while others may have none. An IAP might be responsible for preparing a detailed written analysis that evaluates a proposed investment or loan, but that same officer might have no control over the information presented to a committee or the full BOD before it votes on the proposal.

In sum, in evaluating potential cases of willful or continuing disregard, staff's review should consider the totality of the circumstances, including but not limited to the IAP's:

- education, experience, training, and licenses;
- position at the IDI;
- actual role and activities in the actionable misconduct;
- knowledge of adverse factors that should have caused him or her to reject the transactions at issue or take other actions; and
- failure to heed warnings from outside auditors or regulators.

When staff encounters unsafe or unsound banking practices, breaches of fiduciary duty, or violations of law or regulation that caused or were likely to cause loss to an IDI (or gain to the IAP), and the misconduct appears to reflect "willful or continuing disregard," they should initiate discussions with RMS or DCP FO management and CM or RE during the on-site portion of the examination or visitation to determine whether additional analysis is appropriate. Staff in the Legal Division should also be involved in these discussions. RO staff should consult with WO staff in RMS or DCP and Legal. Additional actions may include conducting further investigative research, identifying and obtaining supporting documents, and documenting findings or recommended action in a memorandum.

Effective Date of Orders

Unlike the rules regarding applications where orders "shall become effective immediately upon issuance, unless otherwise stated therein," 12 C.F.R. 303.11(g)(4), the FDIC Rules of Practice and Procedure governing the issuance of enforcement orders do not explicitly specify an effective date for such orders. Section 8(e) orders issued following adjudication are generally given a 30-day delayed effective date to give the IAP time to go to court to seek injunctive relief. As a general rule, however, immediate effectiveness of orders issued pursuant to stipulation where the possibility of legal challenge is remote makes sense in most cases, and the models for the stipulated order to pay and stipulated order of removal or prohibition each specify that such orders shall be "effective upon issuance." Stipulated orders, therefore, are generally effective on the date of issuance, unless an exception is justified by the particular facts of a specific case, which should be documented in detail.

Modifying or Terminating Removal, Prohibition, and Suspension Actions

Any person subject to an order of prohibition issued under Section 8(e) of the FDI Act may not participate in any manner in the conduct of the affairs of any IDI; may not solicit, procure, transfer, attempt to transfer, vote or attempt to vote any proxy, consent or authorization with respect to any voting rights in any IDI; may not violate any voting agreement approved by a FBA; or may not vote for a director or serve or act as an IAP.

However, Section 8(e)(7)(B) of the FDI Act gives the appropriate FBA and the agency that issued the order the authority to modify or terminate an order of prohibition. Under that provision of the statute, the agencies provide written consent to the prohibited person, specifying the extent of the modification of the order of prohibition. Any FBA that grants a modification of the order must report such action to the FDIC and the public.

A person who has been prohibited under Section 8(e) of the FDI Act may request that the order of prohibition be modified or terminated. Requests that invoke Section 8(e)(7)(B) of the FDI Act generally fall into one of four basic categories, which are summarized below.

1. **Single action:** An IAP seeks to engage in a prohibited activity on a one-time basis. For example, a major shareholder may seek permission to cast a vote at one meeting for a single transaction.

Note: Prior approval is not required before the execution of an agreement to sell IDI stock. However, approval must be obtained prior to the consummation of a sale of IDI stock since it would otherwise involve a prohibited transfer of voting rights.

2. **Series of actions:** An IAP files a request to modify the order of prohibition so that he/she may engage in a series of actions. An example of this series is when an IDI is in the process of being merged or sold and a majority shareholder, who is subject to an order of prohibition, must perform various actions so the sale or merger can take place.
3. **Employment in a specific IDI:** An IAP requests permission to be employed by a specific IDI in a particular position. However, the prohibition will remain in effect pertaining to the applicant's employment at any other IDI or any activities not permitted by the modified order.
4. **Termination of Order:** An IAP requests that the order of prohibition be terminated so that the requester may serve in any IDI that he/she wishes in whatever position he/she may obtain. Granting such a request requires a formal termination of the original order of prohibition.

Requests to terminate or modify a prohibition order should be submitted in writing to the RO that supervises the IDI with which the requestor wishes to become affiliated. The written submission must be accompanied by supporting evidence that provides the following information:

- The nature of the requested agency action (for example, modification of the order to permit certain activities, termination of the order, etc.);
- The nature and location of the IDI and the terms of the proposed affiliation (for example, job title, duties, and compensation); and
- The prohibited person's justification for the requested action, which addresses the applicable factors enumerated below. The prohibited person's assertion that the original order of prohibition was inappropriate is NOT sufficient justification to consider requests filed pursuant to Section 8(e)(7)(B).

In all instances, the Legal Division should be consulted.

Enumerated Factors

To determine whether a modification or termination of an order of prohibition is justified, the facts of the particular case must be analyzed and the applicant should demonstrate:

- His/her fitness to participate in any manner in the conduct of the affairs of an IDI,
- That his/her participation would not pose a risk to the IDI's safety and soundness, and
- That his/her participation would not erode public confidence in the IDI.

Specific factors to consider should include, but are not limited to, the following:

1. The nature, extent, and duration of the violation(s), unsafe or unsound practice(s), or breach(es) of fiduciary duty that led to the issuance of the order;
2. The amount of loss sustained by the IDI and/or the amount of gain received by the prohibited person in connection with the violation(s), unsafe or unsound practice(s), or breach(es) of fiduciary duty, and whether the prohibited person has reimbursed such loss or returned such gain;
3. Any other violation(s), unsafe or unsound practice(s), or breach(es) of fiduciary duty committed, caused, or brought about by the party but not charged by the agency in the removal or prohibition case;
4. The period of time that the order has been outstanding, as well as any prior requests made by the individual;
5. Activities of the individual since the order was issued, including evidence of rehabilitation, such as serving in a position of trust or high responsibility;
6. The nature of the position or proposed action the requestor is seeking, and the scope of relief sought;
7. Whether the requestor's future affiliation with an IDI would pose a threat to the safety and soundness of any IDI or the banking system;
8. The likelihood of future violations of law, unsafe or unsound practices, or breaches of fiduciary duty;
9. Any controls, audits, and/or safeguards that the IDI may put in place regarding the position the requestor is seeking;
10. The views and opinions of other federal and state banking agencies, when applicable; and
11. Such other matters as deemed appropriate.

Removal from Office Based on Specific Violations of Law

IAPs may be removed from office for violations of specific regulations regarding monetary instruments recordkeeping. Officers and directors of IDIs may be removed from office for having

knowledge, without exhibiting remedial efforts, of another IAPs' violations of certain laws and regulations. Officers and directors may also be removed from office for violating the Depository Institution Management Interlocks Act. Furthermore, IAPs of non-bank subsidiaries of a bank holding company or savings and loan holding company can be removed from office upon conviction or entrance into a pretrial diversion program for certain criminal offenses. Unlike a removal or prohibition action under Section 8(e)(1), there is no requirement to establish the elements of effect or culpability.

Statutory Authority

Section 8(e)(2) of the FDI Act authorizes the FDIC to issue a NOI to remove from office.

Grounds

The FDIC may issue a NOI to remove an IAP from office if it determines that any of the following has occurred:

- An IAP has committed a violation of any provision of subchapter II of chapter 53 of title 31, U.S.C., (Records and Reports on Monetary Instruments Transactions (§§ 5311 – 5332)) and such violation was not inadvertent or unintentional.
- An officer or director of an IDI has knowledge that an IAP of the IDI has criminally violated any provision of:
 - Section 1956 (Money Laundering), 1957 (Engaging in Monetary Transactions in Property Derived from Specified Unlawful Activities), or 1960 (Conduct of Illegal Money Transmitting Businesses) of title 18, U.S.C. or
 - Section 5322 or 5324 of title 31, U.S.C. (Violations of Monetary Instrument Transactions Recordkeeping and Reporting Requirements).
- An officer or director of an IDI has committed any violation of the Depository Institution Management Interlocks Act.
- An IAP of a subsidiary (other than an IDI) of a bank holding company or of a subsidiary (other than a savings association) of a savings and loan holding company has been convicted of any criminal offense involving dishonesty or a breach of trust or a criminal offense under Section 1956, 1957, or 1960 of title 18, U.S.C., or has agreed to enter into a pretrial diversion or similar program in connection with a prosecution for such an offense.

In determining whether an officer or director should be removed as a result of the second item listed above, having knowledge that an IAP of the IDI has violated such provisions, the FDIC will consider whether the officer or director took appropriate action to stop, or to prevent the recurrence of, a violation described in such subparagraph.

Temporary Suspension and Prohibition Actions

The FDIC may order the temporary suspension or prohibition of an IAP pending a hearing on an order of removal if the individual's continued participation poses an immediate threat to the IDI or to the interests of the IDI's depositors.

Statutory Authority

Section 8(e)(3) of the FDI Act authorizes the FDIC to issue temporary suspension and prohibition orders.

Grounds

If the FDIC has issued a written notice of removal under Section 8(e)(1) (Removal or Prohibition Actions) or 8(e)(2) (Removal based on Specific Violation of Law), then the FDIC may seek to suspend or prohibit the individual under Section 8(e)(3). The FDIC must:

- Determine that such action is necessary for the protection of the IDI or the interests of the IDI's depositors and
- Serve such party with written notice of the suspension order.

Any suspension order issued under Section 8(e)(3) is effective upon service to the respondent. The suspension order will remain in effect until:

- the FDIC dismisses the charges contained in the related notice filed under Section 8(e)(1) or (e)(2),
- the final order is issued under the related notice filed under Section 8(e)(1) or (e)(2), or
- a court issues a stay of such order.

Suspension or Prohibition Actions Pending Criminal Proceedings

Under Section 8(g) of the FDI Act, IAPs who are charged with a criminal violation of specific banking-related statutes or a crime involving dishonesty or a breach of trust that is punishable by imprisonment for a term exceeding one year under state or federal law may be suspended and/or prohibited from participation in the affairs of an IDI pending disposition of the criminal charges.

Permanent removal or prohibition may be required if the individuals are convicted of or enter into pretrial diversion or other programs in connection with certain crimes. For additional information, refer to the next section (*Removal or Prohibition Actions Following Conviction*).

Note: Actions under Section 8(g) should only be brought where the respondent (1) was an IAP of the IDI at the time the criminal charge was issued or the IAP was convicted, or (2) is an IAP at the time the FDIC issues a notice or order under Section 8(g).

Statutory Authority

Section 8(g)(1)(A) of the FDI Act authorizes the FDIC to issue suspension or prohibition notices pending the outcome of certain criminal proceedings.

Grounds

The FDIC may issue a notice of suspension or prohibition and notice of hearing when the following circumstances are present:

- An IAP is charged with a crime involving dishonesty or breach of trust, and
- The crime is punishable by imprisonment for a term exceeding one year under state or federal law; or
- An IAP is charged with a criminal violation of certain banking-related crime, such as money laundering.

Moreover, the FDIC must determine that the continued service or participation by the IAP might pose a threat to the interests of the IDI's depositors or threaten to impair public confidence in the IDI.

Suspension Actions Affecting Institution's Board of Directors

A suspension or prohibition action may cause an IDI to have less than a full quorum of non-suspended directors. If this occurs, the Legal Division must be consulted to determine what constitutes a quorum under applicable state law for state-chartered banks.

Removal or Prohibition Actions Following Conviction

IAPs who are convicted or enter into a pretrial diversion program or other similar program in relation to a criminal violation of specific banking-related statutes or a crime involving dishonesty or breach of trust that is punishable by imprisonment for a term exceeding one year under state or federal law may be removed or prohibited from participation in the affairs of an IDI. The FDIC must determine that the individual's continued service or participation may pose a threat to the interests of the IDI's depositors, or may threaten to impair public confidence in the IDI, in order to use Section 8(g)(1)(C)'s authority. Moreover, the criminal judgment must be final – no longer subject to appellate review.

Note: Any individual who has been convicted of or has entered into a pretrial diversion or similar program for any criminal offense involving dishonesty, breach of trust, or money laundering is automatically barred, pursuant to Section 19 of the FDI Act, from becoming or continuing as an IAP of any IDI absent the written consent of the FDIC. The FDIC may, however, choose to pursue a discretionary removal or prohibition action under Section 8(g)(1)(C)(i) when warranted by specific circumstances.

For IAPs who are convicted or enter into a pretrial diversion program for charges involving violations of certain sections (listed below) of the U.S.C. listed in 12 U.S.C. §1818(g)(1)(A)(ii), the FDIC is required to issue a removal or prohibition order.

Statutory Authority

Section 8(g)(1)(C) of the FDI Act authorizes the FDIC to issue removal or prohibition orders upon conviction or entrance into a pretrial diversion program for certain crimes.

Grounds

Section 8(g) of the FDI Act authorizes the FDIC to issue a removal or prohibition order against an IAP when all of the following circumstances are present:

- The IAP is convicted of an offense that meets the criteria of Section 8(g) or enters into a pretrial diversion program.
- The judgment is not subject to further appellate review.
- The FDIC determines that the individual's continued service or participation may pose a threat to the interests of the IDI's depositors, or may threaten to impair public confidence in the IDI.

In addition, the FDIC is *required* to issue removal or prohibition orders against IAPs convicted of violating any of the following sections of the U.S.C.:

- 18 U.S.C. § 1956 (Money Laundering),
- 18 U.S.C. § 1957 (Engaging in Monetary Transactions in Property Derived from Specified Unlawful Activities),
- 18 U.S.C. § 1960 (Conduct of Illegal Money Transmitting Businesses), and
- 31 U.S.C. §§ 5322 or 5324 (Violations of Monetary Instrument Transactions Recordkeeping and Reporting Requirements).

Note: Under to Section 8(g)(3), within 30 days of service of the order of removal or prohibition, the IAP may request a hearing to appear before the agency to show that his/her continued service or participation in the conduct of the affairs of the IDI does not pose a threat to the interests of the IDI's depositors or threaten to impair public confidence in the IDI. The IAP's failure to request a hearing may result in a final and unappealable order of prohibition. Within 60 days of a hearing, the agency must notify the IAP whether the order of removal or prohibition from participation will be rescinded or otherwise modified.

Comparison of Section 8(e) and Section 19

By operation of law, Section 19 of the FDI Act automatically bars, except with the prior written consent of the FDIC, any person who has been convicted of any criminal offense involving dishonesty, breach of trust, or money laundering (a covered offense), or who has agreed to enter into a pretrial diversion or similar program in connection with a prosecution for such an offense (a covered individual), from becoming or continuing as an IAP with respect to any IDI; owning or controlling, directly or indirectly, any IDI; or otherwise participating, directly or indirectly, in the conduct of the affairs of any IDI.

A criminal conviction or pretrial diversion for a covered offense is not necessary to establish a basis for a Section 8(e) action. Likewise, the elements of a Section 8(e) action are not necessarily established simply because a person is prohibited from banking by operation of law under Section 19. For example, an individual's covered offense may have occurred unrelated to any role of the individual as an IAP, in which case there would generally be no basis for a Section 8(e) action, but Section 19 would apply by operation of law.

Issuing Section 19 Letters

An enforcement action under Section 8(e) of the FDI Act generally is the preferred mechanism for removing or prohibiting individuals from banking who have engaged in misconduct that meets all requisite statutory elements for a Section 8(e) action. In certain situations, however, a Section 8(e) action may not be feasible or practical. In such instances, if an IAP has been previously barred by operation of law under Section 19, it may be appropriate to send a “Section 19 letter” to a covered individual to provide notice that Section 19 bars his or her participation in the affairs of any IDI.

When FDIC staff discovers that an IAP is prohibited by Section 19 from continuing to participate in the affairs of an IDI, staff should evaluate the case to determine whether the requisite elements of a Section 8(e) action are established and may pursue such action if applicable. If the FDIC discovers that a covered individual is employed by or serving as an IAP but the requisite elements of a Section 8(e) action are not established, the RO may recommend sending a Section 19 letter to the individual, subject to WO concurrence. If approved, the RO should also send a letter to the applicable IDI indicating that the IDI can be subject to criminal penalties for allowing a covered individual to participate in its affairs or to continue as an IAP.

Handling Disputed Cases

When a Section 19 letter is sent, the covered individual has 30 days (from the date of receipt by certified mail) to respond to the FDIC if he or she disputes the applicability of Section 19. If no response is received within the 30-day period, the Section 19 letter will become publicly available on the FDIC’s website (as described below under *Publication of Section 19 Letters*).

If the individual responds in writing and disputes the applicability of Section 19 in his or her case, the RO (RMS and Legal) will review and evaluate any new information and confirm that Section 19 still applies. Upon confirmation, a second letter should be sent to the individual detailing the offense and how it meets the criteria in Section 19.

If the review and evaluation of any new information results in a determination that individual is not covered by Section 19, the WO should be consulted, and the RO should provide a letter of retraction and inform the individual that the original letter is rescinded and will not be posted on the FDIC’s website. A letter of retraction would also be provided to any IDI that was sent a letter regarding the individual being covered by Section 19.

Publication of Section 19 Letters

Once the 30-day period for the individual to respond has passed, the Section 19 letter will be listed in the FDIC’s monthly of Enforcement Decisions and Orders press release, and the letter will be posted to in a searchable, public database. Publication of such letters on the FDIC’s website may aid IDIs screening potential employees. The FDIC’s Enforcement Decisions and Orders website can be found at <https://orders.fdic.gov/s/>.

Modification of a Section 8(e) Order versus Written Consent under Section 19

The modification or termination of an order of prohibition issued under Section 8(e) will not waive or otherwise affect any prohibition created by Section 19, including the ten-year ban mandated for conviction of certain criminal offenses listed in Section 19(a)(2)(A) of the FDI Act.

In order for an individual covered by Section 19 to participate in the affairs of an IDI, the individual must obtain the FDIC's prior written consent.

Enforcement Case Coordination

In order to facilitate the timely resolution of enforcement actions, staff is expected to contact the responsible FO and RO as soon as misconduct possibly warranting enforcement action is identified. Timely notification allows for RO Legal personnel to be advised and for an attorney to be assigned to assist in the matter. Legal Division involvement while staff is still onsite at the IDI can help to focus the inquiry and the collection of pertinent documentation so that a return trip to the IDI may be avoided. Early Legal Division involvement can also expedite the decision on the need for and the completion of any formal Section 10(c) investigation requests.

While processing timeframes will vary based on the specific case, it is expected that all enforcement action cases will be processed as expeditiously as possible. Generally, straightforward cases that require less investigation should be processed in a short timeframe. More complex cases with extensive investigations or AUSA involvement may take longer. RO management should develop a processing timeframe and milestones that are appropriate for the situation.

Pursuing Multiple Actions against Individuals

CMPs or Restitution in Conjunction with Removal or Prohibition Actions

Misconduct by an IAP that warrants the issuance of a removal or prohibition order under Section 8(e) of the FDI Act may also warrant the issuance of a CMP under Section 8(i)(2) and/or a restitution order under Section 8(b)(6). While a CMP or restitution proposal is not expected to accompany every removal or prohibition action, it is expected that CMPs and/or restitution will be considered in all appropriate cases. While these are distinct avenues to address the misconduct, insofar as removal or prohibition is intended to prevent future misconduct, restitution is intended to recover losses or obtain disgorgement of unjust enrichment, and CMPs are intended to be punitive, they are considered companion actions, and therefore the RO's documentation supporting the action should specifically address each course of action.

Enforcement Actions against Accountants

The circumstances of some IDI failures have highlighted the importance of high-quality audits of IDIs. Since the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 expanded the jurisdiction of the banking agencies, the definition of IAP under 12 U.S.C. 1813(u)(4) has included "any independent contractor (including any attorney, appraiser, or accountant) who knowingly or recklessly participates in – (A) any violation of law or regulation; (B) any breach of fiduciary duty; or (C) any unsafe or unsound practice, which caused or is likely to cause more than a minimal financial loss to, or a significant adverse effect on, the insured depository institution." Although Congress established a high standard of proof, Section 8 cases against accountants can and should be pursued when appropriate.

The FDIC and the other federal banking regulatory agencies have each adopted regulations that provide an additional enforcement mechanism applicable to accountants. The FDIC's final rule, at 12 C.F.R. Part 308, Subpart U, amends the FDIC's rules of practice to establish procedures for the removal, suspension, or debarment of independent public accountants from the

performance of audit and attestation services required by Part 363 of the FDIC Rules and Regulations. Action under this rule is narrower in effect than action under Section 8 (the prohibition applies only to the provision of Section 36 audit and attestation services to large institutions). However, the good cause standard established by the rule includes violations of law and certain negligent conduct consistent with Rule 2e of the Securities and Exchange Commission, a much lower standard than the “knowing or reckless” standard applicable to Section 8 actions against accountants. In addition, the basis for accountant debarment under the rule is not limited to conduct occurring in connection with the provision of Section 36 audit services. Thus, accountant debarment may provide an alternative remedy to a Section 8(e) removal/prohibition action that should be considered in appropriate circumstances.