

C. *Conflicts of Interest*

Appendix C contains the following documents (all pages are not numbered):

1. 1998 Statement of Policies Concerning Outside Counsel Conflicts of Interest C-3
2. Outside Counsel Conflicts of Interest Procedures C-19
3. 12 C.F.R. Part 366 – Contractor Conflicts of Interest C-27
4. [FDIC Representations and Certifications Form](#)..... C-39
5. Statement of Policy on Contracting with Firms that Have Unresolved Audit Issues with FDIC, 62 Fed. Reg. 13382 (March 20, 1997) C-41

Internet Access to Forms

1. Access the Internet and type <http://www.fdic.gov> in the Location bar at the top of the screen, and press Enter.
2. Click on the **Public Info** icon, then click on **Manuals, Directives & Policies**, and finally click on **Outside Counsel Deskbook**. Click on the Chapter, Appendix or Form you wish to access or print.

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FDIC

Federal Deposit Insurance Corporation

Washington, D.C. 20429

Office of the General Counsel

June 1998

1998 STATEMENT OF POLICIES CONCERNING OUTSIDE COUNSEL CONFLICTS OF INTEREST

These policies set for the guidelines for the FDIC with respect to outside counsel conflict of interest matters. The policies are administered and applied by the FDIC Legal Division.

In accordance with the “Outside Counsel Conflict of Interest Procedures” issued in December 1996, these policies apply to all requests by FDIC outside counsel for waivers submitted to the FDIC Outside Counsel Conflicts Committee.

The “Statement of Policies Concerning Outside Counsel Conflicts of Interest” issued in December 1993, as well as the “Guidelines of the FDIC/RTC with Respect to Conflict of Interest and Confidentiality and General Policies of Waiver Favored by the Outside Counsel Conflicts Committee” issued in May 1990, are hereby superseded.

These policies are effective immediately.

[signed]
William F. Kroener, III
General Counsel

Attachment

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June 1998

1998 STATEMENT OF POLICIES CONCERNING OUTSIDE COUNSEL CONFLICTS OF INTEREST

I. INTRODUCTION

The resolution of conflicts of interest in connection with the selection and retention of outside legal counsel employed by the Federal Deposit Insurance Corporation ("FDIC") will be governed by these policies.

These policies are for the guidance of the FDIC Legal Division in its relations with outside counsel, for the information of outside counsel who have been or seek to be retained by the FDIC, and for the general use of the FDIC Outside Counsel Conflicts Committee ("Conflicts Committee"). They supersede the "Statement of Policies Concerning Outside Counsel Conflicts of Interest", issued in December 1993, as well as the "Guidelines of the FDIC/RTC with Respect to Conflicts of Interest and Confidentiality and General Policies of Waiver Favored by the Outside Counsel Conflicts Committee" issued in May 1990.

Procedures for requesting waivers of outside counsel conflicts are contained in "Outside Counsel Conflict of Interest Procedures" issued in December 1996.

II. DEFINITIONS

As used in these policies:

"Conflict of interest" or "conflict" means a situation in which outside counsel; any management official or affiliated business entity of outside counsel; or outside counsel's employee, agent, or subcontractor who will perform professional services for the FDIC as a time charger: (1) has one or more personal, business, or financial interests or relationships that would cause a reasonable individual with knowledge of the relevant facts to question their integrity or impartiality; (2) is an adverse party to the FDIC in a lawsuit; (3) has ever been suspended, excluded, or debarred from contracting with a federal entity or has ever had their legal services terminated by the FDIC prior to completion of the Legal Services Agreement for reasons that involved issues of conflicts of interest or ethical responsibilities; or (4) has an unfair competitive advantage, as determined solely by the FDIC, that favors the interests of outside counsel or any person with whom outside counsel has or is likely to have a personal or business relationship.¹ Under these policies, a conflict of

¹ See Contractor Conflict of Interest Regulations at 12 C.F.R. § 366.2. Cf. Rule 1.7, 1.8, 1.9, and 1.10 of the Model Rules of Professional Conduct.

interest includes any representation or any interest adverse, potentially adverse, or presenting the appearance of being adverse to the FDIC, whether or not it is of a nature sufficient to affect counsel's legal judgment or ability to represent the FDIC zealously. A conflict of interest may arise in litigation or in a non-litigated matter. A conflict may also arise when outside counsel fail to cooperate with the FDIC in the resolution of a fee bill audit performed by the FDIC Office of the Inspector General.²

"Conflicts Committee" means the FDIC Outside Counsel Conflicts Committee, which is responsible for resolving outside counsel conflicts of interest.

"FDIC" means the Federal Deposit Insurance Corporation in all its capacities, whether as conservator, receiver, in its corporate capacity, organizer of a bridge bank, successor to the former Resolution Trust Corporation, or successor to the former Federal Savings and Loan Insurance Corporation.

"Institution" means any bank or savings association the deposits of which are insured by the FDIC.

"Legal Services Agreement" or "LSA" means an executed agreement between the Legal Division of the FDIC and outside counsel setting forth the terms and conditions of employment of outside counsel.

"Outside counsel" means a lawyer, law firm or law firms providing services to the FDIC. The term includes all attorneys in a firm, regardless of their status or designation.

"Special Issues" mean (a) core issues concerning the validity of the statutes under which the FDIC operates, the competency of the FDIC to act under such statutes, the legitimacy of such conduct, and the rights, status or powers exercised by the FDIC; (b) matters of first impression or fundamental significance; or (c) matters of high visibility or sensitivity.

"Substantially related" means having a commonality of law or fact between representation of the FDIC and representation of another client.

"Waiver request" means a written request for a waiver by outside counsel to the FDIC Legal Division of an actual or potential conflict of interest or a matter that may present the appearance of a conflict of interest.

² See Statement of Policy on Contracting with Firms that Have Unresolved Audit Issues with FDIC, 62 Fed. Reg. 13382 (March 20, 1997).

III. POLICY OBJECTIVES

The FDIC expects the highest ethical standards to be followed by outside counsel. At a minimum, outside counsel must observe: (1) applicable state bar rules of professional conduct with respect to both conflicts of interest and confidentiality; (2) the American Bar Association Model

Rules of Professional Conduct ("Model Rules") to the extent that the Model Rules are not contrary to applicable state bar rules; and (3) the requirements of 12 C.F.R. Part 366.

The FDIC is particularly cognizant of the consequences in terms of public perception of retaining outside counsel and seeks to avoid even the appearance of conflicts of interest. The Legal Division requires outside counsel to represent the FDIC with undivided dedication and loyalty. Therefore, these policies are not to be construed narrowly.

The FDIC requires outside counsel to observe scrupulously all relevant requirements of attorney-client confidentiality. Confidentiality is crucial to the relationship of confidence and trust that the FDIC expects of outside counsel. The Model Rules provide that the confidentiality principle extends from information disclosed in confidence by the client to information gained from any source regarding the representation and exists both during and after the time of the representation. The FDIC is particularly concerned with safeguarding confidences and proprietary information and will take appropriate measures to ensure that such confidentiality is not jeopardized or breached.

IV. SCOPE

In general, the FDIC requires that any actual, potential, or appearance of a conflict of interest be reported to the conflicts coordinator in the Legal Division office or section that is responsible for overseeing the LSA with the outside counsel. There also are specific reporting requirements contained in 12 C.F.R. Part 366 as amended or superseded. To the extent these policies and 12 C.F.R. Part 366 differ in scope, the broader interpretation controls. The Legal Division, and not outside counsel, will make the determination whether a conflict exists. Procedures for requesting waivers of outside counsel conflicts of interest matters are contained in the "Outside Counsel Conflict of Interest Procedures" issued by the Legal Division. After a conflict has been reported, outside counsel must notify the Legal Division of any material change in facts.

On most matters, conflicts of interest with the Office of Thrift Supervision, the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the National Credit Union Administration, and the Department of Justice (usually only on matters involving closed Institutions or their directors and officers or related third parties) are considered conflicts with the FDIC.

Even though an actual conflict, potential conflict, or appearance of a conflict may be too remote to cause a court to order counsel disqualified, the Conflicts Committee may nevertheless

deny a waiver or take other corrective action. When in doubt, outside counsel must disclose the matter and seek a waiver.

A. Servicers

The FDIC may retain the services of various entities to manage and dispose of failed Institutions' assets ("Servicers"). These entities, in turn, are authorized to retain outside counsel for purposes of managing and disposing of the FDIC's assets. In these situations, outside counsel are not supervised directly by the FDIC and the degree to which attorneys of the Legal Division exercise control over the selection of counsel varies. Nevertheless, as contractors, Servicers are subject to the requirements of 12 C.F.R. Part 366 and are also expected to adhere to these policies in their entirety.

B. Subcontractors

The Legal Division may approve the retention of subcontractors, particularly experts or consultants, for assistance, opinions or testimony in the development of particular legal matters. These subcontractors may be attorneys or non-attorneys. Generally such subcontractors are engaged by outside counsel with approval from the Legal Division and their services are billed to outside counsel.³

When engaging experts or consultants or other subcontractors, outside counsel must be cognizant of the requirements of the regulations at 12 C.F.R. Part 366. Outside counsel must make representations and certifications regarding any disqualifying conditions (discussed infra) and conflicts of interest of their subcontractors who will perform professional services for the FDIC as time chargers under the subcontract. Disqualifying conditions and conflicts of interest of such subcontractors must be submitted to the Conflicts Committee for appropriate action.

C. Subsidiaries

Outside counsel representing a subsidiary (regardless of the tier) of an Institution under the control of the FDIC must submit any conflict of interest to the Legal Division for consideration by the Conflicts Committee. Further, outside counsel representing an interest adverse, potentially adverse, or appearing to be adverse to a subsidiary also must submit any conflict of interest to the Legal Division for consideration by the Conflicts Committee.

³ In some circumstances, experts or consultants on legal matters are retained and paid directly by the Legal Division pursuant to its delegations of authority for the provision of legal services. These experts or consultants may be non-attorneys. As contractors, such experts or consultants are subject to the requirements of 12 C.F.R. Part 366. Because such contractors are retained by the Legal Division instead of the Division of Administration, the disqualifying conditions and conflicts of interest of such contractors must be submitted to the Conflicts Committee for resolution.

V. REPRESENTATIONAL CONFLICTS OF INTEREST

Outside counsel may not, without a waiver, engage in a simultaneous representation of the FDIC and another client having an interest adverse, potentially adverse, or even appearing to be adverse to the FDIC. In the event that outside counsel no longer represents the FDIC it may not later represent another client against the FDIC in a matter substantially related to any matter in which outside counsel previously represented the FDIC.

Examples of situations in which representational conflicts of interest can arise include those matters in which outside counsel represent any of the following:

- (1) A client having an interest adverse to any Institution for which the FDIC acts as conservator or receiver;
- (2) An open Institution that subsequently fails or a client having an interest adverse to such an Institution;
- (3) A debtor-in-possession, trustee in bankruptcy, or a receiver in any federal or state court or administrative proceeding in which the FDIC has an interest, as a creditor or otherwise;
- (4) A creditor in a bankruptcy, receivership, or other litigation proceeding where the FDIC has asserted claims against the same debtor in either the same or an unrelated proceeding;
- (5) An insurance carrier or stockholder or class of stockholders in any action against a director or officer of an Institution;
- (6) An Institution regarding regulatory matters or assistance transactions;
- (7) An officer, director, debtor, creditor or stockholder of any failed or assisted Institution in a matter relating to the FDIC; and
- (8) A prospective bidder for a troubled or failed Institution, or the assets of such Institution.

VI. NON-REPRESENTATIONAL CONFLICTS/DISQUALIFYING CONDITIONS

Generally, outside counsel must seek a waiver if outside counsel have any type of interest adverse, potentially adverse, or even appearing to be adverse to that of the FDIC, whether or not it is of a nature sufficient to affect counsel's legal judgment or ability to represent the FDIC zealously. In particular, a waiver must be sought if: (1) outside counsel cannot subscribe to all of the representations and certifications required by 12 C.F.R. Part 366; (2) outside counsel have an

ideological or other commitment that would impair the outside counsel's judgment or ability to represent the interests of the FDIC zealously; (3) the FDIC has a claim against outside counsel or any of their individual attorneys; or (4) outside counsel have been advised of a conflict of interest pursuant to an unresolved fee bill audit.

A. Contractor Conflict of Interest Regulations

Disqualifying Conditions - The Contractor Conflict of Interest Regulations at 12 C.F.R. Part 366 prohibit the hiring of outside counsel who have: (1) been convicted of any felony; (2) 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 FDIC; (3) demonstrated a pattern or practice of defalcation;⁴ or (4) caused a substantial loss to federal deposit insurance funds.⁵ Prior to retention outside counsel must also agree that they will not allow any employee, agent, or subcontractor who will perform professional services for the FDIC as a time charger to perform those services without verifying that such individuals are not disqualified because of the existence of any of the conditions above.

Outside counsel firms or their “management officials” with one or more disqualifying conditions will be disqualified from working for the FDIC. For a partnership, a management official is any member of the management committee if such a committee exists or, if none, any general partner of the firm. The Conflicts Committee will terminate outside counsel’s legal services and direct the orderly transfer of work away from such firms. A disqualifying condition that pertains only to an individual who is not a management official may result in that individual’s being prohibited from performing services for the FDIC.

Examples of Non-representational Conflicts – Examples of situations in which non-representational conflicts of interest can arise include those matters in which outside counsel or any

⁴ Defined under the regulations to mean two or more instances in which: (1) a loan or advance from an Institution is in default for ninety (90) or more days as to payment of principal, interest, or a combination thereof and there remains a legal obligation to pay an amount in excess of \$50,000; or (2) a loan or advance from an Institution where there has been a failure to comply with the terms to such an extent that the collateral securing the loan or advance was foreclosed upon, resulting in a loss in excess of \$50,000 to the Institution.

⁵ Defined under the regulations to mean: (1) a loan or advance from an Institution, which is currently owed to the FDIC, or the Bank Insurance Fund (“BIF”), the Savings Association Insurance Fund (“SAIF”), or the FSLIC Resolution Fund (“FRF”) 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 the FDIC, or the BIF, the SAIF, or the FRF; or (3) a loan or advance from an Institution which is currently owed to the FDIC, or the BIF, the SAIF, or the FRF, 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.

management official, affiliated business entity, or any employee, agent or subcontractor of outside counsel who will perform professional services for the FDIC as a time charger:

- (1) Is an officer, director, or substantial shareholder of an Institution;
- (2) Has any outstanding debt, whether performing or in default, owed to any failed Institution (excluding debts assumed by an operating Institution);
- (3) Is closely related to any person who is employed by the FDIC, is in litigation with the FDIC, has outstanding debt owed to any failed Institution or an ownership interest in such an Institution; and
- (4) Served or serves as a trustee in bankruptcy or as a receiver in any federal or state court or administrative proceeding;
- (5) Is currently a party to an administrative or judicial proceeding in which any of them is alleged to have engaged in fraudulent activity or has been charged with the commission of a felony.

In addition, the regulations specify that outside counsel must disclose whether they or their management officials, affiliated business entities, employees, agents, or subcontractors are an adverse party to the FDIC in a lawsuit (further discussed in part infra), or have ever been suspended, excluded, or debarred from contracting with a federal entity, or have ever had their legal services terminated by the FDIC prior to completion of the LSA for reasons that involved issues of conflicts of interest or ethical responsibilities.

Prior to retention outside counsel must also agree that they will not allow any employee, agent, or subcontractor who will perform professional services for the FDIC as a time charger to perform those services without verifying that such individual has no conflicts of interest.

B. Ideological or Other Commitment

Representation by outside counsel of borrowers in lawsuits against lenders for alleged improper lending activities may constitute such a commitment to a particular legal position or to particular special interests as to constitute a conflict. Similarly, extensive representation of accountants or insurance companies on bond claims may also constitute such a commitment.

C. Claims Against Outside Counsel

Investigation Ongoing – When malpractice or similar claims by the FDIC against a law firm or individual thereof are being investigated, Legal Division staff may recommend to the Conflicts Committee that a moratorium on new assignments be imposed on the firm. Once imposed, the moratorium may be removed only by action of the Conflicts Committee or the General Counsel.

Suit has been filed – If a firm is sued by the FDIC for malpractice or similar claims, there is a presumption against continued use of that outside counsel. It is FDIC policy that existing assignments are to be removed and no new referrals are to be made. Exceptions to this policy may be granted on a case-by-case basis by the Conflicts Committee or the General Counsel.

If a suit against an individual attorney or employee does not also give rise to a suit against his or her firm, the conflict must nevertheless be reported and a waiver sought. Where a suit has been filed by the FDIC against an individual attorney, the Conflicts Committee may allow the attorney's firm to perform services for the FDIC if appropriate screening mechanisms are established. However, the Legal Division may decline to use the outside counsel firm if the alleged

acts of an individual attorney are egregious, the livelihood of the firm is heavily dependent on the individual attorney who is the subject of the claims, or there are other factors that create an appearance of impropriety.

D. Unresolved Audit Issues

The FDIC Office of the Inspector General (“OIG”) routinely audits outside counsel billings and the supporting documentation for FDIC matters. These audits are documented in reports that may question certain costs and recommend that the Legal Division disallow and attempt to recover such costs. Outside counsel are afforded the opportunity to respond to these OIG audit reports. If the Legal Division agrees with the OIG’s analysis and recommendation and disallows all or a portion of the questioned costs, active resolution efforts will be undertaken by the Legal Division and outside counsel will be given an opportunity to respond to the Legal Division’s requests for repayment of disallowed amounts.

If outside counsel fail to provide a response to the findings, or fail to remit the disallowed costs, or otherwise fail to respond adequately to the issues raised in the report, pursuant to the “Statement of Policy on Contracting with Firms that Have Unresolved Audit Issues with the FDIC,” 62 Fed. Reg. 13382 (March 20, 1997), outside counsel will be advised in writing by Legal Division staff responsible for the audit that failure to cooperate constitutes a conflict of interest with the FDIC. Unless the matter is resolved to the FDIC’s satisfaction within ten business days of receipt of the written notice, the matter will then be referred to the Conflicts Committee for appropriate action, which may include a determination that the FDIC refrain from soliciting any future services from outside counsel and/or termination of legal services on any existing legal referrals.

VII. GENERAL WAIVER POLICY

Generally, requests for waivers of conflicts of interest may be granted or denied on behalf of the FDIC only by the Conflicts Committee or the General Counsel.

Requests for waivers are considered only on a case-by-case basis. Requests for waivers of hypothetical future conflicts of interest or requests for blanket waivers covering multiple

prospective unidentified or hypothetical matters will not be considered. Silence on the part of the FDIC may not be construed as a waiver; outside counsel should inquire of the Legal Division if no response has been received for a previously disclosed conflict.

A. Factors Considered in Granting Waiver Requests

When a waiver is requested, the Conflicts Committee will balance the need to have adequate representation of the FDIC with all relevant factors. Factors considered may include but are not limited to:

- (1) The extent to which the FDIC's confidences may be compromised;
- (2) The extent to which the outside counsel has been forthright in bringing the existence of the conflict to the attention of the FDIC;
- (3) Any appearance of impropriety;
- (4) The presence of Special Issues;
- (5) The feasibility of screening mechanisms;⁶
- (6) The impact of replacing the outside counsel on matters presently handled;⁷
- (7) The nature and extent of the outside counsel's Institution practice;
- (8) The nature and extent of the outside counsel's representation of accountants, attorneys, insurance companies, or directors and officers of failed Institutions;
- (9) The extent to which the representation or acts complained of are factually or substantially related to matters currently or previously handled by the firm for the FDIC;

⁶ The Conflicts Committee will consider such things as the: (i) size and structural divisions of the law firm; (ii) likelihood of contact between the affected attorneys(s) responsible for the adverse representation and firm attorneys performing services on behalf of the FDIC; and (iii) existence and effectiveness of measures to prevent the affected attorney(s) from gaining access to current files or sharing information gained by the firm as the result of its FDIC representation.

⁷ In considering whether to replace outside counsel, the Conflicts Committee will consider: (i) availability of other experienced counsel in the geographic area; (ii) pending deadlines and the feasibility of replacement counsel's becoming sufficiently knowledgeable to pursue the matter effectively; and (iii) the cost of developing applicable expertise in replacement counsel.

- (10) Whether an unfair advantage is gained as a result of the outside counsel's continuing or past representation of the FDIC;
- (11) Whether the conflict could affect the ability of outside counsel to represent zealously the interests of the FDIC;
- (12) In any pending or proposed litigation against outside counsel, the nature of the conflict;
- (13) The magnitude of any loss caused by the outside counsel's representation or conduct;
- (14) The extent to which any acts complained of represent actions of an individual member or employee of outside counsel rather than a practice or pattern of behavior commonly found within the firm;
- (15) The extent to which the acts complained of draw into question the competence or integrity of outside counsel; and
- (16) The extent to which the FDIC is a significant client of the firm.

B. Matrix Guidelines

Conflicts of interest arising from multiple representations are often complex. A matrix illustrating positions generally taken by the Conflicts Committee with respect to certain recurrent types of representational conflicts is attached as Appendix A. The matrix is intended to represent a preliminary indication of the Legal Division's general disposition with respect to waivers of conflicts arising from representational conflicts. It should not be regarded as a determination on the question of waiver, which can come only after a closer, more detailed consideration of a particular situation, with knowledge of relevant facts and a weighing of appropriate factors.

C. Inherited Conflicts

Outside counsel's representations against an open Institution will place the firm in an adversarial position to the FDIC upon the failure of that Institution. The FDIC requires that their outside counsel continue to screen for conflicts, including those that develop because Institutions are placed in receivership or conservatorship. Such "inherited" conflicts are more likely to be waived unless Special Issues are involved. In such circumstances, the outside counsel usually will be prohibited from performing work arising out of the particular failed Institution. Even if outside counsel have obtained a waiver from the open Institution, the outside counsel must, in the event of the Institution's failure, also seek a waiver from the Conflicts Committee.

VIII. CONDITIONS COMMONLY IMPOSED

If a waiver of a conflict of interest is granted by the Conflicts Committee, various conditions may be imposed. In general, outside counsel may not handle any matter pertaining to the same Institution out of which the conflict arises. For example, if the Conflicts Committee grants a waiver to outside counsel representing a party suing the FDIC as receiver of a particular Institution, such a waiver will ordinarily be conditioned upon the outside counsel's not handling any matters for the FDIC arising out of that Institution, although it could handle matters arising out of other FDIC Institutions.

Depending on the facts of each situation, conditions imposed may also preclude outside counsel from undertaking any new referrals from the FDIC office or section involved or may require the imposition of screening mechanisms, i.e., screening all attorneys who are involved in the adverse representation, or are the subject of a claim, from working on any FDIC matter, including access to the FDIC Legal Research Bank. Outside counsel may also be precluded from performing any work at all for the affected FDIC office or section during the pendency of the adverse representation, requiring that any current matters supervised by the particular office or section be transferred to other counsel. This restriction is intended to prevent individual FDIC attorneys in a particular office or section from having to deal with outside counsel as both "friend" and "foe" simultaneously.

A. Claims Against Outside Counsel

If a waiver of a conflict of interest arising from an FDIC claim against outside counsel is granted by the Conflicts Committee, outside counsel may, in addition to other conditions imposed, be required to:

- (1) Agree not to assert as a defense to any claim the fact that the outside counsel has been retained or is continuing to be retained by the FDIC;
- (2) Agree that no information obtained as a result of the retention will be used in defense of any claim asserted by the FDIC;
- (3) Agree that disclosure of any information by the FDIC in connection with the continued retention shall not constitute a waiver of any otherwise applicable privilege; and
- (4) Prohibit any attorney who is the subject of a claim by the FDIC from receiving any portion of the fees paid by the FDIC in any matter.

B. Settlement

The settlement of a claim or adverse representation brought against the FDIC or by the FDIC may eliminate the existence of a conflict. If so, the former conflict of interest will not automatically bar the continued use of the outside counsel. Nevertheless, the FDIC may take the

facts and circumstances of the claim into account in assigning any future work. Any conditions imposed when a waiver of the conflict was granted generally will no longer be applicable. Upon settlement of the claim, outside counsel are expected to provide written notification to the Outside Counsel Unit in Washington.

IX. DELEGATIONS OF AUTHORITY

Previous delegations of authority granted in the 1993 “Statement of Policies Concerning Outside Counsel Conflicts of Interest” are hereby rescinded. The Conflicts Committee will make determinations concerning those conflict matters previously reviewed under delegated authority.

X. NONCOMPLIANCE

Failure to make full and timely disclosure of actual or potential conflicts of interest, or matters that may present the appearance of a conflict, as well as failure to comply with FDIC conflicts of interest policies and procedures, are extremely serious matters. Such failures may subject outside counsel to corrective action including, but not limited to: (1) a letter of reprimand; (2) refusal to waive a conflict; (3) suspension of new referrals; (4) rejection or reduction of fee bills; (5) withdrawal of all pending matters; (6) termination of legal services; (7) imposition of a bar to application; (8) denial of an LSA; (9) referral to the appropriate state licensing authorities; and, in appropriate cases, (10) civil or criminal actions.

XI. CONCLUSION

These policies are designed to provide general guidance only. Within the framework provided by these policies, the Conflicts Committee and the staff of the Legal Division exercise broad discretion. These policies do not provide outside counsel with any right to a waiver.

Contact Information

The Outside Counsel Unit in Washington has sole responsibility for the distribution of outside counsel conflicts policies, procedures, and other related conflicts information. For information, contact the Outside Counsel Unit, 550 17th Street, N.W., Room H10024, Washington D.C. 20429. Telephone Number (800) 846-1901 or (202) 736-3070.

Appendix A					
Probable Conflicts Committee Reaction to Requests for Waiver of Certain Conflicts Arising from Multiple Representation					
Represent FDIC: & Adverse to FDIC on:	Prof. Liability	Routine Closed Inst.	Closed Inst. w/Special Matters	Negotiated Transaction	Employment Matters
Professional Liability	—	+	+	+	+
Routine Closed Institution	+	+	+	+	+
Closed Institution with Special Issues	+	+	—	+	+
Negotiated Transactions	+	+	+	—	+
Employment Enforcement	+	+	+	+	—
General FDIC Corporate & Regulation	—	+	+	+	+

NOTES:

1. Generally, the FDIC disfavors waivers of Professional Liability, Special Issues, and Negotiated Transactions matters if the firm seeking the waiver is working on the same type of matters for an adverse party. The FDIC generally permits their firms to perform Routine Closed Institution work against the FDIC (representing other creditors, bidders, asset purchasers, etc.), but not out of the same Institution or the same FDIC office or section. Also, in order to avoid even an appearance of impropriety and to ensure the integrity of the bidding process, a firm that has represented a failed Institution generally will not be permitted to bid or represent a bidder on that Institution or its assets.
2. The sign "+" means the Conflicts Committee is more likely than in the case of the sign "-" to waive a conflict. This assumes that the conflict does not (i) arise from the same transaction, (ii) to the extent that it can be determined at the time a waiver is sought, involve litigation in the same court, or (iii) arise within the same conservatorship, receivership or office or section primarily responsible for the matter.
3. The matrix addresses only conflicts that may arise out of multiple representations by outside counsel. It does not address conflicts that may arise out of relationships or adverse interests separate

and apart from representations, nor does it address the issue of confidentiality. A waiver of a conflict in connection with a multiple representation is not an authorization to breach confidentiality.

4. "Professional Liability" refers to claims arising out of conduct by those providing professional services, advice, or counsel to Institutions including, but not limited to, directors, officers, attorneys, accountants, appraisers, securities or commodities brokers, as well as fidelity bond and insurance issues involved in those claims.

5. "Routine Closed Institution" refers to asset collections, defensive matters, deposit insurance cases, and representation of bidders, whether litigated or non-litigated, where the issues raised do not involve Special Issues as previously defined.

6. "Negotiated Transactions" refers to those resolution transactions necessary to resolve the status of failing or failed Institutions where substantial negotiations are required to reach and document an agreement.

7. "Employment" refers to matters involving disputes between the FDIC and its employees.

8. "Enforcement" refers to matters involving FDIC administrative enforcement powers including, but not limited to, cease-and-desist, termination of insurance, suspension or removal, and assessment of civil money penalty proceedings.

9. "General FDIC Corporate & Regulations" refers to matters involving the FDIC as a corporation and the FDIC as regulatory agency or insurer including, but not limited to, the scope of corporate powers, the applicability of various statutes and regulations to day-to-day operations, and the applicability of various statutes and regulations to Institutions' operations. Generally, undertaking an adverse representation involving General FDIC Corporate and Regulations will be disfavored if outside counsel represents the FDIC on Professional Liability matters. Each matter is reviewed on a case-by-case basis however.

10. In the event that outside counsel may be requested to represent contractors in disputes regarding contracts with the FDIC or RTC, or in administrative proceedings involving the proposed suspension or exclusion of contractors, the Conflicts Committee will consider such waiver requests on a case-by-case basis, but generally will not favor such requests where outside counsel are representing the FDIC in other than Routine Closed Institution matters. Such matters are not considered General FDIC Corporate & Regulations matters.

December 1996

OUTSIDE COUNSEL CONFLICTS OF INTEREST PROCEDURES

I. INTRODUCTION

This memorandum provides standard procedures for the FDIC Legal Division ("Legal Division") with respect to outside counsel conflict of interest matters. It supersedes the FDIC's Waiver of Outside Counsel Conflicts of Interest: Procedures, issued in August, 1992, and the former RTC's Outside Counsel Conflict of Interest Procedures, issued in November 1995.

These procedures apply to all requests for waivers of outside counsel conflicts of interest submitted to the Outside Counsel Conflicts Committee ("Conflicts Committee"), in accordance with the "Statement of Policies Concerning Outside Counsel Conflicts of Interest" issued in December 1993 ("Statement of Policies"), as amended or superseded.

These procedures are designed primarily for the guidance of Legal Division personnel, although every outside counsel is expected to follow these procedures pursuant to its Legal Services Agreement ("LSA") with the Legal Division. These procedures do not provide outside counsel with any right to due process or right to a waiver.

II. AUTHORITY OF THE CONFLICTS COMMITTEE AND REGIONAL COUNSEL TO RESOLVE CONFLICTS OF INTEREST

The Legal Division has established a Conflicts Committee composed of five members (four attorneys from the Legal Division and a representative from the Office of the Executive Secretary) which under delegated authority from the General Counsel has the authority to resolve outside counsel conflicts of interest and issues arising under the "Contractor Conflicts of Interest Regulations," 61 Fed. Reg. 9590 (March 11, 1996), to be codified at 12 C.F.R. Part 366 ("Contractor Regulations"), as they relate to law firms and sole practitioner lawyers providing services to the FDIC. Generally, requests for waivers of conflicts of interest may be granted or denied on behalf of the FDIC only by the Conflicts Committee, the General Counsel or the Chairman of the FDIC. However, at the field level, FDIC Regional Counsel have delegated authority to waive certain specific conflicts of interest, as set forth in the Statement of Policies.

III. REPORTING CONFLICTS OF INTEREST

A. During the Application Process

Outside counsel desiring to perform work for the FDIC must meet minimum standards of competence, experience, integrity and fitness for contractors, as specified in the Contractor Regulations. As part of the application process for an LSA, outside counsel must provide

information concerning actual or potential conflicts of interest and matters that may present the appearance of a conflict. Each initial or renewal application should be referred to the appropriate Conflicts Coordinator for review of the outside counsel's conflicts disclosures. Disclosures of conflicts made during the application or renewal process should be referred to the Conflicts Committee for resolution prior to final approval or rejection of the application, unless the office or section does not intend to execute an LSA with the firm for reasons other than those concerning conflicts of interest. In such cases, a waiver request need not be submitted, unless outside counsel was inherited and continues to perform work for the FDIC on inherited matters.

Under the Contractor Regulations, if outside counsel discovers a conflict of interest after submitting its application but prior to LSA execution, it must disclose the matter to the FDIC in writing within ten (10) days; however, the Legal Division expects matters of a sensitive or high profile nature to be disclosed immediately upon discovery.

B. After Retention

After outside counsel has executed an LSA, it has the continuing responsibility to monitor and report in writing any actual or potential conflict of interest or appearance of a conflict, regardless of whether it is representing the FDIC on active matters at the time of discovery. Under the Contractor Regulations, conflicts of interest that arise when outside counsel contemplates representation of a client adverse to the FDIC or are discovered during the course of representation of another client must be disclosed in writing to the FDIC within ten (10) days of discovery; however, the Legal Division expects matters of a sensitive or high profile nature to be disclosed immediately upon discovery.

Conflicts of interest must be submitted to the Conflicts Committee for resolution even if the Legal Division office or section recommends denying the waiver request.

C. Failure to Disclose Conflicts or Comply with Policies

Failure to make full and timely disclosure of actual or potential conflicts of interest, or matters that may present the appearance of a conflict, as well as failure to comply with FDIC conflicts of interest policies and procedures are extremely serious matters. Such failures may subject outside counsel to corrective action including but not limited to: (1) a letter of reprimand; (2) refusal to waive a conflict; (3) suspension of new referrals; (4) rejection or reduction of fee bills; (5) withdrawal of all pending matters; (6) termination of legal services; (7) imposition of a bar to application; (8) denial of an LSA; (9) referral to the appropriate state licensing authorities; and, in appropriate cases, (10) civil or criminal actions.

It is solely within the discretion of the Legal Division to determine whether or not a conflict of interest exists. Even the appearance of a conflict may result in the denial of a waiver or other appropriate actions. In the event that matters are transferred pursuant to the corrective actions listed above, outside counsel is expected to follow FDIC policies and procedures and to cooperate fully in the orderly transfer of such matters.

Legal Division personnel should notify their Conflicts Coordinator immediately upon discovery of any undisclosed outside counsel conflict of interest.

IV. PROCEDURES FOR REQUESTING WAIVERS OF CONFLICTS OF INTEREST

To obtain a waiver of an actual or potential conflict of interest, or appearance of such, outside counsel must submit a written request to the designated Conflicts Coordinator at the Legal Division office or section with which the outside counsel negotiated its LSA or, if that office has closed, the office assuming the responsibilities of the closed office. Outside counsel lacking an LSA should direct a written request to the Conflicts Coordinator in the FDIC office or section having geographic jurisdiction over the firm's principal office. Outside counsel should not send waiver requests directly to the Conflicts Group or the Conflicts Committee: waiver requests will only be considered when accompanied by the written recommendation of the appropriate Conflicts Coordinator with the concurrence of the office's Regional Counsel or section's Assistant General Counsel.

Outside counsel's waiver request (or the Conflicts Coordinator's recommendation, absent such request) should detail, where pertinent: (1) the nature of the conflict of interest; (2) the parties and financial institutions involved; (3) the office responsible for the financial institution out of which the conflict of interest arises; (4) the nature of the work that has been, and/or currently is being, performed for the FDIC; (5) the financial institutions (or subsidiaries or servicers) for which work has been, or currently is being, performed on behalf of the FDIC; (6) the FDIC oversight attorney(s) involved in the conflict; and (7) any other relevant considerations suggested by the Statement of Policies.

Waiver requests received by Legal Division personnel who are not Conflicts Coordinators should be immediately forwarded to the appropriate Conflicts Coordinator.

To assist the Conflicts Group in tracking conflicts matters, the Conflicts Coordinators will forward to the Conflicts Group, via facsimile immediately upon receipt, all outside counsel conflicts disclosures or requests for waiver, including those that may not present an actual conflict of interest or those subsequently waived by Regional Counsel pursuant to delegated authority. The Conflicts Coordinator will thereafter: review outside counsel's disclosure and/or request; consult with the FDIC oversight attorney(s) involved in the adverse matter; and coordinate the formulation of a recommendation to the Conflicts Committee. The Conflicts Coordinator is responsible for the completion of all documentation for the Conflicts Committee which should include a copy of outside counsel's disclosure or waiver request, the recommendation of the FDIC oversight attorney, a conflicts tracking system form, and the Conflicts Coordinator's recommendation for resolution of the conflict with concurrence by the office's Regional Counsel or section's Assistant General Counsel.

Appropriately documented conflicts matters are to be submitted to the Conflicts Committee for consideration as soon as completed but no later than THIRTY (30) DAYS after receipt of outside counsel's disclosure or request for waiver. If additional information is needed

from outside counsel or others, the Conflicts Coordinator should ensure that a timely response is received so that the 30-day submission deadline is met. If no timely response is received, the Conflicts Coordinator should refer the matter to the Conflicts Committee without the additional information. Past due matters will be discussed with the Conflicts Coordinator and Legal Division management as appropriate.

As described in III.C., the Conflicts Committee may exercise broad discretion when a conflict of interest is discovered without disclosure by outside counsel. If determined by the Conflicts Committee to be appropriate, however, the Conflicts Coordinator may notify outside counsel in writing of the discovery and allow counsel a specified period of time to address the issue in writing; if no response is received within the specified period, the Conflicts Coordinator will refer the matter to the Conflicts Committee without outside counsel input.

Meetings of the Conflicts Committee are not public proceedings. Appearances before the Conflicts Committee by outside counsel are not allowed. Contacts with individual members of the Conflicts Committee by outside counsel are strongly discouraged. Questions from outside counsel concerning pending waiver requests should be directed to the Conflicts Coordinator or the Conflicts Group in the Outside Counsel Unit.

V. DETERMINATIONS BY THE CONFLICTS COMMITTEE

A. Regular Processing of Waiver Requests

Ordinarily, the Conflicts Committee meets every other Wednesday to resolve pending waiver requests and other matters involving outside counsel. The Conflicts Committee will only consider requests for waiver that are appropriately documented and are received by the Conflicts Group on or before noon (Eastern Time) of the Friday prior to the week of the meeting. Consideration of requests failing to meet this deadline will be deferred until the next regularly scheduled meeting, absent exigent circumstances.

B. Expedited Processing of Waiver Requests

The Conflicts Committee will consider a waiver request on an expedited basis for good cause shown. Good cause can be shown, for example, when a trial date, court or bid deadline is imminent, or when a client, potential client, or an employee of outside counsel will be materially prejudiced by a delay in resolution of the conflict of interest. The Conflicts Coordinator will make the initial determination as to whether to recommend expedited processing of a request for waiver, and will forward the request to the Conflicts Group. A brief written justification for expedited treatment must be incorporated into the documentation. If expedited processing is granted, facsimile copies of the waiver request will be accepted, provided original documents are later provided to the Conflicts Group. The Conflicts Committee will resolve expedited requests at the earliest possible time, customarily by notation vote with a minimum of three concurrences required. The Conflicts Group will notify outside counsel and the Conflicts Coordinator of the decision via facsimile followed by a confirmation letter to the outside counsel.

C. Reconsideration of Conflicts Committee Decisions

The Conflicts Committee will entertain requests for reconsideration of its decisions, when submitted by the appropriate Conflicts Coordinator, upon a showing of good cause. Good cause is generally shown by demonstrating the availability of new and significant information or changed circumstances.

VI. TERMINATIONS AND SUSPENSIONS

A. Conflicts Committee Action

If the Conflicts Committee determines that termination of outside counsel's legal services is appropriate, matters must promptly be transferred to other counsel or to an in-house attorney, unless an exception is justified. For terminations and suspensions, the Conflicts Coordinator of each affected office or section shall distribute a memorandum or e-mail to its Legal Division staff describing the action of the Conflicts Committee. In termination cases, the Conflicts Coordinator should instruct staff to close, transfer, or request exceptions for all active or inactive legal matters assigned to the outside counsel within 45 days of the decision and outline the internal procedures to be followed in each instance. Terminations and suspensions of outside counsel are also noted on the FDIC's computer tracking systems for outside counsel.

Requests for exceptions to terminations to permit outside counsel to continue representation of the FDIC on particular matters will be considered on a case-by-case basis upon the request of the oversight attorney. These requests must be in essentially the same form as a waiver request submission and must demonstrate that good cause exists to justify an exception. Factors considered typically include: (1) availability of other experienced counsel in the geographic area; (2) pending deadlines and the likelihood of replacement counsel's becoming sufficiently knowledgeable to pursue the matter effectively; (3) cost of developing applicable expertise in replacement counsel; and (4) degree of prejudice to the FDIC.

B. Lawsuits Against Outside Counsel

Initiation of suit by the FDIC against outside counsel creates a conflict of interest requiring that no new referrals be made and that pending cases be reassigned to other counsel or to an in-house attorney. The Professional Liability Section distributes a monthly list of lawsuits against outside counsel. Notifications to staff and requests for exceptions follow the procedure described in the preceding subsection.

VII. CONFLICTS TRACKING

All conflict of interest waiver requests processed by the FDIC or RTC since January 1995 have been recorded on the Conflicts Tracking System, CTRACK. For each waiver request,

CTRACK contains all relevant data, such as law firm information, conflict description, recommendation for resolution, and decision. CTRACK information is available in a read-only version in each field office and headquarters, and written reports of pending and historical matters may be generated by any user. The Conflicts Group is responsible for data entry and maintenance of the CTRACK system and also generates reports of pending conflicts matters. The Conflicts Group updates the data on a regular basis and transfers the new data to the field. The designated CTRACK coordinators in each office are responsible for making the updated information available to the office on the day of data transfer.

The Decision Memoranda of the Conflicts Committee from March 1994 forward are available on the Legal Division Tackboard. Individual files are arranged by date of the Conflicts Committee meeting at which the decisions were rendered. These files can be downloaded to WordPerfect to establish a directory and then searched on the F2 key for references to specific outside counsel.

Conflicts-related information may also be found on the FDIC's computer tracking systems for outside counsel, RLIS and OCIS. Comments for individual firms are added to the systems after each meeting of the Conflicts Committee. These comments contain meeting dates and brief descriptions of the restrictions imposed. It is anticipated that this procedure will continue with the implementation of the LMIS system.

Legal Division staff whose duties involve referral of matters to outside counsel must review the conflicts status of outside counsel on CTRACK and other systems PRIOR TO referring any matter to outside counsel.

VIII. DISTRIBUTION OF CONFLICTS COMMITTEE DECISIONS

The Conflicts Group will promptly prepare the Decision Memorandum of the Conflicts Committee's decisions, enter the decisions of each meeting on CTRACK and the Legal Division Tackboard, and will distribute the Decision Memorandum to the Conflicts Coordinators via E-Mail attachment as soon as possible after the meeting. The Conflicts Group is also responsible for notifying each outside counsel in writing of the Conflicts Committee's decisions. Notification letters describe any conditions or corrective actions imposed by the Conflicts Committee and are delivered to the firm by Certified Mail, Return Receipt Requested. The letter states that "The decision of the Committee is effective upon receipt of this letter." Receipt is evidenced by the return of the Certified Mail Receipt.

Conflict waiver requests and determinations are confidential and are not to be communicated to anyone outside the FDIC, except the outside counsel affected by the determination or as necessary in litigation or other matters after approval by the Conflicts Committee. Redacted versions of Decision Memoranda are available to the public in the FDIC Reading Room.

IX. OTHER RESPONSIBILITIES OF CONFLICTS COORDINATORS

Each Conflicts Coordinator is responsible for maintaining adequate documentation concerning all requests for waivers of conflicts of interest within the office's or section's jurisdiction. Documentation should include, at a minimum, the following: (1) correspondence received from outside counsel disclosing the conflict and/or requesting a waiver; (2) internal correspondence between the oversight attorney or others involved in the conflict; (3) recommendation to the Conflicts Committee for resolution of the conflict; (4) copy of the portion of the Decision Memorandum pertaining to the conflict; and (5) copy of the Conflicts Group's letter notifying outside counsel of the Conflicts Committee's decision.

Outside counsel are responsible for compliance with the Statement of Policies. However, the Conflicts Coordinators should generally monitor compliance by outside counsel within their jurisdiction with the Statement of Policies. If the Conflicts Coordinator is notified that the representation or other type of conflict resulting in a conditional waiver is concluded or otherwise resolved, the Conflicts Coordinator is to provide written notice to the Conflicts Group, which will ensure that the indicated changes in status are reflected on the FDIC's computer tracking systems for outside counsel.

Conflicts Coordinators should send **ALL** reported or discovered conflicts and conflicts-related disclosures to the Conflicts Group, even those that indicate a conflict may not exist under the circumstances presented.

X. EFFECTIVE DATE

These procedures are effective immediately. Any questions should be directed to the Conflicts Group of the Outside Counsel Unit, 550 17th Street N.W., H-10085, Washington, D.C., 20429, (202) 736-3070.

CONCUR:

[signed]
Erica F. Cooper
Deputy General Counsel

December 9, 1996

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12 C.F.R. PART 366 — CONTRACTOR CONFLICTS OF INTEREST

Sec.

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

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

SOURCE: 61 FR 9596, March 11, 1996, unless otherwise noted.

366.1 Authority, purpose, and scope.

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

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

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

- (3) Official written guidance to contracting personnel who award contracts for services and to contractors who bid on such contracts.
- (c) *Scope.*
- (1) (i) This part applies to:
 - (A) Contractors, including law firms and other independent contractors, that are not deemed, under 12 U.S.C.1822(f)(1)(B), to be employees of the FDIC, which submit offers to provide services to the FDIC or which enter into contracts for services with the FDIC; and
 - (B) Subcontractors which enter into contracts to perform services under a proposed or existing contract with the FDIC.
 - (ii) Contractors that are deemed under 12 U.S.C. 1822(f)(1)(B) to be employees of the Corporation are subject, in addition to this part, to Title 18 of the United States Code; the Standards of Ethical Conduct for Employees of the Executive Branch (5 CFR part 2635); the Supplemental Standards of Ethical Conduct for Employees of the Federal Deposit Insurance Corporation (5 CFR part 3201); the Executive Branch Financial Disclosure, Qualified Trusts, and Certificates of Divestiture regulations (5 CFR part 2634); and the Supplemental Financial Disclosure Requirements for Employees of the Federal Deposit Insurance Corporation (5 CFR part 3202).
- (2) For all contractors subject to this part, the FDIC will apply this part to contracts which are entered into between the contractors and the FDIC on or after April 10, 1996. In addition, this part applies to contracts between contractors subject to this part and the FDIC which exist on April 10, 1996 for which a contractual action, such as a modification, extension, or exercise of an option, takes place on or after April 10, 1996.
- (d) *Resolution Trust Corporation transition.* This part shall apply to all RTC contractors that provide services to the FDIC after the RTC's termination which occurred, by statute, December 31, 1995.

366.2 Definitions.

As used in this part:

- (a) *Affiliated business entity* means a company that is under the control of the contractor, is in control of the contractor or is under common control with the contractor.
- (b) *Company* means any corporation, firm, partnership, society, joint venture, business trust, association or similar organization, or any other trust unless by its terms it must terminate within twenty-five years or not later than twenty-one years and ten months after the death of individuals living on the effective date of the trust, or any other organization or institution, but shall not include any corporation the majority of the shares of which are owned by the United States, any state, or the District of Columbia.
- (c) *Conflict of interest* means a situation in which:
 - (1) A contractor; any management officials or affiliated business entities of a contractor; or any employees, agents, or subcontractors of a contractor who will perform services under a proposed or existing contract with the FDIC, has one or more personal, business, or financial interests or relationships which would cause a reasonable individual with knowledge of the relevant facts to question the integrity or impartiality of those who are or will be acting under a proposed or existing FDIC contract; or
 - (2) A contractor; any management officials or affiliated business entities of a contractor; or any employees, agents, or subcontractors of a contractor who will perform services under a proposed or existing contract with the FDIC, is an adverse party to the FDIC, RTC, FSLIC, or their successors in a lawsuit; or
 - (3) A contractor; any management officials or affiliated business entities of a contractor; or any employees, agents, or subcontractors of a contractor who will perform services under a proposed or existing contract with the FDIC, has ever been suspended, excluded, or debarred from contracting with a Federal entity or has ever had a contract with the FDIC, RTC, FSLIC or their successors rescinded or terminated prior to the contract's completion and which rescission or termination involved issues of conflicts of interest or ethical responsibilities; or
 - (4) Any other facts exist which the FDIC, in its sole discretion, determines may, through performance of a proposed or existing FDIC contract, provide a contractor with an unfair competitive advantage which favors the interests of the contractor or any person with whom the contractor has or is likely to have a personal or business relationship.

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

(e) *Control* means the power to vote, directly or indirectly, 25 percent or more of any class of the voting stock of a company; the ability to direct in any manner the election of a majority of a company's directors or trustees; or the ability to exercise a controlling influence over the company's management and policies. For purposes of this definition, a general partner of a limited partnership is presumed to be in control of that partnership.

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

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

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

(i) *Management official* means any shareholder, employee or partner who controls a company and any individual who directs the day-to-day operations of a company. With respect to a partnership whose management committee or executive committee has responsibility for the day-to-day operations of the partnership, management official means only a member of such committee but, if no such committee exists, management official means each of the general partners.

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

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

- (1) A loan or advance from an insured depository institution is in default for ninety (90) or more days as to payment of principal, interest, or a combination thereof and there remains a legal obligation to pay an amount in excess of \$50,000; or
- (2) A loan or advance from an insured depository institution where there has been a failure to comply with the terms to such an extent that the collateral securing the

loan or advance was foreclosed upon, resulting in a loss in excess of \$50,000 to the insured depository institution.

- (l) *Person* means an individual or company.
- (m) *RTC* means the former Resolution Trust Corporation in any of its capacities.
- (n) *Subcontractor* means a person that enters into a contract with an FDIC contractor to perform services under a proposed or existing contract with the FDIC.
- (o) *Substantial loss to Federal deposit insurance funds* means:
 - (1) A loan or advance from an insured depository institution, which is currently owed to the FDIC, RTC, FSLIC or their successors, or the Bank Insurance Fund (BIF), the Savings Association Insurance Fund (SAIF), the FRF, or funds maintained by the RTC for the benefit of insured depositors, that is or has ever been delinquent for ninety (90) or more days as to payment of principal, interest, or a combination thereof and on which there remains a legal obligation to pay an amount in excess of \$50,000;
 - (2) An obligation to pay an outstanding, unsatisfied, final judgment in excess of \$50,000 in favor of the FDIC, RTC, FSLIC, or their successors, or the BIF, the SAIF, the FRF or the funds maintained by the RTC for the benefit of insured depositors; or
 - (3) A loan or advance from an insured depository institution which is currently owed to the FDIC, RTC, FSLIC or their successors, or the BIF, the SAIF, the FRF or the funds maintained by the RTC for the benefit of insured depositors, where there has been a failure to comply with the terms to such an extent that the collateral securing the loan or advance was foreclosed upon, resulting in a loss in excess of \$50,000.

366.3 Appropriate officials.

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

366.4 Disqualification of contractors.

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

- (1) Has been convicted of any felony;
- (2) Has been removed from, or prohibited from participating in the affairs of, any insured depository institution pursuant to any final enforcement action by the Office of the Comptroller of the Currency, the Office of Thrift Supervision, the Board of Governors of the Federal Reserve System, or the Federal Deposit Insurance Corporation or their successors;
- (3) Has demonstrated a pattern or practice of defalcation regarding obligations; or
- (4) Has caused a substantial loss to Federal deposit insurance funds.

(b) *Contractors with disqualifying conditions arising prior to contract award.*

- (1) A contractor which has any of the disqualifying conditions identified in paragraph (a) of this section prior to the award of an FDIC contract is disqualified and is prohibited from entering into contracts with the FDIC.
- (2) *If after submitting an offer but prior to award, a contractor discovers that it has any of the disqualifying conditions identified in paragraph (a) of this section, it shall notify the FDIC in writing within 10 days or prior to award, whichever is earlier.*

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

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

- (2) The FDIC may immediately declare any contracts with such contractor in default, terminate the contracts, and order an immediate transfer of duties and responsibilities under the contracts; or
- (3) The FDIC may declare any contracts with such contractor in default and temporarily waive such default in order to allow an orderly transfer of duties and responsibilities under the contracts.

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

366.5 Contractor conflicts of interest.

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

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

(c) *Conflicts of interest arising prior to contract award*

(1) *Requests for review of conflicts of interest.*

- (i) A contractor, with its offer, may request a determination as to the existence of a conflict of interest, may request that the conflict of interest, if any, be waived in accordance with paragraph (b) of this section, or may propose how the contractor could eliminate the conflict.
- (ii) If after submitting an offer, but prior to award, a contractor discovers that it has a conflict, it shall notify the FDIC in writing within 10 days or prior to award, whichever is earlier. The contractor, with its notice, may make such requests or proposals regarding the conflict or potential conflict as are described in paragraph (c)(1)(i) of this section.

- (2) *Review by the FDIC.*
 - (i) Subject to the restrictions set forth in paragraphs (c)(2)(ii) and (c)(3) of this section, the appropriate FDIC official, at his or her sole discretion, may determine whether a conflict of interest exists, may waive the conflict of interest in accordance with paragraph (b) of this section, or may approve in writing a contractor's proposal to eliminate a conflict of interest.
 - (ii) For contractors other than law firms and sole practitioner lawyers, the FDIC may consider a contractor's conflict or potential conflict of interest only if the FDIC first determines that the contractor's offer is the most advantageous of all received.
- (3) *Pre-bid requests and pre-bid review for contractors other than law firms and sole practitioner lawyers.* A request for pre-bid review must be in writing and describe in detail the conflict or potential conflict of interest. The request may provide a proposal for elimination of the conflict or request a waiver of the conflict. The FDIC may perform a pre-bid review of conflicts of interest only if it first determines, at its sole discretion, that the participation of the contractor in the bidding process is necessary to provide adequate competition.
- (d) *Conflicts of interest that arise or are discovered after contract award.* A contractor shall notify the FDIC in writing within 10 days after discovering that it has a conflict of interest. Such notification shall contain a detailed description of the conflict of interest and state how the contractor intends to eliminate the conflict. The FDIC, after receipt of such notification or other discovery of the contractor's conflict or potential conflict of interest, shall take such action as it determines is in the FDIC's best interests, including that:
 - (1) The FDIC may notify the contractor in writing of its finding as to whether a conflict of interest exists and the basis for such determination; whether or not a waiver will be granted; or whether corrective actions may be taken in order to eliminate the conflict of interest. Corrective actions must be completed by the contractor not later than 30 days after notification is mailed by the FDIC unless the FDIC, at its sole discretion, determines that it is in the best interests of the FDIC to grant the contractor an extension in which to complete such corrective action;
 - (2) The FDIC may immediately declare any affected contracts with such contractor in default, terminate the contracts, and order an immediate transfer of duties and responsibilities under such contracts; or

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

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

366.6 Information required to be submitted.

(a) *Initial submission.* Every offer submitted to the FDIC by any contractor shall include a completed Representations and Certifications Form and such other information as the FDIC may deem appropriate to permit it to make a determination with respect to disqualifying conditions or conflicts of interest. The Representations and Certifications Form shall require that the contractor provide the following:

- (1) Certifications that, to the best of the contractor's knowledge, the contractor is not disqualified from service on behalf of the FDIC because of the existence of any of the conditions identified in 366.4(a), or conflicts of interest as defined in 366.2(c)(1) through (3), subject to the contractor's request for waiver of a conflict of interest or proposal for elimination of a conflict of interest as described in 366.5;
- (2) A list and description of any instance during the ten (10) years preceding the submission of the offer in which the contractor or any company under the contractor's control defaulted on a material obligation to any insured depository institution;
- (3) The contractor's agreement that it will not allow any employee, agent, or subcontractor to perform services under the proposed contract with the FDIC unless the contractor first verifies with each such employee, agent, or subcontractor that, to the best of such person's knowledge, such person:
 - (i) Is not disqualified from performing services under the FDIC contract because of the existence of any of the conditions identified in 366.4(a);
 - (ii) Has no conflicts of interest as defined in 366.2(c)(1) through (3), subject to a request by the contractor for a conflict of interest waiver or proposal for the elimination of a conflict of interest as set forth in 366.5; and

- (iii) Has not, during the ten (10) years preceding the submission of the offer, defaulted on a material obligation to any insured depository institution; and
 - (4) Any other information which the FDIC may deem appropriate, the scope of which will be dependent on the particular contract under consideration.
- (b) *Subsequent submissions.* During the term of the contract, the contractor shall:
 - (1) Verify the information described in paragraph (a)(3) of this section for any employee, agent, or subcontractor who will perform services under the contract for whom such information has not been previously verified, prior to such employee, agent, or subcontractor performing services under the contract; and
 - (2) Immediately notify the FDIC if any of the information submitted pursuant to paragraph (a) of this section was incorrect at time of submission or has subsequently become incorrect.
- (c) *Failure to provide information.* A contractor that fails to provide any required information or misstates a material fact may be determined by the FDIC to be ineligible for the award of the FDIC contract for which such information is required or to be in default with respect to any existing contract for which such information is required.
- (d) *Retention of information.* A contractor shall retain the information upon which it relied in preparing its certification(s) during the term of the contract and for a period of three (3) years following the termination or expiration of the contract and shall make such information available for review by the FDIC upon request.
- (e) *Delayed compliance in emergencies.* In emergencies, when unforeseeable circumstances make it necessary to contract immediately in order to protect FDIC personnel or property, the FDIC may authorize delayed compliance with this part.
- (f) *Additional contractual requirements.* In addition to the provisions of this part, the FDIC may include in its contract provisions, conditions and limitations, including additional standards for contractor fitness and integrity.

366.7 Minimum ethical standards for independent contractors.

- (a) In connection with the performance of any contract and during the term of such contract, a contractor shall not:
 - (1) Accept or solicit for itself or others favors, gifts, or other items of monetary value from any person the contractor knows is seeking official action from the FDIC in

connection with the contract or has interests which may be substantially affected by the contractor's performance or nonperformance of duties to the FDIC;

- (2) Use improperly or allow the improper use of FDIC property, or property over which the contractor has supervision or charge by reason of the contract;
- (3) Use its status as an FDIC contractor for its personal, financial or business benefit or for the benefit of a third party, except as contemplated by the contract;
- (4) Make any promise or commitment on behalf of the FDIC not authorized by the FDIC.

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

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

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

366.8 Confidentiality of information.

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

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

- (1) Declare the contractor ineligible for the award of any FDIC contract not yet awarded; or
- (2) Declare the contractor in default under any existing contract with the FDIC.

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

366.9 Liability for rescission or termination.

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

366.10 Finality of determination.

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

Click on the following to access the form for printing:

[FDIC Representations and Certifications Form](#)

Click on the following to access the form for printing:

[FDIC Representations and Certifications Form](#) (page 2)

STATEMENT OF POLICY ON CONTRACTING WITH FIRMS THAT HAVE UNRESOLVED AUDIT ISSUES WITH FDIC

Agency: Federal Deposit Insurance Corporation

Action: Statement of Policy

Summary: The Federal Deposit Insurance Corporation (FDIC) has adopted a policy statement concerning contracting with firms that have unresolved audit issues with FDIC. The policy statement sets forth the procedures to be followed to provide proper notification to an affected contractor or outside counsel when an audit report is issued, and a management decision has been made on a respective finding, in order to afford the firm an opportunity to respond. When an FDIC audit identifies questioned costs and issues remain outstanding or unresolved as a result of the firm's failure to cooperate with FDIC management in resolving issues associated with identified disallowed costs, by for example: (1) failing to respond timely to an FDIC request to produce documentation to support claimed costs; or (2) otherwise failing to adequately document claimed costs; or (3) by failing to remit the disallowed portion of questioned costs identified in such audit reports, application of the policy may result in a determination to refrain from soliciting new business from that firm.

This policy statement applies to firms providing goods and services to FDIC, including attorneys or law firms providing legal services to FDIC.

Effective date: This policy statement is effective March 20, 1997.

For further information contact: Michael J. Rubino, Associate Director, Acquisition Services Branch, at (202) 942-0376, Peter A. Ziebert, Counsel, Contracting Law Unit, at (202) 736-0742, or William S. Jones, Counsel, Legal Operations Section, at (202) 736-3055.

Supplementary Information: The text of the Policy Statement follows:

1. Background

The FDIC Office of the Inspector General (OIG) routinely audits contracts with firms providing services to FDIC. These audits frequently contain an analysis whereby certain contract costs are questioned, as well as a recommendation that FDIC management disallow and attempt to recover these costs. When the OIG transmits the audit report and findings to the appropriate FDIC program office, FDIC management then reviews such findings and recommendation. This evaluation results in the issuance of a final decision that may sustain all of the audit findings, or a portion thereof. When FDIC management determines that certain questioned costs should not be charged to the Corporation, such questioned costs that are sustained are then deemed to be "disallowed" costs within the meaning of the Inspector General Act.

Once a management decision has been made to disallow such costs, active resolution efforts are undertaken by FDIC management to recover funds paid without adequate documentation or otherwise inappropriately paid to the firm during the course of the engagement. In those circumstances where the FDIC requests that an audited firm remit disallowed amounts and the contractor fails to do so or fails to actively cooperate with FDIC management in its efforts to resolve the issues associated with identified disallowed costs, it is prudent business for FDIC to selectively refrain from soliciting future services from the firm.

2. General Policy

To provide procedures whereby the FDIC may elect to refrain from soliciting a firm for new business if:

- (a) the results of an audit reflect potentially recoverable disallowed costs and audit issues remain outstanding or unresolved within the time period set forth in the notice letter sent by FDIC; and
- (b) the firm failed or declined to cooperate with resolution efforts undertaken by FDIC management in response to the audit findings, including the failure to adequately support its contract costs or the failure to remit the disallowed portion of the questioned costs identified in such audit report.

3. Definitions

- (a) Disallowed cost means a questioned cost that management, in a management decision, has sustained or agreed should not be charged to the government.
- (b) Management decision means the evaluation by FDIC management of the findings and recommendations included in an audit report and the issuance of a final decision by management concerning its response to such findings and recommendations, including actions concluded to be necessary.
- (c) Questioned cost means a cost that is questioned in an audit by the OIG or similar auditing agency because of:
 - (i) an alleged violation of a provision of a law, regulation, contract, grant, cooperative agreement, or other agreement or document governing the expenditure of funds;
 - (ii) a finding that, at the time of the audit, such cost is not supported by adequate documentation; or

- (iii) a finding that the expenditure of funds for the intended purpose is unnecessary or unreasonable.

4. Procedures

Issued audit reports that identify questioned costs relating to contractual engagements are assigned to the Division of Administration, Acquisition Services Branch (ASB) staff, or the Outside Counsel Unit, Legal Division (OCU), for resolution. In implementing this policy statement, the following steps shall be taken:

- (a) Management decision. Once a management decision is made on a respective finding, the matter is then assigned to ASB or OCU for resolution. A copy of the relevant audit report shall be transmitted to the firm under a cover letter which:
 - (i) identifies the ASB or OCU which is responsible for resolving the audit issues;
 - (ii) identifies the ASB or OCU employee primarily responsible for resolution and to whom all communications from the firm should be sent;
 - (iii) requests that the firm respond to the findings contained in the report within ten (10) business days of receipt of the letter, or such other time as specified in the letter. Such responses should include supporting documentation where appropriate.
- (b) If the firm fails to respond to this request, or fails to remit the disallowed portion of the questioned costs contained in the audit report, or otherwise fails to adequately respond to the issues raised in the report, the following procedures shall apply:
 - (i) with respect to audits of firms other than outside counsel, the ASB employee identified in section 4(a)(ii) shall send a letter to the firm advising the firm of its failure to cooperate, and which advises the firm that unless it remits the requested repayment or makes other arrangements satisfactory to the Associate Director who is responsible for resolution of this audit (whose name shall be provided to the firm) within ten business days of receipt of this letter, the Director, Division of Administration may, effective as of that date, make a determination that the FDIC refrain from soliciting any future services from this firm until such time as all issues identified in the subject audit report are resolved to the FDIC's satisfaction, and direct that notice to be sent to the firm of this action.
 - (ii) with respect to audits of outside counsel, the Legal Division employee identified in section 4(a)(ii) shall send a letter to the outside counsel which advises such outside counsel that its failure to cooperate constitutes a conflict

of interest with the FDIC, and which advises the outside counsel that unless it remits the requested repayment or makes other arrangements satisfactory to the Assistant General Counsel who is responsible for resolution of this audit (whose name shall be provided to the contractor) within ten business days of receipt of this letter, the matter will be referred to the Outside Counsel Conflicts Committee for appropriate action, which may include a determination that the FDIC refrain from soliciting any future services from such outside counsel and/or terminate FDIC's existing engagements, until such time as all issues identified in the subject audit report are resolved to the FDIC's satisfaction.

Dated at Washington, D.C. this 14th day of March, 1997

Federal Deposit Insurance Corporation
Robert E. Feldman
Deputy Executive Secretary
[FR Doc. 97-6995 Filed 3-19-97; 8:45 am]
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