

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Sections 308.161 through 308.164 and 308.127

Docket No.: XXXXX

RIN: XXXXXX

Amendments to 12 C.F.R. Sections 308.161- 308.164 – Subpart N – Rules and Procedures Applicable to Proceedings Relating to Proceedings Related to Suspension, Removal, and Prohibition Where a Felony is Charged

Amendments to 12 C.F.R. Section 308.127 – Scope Subpart G – Rules and Procedures Applicable to Proceedings Relating to Cease-and-Desist Orders

AGENCY: Federal Deposit Insurance Corporation

ACTION: Final Rule.

SUMMARY: The Federal Deposit Insurance Corporation (FDIC) is amending its procedural regulations implementing sections 8(g) and 8(b) of the Federal Deposit Insurance Act. The amendments are generally technical in nature, and are necessary to ensure that the rules are consistent with statutory changes effected by sections 708 and 702 of the Financial Services Regulatory Relief Act of 2006.

EFFECTIVE DATE: [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

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SUPPLEMENTARY INFORMATION:

## **I. Background**

On October 13, 2006, the President signed into law Public Law No. 109-351, the Financial Services Regulatory Relief Act of 2006 (FSRRA). Section 708 of the FSRRA modified section 8(g) of the Federal Deposit Insurance Act (FDI Act), in a number of ways.

On August 9, 1991, the FDIC issued a final rule entitled “Rules of Practice and Procedure.” 56 FR 37975, August 9, 1991. This rule contained a Subpart N, entitled “Rules and Procedures Applicable to Proceedings Relating to Suspension, Removal, and Prohibition Where a Felony is Charged,” which included sections 308.161-308.164. Section 708 of FSRRA made various modifications to section 8(g) of the FDI Act to clarify the extent of the suspension, removal and prohibition authority of the Federal

banking agencies in cases of certain crimes by institution-affiliated parties (IAPs).

Minor modifications were made to the predicate and findings requirements of section 8(g)(1), as well as conforming amendments to sections 8(g)(2) and (3). Significantly, section 8(g)(1) was modified to clarify that the appropriate Federal banking agency may suspend or prohibit individuals who are the subject of criminal proceedings involving certain crimes from participation in the affairs of any depository institution, not only the depository institution with which the IAP is or was associated.

In addition, because the previous suspension language of section 8(g) had required findings specific to the depositors of the depository institution or to the depository institution itself, it was unclear whether a covered individual could be suspended if the institution had ceased to exist. This problem was addressed by directing the required findings to “any relevant depository institution,” which is defined in a new subsection (E) to mean any depository institution of which the party is or was an IAP at the time the information, indictment, complaint, suspension notice or order of prohibition is issued.

Since much of the language of section 8(g) is repeated in the FDIC’s implementing regulations at Part 308, Subpart N – Rules and Procedures Applicable to Proceedings Relating to Suspension, Removal, and Prohibition Where a Felony is Charged, 12 C.F.R. §§ 308.161-164, numerous conforming amendments of the regulations are required.

Finally, a few changes are made in order to standardize references contained in the various sections and to make the hearing procedures easier to understand and to conform with current practice and procedure.

Section 702 of FSRRA enacted a new section 50 of the FDI Act, codified at 12 U.S.C. § 1831aa, entitled “Enforcement of Agreements.” Subsection (a) of the new section 50 provides that:

Notwithstanding clause (i) or (ii) of section 8(b)(6)(A) or section 38(e)(2)(E)(i), the appropriate Federal banking agency for a depository institution may enforce, under section 8, the terms of –

- (1) any condition imposed in writing by the agency on the depository institution or an institution-affiliated party in connection with any action on any application, notice, or other request concerning the depository institution; or
- (2) any written agreement entered into between the agency and the depository institution or an institution-affiliated party.

On August 9, 1991, the FDIC issued a final rule entitled “Rules of Practice and Procedure.” 56 FR 37975, August 9, 1991. This rule contained a Subpart G, entitled “Rules and Procedures Applicable to Proceedings Relating to Cease-and-Desist Orders” which included section 308.127, entitled “Scope.” Section 308.127(a) described the scope of rules applicable to cease-and-desist proceedings under section 8(b) of the FDI Act. Because the new section 50 modifies the requirements for pursuit of affirmative action under section 8(b)(6), it is appropriate that the procedural regulations respecting pursuit of cease-and-desist actions be amended to reflect the applicability of the new

section 50. Accordingly, the final rule modifies the procedural regulations with the addition of a cross-reference to the new section 50.

## **II. The Proposed Rule**

The following is a section-by-section discussion of the final rule revisions to the FDIC's regulations.

### Section 308.161 – Scope

The proposed rule: (1) revises the scope of the prohibition from “the bank” to “any depository institution;” and (2) revises the description of the predicate offenses and the required findings to reflect statutory changes to section 8(g). The predicate offense description changed from “is charged in any state or federal information, indictment, or complaint, with the commission of or participation in” to “is the subject of any state or federal information, indictment, or complaint, involving the commission of or participation in.” The required findings changed from “if continued service or participation by such party poses a threat to the interests of the bank’s depositors or threatens to impair public confidence in the depository institution” to “if continued service or participation by such party posed, poses, or may pose a threat to the interests of the depositors of, or threatened, threatens, or may threaten to impair public confidence in, any relevant depository institution.”

#### Section 308.162 – Relevant considerations

The proposed rule: (1) clarifies that the considerations apply to a notice of suspension or prohibition, or a removal or prohibition order; and (2) revises the required findings recited in subsection (a)(1)(iii) to reflect the statutory changes to section 8(g).

#### Section 308.163 – Notice of suspension, and orders of removal and prohibition

The proposed rule: (1) revises the title of the section to read “Notice of suspension or prohibition, and orders of removal or prohibition;” (2) revises the scope of the prohibition from “the bank” to “any depository institution” in subsections (a)(1) and (b)(1); revises the required findings in subsection (b)(1); (3) corrects the cross reference in subsection (b)(2) from 308.161(a)(ii) to 308.161(a)(2); and moves subsection (a)(2) respecting the filing and content of requests for hearing to a new subsection (c) to make clear that there is a right to a hearing regarding both notices of suspension and prohibition and orders of removal and prohibition.

#### Section 308.164 – Hearings

The proposed rule: (1) eliminates confusion by changing references to the party filing the request for hearing from the “applicant” to the “institution-affiliated party;” (2) eliminates confusion in subsection (c) caused by the apparent ability of the bank to waive a hearing even if the affected individual were to request a hearing; (3) in subsections (d)

and (e) makes it clear that there is a right to a hearing regarding both notices of suspension and prohibition and orders of removal and prohibition.

#### Section 308.127 – Scope Subpart G

The final rule: (1) revises the heading for section 308.127(a) from “*Cease-and-desist proceedings under section 8 of the FDIA*” to “*Cease-and-desist proceedings under sections 8 and 50 of the FDIA;*” and (2) at the end of section 308.127(a), replaces the period with a comma and adds “and section 50 of the FDIA, 12 U.S.C. § 1831aa.”

### **III. Exemption From Public Notice and Comment**

The revisions to part 308 do not constitute a “rule” for which the FDIC is required to publish a general notice of proposed rulemaking under section 553(b) of Title 5 of the United States Code. This is because the final rule contains only clarifications and technical changes intended to bring the agency’s rules of practice and procedure into conformity with statutory changes and current agency practices and procedures. Thus, the changes to be implemented will have no adverse effect on the public. In addition, the FSRRA changes to the FDI Act took effect on October 13, 2006. It is, therefore, desirable to implement the necessary technical and conforming regulatory amendments as soon as possible. Thus, the FDIC has determined for good cause that public notice and comment are unnecessary, and that the rule should be published in final form.

#### **IV. Paperwork Reduction Act**

The proposed rule will not create or modify any collections of information pursuant to the Paperwork Reduction Act (44 U.S.C. §§ 3501 *et seq.*). Consequently, no information has been submitted to the Office of Management and Budget for review.

#### **V. Regulatory Flexibility Act**

The Regulatory Flexibility Act (5 U.S.C. §§ 601-612) requires an agency to publish an initial regulatory flexibility analysis, except to the extent provided in 5 U.S.C. § 605(b), whenever the agency is required to publish a general notice of proposed rulemaking for a proposed rule. For the reasons discussed above, the FDIC is publishing this rule as a final rule, for which no publication of a general notice of proposed rulemaking is necessary. No regulatory flexibility analysis is required.

#### **VI. The Treasury and General Government Appropriations Act, 1999 – Assessment of Federal Regulations and Policies on Families**

The FDIC has determined that the proposed rule will not affect family well-being within the meaning of section 654 of the Treasury and General Government Appropriations Act, enacted as part of the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999 (Public Law 105-277, 112 Stat. 2681).

## **VII. Small Business Regulatory Enforcement Fairness Act**

The Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA) (Title II, Pub. L. 104 -121) provides generally for agencies to report rules to Congress and the General Accounting Office (GAO) for review. The reporting requirement is triggered when a federal agency issues a final rule. The FDIC will file the appropriate reports with Congress and the GAO as required by SBREFA. The Office of Management and Budget has determined that the proposed rule does not constitute a “major rule” as defined by SBREFA.

## **VIII. Effective Date**

The Administrative Procedure Act (5 U.S.C. §§ 551 *et. seq.*) provides that regulations shall become effective thirty (30) days after their publication in the **Federal Register** (5 U.S.C. § 553). One exception to this requirement is for a finding of “good cause” (*Id.* At 553(d)). For the final rule, the Board finds “good cause” to make the amendments effective immediately upon publication in the **Federal Register** because the amendments are technical and conforming to pre-existing statutory and regulatory requirements.

## **Lists of Subjects**

### **12 CFR Part 308**

Administrative practice and procedure, Bank deposit insurance, Banks, banking, Claims, Crime, Equal access to justice, Fraud, Investigations, Lawyers, Penalties.

### **Part 308 – Rules of Practice and Procedure**

1. The authority citation for Part 308 is revised to read as follows:

Authority: 5 U.S.C. 504, 554-557; 12 U.S.C. 93(b), 164, 505, 1815(e), 1817, 1818, 1820, 1828, 1829, 1829b, 1831i, 1831m(g)(4), 1831o, 1831p-1, 1832(c), 1884(b), 1972, 3102, 3108(a), 3349, 3909, 4717, 15 U.S.C. 78(h) and (i), 78o-4(c), 78o-5, 78q-1, 78s, 78u, 78u-2, 78u-3, and 78w, 6801(b), 6805(b)(1); 28 U.S.C. 2461 note; 31 U.S.C. 330, 5321; 42 U.S.C. 4012a; Sec. 3100(s), Pub. L. 104-134, 110 Stat. 1321-358; and Pub. L. 109-351.

2. Revise Subpart N, 12 C.F.R. §§ 308.161 through 308.164 to read as follows:

#### **Subpart N – Rules and Procedures Applicable to Proceedings Relating to Suspension, Removal, and Prohibition Where a Felony is Charged**

##### **§ 308.161. Scope.**

The rules and procedures set forth in this subpart shall apply to the following:

(a) Proceedings to suspend an institution-affiliated party of an insured state nonmember bank, or to prohibit such party from further participation in the conduct of the affairs of any depository institution, if continued service or participation by such party posed, poses, or may pose a threat to the interests of the depositors of, or threatened, threatens, or may threaten to impair public confidence in, any relevant depository institution (as defined at section 1818(g)(1)(E) of Title 12), where the individual is the subject of any state or federal information, indictment, or complaint, involving the commission of, or participation in:

(1) A crime involving dishonesty or breach of trust punishable by imprisonment exceeding one year under state or federal law; or

(2) A criminal violation of section 1956, 1957, or 1960 of Title 18 or section 5322 or 5324 of Title 31.

(b) Proceedings to remove from office or to prohibit an institution-affiliated party from further participation in the conduct of the affairs of any depository institution without the consent of the Board of Directors or its designee where:

(1) A judgment of conviction or an agreement to enter a pre-trial diversion or other similar program has been entered against such party in connection with a crime described in paragraph (a)(1) of this section that is not subject to further appellate

review, if continued service or participation by such party posed, poses, or may pose a threat to the interests of the depositors of, or threatened, threatens, or may threaten to impair public confidence in, any relevant depository institution (as defined at section 1818(g)(1)(E) of Title 12); or

(2) A judgment of conviction or an agreement to enter a pre-trial diversion or other similar program has been entered against such party in connection with a crime described in paragraph (a)(2) of this section.

#### **§ 308.162 – Relevant considerations**

(a)(1) In proceedings under § 308.161(a) and (b) for a notice of suspension or prohibition, or a removal or prohibition order, the following shall be considered:

(i) Whether the alleged offense is a crime which is punishable by imprisonment for a term exceeding one year under state or federal law and which involves dishonesty or breach of trust; and

(ii) Whether the alleged offense is a criminal violation of section 1956, 1957, or 1960 of Title 18 or section 5322 or 5324 of Title 31; and

(iii) Whether continued service or participation by the institution-affiliated party

posed, poses, or may pose a threat to the interests of the depositors of, or threatened, threatens, or may threaten to impair public confidence in, any relevant depository institution (as defined at section 1818(g)(1)(E) of Title 12).

(b) The question of whether an institution-affiliated party is guilty of the subject crime shall not be tried or considered in a proceeding under this subpart.

**§ 308.163 – Notice of suspension or prohibition, and orders of removal or prohibition**

(a) Notice of suspension or prohibition.

(1) The Board of Directors or its designee may suspend or prohibit from further participation in the conduct of the affairs of any depository institution an institution-affiliated party by written notice of suspension or prohibition upon a determination by the Board of Directors or its designee that the grounds for such suspension or prohibition exist. The written notice of suspension or prohibition shall be served upon the institution-affiliated party and any depository institution that the subject of the action is affiliated with at the time the notice is issued.

(2) The suspension or prohibition shall be effective immediately upon service on the institution-affiliated party, and shall remain in effect until final disposition of the information, indictment, complaint, or until it is terminated by the Board of Directors

or its designee under the provisions of § 308.164 or otherwise.

(b) Order of removal or prohibition.

(1) The Board of Directors or its designee may issue an order removing or prohibiting from further participation in the conduct of the affairs of any depository institution an institution-affiliated party, when a final judgment of conviction not subject to further appellate review is entered against the institution-affiliated party for a crime referred to in § 308.161(a)(1) and continued service or participation by such party posed, poses, or may pose a threat to the interests of the depositors of, or threatened, threatens, or may threaten to impair public confidence in, any relevant depository institution (as defined at section 1818(g)(1)(E) of Title 12).

(2) An order of removal or prohibition shall be entered if a judgment of conviction is entered against the institution-affiliated party for a crime described in § 308.161(a)(2).

(c) The notice of suspension or prohibition or the order of removal or prohibition shall:

(i) Inform the institution-affiliated party that a written request for a hearing, stating the relief desired and grounds therefore, and any supporting evidence, may be filed with the Executive Secretary within 30 days after receipt of the written notice or order; and

(ii) Summarize or cite to the relevant considerations specified in § 308.162 of this subpart.

### **§ 308.164 – Hearings**

(a) Hearing dates. The Executive Secretary shall order a hearing to be commenced within 30 days after receipt of a request for hearing filed pursuant to § 308.163. Upon the request of the institution-affiliated party, the presiding officer or the Executive Secretary may order a later hearing date.

(b) Hearing procedure.

(1) The hearing shall be held in Washington, DC, or at another designated place, before a presiding officer designated by the Executive Secretary.

(2) The provisions of §§ 308.6 through 308.12, 308.16, and 308.21 of the Uniform Rules and §§ 308.101 through 308.102 and 308.104 through 308.106 of subpart B of the Local Rules shall apply to hearings held pursuant to this subpart.

(3) The institution-affiliated party may appear at the hearing and shall have the right to introduce relevant and material documents and oral argument. Members of the

FDIC enforcement staff may attend the hearing and participate as representatives of the FDIC enforcement staff.

(4) There shall be no discovery in proceedings under this subpart.

(5) At the discretion of the presiding officer, witnesses may be presented within specified time limits, provided that a list of witnesses is furnished to the presiding officer and to all other parties prior to the hearing. Witnesses shall be sworn, unless otherwise directed by the presiding officer. The presiding officer may ask questions of any witness. Each party shall have the opportunity to cross-examine any witness presented by an opposing party. The transcript of the proceedings shall be furnished, upon request and payment of the cost thereof, to the institution-affiliated party afforded the hearing.

(6) In the course of or in connection with any hearing under paragraph (b) of this section, the presiding officer shall have the power to administer oaths and affirmations, to take or cause to be taken depositions of unavailable witnesses, and to issue, revoke, quash, or modify subpoenas and subpoenas duces tecum. Where the presentation of witnesses is permitted, the presiding officer may require the attendance of witnesses from any state, territory, or other place subject to the jurisdiction of the United States at any location where the proceeding is being conducted. Witness fees shall be paid in accordance with § 308.14 of the Uniform Rules.

(7) Upon the request of the institution-affiliated party afforded the hearing, or the members of the FDIC enforcement staff, the record shall remain open for five business days following the hearing for the parties to make additional submissions to the record.

(8) The presiding officer shall make recommendations to the Board of Directors, where possible, within ten days after the last day for the parties to submit additions to the record.

(9) The presiding officer shall forward his or her recommendation to the Executive Secretary who shall promptly certify the entire record, including the recommendation to the Board of Directors. The Executive Secretary's certification shall close the record.

(c) Written submissions in lieu of hearing. The institution-affiliated party may in writing waive a hearing and elect to have the matter determined on the basis of written submissions.

(d) Failure to request or appear at hearing. Failure to request a hearing shall constitute a waiver of the opportunity for a hearing. Failure to appear at a hearing in person or through an authorized representative shall constitute a waiver of hearing. If a hearing is waived, the order shall be final and unappealable, and shall remain in full force and effect

pursuant to § 308.163.

(e) Decision by Board of Directors or its designee. Within 60 days following the Executive Secretary's certification of the record to the Board of Directors or its designee, the Board of Directors or its designee shall notify the institution-affiliated party whether the notice of suspension or prohibition or the order of removal or prohibition will be continued, terminated, or otherwise modified. The notification shall state the basis for any decision of the Board of Directors or its designee that is adverse to the institution-affiliated party. The Board of Directors or its designee shall promptly rescind or modify a notice of suspension or prohibition or an order of removal or prohibition where the decision is favorable to the institution-affiliated party.

3. Revise 12 C.F.R. 308.127 to read as follows:

**§ 308.127 Scope.**

(a) *Cease-and-desist proceedings under sections 8 and 50 of the FDIA.* The rules and procedures of this subpart, subpart B of the Local Rules and the Uniform Rules shall apply to proceedings to order an insured nonmember bank or an institution-affiliated party to cease and desist from practices and violations described in section 8(b) of the FDIA, 12 U.S.C. 1818(b), and section 50 of the FDIA, 12 U.S.C. § 1831aa.

Dated: \_\_\_\_\_, 2007.

Robert Feldman,

Executive Secretary.