

## § 366.0

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AUTHORITY: Section 9 (Tenth) of the Federal Deposit Insurance Act (FDI Act), 12 U.S.C. 1819 (Tenth); sections 12(f)(3) and (4) of the FDI Act, 12 U.S.C. 1822(f)(3) and (4); and section 19 of Pub. L. 103-204, 107 Stat. 2369.

SOURCE: 67 FR 69991, Nov. 20, 2002, unless otherwise noted.

### § 366.0 Definitions.

As used in this part:

- (a) The word *person* refers to an individual, corporation, partnership, or other entity with a legally independent existence.
- (b) The terms *we*, *our*, and *us* refer to the Federal Deposit Insurance Corporation (FDIC), except when acting as conservator or operator of a bridge bank.
- (c) The terms *I*, *me*, *my*, *mine*, *you*, and *yourself* refer to a person who submits an offer to perform or performs, directly or indirectly, contractual services or functions on our behalf.
- (d) The phrase *insured depository institution* refers to any bank or savings association whose deposits are insured by the FDIC.

### § 366.1 What is the purpose of this part?

This part establishes the minimum standards of integrity and fitness that contractors, subcontractors, and employees of contractors and subcontractors must meet if they perform any service or function on our behalf. This part includes regulations governing conflicts of interest, ethical responsibility, and use of confidential information in accordance with section 12(f)(3) of the FDI Act, 12 U.S.C. 1822(f)(3), and the prohibitions and the requirements for submission of information in accordance with section 12(f)(4) of the FDI Act, 12 U.S.C. 1822(f)(4).

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### § 366.2 What is the scope of this part?

- (a) This part applies to a person who submits an offer to perform or performs, directly or indirectly, a contractual service or function on our behalf.
- (b) This part does not apply to:
- (1) An FDIC employee for the purposes of title 18, United States Code; or
  - (2) The FDIC when we operate an insured depository institution such as a bridge bank or conservatorship.

### § 366.3 Who cannot perform contractual services for the FDIC?

We will not enter into a contract with you to perform a service or function on our behalf, if you or any person that owns or controls you, or any entity you own or control:

- (a) Has a felony conviction;
- (b) Was removed from or is prohibited from participating in the affairs of an insured depository institution as a result of a federal banking agency final enforcement action;
- (c) Has a pattern or practice of defalcation; or
- (d) Is responsible for a substantial loss to the Deposit Insurance Fund (or any predecessor deposit insurance fund).

[67 FR 69991, Nov. 20, 2002, as amended at 71 FR 20527, Apr. 21, 2006]

### § 366.4 When is there a pattern or practice of defalcation?

- (a) You have a pattern or practice of defalcation under § 366.3(c) when you, any person that owns or controls you, or any entity you own or control has a legal responsibility for the payment on at least two obligations that are:
- (1) To one or more insured depository institutions;
  - (2) More than 90 days delinquent in the payment of principal, interest, or a combination thereof; and
  - (3) More than \$50,000 each.
- (b) The following are examples of when you have or do not have a pattern or practice of defalcation. These examples are not inclusive.
- (1) You have five loans at insured depository institutions. Three of them are 90 days past due. Two of the three loans have outstanding balances of more than \$50,000 each. You have a pattern or practice of defalcation.

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(2) You have five loans at insured depository institutions. Two of them are 90 days past due. One of the two is with ABC Bank for \$170,000. The other one is with XYZ bank for \$60,000. You have a pattern or practice of defalcation.

(3) You have five loans at insured depository institutions. Three of them are 90 days past due. One of the three has an outstanding balance of more than \$50,000. The other two have outstanding balances of less than \$50,000. You do not have a pattern or practice of defalcation.

(4) You have five loans at insured depository institutions. Three of them have outstanding balances of more than \$50,000. Two of those three were 90 days past due but are now current. You do not have a pattern or practice of defalcation.

### § 366.5 What causes a substantial loss to a federal deposit insurance fund?

You cause a substantial loss to the Deposit Insurance Fund (or any predecessor deposit insurance fund) under § 366.3(d) when you, or any person that owns or controls you, or any entity you own or control has:

(a) An obligation to us that is delinquent for 90 days or more and on which there is an outstanding balance of principal, interest, or a combination thereof of more than \$50,000;

(b) An unpaid final judgment in our favor that is in excess of \$50,000, regardless of whether it becomes discharged in whole or in part in a bankruptcy proceeding;

(c) A deficiency balance following foreclosure of collateral on an obligation owed to us that is in excess of \$50,000, regardless of whether it becomes discharged in whole or in part in a bankruptcy proceeding; or

(d) A loss to us that is in excess of \$50,000 that we report on IRS Form 1099-C, Information Reporting for Discharge of Indebtedness.

[67 FR 69991, Nov. 20, 2002, as amended at 71 FR 20527, Apr. 21, 2006]

### § 366.6 How is my ownership or control determined?

(a) Your ownership or control is determined on a case-by-case basis. Your ownership or control depends on the specific facts of your situation and the

particular industry and legal entity involved. You must provide documentation to us to use in determining your ownership or control.

(b) The interest of a spouse or other family member in the same organization is imputed to you in determining your ownership or control.

(c) The following are examples of when your ownership or control may or may not exist. These examples are not inclusive.

(1) You have control if you are the president or chief executive officer of an organization.

(2) You have ownership or control if you are a partner in a small law firm. You might not have ownership or control if you are a partner in a large national law firm.

(3) You have control if you are a general partner of a limited partnership. You have ownership or control if you have a limited partnership interest of 25 percent or more.

(4) You have ownership or control if you have the:

(i) Power to vote, directly or indirectly, 25% or more interest of any class of voting stock of a company;

(ii) Ability to direct in any manner the election of a majority of a company's directors or trustees; or

(iii) Ability to exercise a controlling influence over the company's management and policies.

### § 366.7 Will the FDIC waive the prohibitions under § 366.3?

We may waive the prohibitions for entities other than individuals for good cause shown at our discretion when our need to contract for your services outweighs all relevant factors. The statute does not allow us to waive the prohibitions for individuals.

### § 366.8 Who can grant a waiver of a prohibition or conflict of interest?

The FDIC's Board of Directors delegates to the Chairman, or his designee, authority to issue waivers and implement procedures for part 366.

### § 366.9 What other requirements could prevent me from performing contractual services for the FDIC?

You must avoid a conflict of interest, be ethically responsible, and maintain