

Changes in Directors and Senior Executive Officers

Comptroller's Licensing Manual

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Changes in Directors and Senior Executive Officers

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Changes in Directors and Senior Executive Officers

Introduction

This booklet incorporates policies and procedures used by the Comptroller of the Currency (OCC) to review and evaluate changes in directors and senior executive officers. Users also should consult the "Background Investigations" booklet of the *Comptroller's Licensing Manual* (Licensing Manual) for discussion and procedures relating to background investigations undertaken in the review and evaluation of changes in directors and senior executive officers.

According to 12 USC 1831i, certain depository institutions must give prior notice of proposed changes in directors and senior executive officers and regulatory agencies must complete their review of that notice within a certain time period. This statute is implemented by 12 CFR 5.51, which imposes further implementing regulatory requirements on all national banks.

Application Process

A national bank is required to file a notice of changes in directors or senior executive officers when:

- A bank is not in compliance with minimum capital requirements.
- A bank is in troubled condition, as defined in the Glossary. The troubled bank must comply with the prior notice requirement until reclassified and notified by the OCC.
- The OCC determines, in connection with its review of a capital restoration plan required under section 38 of the act (12 USC 1831o or 12 CFR 6) or otherwise, that prior notice is appropriate.

This requirement applies to both Federal Deposit Insurance Corporation (FDIC)-insured and uninsured national banks. Separate from its authority under section 5.51, the OCC also normally requires prior review of new officers and directors for two years after a bank has opened for business as a condition for approving a charter (12 CFR 5.20(g)(2)). That review does not have a specified time period for completion (see the "Charters" booklet of the Licensing Manual). Also, after a national bank undergoes a change in control, it must report any changes or replacement of its chief executive officer or any director for 12 months after the change occurs. (12 USC 1817(j)(12)) (see the "Change in Bank Control" booklet of the Licensing Manual).

The review of changes in directors or officers required under an enforcement action also is not subject to a specified review period.

A bank that meets one of the notice-of-changes criteria must notify the OCC of proposed changes in directors and senior executive officers.

Bank management must notify the OCC of nominees to fill vacant positions on the board of directors or among senior bank executive officers. This notice includes a copy of the position description, a description of the nominee's qualifications for the position, the biographical portion in the Interagency Biographical and Financial Report, IRS Tax Check Waiver form, and completed fingerprint cards. (Refer to the "Background Investigations" booklet for sample documents.) Those items and a check payable to the OCC covering the cost of processing the fingerprint cards, is sent to the appropriate OCC district or supervisory office.

Bank management normally files the section 5.51 notice. In extenuating circumstances, the proposed officer or director, a board member, or a shareholder may file a notice. This can occur, for example, when the board of directors wants to replace senior managers or a shareholder nominates an alternate candidate. When those situations arise, the OCC verifies that the proposed changes are legitimate.

Background Investigations

The OCC routinely performs background checks on persons proposed as directors or senior executive officers subject to 12 CFR 5.51.

The OCC may waive standard background checks if the investigation would be redundant or is, for other reasons, unnecessary. The OCC may also require additional background checks under some circumstances. Standard and discretionary background checks and procedures are detailed in the "Background Investigations" booklet.

Application Issues

Section 5.51 is designed to ensure that a director or senior executive officer nominated for a position with a national bank directs the bank's affairs in a safe, sound, and legal manner. A person whose competence, experience, character, or integrity is inconsistent with this objective may not serve as a senior executive officer or director in a national bank subject to 12 CFR 5.51. The OCC scrutinizes more closely a person with previous banking experience in a failed or troubled financial institution.

Review Period

The OCC has up to 90 calendar days from the technically complete date to review a proposed director or senior executive officer (see the Glossary). The OCC notifies the bank when the notice is technically complete. The OCC normally makes that determination within 5 calendar days of receiving a notice. Unless disapproved, the nominee may assume the position when notified by the OCC.

Standards of Review

The OCC determines whether the competence, experience, character, and integrity of a candidate indicate that it would not be in the best interest of the depositors of the national bank or of the public for the candidate to be employed by or associated with the national bank. The OCC considers whether the candidate's:

- Experience and expertise are sufficient to perform the outlined duties.
- Character, trustworthiness, and honesty ensure sound national bank management.

The OCC considers not only those factors but all other relevant information necessary to evaluate a nominee.

Decision

The OCC may either disapprove or not object to a person for a director or senior executive officer position.

The confidential memorandum prepared by the OCC analyst documents each OCC decision commenting on the statutory factors and the results of any background checks. If the OCC decision is to disapprove, the confidential memorandum provides objective information showing why the competence, experience, character, or integrity of the proposed director or senior executive officer is inconsistent with the best interests of depositors or the public.

The discovery of adverse or potentially adverse information usually results in a request for additional information and a deadline for submitting a response. This date is prior to the earliest date for which the candidate may assume the position. Normally OCC staff, including a legal representative, interviews the candidate in person or by telephone to permit a response to the concerns identified. Candidates who fail to provide information or to explain adverse information adequately on or before the deadline may be disapproved.

Examples of grounds for disapproval of a proposed director or senior executive officer include, but are not limited to:

- Mismanagement of a financial institution when the proposed person had control, was a director or senior executive officer, or was in another decision-making capacity (competence).
- Significant and improper benefit from insider transactions at financial institutions with which the official was associated previously (integrity).
- Conviction of a crime (character).
- Discipline, censure, or denial of the right to do business or practice a profession by a state or federal regulatory agency or license-granting body (character).

- Submission of an inaccurate or misleading notice (integrity).
- Insufficient experience in a comparable or related position to perform adequately the duties and responsibilities of the proposed position (experience).

In addition to the statutory conditions for disapproval, a candidate may be disapproved if the OCC's investigation has been delayed by incomplete or inaccurate information or inadequate cooperation.

If the notice is technically complete but lacks pertinent information, the OCC may disapprove the candidate or consider the notice abandoned. If the notice is not technically complete, the bank must provide the missing information or the notice is considered abandoned. After that point, a new notice is required.

The OCC informs the bank and the candidate by letter of its no objection or disapproval decision. The OCC may disapprove a candidate at any time within the initial review period of up to 90 days. Nevertheless, the OCC staff renders a decision as soon as practicable. If the decision is to disapprove the person, the letter contains the statutory reason for denial (competence, experience, character, or integrity) and an explanation to support the OCC's decision. If the reason stems from background information received from an outside source, the letter may describe the nature of the information, but it will not identify the source of that information. The candidate must tell the bank of the circumstances surrounding his or her disapproval. If a decision is delayed until the last two or three days of the review period, the national bank and the nominee will be notified by telephone in addition to the letter. If the OCC decision is to disapprove, the letter is faxed or sent by overnight mail.

Waiver of Prior Notice

Consistent with the statute, the OCC may waive prior notice, but not the required filing of the notice. The bank's request explains the need for the waiver. The OCC's letter states the date of when the notice must be filed.

The OCC may waive the prior notice requirement if:

- A delay in filling the position could harm the national bank or the public interest.
- The bank has an immediate need to fill a vacancy created by a death or unanticipated resignation.
- Other extraordinary circumstances exist.

When a new director is elected at a shareholders' meeting who was not proposed by management, 12 CFR 5.51(e)(6)(ii) provides an automatic waiver of the prior notice requirement. However, the bank files a completed notice with the appropriate OCC supervisory office no later than 7 days after the election. The OCC makes a decision on the notice within 30 days of the expiration of the waiver. The time period for the waiver may vary.

Filing the Application

The insured or uninsured national bank completes a separate notice for each proposed person. The bank also encloses:

- Documentation of the bank's investigation of the proposed person, which is no less detailed than that provided in the Management Review Guidelines included in the "Background Investigations" booklet.
- A description of duties and responsibilities of the proposed person along with any proposed terms of employment, if applicable.
- Each person's biographical information (not financial information) in the Interagency Biographical and Financial Report, IRS (Internal Revenue Service) Tax Check Waiver form, and a legible fingerprint card (see the "Background Investigations" booklet).
- The filing fee.

Information in the notice should be provided as of the notice submission date. The bank and each proposed person are fully responsible for understanding the requirements and for the accuracy of the statements.

Streamlined Notices

The OCC strives to prevent unsuitable management of national banks and to maintain public confidence in the national banking system through its implementation of 12 CFR 5.51. To reduce regulatory burden when an extensive investigation is not necessary because information about the proposed director or senior executive officer is already known to the OCC, the OCC may permit a streamlined notice if:

- The candidate is currently employed in, or is an executive officer (as defined in 12 CFR 215) of, the national bank filing the notice.
- The candidate is currently employed in, or is a director of, an affiliated, federally regulated bank or parent holding company.
- A section 5.51 notice was filed on the candidate within the past three years and was not previously disapproved.

The bank contacts the supervisory office before filing a streamlined notice to determine whether the candidate qualifies for the use of that procedure. If eligible to file, the national bank submits with the notice a cover letter containing information in support of a streamlined filing. Each person completes questions 1 and 2 of the biographical portion in the Interagency Biographical and Financial Report, including the certification. Fingerprint cards and the IRS Tax Check Waiver form are not necessary. The national bank and the applicant complete the certifications.

Disclosure Requirements

For banks subject to the OCC proxy rules, the OCC's disapproval authority is a material fact that should be disclosed in proxy materials provided for the bank's annual meeting. National banks subject to section 5.51 should disclose the following:

Federal law requires that the bank furnish the OCC up to 90 days' prior notice of the proposed addition or replacement of individuals as members of the bank's board of directors, or appointment of a senior executive officer. During the 90 days following receipt by the OCC of a technically complete notice, the OCC may disapprove the director(s) or senior executive officer. Accordingly, shareholder action is contingent on whether the OCC decides to disapprove the addition or replacement of said director(s). If the OCC disapproves the proposed addition or replacement, the bank may allow shareholders the opportunity to vote on the election of an alternate director(s).

Other factors may require disclosure depending on the specifics of each case.

Penalties

A bank failing to provide prior notice before the candidate assumes the position, or to obtain a waiver of the prior notice requirement, may be subject to civil money penalties. Civil money penalties can be imposed on a bank up to \$1 million for each day the notice is not provided.

The OCC can take supervisory action against a national bank or proposed candidate who provides false or incomplete information. Deliberate misrepresentation or omission of a material fact constitutes fraud, is grounds for denial, and may subject the bank and the proposed person to criminal sanctions provided by 18 USC 1001. In addition, the OCC may assess substantial civil money penalties for willful violations. Generally, previously issued "no objections" to a proposed person will be revoked if the OCC becomes aware of material violations of law, misrepresentations, or any fraudulent activity by the proposed person prior to assuming the position. If the person has already assumed the position, the OCC may initiate removal proceedings.

Appeals

If a candidate is disapproved, the disapproval letter explains the reasons for the candidate's non-acceptance. Within 15 days of receipt of the notice of disapproval, the national bank or the disapproved candidate may submit an appeal. The appeal shall state that the reasons for disapproval are contrary to fact or insufficient to justify disapproval and have supporting documentation attached.

The Comptroller, or an authorized delegate not previously involved in the denial, evaluates and decides the appeal. The national bank or proposed person files the appeal with the Deputy Comptroller of the district that sent the letter to the bank or the person. Appeals are handled by an Assistant Deputy Comptroller. Information submitted with the original notice, gathered during the OCC review, and provided in

support of the appeal is considered. The appeal is granted and the disapproval overturned if the reasons given for the disapproval are contrary to fact or insufficient to justify the disapproval. Appeals are normally answered within 45 days.

Upon completion of the review, the Comptroller, authorized delegate, or appellate official notifies the appellant in writing of the decision. If the original decision is overturned, the person can assume the position in the bank. Otherwise, the bank can propose another person or leave the position vacant, if appropriate.

Procedures: Prior Notification

Notification of Applicability of 12 CFR 5.51

OCC Office

1. Informs national banks subject to the section 5.51 notice requirements.

Filing a Notice

Bank

2. Contacts its OCC office to:
 - Determine whether a proposed person and position are subject to the section 5.51 notice requirements.
 - Obtain and/or ask questions about forms and fingerprint cards.
 - Determine where to file the 914 notice.
 - Request a waiver of the prior notice requirement, if necessary.

OCC Office

3. Informs the national bank that instructions and section 5.51 notice forms are available on the OCC's Web site, along with the "Background Investigations" booklet. Immediately sends notice forms, fingerprint cards, and IRS Tax Check Waiver form to the bank, if necessary.
4. Reviews any waiver request and notifies the bank promptly of a decision. Consults with district counsel or district management, as necessary.

Bank

5. Completes a separate notice for each nominee and submits the original notice and the biographical portion in the Interagency Biographical and Financial Report prepared by nominee(s) to the appropriate district or Washington, DC, supervisory office. Submits an IRS Tax Check Waiver (see the "Background Investigations" booklet), and fingerprint cards with the appropriate payment.
6. Files a streamlined notice when the criteria discussed under "Streamlined Notices" are met. The bank should include a cover letter addressing why a streamlined notice is appropriate. The filing bank should discuss its qualifications to file a streamlined notice with the supervisory office prior to filing.

Processing a Notice

OCC Office

7. Establishes the official file and logs the section 5.51 notice onto the Corporate Activity Information System (CAIS).
8. Informs the Congressional Liaison Office in Washington, DC, whenever a written or telephone inquiry is received from a member of Congress or his or her representative. All congressional inquiries must be documented in the case file.
9. Forwards the filing fee and deposit memorandum (Form 6043-01) to the OCC, P.O. Box 73150, Chicago, IL 60673-7150. Retains a copy of the deposit memorandum. Contacts applicant if the filing fee is not received or is inaccurate.
10. Reviews the notice within 5 calendar days to determine technical completeness. If the notice is incomplete, provides the bank with reasons for that determination and requests any missing information.
11. Immediately forwards the fingerprint card to Headquarters Licensing for processing.
12. If a streamlined notice was submitted and is inappropriate under the circumstances, notifies the bank that the missing portions of the notice must be filed. Reminds the bank that the review period does not begin until the filing is technically complete.
13. Notifies the bank promptly when the notice is technically complete, provided that the fingerprints are legible, and when the review period expires. Records the technically complete date in CAIS.
14. Evaluates of the competence, experience, character, and integrity of the proposed person. Performs the following:
 - Reviews information provided by the candidate.
 - Requests comments from the appropriate field examiner/bank analyst.
 - Reviews relevant Supervisory Monitoring System (SMS) or Examiner View (EV) comments.
 - Conducts the standard background checks. If any of the standard background checks are waived, the reasons are documented in the file and approved by the appropriate manager.
 - Conducts discretionary background checks as necessary.
 - If the supervisory office finds material adverse information on the candidate, contacts the bank and/or candidate to allow for rebuttal or

submission of additional information. Consults legal staff promptly when disapproval is contemplated.

- Informs the bank promptly if additional information is required or if a significant background check has not been received within the review period.
15. Conducts a review and prepares a confidential memorandum. Recommendations address all statutory and supervisory factors and include the results of background checks. If disapproval is recommended, sound evidence is provided and the legal staff is contacted prior to issuing the decision.
 16. Forwards the confidential memorandum to the decision maker for signature.

Decision

Decision Maker

17. Makes a decision as soon as practicable, but no later than 90 days after receipt of a notice under delegated authority. If the notice was part of an automatic waiver for a new director, the decision must be made within 30 days of the expiration of the waiver.
18. Issues a letter of no objection or of disapproval to the bank and the candidate by the expiration date. Letters of disapproval contain the statutory reason for denial and support for that decision. If a decision is delayed until the last two or three days of the review period, the bank and the candidate are notified by telephone in addition to the letter. If the OCC decides to disapprove, the letter is faxed or sent by overnight mail. The decision-making office notifies other affected federal agencies on a case-by-case basis.

OCC Office

19. Enters decision date in EV.
20. If background checks reveal adverse information and the nominee is disapproved, enters the adverse information and disapproval into the Enforcement Action Referral System.

Closeout

OCC Office

21. Sends notice and related correspondence to the official bank file. A separate folder containing information on each section 5.51 notice is placed in File #5, Correspondence/Chronology File.

Procedures: After-the-Fact Notice

Filing a Notice

Bank

1. Fails to file the notice at least 90 days prior to the person assuming the position of director or senior executive officer. Files tardy notice with the OCC.

Processing a Notice

OCC Office

2. Accepts the tardy notice and completes steps 7 through 17 in Procedures—Prior Notification within 5 business days as if processing a timely notice.
3. Requests legal staff to determine whether civil money penalties should be pursued (refer to PPM 5000-7, Civil Money Penalty).

Decision

Decision Maker

4. Makes a decision under delegated authority.
5. By the expiration date, issues a letter of no objection or of disapproval, reporting the decision and the referral of civil money penalties to the legal staff. Letters of disapproval contain the statutory reason for denial and support for that decision. If a decision is delayed until the last two or three days of the review period, the bank and the person are notified by telephone in addition to the letter. If the OCC decides to disapprove, the letter is faxed or sent by overnight mail and followed by regular mail.
6. If the OCC disapproves the proposed person, coordinates with District Counsel and the Litigation and Enforcement and Compliance divisions.

OCC Office

7. Enters decision date in CAIS.

Closeout

OCC Office

8. Sends notice and related correspondence to the official bank file. A separate folder containing information on each section 5.51 notice is placed in File #5, Correspondence/Chronology File.

Procedures: Request from Other Agency

Processing a Request

OCC Office

1. Reviews the request for comments from the FDIC, the Federal Reserve Board, the Office of Thrift Supervision, or state agencies.
2. If the request asks for information on the candidate's experience in a national bank not supervised by the receiving district, faxes the request to the appropriate district/supervisory office for a response. If the request was sent to one or more OCC districts, the applicable districts coordinate a single response to the requesting agency.
3. Scans the information submitted for relationships and/or banking experience with a national bank or with the OCC. If the proposed person indicates current or previous association with a national bank, checks Examiner View comments for the applicable bank(s).
4. If the proposed person has not been associated with a national bank within the last five years or reports no association with a national bank, checks the Enforcement Action Report System, Financial Crimes Enforcement Network (FinCEN), and Suspicious Activity Report (SAR) systems to ensure that negative involvement with a national bank is not overlooked or omitted from the notice.
5. Requests comments from other staff (supervision, District Counsel, examining staff) as necessary.
6. If the OCC has adverse comments, drafts a comment letter, and forwards it to District Counsel for review. Forwards information to the appropriate official for signature. For "no comment" letters, documents the file and response to the other agency and forwards it for signature.

Comment

Decision Maker

7. Signs and forwards the comment letter containing a statement of confidentiality to the requesting agency. OCC documents containing derogatory or potentially derogatory information are not distributed beyond the requesting agency. (The same confidentiality is afforded to information from external sources that the OCC used as a basis for its disapproval.)

OCC Office

8. If the district tracks requests from other agencies, makes appropriate entries in CAIS.

9. Notifies the requesting agency promptly of any changes to the OCC's comments. For example, if the OCC has submitted comments or informed the requesting agency that it has no comments to submit and the proposed candidate has become the subject of an enforcement action relating to employment in a recently examined national bank, the OCC promptly notifies the requesting agency of such an occurrence.

Closeout

OCC Office

10. Sends notice and related correspondence to the supervisory office subject files once complete. This is normally within 30 days. The information must be retained for 7 years.
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Procedures: Appeal

These procedures must be performed by a person not previously involved in the decision.

Processing an Appeal

Bank/Proposed Person

1. Within 15 days of receiving notice of disapproval, requests the Deputy Comptroller to review the decision based on the information provided by those requesting an appeal and information previously available to the OCC.

OCC Appeal Official

2. Reviews information submitted with the original notice gathered during the decision process and provided by the appellant to support the appeal.
3. Determines whether the reasons for disapproval were contrary to fact or insufficient to justify the disapproval.
4. Informs the OCC's Director of Litigation of all appeals when a disapproval is upheld.

Decision

OCC Appeal Official

5. Informs the candidate/bank of the decision, normally within 45 calendar days of receipt of the appeal.

OCC Office of Appeal Official

6. Enters decision in CAIS and the Enforcement Action Referral System.

Closeout

OCC Office of Appeal Official

7. Files appeal and all related correspondence in the bank file in the supervisory office. Places all documentation in File #5, Correspondence/Chronology File. The file includes all documents submitted to the agency or generated during the appeal, including documentation of telephone calls and meetings.

Glossary

Calendar days include all seven days of the week and legal holidays.

National bank means an insured or uninsured national banking association.

Nominee is a person or candidate proposed as an officer or director in a national bank requiring a section 914 notice.

Section 914 notice is a notice filed pursuant to 12 CFR 5.51 by a bank in troubled condition, a bank not in compliance with its minimum capital requirement, or a bank that the OCC determines is subject to the filing requirements. The notice is filed with the appropriate OCC district or supervisory office for changes in directors and senior executive officers.

Senior executive officer means the chief executive officer, chief operating officer, chief financial officer, chief lending officer, chief investment officer, or any other person who the OCC identifies to the national bank who exercises significant influence over, or participates in, major policymaking decisions of the bank without regard to title, salary, or compensation. The term also includes employees of entities (such as a consulting firm) retained by a national bank to perform such functions in lieu of hiring the persons directly and, for a federal branch operated by a foreign bank, the person functioning as the chief managing official.

Technically complete notice is a notice that provides all requested information. It contains:

- The information requested in the sample Notice of a Proposed Change in Director or Senior Executive Officer, completed by the bank (if a waiver was granted to the prior notice requirement, a copy of the waiver letter is attached).
- The biographical portion in the Interagency Biographical and Financial Report completed by the person.
- A certification signed by the bank and the person.
- A legible fingerprint card.
- An Internal Revenue Service Tax Check Waiver form.
- The applicable filing fee.

Technical completeness does not imply OCC approval. The OCC may require additional information during its review.

Technically complete notice date is the date that a notice is deemed technically complete.

Troubled condition (bank):

- Has a composite rating of 4 or 5 under the Uniform Financial Institutions Rating System.

- Is subject to a cease and desist order, consent order, or a formal written agreement, unless otherwise informed in writing by the OCC.
- Is informed in writing after an examination that it is in "troubled condition" for the purpose of this section.

References

Changes in Directors and Senior Executive Officers

Laws 12 USC 1831i
Regulations 12 CFR 5.51

Civil Money Penalties

Laws 12 USC 504, 1818(l);
18 USC 1001, 1007
Issuance PPM-5000-7 (Rev.)

Financial Institutions Reform, Recovery and Enforcement Act of 1989

Law 12 USC 1831i

Officers

Regulation 12 CFR 215

Penalties

Law 18 USC 1001