

I. INTRODUCTION

Subpart F of Part 303 of the FDIC Rules and Regulations implements Section 32 of the Federal Deposit Insurance (FDI) Act and sets forth the circumstances under which an insured state nonmember institution or state savings association must notify the FDIC of any replacement or addition to its board of directors or any senior executive officers, or any change in the responsibilities of any senior executive officer, and the procedures for filing such Notice. Section 303.102(a) of the FDIC Rules and Regulations requires that an insured state nonmember institution give the FDIC written Notice (described below in *Form of Notice*, Part III), at least 30 days prior to adding or replacing any member of its board of directors, employing any person as a senior executive officer of the bank, or changing the responsibilities of any senior executive officer so that the person would assume a different senior executive officer position, if:

- (1) The bank is not in compliance with all minimum capital requirements applicable to the bank, as determined on the basis of the bank's most recent Call Report or report of examination;
- (2) The bank has been designated in troubled condition; or,
- (3) The FDIC determines, in connection with its review of a capital restoration plan required under Section 38(e)(2) of the FDI Act or otherwise, that such Notice is appropriate.

Insured branches of foreign banks: Section 303.102(b) of the FDIC Rules and Regulations states that in the case of the addition of a member of the board of directors or a change in a senior executive officer in a foreign bank having an insured state branch, the Notice requirement does not apply to additions and changes in the foreign bank parent, but only to changes in senior executive officers in the state branch.

Definitions under Section 303.101 of the FDIC Rules and Regulations:

Director - A person who serves on the board of directors or board of trustees of an insured state nonmember institution. However, a director does not include an advisory director who: (1) is not elected by the shareholders; (2) is not authorized to vote on any matters before the board of directors or any committee thereof; (3) solely provides general policy advice to the board of directors or any committee thereof; and (4) has not been identified by the FDIC as a person who performs the functions of a director for purposes of Subpart F of Part 303.

Senior executive officer - A person who holds the title of president, chief executive officer, chief operating officer, chief managing official (in an insured state branch of a foreign bank), chief financial officer, chief lending officer, or chief investment officer, or, without regard to title, salary, or compensation, performs the function of one or more of these positions. Senior executive officer also includes any other person identified by the FDIC, whether or not hired as an employee, with significant influence over, or who participates in, major policy making decisions of the insured state nonmember bank.

Troubled Condition - a state nonmember bank that:

- Has a composite rating of 4 or 5, as determined in the most recent report of examination, or an equivalent rating in the case of an insured state branch of a foreign bank, an equivalent rating;

- Is subject to a proceeding initiated by the FDIC for termination or suspension of federal deposit insurance;
- Is subject to a Cease and Desist Order, Consent Order (Order), or a written agreement issued by either the FDIC or the state banking authority that requires action to improve the financial condition of the bank, or is subject to a proceeding initiated by either agency that contemplates the issuance of an Order requiring action to improve the financial condition of the bank (unless otherwise informed in writing by the FDIC); or,
- Is informed in writing by the FDIC that it is in troubled condition for purposes of the requirements of Subpart F of Part 303 of the FDIC Rules and Regulations on the basis of the most recent Call Report or report of examination, or other information available to the FDIC.

II. WAIVER OF PRIOR NOTICE

While a prior Notice is always required for institutions subject to Section 32 of the FDI Act, there are two instances where the 30 day advanced Notice requirements can be waived. One occurs through the FDIC granting the waiver and the other is “automatic.” The following conditions must be met to warrant a waiver:

- Waiver Requests: The FDIC may permit an individual, upon petition by the bank to the appropriate Regional Director, to serve as a senior executive officer or director before filing the Notice, if the FDIC finds that: (1) delay would threaten the safety and soundness of the bank; (2) delay would not be in the public interest; or (3) other extraordinary circumstances exist that justify waiver of prior Notice. Written confirmation of the waiver should be provided to the applicant. Granting a waiver does not affect the authority of the FDIC to disapprove a Notice within 30 days after a waiver is granted.
- Automatic Waiver: In the case of the election of a new director not proposed by management at a meeting of the shareholders of a state nonmember bank, the prior 30-day Notice is automatically waived and the individual may begin serving immediately, provided that a complete Notice is filed within two business days after the individual's election. The automatic waiver does not affect the authority of the FDIC to disapprove a Notice within 30 days after the election of an individual who has filed a Notice and is serving pursuant to an automatic waiver.

III. FORM OF NOTICE

Notices are to include:

- Interagency Notice of Change in Director or Senior Executive Officer (Notice)
- Interagency Biographical and Financial Report (IBFR)
- Consent for Release of Information

Notifications of changes in senior executive officers or the board of directors must be submitted by the institution or an agent thereof, such as bank counsel. In addition to the Notice, any employment contracts must be provided to review for compliance with Part 359 of the FDIC Rules and Regulations, *Golden Parachute and Indemnification Payments*. Use of the IBFR is not mandatory; however, all of the information required by the IBFR must be submitted. The requirement to provide personal financial data may be satisfied by a current statement of assets and liabilities and an income summary. The applicant is required to submit fingerprints even if the individual is, or was recently, a director or officer of another insured institution. The

applicant will be asked to submit fingerprints via procedures established by the FDIC. Refer to Section 1.5 of these Procedures for additional information regarding fingerprinting. The Notice and IBFR are available on the external FDIC website at:

<https://www.fdic.gov/regulations/laws/forms/applications.html>.

The Notice can also be filed electronically through the FDIC's online secure information exchange. Refer to *Applications Overview*, Section 1.1 of these Procedures, for more information regarding applications filed through the secure exchange.

The FDIC may request additional information at any time while processing the application.

IV. ACCEPTING AND PROCESSING THE NOTICE

The following steps provide general guidance on processing a Notice. Refer to *Applications Overview*, Section 1.1 of these Procedures, for general information regarding receipt and acceptance of applications.¹

1. All applications are to be entered into the appropriate internal database within three business days of receipt. In all cases, dates and comments in the record should be updated regularly to reflect the current status of the application. The Case Manager should forward the Notice to Legal for review.
2. The Case Manager should promptly review the Notice upon receipt due to the statutory time limit for issuing a disapproval.
3. The Regional Office (RO) shall notify the applicant in writing of the date on which the Notice is accepted as substantially complete for processing and of the date on which the 30-day notice period will expire. The 30-day review period begins on the date the FDIC receives a substantially complete Notice. If processing cannot be completed within 30 days, the RO must advise the notificant in writing, prior to expiration of the 30-day period, of the reason for the delay in processing and of the additional time period, not to exceed 60 days, in which processing will be completed. Any extensions should be documented in the appropriate internal database.

Letters requesting comments from the OCC, FRB, and the appropriate state authority should be sent once the Notice is deemed substantially complete. A copy of the individual's employment history or resume should accompany the request for comment.

4. The Case Manager will initiate background checks through the appropriate background investigation system. FBI Fingerprint Identification and FBI Name Checks are required for all Section 32 applications. Consumer credit reports may be requested if there is a legitimate business need for the information, but such requests must be approved by Regional management (Assistant Regional Director or above). If an adverse action is taken against the notificant based, in whole or in part, on information contained in a credit report, RMS may be required to provide the notificant certain information. Refer to *Background Investigations*, Section 1.5 of these Procedures, for additional information

¹ Case Managers are to follow the general guidance and expectations for all applications regarding receipt and acceptance, recordkeeping responsibilities, DCP notifications, WO action or input, delegations, and other applicable instructions in *Applications Overview*, Section 1.1 of these Procedures.

regarding the fingerprinting process and background reviews.

5. Refer to *Section 32 Review Considerations*, Part V of this Section, for information on the review and assessment of Section 32 Notices. Assess the Notice and complete the appropriate SOI form.² Retrieve the Application Summary Statement from the appropriate internal database and attach to the SOI. The SOI narrative should address:
 - The reason for the Notice;
 - The condition of the institution;
 - The institution's compliance with BSA/AML;
 - The competence, experience, character, and integrity of the candidate; and,
 - Comments from other regulators.
6. If non-objection (approval) of the Notice is being recommended, prepare a non-objection letter to be sent to the bank, with a copy sent directly to the individual. Given the short processing timeframe, it is not uncommon that a non-objection letter will be sent prior to receipt of the FBI Name Check. However, the non-objection letter should include a non-standard condition allowing the FDIC to rescind the non-objection if the results of the background investigation warrant such action. The Case Manager must obtain the applicant's written agreement to any non-standard conditions prior to submitting the approval documents for signature. Refer to *Standard and Non-standard Conditions*, Section 1.11 of these Procedures, for further instructions.

If an employment contract, severance agreement, or other compensation agreement is contemplated in connection with the change, a sentence similar to the following should be added to the letter:

"This non-objection shall in no way be construed as approval of an employment contract, severance or other compensation agreement pursuant to Section 18(k) of the FDI Act."

However, if an application under Part 359 of the FDIC Rules and Regulations to enter into an employment agreement was processed simultaneously, the Part 359 approval and the Notice non-objection letter may be combined. Refer to Part 359 - *Golden Parachute and Indemnification Payments*, and Section 21 of these Procedures, for additional information.

Note: In the case of an after-the-fact Notice, the standard Notice acceptance and non-objection letters should be modified to reflect that the individual has already assumed a position at the institution.

7. If objection (disapproval) of the Notice is being recommended, prepare an objection letter to be sent to the bank, with a copy sent directly to the individual. The letter should be reviewed by RO Legal. Refer to *Section 32 Review Considerations*, Part V of this Section, for additional information regarding disapproval cases. Subpart L of Section 308 of the FDIC Rules and Regulations sets forth the following required content for Notice disapproval letters:

² Case Managers should follow the general instructions and a detailed discussion of SOI requirements for all types of applications found in *Summary of Investigation*, Section 1.2 of these Procedures, as well as the specific instructions in this Section.

- (1) Summarize or cite the relevant considerations specified in Section 308.152;
 - (2) Inform the individual and the bank that a request for review of the disapproval may be filed within fifteen days of receipt of the disapproval letter; and
 - (3) Specify that additional information, if any, must be contained in the request for review.
8. Update the appropriate internal database to reflect the final action, the date of the action, hours spent on the application and any other required information.

V. SECTION 32 REVIEW CONSIDERATIONS

Troubled institutions require strong, experienced management. Bankers who might perform adequately in a small composite 1- or 2-rated institution may lack the experience and skills to effectively perform in an executive capacity at a more complex or troubled institution. Similarly, individuals who have had serious financial problems may not be appropriate candidates to serve as directors or senior executive officers. While greater emphasis should be placed on the individual's qualifications to serve in a specific capacity, a review of financial information is considered valuable as it relates to, or reflects on, the individual's integrity and character.

Proposed directors and senior executive officers should reflect backgrounds of strong personal and professional financial responsibility and exemplary track records for honesty and integrity.

Case Managers must develop an opinion as to the competence, experience, character, and integrity of the proposed candidate. If the individual is, or has been, a director or senior executive officer of another insured institution, information may be available from RO supervisory records. Case Managers should contact other RO personnel, Field Supervisors, Supervisory Examiners, and prior Examiners-in-Charge to obtain information that may be helpful in assessing the candidate's suitability. If the individual's experience is at a national bank, federal savings and loan association, or state member bank, it may be advisable to contact the other agencies, particularly if there is an indication that unfavorable information may exist.

If the individual was previously associated with a failed institution, DRR should be contacted to determine whether the individual is a "person of interest." The Legal Division's Litigation and Resolutions Branch, Professional Liability and Financial Crimes Division, should be contacted to verify whether there is an ongoing investigation and to obtain any comments. Refer to Evaluating Management Associated with a Troubled or Failed Institution, in *Applications Overview*, Section 1.1 of these Procedures, for additional guidance. Case Managers should also review any material loss review, or other similar analyses, to retrieve any relevant information regarding the failure.

Background and prior experience issues that have resulted in objections include the following:³

- Individuals in key decision making positions who have limited executive level experience or who have been associated with failed financial institutions or financial institutions that are or were in troubled condition as a result of the individual's omissions or decisions.

³ Refer to Applying for Deposit Insurance - A Handbook for Organizers of De Novo Institutions.

- Individuals, singularly or through related business interests, who have a history of bankruptcy filings or defaults on obligations that have resulted in losses to insured financial institutions or the DIF, or exhibit other behaviors that indicate a lack of financial responsibility; or individuals who have been unable or unwilling to demonstrate the financial capacity to meet their personal obligations.

Notices for which Disapproval Appears Warranted

The FDIC may object to a Notice, if it finds that the competence, experience, character, or integrity of the individual subject to the Notice indicates that it would not be in the best interest of the depositors, bank or public to permit the individual to be employed by, or associated with, the bank. Disapproval of a Section 32 Notice does not exclude the individual from banking, only from the position in question.

If consideration of the facts and circumstances may result in a recommendation to object to a Notice, RO Legal should be consulted for its assessment of the basis for the non-objection. The Case Manager should also facilitate appropriate and timely discussions with the bank and the candidate to ensure that all necessary facts are obtained prior to making a decision. RO staff should also consult with WO RMS and Legal, as appropriate. The concurrence of Regional Counsel and records of all discussions and meetings should be placed in the document distribution repository and summarized in the system of record. If disapproval is the appropriate action, and if the bank and candidate elect not to withdraw the Notice, a formal letter objecting to the Notice will be issued to the bank and candidate. Refer to *Denials and Disapprovals*, Section 1.3 of these Procedures, and *Requests for Review of Notice of Disapproval*, Part VI of this Section for more information.

VI. REQUESTS FOR REVIEW OF NOTICE OF DISAPPROVAL

Pursuant to Section 308.153 of the FDIC Rules and Regulations, the bank and/or the candidate may file a Request for Review with the RO within 15 days of receipt of the Notice of Disapproval. The Request for Review must be in writing and should specify the reasons why the FDIC should reconsider its disapproval and set forth relevant, substantive and material documents, if any, that for good cause were not previously set forth in the Notice.

Upon receipt of a Request for Review, RO staff should send copies of the date-stamped Request for Review and the Notice of Disapproval file to the appropriate Section Chief (RMAS or LBS) and to the Supervision and Legislation Branch of the Legal Division. The RO should draft a memorandum that includes the RO's recommendation related to the Request for Review. The memorandum should also include support for the recommendation along with any necessary supporting documents.

The RO's recommendation is due to the WO no later than 10 days after the Request for Review is filed. A decision on the Request for Review by the RMS Director is due to the bank and candidate within 30 days of the RO's receipt of the Request for Review. If the objection is upheld, the bank and/or candidate may request a hearing of that decision by filing a request with the FDIC's Executive Secretary within 15 days after receipt of the RMS Director's decision. Refer to Sections 308.154 and 308.155 of the FDIC Rules and Regulations for additional information.

VII. TIME FRAME FOR PROCESSING THE NOTICE

Statutory: 30 days from receipt of a substantially complete Notice. If processing cannot be completed within 30 days, the RO must advise the notificant in writing, prior to expiration of the 30-day period, of the reason for the delay in processing and of the additional time period, not to exceed 60 days, in which processing will be completed. If the FDIC does not respond within 30 days of receiving a substantially complete Notice, or within 60 days if the period was extended, non-objection is automatic and the individual may commence service with the bank.

The statutory time limitation does not apply in the case of an after-the-fact Notice.

RO Processing Guideline: 25 days from receipt of a substantially complete Notice.

Note: RMS policy is to act on all applications as soon as possible and not allow the timeframe to expire.

VIII. TIME FRAME FOR PROCESSING REQUESTS FOR REVIEW

Statutory: 30 days from receipt.

Internal Processing Guideline: RO 10 days, WO 20 days.

IX. PUBLICATION REQUIREMENT

None.

X. DELEGATED AUTHORITY

Delegations of authority regarding applications, notices, and other filings are discussed in *Applications Overview*, Section 1.1 of these Procedures.

Interim delegations of authority regarding issuance of decisions pursuant to Section 308.154(b), Requests for Review of Section 32 Notices of Disapproval, may exist and should be followed accordingly.

XI. REFERENCES

Section 32 of the FDI Act

Parts 303 (Subpart F), 308 (Subpart L), 390 and 391 of the FDIC Rules and Regulations