

OCC Bulletin 2017-48: Updated Guidance on Bank Enforcement Actions

November 9, 2017

Financial Services

On October 31, 2017, the Office of the Comptroller Currency (“OCC”) released [OCC Bulletin 2017-48](#), Updated Guidance: Bank Enforcement Actions and Related Matters, updating its internal policies and procedures regarding bank enforcement actions and related matters. The update is a continuation of the OCC’s effort, following recommendations from an international peer review report in [December 2013](#), to revise its policies to promote consistency and to implement better controls of its processes.

According to the Bulletin, the OCC’s objectives were to: (1) enhance standard processes for initiating, tracking, and resolving enforcement actions; (2) ensure the agency and its business units analyze the volume and trends of enforcement actions; and (3) use consistent terms and monitoring within and across OCC business units. The update does not detail processes for determining what remediation amounts, financial penalties, and other corrective actions are appropriate in specific cases.

In issuing this update, the OCC rescinds its prior guidance, OCC Bulletin 2011-37, issued on September 9, 2011, and revises the section of the OCC’s Policies and Procedures Manual related to enforcement actions, [PPM 5310-3](#), to provide internal guidance on consistent terminology, communication, format, follow-up, analysis, documentation, and reporting of bank enforcement actions. The OCC also reflects these changes in relevant booklets of the *Comptroller’s Handbook*.¹ The updated policy will be effective on December 1, 2017.

This client alert summarizes the most significant changes to the OCC’s policies and procedures regarding bank enforcement actions and related matters. We also provide a section-by-section comparison of the OCC’s newly revised enforcement action policies and procedures to the former version of the these policies (PPM 5310-3 (REV), as updated by OCC Bulletin 2011-37 on Sept. 9, 2011) (“Former PPM”).

¹ The updates are reflected in the [“Bank Supervision Process,”](#) [“Community Bank Supervision,”](#) [“Federal Branches and Agencies Supervision,”](#) and [“Large Bank Supervision”](#) booklets.

The most notable changes include:

- Characterizing Operating Agreements and “other conditions imposed in writing” under 12 U.S.C. § 1818 as “informal” enforcement actions, even though, under the terms of § 1818, such agreements are often required to be made public;
- Creating a presumption in favor of formal enforcement actions for all 3-rated banks and not just those with a less than satisfactory management rating;
- Confirming the existence of the Major Matters Supervision Review Committee (MMSRC), which is charged with making enforcement decisions on cases that are of “heightened importance”;
- Adopting a new requirement that enforcement documents “identify the underlying basis for the enforcement action,” which means that such documents may include a more detailed description of the alleged wrongful conduct. This, in turn, could create additional exposure for banks if plaintiffs seek to rely on these descriptions;
- Shifting the timing of enforcement actions by anchoring the timeline to the start of the supervisory activity rather than the finalization of the report or rating;
- Providing more flexibility for the OCC to alter (by making them more or less severe) or exit existing enforcement actions; and
- Confirming the OCC’s current internal position that banks may not disclose informal enforcement actions (e.g., to comply with securities law obligations) without first seeking OCC approval.

The section-by-section comparison of the OCC’s newly revised enforcement action policies and procedures to the former version is set forth below.²

I. Purpose and Introduction

The OCC incorporated a new purpose statement in its Policies and Procedures Manual for enforcement actions and related matters, PPM 5310-3 (Oct. 31, 2017) (“New PPM”), reflecting its goals to provide guidance to facilitate examiners’ selection of the enforcement actions best suited to resolve a bank’s deficiencies, promote consistency across its supervisory offices, and preserve flexibility for the agency to deal with individual circumstances.³

To promote consistency and align with other policy updates,⁴ the OCC introduces the term “deficient practices” into the New PPM, defining it as “practices or lack of practices”⁵ that (1) deviate from sound governance, internal control, or risk management principles and have the

² Some details contained in the body of the Former PPM are now reflected in Appendices, including discussion relating to which enforcement action is appropriate in a particular situation and when the OCC has discretion to impose additional Prompt Corrective Action (“PCA”) restrictions. This information is substantially similar to what is contained in the Former PPM.

³ New PPM, at 1.

⁴ See, e.g., [OCC Bulletin 2017-18](#) (updating policies and procedures regarding violations of laws and regulations); [OCC Bulletin 2014-52](#) (updating policies and procedures regarding matters requiring attention).

⁵ “Practices” include a bank’s policies, procedures, processes, and controls. New PPM, at 3, fn. 5.

potential to adversely affect the bank's condition, including financial performance or risk profile, if not addressed, or (2) result in substantive noncompliance with laws or regulations, enforcement actions, or conditions imposed in writing in connection with the approval of any applications or other requests by banks. This defined term replaces the OCC's usage of other terms that were used in former guidance, including various iterations of problems, weaknesses, and deficiencies.

II. Types of Enforcement Actions

The Bulletin updates OCC policies to reflect the current list of informal and formal enforcement actions available to the OCC.

Informal Enforcement Actions

In recommending matters where examiners should consider informal enforcement action, the New PPM substantively mirrors the Former PPM by emphasizing situations where the bank's condition is sound but deficiencies have not been corrected in a timely manner.

However, the New PPM also incorporates phrasing that examiners should consider informal action when "escalation" beyond a citation of a violation or documentation of an issue in an Matter Requiring Attention (MRA) is otherwise warranted.⁶ The term "escalation" refers to the agency's ability to terminate and replace an existing enforcement action with a more comprehensive or severe action, as discussed below in Section X.⁷

Notably, the New PPM expands the list of "informal enforcement actions" to include certain enforcement actions that are required to be made public. Informal enforcement actions generally involved non-public actions, such as Commitment Letters and Memorandums of Understanding (MOUs). However, the New PPM expands the list of informal enforcement actions to include Operating Agreements,⁸ which are "written agreements" within the meaning of 12 U.S.C. § 1818, as well as "conditions imposed in writing" within the meaning of 12 U.S.C. § 1818.⁹ Both written agreements and conditions imposed in writing generally must be publicly disclosed under § 1818. However, while these agreements were not previously categorized as informal enforcement actions in the Former PPM, the substantive requirements for publicizing these agreements under § 1818 has not changed, nor has the presumption that other informal actions should remain non-public.

Formal Enforcement Actions

The New PPM recommends formal enforcement actions, all of which typically are made public, "[w]hen a bank's deficiencies are severe, uncorrected, repeat, unsafe or unsound, or negatively affect the bank's condition."¹⁰ The list continues to include "formal agreements," even though

⁶ New PPM, at 4.

⁷ New PPM, at 12; *see also* Part X.

⁸ "Operating Agreement" does not include those that relate to a bank's licensing filing (i.e., application, notice, or other request submitted to the OCC under 12 C.F.R. Part 5).

⁹ This refers only to those conditions imposed in writing outside of an approval of a bank's licensing filing.

¹⁰ New PPM, at 5.

other forms of agreements enforceable under § 1818 (e.g., Operating Agreements and conditions imposed in writing) are now considered informal. The New PPM also includes in the list of formal enforcement actions Gramm-Leach-Bliley (GLBA) Agreements pursuant to 12 C.F.R. § 5.39 (regarding financial subsidiaries of national banks) and Civil Money Penalties (CMPs).¹¹

III. Determining the Appropriate Supervisory or Enforcement Response

The New PPM now provides an expanded, non-exhaustive list of factors examiners may consider when determining the appropriate response to a bank's deficiencies, including:

- the bank's financial condition;
- its risk profile;
- the nature, extent, and severity of the bank's deficiencies;
- the extent of unsafe or unsound practices;
- the board and management's ability and willingness to correct deficiencies in a timely manner;
- potential adverse impact to bank customers, the Deposit Insurance Fund, or the public;
- the nature, extent, and severity of previously identified but uncorrected deficiencies; and
- the bank's progress with compliance with existing enforcement actions.¹²

The New PPM also emphasizes that the "severity and direction" of the bank's deficiencies, ratings, and risk levels are "crucial factors" for determining whether to use an informal or formal enforcement action.¹³

In the New PPM, the OCC retains the presumption in favor of formal enforcement actions for the following circumstances identified in the Former PPM as "significant or substantial problems or weaknesses"¹⁴:

- significant deficiencies in the bank's risk management systems, including policies, processes, and control systems;
- significant insider abuse;
- systemic or significant violations of laws or regulations;
- the board and management disregarding, refusing, or otherwise failing to correct previously identified deficiencies, including noncompliance with an existing enforcement action, failure to correct concerns communicated in MRAs, or failure to correct violations of laws or regulations; or

¹¹ *Id.*

¹² *Id.* at 6.

¹³ *Id.*

¹⁴ Former PPM, at 9.

- the board and management refusing or failing to satisfactorily maintain the bank's books and records; attempting to place unreasonable limitations on how, when, or where an examination is conducted; or imposing limits or restrictions on examiner access to the bank's personnel, books, or records.¹⁵

Notwithstanding the presumption, the New PPM adds that the OCC will exercise judgment based on the "totality of the conduct and circumstances."¹⁶ The OCC also introduces some flexibility in providing that in "certain rare circumstances," the supervisory office may replace an existing enforcement action with a "less severe" enforcement action when the circumstances warrant.¹⁷

Most notably, under the New PPM, while treatment for 1- and 2-rated banks remains substantially similar to the treatment under the Former PPM, a 3-rated bank now faces a presumption in favor of formal enforcement actions.¹⁸ In contrast, under the Former PPM, this presumption only arose when a bank was considered to have weak management or had a less than satisfactory management rating and there was uncertainty as to the willingness of the board of management to take appropriate remedial action.¹⁹ Instead, the New PPM provides that this new presumption for all 3-rated banks is "particularly strong" when either of the aforementioned weak management factors exists or when the bank is deteriorating because of declining trends in financial performance or an increasing risk profile. This reflects a marked increase in risk for 3-rated banks.

For 4- and 5-rated banks, the enforcement action policy remains similar, where the favored form of enforcement actions include Consent Orders, PCA directives, and cease and desist orders.²⁰ The OCC also removed language discussing informal enforcement actions for 4- or 5-rated banks, presumably indicating that formal enforcement actions will be the norm with such institutions.²¹

IV. Decision Authority

The OCC update acknowledges the existence of the Major Matters Supervision Review Committee (MMSRC), a committee the OCC has been using when making enforcement decisions on cases that are of "heightened importance" based on their visibility, policy sensitivity, involvement of multiple agencies, nature of the issues, or potential systemic impact.²² Assuming that the proposed enforcement action is not referred to the MMSRC, the review process remains much the same as it was under the Former PPM. Enforcement action recommendations made by the senior deputy comptrollers typically will be reviewed (depending on the nature of the proposed action and the specific institution) by the Washington Supervision

¹⁵ New PPM, at 6.

¹⁶ *Id.* at 7

¹⁷ *Id.*; see also Part X (Terminating an Enforcement Action).

¹⁸ *Id.*

¹⁹ Former PPM, at 8.

²⁰ New PPM, at 8.

²¹ Former PPM, at 9.

²² New PPM, at 8.

Review Committee (WSRC), a District Supervision Review Committee (DSRC), or a Midsize Supervision Review Committee (MSRC).²³

V. Content of Enforcement Action Documents

The New PPM adopts a new requirement that enforcement documents “identify the underlying basis for the enforcement action.”²⁴ This information must be provided in addition to previous requirements that the document explicitly guide the bank or management’s corrective actions and facilitate OCC follow-up activities; that it list any prohibited or restricted activities; and that it assign time frames for actions by the bank’s board or management.²⁵

VI. Timeliness of Enforcement Actions

The OCC update alters the required timeframe for examiners to present a proposed enforcement action to bank management. These changes appear to decrease the likelihood of prolonged examinations without closure because the New PPM anchors the timeline for the delivery of enforcement actions to the start of the supervisory activity from which those actions result rather than tying it to when examiners finalize the supervisory report or rating. Specifically, the New PPM sets forth the expectation that a proposed enforcement action, whenever possible, be presented to the bank within 180 days of the start of a supervisory activity that results in any formal written communication that:

- involves one or more of the significant deficiencies listed in the “Determining the Appropriate Supervisory or Enforcement Response” section of the New PPM;
- assigns a composite CAMELS or ROCA rating of 3, 4, or 5;
- states the bank is undercapitalized, significantly undercapitalized, or critically undercapitalized;
- states that an undercapitalized bank has failed to submit an acceptable capital restoration plan or has failed in some material respect to implement it; or
- states that the bank is in noncompliance with the safety and soundness guidelines (12 C.F.R. Part 30, Appendix A).²⁶

The Former PPM provided that such presentation should occur within 15 days following the finalization of the decision to take an enforcement action that requires the signature of the bank’s board of directors.²⁷ The New PPM also adds an approval requirement for cases extending beyond the new timeframe.²⁸

²³ *Id.*

²⁴ *Id.* at 9.

²⁵ *Id.*

²⁶ *Id.*

²⁷ Former PPM, at 12. The Former PPM specifies that actions requiring a board signature include commitment letters, MOUs, formal agreements, and cease and desist orders. *Id.*

²⁸ New PPM, at 10.

In addition, in cases involving formal orders of investigation, the New PPM requires that enforcement action recommendations be made to the appropriate reviewing committee within 90 days of completion of the investigative work.

VII. Follow-Up Activities

The New PPM changes examiners' responsibilities in regards to follow-up activities in two ways: (1) supervisory strategies must now include a specific plan for examiner follow-up (which must now include "validation" of corrective action progress); and (2) the time frame for initial and periodic follow-ups have been relaxed.

First, under the New PPM, the OCC's supervisory strategy must now include a plan for examiner follow-up, including activities to monitor progress and activities to verify and validate the effectiveness of the bank's corrective actions.²⁹ The OCC added the validation prong in this New PPM, which refers to the process by which examiners confirm the effectiveness and sustainability of corrective actions. Verification refers to the examiners' review to confirm that the bank has completed the required corrective actions.³⁰

Second, examiners now have a window of 180 days from when the enforcement action was executed to perform the initial assessment;³¹ previously, examiners had 60 days from the latest due date of any corrective action in the enforcement action.³² The OCC also built in more flexibility for itself on the periodic follow-ups following an initial assessment. Examiners must now assess compliance with an enforcement action that remains outstanding at least once within the bank's supervisory cycle, which has changed from the Former PPM's requirement of every six months.³³

VIII. Assessing Compliance with Enforcement Actions

While remaining substantially similar to the Former PPM, the OCC introduces new nomenclature for corrective actions that are not in compliance with requirements set forth in enforcement actions—articles that are "past due" and articles that are "pending validation"—and updates the categories to reflect the newly introduced validation process. Articles that are "past due" include when the bank has failed to adopt corrective actions in a timely manner or has otherwise failed to comply with corrective actions (similar to what is discussed in the Former PPM³⁴), but also now include "when examiners determine during validation that corrective actions are not effective or sustainable."³⁵ Articles that are "pending validation" refer to situations where an "insufficient time has passed for the bank to demonstrate *sustained*

²⁹ New PPM, at 10.

³⁰ *Id.*

³¹ *Id.*

³² Former PPM, at 13.

³³ Compare New PPM at 10 with Former PPM at 14. The New PPM provides an appendix which details the specific timelines for follow-up by type of enforcement actions, including certain shorter timeframes required by statute. See New PPM, App. C.

³⁴ Former PPM, at 14.

³⁵ New PPM, at 11.

performance under the corrective actions, examiners have not validated the *sustainability* of the corrective actions, or examiners determine additional testing is warranted.”³⁶

Under the Former PPM, when an examiner determined that a bank had not achieved compliance because “additional action on the part of the bank, its board, and management is required” to address corrective articles, there was a “strong presumption to take more severe action.”³⁷ This “strong presumption” for more severe action to address such failures has been removed in the New PPM.³⁸ However, it is unclear whether this modification will have material effect in practice. It is possible the OCC simply revised the language to reflect its current treatment of required corrective actions that are past due.

IX. Communicating Enforcement Action Compliance

The New PPM substantially overhauls the form by which enforcement actions will be communicated to banks, although the substance of what is communicated is similar. The New PPM requires examiners to provide written communication to the bank after completing verification or validation activities. This written communication must include:

- a table that states the status (i.e., in compliance or not in compliance) of each actionable article, as appropriate; and
- a write-up for each actionable article that includes a summary of the article’s requirements, status of the actions required, additional actions required (if applicable), and any commitment by the bank (if applicable).³⁹

The OCC offers a new template for examiners on which to provide such written communication (Appendix F) and includes three examples (Appendix G).⁴⁰ The OCC also has added a specific section on “Bank Submissions and Requests,” which requires examiners to respond to a bank’s submission within 30 days of receipt, or at least to notify the bank of receipt and pending review. Further, the New PPM confirms the OCC’s practice of requiring any requests for extensions of corrective action due dates to be in writing and made prior to the due date.⁴¹

X. Terminating an Enforcement Action

The OCC also clarifies its ability to terminate enforcement actions for both positive and negative reasons. The New PPM allows the OCC to terminate an enforcement action when the bank is in compliance with all articles of the enforcement action; the OCC determines that articles deemed “not in compliance” have become outdated or irrelevant; or the OCC incorporates the articles

³⁶ *Id.* (emphasis added).

³⁷ Former PPM, at 14.

³⁸ Compare New PPM at 11 with Former PPM at 14.

³⁹ New PPM, at 11.

⁴⁰ New PPM, App. F & App. G.

⁴¹ New PPM, at 12.

deemed “not in compliance” into a new action.⁴² Previously, the latter two circumstances were referred to as “limited exceptions.”⁴³

The New PPM also describes the OCC’s practice regarding the replacement of existing enforcement actions. While the Former PPM also allowed for the modification of enforcement actions, the New PPM introduces the term “escalation” to refer to the OCC’s ability to terminate and replace an existing enforcement action with a more comprehensive or severe action.⁴⁴ When a formal action is insufficient to achieve compliance, the New PPM also anticipates that examiners should consider additional actions, such as CMP assessments against the board or management, proceedings in federal court, or other more severe actions.⁴⁵ While in practice this may not be materially different from the OCC’s prior practice, the Former PPM stated that there was a “strong presumption” for the use of additional actions, language not used in the New PPM.⁴⁶ In addition, the New PPM explains that replacement with a less severe or less comprehensive action may be appropriate when the bank’s condition and risk profile have significantly improved and the severity of the existing enforcement action is no longer appropriate.⁴⁷

XI. Documentation in OCC’s Supervisory Information Systems

Section XI sets expectations for maintaining accurate information in the OCC’s supervisory information systems regarding each enforcement action, in an apparent effort to ensure better tracking of enforcement actions.⁴⁸ The New PPM requires the OCC’s information systems to include tracking dates and supporting documentation for most of the relevant activities of each enforcement action, such as documentation of the decision to initiate and terminate the enforcement action and descriptions of the actions examiners have taken to follow up.⁴⁹ Maintaining such information should allow for more consistent OCC enforcement activity, as well as greater adherence to these policies.

XII. Public Disclosure of Enforcement Actions

The final section of the New PPM details the public nature of certain enforcement orders. The OCC explains that it is required, by statute, to publish certain enforcement actions, such as Consent Orders, cease and desist orders, formal agreements, capital directives, PCA Directives, safety and soundness orders, and CMPs.⁵⁰ Although the New PPM states that the OCC “also makes available to the public GLBA Agreements, conditions imposed in writing, and Operating Agreements,” in fact, these documents, too, are typically required to be made public

⁴² New PPM, at 12.

⁴³ Former PPM, at 15.

⁴⁴ New PPM, at 12.

⁴⁵ *Id.* at 12–13.

⁴⁶ Former PPM, at 8.

⁴⁷ *Id.* at 13.

⁴⁸ *Id.*

⁴⁹ *Id.* at 14.

⁵⁰ *Id.*

under § 1818.⁵¹ The OCC also states that public disclosures beyond those required by law are considered on a case-by-case basis.

The New PPM also clarifies when the OCC believes it appropriate for banks to disclose enforcement orders. Banks may disclose formal enforcement actions once they have been executed without further action by the OCC, while banks are not permitted to disclose nonpublic informal actions without OCC authorization.⁵² While the Former PPM was silent on disclosure of non-public actions, the New PPM aligns with the OCC's longstanding practice of requiring banks to seek OCC authorization in accordance with 12 C.F.R. Part 4 to disclose any nonpublic informal action (e.g., to comply with the institution's obligations under the securities laws).⁵³

Concluding Thoughts

While these enforcement policies have been updated to ensure consistency across its policies and procedures, the revisions go beyond mere formalities and may provide both benefits to regulated entities as well as increased risks.

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⁵¹ *Id.*

⁵² *Id.*

⁵³ The Former PPM included a final section discussing the OCC's Problem Bank Report (PBR). Former PPM, at 16. The PBR is not discussed in the New PPM.