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## **OCC Guidance Details Expectations and Oversight of Independent Consultants for Enforcement Actions Involving Significant Violations of Law, Fraud, or Harm to Consumers**

On November 12, 2013, the Office of the Comptroller of the Currency (“OCC”) issued OCC Bulletin 2013-33, which provides guidance and establishes standards that the OCC will use when requiring banks to employ independent consultants in connection with enforcement actions. The bulletin specifically focuses on the use of independent consultants for enforcement actions addressing significant violations of law, fraud, or harm to consumers. The bulletin establishes a policy to carefully assess the need for independent consultants for a particular enforcement action, evaluate the consultant’s independence, capacity, resources and expertise, and monitor a consultant’s performance.

### **Assessment of the Need for Independent Consultants**

The guidance provides that, before issuing an enforcement action, the OCC will carefully assess whether to require a supervised institution to employ an independent consultant as part of the remediation effort. The assessment will be based on the particular facts and circumstances of each bank and will consider such factors as the severity of the violations, the criticality of the function requiring mediation, existing management’s ability to resolve issues without contracted consultants, remedial actions already taken by the bank, and alternatives to contracting with an independent consultant.

### **Evaluation of Consultant Qualifications**

Upon determination by the OCC that an enforcement action requires an independent consultant, a bank must submit a request for a written determination of supervisory no objection from the OCC that the independent consultant selected by the bank is qualified for the required remediation, is sufficiently independent from the bank, and that the terms of the engagement contract and work plan are acceptable. The guidance provides that such submission should document the bank’s due diligence in selecting the independent consultant, detailing the bank’s evaluation of the consultant’s qualification, independence, resources, expertise, capacity, reputation, information security, risk management, conflicts of interests, and financial viability.

The OCC will also assess the independence of the proposed consultant and its ability to perform work with a high level of objectivity, free from bias and based on their independent judgment. The guidance indicates that no single factor is determinative for the assessment of independence, with the exception that any direct conflict or fact that calls into question the consultant’s integrity will automatically disqualify that consultant. Beyond that, the guidance provides the following examples of factors that will be used in order to assess a consultant’s independence:

- The scope and volume of other contracts or services provided by the consultant to the bank;
- Specialized expertise of the consultant and the availability of other consultants with the requisite level of expertise;
- Proposed mitigants to address any potential conflict or appearance of a conflict;
- Financial relationships between the bank and the proposed consultant; and
- Prior employment of consultant staff by the bank.

These factors are not only insightful into the assessment processes of the OCC, but also helpful for a bank's own assessment of independent consultants. Banks should model their due diligence and evaluation practices for the employment of independent consultants with particular attention paid to the factors provided in the OCC guidance.

As part of a bank's submission to the OCC for a written determination of supervisory no objection, banks must also include the independent consultant's engagement contract and work plan. The OCC will review the two documents to ensure the terms are consistent with the requirements of the enforcement action. The guidance provides several requirements that the engagement contract and work plan must guarantee. Notably, provisions must be made to allow the OCC to privately meet or discuss issues with the independent consultant and that all disagreements on material matters between the bank and independent consultant must be brought to the OCC's attention. Banks should ensure that all requirements prescribed in the guidance are reflected in their submission to the OCC.

### **Monitoring Independent Consultant's Performance**

The guidance indicates that the OCC will play an active role in overseeing the effectiveness of independent consultants in connection with enforcement actions. The level and frequency of oversight will vary based on the individual facts and circumstances of each enforcement action and bank. In determining each individual level of oversight, the OCC will consider the nature of the deficiencies or violations the independent consultant is engaged to identify, the scope and duration of work, and the potential for and materiality of harm to consumers and the bank.

Finally, the guidance provides a verification process to identify whether the bank and independent consultants have addressed and corrected the violations or deficiencies. This will be done through a review of the independent consultant's written report of findings and recommendations to the bank's board of directors. The guidance also provides a procedure for responding to the independent consultant's final written reports and findings where further remedial actions are recommended.

OCC Bulletin 2013-33 should prove useful to bank management and banks' boards of directors in evaluating and selecting independent consultants required by enforcement actions. Importantly, the bulletin highlights that the employment of independent consultants will not absolve bank management or a bank's board of directors of their responsibility to ensure all actions required by the enforcement action are identified and implemented, and that independent consultants are not a substitute for the supervisory judgment of the OCC. However, the careful and diligent selection of independent consultants will undoubtedly promote a good relationship between the bank and the OCC and facilitate a more prompt resolution of the deficiencies or violations at their institution.

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