

Be Mindful of Change in Bank Control Act Compliance

Article By:

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Each federal banking agency has a regulation implementing the ***Change in Bank Control Act***, which essentially requires a person to file a notification with the banking agency and receive its approval prior to obtaining "control" of a bank or bank holding company. For bank holding companies, the Federal Reserve is the banking agency with which the notice is filed, and for stand-alone banks it is the bank's primary federal regulator (FDIC, Federal Reserve, or OCC). The implementing regulations of each federal agency are substantially similar.

A person is deemed to exercise "control" if the person (either alone or acting in concert with others) (1) owns 25 percent or more of any class of voting securities or (2) owns 10 percent or more of any class of voting securities, and either (i) the institution has registered securities under Section 12 of the Securities Exchange Act of 1934 or (ii) the person (or group acting in concert) is the largest shareholder. With certain exceptions, if either standard is met, the person (or group of persons acting in concert) will need to file a notice with the appropriate banking agency and seek its approval before consummating the acquisition of the shares.

It is important to note that certain shareholders are deemed to "act in concert," and their shares must be aggregated for purposes of determining whether control exists. For example, immediate family members (as defined in the regulation) are deemed to act in concert. "Immediate family" for these purposes is defined to include a person's spouse, parents, stepparents, siblings, stepsiblings, children, stepchildren, grandchildren, grandparents, father-in-law, mother-in-law, brothers-in-law, sisters-in-law, sons-in-law, daughters-in-law, and the spouse of any of the foregoing. Also, a person is deemed to act in concert with any trust for which the person acts as trustee. A company is deemed to act in concert with its controlling shareholders, partners, and management officials. It is important to capture these relationships and to aggregate such holdings to ensure that the ownership thresholds are not unintentionally exceeded.

It is sometimes easy for a child to think of his or her parent as being the controlling shareholder because the parent may own substantially more shares and have owned a large interest for a longer period of time. However, this does not factor into the analysis. Thus, if a parent owns 10 percent and is the largest shareholder and a child owns only one share, they are aggregated, and both must file a Notice of Change in Control.

Another situation in which the issue could arise is where a family member who is a controlling shareholder dies and leaves shares to his or her children or grandchildren. In this situation, the

children and grandchildren may need to file a Notice of Change in Control and receive approval. Generally, in an inheritance situation, this filing must be made within 90 days after the shares have been transferred.

We have recently been involved with several merger applications and holding company formation applications in which the banking agencies asked for a list of shareholders (or family groupings) that own 10 percent or more of the applicant's outstanding shares. The agencies then check their records to determine whether these shareholders have been approved under the Change in Bank Control Act. If their records indicate that no approval has been issued, then they require such shareholders to provide Interagency Biographical and Financial Reports and fingerprint cards (depending on the level of ownership), and these shareholders are reviewed as part of the merger or holding company application. This has the potential to slow down the merger/holding company formation application process. Further, the agencies have the authority to seek civil money penalties for violations of the Change in Bank Control Act. Our experience has been that this occurs only on the rare occasions someone intentionally seeks to avoid filing a notice in an effort to gain control. To avoid these potential issues, it is important that shareholders be mindful of the Change in Bank Control Act rules and ensure compliance before exceeding the relevant thresholds.

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