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July 28, 2008

Robert E. Feldman
Executive Secretary
Attention: Comments/Legal ESS
Federal Deposit Insurance Corporation
550 17th Street, N.W.
Washington, D.C. 20429

Re: Guidelines for Appeals of Material Supervisory Determinations

Dear Mr. Feldman:

The Independent Community Bankers of America (ICBA)[1] appreciates the opportunity to offer comments in connection with the FDIC's proposal to amend its Guidelines for Appeals of Material Supervisory Determinations. Under the present Guidelines, FDIC-supervised institutions may appeal an adverse material supervisory determination such as a downgraded examination rating or a classification regarding a loan to the FDIC's Supervisory Appeals Review Committee (SARC). The proposal would amend the Guidelines by modifying the supervisory determinations eligible for appeal.

Summary of ICBA's Position

ICBA supports an FDIC appeal process that is relatively simple to use and understand, generally unrestricted in its scope, and one that can render an appellate decision expeditiously and impartially. The FDIC's proposed changes to its Guidelines would

[1] *The Independent Community Bankers of America represents nearly 5,000 community banks of all sizes and charter types throughout the United States and is dedicated exclusively to representing the interests of the community banking industry and the communities and customers we serve. ICBA aggregates the power of its members to provide a voice for community banking interests in Washington, resources to enhance community bank education and marketability, and profitability options to help community banks compete in an ever-changing marketplace.*

With nearly 5,000 members, representing more than 20,000 locations nationwide and employing nearly 300,000 Americans, ICBA members hold $1 trillion in assets, $800 billion in deposits, and $700 billion in loans to consumers, small businesses and the agricultural community. For more information, visit ICBA's website at www.icba.org.

INDEPENDENT COMMUNITY BANKERS *of* AMERICA *The Nation's Voice for Community Banks®*
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unnecessarily restrict and complicate the SARC process and further discourage bankers from filing appeals.

ICBA believes that the list of supervisory determinations that are eligible for appeal should cover as many different issues as possible as long as the appellate process does not get overloaded or interfere with the FDIC's ability to bring formal or informal enforcement actions. The FDIC in its proposal implies that SARC appeals can impair the agency's ability to litigate or bring an enforcement action but does not spell out exactly why or give any concrete examples where SARC appeals have interfered with enforcement actions.

During this economic downturn when community banks are already experiencing tough and thorough safety and soundness exams, the FDIC should be considering ways to make the appellate process more open and easier to use. **ICBA recommends that the current guidelines not be changed as proposed until the FDIC presents compelling evidence that SARC appeals are interfering with its ability to bring enforcement actions.**

We further recommend that the FDIC consider ways to further involve the ombudsman in the SARC appeals process. From the community bank's perspective, involving the ombudsman more in the appellate process would make the process more impartial and user friendly.

Background

The Riegle Community Development and Regulatory Improvement Act of 1994 (Riegle Act) required the FDIC and the other federal banking agencies to establish an independent intra-agency appellate process to review material supervisory determinations. The term "material supervisory determinations" is defined in the Riegle Act to include determinations relating to: (1) examination ratings; (2) the adequacy of loan loss reserve provisions; and (3) classifications on loans that are significant to an institution. The Riegle Act specifically excludes from the definition of "material supervisory determinations" a decision to appoint a conservator or receiver for an insured depository institution or to take prompt corrective action. However, the Riegle Act says that the requirement to establish an appeals process shall not affect the authority of the Federal banking agencies to take enforcement or supervisory actions against an institution.

In 1994, the FDIC proposed for comment its Guidelines for Appeals of Material Supervisory Determinations. The FDIC proposed that the term "material supervisory determinations" in addition to the statutory exclusions noted above, also exclude (1) decisions to initiate formal enforcement actions under section 8 of the Federal Deposit Insurance Act, and (2) decisions to initiate informal enforcement actions such as memoranda of understanding.

After commenters suggested that the proposed limitations on determinations eligible for appeal were too restrictive, the FDIC revised its proposal and issued final Guidelines in 1995 stating that "although determinations to take prompt corrective action or initiate

formal or informal enforcement actions are not appealable, the determinations upon which such actions may be based (e.g., loan classifications) are appealable provided they otherwise qualify." Therefore, determinations underlying enforcement actions, such as the citation of apparent violations of law or regulation, have been appealable under the FDIC's Guidelines since their enactment in 1995.

FDIC's Proposal

The FDIC is now proposing that its Guidelines be amended to eliminate the ability of an FDIC-supervised institution to file an appeal to SARC with respect to (1) decisions to initiate informal enforcement actions and (2) formal enforcement-related actions and decisions, including determinations and the underlying facts and circumstances that form the basis of a recommended or pending formal enforcement action. According to the FDIC, these changes will better align the FDIC's appeals process with the appeals processes of the other Federal banking agencies. Also, since FDIC's current procedures for initiating formal enforcement actions ensure review of material supervisory determinations by high level FDIC officials, there is no need for determinations underlying formal enforcement actions to be separately reviewable by SARC.

ICBA's Position

ICBA supports an FDIC appeal process that is relatively simple to use and understand, generally unrestricted in its scope, and one that can render an appellate decision expeditiously and impartially. **Although we believe that there are some changes that the FDIC can make to its Guidelines to improve the SARC process, we believe that the proposed changes would unnecessarily restrict and complicate the SARC process and further discourage bankers from filing appeals.**

ICBA believes that the list of supervisory determinations that are eligible for appeal should cover as many different issues as possible as long as the appellate process does not get overloaded or interfere with the FDIC's ability to bring formal or informal enforcement actions. For instance, a community bank should be able to bring an appeal to SARC concerning a downgraded examination rating even though the bank has been notified that an informal enforcement action has been initiated concerning an apparent violation of a law or regulation, particularly if the citation has something to do with the loan that was reclassified. ICBA sees no reason why the SARC appeal process and the enforcement action cannot proceed contemporaneously without the one interfering with the other.

The FDIC in its proposal implies that SARC appeals can impair the agency's ability to litigate or bring an enforcement action but does not spell out exactly why or give any concrete examples where SARC appeals have interfered with enforcement actions. For instance, in the explanation of the proposal, the FDIC says that "recent SARC appeals by FDIC-supervised institutions have highlighted a situation where an appeal to the SARC is inconsistent with the intent of the Riegle Act that "the appeals process not impair, in any way, the agencies' litigation or enforcement authority." However, the FDIC does not

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elaborate on this statement or give any examples of how SARC appeals impair its ability to litigate or enforce its statutes.

The FDIC also says that since formal enforcement actions are generally reviewed at "the highest levels" of the FDIC before issuance, SARC appeals are unnecessary in these cases. However, in cases where the issues are different, a bank may want to pursue both avenues. For example, a bank may want to appeal to the highest levels of the FDIC a reclassification of a loan as well as an enforcement action involving a fair lending issue. In that case, a bank would want to pursue both a SARC appeal and an appeal to the FDIC's Board on the fair lending issue since the legal and factual issues may be completely separate.

ICBA believes a fair and impartial appeals process is now more important than ever since deposit insurance premiums depend on a bank's CAMELS ratings. Furthermore, now is not the appropriate time for the FDIC to restrict supervisory determinations that are eligible for appeal. During this economic downturn when community banks are already experiencing tough and thorough safety and soundness exams, the FDIC should consider ways to make the appellate process more open and easier to use. **ICBA recommends that the current guidelines not be changed as proposed until the FDIC presents compelling evidence that SARC appeals are interfering with its ability to bring enforcement actions**.

We further recommend that the FDIC consider ways to further involve the ombudsman in the appeals process. One possibility would be for the ombudsman to conduct an informal review of examination findings prior to the SARC process and the ombudsman would have the authority to overrule any decision made by an examiner. If the issue was not resolved by the ombudsman, then the bank would have available the more formal SARC process. From the community bank's perspective, involving the ombudsman more in the appellate process would make the process more impartial and user friendly, and could encourage banks to pursue appeals.

Conclusion

ICBA opposes the FDIC's proposed changes to its Guidelines for Appeals of Material Supervisory Determinations because they would unnecessarily restrict and complicate the SARC process, further discouraging bankers from pursuing appeals. The FDIC implies that SARC appeals can impair the agency's ability to litigate or bring and enforcement action but does not spell out exactly why or give any examples where SARC appeals have interfered with enforcement actions. Until the FDIC presents compelling evidence that SARC appeals are interfering with its ability to bring enforcement actions, ICBA recommends that the Guidelines not be changed.

We further recommend that the FDIC consider ways to further involve the ombudsman in the SARC appeals process. Involving the ombudsman more in the appellate process would make the process more impartial and user friendly, and would encourage community banks to pursue appeals.

ICBA appreciates the opportunity to offer comments in connection with the FDIC's proposed changes to its Guidelines for Appeals of Material Supervisory Determinations. If you have any questions about our letter, please do not hesitate to contact me at 202-659-8111 or Chris.Cole@icba.org.

Sincerely,

/s/ Christopher Cole

Senior Regulatory Counsel