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July 28, 2008

Mr. Robert E. Feldman
Executive Secretary
Attn: Comments/Legal ESS
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, DC 20429

Re: Docket No. E8 – 11416; Guidelines for Appeals of Material Supervisory Determinations; 73 Federal Register 30393; May 27, 2008.

Dear Mr. Feldman:

The American Bankers Association (ABA)¹ appreciates the opportunity to comment on the Federal Deposit Insurance Corporation's (FDIC) proposed amendments to the Guidelines for Appeals of Material Supervisory Determinations (Guidelines). The FDIC intends to align its Supervisory Appeals Review Committee (SARC) process with material supervisory determinations appeal procedures common among the Federal banking agencies. These amendments would eliminate the ability of FDIC-supervised institutions to file appeals with the SARC (or resolve matters already on appeal) with respect to determinations or the facts or circumstances underlying formal enforcement-related actions or decisions.

The ABA supports the FDIC's effort to create efficient and streamlined regulatory procedures, and we appreciate the opportunity to comment on the proposed changes. However, we have the following comments on the proposal:

- The proposed changes would reduce opportunities to resolve issues in a constructive manner at a time of increasing need for such opportunities. It will diminish the utility of appeals processes and force more disputes to be resolved through an adversarial enforcement process. Given the variety of regulatory issues and concerns, the FDIC should be looking for ways to encourage more dialogue with bankers about issues; unfortunately, the proposal does just the opposite.

¹ The American Bankers Association brings together banks of all sizes and charters into one association. ABA works to enhance the competitiveness of the nation's banking industry and strengthen America's economy and communities. Its members – the majority of which are banks with less than \$125 million in assets – represent over 95 percent of the industry's \$13.3 trillion in assets and employ over 2 million men and women.

- Changes to the FDIC's rules governing appeals should include additional changes that vest the FDIC Ombudsman with more authority to resolve disputes through comparatively quick and inexpensive informal appeals, similar to programs implemented by the Office of the Comptroller of the Currency and the Office of Thrift Supervision.

Purpose of SARC Appeal Process

Bankers and bank examiners alike often face questions that have no obvious correct answer. In these cases, judgment must be applied based on the best information available. Despite the best efforts and intentions of all involved, occasionally bankers will disagree with examiners or believe they have been unfairly evaluated. Moreover, in some cases, decisions and judgments are made that upon dispassionate review are just wrong. The sooner these are rectified, in the simplest manner possible, the better for all involved.

Independent review of the underlying facts, circumstances, and determinations is necessary to preserve the integrity of the regulatory system and perceived fairness of the process while maintaining a necessary level of accountability. The independent oversight of the SARC can be very helpful in ensuring consistent application of applicable rules.

SARC appeals are the final opportunity for examined institutions and the FDIC to reach an acceptable resolution outside of the arena of an enforcement action. The SARC appeal and the accompanying review of facts, determinations, and circumstances provide an institution with the opportunity to resolve matters in a process that is far less adversarial than is the case with an enforcement proceeding. While the SARC process still leaves room for more efficient resolutions (see the discussion about the Ombudsman's office, below), it is a far preferable and less intimidating forum for resolving disputes than is an enforcement action.

Concerns Arising from Proposed Amendments

The proposed revisions to the guidelines governing SARC appeals will reduce the opportunities to resolve issues outside of the enforcement context. An administrative appeal that is run through the SARC (or through the Ombudsman's office) is useful in narrowing the focus of claims and identifying with specificity the matters in dispute. This determination makes the process of achieving a constructive resolution more efficient. Disputes judged to be without merit can be easily dispensed with, thereby reducing the number of cases that wind up in enforcement actions. Early administrative reviews with comparatively quick resolutions allow the FDIC to focus resources on banks most in need of investigation, formal action, and increased supervision. Thus, rather than adopt a change that will result in more matters being resolved through enforcement actions, the FDIC should encourage more matters to be resolved through the SARC and the Ombudsman's office.²

² We recognize that some matters will require the FDIC to bring an enforcement action quickly to prevent a rapid deterioration in the condition of a bank. These circumstances should be the exception, however. The proposed rule essentially shifts the focus of dispute

If an enforcement action is deemed appropriate after those processes play out, the matter can be referred to enforcement for prompt resolution.

The proposed changes could have a chilling effect on appeals to the SARC. A bank that realizes that an appeal can be terminated by the agency initiating a formal enforcement action against the bank may well be less likely to bring a challenge. This again exerts a pressure in precisely the wrong direction by creating another reason not to pursue an appeal of an examination matter. Rather than changing the rules in a way that likely will decrease SARC appeals (due to a fear of prompting an enforcement action or investigation), the FDIC should be doing what it can to improve communication with the industry.

Recommendations for a More Efficient Appeals Process

Ombudsman's Office

The FDIC's proposal underscores the need for vesting additional authority in the FDIC's Office of Ombudsman. If disputes that currently are resolved through the SARC soon will be resolved through enforcement actions, the need for an informal, non-adversarial forum for resolving disputes becomes even greater. Thus, we reiterate a request previously submitted to the FDIC³ to increase the authority in the FDIC Ombudsman to have a more prominent role than current FDIC rules permit.

An expanded role for the Ombudsman would enhance the credibility of the examination process. Providing bankers with an opportunity for a full discussion, leading to the meaningful possibility of the Ombudsman overruling an examination finding, is likely to result in a greater understanding by both the regulator and regulated of the other's point of view. This, in turn, would result either in changes to the exam outcome or a better appreciation by the banker of the reasons for the agency's position. Either outcome is preferable to a disagreement that simply festers.

As we noted in our earlier letter, to be effective and efficient an enhanced Ombudsman's office should have the following characteristics:

- Independence. Like the SARC, the Ombudsman should operate outside the supervision area and report directly to the Chairman.
- Authority. The Ombudsman should have the right to suspend or re-evaluate any examiner decision, subject only to the final determination of the FDIC Board of Directors. The Ombudsman should have the authority to review post-exam surveys to identify trends, differences among regions and potential disputes.

resolution more towards enforcement and away from less contentious means of resolving problems with no compelling reason to do so.

³ See Letter to the Hon. Sheila Bair, Chairman, FDIC, from Wayne Abernathy, Executive Vice President, ABA, dated January 31, 2008.

- Expertise and Experience. The Ombudsman should be respected among peers and sufficiently expert to operate with the confidence of the agency and the Chairman. The Ombudsman should be a seasoned professional, such as a senior-level commissioned examiner. The Ombudsman's office should have the authority to coordinate with other FDIC experts, including lawyers, accountants or economists.
- Communication. The Ombudsman should communicate candidly and, when appropriate, confidentially with the filing institution. Once the appeal is filed, the examiner and the bank should have the opportunity to present any relevant information.
- Review. The Ombudsman should maintain regular contact with banks in order to confirm that the bank is not subject to examiner retribution. Summaries of the post-review oversight should be provided to the Chairman and the Director, Division of Supervision and Consumer Protection. When retribution is identified, the agency should take proper steps.

Permanent, Independent Review Board

If Ombudsman review does not resolve the dispute, the bank should have the opportunity to file a formal appeal. We recommend formal review be made to a permanent review board at the regional level. This regional review board should be composed of individuals who are independent from any examiner that made or reviewed the initial material supervisory determination and are outside the reporting stream of those making or reviewing the determination. As with informal appeals, there should be follow-up communications with the bank following a formal appeal to assure no examiner retribution. We believe these recommendations would not only encourage efficient operations but also preserve the integrity of a strong appeals process.

Thank you for the opportunity to comment on this important matter. Should you have any questions, please contact the undersigned at (202) 663-5333 or ddepier@aba.com.

Sincerely,

A handwritten signature in black ink, appearing to read "Denyette DePierro". The signature is fluid and cursive, with a large initial "D" and "P".

Denyette DePierro