

THE FDIC SHOULD RESTORE THE OSA OR, AT MINIMUM, SOLICIT PUBLIC VIEWS BEFORE REGRESSING TO THE SARC

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Guidelines for Appeals of Material Supervisory Determinations

Agency: Federal Deposit Insurance Corporation

Comment Period Opens: October 21, 2022

Comment Period Closes: November 21, 2022

Comment Submitted: November 8, 2022

RIN: 3064-ZA20

Document No. 2022-10904

We appreciate the opportunity to comment further concerning the actions of the Federal Deposit Insurance Corporation (FDIC) to disband the Office of Supervisory Appeal (OSA). In our comment on June 13, 2022,¹ we strongly encouraged the FDIC to restore the OSA or at least solicit public views before regressing to the Supervisory Appeals Review Committee (SARC) arrangement. Since then, the FDIC has chosen to continue its reliance on the SARC. The FDIC, however, is attempting to address issues raised within the comments received by adding amendments to its Guidelines for Appeals of Material Supervisory Determinations and is again requesting comment on the added amendments. We welcome the opportunity to comment further on the amended proposal. This comment does not represent the views of any party or special interest group. Rather, it is designed to help the FDIC as it considers how to handle its statutory obligation to provide insured depositories an effective means of appealing material supervisory decisions.

In general, although the proposed amendments are better than the current policy, they are also inadequate and fall far short of providing a more objective, fact-based appeals process overseen by an independent individual or committee. We again strongly advocate that the FDIC reestablish the OSA, which would ensure a far more objective and fair process.

1. Brian R. Knight and Thomas M. Hoenig, "The FDIC Should Restore the OSA or, at Minimum, Solicit Public Views before Regressing to the SARC" (Public Interest Comment, Mercatus Center at George Mason University, Arlington, VA, June 13, 2022).

The amended guidelines would expand the role of the ombudsman in the supervisory appeals process. Expanding the role of the ombudsman, while welcome, is a minor enhancement. Although the ombudsman's role is ostensibly to ensure the appellant is treated fairly throughout the process, this office is not fully independent and has no decision authority, except to monitor the process and report to the chair any actions thought to be exceptions within the process. The ombudsman does not have the authority to nullify the SARC's decisions. Also, as outlined in our original comment, the chair is the CEO to whom senior executives and staff report. The CEO and other executives overseeing the appeals process necessarily rely on and, therefore, generally must support staff decisions and judgements. Thus, they are hardly independent participants within the appeals process. This is a critical flaw in the SARC, which undermines public trust in the process and explains why bankers supported the introduction of the OSA as a more legitimate appeals process.

In addition, the revised guidelines would require the sharing of briefing documents among opposing parties. This would be an improvement over the past practice in which FDIC staff had access to the appellant's petition, but the appellant was not given access to staff memorandums. Such an arrangement clearly favors the staff, and this change will be welcome. However, staff continue to have a commanding advantage presenting their arguments before their own management. The OSA would end this advantage and provide a far more "arm's length" access for all parties involved in the appeal.

Finally, the revised guidelines would allow the appellant to request from the division director a stay of supervisory action or determination. This also is an improvement but does little to address the fundamental issue of independent review and objective decision-making. For example, most significant supervisory actions will have been discussed with the division director or other executive officer many times before they are initiated and ultimately approved by them. Thus, the granting of a stay would be rare, given that it would be inconsistent with decisions already made by the division director in approving or not objecting to the action under review.

The FDIC must be free to initiate supervisory actions as judged necessary to assure a safe and sound banking system. But just as importantly, the banking system expects and should be confident that it can appeal what it judges incorrect actions that a bank supervisor might initiate against it. Each party would be best served if the FDIC were willing to place its decisions before an informed and independent review board or individual. Instead, under the SARC, the FDIC is both a party to and judge of challenges to its supervisory actions, a situation that inevitably casts a shadow of doubt on the fairness of the appeal process. Therefore, we renew our call for the FDIC to restore the OSA immediately.