**FDIC** Federal Deposit Insurance Corporation

# MEMO

**TO:** The Board of Directors

**FROM:** Matthew P. Reed
General Counsel

**DATE:** January 22, 2026

**RE:** Amendments to the FDIC's Guidelines for Appeals of Material Supervisory Determinations

## Recommendation

Staff presents the attached Notice of Guidelines for consideration by the Board of Directors (Board) and requests authorization to publish it in the *Federal Register*. Through this Notice, the FDIC would generally replace the Supervision Appeals Review Committee (SARC) as the final level of review in the agency's supervisory appeals process with a standalone, independent office within the FDIC, known as the Office of Supervisory Appeals (Office).

## Background

Section 309(a) of the Riegle Community Development and Regulatory Improvement Act of 1994 (Riegle Act) required each of the Federal banking agencies to establish an independent intra-agency appellate process to review material supervisory determinations. To satisfy this requirement, the Board established the SARC and adopted *Guidelines for Appeals of Material Supervisory Determinations* (Guidelines) governing the appellate process.

In January 2021, the Board replaced the SARC with an independent, standalone office within the FDIC, staffed by reviewing officials with bank supervisory or examination experience, known as the Office of Supervisory Appeals. This office was granted delegated authority to consider and resolve appeals of material supervisory determinations. In May 2022, however, the Board disbanded this new office before it had an opportunity to consider any appeals and reconstituted the SARC and restored the SARC as the final level of review in the FDIC's supervisory appeals process.

In July 2025, the FDIC proposed to re-establish an Office of Supervisory Appeals as the final level of review of material supervisory determinations made by the FDIC, replacing the SARC in the appellate process. The proposal explained that reinstating the Office would promote and enhance the independence of the appeals process and ensure requisite expertise of reviewing officials. The structure of the proposed Office would be largely consistent with that of the Office established in 2021. The FDIC also proposed certain other enhancements to reflect its experience administering the supervisory appeals process, while maintaining current provisions regarding the timeline for the submission and review of appeals.

**Discussion of Comments and Final Guidelines**

The FDIC received eight comment letters in response to the proposal. Commenters included several trade organizations, a law firm, a public interest group, and a financial holding company. Nearly all commenters expressed support for the proposal but recommended changes to specific aspects of the proposed appellate process, as discussed below. Staff recommends adopting the Guidelines generally as proposed, with certain changes to address commenters' feedback.

*Reviewing Official Qualifications and Staffing*

Commenters generally supported the FDIC's proposal to staff the Office with reviewing officials that have bank supervisory or examination experience, as well as former bankers and other former industry professionals. One commenter suggested that the FDIC exclude individuals who lack bank supervisory or examination experience from the panel, stating that specific training and experience is necessary to make supervisory decisions.

A few commenters recommended requiring each panel to include at least one reviewing official with industry experience. These commenters suggested that ensuring a diversity of perspectives on panels would promote fairness and instill confidence in the Office's independence. Staff recommends that the final Guidelines provide that each three-member panel will include at least one reviewing official with bank supervisory or examination experience and at least one reviewing official with industry experience, generally defined as having worked at a bank or for a company that provides services to banks or banking-related services. If vacancies or the unavailability of reviewing officials (such as due to a health event) results in an inability to form a three-member panel, the FDIC Chairperson could authorize the Office to conduct business temporarily with fewer than three members, or appoint one or more reviewing officials to serve on a temporary basis, not to exceed 120 days.

A commenter suggested that the appealing institution should be provided with information about the panel members to ensure independence by allowing the appealing institution to raise any concerns about the independence of panel members. Staff recommends the final Guidelines provide that the FDIC will publish background information on the Office's reviewing officials on its website.

*Material Supervisory Determinations Eligible for Appeal*

A commenter suggested the FDIC should permit appeals of determinations relating to resolution plans, compliance with commitments and conditions imposed through supervision or application processes, and compliance with or remediation of issues covered in an informal enforcement action. Staff agrees with the suggestion to permit appeals of determinations as to compliance with informal enforcement actions, and recommends that the final Guidelines provide that such determinations are appealable. Staff also agrees that the Guidelines should permit appeals of determinations relating to compliance with conditions imposed through the supervision or application processes. Examiners' evaluation of compliance with such conditions may have important consequences for an institution and is likely material. Staff recommends that the definition of "material supervisory determination" not be expanded to include determinations relating to resolution plans. These decisions are not supervisory in nature and require different areas of expertise.

*Formal Enforcement-Related Provisions*

The FDIC received a number of comments on the provisions of the Guidelines relating to formal enforcement actions and their underlying facts and circumstances. As discussed below, most of these comments recommended different ways the FDIC should expand institutions' opportunities to appeal supervisory determinations when there is a related enforcement action.

One commenter suggested that when an institution receives notice that the FDIC is considering an enforcement action, the FDIC should provide the institution with a four-week window for the institution to challenge relevant supervisory determinations through the appeals process and pause the enforcement action until the Office has issued a decision.

Two commenters recommended that supervisory appeals should be permitted to proceed even while a formal enforcement action is being considered or pending. One of these commenters stated that formal enforcement actions cannot serve as a substitute for the supervisory appeals process because administrative law judges defer to examiners' conclusions.

Two commenters stated that the FDIC should not exclude determinations or the underlying facts and circumstances that form the basis of a recommended or pending formal enforcement action from appeal.

Two commenters suggested that the FDIC adopt a process for expedited review of determinations when appropriate, such as consequential matters or determinations that result in an institution becoming critically undercapitalized for Prompt Corrective Action purposes.

Staff believes there is value in expanding institutions' appellate rights to allow appeals in certain cases whether an enforcement action is proposed or pending. The final Guidelines would permit the facts and circumstances that form the basis for certain formal enforcement actions to be in scope for consideration by the Office as part of an appeal of a material supervisory determination. The formal enforcement action itself would not be appealable under the Guidelines; formal enforcement actions are contested through the administrative enforcement process defined by section 8 of the Federal Deposit Insurance Act.

When the FDIC provides an institution with material supervisory determinations that form the basis of certain proposed formal enforcement actions, the institution would have an opportunity to appeal the determinations. Specifically, the final Guidelines would allow the facts and circumstances underlying a proposed formal enforcement action to be in scope for appeals to the Office if the proposed enforcement action is *not* based, in whole or in part, on: (1) unsafe or unsound practices under section 8 of the Federal Deposit Insurance Act, or (2) violations of laws or regulations relating to an institution's anti-money laundering and countering the financing of terrorism (AML/CFT) program or the institution's sanctions compliance.

If an institution appeals a supervisory determination that forms the basis for a proposed formal enforcement action, the appeal would be considered on an expedited basis under a schedule determined by the Office. Generally, staff expects to delay the initiation of the enforcement action until the conclusion of the appeal, but there may be certain circumstances in which the FDIC would pursue a simultaneous enforcement action.

The final Guidelines would also require an institution subject to a potential enforcement action to sign an agreement to toll a relevant statute of limitations. If the institution fails to do so upon a request by the FDIC, the facts and circumstances underlying the enforcement action would no longer be eligible to be considered as part of an appeal.

Consistent with the current SARC Guidelines, if supervisory appeal rights are suspended due to notice of a formal enforcement action, the FDIC would need to move forward with the formal enforcement action within specified time frames or the institution's supervisory appeal rights would be reinstated. These time frames would be consistent with the time frames that currently apply to the suspension and reinstatement of appeal rights under the Guidelines.

*Burden of Proof and Standard of Review*

Commenters generally supported the standards of review and burden of proof in the proposal. One commenter was supportive of the proposed standard of review that would underscore the independence of the Office's review by specifying that the Office would not defer to the judgment of either party.

Commenters also asked for further clarification regarding the burden of proof. One commenter stated that it was consistent with appellate practice to place the burden of proof on the appealing institution, but asked that the final Guidelines clarify that the standard of proof is preponderance of evidence to align with generally accepted administrative law principles and to avoid giving undue deference to examiners' conclusions.

Two commenters believed the burden proof in appeals should be on the FDIC. One commenter believed that placing the burden of proof on the appealing institution means the appeal cannot succeed unless the examiners are clearly wrong. Another commenter stated that placing the burden of proof on the appealing institution is not required by statute and is unnecessarily prescriptive since the process is not governed by the Administrative Procedure Act or other judicial review procedure.

Under the final Guidelines, with respect to the standard of review, the Office would review the appeal for consistency with the policies (including regulations, guidance, policy statements, examination manuals, and other written publications) of the FDIC and the overall reasonableness of, and the support offered for, the positions advanced. The Office would make an independent supervisory determination and would not defer to the judgments of either party.

Staff believes that the current burden of proof is appropriate and consistent with appellate proceedings, which generally require the appellant to establish that the decision being appealed was in error. Staff does not recommend adopting a preponderance of the evidence standard in the final Guidelines. However, staff notes that the preponderance of the evidence standard is generally consistent with the Guidelines and how the SARC has historically decided appeals.

*Information Sharing Provisions*

Commenters generally supported the information sharing provisions in the proposal, which would require appeal materials submitted to the Office to be shared with an institution, subject to applicable legal limitations on disclosure, on a timely basis. However, commenters provided some suggestions to enhance transparency.

One commenter suggested the FDIC prohibit all *ex parte* communications during an appeal and require any such communications that inadvertently occur to be made available to both parties in writing on a timely basis. Staff agrees that it would be useful for the Guidelines to address any potential communication concerning an appeal that might occur, and recommends that the final Guidelines require that any *ex parte* communications concerning the substance of an appeal between the Office and supervisory staff will be shared in writing.

A commenter suggested that an appealing institution should receive any information that a State regulatory authority provides the FDIC. However, State regulators are not a party to the FDIC's appeals process and their regulatory information may be governed by a variety of State laws and rules. Staff notes that the FDIC does not have the authority to commit to disclosure of such information in all cases.

*Supervisory Stays*

One commenter supported allowing an institution to request a stay of a supervisory decision or action while a supervisory appeal is pending, but recommended that the Office, rather than the Division Director, decide the request for a stay when an appeal is pending with the Office. The commenter believed allowing the Office to decide stay requests would enhance independence. Staff believes that the Division Director should continue to decide requests for supervisory stays as the decision to grant a stay of a supervisory determination while an appeal is pending is ultimately a matter of supervisory judgment.

The same commenter suggested the FDIC lay out the basis for analyzing stay requests. Staff recommends that the final Guidelines provide that the analysis for granting stay requests will include a weighing of potential harms.

*Legal Division's Role*

Commenters expressed some concerns about the role of the FDIC's Legal Division in the proposed Guidelines. One commenter suggested that the proposal weakened the independence of the Office and made the Legal Division the ultimate appellate authority by authorizing the Legal Division to require the Office to revise its draft decisions and to decide procedural questions without providing an appealing institution with notice and opportunity to be heard.

Staff does not believe the proposed role of the Legal Division undermines the Office's independence. The Office will exercise independent judgment in deciding appeals, but should do so within the bounds of applicable laws and regulations, as well as policy established by the Board. The Legal Division's role is to ensure that the Office's decisions fall within those bounds, and as explained in the proposal, the Legal Division will not exercise supervisory judgment or opine on the merits of appeals. Staff recommends adopting this aspect of the Guidelines as proposed.

As for procedural issues, staff appreciates, however, that many procedural questions may warrant collaboration with the Office. Thus, staff recommends that the final Guidelines provide that procedural questions will be referred to the Legal Division for resolution, but also provide that the Legal Division will consult with the Office on such matters. If the Legal Division decides on a procedural request, the decision would be provided to the institution.

Another commenter focused on Legal's role in determining that an issue raised in an appeal is ineligible for review. The proposal provided that in such cases, the Legal Division would provide notice, with a written explanation, to the Office. However, for transparency, the commenter suggested that such action should be accompanied by a written determination accessible to the appealing institution. Staff agrees and recommends that the final Guidelines provide that notice and a written explanation will be provided to both the Office and the appealing institution in such cases.

*Waiver Authority*

The proposal provided that the Office, with the concurrence of the Legal Division, would have discretion to waive any provision of the Guidelines for good cause. Staff recommends tailoring this waiver authority to reflect the status of the Office as an independent office. Staff recommends allowing the Office, with the Legal Division's concurrence, to waive for good cause deadlines or procedural requirements concerning the administration of appeals. This would provide necessary flexibility to address unusual circumstances that may arise in handling appeals. Waiver authority would not, however, extend to provisions such as the qualifications of reviewing officials, the standard of review, or the types of determinations that may be appealed, which define the basic structure of the appellate process.

*Transition*

Commenters expressed a variety of views about how the FDIC should transition appellate review from the SARC to the new Office. One commenter recommended the FDIC establish the Office on an expedited basis, while another commenter recommended the FDIC provide clear communication to institutions about the transition and provide opportunities for institutions to give feedback. Staff understands that appealing institutions need clear communication regarding the transition from the SARC to the Office. Staff recommends that the FDIC notify the public of the transition once the Office is operational.

**Conclusion**

Staff recommends that the Board approve the attached Notice of Guidelines for publication in the *Federal Register*. The Guidelines would become effective upon the FDIC's Chairperson making a determination that the Office is sufficiently operational to carry out the function of considering and deciding appeals of material supervisory determinations.

**Staff Contacts**

James Watts, Counsel, 202-898-6678
Sarah Chung, Senior Attorney, 202-898-7376