

**FEDERAL DEPOSIT INSURANCE CORPORATION**

**RIN 3064–ZA50**

**Guidelines for Appeals of Material Supervisory Determinations**

**AGENCY:** Federal Deposit Insurance Corporation.

**ACTION:** Notice of guidelines; request for comments.

**SUMMARY:** The Federal Deposit Insurance Corporation (FDIC) proposes to amend its Guidelines for Appeals of Material Supervisory Determinations to replace the existing Supervision Appeals Review Committee with an independent, standalone office that would consider and decide supervisory appeals.

**DATES:** Written comments must be received by the FDIC on or before **[INSERT DATE 60 DAYS AFTER PUBLICATION IN THE *FEDERAL REGISTER*]** for consideration.

**ADDRESSES:** Interested parties are invited to submit written comments, identified by RIN 3064-ZA50, by any of the following methods:

*Agency Website:* <https://www.fdic.gov/federal-register-publications>. Follow instructions for submitting comments on the agency’s website.

*Email:* [comments@FDIC.gov](mailto:comments@FDIC.gov). Include RIN 3064-ZA50 in the subject line of the message.

*Mail:* Jennifer M. Jones, Deputy Executive Secretary, Attention: Comments - RIN 3064-ZA50, Federal Deposit Insurance Corporation, 550 17th Street, NW, Washington, DC 20429.

*Hand Delivery/Courier:* Comments may be hand-delivered to the guard station at the rear

of the 550 17th Street NW building (located on F Street NW) on business days between 7 a.m. and 5 p.m.

*Public Inspection:* Comments received, including any personal information provided, may be posted without change to <https://www.fdic.gov/federal-register-publications>.

Commenters should submit only information they wish to make available publicly. The FDIC may review, redact, or refrain from posting all or any portion of any comment that it may deem to be inappropriate for publication, such as irrelevant or obscene material.

The FDIC may post only a single representative example of identical or substantially identical comments, and in such cases will generally identify the number of identical or substantially identical comments represented by the posted example. All comments that have been redacted, as well as those that have not been posted, that contain comments on the merits of this notice will be retained in the public comment file and will be considered as required under all applicable laws. All comments may be accessible under the Freedom of Information Act.

**FOR FURTHER INFORMATION CONTACT:** James Watts, Counsel, 202-898-6678, [jwatts@fdic.gov](mailto:jwatts@fdic.gov); Sarah Chung, Senior Attorney, 202-898-7376, [schung@fdic.gov](mailto:schung@fdic.gov); Legal Division.

**SUPPLEMENTARY INFORMATION:**

The FDIC's Guidelines for Appeals of Material Supervisory Determinations (Guidelines) provide the process by which insured depository institutions (IDIs) may appeal material supervisory determinations made by the FDIC.<sup>1</sup> The Supervision Appeals Review Committee (SARC) has been the final level of review of the FDIC's material supervisory

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<sup>1</sup> 87 FR 77112 (Dec. 16, 2022).

determinations. The FDIC is proposing to revise the Guidelines to replace the SARC with an independent, standalone office within the FDIC, known as the Office of Supervisory Appeals (Office). The Office would have delegated authority to consider and resolve appeals of material supervisory determinations.

## **I. Background**

Section 309(a) of the Riegle Community Development and Regulatory Improvement Act of 1994 (Riegle Act) required the FDIC (as well as the other Federal banking agencies and the National Credit Union Administration) to establish an “independent intra-agency appellate process” to review material supervisory determinations.<sup>2</sup> The Riegle Act defines the term “independent appellate process” to mean “a review by an agency official who does not directly or indirectly report to the agency official who made the material supervisory determination under review.”<sup>3</sup> In the appeals process, the FDIC is required to ensure that (1) an IDI’s appeal of a material supervisory determination is heard and decided expeditiously; and (2) appropriate safeguards exist for protecting appellants from retaliation by agency examiners.<sup>4</sup>

The Riegle Act defines “material supervisory determinations” 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.<sup>5</sup> Expressly excluded from this definition are decisions to appoint a conservator or receiver for an IDI or to take prompt corrective action pursuant to section 38 of the Federal

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<sup>2</sup> 12 U.S.C. 4806(a).

<sup>3</sup> 12 U.S.C. 4806(f)(2).

<sup>4</sup> *See* 12 U.S.C. 4806(b).

<sup>5</sup> 12 U.S.C. 4806(f)(1)(A).

Deposit Insurance Act (FDI Act), 12 U.S.C. 1831o.<sup>6</sup> Finally, section 309(g) of the Riegle Act expressly provides 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 IDI.<sup>7</sup>

On March 21, 1995, the FDIC's Board of Directors (Board) adopted the Guidelines to implement section 309(a) and established the SARC to consider and decide appeals of material supervisory determinations.<sup>8</sup> Since that time, the SARC has been composed of FDIC Board members and other senior FDIC officials.

In January 2021, the FDIC adopted Guidelines that replaced the SARC with an independent, standalone office within the FDIC, known as the Office of Supervisory Appeals.<sup>9</sup> The Office was granted delegated authority to consider and resolve appeals of material supervisory determinations and was staffed by reviewing officials with bank supervisory or examination experience.

In May 2022, the FDIC adopted revised Guidelines that restored the SARC as the final level of review of material supervisory determinations made by the FDIC.<sup>10</sup> Based on extensive experience over many years, the FDIC believes that the Office should be reinstated in order to promote and enhance the independence of the appeals process and to ensure requisite expertise of reviewing officials.

## **II. Discussion of Guidelines**

The FDIC is proposing to establish an Office of Supervisory Appeals as the final

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<sup>6</sup> See 12 U.S.C. 4806(f)(1)(B).

<sup>7</sup> See 12 U.S.C. 4806(g).

<sup>8</sup> See 60 FR 15923 (Mar. 28, 1995).

<sup>9</sup> See 86 FR 6880 (January 25, 2021).

<sup>10</sup> See 87 FR 30942 (May 20, 2022).

level of review of material supervisory determinations made by the FDIC, replacing the SARC in the appellate process. The FDIC anticipates that the structure of the Office would be largely consistent with that of the previous Office. The FDIC is also proposing to make certain other enhancements to reflect its experience administering the supervisory appeals process, as described below. In other respects, including the timeline for the submission and review of appeals, the proposed Guidelines would be consistent with the current Guidelines.

The FDIC anticipates that an Office structure, like the one established in 2021, could provide several advantages over the existing supervisory appeals process and would address comments and concerns articulated to the FDIC. For example, creating a standalone Office to consider and resolve supervisory appeals, staffed with former industry professionals and those with bank supervisory experience, would allow the process to operate more independently and without perceived conflicts of interest. In addition, establishing the Office within the FDIC would continue to protect supervisory and confidential information while still satisfying the FDIC's statutory requirement to have an intra-agency appeals process. In addition, the proposal would ensure that individuals who decide on appeals have a deep understanding of banking and the supervisory process. These changes would facilitate a robust, independent supervisory appeals process that would be consistent over time.

#### *Structure of the Office and Reviewing Officials*

As it did in 2021, the FDIC is proposing to establish the Office as a standalone office independent of the Divisions that make supervisory determinations. The Office would be staffed by reviewing officials with relevant experience, serving on term

appointments. The Office would report directly to the FDIC Chairperson's Office and would be granted delegated authority from the Board to consider and resolve appeals.

When the FDIC previously established an Office of Supervisory Appeals, the Guidelines required that reviewing officials be individuals with bank supervisory or examination experience, such as retired bank examiners, serving on term appointments. The FDIC continues to believe direct experience with the supervisory process is highly valuable for reviewing officials. The FDIC recognizes this experience can be achieved through both government and industry experience. Furthermore, it was the FDIC's experience in 2021 that hiring only former government officials resulted in a limited pool of candidates. Thus, in addition to former government officials with supervisory experience, the FDIC will also consider former bankers and other former industry professionals with relevant experience to serve as reviewing officials. Reviewing officials, as employees of the FDIC, will be part-time, intermittent employees who have been cleared for conflicts of interest and are subject to the FDIC's requirements for confidentiality. The FDIC may also consider employees with relevant experience from other government agencies to serve as reviewing officials on a part-time basis through interagency agreement(s). Current FDIC employees will not be eligible to serve in these roles, however. Based on past experience with respect to staffing the Office, the FDIC plans to initiate the hiring process in the near term so that the Office may be fully operational as soon as the final Guidelines are in place.

When an appeal is submitted to the Office, a panel of three reviewing officials would be assigned to consider the matter. Given the value of experience with the supervisory process, at least one member of any panel would be required to have bank

supervisory experience.

### *Legal Support for the Office*

The Legal Division would provide counsel to the Office and generally advise the Office on FDIC policies and rules. To promote independence, the Office would be advised by legal staff that were not involved in making the material supervisory determinations under review.

If an appeal seeks to change or modify FDIC policies or rules, or raises a policy matter of first impression, the Legal Division would provide notice, along with a written explanation, to the Office. Afterwards, the Legal Division would refer the matter to the Chairperson's Office.

In addition, the Legal Division would review decisions of the Office for consistency with applicable laws, regulations, and policies of the FDIC prior to their issuance. If the Legal Division determines that an Office decision is contrary to a law, regulation, or FDIC policy, the Legal Division would notify the Chairperson's Office of the matter and the Office would be required to revise the decision to conform with relevant laws, regulations, or policies. The Legal Division would not exercise supervisory judgment or opine on the merits of an appeal.

If an appeal raises procedural questions, including whether issues raised by the institution are eligible for review, the appropriate Division Director or the Office would refer such questions to the Legal Division. The Legal Division would determine whether an appeal, or an issue raised in an appeal, is ineligible for review if it fails to meet the requirements in the Guidelines. The Legal Division would provide notice, with a written explanation, to the Office if an appeal, or an issue raised in an appeal, is deemed

ineligible for review.

### *Burden of Proof and Standard of Review*

The burden of proof as to all matters at issue in the appeal, including timeliness of the appeal if timeliness is at issue, would rest with the institution.

The proposed Guidelines retain the existing standard of review for the Division Director. The Division Director would review the appeal by considering whether the material supervisory determination is consistent with applicable laws, regulations, and policy, and make his or her own supervisory determination without deferring to the judgments of either party.<sup>11</sup> The Division Director would have discretion to consider examination workpapers and other materials developed by staff during an examination.

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's standard of review would align with the Division Director's standard of review. Similar to the current SARC Guidelines and the 2021 Office of Supervisory Appeals Guidelines, the Office would make an independent supervisory determination. However, unlike the current Guidelines or the 2021 Guidelines, the proposed Guidelines would specify that the Office will make its determination without deferring to the judgments of either party. This standard of review would underscore the independence of the review by the Office, subject to the reasonableness of the support for the positions advanced by both parties.

The scope of the Office's review would be limited to the facts and circumstances

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<sup>11</sup> The FDIC has previously noted that this may be considered a *de novo* standard of review, but lays out with more specificity the actual considerations to be applied. See 87 FR 64034 and 64038 (Oct. 21, 2022).



as they existed prior to, or at the time the material supervisory determination was made, even if later discovered, and no consideration would be given to any facts or circumstances that occur or corrective action taken after the determination was made. As noted above, the Office would not consider aspects of an appeal that seek to change or modify FDIC policy or rules. Therefore, the Office could not overturn a material supervisory determination if the result of such a ruling would be inconsistent with the policies of the FDIC.

#### *Formal Enforcement-Related Actions*

Section 309 of the Riegle Act, which required the establishment of an appellate process, also provides that “[n]othing in this section shall affect the authority of an appropriate Federal banking agency...to take enforcement or supervisory action.”<sup>12</sup> To clarify how the appellate and enforcement processes interact, the proposed Guidelines would retain certain provisions, summarized below, specifically addressing the appealability of formal enforcement actions and determinations underlying formal enforcement actions.

The proposed Guidelines would continue to allow institutions to appeal material supervisory determinations while preserving the FDIC’s ability to take enforcement action where appropriate. The proposed Guidelines would define “material supervisory determination” to exclude “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.” For example, if a violation of law prompts an enforcement action against an institution, neither the enforcement action nor

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<sup>12</sup> 12 U.S.C. 4806(g).

the underlying violation would be appealable through the supervisory appeals process; however, the institution could contest those matters through the administrative enforcement process.<sup>13</sup>

For purposes of the proposed Guidelines, a formal enforcement action would commence when the FDIC initiates a formal investigation, issues a notice of charges or notice of assessment, provides an institution with a draft consent order, or provides written notice that the FDIC is reviewing the facts and circumstances to determine if formal enforcement action is merited. However, a formal enforcement action would not suspend or affect a pending appeal that was previously submitted.

The FDIC has, however, encountered issues in administering these provisions of the Guidelines that it believes warrant further consideration. First, the Guidelines' enforcement-related provisions have been confusing to some institutions, leading to some uncertainty as to which determinations are subject to appeal. Second, the Guidelines provide for a piecemeal appeal in some instances by allowing an institution to appeal certain determinations within the standard timeframes established by the Guidelines and others only after a decision is made on the enforcement action. Third, in many instances, the facts underlying an enforcement action are relevant factors to other material supervisory determinations (such as ratings downgrades), but an institution that wants to appeal such determinations is unable to include such facts as part of the record in an appeal. Finally, the FDIC is concerned that because many enforcement actions result in a stipulated order, an institution may not receive an independent review of some

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<sup>13</sup> In some instances, a determination such as an examination rating might depend in part upon determinations that form the basis for a formal enforcement action. In such cases, the institution may still appeal the rating on grounds other than those that form the basis of the formal enforcement action.

supervisory determinations. Accordingly, the FDIC requests comment on the provisions of the proposed Guidelines relating to formal enforcement-related actions and decisions and how they might be addressed in the context of material supervisory determinations that an institution seeks to appeal.

#### *Role of the Ombudsman*

The Ombudsman currently serves as a non-voting member of the SARC. The Ombudsman serves as a neutral liaison between the FDIC and institutions, as provided by section 309 of the Riegle Act.<sup>14</sup> Because the FDIC sees value in the Ombudsman's perspective, the proposed Guidelines would allow the Ombudsman to submit views to the panel for consideration. In addition, consistent with the current Guidelines, the proposed Guidelines would retain provisions regarding the Ombudsman's neutral oversight of the process and to monitor the supervisory process for retaliation.

#### *Ex Parte Communications*

The current Guidelines include a provision on sharing of information, requiring that information considered by the SARC be timely shared with both parties to the appeal, subject to applicable legal limitations on disclosure. In light of the Office structure and the roles defined in the proposed Guidelines, this provision would apply to materials submitted to the Office by either the relevant Division or the appealing institution. The Ombudsman would also oversee the sharing of information considered by the Office in connection with an appeal.

#### *Transition Period*

Until the Office is fully operational, the current Guidelines will continue to apply,

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<sup>14</sup> See 12 U.S.C. 4806(d).

and all appeals of Division Directors' decisions will be reviewed by the SARC.

Transition from SARC to the Office will occur when the Office is fully operational, which will occur upon or following issuance of the final revised Guidelines.

#### *Request for Comment*

The FDIC is requesting comment on all aspects of the proposed Guidelines, including the provisions relating to formal enforcement-related actions as explained above.

#### *Regulatory Review*

The Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget has reviewed this proposal and determined that it does not constitute a "significant regulatory action" for purposes of Executive Order 12866.

For the reasons set out in the preamble, the Federal Deposit Insurance Corporation's Board of Directors proposes to adopt the Guidelines for Appeals of Material Supervisory Determinations as set forth below.

### **Guidelines for Appeals of Material Supervisory Determinations**

#### *A. Introduction*

Section 309(a) of the Riegle Community Development and Regulatory Improvement Act of 1994 (Public Law No. 103-325, 108 Stat. 2160) (Riegle Act) required the Federal Deposit Insurance Corporation (FDIC) to establish an independent intra-agency appellate process to review material supervisory determinations made at insured depository institutions that it supervises. The Guidelines for Appeals of Material Supervisory Determinations (Guidelines) describe the types of determinations that are

eligible for review and the process by which appeals will be considered and decided.

#### *B. Reviewing Officials*

The Office of Supervisory Appeals (Office) will be staffed with reviewing officials, hired for terms, who have bank supervisory or examination experience or other relevant experience. Reviewing officials will consider and decide appeals submitted to the Office in panels of three reviewing officials selected by the Office who have no conflicts of interest with respect to the appeal or the parties to the appeal. At least one reviewing official on a panel will have bank supervisory experience. Current government employees with relevant experience may serve on a part-time basis. However, current FDIC employees are not eligible.

#### *C. Institutions Eligible to Appeal*

The Guidelines apply to the insured depository institutions that the FDIC supervises (i.e., insured State nonmember banks, insured branches of foreign banks, and state savings associations), and to other insured depository institutions for which the FDIC makes material supervisory determinations.

#### *D. Determinations Subject to Appeal*

An institution may appeal any material supervisory determination pursuant to the procedures set forth in these Guidelines.

(1) Material supervisory determinations include:

- (a) CAMELS ratings under the Uniform Financial Institutions Rating System;
- (b) IT ratings under the Uniform Rating System for Information Technology;
- (c) Trust ratings under the Uniform Interagency Trust Rating System;
- (d) CRA ratings under the Revised Uniform Interagency Community

Reinvestment Act Assessment Rating System;

(e) Consumer compliance ratings under the Uniform Interagency Consumer Compliance Rating System;

(f) Registered transfer agent examination ratings;

(g) Government securities dealer examination ratings;

(h) Municipal securities dealer examination ratings;

(i) Determinations relating to the appropriateness of loan loss reserve provisions;

(j) Classifications of loans and other assets in dispute the amount of which, individually or in the aggregate, exceeds 10 percent of an institution's total capital;

(k) Determinations relating to violations of a statute or regulation, including the severity of a violation, that may affect the capital, earnings, or operating flexibility of an institution, or otherwise affect the nature and level of supervisory oversight accorded an institution;

(l) Truth in Lending Act (Regulation Z) restitution;

(m) Filings made pursuant to 12 CFR 303.11(f), for which a request for reconsideration has been granted, other than denials of a change in bank control, change in senior executive officer or board of directors, or denial of an application pursuant to section 19 of the Federal Deposit Insurance Act (FDI Act), 12 U.S.C. 1829 (which are contained in 12 CFR part 308, subparts D, L, and M, respectively), if the filing was originally denied by the Director, Deputy Director, or Associate Director of the Division of Depositor and Consumer Protection (DCP) or the Division of Risk Management Supervision (RMS);

(n) Decisions to initiate informal enforcement actions (such as memoranda of

understanding);

(o) Determinations regarding the institution's level of compliance with a formal enforcement action; however, if the FDIC determines that the lack of compliance with an existing formal enforcement action requires an additional formal enforcement action, the proposed new enforcement action is not appealable;

(p) Matters requiring board attention; and

(q) Any other supervisory determination (unless otherwise not eligible for appeal) that may affect the capital, earnings, operating flexibility, or capital category for prompt corrective action purposes of an institution, or that otherwise affects the nature and level of supervisory oversight accorded an institution.

(2) Material supervisory determinations do not include:

(a) Decisions to appoint a conservator or receiver for an insured depository institution, and other decisions made in furtherance of the resolution or receivership process, including but not limited to determinations pursuant to 12 CFR parts 370, 371, and 381, and 12 CFR 360.10 of the FDIC's rules and regulations;

(b) Decisions to take prompt corrective action pursuant to section 38 of the FDI Act, 12 U.S.C. 1831o;

(c) Determinations for which other appeals procedures exist (such as determinations of deposit insurance assessment risk classifications and payment calculations); and

(d) 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.

(3) A formal enforcement-related action or decision commences, and becomes unappealable, when the FDIC initiates a formal investigation under 12 U.S.C. 1820(c) (Order of Investigation), issues a notice of charges or a notice of assessment under 12 U.S.C. 1818 or other applicable laws (Notice of Charges), provides the institution with a draft consent order, or otherwise provides written notice to the institution that the FDIC is reviewing the facts and circumstances presented to determine if a formal enforcement action is merited under applicable statutes or published enforcement-related policies of the FDIC, including written notice of a referral to the Attorney General pursuant to the Equal Credit Opportunity Act (ECOA) or a notice to the Secretary of Housing and Urban Development (HUD) for violations of ECOA or the Fair Housing Act (FHA). Such notice may be provided in the transmittal letter accompanying a Report of Examination. For the purposes of these Guidelines, remarks in a Report of Examination do not constitute written notice that the FDIC is reviewing the facts and circumstances presented to determine if a proposed enforcement action is merited. Commencement of a formal enforcement-related action or decision will not suspend or otherwise affect a pending request for review or appeal that was submitted before the commencement of the formal enforcement-related action or decision.

(4) Additional appeal rights:

(a) In the case of any written notice from the FDIC to the institution that the FDIC is determining whether a formal enforcement action is merited, the FDIC must issue an Order of Investigation, issue a Notice of Charges, or provide the institution with a draft consent order within 120 days of such a notice, or the most recent submission of information from the institution, whichever is later, or appeal rights will be made



available pursuant to these Guidelines. If the FDIC timely provides the institution with a draft consent order and the institution rejects the draft consent order in writing, the FDIC must issue an Order of Investigation or a Notice of Charges within 90 days from the date on which the institution rejects the draft consent order in writing or appeal rights will be made available pursuant to these Guidelines. The FDIC may extend these periods, with the approval of the FDIC Chairperson, after the FDIC notifies the institution that the relevant Division Director is seeking formal authority to take an enforcement action.

(b) In the case of a referral to the Attorney General for violations of the ECOA, beginning on the date the referral is returned to the FDIC, the FDIC must proceed in accordance with paragraph (a) of this section, including within the specified timeframes, or appeal rights will be made available pursuant to these Guidelines.

(c) In the case of providing notice to HUD for violations of the ECOA or the FHA, beginning on the date the notice is provided, the FDIC must proceed in accordance with paragraph (a) of this section, including within the specified timeframes, or appeal rights will be made available pursuant to these Guidelines.

(d) Written notification will be provided to the institution within 10 days of a determination that appeal rights have been made available under this section.

(e) The relevant FDIC Division and the institution may mutually agree to extend the timeframes in paragraphs (a), (b), and (c) of this section if the parties deem it appropriate.

#### *E. Good-Faith Resolution*

An institution should make a good-faith effort to resolve any dispute concerning a material supervisory determination with the on-site examiner and/or the appropriate

Regional Office. The on-site examiner and the Regional Office will promptly respond to any concerns raised by an institution regarding a material supervisory determination.

Informal resolution of disputes with the on-site examiner and the appropriate Regional Office is encouraged, but seeking such a resolution is not a condition to filing a request for review with the appropriate Division, either DCP, RMS, or the Division of Complex Institution Supervision and Resolution (CISR), or to filing a subsequent appeal with the Office under these Guidelines. An institution may also avail itself of the Ombudsman to attempt to reach an agreeable outcome.

*F. Filing a Request for Review with the Appropriate Division*

(1) An institution may file a request for review of a material supervisory determination with the Division that made the determination, either the Director, DCP, the Director, RMS, or the Director, CISR (Director or Division Director), 550 17th Street NW, Room F-4076, Washington, DC 20429, within 60 calendar days following the institution's receipt of a report of examination containing a material supervisory determination or other written communication of a material supervisory determination. Requests for review also may be submitted electronically. To ensure confidentiality, requests should be submitted through [securemail.fdic.gov](mailto:securemail.fdic.gov), directing the message to [DirectorReviewRequest@fdic.gov](mailto:DirectorReviewRequest@fdic.gov). A request for review must be in writing and must include:

(a) A detailed description of the issues in dispute, the surrounding circumstances, the institution's position regarding the dispute and any arguments to support that position (including citation of any relevant statute, regulation, policy statement, or other authority), how resolution of the dispute would materially affect the institution, and

whether a good-faith effort was made to resolve the dispute with the on-site examiner and the Regional Office; and

(b) A statement that the institution's board of directors or senior management has considered the merits of the request and has authorized that it be filed. Senior management is defined as the core group of individuals directly accountable to the board of directors for the sound and prudent day-to-day management of the institution. If an institution's senior management files an appeal, it must inform the board of directors of the substance of the appeal before filing and keep the board of directors informed of the appeal's status.

(2) Within 45 calendar days after receiving a request for review described in paragraph (1) of this section, the Division Director will:

(a) Review the appeal, considering whether the material supervisory determination is consistent with applicable laws, regulations, and policy, make his or her own supervisory determination without deferring to the judgments of either party, and issue a written determination on the request for review, setting forth the grounds for that determination; or

(b) Refer the request for review to the Office for consideration as an appeal under Section G and provide written notice to the institution that the request for review has been referred to the Office.

(3) No appeal to the Office will be allowed unless an institution has first filed a timely request for review with the appropriate Division Director.

(4) In any decision issued pursuant to paragraph (2)(a) of this section, the Director will inform the institution of the 30-day time period for filing with the Office and will

provide the mailing address for any appeal the institution may wish to file.

(5) The Division Director may request guidance from the Legal Division as to procedural or other questions relating to any request for review.

#### *G. Appeal to the Office*

An institution that does not agree with the written determination rendered by the Division Director may appeal that determination to the Office within 30 calendar days after the date of receipt of that determination. Failure to file within the 30-day time limit may result in denial of the appeal by the Office.

##### **1. Filing with the Office**

An appeal to the Office will be considered filed if the written appeal is received by the FDIC within 30 calendar days after the date of receipt of the Division Director's written determination or if the written appeal is placed in the U.S. mail within that 30-day period. The appeal should be sent to the address indicated on the Division Director's determination being appealed, or sent via e-mail to [ESS\\_Appeals@fdic.gov](mailto:ESS_Appeals@fdic.gov). An acknowledgment of the appeal will be provided to the institution, and copies of the institution's appeal will be provided to the Office of the Ombudsman and the appropriate Division Director. Copies of all relevant materials related to an appeal will be provided to the Office of the Ombudsman.

##### **2. Contents of Appeal**

The appeal should be labeled to indicate that it is an appeal to the Office and should contain the name, address, and telephone number of the institution and any representative, as well as a copy of the Division Director's determination being appealed. If oral presentation is sought, that request should be included in the appeal. If expedited

review is requested, the appeal should state the reason for the request. Only matters submitted to the appropriate Division Director in a request for review may be appealed to the Office. Evidence not presented for review to the Division Director is generally not permitted; such evidence may be submitted to the Office only if approved by the reviewing panel and with a reasonable time for the Division Director to review and respond. The institution should set forth all of the reasons, legal and factual, why it disagrees with the Division Director's determination. Nothing in this appellate process shall create any discovery or other such rights.

### 3. Burden of Proof

The burden of proof as to all matters at issue in the appeal, including timeliness of the appeal if timeliness is at issue, rests with the institution.

### 4. Submission from the Division Director

The Ombudsman and the Division Director may submit views regarding the appeal to the Office within 30 calendar days of the date on which the appeal is received by the Office.

### 5. Oral Presentation

The Office will, if a request is made by the institution or by FDIC staff, allow an oral presentation. The panel may hear oral presentations in person, telephonically, electronically, or through other means agreed upon by the parties. If an oral presentation is held, the institution and FDIC staff will be allowed to present their positions on the issues raised in the appeal and to respond to any questions from the panel.

### 6. Consolidation, Dismissal, and Rejection

Appeals based upon similar facts and circumstances may be consolidated for

expediency. An appeal may be dismissed by the Office if it is not timely filed, if the basis for the appeal is not discernable from the appeal, or if the institution moves to withdraw the appeal. The Office will decline to consider an appeal if the institution's right to appeal is not yet available under section D(4), above.

#### 7. Scope of Review and Decision

The panel will be an appellate body and will make independent supervisory determinations. The panel will 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 panel will make its own supervisory determination without deferring to the judgments of either party. The panel's review will be limited to the facts and circumstances as they existed prior to, or at the time the material supervisory determination was made, even if later discovered, and no consideration will be given to any facts or circumstances that occur or corrective action taken after the determination was made. The panel will not consider any aspect of an appeal that seeks to change or modify existing FDIC rules or policy, and may not overturn a material supervisory determination if the result of such a ruling would be inconsistent with the policies of the FDIC. The panel will notify the institution, in writing, of its decision concerning the disputed material supervisory determination(s) within 45 days after the date the panel meets to consider the appeal, which meeting will be held within 90 days after either the date of the filing of the appeal or the date that the Division Director refers the appeal to the Office.

#### 8. Role of the Legal Division

The Legal Division will provide counsel to the Office and generally advise the Office on FDIC policies and rules. If an appeal seeks to change or modify FDIC policies or rules, or raises a policy matter of first impression, the Legal Division will provide notice, along with a written explanation, to the Office, and then, after such notice is provided, refer the matter to the Chairperson's Office.

The Legal Division will review decisions of the Office for consistency with applicable laws, regulations, and policies of the FDIC prior to their issuance. If the Legal Division determines that a decision is contrary to a law, regulation, or policy of the FDIC, the Legal Division will notify the Chairperson's Office of the matter and the Office will revise the decision to conform with relevant laws, regulations, or policies.

If an appeal raises procedural questions, including whether issues raised by the institution are eligible for review, the appropriate Division Director or the Office will refer such matters to the Legal Division. The Legal Division may determine whether an appeal, or an issue raised in an appeal, is ineligible for review if it fails to meet the requirements in the Guidelines. The Legal Division will provide notice, with a written explanation, to the Office if an appeal, or an issue raised in an appeal, is deemed ineligible for review.

#### 9. Sharing of Appeal Materials

Materials concerning an appeal submitted to the Office by either the relevant Division or an appealing institution will be shared with the other party to the appeal, subject to applicable legal limitations on disclosure, on a timely basis. The Ombudsman will verify that both parties have received these materials.

#### *H. Publication of Decisions*

Decisions of the Office will be published as soon as practicable, and the published

decisions will be redacted to avoid disclosure of the name of the appealing institution and any information exempt from disclosure under the Freedom of Information Act and the FDIC's document disclosure regulations found in 12 CFR part 309. In cases in which redaction is deemed insufficient to prevent improper disclosure, published decisions may be presented in summary form. Published SARC or Office decisions may be cited as precedent in appeals to the Office. Annual reports on the Office's decisions and Division Directors' decisions with respect to institutions' requests for review of material supervisory determinations also will be published.

#### *I. Appeal Guidelines Generally*

Appeals to the Office will be governed by these Guidelines. The Office, with the concurrence of the Legal Division, will retain discretion to waive any provision of the Guidelines for good cause. Supplemental rules governing the Office's operations may be adopted.

Institutions may request extensions of the time period for submitting appeals under these Guidelines from either the appropriate Division Director or the Office, as appropriate. If a filing under these Guidelines is due on a Saturday, Sunday, or a Federal holiday, the filing may be made on the next business day.

Institutions may request a stay of a supervisory action or determination from the Division Director while an appeal of that determination is pending. The request must be in writing and include the reason(s) for the stay. The Division Director has discretion to grant a stay and will generally decide whether to grant a stay within 21 days of receiving the institution's request, providing the institution with the reason(s) for his or her decision in writing. A stay may be granted subject to conditions, including time limitations, where



appropriate.

#### *J. Limitation on Agency Ombudsman*

Except as otherwise provided by these Guidelines, the subject matter of a material supervisory determination for which either an appeal to the Office has been filed, or a final Office decision issued, is not eligible for consideration by the Ombudsman.

#### *K. Coordination with State Regulatory Authorities*

In the event that a material supervisory determination subject to a request for review is the joint product of the FDIC and a State regulatory authority, the Director, DCP, the Director, RMS, or the Director, CISR, as appropriate, will promptly notify the appropriate State regulatory authority of the request, provide the regulatory authority with a copy of the institution's request for review and any other related materials, and solicit the regulatory authority's views regarding the merits of the request before making a determination. In the event that an appeal is subsequently filed with the Office, the Office will notify the institution and the State regulatory authority of its decision. Once the Office has issued its determination, any other issues that may remain between the institution and the State regulatory authority will be left to those parties to resolve.

#### *L. Effect on Supervisory or Enforcement Actions*

The use of the procedures set forth in these Guidelines by any institution will not affect, delay, or impede any formal or informal supervisory or enforcement action in progress during the appeal or affect the FDIC's authority to take any supervisory or enforcement action against that institution.

#### *M. Effect on Applications or Requests for Approval*

Any application or request for approval made to the FDIC by an institution that

has appealed a material supervisory determination that relates to, or could affect the approval of, the application or request will not be considered until a final decision concerning the appeal is made unless otherwise requested by the institution.

*N. Prohibition on Examiner Retaliation*

FDIC policy prohibits any retaliation, abuse, or retribution by an agency examiner or any FDIC personnel against an institution. Such behavior against an institution that appeals a material supervisory determination constitutes unprofessional conduct and will subject the examiner or other personnel to appropriate disciplinary or remedial action. In light of this important principle, the Ombudsman will monitor the supervision process following an institution's submission of an appeal under these Guidelines. The Ombudsman will report to the Board on these matters periodically.

Institutions that believe they have been retaliated against are encouraged to contact the Regional Director for the appropriate FDIC region. Any institution that believes or has any evidence that it has been subject to retaliation may file a complaint with the Director, Office of the Ombudsman, Federal Deposit Insurance Corporation, 3501 Fairfax Drive, Suite E-2022, Arlington, Virginia, 22226, explaining the circumstances and the basis for such belief or evidence and requesting that the complaint be investigated and appropriate disciplinary or remedial action taken. The Office of the Ombudsman will work with the appropriate Division Director to resolve the allegation of retaliation.

Federal Deposit Insurance Corporation.  
By order of the Board of Directors.  
Dated at Washington, DC, July 15, 2025.  
**Jennifer M. Jones,**  
*Deputy Executive Secretary.*