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September 16, 2025

VIA E-MAIL (COMMENTS@FDIC.GOV)

Jennifer M. Jones
Deputy Executive Secretary
Federal Deposit Insurance Corporation
550 17th Street NW
Washington, D.C. 20429

**Re: Proposed Guidelines for Appeals of Material Supervisory Determinations
(RIN 3064-ZA50)**

Dear Ms. Jones:

This Firm has substantial experience with the appeals processes of the FDIC and the other prudential banking regulators. We respectfully submit the following comments in response to the FDIC's July 18, 2025 notice of proposed Guidelines for Appeals of Material Supervisory Determinations (the "Proposed Guidelines").¹

First, the Proposed Guidelines specify that at least one member of each reviewing panel will have bank supervisory experience.² While this makes sense, we respectfully submit that at least one member of each reviewing panel also should have experience as a banker or other industry professional. Requiring a diversity of backgrounds and experience on the reviewing panels can only strengthen the appeals process and enhance reasoned decision-making.

Second, the Proposed Guidelines would weaken the independence of the new Office of Supervisory Appeals ("Office") by effectively making the FDIC Legal Division the ultimate

¹ Guidelines for Appeals of Material Supervisory Determinations, 90 Fed. Reg. 33,942 (proposed July 18, 2025).

² *Id.* at 33,945.

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appellate authority. Specifically, they would authorize the FDIC Legal Division to: 1) require the Office to revise its draft decisions; and 2) decide procedural questions.³ All of this would apparently be done in secret, without providing notice and an opportunity to be heard to an appealing depository institution.⁴

The proposed role of the Legal Division in the new process is inappropriate, particularly if the FDIC wishes the new Office to be trusted as an independent appellate authority.⁵ The new Office should be the highest appellate authority⁶ and should itself decide all procedural issues. Moreover, nothing should be submitted to the Office in secret by the FDIC Legal Division, without notice to an appealing depository institution and an opportunity for it to respond.

Third, if any materials submitted to the Office by the FDIC Division that made the determination appealed (or the FDIC Legal Division, as applicable) are withheld from the appealing depository institution due to “applicable legal limitations on disclosure,”⁷ a privilege log should be provided to the appealing depository institution. This privilege log should provide information, such as document title, document date, document type, author(s), recipient(s), document description, and asserted privilege basis (e.g., attorney-client privilege), that would allow the appealing depository institution to understand what has been withheld and the purported legal basis for such withholding. Otherwise, if such material is incorrectly withheld, the appealing depository institution would be unable to challenge the improper withholding because it would remain unaware that anything had been withheld.

Fourth, the Proposed Guidelines provide (just as was proposed in 2020 and briefly adopted) that, unless the FDIC issues an order of investigation, notice of charges, or draft consent order, appeal rights resume 120 days after the FDIC notifies a depository institution in writing that it is determining whether a formal enforcement action is merited.⁸ Similarly, unless the FDIC issues an order of investigation or notice of charges after an institution rejects a draft consent order, appeal rights resume within 90 days.⁹ But the FDIC can extend these periods indefinitely, and

³ *Id.* at 33,948.

⁴ *See id.*

⁵ The proposed role of the Legal Division also is potentially violative of the Section 309(a) of the Riegle Community Development and Regulatory Improvement Act of 1994 (“Riegle Act”). *See* 12 U.S.C. § 4806(a) (requiring the FDIC to “establish an *independent* intra-agency appellate process” (emphasis added)).

⁶ Alternatively, if the new independent Office is not to be the highest appellate authority, it should be an intermediate appellate authority, with the SARC or another non-independent FDIC body or person(s) continuing to serve as the highest appellate authority. This would provide a depository institution that is not successful before the independent Office with an additional, third level of appeal.

⁷ 90 Fed. Reg. at 33,948.

⁸ *Id.* at 33,946.

⁹ *Id.*

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thereby indefinitely block the filing of an appeal, if it notices a depository institution that the relevant FDIC Division Director is seeking formal authority to take an enforcement action.¹⁰

We reiterate the comments of the New York League of Independent Bankers (NYLIB) on an earlier proposal that included these same provisions:

The FDIC should not be permitted to extend the 120-day period that prevents an institution from appealing an erroneous or unwarranted material supervisory determination without the institution's consent. The current proposal would allow the FDIC to indefinitely prevent an institution from being able to appeal a material supervisory determination, without the FDIC ever actually issuing a draft consent order, Order of Investigation, or Notice of Charges, because the relevant Division Director is purportedly "seeking formal authority to take an enforcement action." *If the FDIC does not issue a draft consent order, Order of Investigation, or Notice of Charges within 120 calendar days, an institution should be able to challenge an erroneous or unwarranted material supervisory determination through the appeals process without delay.*

Similarly, after the institution has rejected a draft consent order in writing, the FDIC should not be permitted to extend the proposed 90-day period that would prevent an institution from filing an appeal without the institution's consent. The current proposal would allow the FDIC to indefinitely prevent an institution that has rejected a draft consent order from being able to appeal a material supervisory determination because the relevant Division Director is purportedly "seeking formal authority to take an enforcement action." *If the FDIC does not issue an Order of Investigation or a Notice of Charges within 90 calendar days, an institution should be able to challenge an erroneous or unwarranted material supervisory determination through the appeals process without delay.*¹¹

We agree with NYLIB. If the FDIC does not move forward promptly with an enforcement action, a depository institution should be permitted to appeal even though the relevant Division Director is "seeking formal authority to take an enforcement action." Otherwise, appellate rights may be suspended for additional months – or potentially even years – while the Division Director is purportedly in the process of "seeking" formal authority. The FDIC should not design guidelines

¹⁰ See *id.*

¹¹ Letter from Ed Lutz, President, NYLIB to Robert E. Feldman, Executive Secretary, FDIC 4-5 (Oct. 20, 2020) (emphases added), available at <https://www.nylib.org/nylib-news/2020/10/20/nylib-comments-on-proposed-changes-to-fdic-appeals-process>.

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that would encourage regulatory abuse by permitting the indefinite – and perhaps permanent – suspension of appellate rights.

Fifth, and more generally, the FDIC should not continue to define “[f]ormal enforcement-related actions and decisions” to “includ[e] determinations and the underlying facts and circumstances that form the basis of a recommended or pending formal enforcement action.”¹²

For one thing, the inclusion of “determinations and the underlying facts and circumstances that form the basis of a recommended or pending formal enforcement action” is legally questionable. While the Riegle Act provides that filing an appeal does not block the FDIC from taking enforcement or supervisory action,¹³ nowhere does it provide that the FDIC has the authority to block an appeal of a material supervisory determination simply by indicating that it is considering initiating a formal enforcement action.

The purposes of the Riegle Act also are not served by blocking depository institutions from filing appeals of material supervisory determinations that may form the basis of a potential formal enforcement action – or that are based on the same underlying facts as a potential formal enforcement action. Efficiency is best served by allowing appeals to proceed even while a formal enforcement action is being considered or is pending, as the intra-agency appeals process is significantly faster than a contested administrative enforcement proceeding, and a successful appeal, therefore, could moot or clarify some issues prior to an administrative hearing. In addition, the FDIC’s current approach provides for an inefficient piecemeal approach to appeals. Where an enforcement action is based on a putative pillar violation, for example, the putative pillar violation may infect both the appealing institution’s management and composite ratings, and the institution’s appeal of those ratings will be materially prejudiced if it cannot address the pillar violation as well as the underlying facts.

Moreover, in many instances, depository institutions that are sent draft consent orders will stipulate to the issuance of those orders, even where they have meritorious arguments that material supervisory determinations they received were incorrect or unwarranted. Due to the short timeline for filing an appeal, such institutions are often time-barred from filing an appeal after stipulating to the issuance of a consent order.¹⁴ Even if they were not, however, an institution that is subject

¹² *Id.* at 33,946.

¹³ See 12 U.S.C. § 4806(g) (“Nothing in this section shall affect the authority of an appropriate Federal banking agency or the National Credit Union Administration Board to take enforcement or supervisory action.”)

¹⁴ Arguably, by making “determinations and the underlying facts and circumstances that form the basis of a recommended or pending formal enforcement action” unappealable, the FDIC bars appeals of the determinations and the underlying facts and circumstances that form the basis of final formal enforcement actions, such as orders that have been issued.

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to extra FDIC scrutiny and control under a consent order is extraordinarily unlikely to risk antagonizing the agency by filing a meritorious appeal.

We submit that the FDIC's appeals guidelines should simply provide that material supervisory determinations do not include "[f]ormal enforcement-related actions and decisions." This would bring the FDIC in line with the Board of Governors of the Federal Reserve Board, which does not prohibit appeals due to contemplated or pending formal enforcement actions.¹⁵ The Federal Reserve Board simply provides that the definition of "material supervisory determination" does not include "any supervisory determination for which an independent right of appeal exists," such as "an action to impose administrative enforcement actions under the FDI Act" or other statutes.^{16,17}

¹⁵ See Internal Appeals Process for Material Supervisory Determinations and Policy Statement Regarding the Ombudsman for the Federal Reserve System, 85 Fed. Reg. 15,175 (March 17, 2020).

¹⁶ *Id.* at 15,179. *Cf. id.* at 15,181 ("An appeal does not prevent or suspend the Federal Reserve or any other appropriate agency from taking any supervisory or enforcement action—either formal or informal—it deems appropriate to discharge the agency's supervisory responsibilities. In such cases, the rights of appeal provided for in the statutes and regulations concerning those actions shall govern.").

¹⁷ Alternatively, if the FDIC did not wish to adopt the Federal Reserve Board's approach, the OCC's approach would be better than the approach in the Proposed Guidelines. While the OCC prohibits appeal of the underlying facts that form the basis of a recommended or pending formal enforcement action and of the acts or practices that are the subject of a pending formal enforcement action, it nevertheless provides that "banks may appeal conclusions in the ROE . . . limited to a consideration of whether the examiners appropriately applied agency policies and standards." OCC Bulletin No. 2013-15, Bank Appeals Process: Guidance for Bankers (June 7, 2013), *available at* <https://www.occ.gov/news-issuances/bulletins/2013/bulletin-2013-15.html>.

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Finally, we agree with the prior commenter that the FDIC should “support the enactment of the FAIR EXAMS Act, which offers a legally sound, structurally independent, and procedurally robust alternative to the FDIC’s internal appeals mechanisms.”¹⁸ Nevertheless, while we wait for Congress to enhance or replace the Riegle Act, it is appropriate for the FDIC to strengthen and enhance the *independent* intra-agency appellate process that is currently required by the Riegle Act.

Thank you for your courtesies.

Very truly yours,

/s/ *Pinchus D. Raice*

Pinchus D. Raice

/s/ *Dustin N. Nofziger*

Dustin N. Nofziger

¹⁸ Letter from Dennis E. Nixon, President & CEO, International Bancshares Corp. to Jennifer M. Jones, Deputy Executive Secretary, FDIC 1 (Aug. 29, 2025), *available at* <https://www.fdic.gov/federal-register-publications/comments-rin-3064-za50>.