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Assistant Executive Secretary.

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## FEDERAL DEPOSIT INSURANCE CORPORATION

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### Guidelines for Appeals of Material Supervisory Determinations

**AGENCY:** Federal Deposit Insurance Corporation.

**ACTION:** Notice of guidelines.

**SUMMARY:** The Federal Deposit Insurance Corporation has adopted revised Guidelines for Appeals of Material Supervisory Determinations to establish an independent office that would replace the existing Supervision Appeals Review Committee and to modify the procedures and timeframes for considering formal enforcement-related decisions through the supervisory appeals process.

**DATES:** The new Guidelines for Appeals of Material Supervisory Determinations will become effective once the Office of Supervisory Appeals is fully operational.

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#### SUPPLEMENTARY INFORMATION:

On September 1, 2020, the Federal Deposit Insurance Corporation (FDIC) published in the **Federal Register** for notice and comment proposed amendments to its Guidelines for Appeals of Material Supervisory Determinations (Guidelines), which provide the process by which insured depository institutions (IDIs) may appeal material supervisory determinations made by the FDIC.<sup>1</sup> The FDIC proposed to establish an independent office that would replace the existing Supervision Appeals Review Committee (SARC) and to modify the procedures and timeframes for considering formal enforcement-related decisions through the supervisory appeals process. The comment period ended October 20, 2020, and the FDIC received fifteen comment letters. These comments and

the FDIC's responses are summarized below.

#### 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 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>

#### A. Structure of the Supervisory Appeals Review Committee

On March 21, 1995, the FDIC's Board of Directors (Board) adopted the Guidelines to implement Section 309(a). The Board, at that time, established the SARC to consider and decide appeals of material supervisory determinations.<sup>8</sup> The SARC was initially comprised of five members: The FDIC's Vice Chairperson (as Chairperson of the SARC), the Director of the Division of Supervision (DOS) (the predecessor to the Division of Risk Management Supervision (RMS)), the Director of the

Division of Compliance and Consumer Affairs (DCA) (the predecessor to the Division of Depositor and Consumer Protection (DCP)), the FDIC Ombudsman, and the General Counsel.<sup>9</sup> Consistent with the Riegle Act's mandate to create an intra-agency appeals process, membership in the SARC was limited to FDIC officials.<sup>10</sup> In order to "establish[] a fair and credible review process," the SARC was comprised of senior officials at the FDIC, including the Directors of DOS and DCA, who were expected to "bring to the Committee the necessary experience and judgment to make well-informed decisions concerning determinations under review."<sup>11</sup> The Guidelines were subsequently amended to add the Director of the Division of Insurance as a voting member of the SARC, and to provide formally that the Directors of DOS and DCA would not vote on cases brought before the SARC involving their respective divisions.<sup>12</sup>

In July 2004, the FDIC revised the Guidelines to change the structure and composition of the SARC to its current form. Specifically, the voting members of the SARC are now comprised of: One of the FDIC's three inside directors (who serves as the SARC Chairperson), and one deputy or special assistant to each of the other two inside directors.<sup>13</sup> The FDIC's General Counsel also serves as a non-voting member of the SARC. In the event of a vacancy, the Guidelines authorize the FDIC Chairperson to designate alternate member(s) to the SARC, so long as the alternate member was not directly or indirectly involved in making or affirming the material supervisory determination under review. These changes were intended to avoid the potential conflicts then faced by the Ombudsman and Division Directors,<sup>14</sup> and to "further underscore the perception of the SARC as a fair and independent high-level body for review of material supervisory determinations within the FDIC."<sup>15</sup>

In July 2017, the FDIC further revised the Guidelines to provide an opportunity for IDIs to appeal certain material supervisory determinations

<sup>9</sup> 60 FR 15923, 15930. Committee members could also designate another person to serve on their behalf.

<sup>10</sup> 60 FR 15923, 15924.

<sup>11</sup> 60 FR 15923, 15924.

<sup>12</sup> 69 FR 41479, 41480 (July 9, 2004).

<sup>13</sup> 69 FR 41479, 41480.

<sup>14</sup> 69 FR 41479, 41480-81. For example, the Ombudsman was excluded from the SARC in order to avoid any possible conflict between the Ombudsman's statutory role as a liaison between the agency and financial institutions on the one hand, and as a decision maker on the SARC on the other hand.

<sup>15</sup> 69 FR 41479, 41480.

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

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

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

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

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

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

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

<sup>1</sup> 85 FR 54377 (Sep. 1, 2020).

underlying formal enforcement actions through the supervisory appeals process.<sup>16</sup> The Guidelines currently provide that if the FDIC does not commence a formal enforcement action within certain time frames after giving written notice to an IDI of a recommended or proposed formal enforcement action, the IDI may appeal the facts and circumstances underlying the formal enforcement action to the SARC.<sup>17</sup>

### *B. 2019 Listening Sessions on Supervisory Appeals and Dispute Resolution Process*

In 2019, the FDIC decided to explore potential improvements to the supervisory appeals process. As part of this process, the FDIC's Office of the Ombudsman hosted a webinar and in-person listening sessions in each FDIC Region regarding the agency's supervisory appeals and dispute resolution processes. The sessions offered bankers and other interested persons an opportunity to provide individual input and recommendations regarding the supervisory appeals process.<sup>18</sup> Participants were encouraged to comment on various topics, including: Perceived barriers to, or concerns about, resolving disagreements; timeframes and procedures for pursuing reviews and appeals; and information publicly available on appeals and examination disagreements.

Among other topics, session participants offered suggestions on the composition of the SARC. In particular, participants focused on the composition of the SARC and opportunities to further enhance the independence of the appeals process. Relatedly, participants emphasized the importance of ensuring that SARC members have the subject matter expertise needed to decide supervisory appeals. Participants offered a range of suggestions on this topic, including adding an individual who is not otherwise affiliated with the FDIC to the SARC, such as a retired banking attorney or a former Federal or State bank regulator. Certain challenges were also discussed with respect to adding an individual who is not affiliated with the FDIC, such as ensuring the confidentiality of

information and the avoidance of conflicts of interest.

Questions related to the timeframes for appeals and the types of matters that may be appealed if the FDIC pursues a formal enforcement action were also raised at a number of the listening sessions. Through these discussions, it appears that the procedures that apply when the FDIC has provided notice of a recommended or proposed formal enforcement action may be a source of confusion to bankers.

Participants also raised concerns about bankers' fear of retaliation by FDIC examiners, notwithstanding existing provisions in the Guidelines prohibiting such retaliation. This concern was cited as a basis for causing bankers to be reluctant to fully engage with the FDIC on material areas of disagreement. FDIC policy prohibits any retaliation, abuse, or retribution by an agency examiner or any FDIC personnel against an institution, and the FDIC continues to explore options to reaffirm its commitment to ensure compliance with this policy. In addition, while not specifically related to the supervisory appeals process, participants provided a variety of comments and recommendations on the examination process. Participants also shared views regarding the publicly available information on SARC decisions and ideas for improving the transparency of SARC decisions, such as publishing aggregate data on the outcomes of supervisory appeals.

### *C. Notice and Request for Comment*

In August 2020, the FDIC published for comment a proposal to replace the SARC with an independent, standalone office within the FDIC, known as the Office of Supervisory Appeals (Office).<sup>19</sup> The Office would have delegated authority to consider and resolve appeals of material supervisory determinations. The Office would be fully independent of those FDIC Divisions with authority to issue material supervisory determinations and would be staffed by reviewing officials with bank supervisory or examination experience. Reviewing officials, as employees of the FDIC, would be cleared for conflicts of interest and subject to the FDIC's usual requirements for confidentiality.

Under the proposed Guidelines, an IDI would be encouraged to make a good-faith effort to resolve disagreements with its examiners and/or the appropriate Regional Office. If these efforts were not successful, the IDI would submit a request for review to the

appropriate Division Director, who would have the option of issuing a written decision or sending the appeal directly to the Office. An IDI that disagrees with the decision made by the Division Director could submit an appeal to the Office.

If a material supervisory determination was appealed to the Office, a three-member panel of the Office would consider the appeal and issue a written decision. The Division Director and the Ombudsman would be permitted to submit views on the appeal to the panel. The Legal Division would provide counsel to the Office. Oral presentation to the panel would be permitted if a request was made by the institution or by FDIC staff.

The proposal provided that the panel would review an appeal for consistency with the policies, practices, and mission of the FDIC and the overall reasonableness of, and the support offered for, the positions advanced, consistent with the existing standard of review for the SARC. The scope of the panel's review would 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 would be given to any facts or circumstances that occur or corrective action taken after the determination was made. The Office's role would not be to set policy, and the Office would not consider aspects of an appeal that sought to change or modify FDIC policy or rules.

Consistent with the existing Guidelines and the Riegle Act, the Office would not review decisions to appoint a conservator or receiver for an IDI. The FDIC proposed to further clarify that decisions made in furtherance of the resolution or receivership process or planning also would not be considered material supervisory determinations.

The FDIC also proposed amending the procedures for considering formal enforcement-related decisions through the supervisory appeals process. Specifically, the proposal clarified that, for purposes of the supervisory appeals process, a formal enforcement-related action commences—and appeal rights become unavailable—when the FDIC initiates a formal investigation, issues a notice of charges (or notice of assessment, as applicable), provides the IDI with a draft consent order, or otherwise provides written notice to the IDI that the FDIC is reviewing the relevant facts and circumstances to determine whether a formal enforcement action is merited. The FDIC would then have 120 days from the date

<sup>16</sup> 82 FR 34522, 34524 (July 25, 2017). The FDIC also noted that it provides an informal process through which institutions can obtain review by the relevant Division Director of matters that are not covered by the SARC process or another existing FDIC appeals or administrative process. See FIL-51-2016 (July 29, 2016).

<sup>17</sup> 82 FR 34522, 34526.

<sup>18</sup> See FIL-52-2019 (Sep. 24, 2019), available at <https://www.fdic.gov/news/financial-institution-letters/2019/fil19052.pdf>.

<sup>19</sup> 85 FR 43777 (Sep. 1, 2020).

on which notice was given to provide the IDI with a draft consent order. If the FDIC failed to provide a draft consent order within this 120-day period, the IDI's supervisory appeal rights would be made available.

Once the FDIC provides an IDI with a draft consent order, the parties would have an opportunity to negotiate the details of a potential settlement. The proposal did not include a fixed time limit on such negotiations. At any time, the IDI could notify the Division in writing that it believes further negotiation would not be productive, and the Division would then have 90 days to issue a notice of charges (or assessment) or to open an order of investigation. If the Division failed to issue such a notice or open an order of investigation within that time, the IDI would have 60 days to file an appeal of the material supervisory determination, consistent with the standard timeline following a material supervisory determination. If the IDI agrees to the consent order, then the matter would be resolved, and the need for an appeal would be obviated.

## II. Final Guidelines and Discussion of Comments

The FDIC received fifteen comments from a variety of interested parties, including banks, trade associations, law firms, and a consultant. Commenters generally supported the proposal, with most asserting that the changes would enhance the supervisory appeals process. In particular, commenters supported the steps taken to promote the independence of the Office, suggesting that this would bolster the industry's confidence in the supervisory appeals process.

The FDIC's proposal solicited feedback on particular aspects of the supervisory appeals process. Comments on these matters and the FDIC's responses are summarized below.

### Review of Office Decisions

The FDIC asked whether commenters believed that the Chairperson or the Board should have an opportunity to review Office decisions before issuance. While a few commenters asserted that the FDIC's senior management should review Office decisions, most commenters believed that review by the Chairperson or the Board would undermine the independence of the Office. In particular, two commenters suggested that review by the Chairperson or Board could deter banks from availing themselves of the process. A trade association also noted that if an appeal relates to an enforcement action, review of the appeal by the Board

members could compromise the spirit of the Board's review of the administrative law judge's recommended decision.

Consistent with the proposal, the final Guidelines provide for review of material supervisory determinations by the Division Director and then by the Office. The FDIC proposed to establish the Office with authority to consider and resolve appeals of material supervisory determinations in order to promote independence. Additional levels of review also could delay the resolution of appeals, and the FDIC is mindful of the need to decide appeals expeditiously. For these reasons, the final Guidelines do not provide for additional levels of review beyond the Office.

### Qualifications To Serve in the Office

The FDIC proposed staffing the Office with reviewing officials who have bank supervisory or examination experience, such as retired bank examiners. The FDIC asked whether bank supervisory or examination experience would constitute appropriate qualifications and experience for these positions. Commenters expressed a range of views on this topic. Some commenters supported staffing the Office with individuals with bank supervisory or examination experience. On the other hand, several trade associations, a bank, and a law firm stated that the Office should not be limited to staff with supervisory experience, and should also include retired bank officers, bank board members, consultants, or banking law attorneys. Some of these commenters suggested that each review panel include one or more members with industry experience.

The FDIC appreciates the perspective and expertise that bankers and other industry professionals could bring to the process. At the same time, the FDIC acknowledges that, because of the Office's role in making final decisions on appeals of material supervisory determinations on behalf of the agency, supervisory experience and training provides a firm foundation for exercising that responsibility and helps ensure a thorough understanding of the supervisory process. With this in mind, the FDIC will, as proposed, deem bank supervisory or examination experience as required background for panelists. However, the FDIC appreciates that industry perspective can be valuable and accordingly will generally view relevant industry experience favorably.

### Staffing

A number of commenters made suggestions with respect to the staffing of the Office. A trade association

recommended that reviewing officials serve staggered terms, with no official serving more than five years. Another trade association suggested that terms should not be renewable. Two commenters recommended that reviewing officials selected for the Office should not have been employed by the FDIC for at least the two years prior, thereby promoting separation between the Office and existing staff. The FDIC believes some of these recommendations will be beneficial to promoting the Office's independence, and will consider others carefully as it prepares to hire reviewing officials. Reviewing officials will be hired for terms, and only former, rather than current, government officials will be eligible to serve as reviewing officials.

### Role of the Ombudsman

A few commenters recommended changes with respect to the Ombudsman's role in the process to promote the Office's independence. In particular, a bank encouraged the FDIC to include the Ombudsman as a non-voting member on the panel. The Ombudsman serves as a neutral liaison between the FDIC and institutions, as provided by section 309 of the Riegle Act.<sup>20</sup> The FDIC believes including the Ombudsman as a member of the panel could undermine this role, because as a member of the panel, the Ombudsman would be expected to serve in a decision-making capacity. In addition, institutions that might feel free to share confidential information with the Ombudsman in its role as liaison may be reluctant to do so if the Ombudsman would later be deciding a supervisory appeal.<sup>21</sup> In light of these concerns, and because the FDIC sees value in the Ombudsman's perspective, the final Guidelines allow the Ombudsman to submit views to the panel.

### Administrative and Legal Support for the Office

Two commenters recommended resourcing the Office with independent administrative and legal support. The Office will share administrative support with the Legal Division, which also will provide counsel to the Office. To promote independence, legal staff that were involved in making the material

<sup>20</sup> See 12 U.S.C. 4806(d).

<sup>21</sup> The tension between the Ombudsman's statutory role and acting as a decision maker with respect to material supervisory determinations was among the reasons the FDIC removed the Ombudsman from the SARC when it was reconstituted in 2004. The FDIC also considered making the Ombudsman a non-voting member of the SARC, but concluded that also would not resolve this tension. See 69 FR 41479, 41481 (July 9, 2004).

supervisory determination that has been appealed will not advise the Office.

To provide further clarity, the Guidelines state that the Legal Division will provide counsel to the Office and generally advise 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 Office will, with the Legal Division's concurrence, refer the matter to the Chairperson's Office. In addition, 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 an Office decision is contrary to a law, regulation, or FDIC policy, the Office will be required to revise the decision to conform with relevant laws, regulations, or policies. The Legal Division will not exercise supervisory judgment or opine on the merits of an appeal.

#### Retaliation Concerns

A trade association stated that the FDIC should take measures to ensure that reviewing officials are not retaliated against for their decisions. The FDIC has structured the Office to minimize the risk that a fear of retaliation could impact decisions by reviewing officials. Reviewing officials will be hired for terms, and only former, rather than current, government officials will be eligible to serve as reviewing officials. Additionally, all decisions related to which reviewing officials will serve on which panels will be decided by the Office, and not by any FDIC officials outside of the Office.

The FDIC also received comments reiterating that some IDIs may not appeal decisions due to a fear of retaliation from examiners. As noted in the proposal, FDIC policy currently prohibits any retaliation, abuse, or retribution by an agency examiner or any FDIC personnel against an institution, and the FDIC continues to explore options to reaffirm its commitment to and ensure compliance with this policy.

#### Standard of Review

Like the current standard of review, under the proposed Guidelines, the Division Director and the Office would review appeals for consistency with the policies, practices, and mission of the FDIC and the overall reasonableness of, and the support offered for, the positions advanced. Two trade associations encouraged the FDIC to adopt a *de novo* standard of review, and align the standard with the approach

recently taken by the Federal Reserve Board (FRB).

The FDIC agrees that a change in the standard of review for appeals to the Division Director would be appropriate. The final Guidelines therefore provide that the Division Director will make his or her own supervisory determination, which is substantially similar to the standard adopted by the initial review panel under the FRB's approach.<sup>22</sup> Under this standard, the Division Director would have discretion to consider examination workpapers and other materials developed by staff during an examination, but would make an independent supervisory determination, without deferring to the judgments of either party. The final guidelines do not, however, alter the standard of review when the appeal is reviewed by the Office. Consistent with the proposal, the Office would review appeals for consistency with the policies, practices, and mission of the FDIC and the overall reasonableness of, and the support offered for, the positions advanced.

#### Ex Parte Communications

A law firm and two trade associations recommended that the FDIC prohibit *ex parte* communications between supervisory staff and the Office during an appeal, asserting that this is a due process and fairness concern. The FDIC understands this concern and is addressing it in the final Guidelines by requiring that communications between the Office and either supervisory staff or the appealing institution, including materials submitted to the Office for review, are also shared with the other party to the appeal, subject to limitations on disclosure.

#### Review Panel Size

The FDIC proposed that each appeal would be heard by a panel of three reviewing officials, and asked whether three reviewers per panel would be an appropriate number, or whether there were some situations where more or fewer panelists might be appropriate. A number of commenters suggested panels comprised of five reviewing officials. In particular, a trade association asserted that this number is common across governmental bodies, affords increased diversity in perspectives and expertise, and decreases the likelihood of deference to the strong opinions of one panel member. Other commenters suggested expanding the size of panels to five members in order to accommodate the addition of staff with industry experience. Two commenters,

including a trade association and a consultant, suggested expanding the size of review panels in case a review official becomes ill or must be recused. A law firm suggested that relatively minor matters (*e.g.*, examination ratings, loan loss reserve provisions, loan classifications) should be handled by a panel of three members, while more serious matters (*e.g.*, violations of law or regulation, applications, decisions to initiate informal enforcement actions, matters requiring Board attention) should be handled by five-member panels.

The FDIC agrees that five-member panels could be beneficial in some situations. To provide the Office with flexibility, the final Guidelines provide that panels may be comprised of either three or five reviewing officials. When an appeal is submitted to the Office, a panel of either three or five reviewing officials will be assigned to consider the matter. The FDIC believes that initial experiences administering this new process may help to determine the most appropriate size for panels going forward.

#### Other Levels of Review

The FDIC proposed that an IDI would be able to appeal the Division Director's decision to the Office, and that no appeal of the Office's decision would be permissible. The FDIC asked commenters whether the appellate process should have any additional level(s) of review before or after the Office.

Commenters generally stated that the process should not include an additional level of review before an appeal to the Office. In particular, a trade association asserted that the FDIC should remove barriers for institutions wishing to appeal material supervisory determinations, including layers of review. However, a few commenters recommended an additional level of review following a decision by the Office. A law firm suggested allowing Office decisions to be appealed to the individuals that currently serve on the SARC, and a trade association suggested that either the Board or the institution could request reconsideration of Office decisions within 30 days of issuance. A bank holding company also recommended that institutions have the option to bring matters to an administrative law judge as an alternative to review by the Office.

The final Guidelines do not include any additional levels of review. It is not clear that review by the individuals currently comprising the current SARC would be beneficial because replacing the SARC with the Office was intended

<sup>22</sup> See 85 FR 15175, 15180 (Mar. 17, 2020).

to promote independence, and commenters generally supported that aspect of the proposal. The final Guidelines balance the statutory objectives of independent review and timely resolution of appeals by allowing the Office's decision to serve as the final review.<sup>23</sup> Proceedings before an administrative law judge serve a different purpose and are governed by different procedural standards, and therefore may not be well-suited for appeals of material supervisory determinations. For example, proceedings before administrative law judges typically involve motion practice, discovery, and oral hearings. The supervisory appeals process, by contrast, is intended to resolve disagreements in a more informal and expeditious manner. For these reasons, the FDIC concludes that the appeals process should not provide for review by an administrative law judge as an alternative to review by the Office.

#### Timelines for Appeals

The FDIC asked whether the proposed timelines properly balance the goals of resolving appeals as expeditiously as possible and providing adequate time for preparation and review. Under the Guidelines, an institution would have 60 calendar days in which to file a request for review with the Division Director. Within 45 calendar days after receiving that request, the Division Director would either review the appeal and issue a written determination or refer the request for review to the Office for consideration. Upon receiving the Division Director's decision, an IDI would have 30 calendar days to file an appeal with the Office. Within 90 calendar days after receiving the appeal (including 30 days for the Ombudsman and the Division Director to submit views), the Office would meet to adjudicate the appeal, and would notify the institution of its decision within 45 calendar days after that meeting.

While several commenters stated that these timeframes were reasonable, others encouraged the FDIC to consider changes to expedite the process. A law firm asserted that unless a particularly serious matter is involved, the appeals process should be completed within 180 days of the examination exit meeting, rather than within 270 days as the proposal would allow. A bank holding company stated that the Office should

issue decisions within 60 days of receiving appeals. A few commenters recommended allowing institutions to petition the Office for expedited review of supervisory determinations in certain circumstances. In addition, two trade associations suggested allowing extensions of the time frames in the appeals process. Another commenter suggested that the FDIC clarify that whenever a deadline falls on a weekend or federal holiday, the deadline should move to the next business day.

The FDIC believes that, in general, the proposed timeframes appropriately balance the interest in resolving appeals expeditiously with the need for adequate preparation and review. The FDIC expects that the process will move more quickly in straightforward cases that do not involve complex issues or review of extensive documents. Additionally, certain circumstances may warrant expedited consideration of an appeal, and the FDIC agrees that the process should permit institutions to petition for expedited review. Under section G.2 of the final Guidelines, an institution may request expedited review in its appeal to the Office.

The FDIC expects that extensions will generally be unnecessary, but believes that it is reasonable to permit institutions to request extensions under appropriate circumstances. This is consistent with both the spirit of the process and current FDIC practice. Accordingly, the final Guidelines provide that an institution may request an extension of the time period to submit an appeal. Such requests may be directed to the appropriate Division Director with respect to the first stage of the appeal, and to the Office with respect to the second stage. Finally, the FDIC agrees that the suggested clarification with respect to deadlines that fall on a weekend or federal holiday would be helpful, and has adopted it in the final Guidelines.

#### Publicly Available Information on the Process

The FDIC proposed publishing decisions of the Office as soon as practicable and with redactions to avoid disclosure of the name of the appealing institution and other information exempt from disclosure under the Freedom of Information Act. For cases in which redaction is deemed insufficient to prevent improper disclosure, the FDIC proposed publishing decision summaries. The FDIC also proposed that published Office decisions could be cited as precedent in Office appeals. Finally, the FDIC proposed publishing annual reports on decisions issued by Division

Directors. These proposals are consistent with the FDIC's current policies regarding decisions issued by Division Directors and the SARC. The FDIC asked commenters what other information should be published about the appeals process or specific decisions while still maintaining confidentiality.

Several commenters agreed that the information published about the supervisory appeals process was sufficient, and agreed that the FDIC should continue to ensure that confidentiality is preserved. One commenter encouraged the FDIC to publish a chart online listing the outcome of appeals along with a short summary of the case. The FDIC agrees that the transparency of the appeals process could be enhanced by providing summary statistics on the outcomes of appeals. The final Guidelines therefore provide for the publication of such information.

#### Authorization To Submit an Appeal

Two trade associations requested that an institution's senior management should be permitted to authorize supervisory appeals. The FDIC has adopted this suggestion in the final Guidelines. 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.

#### Formal Enforcement-Related Changes

The FDIC proposed a timeline that would apply to supervisory appeals in instances in which the FDIC is also evaluating whether a formal enforcement action is merited. In any case where the FDIC has provided notice to an IDI that it is determining whether a formal enforcement action is merited based on an examination, the FDIC would have 120 days to issue an order of investigation, a notice of charges (or notice of assessment, as applicable), or provide the institution with a draft consent order. If the FDIC fails to do so within the 120-day timeframe, the IDI's supervisory appeal rights would be made available. However, if the FDIC provides an IDI with a draft consent order, the parties would have an opportunity to negotiate the details of a potential settlement without a fixed time limit. At any time, if the IDI believes that further negotiations would not be productive, it could notify the Division of its decision in writing, at which point the Division would have 90 days to issue a notice of charges (or assessment) or to open an order of investigation. If the Division failed to produce a notice of charges (or

<sup>23</sup> Two commenters, including a bank and a trade association, requested that the FDIC make clear that Office decisions are subject to further review by the federal courts. The FDIC has noted in the past that because supervisory decisions are entrusted to agency discretion, they cannot be appealed to the courts.

assessment) or to open an order of investigation within those 90 days, the IDI's supervisory appeal rights to the Office would be made available. The IDI would have 60 days to file an appeal, consistent with the standard timeline following a material supervisory determination.

The FDIC proposed that these time periods could be extended with the approval of the Chairperson's Office, or with the mutual agreement of both parties. The FDIC asked commenters whether this timeline would be too restrictive for some cases, and whether commenters expect to invoke the provision(s) allowing for an extension. Several commenters stated that the proposed timeframe was appropriate. A bank suggested that instead of the proposed extension provisions, the process should permit both the FDIC and the institution to request a one-time extension of a deadline for 30 days. The FDIC believes that limiting the parties to a one-time 30-day extension could hinder the parties' efforts to settle an enforcement action, and is therefore finalizing these provisions as proposed.

#### Transition Period

The FDIC expects that a period of time will be necessary to establish and staff the Office. The current Guidelines, which permit appeals of Division Directors' decisions to the SARC, will apply until the Office is fully operational. The FDIC will publish a notice to inform institutions when this occurs.

For the reasons set out in the preamble, the Federal Deposit Insurance Corporation's Board of Directors adopts 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 (Pub. L. 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. The procedures set forth in these Guidelines establish an appeals process

for the review of material supervisory determinations by the Office of Supervisory Appeals (Office).

#### B. Reviewing Officials

The Office will be staffed with reviewing officials who have bank supervisory or examination experience. Reviewing officials will be hired for terms, and only former, rather than current, government officials will be eligible to serve as reviewing officials. Reviewing officials will consider and decide appeals submitted to the Office. Each appeal will be reviewed and decided by a panel of either three or five reviewing officials who have no conflicts of interest with respect to the appeal or the parties to the appeal. All decisions related to which reviewing officials will serve on which panels will be decided by the Office.

#### 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 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 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 parts 370, 371, and 381, and § 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. 1831*o*;

(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 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 Chairperson's Office, 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 within paragraph (a), 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 within paragraph (a), 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) 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.

#### 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. 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), 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 Office or 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 email to [ESS\\_Appeals@fdic.gov](mailto:ESS_Appeals@fdic.gov). Upon receiving the appeal, the Office will send an acknowledgment to the institution, and will send copies of the institution's appeal to the Office of the Ombudsman and the appropriate Division Director.

#### 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 the Office administrative 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. Submissions from the Ombudsman and the Division Director

The Ombudsman and the Division Director each 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 Office 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 Office.

#### 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 Office will be an appellate body and will make independent supervisory determinations. The Office will review the appeal for consistency with the policies, practices, and mission of the FDIC and the overall reasonableness of, and the support offered for, the positions advanced. The Office'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 Office will not consider any aspect of an appeal that seeks to change or modify existing FDIC rules or policy. The Office will notify the institution, in writing, of its decision concerning the disputed material supervisory determination(s) within 45 days after the date the Office 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 Office will, with the Legal Division's concurrence, refer the matter to the Chairperson's Office.

The Legal Division also 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 Office will revise the decision to conform with relevant laws, regulations, or policies.

#### 9. Other Communications

Any communications between the Office and either supervisory staff or the appealing institution will be shared with the other party to the appeal, subject to limitations on disclosure.

#### 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 309. In cases in which redaction is deemed insufficient to prevent improper disclosure, published decisions may be presented in summary form. Published 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.

#### J. Limitation on Agency Ombudsman

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. However, pursuant to Section (G)(4) of these Guidelines, the Ombudsman may submit views to the Office for its consideration in connection with any pending appeal.

#### 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 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

The FDIC has an experienced examination workforce and is proud of its professionalism and dedication. 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. 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, on January 19, 2021.

**James P. Sheesley,**

*Assistant Executive Secretary.*

[FR Doc. 2021-01547 Filed 1-22-21; 8:45 am]

**BILLING CODE 6714-01-P**

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### FEDERAL ELECTION COMMISSION

#### Sunshine Act Meeting

**TIME AND DATE:** Thursday, January 28, 2021 at 10:00 a.m.

**PLACE:** Virtual meeting. Note: Because of the covid-19 pandemic, we will conduct the open meeting virtually. If you would like to access the meeting, see the instructions below.

**STATUS:** This meeting will be open to the public. To access the virtual meeting, go to the commission's website [www.fec.gov](http://www.fec.gov) and click on the banner to be taken to the meeting page.

**MATTERS TO BE CONSIDERED:**

Draft Advisory Opinion 2020-06:

Escobar

Audit Division Recommendation Memorandum on the Mississippi Republican Party (A17-15) Management and Administrative Matters

**CONTACT PERSON FOR MORE INFORMATION:**

Judith Ingram, Press Officer; Telephone: (202) 694-1220.

**Authority:** Government in the Sunshine Act, 5 U.S.C. 552b.

**Laura E. Sinram,**

*Acting Secretary and Clerk of the Commission.*

[FR Doc. 2021-01594 Filed 1-21-21; 11:15 am]

**BILLING CODE 6715-01-P**

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### FEDERAL TRADE COMMISSION

[File No. 192 3172]

#### Everalbum, Inc.; Analysis of Proposed Consent Order To Aid Public Comment

**AGENCY:** Federal Trade Commission.

**ACTION:** Proposed consent agreement; request for comment.

**SUMMARY:** The consent agreement in this matter settles alleged violations of federal law prohibiting unfair or deceptive acts or practices. The attached Analysis of Proposed Consent Order to Aid Public Comment describes both the allegations in the draft complaint and the terms of the consent order—embodied in the consent agreement—that would settle these allegations.

**DATES:** Comments must be received on or before February 24, 2021.

**ADDRESSES:** Interested parties may file comments online or on paper by following the instructions in the Request for Comment part of the **SUPPLEMENTARY INFORMATION** section below. Please write "Everalbum, Inc.; File No. 192 3172" on your comment, and file your comment online at <https://www.regulations.gov> by following the instructions on the web-based form. If you prefer to file your comment on paper, mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Suite CC-5610 (Annex D), Washington, DC 20580, or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street SW, 5th Floor, Suite 5610 (Annex D), Washington, DC 20024.

**FOR FURTHER INFORMATION CONTACT:**

James Trilling (202-326-3497), Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580.

**SUPPLEMENTARY INFORMATION:** Pursuant to Section 6(f) of the Federal Trade Commission Act, 15 U.S.C. 46(f), and FTC Rule 2.34, 16 CFR 2.34, notice is hereby given that the above-captioned consent agreement containing a consent order to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period of thirty (30) days. The following Analysis to Aid Public Comment describes the terms of the consent agreement and the allegations in the complaint. An electronic copy of the full text of the consent agreement package can be obtained at <https://www.ftc.gov/news-events/commission-actions>.

You can file a comment online or on paper. For the Commission to consider your comment, we must receive it on or before February 24, 2021. Write "Everalbum, Inc.; File No. 192 3172" on your comment. Your comment—including your name and your state—