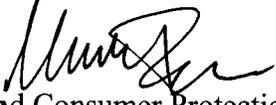


February 24, 2012

TO: Board of Directors

FROM: Sandra L. Thompson 
Director
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Mark Pearce 
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SUBJECT: Amendments to the Guidelines for Appeals of
Material Supervisory Determinations and to the Guidelines
for Appeals of Deposit Insurance Assessment Determinations

EXECUTIVE SUMMARY

This is a proposal that the Board adopt and authorize publication in the Federal Register of certain minor, technical, and nonsubstantive changes to the Guidelines for Appeals of Material Supervisory Determinations (SARC Guidelines) and to the Guidelines for Appeals of Deposit Insurance Assessment Determinations (AAC Guidelines), contained in the attached Federal Register Notice. These minor amendments to both guidelines are made to reflect changes to the FDIC Board of Directors, and to the categories of institutions that the FDIC supervises, made by the Dodd-Frank Wall Street Reform and Consumer Protection Act. These amendments also reflect that matters subject to appeal may now come from the newly created Division of Depositor and Consumer Protection, the Division of Risk Management Supervision, and the Office of Complex Financial Institutions, which have replaced the former Division of Supervision and Consumer Protection. Finally, the amended AAC Guidelines provide that a representative of the FDIC's new Consumer Financial Protection Bureau Board member replaces the representative of the former Office of Thrift Supervision Board member on the AAC. The SARC and AAC Guidelines are republished to reflect these limited changes.

RECOMMENDATION

The new Division of Risk Management Supervision ("RMS"), the Division of Depositor and Consumer Protection ("DCP"), the Office of Complex Financial Institutions

("OCFI"), and the Legal Division request that the Board of Directors adopt and approve for publication in the *Federal Register* the revised Guidelines for Appeals of Material Supervisory Determinations and the revised Guidelines for Appeals of Deposit Insurance Assessment Determinations, attached for your consideration. The amendments being proposed, which are technical in nature, would be unlikely to benefit from public comment. Publication without prior notice and comment is recommended.¹

BACKGROUND

SARC Guidelines

Section 309(a) of the Riegle Community Development and Regulatory Improvement Act of 1994 requires the FDIC (as well as the other Federal banking agencies and the National Credit Union Administration Board) to establish an independent intra-agency appellate process to review material supervisory determinations.

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. In the appeals process, the FDIC is also required to ensure that (1) an appeal of a material supervisory determination by an insured depository institution is heard and decided expeditiously; and (2) appropriate safeguards exist for protecting appellants from retaliation by agency examiners.

Responsibility for making material supervisory determinations is shared by DCP, for determinations grounded in the FDIC's depositor and consumer protection programs, by RMS, for safety and soundness and risk management determinations, and by OCFI for risk evaluation of certain large financial entities. Under the guidelines, an institution that disputes any material supervisory determination may request review by the appropriate Division or Office Director. Should an institution be dissatisfied with the Division or

¹ Section 309(c) of the Riegle Community Development and Regulatory Improvement Act of 1994 (Public Law No. 103-325, 108 Stat. 2160) ("Riegle Act") requires public notice and opportunity for comment on proposed guidelines for the establishment of the required independent review process for material supervisory determinations. Publication for notice and comment was made when the original guidelines were established in 1995, satisfying this requirement. Publication for notice and comment was also made when the guidelines were substantially revised in 2004 and again in 2008, each time noting that while the FDIC considered it appropriate to garner comments regarding the amendments being proposed, "notice and comment was not required and need not be employed should the FDIC make future amendments." In 2010, amendments to the SARC Guidelines were made to extend the decisional deadline for requests for review and to clarify the decisional deadline in written decisions by the SARC. Additionally, limited technical and clarifying amendments were made to both the SARC and the AAC Guidelines. The technical amendments proposed were thought unlikely to benefit from public comment, and publication without prior notice and comment was deemed appropriate.

Office Director's determination, that institution may then file an appeal with the SARC, which is outside the FDIC's supervisory process. The SARC may grant a request for oral presentation or schedule oral presentation on its own determination that such a presentation would likely be helpful or would otherwise be in the public interest. After reviewing the determination made at the division level, the SARC will issue a final written decision.

On March 21, 1995, the FDIC's Board of Directors adopted the original Guidelines for Appeals of Material Supervisory Determinations, which established the procedures governing the SARC. The SARC Guidelines were modified in 2004 to change the composition and procedures of the SARC (69 FR 41479 (July 9, 2004)) and were amended again in 2008 to modify the supervisory determinations eligible for appeal. (73 FR 54822 (Sept. 23, 2008)). In 2010, amendments to the SARC Guidelines were made to extend the decisional deadline for requests for review and to clarify the decisional deadline in written decisions by the SARC. Additionally, limited technical and clarifying amendments were made to both the SARC Guidelines and the AAC Guidelines in 2010, without notice and comment. (75 FR 20358 (Apr. 19, 2010)).

AAC Guidelines

The FDIC Board of Directors created the AAC in 1999 to provide a high-level process for considering all deposit insurance assessment appeals brought from determinations made by the appropriate FDIC Divisions. Responsibility for deposit insurance assessments is shared by the Division of Finance ("DOF"), the Division of Insurance and Research ("DIR"), and, in some cases, RMS, DCP, or OCFI. DOF is responsible for calculating the assessments owed by individual insured institutions based on assessment risk rates assigned by DIR, which in turn uses supervisory information provided by RMS, DCP, or OCFI.

Institutions that dispute the computation of their quarterly assessment payments may request revision of their assessment payments by following the procedures set forth at 12 C.F.R. § 327.3(f). Institutions that dispute their risk assignment—or dispute any determination for which review may be requested as provided in Part 327—may request review by following the procedures set forth at 12 C.F.R. § 327.4(c).

The AAC provides a process for considering all deposit insurance assessment appeals brought from determinations made by the appropriate FDIC divisions and offices pursuant to 12 C.F.R. §§ 327.3(f) and 327.4(c). Having complied with those procedures and received a determination from the appropriate division or office, an institution dissatisfied with that determination may file an appeal with the AAC. After reviewing the determination made at the division or office level, the AAC will issue a final decision.

The AAC Guidelines were promulgated by the FDIC on July 2, 2004, following notice and comment rulemaking. (69 FR 41479 (Jul. 9, 2004)). Although the FDIC considered it desirable in that instance to garner comments regarding the AAC Guidelines, notice and comment rulemaking was not required, and the FDIC pointed out that notice and

comment rulemaking need not be employed in making future amendments. Limited technical and clarifying amendments were made to the AAC Guidelines in 2010, without notice and comment. (75 FR 20358 (Apr. 19, 2010)).

ANALYSIS OF PROPOSED CHANGES

The SARC Guidelines have been amended to provide that, in place of the former DSC, now RMS, DCP, or OCFI, will make material supervisory determinations appropriate to each Division or Office. Material supervisory determinations, made by the appropriate Division or Office Director, are subject to challenge under the SARC Guidelines by insured depository institutions. The SARC Guidelines describe the types of determinations that are eligible for review and the process by which appeals will be considered and decided.

In addition, the SARC Guidelines have been amended to reflect the transfer of supervisory authority over state savings associations from the former Office of Thrift Supervision (“OTS”) to the FDIC pursuant to Section 312(b)(2)(C) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Public Law No. 111-203, 124 Stat. 1376, 1522).

The AAC Guidelines have been amended in light of a change to the FDIC Board of Directors made by the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”). The Dodd-Frank Act changed the FDIC Board of Directors by replacing the Director of OTS with the Director of the Consumer Financial Protection Bureau (“CFPB”).² Consequently, the AAC Guidelines have been amended to substitute a deputy or special assistant to the FDIC’s CFPB Director in place of a deputy or special assistant to the FDIC’s former OTS Director.

The AAC Guidelines have also been amended to provide for AAC review of assessment determinations or any other determinations for which review may be requested as provided in Part 327 of the regulations, that are made by RMS, DCP, or OCFI, in place of the former DSC.

Finally, both SARC Guidelines and the AAC Guidelines have been amended to make additional, minor, limited and nonsubstantive language changes.

² Pub. L. No. 111-203, § 336, 124 Stat. 1376, 1540 (2010) (codified at 12 U.S.C. § 1817(nt)).

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