

Billing Code 6714-01=P

FEDERAL DEPOSIT INSURANCE CORPORATION

Guidelines for Appeals of Material Supervisory Determinations

AGENCY: Federal Deposit Insurance Corporation.

ACTION: Notice of Guidelines.

SUMMARY: On July 18, 2017, the Federal Deposit Insurance Corporation (“FDIC”) Board of Directors (“Board”) adopted revised Guidelines for Appeals of Material Supervisory Determinations (“Guidelines”) to provide institutions with broader avenues of redress with respect to material supervisory determinations and enhance consistency with the appeals process of the other Federal banking agencies. The revisions to the Guidelines: (1) permit the appeal of the level of compliance with an existing formal enforcement action, the decision to initiate an informal enforcement action, and matters requiring board attention; (2) provide that a formal enforcement-related action or decision does not affect an appeal that is pending under the Guidelines; (3) make additional opportunities for appeal available under the Guidelines in certain circumstances; (4) provide for the publication of annual reports on Division Directors’ decisions with respect to material supervisory determinations; and (5) make other limited technical and conforming amendments.

DATES: The revised Guidelines become effective on July 18, 2017.

FOR FURTHER INFORMATION CONTACT: Patricia Colohan, Associate Director, Division of Risk Management Supervision, (202) 898-7283; Sylvia Plunkett, Senior Deputy

Director, Division of Depositor and Consumer Protection, (202) 898-6929; and James Watts, Senior Attorney, Legal Division, (202) 898-6678.

SUPPLEMENTARY INFORMATION:

On August 4, 2016, the FDIC published in the **Federal Register** for notice and comment proposed amendments to the Guidelines for Appeals of Material Supervisory Determinations that would provide institutions with broader avenues of redress with respect to material supervisory determinations.¹ The 60-day comment period ended October 3, 2016. The FDIC received two comment letters, one from a trade association and another from a financial holding company. These comments and the FDIC's responses are summarized below.

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 Board) to establish an independent intra-agency appellate process to review material supervisory determinations.² 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."³ In the appeals process, the FDIC is required to ensure that: (1) an appeal of a material supervisory determination by an insured depository institution is heard and decided

¹ 81 FR 51441 (Aug. 4, 2016).

² 12 U.S.C. 4806(a).

³ 12 U.S.C. 4806(f)(2).

expeditiously; and (2) appropriate safeguards exist for protecting appellants from retaliation by agency examiners.⁴

The term “material supervisory determinations” is defined 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.⁵ The Riegle Act specifically excludes from the definition of “material supervisory determinations” a decision to appoint a conservator or receiver for an insured depository institution or to take prompt corrective action pursuant to section 38 of the Federal Deposit Insurance Act (“FDI Act”), 12 U.S.C. 1831o.⁶ 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 institution.⁷

On December 28, 1994, the FDIC published in the **Federal Register**, for a 30-day comment period, a notice of and request for comments on proposed Guidelines for Appeals of Material Supervisory Determinations.⁸ In the proposed Guidelines, the FDIC proposed that the term “material supervisory determinations,” in addition to the statutory exclusions noted above, also should exclude: (1) determinations for which other appeals procedures exist (such as determinations relating to deposit insurance assessment risk classifications); (2) decisions to initiate formal enforcement actions under section 8 of the FDI Act; (3) decisions to initiate informal enforcement actions (such as memoranda of understanding); (4) determinations relating

⁴ 12 U.S.C. 4806(b).

⁵ 12 U.S.C. 4806(f)(1)(A).

⁶ 12 U.S.C. 4806(f)(1)(B).

⁷ 12 U.S.C. 4806(g).

⁸ 59 FR 66965 (Dec. 28, 1994)

to a violation of a statute or regulation; and (5) any other determinations not specified in the Riegle Act as being eligible for appeal.

Commenters to those proposed Guidelines had suggested that the proposed limitations on determinations eligible for appeal were too restrictive. In response to comments received, the FDIC modified the proposed Guidelines on March 21, 1995. The FDIC added a final clarifying sentence to the listing of “Determinations Not Eligible for Appeal” in the Guidelines as follows: “The FDIC recognizes that, although determinations to take prompt corrective action or initiate formal or informal enforcement actions are not appealable, the determinations upon which such actions may be based (e.g., loan classifications) are appealable provided they otherwise qualify.”⁹

On March 18, 2004, the FDIC published in the **Federal Register**, for a 30-day comment period, a notice and request for comments regarding proposed revisions to the Guidelines, which would have changed the composition and procedures of the SARC.¹⁰ On July 9, 2004, the FDIC published in the **Federal Register** a notice of guidelines which, effective June 28, 2004, adopted the revised Guidelines, largely as proposed.¹¹

On May 27, 2008, the FDIC published in the **Federal Register**, for a 60-day comment period, a notice and request for comments regarding proposed revisions to the Guidelines.¹² On September 23, 2008, the FDIC published in the **Federal Register** final revisions to the Guidelines¹³ modifying the supervisory determinations eligible for appeal to eliminate the ability of an FDIC-supervised institution to file an appeal with the SARC for formal enforcement-

⁹ 60 FR 15929 (Mar. 28, 1995).

¹⁰ 69 FR 12855 (Mar. 18, 2004).

¹¹ 69 FR 41479 (July 9, 2004).

¹² 73 FR 30393 (May 27, 2008).

¹³ 73 FR 54822 (Sept. 23, 2008).

related actions and decisions, including determinations and the underlying facts and circumstances that form the basis of a recommended or pending formal enforcement-related action or decision, and the initiation of an investigation under section 10(c) of the FDI Act.¹⁴ The FDIC noted at that time that these amendments better aligned the SARC appellate process with the material supervisory determinations appeals procedures at the other Federal banking agencies.

On April 19, 2010, the FDIC published in the **Federal Register** revised Guidelines, effective April 13, 2010, extending the decision deadline for requests for review and clarifying the decisional deadline for written decisions by the SARC.¹⁵

On March 23, 2012, the FDIC published in the **Federal Register** revised Guidelines, effective March 20, 2012 that included technical and ministerial revisions to reflect changes in the organization of the FDIC's Board, of its offices and divisions, and in the categories of institutions that it supervises.¹⁶

Amendments to the Guidelines

As explained above, the FDIC adopted amendments to the Guidelines in 2008 modifying the supervisory determinations eligible for appeal to eliminate the ability of an FDIC-supervised institution to file an appeal with the SARC for 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-related action or decision, and the initiation of an investigation. Since that time, the FDIC's experience in administering the current SARC appeals process suggests that it would be beneficial for institutions to have broader avenues of redress

¹⁴ 12 U.S.C. 1820(c).

¹⁵ 75 FR 20358 (Apr. 19, 2010).

¹⁶ 77 FR 17055 (Mar. 23, 2012).

with respect to material supervisory determinations. Accordingly, the FDIC is amending the Guidelines to expand institutions' opportunities for appeal under certain circumstances and enhance consistency with the appeals process of the other Federal banking agencies. The FDIC is also making certain technical and non-substantive changes to the Guidelines to make them easier to understand.

I. Material Supervisory Determinations Eligible for Review

The amendments published for comment in the Federal Register on August 4, 2016 proposed to broaden the definition of "material supervisory determination" in two respects. First, the amendments proposed to allow determinations regarding an institution's level of compliance with a formal enforcement action to be appealed as a material supervisory determination; however, if the FDIC determines that lack of compliance with an existing enforcement action requires additional enforcement action, the proposed new enforcement action would not be appealable. Second, the amendments proposed to remove from the list of determinations that are not appealable the decision to initiate an informal enforcement action, such as a Memorandum of Understanding. Commenters supported these changes and the FDIC has adopted them as proposed.

One commenter noted that while the amendments published for comment proposed to remove from the list of determinations that are not appealable the decision to initiate an informal enforcement action, they did not propose to make such decisions expressly appealable. The commenter requested that, for clarity, the FDIC add the decision to initiate an informal enforcement action to the list of appealable determinations. The FDIC agrees that this change clarifies institutions' opportunities for appeal. Accordingly, the amended Guidelines provide

expressly that material supervisory determinations include decisions to initiate informal enforcement actions.¹⁷

A commenter recommended that the definition of material supervisory determination include *matters requiring board attention*. This commenter noted that *matters requiring board attention* are arguably subject to appeal under the current Guidelines. The FDIC believes that this change clarifies institutions' opportunities for appeal and enhances consistency with the appellate processes used by other agencies. Accordingly, the amended Guidelines provide expressly that *matters requiring board attention* are material supervisory determinations that may be appealed under the Guidelines.

A commenter stated that the FDIC should allow appeals of the conclusions in an examination report. As discussed above, the Riegle Act provides for the review of "material supervisory determinations."¹⁸ The FDIC anticipates that many conclusions in examination reports would be "material supervisory determinations" within the meaning of the statute and Guidelines and therefore appealable under the Guidelines. However, in 2016 the FDIC also put in place 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).

One commenter recommended that the definition of material supervisory determination include any supervisory action that would adversely impact an institution, including: (1) formal enforcement actions and assessments of civil money penalties; (2) public disclosure of a determination that an institution has violated a law or regulation, has committed an unsafe or

¹⁷ As a practical matter, the FDIC believes that appeals of decisions to initiate informal enforcement actions are likely to be rare due to differences in the processes for initiating formal and informal enforcement actions.

¹⁸ 12 U.S.C. 4806(a).

unsound practice, or is in an unsafe and unsound condition; (3) restrictions on an institution's ability to open or expand branches or to purchase other institutions or their assets; (4) decisions to refer a matter to another agency for enforcement; and (5) ratings downgrades that would have adverse consequences for the institution, regardless of whether the downgrade is related to an enforcement action. Each of these supervisory actions is addressed below.

Institutions that wish to appeal a formal enforcement action, including the assessment of a civil money penalty, have the ability to seek redress through the administrative process established under Section 8 of the FDI Act and Part 308 of the FDIC's regulations.

Recommendations to pursue formal enforcement actions are reviewed by high-level FDIC officials prior to their initiation and are monitored by such officials subsequently. Contested enforcement actions include the right to an administrative hearing held before an impartial administrative law judge who makes findings of fact and conclusions of law and issues a recommended decision to the FDIC Board of Directors. The Board of Directors issues a final decision that is subject to review in federal court.

Accordingly, the FDIC believes that the administrative enforcement process provides the appropriate avenue for contesting such determinations and notes that addressing formal enforcement-related actions through the administrative enforcement process is consistent with the other Federal banking agencies' appellate processes.¹⁹ The FDIC also notes that public disclosure of a determination that an institution has violated a law or regulation, has committed

¹⁹ The FDIC considered institutions' opportunity to contest determinations through the administrative enforcement process when it revised the Guidelines in 2008, eliminating the ability to file appeals with the SARC with respect to formal enforcement-related actions or decisions, including determinations and the underlying facts and circumstances forming the basis of a recommended or pending formal enforcement action. *See* 73 FR 54822, 54824 (Sep. 23, 2008).

an unsafe or unsound practice, or is in an unsafe and unsound condition would typically occur in connection with a formal enforcement action, and is required by law to be made public.

Institutions currently may appeal restrictions based on examination ratings by appealing the relevant rating. Ratings also may affect institutions' applications with respect to certain activities. The FDIC also applies specific standards to failed bank acquisitions based upon the acquiring institution's CAMELS rating.²⁰ The Guidelines currently permit appeals of final decisions with respect to certain applications. *See* Section D, paragraph (m) of the Guidelines. Institutions file requests for reconsideration of such applications pursuant to Part 303.11(f) of the FDIC's regulations, 12 C.F.R. 303.11(f). If the request for reconsideration is granted, and the filing was originally denied by a Division Director, the institution may appeal that determination to the SARC. In addition, if an institution has concerns with FDIC staff processing of applications before a final decision is made, the FDIC also provides an informal process to obtain review of the matter by the Division Director. *See* FIL-51-2016 (July 29, 2016).

With respect to referrals of matters to another agency, the Equal Credit Opportunity Act ("ECOA") requires the FDIC to refer matters to the Attorney General whenever the agency has reason to believe that one or more creditors has engaged in a pattern or practice of discouraging or denying applications for credit in violation of the statute.²¹ Similarly, where the FDIC has reason to believe that an ECOA violation also would violate the Fair Housing Act ("FHA") and the matter is not required to be referred to the Attorney General, it is required to notify the Department of Housing and Urban Development ("HUD").²²

²⁰ *See* FDIC Statement of Policy on Qualifications for Failed Bank Acquisitions, 74 FR 45440, 45448 (Sep. 2, 2009).

²¹ 15 U.S.C. 1691e(g).

²² 15 U.S.C. 1691e(k).

The Guidelines currently allow institutions to appeal a variety of ratings, including CAMELS ratings, information technology ratings, trust ratings, Community Reinvestment Act ratings, and consumer compliance ratings, regardless of whether a change in the rating is related to an enforcement action. However, the facts and circumstances that form the basis of a recommended or pending formal enforcement action cannot be challenged through the process set forth in the Guidelines and must instead be addressed through the administrative enforcement process. In such instances, an appeal of the rating may be available through the SARC process based on grounds other than the facts and circumstances that form the basis of the recommended or pending formal enforcement action.

II. Commencement of Formal Enforcement Action

Currently, the Guidelines state that a formal enforcement action or decision commences, and therefore becomes unappealable, when the FDIC initiates a formal investigation under 12 U.S.C. § 1820(c) or provides written notice to the institution indicating the FDIC's intention to pursue available formal enforcement remedies under applicable statutes or published enforcement-related policies of the FDIC, including written notice of a referral to the Attorney General pursuant to ECOA or a notice to HUD for violations of ECOA and the FHA. The proposed amendments provided that a formal enforcement-related action or decision would commence and become unappealable when the FDIC initiates a formal investigation under 12 U.S.C. § 1820(c) or provides written notice to the institution of a recommended or proposed formal enforcement action under applicable statutes or published enforcement-related policies of the FDIC, including written notice of a referral to the Attorney General pursuant to ECOA or a notice to HUD for violations of ECOA and the FHA. This amendment, which the FDIC has

adopted as proposed, is not intended to make a substantive change, but rather, to clarify the Guidelines and make them more consistent with the appellate processes used by other agencies.

A commenter requested that the FDIC further clarify when a formal enforcement-related action has commenced. Institutions will be notified in writing that the FDIC has recommended or proposed a formal enforcement action. Other types of correspondence from the FDIC to the institution, such as letters requesting additional information or referencing a violation of law without an express statement that the FDIC has recommended or proposed a formal enforcement action, are not considered to constitute notice of a recommended or proposed formal enforcement action for purposes of the Guidelines.

One commenter also expressed the concern that examiners may try to shield material supervisory determinations from appellate review by labeling them “enforcement-related” or initiating a formal enforcement action on the eve of appeal. Formal enforcement actions are reviewed by high-level FDIC officials prior to their initiation. Moreover, field examiners do not decide whether material supervisory determinations form the basis of a formal enforcement action and are therefore reviewable only through the administrative enforcement process. Institutions submit requests for review to staff at the FDIC’s Washington office. Division staff who were not substantively involved in the decision carefully consider the request for review in consultation with Legal Division SARC specialists to ascertain whether specific determinations are subject to appeal under the Guidelines, or alternatively, through another process. The FDIC believes that these processes mitigate the concern that an examiner might characterize a finding as related to a formal enforcement action, or initiate such an action, for the purpose of precluding an appeal under the Guidelines.

The proposed amendments also provided that initiation of a formal enforcement-related action or decision would not affect the appeal of any material supervisory determination that is pending under the Guidelines. In other words, this ensures that where an institution has filed an appeal of a material supervisory determination through the SARC process, the appeal will not be affected if the FDIC subsequently initiates a formal enforcement-related action or decision based on the same facts and circumstances as the appeal. The FDIC has adopted this amendment as proposed.

III. Additional Opportunities for Appeal

The amendments published for comment proposed to allow institutions additional opportunities to appeal material supervisory determinations through the SARC process in certain circumstances. In particular, the amendments proposed to allow an institution an additional opportunity to appeal material supervisory determinations where the FDIC provides the institution with written notice of a recommended or proposed formal enforcement action but does not pursue an enforcement action within 120 days of the written notice. The FDIC could extend this 120-day period, with the approval of the SARC Chairperson, if the FDIC notifies the institution that the relevant Division Director is seeking formal authority to take an enforcement action. The FDIC also proposed to allow institutions an additional opportunity to appeal material supervisory determinations through the SARC process in the case of a referral to the Attorney General for certain violations of ECOA if the Attorney General returns the matter to the FDIC and the FDIC does not initiate an enforcement action within 120 days of the date the referral is returned. Similarly, an additional opportunity to appeal through the SARC process would be allowed if the FDIC provides notice to HUD for violations of ECOA or the FHA, but

does not initiate an enforcement action within 120 days of the date the notice is provided. The amendments published for comment proposed to allow the 120-day timeframe to be extended if the FDIC and the institution mutually agree and deem it appropriate in order to reach a mutually agreeable solution. Institutions would be provided written notice of the additional opportunity to submit an appeal through the SARC process within 10 days of a determination that an appeal will be made available. The FDIC has adopted these amendments as proposed.

A commenter suggested that the FDIC should reduce the 120-day period in these provisions to 60 days because during this period, banks are subject to penalties and restrictions that can adversely affect operations. The FDIC believes that the 120-day time frame contained in these provisions is appropriate. As discussed above, formal enforcement actions are reviewed by high-level FDIC officials prior to their initiation. The 120-day time period appropriately balances the need for adequate review of enforcement actions with institutions' desire to promptly appeal material supervisory determinations.

IV. Structure of the Appellate Process

Commenters also addressed the structure of the appellate process. One commenter stated that the FDIC should employ an independent review process that is not confined exclusively to agency officials. The FDIC is mindful of the commenter's concern but concludes that review by high-level officials who were not involved in the determination at issue and do not report to the official who made the determination is consistent with the Riegle Act, which provides for an intra-agency appellate process.²³ The SARC is comprised of high-level officials, including one inside member of the FDIC's Board of Directors, who is designated the SARC Chairperson, and

²³ 12 U.S.C. 4806(a).

one deputy or special assistant to each of the inside Board members who are not designated as the SARC Chairperson. Furthermore, the amended Guidelines are specifically intended to provide institutions with broader avenues of redress with respect to material supervisory determinations. The FDIC also provides an informal process for review at the Division Director level of any matters that are not covered by an existing FDIC appeals or administrative process, such as the SARC appeals process or the administrative enforcement process. *See* FIL-51-2016 (July 29, 2016). Institutions may use this informal process to address, for example, concerns about FDIC staff processing of applications before a final decision is made.

A commenter suggested that under the Guidelines, initial appeals should be filed with the SARC, which is outside the supervision structure, rather than with the Division Director. The commenter noted that the OCC allows institutions to file appeals with its Ombudsman. The FDIC's experience in administering the appellate process, however, suggests that Division-level review resolves issues, narrowing the matters in dispute prior to SARC review or eliminating the need for an appeal to the SARC. Division-level review also ensures that the arguments are more fully developed for SARC review and allows the Division Director to correct errors and maintain consistency across the organization.

The same commenter stated that if the FDIC retains Division-level reviews, it should increase the transparency of those reviews by publishing Division Directors' decisions. Division Directors conduct their reviews on an expedited basis, issuing written determinations on institutions' requests for review within 45 days of receipt of the request. However, the FDIC believes that the transparency of the process could be enhanced by providing institutions with additional information regarding Division-level reviews. Accordingly, the amended Guidelines

provide for publication of annual reports on Division Directors' decisions with respect to institutions' requests for review of material supervisory determinations.

A commenter stated that the FDIC should clarify that SARC decisions may be appealed to the federal courts of appeal. The FDIC notes that because supervisory decisions are entrusted to agency discretion, SARC decisions are not appealable.

V. Standard of Review

Commenters also addressed the standard of review that applies to appeals filed under the Guidelines. A commenter stated that the proposed amendments to the Guidelines did not address the high standard of review banks must meet when seeking redress. Another commenter stated that the FDIC should apply a *de novo* standard of review to appeals rather than the current standard, which the commenter believes is too deferential to examiners. Pursuant to Section M of the Guidelines, the SARC reviews 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.” The SARC’s balanced approach includes review of the evidence and arguments presented by both Division staff and the appealing institution. In addition to submitting written materials, an institution is generally invited to make an oral presentation before the SARC and explain its positions on the issues raised in the appeal. The FDIC believes that this approach is reasonable and enables institutions to obtain a full and fair review of material supervisory determinations.

A commenter suggested that institutions also should be entitled to adduce evidence and engage in reasonable discovery during the appeals process. However, institutions often present

extensive evidence in support of their appeals, and it is not apparent that the current process has hindered institutions' appeals.

One commenter requested that the FDIC clarify the standard of review for Division-level reviews, noting that the Guidelines are not clear in this respect. The FDIC agrees that it would be useful to clarify this aspect of the process. Historically, the same standard of review has been applied to Division-level reviews and SARC appeals. The amended Guidelines apply the current standard of review for SARC appeals to Division-level reviews.

VI. Stay of Supervisory Actions

A commenter requested that the FDIC stay supervisory actions during the pendency of an appeal. While the FDIC generally does not stay material supervisory determinations while an appeal under the Guidelines is pending, the Guidelines do not prohibit an institution from making such a request of the Division Director.

For the reasons set out in the Preamble, the Board has adopted the Guidelines for Appeals of Material Supervisory Determinations as set forth below.

Amended 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. The procedures set forth in these Guidelines establish an appeals process for the review of material supervisory determinations by the Supervision Appeals Review Committee (“SARC”).

B. SARC Membership

The following individuals comprise the three (3) voting members of the SARC: (1) One inside FDIC Board member, either the Chairperson, the Vice Chairperson, or the FDIC Director (Appointive), as designated by the FDIC Chairperson (this person would serve as the Chairperson of the SARC); and (2) one deputy or special assistant to each of the inside FDIC Board members who are not designated as the SARC Chairperson. The General Counsel is a non-voting member of the SARC. The FDIC Chairperson may designate alternate member(s) to the SARC if there are vacancies so long as the alternate member was not involved in making or affirming the material supervisory determination under review. A member of the SARC may designate and authorize the most senior member of his or her staff within the substantive area of responsibility related to cases before the SARC to act on his or her behalf.

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 with respect to 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.

Material supervisory determinations include:

- (a) CAMELS ratings under the Uniform Financial Institutions Rating System;
- (b) IT ratings under the Uniform Interagency Rating System for Data Processing Operations;
- (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 adequacy 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 (Regulation Z) restitution;
- (m) Filings made pursuant to 12 C.F.R. § 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 C.F.R. § 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 additional 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 otherwise affect the nature and level of supervisory oversight accorded an institution.

Material supervisory determinations do not include:

- (a) Decisions to appoint a conservator or receiver for an insured depository institution;
- (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.

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) or provides written notice to the institution of a recommended or proposed formal enforcement action 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”). For the purposes of these Guidelines, remarks in a Report of Examination do not constitute written notice of a recommended or proposed enforcement action. A formal enforcement-related action or decision does not affect the appeal of any material supervisory determination that is pending under these Guidelines.

Additional SARC Rights:

- (a) In the case of any written notice from the FDIC to the institution of a recommended or proposed formal enforcement action, including a draft consent order, if an enforcement action, such as the issuance of a notice of charges or the signing of a consent order, is not pursued within 120 days of the written notice, SARC appeal rights will be made available pursuant to these guidelines. The FDIC may extend this 120-day period, with the approval of the SARC Chairperson, if 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, if the Attorney General returns the matter to the FDIC and the FDIC does not initiate an enforcement action within 120 days of the date the referral is returned, SARC 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, if the FDIC does not initiate an enforcement action within 120 days of the date the notice is provided, SARC appeal rights will be made available under these guidelines.
- (d) Written notification of SARC rights will be provided to the institution within 10 days of a determination that such rights have been made available.
- (e) The FDIC and an institution may mutually agree to extend the timeframes in paragraphs (a), (b), and (c) if the parties deem it appropriate in order to reach a mutually agreeable solution.

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/or 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 or RMS, or to filing an appeal with the SARC under these Guidelines.

F. Filing a Request for Review with the Appropriate Division

An institution may file a request for review of a material supervisory determination with the Division that made the determination, either the Director, DCP, or the Director, RMS, (“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 has considered the merits of the request and has authorized that it be filed.

The Division Director 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 Division Director will issue a written determination on the request for review, setting forth the grounds for that determination, within 45 days of receipt of the request. No appeal to the SARC will be allowed unless an institution has first filed a timely request for review with the appropriate Division Director.

G. Appeal to the SARC

An institution that does not agree with the written determination rendered by the Division Director must appeal that determination to the SARC within 30 calendar days from the date of that determination. The Director's determination will inform the institution of the 30-day time period for filing with the SARC and will provide the mailing address for any appeal the institution may wish to file. Failure to file within the 30-day time limit may result in denial of the appeal by the SARC. If the Division Director recommends that an institution receive relief that the Director lacks delegated authority to grant, the Director may, with the approval of the Chairperson of the SARC, transfer the matter directly to the SARC without issuing a determination. Notice of such a transfer will be provided to the institution. The Division Director may also request guidance from the SARC Chairperson as to procedural or other questions relating to any request for review.

H. Filing with the SARC

An appeal to the SARC will be considered filed if the written appeal is received by the FDIC within 30 calendar days from the date of the Division Director's written determination or if the written appeal is placed in the U.S. mail within that 30-day period. If the 30th day after the date of the Division Director's written determination is a Saturday, Sunday, or a Federal holiday, filing may be made on the next business day. The appeal should be sent to the address indicated on the Division Director's determination being appealed.

I. Contents of Appeal

The appeal should be labeled to indicate that it is an appeal to the SARC 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. Only matters previously reviewed at the division level, resulting in a written determination or direct referral to the SARC, may be appealed to the SARC. Evidence not presented for review to the Division Director may be submitted to the SARC only if authorized by the SARC Chairperson. The institution should set forth all of the reasons, legal and factual, why it disagrees with the Division Director's determination. Nothing in the SARC administrative process shall create any discovery or other such rights.

J. 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.

K. Oral Presentation

The SARC may, in its discretion, whether or not a request is made, determine to allow an oral presentation. The SARC generally grants a request for oral presentation if it determines that oral presentation is likely to be helpful or would otherwise be in the public interest. Notice of the SARC's determination to grant or deny a request for oral presentation will be provided to the institution. If oral presentation is held, the institution will be allowed to present its positions on the issues raised in the appeal and to respond to any questions from the SARC. The SARC may also require that FDIC staff participate as the SARC deems appropriate.

L. Dismissal, Withdrawal and Rejection

An appeal may be dismissed by the SARC 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. An appeal may be rejected if the right to appeal has been cut off under Section D, above.

M. Scope of Review and Decision

The SARC 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 SARC will notify the institution, in writing, of its decision concerning the disputed material supervisory determination(s) within 45 days from the date the SARC meets to consider the appeal, which meeting will be held within 90 days from the date of the filing of the appeal. SARC 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 SARC may reconsider its decision only on a showing of an intervening change in the controlling law or the availability of material evidence not reasonably available when the decision was issued.

N. Publication of Decisions

SARC decisions will be published as soon as practicable, and the published decisions will be redacted to avoid disclosure of exempt information. In cases in which redaction is deemed insufficient to prevent improper disclosure, published decisions may be presented in summary form. Published SARC decisions may be cited as precedent in appeals to the SARC. Annual

reports on Division Directors' decisions with respect to institutions' requests for review of material supervisory determinations also will be published.

O. SARC Guidelines Generally

Appeals to the SARC will be governed by these Guidelines. The SARC will retain discretion to waive any provision of the Guidelines for good cause. The SARC may adopt supplemental rules governing its operations; order that material be kept confidential; and consolidate similar appeals.

P. Limitation on Agency Ombudsman

The subject matter of a material supervisory determination for which either an appeal to the SARC has been filed, or a final SARC decision issued, is not eligible for consideration by the Ombudsman.

Q. 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, or the Director, RMS, 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 SARC, the SARC will notify the institution and the State regulatory authority of its decision.

Once the SARC 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.

R. 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 or affect the FDIC's authority to take any supervisory or enforcement action against that institution.

S. 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.

T. 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, 550 17th Street, Washington, DC 20429, 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.

By order of the Board of Directors.

Dated at Washington, DC, the 18th day of July, 2017.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.