

**Billing Code**

## **FEDERAL DEPOSIT INSURANCE CORPORATION**

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

**AGENCY:** Federal Deposit Insurance Corporation.

**ACTION:** Notice and request for comment.

**SUMMARY:** The Federal Deposit Insurance Corporation proposes to amend its Guidelines for Appeals of Material Supervisory Determinations (Guidelines) to establish an independent office that would generally 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.

**DATES:** Written comments must be received by the FDIC on or before October 20, 2020, for consideration.

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

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.
- *Agency Web Site:* <http://www.fdic.gov/regulations/laws/federal/>. Follow the instructions for submitting comments.
- *Email:* [Comments@FDIC.gov](mailto:Comments@FDIC.gov). Include “Guidelines for Appeals of Material Supervisory Determinations” in the subject line of the message.

- *Mail:* Robert E. Feldman, Executive Secretary, Attention: Comments, Federal Deposit Insurance Corporation, 550 17th Street NW, Washington, DC 20429.
- *Hand Delivery/Courier:* Guard station at the rear of the 550 17th Street building (located on F Street) on business days between 7:00 a.m. and 5:00 p.m. (EST).
- *Public Inspection:* All comments received will be posted without change to <http://www.fdic.gov/regulations/laws/federal> including any personal information provided. Comments may be inspected and photocopied in the FDIC Public Information Center, Room E-1005, 3501 North Fairfax Drive, Arlington, VA 22226 on business days between 9:00 a.m. and 4:00 p.m. (EST).

**FOR FURTHER INFORMATION CONTACT:** Samuel B. Lutz, Counsel, Legal Division, (202) 898-3773; James Watts, Counsel, Legal Division, (202) 898-6678.

**SUPPLEMENTARY INFORMATION:**

The Federal Deposit Insurance Corporation (FDIC) is publishing for comment proposed amendments to its Guidelines for Appeals of Material Supervisory Determinations (Guidelines). The FDIC is seeking comments regarding these amendments to the Guidelines in order to provide the public an opportunity to provide input and feedback, although notice and comment is not required.

The Guidelines describe the process by which insured depository institutions (IDIs) may appeal material supervisory determinations made by the FDIC. The current appeals process provides for two stages of review. First, an IDI requests review of a material supervisory determination by the appropriate Division Director from the Division of Risk Management Supervision (RMS), the Division of Depositor and Consumer Protection (DCP), or the Division of Complex Institution Supervision and Resolution (CISR). If the IDI is not satisfied with the

Division Director’s decision, it may proceed to the second stage of the process – an appeal of that decision to the FDIC’s Supervision Appeals Review Committee (SARC), a standing committee of the FDIC’s Board of Directors (Board).

The proposed amendments would replace the SARC with a newly established independent office that would exclusively consider supervisory appeals. In addition, the proposal would modify the procedures and timeframes related to considering formal enforcement-related decisions through the supervisory appeals process.

## **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>4</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>5</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>6</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>7</sup> Specifically excluded from this

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

<sup>5</sup> 12 U.S.C. 4806(f)(2).

<sup>6</sup> 12 U.S.C. 4806(b).

<sup>7</sup> 12 U.S.C. 4806(f)(1)(A).

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>8</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>9</sup>

A. Structure of the Supervisory Appeals Review Committee

On March 21, 1995, the 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>10</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 RMS), the Director of the Division of Compliance and Consumer Affairs (DCA) (the predecessor to DCP), the FDIC Ombudsman, and the General Counsel.<sup>11</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>12</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>13</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>14</sup>

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<sup>8</sup> 12 U.S.C. 4806(f)(1)(B).

<sup>9</sup> 12 U.S.C. 4806(g).

<sup>10</sup> 60 FR 15923 (Mar. 28, 1995).

<sup>11</sup> 60 FR 15923, 15930. Committee members could also designate another person to serve on their behalf.

<sup>12</sup> 60 FR 15923, 15924.

<sup>13</sup> 60 FR 15923, 15924.

<sup>14</sup> 69 FR 41479, 41480 (July 9, 2004).

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>15</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>16</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>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 parties 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

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

<sup>16</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>17</sup> 69 FR 41479, 41480.

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

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 Committee 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 Committee, 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 written or proposed 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 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. 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.

### **Amendments to the Guidelines**

The FDIC's experience with the SARC, along with feedback obtained through the listening sessions, suggests that there may be opportunities to improve the FDIC's supervisory appeals process, particularly with respect to enhancing the independence of the SARC and the procedures and timeframes that apply to determinations in the context of formal enforcement-related decisions. Accordingly, through this Notice, the FDIC is seeking comment on amendments to the supervisory appeals process that would establish an independent office within the FDIC that would have as its only function the review and consideration of supervisory appeals. The FDIC is also proposing amendments to improve its procedures and timeline for the consideration of certain decisions related to formal enforcement actions through the supervisory appeals process.

#### *Proposed Office of Supervisory Appeals*

The FDIC proposes to replace the SARC with an independent, standalone office within the FDIC, which would be known as the Office of Supervisory Appeals (Office). The Office would report directly to the FDIC Chairperson's Office and would have delegated authority to independently consider and resolve intra-agency supervisory appeals. The Office would be fully independent of those FDIC Divisions with authority to issue material supervisory determinations (RMS, DCP, and CISR), while still operating within the FDIC.

## 1. Staffing of the Office

The FDIC proposes that the members of the Office responsible for deciding appeals have bank supervisory or examination experience (for example, such individuals may be retired bank examiners). Such reviewing officials would be employees of the FDIC and may serve on staggered terms. To promote the independence of the Office, the FDIC anticipates recruiting externally and employing reviewing officials on a part-time or intermittent, time-limited basis. It is possible that particular individuals would be selected from a pool of reviewing officials for an appeal on a case-by-case basis. Members of the Office, as employees of the FDIC, would be cleared for potential conflicts of interest and would be subject to the FDIC's normal requirements for confidentiality. In creating this Office, the FDIC is not intending to create unnecessary layers of decision-making. The Office, as envisioned, would be devoted to executing the FDIC's supervisory appeals functions, which responsibilities would include considering and reviewing appeals and issuing decisions.

## 2. Appeals Process

IDIs would continue to be encouraged to make good-faith efforts to resolve disagreements with examiners and/or the appropriate Regional Office. If these efforts are not successful, IDIs would submit a request for review with the appropriate Division Director. Upon receiving a request for review, the Division Director would have the option of issuing a written decision or sending the appeal directly to the Office. For example, if an IDI appealed a second material supervisory determination based on similar facts and circumstances while its initial appeal is pending before the Office, the FDIC expects that the Division Director would refer the subsequent appeal to the Office. IDIs that disagree with a decision made by the Division Director could submit an appeal to the Office.



A three-member panel of the Office would consider appeals and would issue a written decision. The IDI and the Division Director would continue to be permitted to submit views on the appeal to the Office during this stage of Office's review process, and the Ombudsman also would be authorized to submit views to the review panel. The Legal Division would provide counsel to the Office.

Oral presentation would be permitted if a request is made by the institution or by FDIC staff. Under the existing Guidelines, the SARC has discretion whether or not to allow oral presentation, but requests for oral presentations are generally granted.

The reviewing panel would be an appellate body that would make independent supervisory determinations. The panel 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, 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, which is the province of the Board and its designees. For that reason, the Office would not consider aspects of an appeal that seek to change or modify FDIC policy or rules. As part of its role in providing counsel to the Office, the Legal Division would also advise on existing FDIC policies and rules, and help ensure no decisions made by the Office changed or modified FDIC policies or rules. Additionally, if an institution has multiple appeals pending based upon similar facts and circumstances, those appeals could be consolidated for expediency.

Consistent with the existing *Guidelines* and the Riegle Act, decisions to appoint a conservator or receiver for an insured depository institution would not be considered material supervisory determinations. Under this proposal, the *Guidelines* would further clarify that decisions made in furtherance of the resolution or receivership process or planning (such as decisions made pursuant to Parts 370, 371, and 381, and section 360.10 of the FDIC’s rules and regulations) also would not be considered material supervisory determinations. Unlike the “material supervisory determinations” enumerated in the statute and the current *Guidelines*,<sup>19</sup> decisions made under the regulatory provisions identified above are not focused on monitoring for and addressing issues that may affect an institution’s condition. Instead, these decisions involve actions related to assessing or promoting the resolvability of certain institutions, such as those facilitating the prompt payment of deposit insurance to a large number of depositors or the orderly resolution of an institution with a portfolio of qualified financial contracts.

The FDIC anticipates that these combined changes could provide several advantages over the existing supervisory appeals process and would address several of the recommendations presented during the Webinar and in-person listening sessions. In particular, the FDIC anticipates that:

- By creating a standalone office within the FDIC with authority to consider and resolve supervisory appeals, and by staffing that office with professionals serving term or other non-permanent appointments, the supervisory appeals process could operate more independently, and without perceived conflicts of interest, in the FDIC’s organizational structure;

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<sup>19</sup> The Riegle Act defined “material supervisory determinations” to include determinations relating to examination ratings, the adequacy of loan loss reserve provisions, and loan classifications on loans that are significant to an institution. 12 U.S.C. § 4806(f)(1)(A). Section D of the current *Guidelines* defines “material supervisory determinations” more broadly to include seventeen different types of supervisory determinations.

- Establishing the Office within the FDIC would continue to protect supervisory and confidential information, and avoid actual and perceived conflicts of interest, while still satisfying the FDIC’s statutory requirement to have an intra-agency appeals process;
- Staffing the Office with professionals who have bank supervisory or examination experience would ensure that individuals deciding on appeals have relevant knowledge and expertise, and would facilitate a robust and responsive supervisory appeals process that will be consistent over time; and
- The proposed structure would be scalable in terms of staffing, so the Office may be in a position to adapt more quickly to cyclical workload variations, allowing the FDIC to handle varying numbers of appeals in shorter periods of time.

The FDIC anticipates that staffing and otherwise establishing the Office would require a period of time following the adoption of any revised Guidelines. During this time, supervisory appeals would continue to be heard by the SARC pursuant to the existing Guidelines.

*Procedures and Timeframes for Formal Enforcement-Related Decisions*

The FDIC also proposes to amend its procedures for considering formal enforcement-related decisions through the supervisory appeals process. Generally, the FDIC identifies the facts and circumstances that may give rise to a formal enforcement action during the examination process, and these facts and circumstances are described in a Report of Examination (ROE) that is transmitted to the IDI at the conclusion of the examination.

In July 2017, the FDIC revised its Guidelines to provide an opportunity for IDIs to appeal certain material supervisory determinations underlying formal enforcement actions through the

supervisory appeals process.<sup>20</sup> Specifically, the revised Guidelines provide that if the FDIC does not commence a formal enforcement action within 120 days 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, unless the SARC Chairperson agrees to extend the 120-day period.<sup>21</sup>

While the 2017 amendments to the Guidelines may have been helpful in addressing some of the issues the FDIC encountered in administering the supervisory appeals process, further changes to the process may be beneficial. Consistent with feedback obtained through the 2019 listening sessions, the FDIC has observed some confusion as to when determinations underlying formal enforcement-related actions become appealable. In addition, a timeframe longer than 120 days may be necessary in order to fully review the facts and circumstances that lead to enforcement actions and ensure that such actions are not brought prematurely, and to allow sufficient time for an IDI to consider and execute a consent order.

The proposal clarifies that, for purposes of the supervisory appeals process, a formal enforcement-related action commences – and appeal rights become temporarily 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. This written notification may be provided in the transmittal letter that accompanies the ROE.

The proposal would further require that if the FDIC provides written notice that the FDIC is determining whether a formal enforcement action is merited, the FDIC must provide the IDI

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<sup>20</sup> 82 FR 34522, 34524 (July 25, 2017).

<sup>21</sup> 82 FR 34522, 34526.

with a draft consent order within 120 days of the date on which notice was given. Such a draft consent order could include a standalone cease and desist order, an order to pay civil money penalties, or an order for restitution. If the FDIC failed to provide the IDI with 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 would not impose a fixed time limit on such negotiations. At any time, if the IDI believes that further negotiations would not be productive and notifies the Division of this decision in writing, the Division would have 90 days from receiving the institution's rejection of the consent order to issue a notice of charges (or assessment) or to open an order of investigation, or the IDI's supervisory appeal rights would be made available. In either case, once the IDI's supervisory appeal rights are made available, the IDI would have 60 days to file an appeal, 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.

#### Request for Comment

*Question 1: In contrast to the SARC, the Office would not provide representation for Board members in the review process. Should the FDIC Chairperson and/or other Board members have an opportunity to review decisions before issuance?*

*Question 2: The FDIC proposes that the members of the Office have bank supervisory or examination experience. Does this constitute the appropriate qualifications and experience?*

*Question 3: Are there additional steps the FDIC should take to promote independence of the Office?*

*Question 4: How many reviewing officials should be included on a panel? Is three an appropriate number? Are there situations where more or less panelists might be appropriate?*

*Question 5: Should the appellate process have any additional level(s) of review before or after the proposed three-member panel?*

*Question 6: Do the proposed timelines properly balance the goals of resolving appeals as expeditiously as possible and providing adequate time for preparation and review?*

*Question 7: Participants at the listening sessions commented on the type and extent of publicly available information on SARC decisions. What type of information would be helpful to publish about the appeals process or specific appeal decisions to promote transparency while still maintaining confidentiality?*

*Question 8: The FDIC expects the proposed changes to the procedures and timeframes applicable to formal enforcement-related decisions to be effective for the majority of enforcement actions. How should the FDIC handle those unusual cases for which the proposed timeframes are too restrictive? Should the parties expect to invoke the provision(s) allowing for an extension of the timeframes in these cases?*

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## **Proposed 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 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 consider and decide appeals submitted to the Office. Each appeal will be reviewed and decided by a panel of three reviewing officials who have no conflicts of interest with respect to the appeal or the parties to the appeal.

#### *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.

- (1) 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 Act (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 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 section 360.10 of the FDIC's rules and regulations;
  - (b) Decisions to take prompt corrective action pursuant to section 38 of the FDI Act, 12 U.S.C. § 1831o;

- (c) Determinations for which other appeals procedures exist (such as determinations of deposit insurance assessment risk classifications and payment calculations); and
- (d) Formal enforcement-related actions and decisions, including determinations and the underlying facts and circumstances that form the basis of a recommended or pending formal enforcement action.

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

(4) Additional Appeal Rights:

- (a) In the case of any written notice from the FDIC to the institution that the FDIC is determining whether a formal enforcement action is merited, the FDIC must issue an Order of Investigation, issue a Notice of Charges, or provide the institution with a draft consent order within 120 days of such a notice, or 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 has considered the merits of the request and has authorized that it be filed.

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

- (a) 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, 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 from the date 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 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. 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. 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, 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, with consultation from the Legal Division, will refer any appeals that raise policy matters of first impression to the Board for its consideration. The Office will notify the institution, in writing, of its decision concerning the disputed material supervisory determination(s) within 45 days from the date the Office meets to consider the appeal, which meeting will be held within 90 days from the date of the filing of the appeal or from the date that the Division Director refers the appeal to the Office.

#### *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 exempt information. 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 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.

#### *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.

By order of the Board of Directors.

Dated at Washington, DC, the \_\_\_th day of August, 2020.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.