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October 20, 2020

By electronic submission to Comments@FDIC.gov

Mr. Robert E. Feldman
Executive Secretary
Federal Deposit Insurance Corporation
550 17th Street N.W.
Washington, D.C. 20429

Re: Notice and Request for Comment on Proposed Amendments to the FDIC's Guidelines for Appeals of Material Supervisory Determinations (RIN 3064-ZA20)

Ladies and Gentlemen:

Davis Polk & Wardwell LLP appreciates the opportunity to comment on the proposal (**Proposal**) issued by the Federal Deposit Insurance Corporation (**FDIC**) that would update the FDIC's existing Guidelines for Appeals of Material Supervisory Determinations (**Guidelines**).¹

We commend the FDIC for releasing the Proposal, which if adopted would represent another important step in the process of using transparency and accountability to strengthen the public's confidence in supervisory determinations made by the FDIC, including the confidence of FDIC-supervised banks.² In particular, we support the FDIC's independent Office of Supervisory Appeals (**Office**),³ including the FDIC's proposed staffing model for the Office, which contemplates that the FDIC will recruit external candidates with bank supervisory or examination experience who are not within the career structure of the FDIC.⁴ We believe that this staffing model ensures that the Office will have the broad range of

¹ FDIC, *Guidelines for Appeals of Material Supervisory Determinations*, 85 Fed. Reg. 54,377 (Sept. 1, 2020).

² See Jelena McWilliams, *Trust Through Transparency* (Oct. 3, 2018), <https://www.fdic.gov/news/speeches/spoct0318.html>.

³ The current Guidelines provide for two stages of review. At the first stage, an FDIC-supervised bank may request that a material supervisory determination be reviewed by the appropriate FDIC Division Director. If the bank is not satisfied with the Division Director's decision, it may move to the second stage, which is an appeal to the FDIC's Supervision Appeals Review Committee (**SARC**), which is a standing committee of the FDIC's Board of Directors. The Proposal would replace the SARC with the Office, but would otherwise maintain the two-stage review process.

⁴ Proposal at 54,378.

expertise necessary to address the issues that could be presented by an appeal of a material supervisory determination while also creating a structure designed for fair and neutral decision-making. We bring to your attention the comment in the joint ABA-BPI letter, with which we agree, that the examiner whose decision is being appealed should not have ex parte communications with the Office during the appeal. While there is no reason to import many judicial mechanisms into the administrative appeals process, the prohibition on ex parte communications is seen as a fundamental element of due process.

We strongly endorse the Proposal's recognition that the FDIC's Legal Division should play an important role in the resolution of appeals of material supervisory determinations. Under the Proposal, the Legal Division would provide counsel to the Office, advise on existing FDIC policies and rules, and ensure that no decisions made by the Office change or modify FDIC policies or rules.⁵ We believe that foundational principles of fairness and due process dictate that the FDIC's Legal Division should be involved in every appeal of a material supervisory determination, providing advice as necessary on the legal interpretation of any statutes, regulations or guidance at issue in the appeal. Even if not all appeals of material supervisory determinations involve issues that are purely questions of law, many appeals will – at a minimum – present mixed questions of law and fact.⁶ In those cases, the involvement of the FDIC's Legal Division will be critical to appropriately resolving the appeal, and we believe it is important to establish the expectation that the Legal Division will as a matter of course be involved in all appeals of material supervisory determinations handled by the Office, rather than involving the Legal Division on an *ad hoc* basis.

Finally, consistent with the current Guidelines, the Proposal would provide for the publication of decisions made by the Office as soon as practicable, with redactions to avoid disclosure of the name of the appealing institution and other exempt information.⁷ We believe this approach with respect to decisions made by the Office would strike the right balance between confidentiality and transparency.

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⁵ Proposal at 54,379. Because setting FDIC policy is the province of the FDIC's Board of Directors and its designees, the Office, with consultation from the Legal Division, would refer any appeals that raise policy matters of first impression to the FDIC's Board of Directors. Proposal at 54,382.

⁶ See Davis Polk and Wardwell LLP, Comment Letter on Proposed Amendments to Guidelines on an Internal Appeals Process for Institutions Wishing to Appeal an Adverse Material Supervisory Determination (Docket No. OP-1597) (April 30, 2018) at 5-6, <https://www.finregreform.com/wp-content/uploads/sites/32/2018/04/Comment-Letter-of-Davis-Polk-Wardwell-LLP-on-Proposed-Amendments-to-Gu....pdf> (discussing mixed questions of law and fact that could be presented by appeals of material supervisory determinations).

⁷ Proposal at 54,382-83.

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Davis Polk thanks the FDIC for its consideration of our comments. If you have any questions, please do not hesitate to contact Margaret E. Tahyar at (212) 450-4379 or Ryan Johansen at (212) 450-3408.

Yours Sincerely,

DAVIS POLK & WARDWELL LLP



Margaret E. Tahyar