

October 20, 2020

Mr. Robert E. Feldman
Executive Secretary
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, DC 20429

Re: *Proposed Changes to Guidelines for Appeals of Material Supervisory Determinations (RIN 3064-ZA20)*

Dear Mr. Feldman:

The American Bankers Association¹ (ABA) and Bank Policy Institute² (BPI) appreciate the opportunity to comment on the FDIC’s proposed revisions to its Guidelines for Appeals of Material Supervisory Determinations (Proposed Guidelines).³

The FDIC’s Proposed Guidelines seek to replace the FDIC’s existing Supervision Appeals Review Committee (SARC) with a new Office of Supervisory Appeals (Office). This new Office would decide supervisory appeals and be staffed with reviewing officials that are recruited externally to serve for a time-limited basis. As stated in the Proposed Guidelines, “[t]he FDIC anticipates that these combined changes could provide several advantages over the existing supervisory appeals process”⁴ The FDIC goes on to note that this new structure would help avoid “actual and perceived conflicts of interest” while also ensuring “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.”⁵

As a general matter, both ABA and BPI support the Proposed Guidelines, which reflect thoughtful improvements to a seldom-used formal appeals process that is in need of refinement. If finalized, these welcome changes would bolster the banking industry’s confidence in the intra-agency appeals process mandated by Section 309(a) of the Riegle Community Development and Regulatory Improvement Act of 1994 (Riegle Act).⁶

¹ The American Bankers Association is the voice of the nation’s \$21.1 trillion banking industry, which is composed of small, regional and large banks that together employ more than 2 million people, safeguard \$17 trillion in deposits and extend more than \$11 trillion in loans. Learn more at www.aba.com.

² The Bank Policy Institute is a nonpartisan public policy, research and advocacy group, representing the nation’s leading banks and their customers. Our members include universal banks, regional banks and the major foreign banks doing business in the United States. Collectively, they employ almost 2 million Americans, make nearly half of the nation’s small business loans, and are an engine for financial innovation and economic growth.

³ Guidelines for Appeals of Material Supervisory Determinations, 85 Fed. Reg. 54,377 (September 01, 2020). Available at: <https://www.govinfo.gov/content/pkg/FR-2020-09-01/pdf/2020-19276.pdf>.

⁴ Id at 54,379.

⁵ Id.

⁶ 12 U.S.C. § 4806.

In response to the questions posed in the notice and request for comment on the Proposed Guidelines, we offer the following technical recommendations on how to further enhance the independence and effectiveness of the new Office.

QUESTION RESPONSES

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?

No, neither the FDIC Chairperson nor Board members should have an opportunity to review decisions of the Office before issuance. Perhaps the most significant change from current practice that is reflected in the Proposed Guidelines is the decision to enable the Office to make its determinations independent of influence by the FDIC's Chairperson or Board and we believe this change should remain in the final version of the Proposed Guidelines. We believe that the Office should be as independent as possible, which includes having independence from review by the FDIC's leadership.

Introducing a review of the Office's determinations by the FDIC's Chairperson and/or Board would undermine the Office's structural independence by re-inserting the FDIC's leadership into the position of resolving exam appeals, as it does currently with SARC. This outcome and the perceived reduction in the Office's independence could deter banks from availing themselves of the Office's exam appeal function. For these reasons, we strongly believe that the Office's determinations must be deemed final and subject to no further review.

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?

We agree with the Proposed Guidelines that bank supervisory or examination experience would be an appropriate background for a reviewing official. However, we respectfully submit that former supervisors are not the only individuals who may be qualified to serve. For that reason, we believe that the FDIC should not exclude other candidates who may have skills and experience suitable for the role. The FDIC should ensure that the members of the Office reflect a diverse range of experience and views that promote the exercise of independent judgment and fairness.

Since the Office will be asked to resolve highly technical matters, other candidates likely to have appropriate experience to serve may include retired bank officers, bank board members, consultants, attorneys, and other industry experts. Key to the fairness, independence, and quality of the Office's process and decisions will be the diversity of professional backgrounds within the available pool of reviewing officials.

In addition to those with supervisory or examination experience, candidates with banking industry experience, including those who may themselves have been examiners or previously had involvement in a banking organization's interactions with regulators, could contribute a valuable perspective to the Office.⁷ In the interest of strengthening the quality and fairness of the Office's

⁷ Underlying this point is the presumption that all conflicts of interest would be adequately addressed.

pool of reviewing officials, the FDIC should avoid any staffing process that would involve the outright denial of former banking industry officials from service. Such a process would unfairly deprive the Office of reviewing officials with different perspectives than those individuals who have exclusively served as former examiners and supervisors.

By both permitting a diverse range of applicants and making a concerted effort to hire individuals with diverse professional backgrounds, the FDIC would make the banking industry considerably more confident in the independence of the Office. To draw a parallel, no defendant in a lawsuit would ever be comfortable adjudicating before a court system that only permitted judges to emanate from the ranks of plaintiff's lawyers and government prosecutors. Indeed, our nation's judicial system embraces diversity on the bench and in no way disqualifies individuals on the basis of their former professional affiliations. That same logic to enable a range of qualified professionals to serve should govern here, just as it appears to for the hiring decisions of Administrative Law Judges (ALJs) in the Office of Financial Institution Adjudication.⁸

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

Yes. We have several suggestions that, if adopted, should further enhance the independence of the Office:

a. Ensure a Balanced, Effective and Independent Hiring Process

The hiring process and ultimate selection of the reviewing officials for the Office will be a critical feature of independence. As noted in Question 2, a diverse range of candidates should be considered, not just former examiners. We believe that the FDIC must ensure that it sets out a hiring process that enables the selection of individuals capable of exercising the independent judgment necessary to overturn examiner determinations when it is appropriate to do so. This hiring process must not unfairly eliminate diverse candidates or favor the hiring of reviewing officials that are unfairly predisposed to affirming the work of examiners without sufficient critical review.

b. Review and Certify the Office's Independence

The FDIC should promote independence by undertaking a regular, formal review of the Office to substantiate its independence, just as financial institutions verify the independence of their internal audit function. This responsibility to audit the independence of the Office should fall to the FDIC's Office of Inspector General. The findings of the Inspector General as to the Office's independence should be reviewed and approved by the FDIC Board annually and, once approved, should be made available to the public.

c. Empower the Office with a *De Novo* Standard of Review

In its Proposed Guidelines, the FDIC states that a reviewing panel of the Office will "review the appeal for consistency with the policies, practices, and mission of the FDIC and the overall

⁸ The Office of Financial Institution Adjudication is an inter-agency group of ALJs established to preside over the administrative enforcement proceedings of the FDIC, Office of the Comptroller of the Currency, Federal Reserve Board, and National Credit Union Administration.

reasonableness of, and the support offered for, the positions advanced, consistent with the existing standard of review for the SARC.”⁹ The existing SARC Guidelines do not use the phrase “standard of review,” but do state that “[t]he 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.”¹⁰

We believe that the FDIC should abandon this standard of review in favor of a more neutral, *de novo* standard. Adopting a *de novo* standard would align with the approach recently taken by the FRB in its revision of its own intra-agency appellate process for material supervisory determinations.¹¹ Specifically, in the FRB’s March 17, 2020 publication of its revisions, the FRB finalized changes to its initial review panel stating that it shall “make its own supervisory determination and shall not defer to the judgment of the Reserve Bank staff that made the supervisory determination . . .” and even acknowledged that “[a]s noted by a few commenters, this approach may be considered a *de novo* standard of review.”¹²

As recognized by the FRB, a *de novo* standard is fair as it affords no undue deference to either party involved in the appeals process. We believe that the FDIC should explicitly adopt this evenhanded standard to give the Office full discretion to fairly review and consider the relevant facts and circumstances at hand and, when appropriate, overturn erroneous supervisory determinations.

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?

The consensus view of our members was that the most important attribute of the Office would not be the number of reviewing officials per panel, but the selection of highly qualified, independent reviewing officials with a diversity of experience and views. Regardless of size, our members believe that the FDIC should ensure that the Office hires enough reviewing officials to manage the workload and account for employee attrition, conflicts of interest, incidences of recusal, and any other instances where reviewing officials may prove unavailable for any particular appeal.

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

No. We do not believe that additional levels of review are necessary and would object to further review of the Office’s decisions.

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?

We are concerned by the Proposed Guidelines’ temporary suspension of a bank’s appeal rights with respect to material supervisory determinations while the FDIC considers whether a formal enforcement action is merited. Even recognizing that the FDIC has a strong interest in exercising its

⁹ See Proposed Guidelines at 54,379.

¹⁰ See Guidelines for Appeals of Material Supervisory Decisions. Paragraph J. Available at: <https://www.fdic.gov/regulations/laws/sarc/sarcguidelines.html>

¹¹ See Internal Appeals Process for Material Supervisory Determinations and Policy Statement Regarding the Ombudsman for the Federal Reserve System. 85 Fed. Reg. 15,175 (March 17, 2020). Available at: <https://www.govinfo.gov/content/pkg/FR-2020-03-17/pdf/2020-05491.pdf>.

¹² 85 Fed. Reg. at 15,177.

enforcement powers when appropriate, we do not believe these Proposed Guidelines have properly weighed the bank's ability to appeal against the FDIC's enforcement interests.

When erroneous supervisory determinations lead to enforcement actions, or an ill-advised review is undertaken to determine whether a formal enforcement action is merited, banks will simply have no recourse or timely access to the Office under these revised Guidelines. Currently, material supervisory determinations that are appealable include both (1) CAMELS ratings; and (2) 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 to an institution. Suspending an insured depository institution's appeal rights once an examiner decides that the matter under dispute merits review to determine whether to bring a formal enforcement action could render such rights meaningless.

In some sense, this is acknowledged in these Proposed Guidelines where it states that "the FDIC has observed some confusion as to when determinations underlying formal enforcement-related actions become appealable."¹³ We believe a clearer system that does not suspend the appeal rights of institutions but rather expedites an independent review of consequential matters would be a considerable improvement. This would be consistent with the FRB's appeals process, which makes it clear that supervisory determinations remain in effect until modified or terminated through the appeals process while also acknowledging that the FRB is not prevented from exercising its supervisory or enforcement powers throughout.¹⁴ We recognize that not every matter of disagreement will merit an expedited review by the Office, but there may be viability in a more limited "emergency petition" that banks could submit directly to the Office and that the Office would have the discretion to review on an expedited basis. This could help protect against the rare occasions when an examiner may abuse his or her discretion or banks would otherwise be deprived of their appeals rights under the FDIC's Guidelines. We note that the FRB's recently modified appeals process provides expedited review for appealing material supervisory determinations that relate to or cause an institution to become critically undercapitalized.¹⁵

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?

We support the current publication process and believe that it effectively balances transparency and confidentiality. To maintain that effective balance, we ask that the FDIC continue to ensure that these summaries in no way provide information that could help to identify individual institutions that decide to undertake an appeal.

¹³ See Proposed Guidelines at 54,380.

¹⁴ 85 Fed. Reg. at 15,181.

¹⁵ Id. The FRB's modified guidelines state, in relevant part: "[n]otwithstanding any other provision in this process, a matter processed under expedited review will be subject to the same policies that govern all appeals except that the initial review panel will issue a decision within 35 calendar days following the date the appeal is received (such period may be extended by up to an additional 7 calendar days if the initial review panel decides that such time is required to supplement the record and to consider any additional information received), the institution shall have 7 days to file an appeal of the initial review panel's decision, and the final review panel will issue a decision within 10 calendar days."

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?

We believe that if the FDIC and bank find agreement that the 120-day timeline is not enough time to resolve a disagreement, it may well be appropriate to extend that timeline. However, we also believe that matters capable of waiting over 120-days to resolve could be good candidates for the application of a proper appeals process. When such an extended discussion over a potential enforcement matter takes place, it may be evidence that the disagreement is not a clear instance of consumer harm or risk to the Deposit Insurance Fund that might otherwise justify limiting a bank's right to appeal.

ADDITIONAL SUGGESTIONS

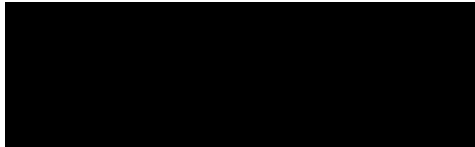
In addition to our responses to the questions set out in the Proposed Guidelines, we believe the following suggestions merit serious consideration. These recommendations are intended to improve the effectiveness and fairness of the process described in the Proposed Guidelines.

- Permit a bank's senior management to authorize supervisory appeals, provided that management informs the board of directors of its decision and keeps the board updated on the status of the appeal. The Proposed Guidelines currently require appeals to be authorized by the bank's board of directors. However, the decision to authorize an appeal falls within management's role to conduct the day-to-day operations of the bank and is more appropriately made by the bank's senior management. This suggested change would also make the FDIC's appeals process more consistent with the FRB's appeals process, which enables bank management to authorize an appeal.¹⁶
- In fairness to banks that appeal, ensure access to the Office is on equal terms by prohibiting *ex parte* discussions between the Office and relevant examiners (and Division Director(s)) while their supervisory determinations are under review.
- When a Division Director decides to affirm an examiner's judgment and a bank decides to appeal, consider establishing processes that give appealing banks sufficient insight into what formed the basis for the Division Director's decision to affirm. Recognizing that not all materials will be suitable for disclosure to the appealing bank, we believe that sharing the documentary basis for the decision, or providing a summary of the basis for that decision, will allow banks to better tailor their appeal submission and may expedite resolution.

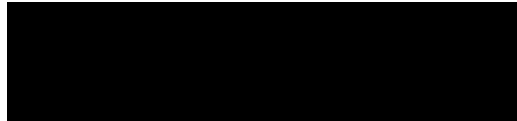
¹⁶ 85 Fed. Reg. at 15,176.

Both ABA and BPI appreciate the opportunity to share our views with the FDIC through this request for comment. If you have any questions, please contact Shaun Kern, by phone at (202) 663-5253 or by email at skern@aba.com or, Gregg Rozansky, by phone at (917) 863-5945 or by email at Gregg.Rozansky@BPI.com.

Sincerely,



Shaun Kern
Senior Counsel
American Bankers Association



Gregg Rozansky
Senior Vice President,
Senior Associate General Counsel
Bank Policy Institute