IBC BANK

October 20, 2020

Mr. Robert E. Feldman
Executive Secretary
Attn: Comments, RIN 3064-ZA20
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, D.C. 20429
Comments@FDIC.gov

RE: Notice and Request for Comment Regarding Proposed Amendments to Guidelines for Appeals of Material Supervisory Determinations

Dear Mr. Feldman:

International Bancshares Corporation, a multi-bank financial holding company headquartered in Laredo, Texas, appreciates the opportunity to submit the following comments in response to the September 1, 2020 Notice and Request for Comment ("Notice") relating to the FDIC's proposed amendments to the Guidelines for Appeals of Material Supervisory Determinations ("Guidelines"). 85 Fed. Reg. 54,377.

International Bancshares Corporation is one of the largest independent commercial bank holding companies headquartered in Texas and is a publicly-traded financial holding company. Its five bank subsidiaries (collectively, "IBC") provide commercial and retail banking services through facilities located in communities in South, Central, and Southeast Texas and the State of Oklahoma. IBC's flagship bank is International Bank of Commerce — Laredo, which represents the majority of IBC's banking assets. IBC now has more than 180 facilities and more than 280 ATMs, and provides full service banking seven days a week at many of its facilities. Each of the five charters is an FDIC-supervised institution.

IBC has been a strong and consistent advocate for expanding the rights of insured depository institutions to appeal Material Supervisory Determinations before neutral arbiters and to eliminate the "penalty box" (*i.e.*, prohibition on expanding) that institutions are placed into for certain adverse decisions. IBC welcomes the FDIC's efforts to improve the appeals process for Material Supervisory Determinations, but additional changes are needed to ensure fairness and due process consistent with the requirements of the Riegle Act.

Proposed Office of Supervisory Appeals.

The FDIC's proposal to replace the Supervision Appeals Review Committee ("SARC") with a newly established Office of Supervisory Appeals (the "Appeal Office") is a step in the right direction to providing greater independence in the appeals process.[1] However, the proposal includes several weaknesses that should be addressed before the revised Guidelines are finalized. In that regard, we respectfully submit that the FDIC should make the following changes to the proposal:

- **Provide the Appeal Office with dedicated legal counsel that is independent of the FDIC's Legal Division.** As proposed, the FDIC's Legal Division would provide counsel to the Appeal Office, including advising on existing FDIC policies and rules, and "help[ing] ensure no decisions made by the Office changed or modified FDIC policies or rules." 85 Fed. Reg. 54,379. This means that the Appeal Office may not be strictly independent in practice, because the Legal Division may have provided advice relating to the determination that is subject to appeal. Given this potential conflict of interest, the FDIC should provide the Appeal Office with dedicated legal counsel that is solely focused on appellate matters.

- **Require *de novo* review of appeals.** Appeals should be subject to *de novo* review by the Appeal Office. Moreover, in order to prevail in any appeal, banks should be required to show only that the Material Supervisory Determination was more likely than not erroneous or inconsistent with applicable FDIC policies, procedures or legal requirements. The current requirement that the SARC 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" is too vague to provide appropriate guidance to the Appeal Office and too deferential to the agency.

- **Expand the public disclosure and precedential value of decisions by the Appeal Office.** Decisions are often published in "summary form," which results in the removal of important information that could be relevant to the industry in other matters. The Guidelines should clarify that the only information subject to removal from a written decision by the Appeal Office prior to publication is such information that would clearly reveal the identity of the relevant institution (*e.g.*, the name and address of the institution, the location of its headquarters, its total assets, etc.). Moreover, the Guidelines should state that public disclosure in summary form is acceptable only if there is no practicable way to avoid identifying the relevant institution through redactions. Finally, the Guidelines should clearly state that written opinions by the Appeal Office have

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[1] IBC believes that appeals of Material Supervisory Determinations should be heard by an Office of Independent Examination Review within the Federal Financial Institutions Examination Council, as set forth in the Financial Institutions Examinations Fairness and Reform Act, S. 2649. We encourage the FDIC to support S. 2649, because it provides a fair and independent framework for hearing appeals. Inasmuch as the FDIC will not support such a framework, we submit the following comments in support of the basic proposition that the FDIC should expand access to appeals and further enhance the independence of appellate review.

precedential value in all matters involving similar facts and circumstances, including routine supervisory matters.

- **Eliminate the "Penalty Box" for institutions during the pendency of any appeal.** Historically, the FDIC has automatically removed filings by banks from expedited processing based on certain adverse Material Supervisory Determinations, even during the pendency of an appeal.[2] Moreover, the FDIC has allowed filings to languish in "standard processing" without a decision, until the appeal is decided in the institution's favor or the adverse finding has been addressed by the institution to the FDIC's satisfaction. This practice by the FDIC is commonly known as placing an institution in the "penalty box," which effectively deprives the institution of due process by terminating its ability to expand. The FDIC should revise the proposal to stay any removal or suspension from expedited processing during the pendency of an appeal, unless the violation is alleged to involve a violation of criminal law or pose an imminent threat to the safety and soundness of the institution or the insurance fund.

Procedures and Timeframes for Formal Enforcement-Related Decisions.

We also welcome revisions to the Guidelines that would clarify the FDIC's procedures and timeframes relating to enforcement-related decisions. However, it appears that certain proposed revisions would make it more difficult for institutions to achieve due process, in contravention of the FDIC's stated purpose of improving the supervisory appeals process.

Under existing FDIC guidelines, Material Supervisory Determinations do not include "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." FDIC, Guidelines for Appeals of Material Supervisory Determinations, FIL-42-2017. According to the Notice, the Guidelines would be revised to clarify that 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 institution with a draft consent order; or otherwise provides written notice to the institution 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 Report of Examination. 85 Fed. Reg. 54,380.

The proposed changes would further require that if the FDIC provides written notice to the institution that it is determining whether a formal enforcement action is merited, it must provide the institution with a draft consent order within 120 days of the date on which notice was given. If the FDIC fails to provide the institution with a draft consent order within this 120-day period, the institution's supervisory appeal rights would be made available. The proposal

[2] Examples of such filings include merger applications and applications to open new facilities. Examples of Material Supervisory Determinations that may result in automatic removal from expedited processing include CRA and Compliance rating downgrades (which may themselves occur automatically based on certain findings).

includes similar changes regarding the timing of the restoration of appeal rights. The FDIC describes the proposed amendments as "beneficial" and an "improve[ment]" to its procedures. *Id.* at 54,378; 54,380.

Upon careful review of the proposal, we respectfully submit that not all of the revisions "improve" the supervisory appeals process. Instead, it appears that the proposal expands the circumstances under which a decision becomes unappealable, and thus makes it more difficult for institutions to file appeals, as shown in the chart below:

A formal enforcement-related action or decision commences, and becomes unappealable when:

Current Guidelines	Proposed Guidelines
The FDIC initiates a formal investigation under 12 U.S.C. §1820(c); or	The FDIC initiates a formal investigation under 12 U.S.C. §1820(c); or
The FDIC provides written notice to the institution of a recommended or proposed formal enforcement action.	The FDIC issues a notice of charges or a notice of assessment under 12 U.S.C. §1818; or
	The FDIC provides the institution with a draft consent order; or
	The FDIC "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…"

As the chart above shows, the current guidelines exclude from the definition of an appealable Material Supervisory Determination formal enforcement-related actions and decisions that are commenced through a formal investigation or written notice of a "recommended or proposed" formal enforcement action (*i.e.*, situations where a decision to conduct a formal investigation or pursue enforcement has been made at some level within the agency). However, the proposal appears to further exclude instances where the FDIC is merely *reviewing the facts and circumstances* to determine if an enforcement action is merited. Moreover, the proposal appears to expand the circumstances under which such notification may occur, to include "the transmittal letter accompanying a Report of Examination." Thus, the proposed changes may have the practical effect of further limiting the circumstances under which institutions may file appeals.

Based on this analysis, we respectfully submit that the proposed revisions regarding when a Material Supervisory Determination becomes unappealable should be removed, because they do not "improve" the supervisory appeals process for institutions. Moreover, we submit that the existing guidelines—which terminate appellate rights for matters that "form the basis of" an

enforcement action—should be removed altogether in favor of provisions that *expand* appellate rights for adverse decisions.[3]

In particular, IBC strongly urges the FDIC to expand the definition of a Material Supervisory Determination to include any (i) supervisory action that would adversely impact the institution, including any restriction on the institution's ability to open or expand branches; (ii) restriction on the institution's ability to purchase other institutions or assets of other institutions; (iii) decision to refer a matter to another agency for enforcement; or (iv) public disclosure of a determination that the institution has violated any law or regulation, has committed an unsafe or unsound practice, or is in an unsafe or unsound condition.

Even if the FDIC is not prepared at this time to expand the definition of a Material Supervisory Determination in the manner described above, it should, at the very least, allow financial institutions to appeal determinations and the underlying facts and circumstances that form the basis of a recommended or pending formal enforcement-related action. Put simply, the FDIC should pursue a policy objective of providing financial institutions with greater access to the appellate process, not less, and nothing in the Riegle Act prevents it from doing so.

Request for Comment

We are also pleased to provide the following responses to the specific questions set forth in the proposal.

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. Appellate decisions should be made by the Appeal Office, without review by interested parties within the FDIC. Moreover, any written decision by the Appeal Office should state that the decision constitutes final agency action, so that the institution may pursue further appellate review as necessary or appropriate.

[3] Removing the exception to the definition of a Material Supervisory Determination for "determinations and the underlying facts and circumstances that form the basis of a recommended or pending formal enforcement action" would be consistent with the Riegle Act. In this regard, the Riegle Act states only that nothing "shall affect the authority ... to take enforcement or supervisory action." In fact, permitting an institution to appeal adverse factual findings that are the subject of an enforcement action would not affect the FDIC's authority to take such action. 12 U.S.C. §4806(a).

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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?

Yes. IBC supports the FDIC's decision to include members of the Office that have bank supervisory or examination experience. However, in order to avoid even the appearance of a conflict, any such experience should be with an agency other than the FDIC.

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

Yes, as set forth above. In particular, the FDIC should:

- Provide the Appeal Office with dedicated legal counsel that is independent of the FDIC's Legal Division.
- Require *de novo* review of appeals, subject to a showing by the institution that the Material Supervisory Determination was more likely than not erroneous or inconsistent with applicable FDIC policies, procedures or legal requirements.
- Expand the public disclosure and precedential value of appeal decisions.
- To avoid conflicts, employ former examiners who have supervisory or examination experience, but who have not previously worked for the FDIC.
- Eliminate the "Penalty Box" for institutions during the pendency of any appeal.

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?

Three reviewing officials is an appropriate number. However, in order to avoid even the appearance of a conflict, none of the reviewing officials should have prior experience working for the FDIC.

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

No further review is necessary before the matter reaches the Appeal Office. However, institutions should have the option to have matters heard by an Administrative Law Judge, as an alternative to review by the Appeal Office.

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?

No. The proposal provides up to 135 days for the Appeal Office to issue a written opinion. Given that the Appeal Office is dedicated to hearing and deciding appellate matters, it should take the Appeal Office no longer than 60 days after the record is closed to issue an

opinion. Institutions that are placed in the "Penalty Box" for adverse FDIC decisions—which could occur in the majority of instances where an appeal is filed—should not be required to wait any longer than absolutely necessary for their appeals to be decided upon. Moreover, issuing a decision up to 135 days after an appeal is filed would be inconsistent with the requirement in the Riegle Act that appeals be "heard and decided expeditiously." 12 U.S.C. § 4806(b)(1).

We also respectfully submit that the proposed timelines relating to enforcement-related decisions are too deferential to the FDIC. In particular, the proposal provides the FDIC with an excessive amount of time after providing notice to an institution to draft a Consent Order (120 days), during which time the institution may be placed in the penalty box without an opportunity to expand or without due process rights. The time given to the FDIC to draft a consent order should be no more than 60 days.

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?

Written decisions by the Appeal Office should be available in full, with redactions made only to protect the identity of the relevant institution. Moreover, the FDIC should revise the Guidelines to require that decisions by the Appeal Office have precedential value in other matters involving similar facts and circumstances. Likewise, FDIC examiners should be required to apply the reasoning by the Appeal Office to similar matters, including routine supervisory matters.

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?

See response to Question 6, above.

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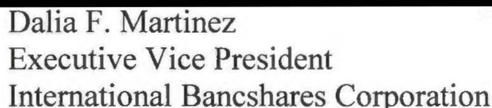
Thank you for the opportunity to provide comments regarding the FDIC's proposed revisions to the Guidelines for Appeals of Material Supervisory Determinations. Although certain aspects of the proposed revisions represent an important step forward in improving the independence of the appeal process, the changes outlined above would make the FDIC's regulatory appeal process fairer and more effective.

Sincerely,



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