October 20, 2020

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

RE: RIN 3064-ZA20: Guidelines for Appeals of Material Supervisory Determinations

Dear Mr. Feldman:

The Consumer Bankers Association ("CBA")[1] appreciates the opportunity to respond to the Federal Deposit Insurance Corporation's ("the FDIC" or "the Agency") notice and request for comment ("the Proposal") regarding revisions to the agency's Guidelines for Appeals of Material Supervisory Determinations ("Guidelines"). We applaud the FDIC's efforts to enhance the independence of the Supervision Appeals Review Committee ("SARC") and modify the procedures and timeframes for considering formal enforcement-related decisions through the supervisory appeals process. CBA believes the creation of the proposed Office of Supervisory Appeals ("the Office") is an improved alternative to the current SARC and will be a better-utilized forum for insured depository institutions to dispute material supervisory determinations ("MSDs") before a fair and impartial authority.

In response to the questions posed by the notice and request for comment, we offer the following views:

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?

CBA does not believe Board members should be represented within the Office, but there may be instances in which Board members should have an opportunity to review decisions before issuance. For example, in considering changes or modifications to FDIC policy or rules, a Board member may wish to review the Office's decisions to better inform the Board's broader policy considerations. In such instance, involvement by the Board should be limited to reviewing the matter pending before the Office and the Board member should not participate in or influence the decision ultimately issued by the Office.

Because the Board reviews all recommended decisions issued by the FDIC's Administrative Law Judges, Board participation in the appeals of MSDs is unnecessary, could undermine the independence of the Office, and could compromise the spirit of the Board's review under the FDIC Rules of Practice and Procedure in subsequently filed or related formal enforcement actions. Appeals to the Office are fundamentally different proceedings than formal enforcement proceedings, thus the Office should not

[1] The Consumer Bankers Association is the only national trade association focused exclusively on retail banking. Established in 1919, the association is now a leading voice in the banking industry and Washington, representing members who employ nearly 2 million Americans, extend roughly $3 trillion in consumer loans and provide $270 billion in small business loans.

mimic an administrative court. Further, to the extent the Office affords institutions an opportunity to resolve appeals outside the formal enforcement proceeding context, the agency should make every effort to ensure there are meaningful distinctions between the functions of the Office and the formal enforcement process to incentivize insured depositories to actually utilize the Office. Otherwise, institutions may be reluctant to utilize the Office's so-called "independent" and non-adversarial review if such review involves scrutiny from the highest level of the FDIC's leadership.

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?

While bank supervisory or examination experience is undoubtedly useful experience that should be represented within the Office, it is critically important that industry experience also be represented in every case before the Office. Specifically, at least one member of every three person panel should be required to have experience working at an insured depository institution (preferably within senior leadership of an insured depository institution).[2] Reviewing panels could also benefit from the perspectives of seasoned auditors, bank consultants, or banking law attorneys with experience advising parties about examinations or representing parties in enforcement actions.

CBA believes the proposal could be improved by including more specificity about the minimum qualifications for members of the Office. For example, members of the Office, regardless of background, should be experienced and skilled financial services professionals with no fewer than 10 years of qualifying experience.

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

As the FDIC acknowledges in the proposal, staffing and establishing the Office will take some time following the adoption of any revised Guidelines. To ensure the project is not stalled indefinitely due to staffing challenges, we suggest the FDIC codify an implementation period with firm, actionable deadlines wherein the FDIC will commit to allocate funding and staffing positions to the Office, publish job-postings for the Office, and begin screening qualified candidates.

Additionally, because the federal hiring process can take several months to advertise positions, interview candidates, and perform background and security screens, we strongly urge the FDIC to create a pool of vetted individuals who can readily fill vacancies in the Office on a case-by-case basis. As a condition of entering the pool, these individuals should be required to complete federal background and security screens and any necessary federal hiring paperwork to ensure subsequent rotation from the pool to the Office can occur in a matter of days and without undue delay.

A pool would best equip the FDIC to provide alternates in the event of actual or perceived conflicts of interest among members of the Office. In instances where an appellate party asserts a member of the reviewing panel has a conflict of interest, the FDIC could easily rotate and replace members of the Office from members of the pool, thereby guaranteeing a fully comprised and impartial panel for every case presented to the Office.

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[2] For five person panels, the FDIC should require at least two members have experience working at an insured depository institution (preferably within senior leadership).

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?

CBA encourages the FDIC to staff the Office with five reviewing officials per panel to provide broader expertise and viewpoints. As we see in numerous five person panels across governmental bodies, five person panels afford increased diversity in perspectives, composition, and expertise which, in turn, facilitates balanced decisions and ensures fairness in the proceedings. Additionally, we believe a panel of five will be less likely to be influenced by "group think" and strong opinions of one member.

As aforementioned, CBA believes the FDIC should create a qualified applicant pool to properly staff the Office with term-limited appointments and to prepare for instances of conflicts of interest. However, if the FDIC does not create a pool, or the pool is not adequately staffed due to hiring challenges, the FDIC may be faced with the rare event where a panel may be reduced to an even number of members (for example, due to a conflict of interest, illness or death of a member). Accordingly, the FDIC should codify a process that will be utilized to break a tie-vote if there are an even number of members on a panel. For example, the FDIC could designate an alternate member for each panel that could be subbed in to resolve conflicts of interest, recusals, or other departures.

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

CBA does not believe additional levels of review are necessary. To the contrary, CBA encourages the FDIC to remove barriers for institutions wishing to appeal MSDs, including additional layers of review and associated delays in securing final resolution of disputes.

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?

CBA does not have any suggested amendments to the timelines set forth in the proposal. However, we note there is still confusion related to timing and viability of appeal rights as a result of new language added to the proposal as set forth in paragraph D(3) of the proposed Guidelines (page 25 of the proposal). Here, the proposal reads (new language is underlined and appears in bold):

> *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 polices 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 present to determine if a proposed enforcement action is merited.*

Although the added language was likely included to clarify the distinction between how the Agency communicates the formal enforcement process (which suspend appeal rights) versus MSDs (which can be appealed), CBA believes the viability of appeal rights could be uncertain in instances where the Report of Examination ("ROE") communicates MSDs that can be appealed, but the accompanying ROE transmittal letter communicates a formal enforcement proceeding has commenced (thereby suspending appeal rights). We urge the FDIC to consider ways to alleviate this confusion and ensure institutions' appeal rights remain viable for a period of time after receiving the ROE. If the FDIC routinely commences formal enforcement proceedings through ROE transmittal letters, institutions will be simultaneously stripped of appeal rights the moment they become viable (upon receipt of the ROE). The FDIC should ensure this contradictory outcome does not undermine the agency's current efforts to create a more robust and widely used appeals process.

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?

CBA strongly believes the FDIC should take all necessary precautions to preserve the confidentiality and anonymity of decisions from the Office, including but not limited to, redacting the name of the institution and any details about the case that, if disclosed, could easily reveal the institution based on product and/or practice. Nevertheless, CBA recommends all other non-sensitive information be made available to the public in searchable format on the FDIC website by topic, keyword, date filed, and decisional outcome. Additionally, the FDIC should provide a short summary of decisions in its annual report to Congress and in the FDIC Quarterly publications.

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?

In instances where the proposed timeframes are too restrictive, the parties should have an ability to invoke provisions that allow for an extension of time and the FDIC should create a formalized process to request such extension.

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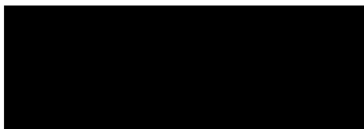
Thank you for the opportunity to comment on this matter. Should you have any questions, please contact the undersigned at jburke@consumerbankers.com or at (202)552-6636.

Sincerely,



Jenna Burke
Vice President, Associate General Counsel
Consumer Bankers Association