



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

RE: Written comments regarding proposed Guidelines for Appeal of Material Supervisory
Determinations

Dear Mr. Feldman,

Enterprise Bank is a community bank located in Pittsburgh, PA. It was specifically established to provide services to small business. The Bank prioritizes [REDACTED]. The Bank is regulated by the FDIC and Pennsylvania Department of Banking. It has previously participated in the SARC appeals process on three separate occasions.

FDIC Chairwoman Jelena McWilliams stated it is her desire to ensure that the appeals process is robust, fair and independent. Independent is defined in Webster's Dictionary as "not influenced or controlled by others; thinking or acting for oneself". Independence is a state of mind. The appeals process must utilize personnel and a structure that is independent of the FDIC if the stated goal of this new appeal process is to be obtained.

The Bank's initial experience with the FDIC appeals process included a situation where the regional examination supervisor overtly discouraged the Bank from appealing an examination decision. Specifically, the supervisor explained the appeal would be a waste of the Bank's time since the supervisor had already discussed the matter with the FDIC personnel who were to decide the appeal and they have concluded we would lose the appeal. This circumstance left the Bank with the distinct impression that independence cannot be achieved within the current appeal structure.

The Bank has participated in the SARC appeal process and has lost on all occasions. The Bank has appealed various [REDACTED] decisions which were reversed by the examination group. Hindsight is always 20-20 as time eventually determines which parties' judgment was accurate. In our case, time proved that our judgement was correct and the examination group was incorrect on all of the [REDACTED] issues. SARC consistently ruled against the Bank year after year even though time had proven the Bank's judgment to be accurate based upon actual outcomes. These SARC decisions ultimately resulted in Call Report [REDACTED] information being reported on an inaccurate basis thus misleading the public. When provided evidence of specific outcomes that were in line with the Bank's position, the FDIC examination personnel merely responded to this situation by commenting that they were happy things worked out for us but they believed they interpreted [REDACTED] rules in a consistent manner following FDIC regulations. [REDACTED]

[REDACTED] Our Bank's example of the actual real world interrelationship between [REDACTED]

█ exposes an overly conservative mindset rather than a desire to accurately reflect █. This ultraconservative mindset is understandable when considering outside and inside FDIC Agency criticism of the Agency for bank failures. However, an ultraconservative mindset is not necessarily conducive to reaching the goal of accuracy. If the new appeals structure is staffed with a controlling group of experienced FDIC examination related professionals, there will not be a true check and balance in place to counteract this ultraconservative mindset.

It should be noted that this ultra conservative regulatory mindset discourages banks from assisting borrowers in distress and does not result in good public policy. Safety and soundness is best monitored from honest and accurate financial reporting. The new appeals process should promote honest and accurate financial reporting if the stated goal of independence and fairness is to be achieved in the appeals process.

Pursuant to the proposed appeals procedures, the selected individuals that will decide appeals cases consist of former FDIC employees who have bank regulatory or examination experience. The proposal further provides that the Office will appoint a panel of these individuals to hear cases. Whether or not these employees are current or former employees is of no import. Ultimately “employees” are not independent of the employer no matter how you structure. To be an employee by legal definition means you are controlled by the employer. An employee cannot be independent of an employer due to the inherent control present. An individual who has spent a significant portion of their career in examination on behalf of the FDIC will more likely than not have an inherent bias in their mindset. This inherent bias will not promote the goal of obtaining independent, accurate judgment in deciding cases. It is vital that personnel deciding cases be cleared of potential conflicts of interest. It is also important that legal, accounting and audit experience be present in the individual or group of individuals that will decide these cases. The proposed structure perhaps adequately addresses the need for obtaining appropriate experience in order to understand the various complex issues being appealed but altogether ignores the need for those individuals to be wholly independent from the parties to the appeal.

The Bank would suggest that the Office select an appellate panel to hear each case. The panel would consist of three individuals with divergent backgrounds as follows: One would consist of an individual with Bank supervisory or examination experience such as a retired bank examiner. The second would consist of an individual with bank industry financial experience. Such as a retired bank CFO who is a certified public accountant. The third would consist of an individual who has a strong legal background such as a retired judge with business and regulatory experience. An appellate team of this nature would bring the appropriate experience together to review appeals and issue decisions without sacrificing independence from the FDIC examination background and experience. This structure would assure that the decisions made would originate from a decision unit that contained the appropriate legal, accounting and audit expertise. The judicial presence on the panel would balance the inherent mindset differentials between regulatory and industry experience with an unbiased law-rules based influence. This panel structure as a unit creates a truly independent mindset coupled with the appropriate expertise to make sound accurate decisions.

The Bank recognizes that a “separate” appeals office that is a part of the FDIC agency structure that is funded by the FDIC cannot by definition truly be independent of the FDIC. However, many concepts can be implemented to improve the inherent independence problem. Some of these concepts are proposed in the existing recommendation of structure. The most challenging goal is to have someone lead and manage the appeals office that has a truly independent mindset. If this person truly functions in an independent way the rest of the appeals office will follow. The Bank would recommend that the official


responsible for running this office not be a career FDIC official. Rather, it should be a person who has a judicial administration experience that is derived from outside the FDIC agency. This would match the judicial administrative experience needed to perform the job while keeping an independent mindset from other FDIC agency personnel.

The Bank offers short answers to the following eight questions as requested in the request for comment.

- Question 1: No. To ask this question brings concern that the author doesn't really wish to have an independent appeals process.
- Question 2: No. In and of itself this creates an independence problem as previously discussed.
- Question 3: Yes, see previous discussion.
- Question 4: Yes, we believe there is an appropriate level if structured as previously discussed.
- Question 5: If the appellate process is truly independent as discussed above then the Bank believes that the FDIC or the Bank should have the options of having decision reviewed by a Washington DC district court since no FDIC appeals structure can truly be independent. All individuals, businesses and government agencies should be able to utilize the judicial checks and balance available in our democratic government structure.
- Question 6: Yes.
- Question 7: The Bank believes full transparency should be employed in all of these processes with only specific bank client names and financial information being redacted from published information. The Bank believes these decisions should provide guidance to industry and examination personnel.
- Question 8: The Bank believes the time frames mentioned in the guidance to be reasonable and is unable to conceptualize an unusual case requiring an extension at this point in time.

The Bank appreciate the opportunity to comment on the proposed changes to Supervisory Appeals process and hopes the FDIC continues to refine the system to achieve independent and accurate legal determination resulting from the appeals process.

Sincerely,



Charles H. Leyh
President
Enterprise Bank