DECISION
OF THE
ASSESSMENT APPEALS COMMITTEE

CASE NO. 2010-01

*** (the Bank) filed an appeal with the Assessment Appeals Committee (Committee) of the Federal Deposit Insurance Corporation (FDIC) by letter dated December 2, 2009. The Bank appealed a determination issued by the FDIC's Division of Insurance and Research (DIR) on November 17, 2009. DIR had denied the Bank's request to upgrade its capital evaluation from Adequately Capitalized to Well Capitalized for the third and fourth assessment periods of 2008 and the first assessment period of 2009, and to refund $69,755.07 in deposit insurance assessments. The requested upgrade would have placed the Bank in Risk Category I for all three periods, with deposit insurance assessments for the three periods totaling $123,059.10. DIR's denial left the Bank in Risk Category II for all three periods, with deposit insurance assessments for the three periods totaling $192,814.17. This appeal followed.

At its meeting held on February 3, 2010, after carefully considering the oral presentations, the written submissions, and the facts of this case, the Committee determined that the Bank's appeal must be denied.

BACKGROUND

In an undated letter received by DIR on October 7, 2009, the Bank requested review of its capital evaluation for the third and fourth assessment periods of 2008, and the first assessment period of 2009, under procedures set forth at 12 C.F.R. § 327.4(c). The Bank asserted that a "mix up" had occurred regarding the proper reporting of $2,140,000 in goodwill on its Call Reports for each of those three periods. The goodwill was the byproduct of an August 2008 merger involving the Bank and another depository institution. According to the Bank, "miscommunication" between the Bank, *** (state) banking officials, and the FDIC resulted in the Bank's failure to deduct the $2,140,000 in goodwill from total equity capital in its calculation of Tier 1 capital on Call Report Schedule RC-R for each of the three assessment periods at issue. It was not until a May 4, 2009 safety and soundness examination, when examiners caught the reporting error, that the Bank was required to correct and resubmit its Call Reports for the three periods. With the Call Report resubmissions, the Bank's capital levels fell from Well Capitalized to Adequately Capitalized for all three periods, and its deposit insurance assessments were adjusted to the applicable higher rate.

In its Request for Review, the Bank asserted that it had on several occasions - from August through November of 2008 - consulted with two individuals at the *** (Banking Department), and an analyst at the FDIC, without any mention from these individuals of Call Report errors. Further, the Bank asserted that it had no intent to misstate the figures on its Call Reports, and it sought reimbursement of $69,755.07, the difference between the Risk Category I and II rates over the three periods.

By letter dated November 17, 2009, DIR denied the Bank's Request for Review of its capital evaluation. DIR informed the Bank that capital evaluations are assigned in accordance with the FDIC's regulations, specifically 12 C.F.R. § 327.9(b), and that regulatory levels must be met as of the relevant Call Report dates. Given the Bank's resubmitted Call Reports, DIR concluded that the Bank's capital evaluations - as Adequately Capitalized - were correct for the three assessment periods in question.

By letter dated December 2, 2009, the Bank timely appealed to the Assessment Appeals Committee. In its appeal, the Bank argues that the FDIC analyst confirmed that the Bank's Call Reports "are computer checked" and that "[c]omputer review" of the three Call Reports never detected the error on Schedule RC-R over the three assessment periods. Once the examiners caught the error (at the May 2009 examination), the Bank avers that sufficient capital was immediately added to return it to Well Capitalized status, and that, other than the three periods in question, the Bank was never below Well Capitalized for any assessment period going back to 2001. In addition, the Bank contends that one individual at Banking Department advised that goodwill could be included (presumably, on Schedule RC-R) and another - the superintendent – after "apparently" reviewing the Bank's September 30, 2008 Call Report, never indicated that the Call Report was inaccurate. The Bank seeks a $69,755.07 refund, the additional assessment amount it paid over the three periods at the Risk Category II rate.

ANALYSIS

The Bank appeals for relief from application of the FDIC's capital regulations. These regulations require a Well Capitalized institution to satisfy three regulatory capital ratio standards: a Total risk-based capital ratio of 10 percent or greater; a Tier 1 risk-based capital ratio of 6.0 percent or greater; and a Tier 1 leverage capital ratio of 5.0 percent or greater. 12 C.F.R § 327.9(b)(1)(i). All three standards must be met to be considered Well Capitalized. AAC Case No. 2009-01 (June 4, 2009); AAC Case No. 2004-06 (January 13, 2005). Capital evaluations are made on the basis of data reported on the institution's Call Reports. 12 C.F.R § 327.9(b).

The Bank's September 30, 2008, December 31, 2008, and March 31, 2009 Call Reports, as resubmitted, indicated that its Total risk-based capital levels were 9.20 percent, 9.68 percent, and 9.73 percent for each of these periods, respectively. Accordingly, the Bank did not meet Well Capitalized standards for any of the periods; instead, it was evaluated as Adequately Capitalized (12 C.F.R § 327.9(b)(2)), and assigned to Risk Category II for all of the periods in question. Despite the clarity of the regulatory framework, the Bank seeks an upgrade in its capital evaluation for the three assessment periods in question.

In considering past requests for similar relief, the Committee has looked to whether unique circumstances (generally circumstances beyond a bank's control) prevented the bank from complying with the regulations or whether application of the capital regulations to the facts of the case would be inequitable. AAC Case No. 2009-01 (June 4, 2009); AAC Case No. 2008-02 (April 4, 2008); AAC Case No. 2004-06 (January 13, 2005). Here, the Bank bases its claim for relief on the grounds that it was never informed of the goodwill reporting errors on its Call Reports despite computer review and consultation with individuals at the FDIC and at its state banking division.

Contrary to the Bank's assertion, it in fact received repeated notice that it was reporting goodwill incorrectly. Each time the Bank failed to deduct goodwill on Schedule RC-R of each Call Report, the Bank's Call Report software automatically generated an edit failure, and a detailed (as well as a shorter) notification of the goodwill reporting problem was sent to the Bank. Each edit failure required the Bank to correct the error or provide an explanation before that Call Report could be successfully submitted to the FDIC's Central Data Repository. Moreover, the Bank provided an explanation for each edit failure. For the first Call Report, it explained (on October 15, 2008) that the Call Report was correct "Due to the purchase price of bank acquisition"; for the second Call Report, it explained (on January 27, 2009) that accountants told the Bank to keep reporting goodwill as it had; for the third Call Report, it offered (on April 28, 2009) the preparer's view that the Bank's goodwill was properly reported.

In each instance, the Bank's explanation was inadequate and should have been rejected. Nevertheless, each of the Bank's explanations was noted by the FDIC analyst and erroneously accepted, allowing each Call Report to be filed.

Following acceptance of the Bank's October 15, 2008 explanation, discussions between the Bank and the FDIC analyst on correct goodwill reporting apparently continued, reflecting at least some ongoing uncertainty. On November 12, 2008, the FDIC analyst sent the Bank by e-mail the verbatim Call Report instructions for reporting goodwill. Not until the May 4, 2009 examination, however, was the Bank required to amend its Call Reports and properly report its goodwill.

With this actual background in mind, the Committee must consider whether the Bank is entitled to relief.

Relief for the Bank on the facts presented here would in effect estop the FDIC from applying its capital regulations because of an FDIC employee's mistake. The Supreme Court has never imposed estoppel against the federal government. Rather, the Court has stated the general rule that the federal government may not be equitably estopped on the same terms as private litigants (that is, for negligence or a mistake). The Court has, however, left open the possibility that a stricter standard - affirmative misconduct – *might* merit estoppel against the government. *OPM v. Richmond*, 497 U.S. 414, 419 (1990). In the present matter, the FDIC analyst appears to have made a mistake; no evidence suggests any affirmative misconduct on his part. The Committee is reluctant to impose the remedy of estoppel on these facts.

In addition, under the Federal Deposit Insurance Act, the responsibility for ensuring accurate and correct Call Reports falls unambiguously on the reporting institution, with significant penalties for failure to comply. 12 U.S.C. § 1817(a). The Bank seeks to shift this statutory responsibility onto the FDIC and its state regulator.

Granting the Bank's appeal would also contradict the Call Report instructions, which provide that each bank is responsible for ensuring that the data reported on each Call Report reflects fully and accurately the item reporting requirements for the relevant report date. The instructions state: "This responsibility cannot be transferred or delegated to software vendors, servicers, or others outside the reporting bank." General Instructions, FFIEC 031 and 041 (6-09), at 6.

We note too that the Bank's basis for relief conflicts with Committee precedent. In AAC Case No. 2001-02 (Aug. 23, 2001), the bank alleged that it was not informed by FDIC representatives of a change in capital grade cutoff dates and the importance of capital status before filing its Call Report. The AAC rejected this argument, observing that the bank was "attempting to shift its responsibility for compliance with written regulatory requirements to the agency administering the regulations." AAC Case No. 2001-02 at 4. In that same vein, the AAC has ruled that misstatements by FDIC employees do not bind the Committee. AAC No. 2008-03, at 5 (Dec. 22, 2008) (FDIC examiners' alleged statements that bank's assessment would be lowered on appeal were not correct and would not bind the Committee); AAC No. 2004-04, at 4 (Sept. 7, 2004) (same).

Finally, the Bank contends that state banking officials failed to tell the Bank it was misreporting its goodwill. The burden of compliance with the FDIC's capital regulations, however, falls on the Bank. Just as this burden cannot be shifted onto FDIC employees, it also cannot be shifted onto state banking officials.

The Committee is mindful of the Bank's situation and the complexities of Call Report requirements, but cannot approve of the transfer of these reporting responsibilities onto the FDIC or other regulatory entities. The Committee also notes the Bank's history as a Well Capitalized institution and its laudable efforts to return quickly to Well Capitalized status. But moving quickly to restore Well Capitalized status does not excuse the Bank's failure to comply with the regulatory requirements for a Well Capitalized institution, as the Committee has previously ruled. AAC No. 2008-01, at 3 (April 4, 2008) (holding company's efforts to restore quickly an institution's capital rating does not excuse failure to comply with the FDIC's capital regulations).

After considering all of the facts and arguments presented by the Bank in its written submission and its oral presentation, the Committee finds that the circumstances presented are not unique nor is application of the capital regulations in this instance inequitable.

CONCLUSION

The Bank's September 30, 2008, December 31, 2008, and March 31, 2009 Call Reports, as resubmitted, indicated that the Bank did not meet Well Capitalized standards for the third and fourth assessment periods of 2008, and the first assessment period of 2009. The Bank was correctly evaluated as Adequately Capitalized for the three periods and assigned to Risk Category II. While the Committee sympathizes with the Bank's position and commends its quick return to Well Capitalized status, no basis for granting the requested relief is presented here. Accordingly, for the reasons set forth in this decision, the Bank's appeal is denied.

By direction of the Assessment Appeals Committee, dated March 24, 2010.

Valerie J. Best
Assistant Executive Secretary Section