

September 3, 2020

Robert E. Feldman  
Executive Secretary  
Attention: Comments  
Federal Deposit Insurance Corporation  
550 17<sup>th</sup> Street NW  
Washington, DC 20429

Dear Mr. Feldman:

In response to the FDIC's recent *Notice and Request for Comment* ("Notice") pertaining to the *Guidelines for Appeals of Material Supervisory Determinations*, ("Appeals Process"), FinPro, Inc. ("FinPro") offers the following observations.

For background, FinPro has been in business for more than 30 years and primarily serves the community banking space for such items as strategic planning, enterprise risk management, Interest Rate Risk analytics, mergers and acquisitions, capital raises, and complex regulatory issues (including a number of successful appeals). FinPro has clients in 46 states as well as international clients. What makes FinPro particularly well positioned to comment on this Notice is its team of retired federal regulators, most of whom have 30+ years of examination experience, all of whom have held very senior positions within the FDIC and OCC.

FinPro commends the FDIC for issuing this Notice and attempting to improve the Appeals Process. Before we respond to the eight specific questions identified in the *Request for Comment*, we urge the FDIC to more formally address the most significant obstacle to banks exercising their right to appeal, and that is the fear of retaliation. Specifically, the risk of field examiner retaliation. Retaliation can take many forms, and is rarely so overt that it is easily identified. Instead, it often manifests itself in more subtle but insidious ways. Adversely classifying loans that are borderline credits. Opining that policies and procedures are no longer sufficient despite the lack of regulatory concern expressed in prior examinations with an unchanged risk profile. Expanding the volume of loans subject to regulatory review. Leveraging the notion of "examiner discretion" to criticize a bank's management team despite the absence of written regulations, guidance, or policy statements addressing the specific criticism.

Fear of retaliation is real, and the solution is difficult. FinPro would like to offer possible solutions for FDIC consideration:

1. For all banks rated a Composite 3/4/5, provide a draft Report of Examination (“ROE”) to the bank (after the Regional Office completes its review) and offer the Board up to 10 business days to respond with any Material Supervisory Determination disagreements before the ROE is finalized by the Regional Office. This suggestion focuses on process. Currently the field examiners meet with management at the conclusion of the examination and verbally discuss findings. The field examiners also state that all ROE findings are subject to Regional Office review. Generally, the next step in the process is that the Regional Office reviews/adjusts the examiners conclusions and issues the ROE in final form one to two months after the management meeting. The ROE does not always align with the findings, tone, or tenor verbally presented at the management meeting. This “Draft ROE” process would not materially extend the examination process and could potentially create a less contentious debate of the facts and analysis.
  - FinPro is aware that banks are expected to respond to ROEs, typically within 45 days for 3/4/5 rated institutions. However, at that point the ROE is final and disagreements can only be resolved through more formal actions. These “more formal” actions are what may cause stress between the bank and the FDIC, leading to the real concerns of retaliation as the bank considers an appeal.
  - FinPro is also aware that bankers can reach out to the Regional Office or Field Office to resolve differences before the ROE is finalized and transmitted. However, the bank is at a material disadvantage in that the Board has not seen the ROE and cannot predict the outcome of the Regional Office review. So, while this option is good in that it has the potential to prevent a material disagreement, the bank does not have all requisite information needed to anticipate and resolve disputes.
2. Offer banks the option of initiating the first level appeal to the Ombudsman instead of the Division Director. Such an approach would somewhat align with the OCC’s appeal process, where OCC regulated banks can appeal to either the Deputy Comptroller or the Ombudsman. The Ombudsman’s Office introduces a “neutral third party” at this first level review and possibly minimizes the concern about retaliation.
3. Establish a practice that staff from the field office involved with the appeal is subject to a one-exam “cooling off period” and therefore no staff from that office can examine the bank for one examination cycle. Regardless as to whether the appeal is successful or not successful, requiring staff from a different field office to perform the next examination certainly tempers the risk of retaliation from the involved field examiners or their colleagues. This practice would also somewhat align with the Federal Reserve’s appeal process.

It is important to conclude this discussion by noting that almost all FDIC field examiners are talented and perform their difficult jobs with complete professionalism. They are well trained

and FinPro believes that they genuinely want to do a good job. The above suggestions are not intended to disparage field examiners but rather to create an environment where banks are comfortable using the Congressionally legislated appeals process with limited or no concerns about retaliation.

### Requests for Comment

*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?*

- The creation of the Office should be synonymous with delegation to the Office. The FDIC Board should establish the appropriate policies and procedures for the Office and then ensure Office staff follows such policies (or reports deviation from policy). The creation of this new Office means that the Board would delegate (1) responsibility, (2) authority, and (3) accountability. As a result, the FDIC Chairperson and/or other Board members need not review decisions before issuance.
- Having said that, the FDIC Board may wish to identify situations where Board members do have the opportunity to review decisions before issuance. Such situations should not be ad hoc but rather well defined with the bylaws/policies that create the Office. Examples might be appeals from banks above a certain size/complexity level, or might involve appeals that allege illegal or improper actions by FDIC employees.

*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?*

- FinPro urges more specificity around this area and suggests at least 15 years of supervisory experience (Safety & Soundness or Compliance) as well as being a commissioned bank examiner. Also, individuals should have occupied a position at or above the Assistant Regional Director level. Ideally the candidate would have some industry related experience in addition to examiner experience.
- In addition, FinPro recommends that one member of the three-person panel be a banker who is currently part of the FDIC's Community Bank Advisory Board.
- Lastly, no member of the three-member panel should (a) have examined banks in the five years prior to retirement (pursuant to the retired examiner concept) in the Region where the appealing bank is headquartered or (b) currently work (pursuant to the Community Bank Advisory Board concept) in the State where the appealing bank is headquartered.

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

- There would be a benefit for requiring that any candidates for the Office be retired from the FDIC for at least 24 months. This would ensure reasonable separation between the Office and existing FDIC staff.

*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?*

- While three voting members is appropriate, FinPro urges that each panel have four members with one member designated as an alternate. This would ensure continuity should one of the voting members become ill or need to be recused for any reason.

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

- The current structure implemented by the FDIC makes sense, subject to modifications discussed earlier in this document. A Request for Review at the Division Director (or Ombudsman) level is a good first step in the formal process, with the lack of an acceptable resolution allowing banks to appeal to the proposed three-member panel. The informal process, allowing banks to try to work out differences with the Field Examiner, Field Supervisor, or Regional Office also makes sense and will be improved if the FDIC deploys the draft ROE process recommended earlier in this document.

*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?*

- Yes.

*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?*

- FinPro urges that public disclosure regarding Final Determinations of Appeals be limited to the following categories:
  - Type of examination subject to appeal:
    - Safety and Soundness
    - Compliance
    - IT
    - CRA
    - Etc.
  - Type of Material Supervisory Determination (for example):
    - Loan classification
    - Violation of Law

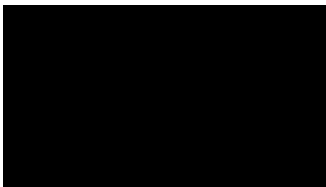
- Inadequate ALLL or ACL
  - Composite or Component Ratings (CAMELS)
  - BSA
  - Assessment Area
  - Compliance Management System
  - Etc.
- Whether the appeal was granted, partially granted, or not granted for each MSD

*Question 8: The FDIC expect 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 the cases?*

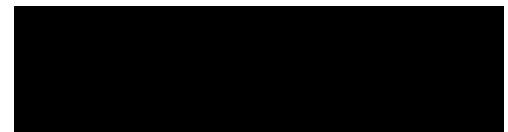
- Notwithstanding the complexity of the issue, it is reasonable for the industry to expect the FDIC to issue a Draft enforcement action within 120 days of delivering written notice to a bank. Providing such notice to a bank has far reaching implications and must be done with the proper amount of facts and analysis. If the perception of facts is so serious as to warrant consideration of a formal enforcement action then it is logical to assume that the FDIC can, and should desire to, provide a Draft within 120 days. Similarly, it is reasonable for the industry to expect the FDIC to issue an Order of Investigation or a Notice of Charges within 90 days from the date a bank rejects the draft consent order in writing. A bank that has received a notice but not a Draft order within 120 days, or has rejected a draft consent order in writing but not received an Order of Investigation or Notice of Charges within 90 days, should have access to the appeals process.

Thank you for the opportunity to comment on this important initiative. We would be pleased to answer any questions or discuss any items in further detail and can be reached at 908-234-9398.

Sincerely,



Don Musso  
President & CEO



Scott Polakoff  
Executive Vice President