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October 19, 2020

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

VIA EMAIL & FEDERAL EXPRESS
(RFeldman@FDIC.gov)

RE: Guidelines for Appeals of Material Supervisory Determinations

Dear Mr. Feldman:

Please accept the following as my firm's comments to the Federal Deposit Insurance Corporation's ("FDIC") proposed *"Guidelines for Appeals of Material Supervisory Determinations"* ("Appeals Guidelines"). The firm of Igler | Pearlman, P.A. has experience with the formal and informal supervisory enforcement actions, including the current appeals process that provides for appeals at the Regional Director level, culminating with the Supervision Appeals Review Committee ("SARC").

Before answering the eight (8) questions for comment, we would like to point out that the current process is cumbersome, time consuming, and costly to the insured depository institution ("IDI"). These three issues need to be addressed in any new guidelines for appeal.

The Appeals Guidelines need to allow for the IDI to appeal examination findings to the Regional Director once the onsite examination is completed. In the past, it might take up to six to eight months to receive the final written report of examination ("ROE"). This is too long and the delay causes information to become stale. Chairperson Jelena McWilliams has improved the process by requiring the ROE to be completed within forty-five (45) days of the completion of the onsite examination. That being said, the IDI should have the ability to not wait until the ROE becomes final before being able to appeal issues based on the findings relayed by the examiners at the examination exit meeting.

When an ROE is issued, past experience has shown that the Regional Office is less inclined to reverse the written findings. At the forty-five (45) day mark, the Regional Director should, within ten (10) business days, be able to forward his concurrence with the findings in the ROE to the newly created Office of Supervisory Appeals ("Office"). According to the Appeals Guidelines, the Office will have forty-five (45) days to review the request for appeal to determine if it is complete and timely. The meeting of the Office to consider appeal will be within ninety (90) days from the date of filing the appeal or the date the appeal is referred to the Office and the decision of the Office is then due forty-five (45) days of the meeting of the Office.

Based on all these deadlines, the Office has up to one hundred thirty-five (135) days to issue its decision from the date of the appeal. That is effectively four and a half months after the appeal is filed. Collectively, however, this would result in a six (6) months appeals process, if

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there are no additional delays. This is why it is crucial that the IDI be allowed to appeal a non-formal enforcement matter, e.g. an appeal of a CAMELS rating before the ROE is issued.

As to the eight specific questions, our comments are as follows:

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?

Comment: Yes, in our opinion, the FDIC Chairperson should have an opportunity to review any proposed Office decisions before they become final.

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?

Comment: The experience requirement is appropriate, but we believe to be transparent and provide for the appearance of independence, of the three members appointed to the Office, one should be a banker or bank regulatory attorney who is familiar with and has utilized the appeals process for SARC review.

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

Comment: As stated in the comment to Question 2, one of the three members of the Office should be independent, i.e. outside of the FDIC, a banker or a non-FDIC attorney with experience with formal and informal enforcement actions.

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?

Comment: For *Determinations Subject to Appeal,* matters 1(a), (b), (c), (d), (e), (f), (g), (h), (i), (j), (l), and (o) ("Standard Matters") could be handled by an Office panel of three members, one of whom being totally independent from the FDIC. *See* Comment 2. For more serious matters, 1(k), (m), (n), (p) and (q), we would recommend the Office panel be comprised of five members, one of whom would again be totally independent from the FDIC.

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

Comment: We would suggest for Standard Matters, an appeal to the Chairperson should be adequate. For more serious matters, 1(c), (m), (n), (p), and (q), the IDI should have an option to appeal the Office findings to the individuals currently comprising the SARC.

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?

Comment: The entire appeals process, except for Non-Standard matters as defined above, should be able to be completed in less, but no more, than one hundred and eighty (180) days from the examination exit meeting with the IDI Board of Directors. Otherwise, the process becomes stale and potentially more expensive.

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?

Comment: As previously stated herein, the information that is subject to publication should not reference any specific CAMELS ratings or specific individual names. It should state the issues that were considered, and whether the Office agreed with the Appellant or Appellee. For example, the Office determined that the Capital rating should be upgraded, without stating the number. Any interpretation of a rule or statute would also be useful, as well as a frank assessment of whether there were any examination procedures that were not appropriately followed by the examiners.

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?

Comment: To be effective and timely, the proposed timelines in the Appeals Guidelines to address formal enforcement of matters are appropriate. In the prior era (2007-2012), the IDI had a short period within what it could attempt to negotiate the terms of a Consent Order. If the IDI was not willing to voluntarily stipulate to the entry of the Consent Order, the Regional Office (our experience with Atlanta Regional Office and Dallas Regional Office) would simply file Notice of Charges and have matter assigned to an administrative law judge, who would schedule the matter for a hearing date, with limited prior discovery. Under the proposed Appeals Guidelines, the IDI is afforded an opportunity to appeal the FDIC's proposed formal enforcement proceeding prior to it being heard by the administrative law judge. This is a more transparent and informal means to address the FDIC's formal enforcement action, without having to expend significant resources, i.e. time, personnel, and money necessary in any litigation.

In advance, we appreciate the FDIC's consideration to the foregoing comments to the proposed Appeals Guidelines.

Sincerely,
IGLER | PEARLMAN, P.A.

[redacted]

A. George Igler