



July 11, 2017

**MEMORANDUM TO:** The Board of Directors

**FROM:** Doreen R. Eberley  
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Mark Pearce  
Director, Division of Depositor and Consumer Protection

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General Counsel

**SUBJECT:** Amendments to the Guidelines for Appeals of Material Supervisory Determinations

**Recommendation**

Staff recommends that the Board of Directors (“Board”) adopt the attached Notice of Guidelines and authorize its publication in the Federal Register. Through this Notice, the FDIC would revise the Guidelines for Appeals of Material Supervisory Determinations, providing institutions with broader avenues of redress with respect to material supervisory determinations and enhancing consistency with the appeals processes of the other Federal banking agencies.

**Background**

Section 309(a) of the Riegle Community Development and Regulatory Improvement Act of 1994 required each federal banking agency to establish an independent intra-agency appellate process to review material supervisory determinations. To satisfy this requirement, the Board established the Supervision Appeals Review Committee (“SARC”) and adopted Guidelines for Appeals of Material Supervisory Determinations (“Guidelines”) governing the appellate process. The Board has periodically amended the Guidelines, often through notice and comment.

The Board approved publication of proposed amendments to the Guidelines for notice and comment on July 28, 2016. These proposed amendments were a result of the Board’s commitment to review aspects of the Guidelines in response to the FDIC Office of Inspector General’s *Report of Inquiry into the FDIC’s Supervisory Approach to Refund Anticipation Loans and the Involvement of FDIC Leadership and Personnel*. The FDIC received two comment letters on the proposal – one from a trade association and the other from a financial holding company. These commenters supported the proposed amendments to the Guidelines and recommended further changes. The comments were considered in developing the revised Guidelines, and the major aspects of the comments are discussed below.

**Description of Final Guidelines**

The revised Guidelines would adopt the proposed amendments without change and include additional amendments based on feedback received from commenters, as described below. As revised, the Guidelines would expand institutions’ appellate rights under certain

circumstances and enhance consistency with the appeals processes of the other Federal banking agencies. The Guidelines would:

- expand the material supervisory determinations eligible for review;
- provide that a formal enforcement-related action or decision does not affect an appeal that is pending under the Guidelines;
- make additional opportunities for appeal available under the Guidelines in certain circumstances; and
- provide for the publication of annual reports on Division Directors' decisions with respect to material supervisory determinations.

#### *Material Supervisory Determinations Eligible for Review*

Under the current Guidelines, the material supervisory determinations eligible for review do not include determinations regarding compliance with an existing formal enforcement action. The revised Guidelines would allow institutions to appeal determinations regarding the institution's level of compliance with an existing formal enforcement action; however, if the FDIC determines that lack of compliance with an existing formal enforcement action requires additional enforcement action, the proposed new enforcement action would not be appealable. This expansion of institutions' appeal rights would make the FDIC's process consistent with the OCC's current appeals process.

The Guidelines also would remove from the list of determinations that are not appealable the decision to initiate an informal enforcement action, such as a Memorandum of Understanding.

A commenter requested that the Guidelines state expressly that *matters requiring board attention* in examination reports are subject to appeal, noting that such determinations are arguably appealable under the current Guidelines. Staff believes that this change would clarify institutions' appeal rights and enhance consistency with the OCC's process, which expressly permits appeals of *matters requiring attention*.

A commenter also sought clarification of the proposed amendment that would remove decisions to initiate informal enforcement actions from the list of determinations that are not subject to appeal. Staff believes that institutions' appellate rights would be clarified by affirmatively stating that decisions to initiate informal enforcement actions are subject to appeal.

#### *Commencement of Formal Enforcement Action*

The Guidelines currently state that a formal enforcement-related action or decision commences, and therefore becomes unappealable, when the FDIC initiates a formal investigation under 12 U.S.C. § 1820(c) or provides written notice to the bank *indicating its intention to pursue available formal enforcement remedies* under applicable statutes or published enforcement-related policies of the FDIC, including written notice of a referral to the Attorney General pursuant to ECOA or a notice to HUD for violations of the FHA or ECOA. The proposed amendments would provide that 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) or provides written notice to the bank *of a recommended or proposed formal enforcement action* under applicable statutes or published enforcement-related policies of the FDIC, including written notice of a referral to the Attorney General pursuant to the ECOA or a notice to HUD for violations of the FHA or ECOA. This change would make the FDIC's process consistent with the OCC's appeals process.

The final Guidelines also would provide that a formal enforcement-related action or decision does not affect the appeal of any material supervisory determination that is pending under the Guidelines.

#### *Additional SARC Appeal Rights*

Under the current Guidelines, an institution's right to appeal a material supervisory determination becomes unavailable when the FDIC notifies the institution of its intent to pursue a formal enforcement action. The revised Guidelines would provide institutions with SARC appeal rights in the following circumstances:

- if the FDIC does not pursue a formal enforcement action, such as the issuance of a notice of charges or the signing of a consent order, within 120 days of providing written notice to the institution of the recommended or proposed formal enforcement action (subject to extension with the approval of the SARC Chairperson);
- if a matter referred to the Department of Justice pursuant to the Equal Credit Opportunity Act ("ECOA") is returned to the FDIC, or a notice is sent to the Department of Housing and Urban Development ("HUD") for certain violations of the ECOA or the Fair Housing Act, and the FDIC does not initiate an enforcement action within 120 days of the date the referral is returned.

In all of these circumstances, the institution would be given written notice of appeal rights within 10 days of a determination that appeal rights have been made available. Reinstatement of SARC appeal rights could be stayed if the FDIC and the bank agree that a stay is appropriate in order to reach a mutually agreeable solution to the proposed enforcement action.

Commenters recommended reducing the time period for reinstating appeal rights from 120 days to 60 days. Staff believes, however, that the proposed 120-day time period appropriately balances the need for adequate review of enforcement actions with institutions' desire to promptly appeal material supervisory determinations.

#### *Standard of Review for Requests for Review*

In response to a request that the FDIC clarify the standard of review for Division-level reviews, staff recommends that the Guidelines expressly apply the same standard of review to Division-level reviews that would apply to appeals before the SARC. Section M of the Guidelines provides that the SARC reviews appeals for consistency with the policies, practices, and mission of the FDIC and the overall reasonableness of, and the support offered for, the positions advanced.

### *Reports on Division Directors' Decisions*

A commenter suggested increasing the transparency of Division-level reviews by publishing Division Directors' decisions. Publication of Division Directors' decisions might suggest that these decisions are binding on the FDIC or that they may be cited as precedent. Moreover, Division Directors' reviews are intended to be conducted on an expedited basis. However, staff believes that the transparency of the process could be enhanced by providing additional information regarding Division-level reviews. Staff recommends that the Guidelines provide for the publication of annual reports on Division Directors' decisions.

### **Additional Comments**

Commenters also recommended broader changes to the structure of the appellate process. Their recommendations included providing for review of material supervisory determinations by officials outside the agency and expanding the scope of the appeals process to include all supervisory actions that adversely affect institutions, such as enforcement-related actions and decisions. As discussed further in the preamble to the revised Guidelines, staff believes that such changes are not warranted.

### **Conclusion**

Staff recommends that the Board approve the attached Notice of Guidelines for publication in the Federal Register.

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