Federal Deposit Insurance Corporation
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January 19, 2021

MEMORANDUM TO: The Board of Directors

FROM: Nicholas J. Podsiadly
General Counsel

SUBJECT: 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 establish an independent office that would generally replace the existing Supervision Appeals Review Committee (SARC) and would modify the procedures and timeframes for considering formal enforcement-related decisions through the supervisory appeals process.

Background

Section 309(a) of the Riegle Community Development and Regulatory Improvement Act of 1994 required each of the federal banking agencies to establish an independent intra-agency appellate process to review material supervisory determinations.[1] To satisfy this requirement, the Board established the 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.

Under the FDIC's current supervisory appeals process, institutions are encouraged to make good-faith efforts to resolve disagreements with examiners and/or the appropriate FDIC Regional Office. If these efforts are not successful, the institution may submit a request for review with the appropriate Division Director, who issues a written decision. If the institution is not satisfied with the Division Director's decision, it may appeal that decision to the SARC, a standing Board-level committee that is authorized to decide supervisory appeals.

In 2019, the FDIC decided to explore potential improvements to the supervisory appeals process. As part of this process, the FDIC's Office of the Ombudsman hosted a Webinar and in-person listening sessions in each FDIC Region regarding the agency's supervisory appeals and dispute resolution processes. The sessions offered bankers and other interested parties an opportunity to provide individual input and recommendations regarding the supervisory appeals process. Among other topics, session participants focused on the composition of the SARC and opportunities to further enhance the independence of the appeals process. Participants offered a range of suggestions and raised questions concerning the timeframes for appeals and the types of matters that may be appealed if the FDIC pursues a formal enforcement action, demonstrating a potential source of confusion to bankers.

[1] 12 U.S.C. § 4806(a).

In August 2020, the FDIC published for comment a proposal to replace the SARC with an independent, standalone office within the FDIC, known as the Office of Supervisory Appeals (Office).[2] The Office would have delegated authority to consider and resolve appeals of material supervisory determinations. It would be fully independent of those FDIC Divisions with authority to issue material supervisory determinations and would be staffed by reviewing officials with bank supervisory or examination experience. The FDIC also proposed to modify the procedures and timeframes that apply to appeals of material supervisory determinations relating to formal enforcement-related actions through the supervisory appeals process. The comment period for the proposal closed on October 20, 2020.

Discussion of Comments and Revised Guidelines

The FDIC received fifteen comments from a variety of interested parties, including banks, trade associations, law firms, and a consultant. Commenters generally supported the proposal, with most asserting that the changes would enhance the supervisory appeals process.

Staff is recommending that the Board generally adopt the Guidelines as proposed, with certain additional amendments based on feedback received from commenters. These amendments and other significant comments are discussed in further detail below.

Review of Office Decisions

The FDIC asked whether commenters believed that the Chairperson or the Board should have an opportunity to review Office decisions before issuance. While a few commenters asserted that the FDIC's senior management should review Office decisions, most commenters believed that review by the Chairperson or the Board would undermine the independence of the Office.

Consistent with the proposal, the revised Guidelines provide for review of material supervisory determinations by the Division Director and then by the Office. Additional levels of review could delay the resolution of appeals. For these reasons, the revised Guidelines do not provide for additional levels of review.

Qualifications to Serve in the Office

The FDIC proposed staffing the Office with reviewing officials who have bank supervisory or examination experience, such as retired bank examiners. The FDIC asked whether bank supervisory or examination experience would constitute appropriate qualifications and experience for these positions. Commenters expressed a range of views on this topic. Some commenters supported staffing the Office with individuals that have bank supervisory or examination experience, while others stated that the Office should not be limited to staff with supervisory experience.

Staff believes that, consistent with the proposal, the FDIC should deem bank supervisory or examination experience as required background for reviewing officials, given the Office's role in

[2] 85 Fed. Reg. 54377 (Sep. 1, 2020).

making decisions on material supervisory determinations on behalf of the agency. However, the perspective and expertise that bankers and other industry professionals could bring to the process may be valuable, and applicants' relevant industry experience will be viewed favorably.

Retaliation Concerns

One commenter stated that the FDIC should take measures to ensure that reviewing officials are not retaliated against for their decisions. The FDIC has structured the Office to minimize the risk that a fear of retaliation could impact decisions by reviewing officials. For example, reviewing officials will be hired for terms, and only former, rather than current, officials will be eligible to serve as reviewing officials.

The FDIC also received comments reiterating that some institutions may not appeal decisions due to a fear of retaliation from examiners. As noted in the proposal, FDIC policy prohibits any retaliation, abuse, or retribution by an agency examiner or any FDIC personnel against an institution, and the FDIC continues to explore options to reaffirm its commitment to and ensure compliance with this policy.

Standard of Review

Under the proposed Guidelines, the Division Director and the Office would review 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. Some commenters encouraged the FDIC to adopt a *de novo* standard of review and align the standard with the approach recently taken by the Federal Reserve Board (FRB).

The revised Guidelines include a change in the standard of review for appeals to the Division Director. The Division Director would make his or her own supervisory determination, which is substantially similar to the standard of review for the initial review panel under the FRB's approach.[3] Under this standard, the Division Director would have discretion to consider examination work papers and other materials developed by staff during an examination, but would make an independent supervisory determination without deferring to the judgments of either party. The revised Guidelines do not alter the standard of review when the appeal is reviewed by the Office.

Ex Parte Communications

Commenters recommended prohibiting *ex parte* communications between supervisory staff and the Office during an appeal, asserting that this is a due process and fairness concern. The revised Guidelines address this concern by requiring that communications between the Office and either supervisory staff or the appealing institution, including materials submitted to the Office for review, also be shared with the other party to the appeal.

[3] *See* 85 Fed. Reg. 15175, 15180 (Mar. 17, 2020).

Review Panel Size

The FDIC proposed that each appeal to the Office would be heard by a panel of three reviewing officials. A number of commenters suggested panels comprised of five reviewing officials for varying reasons, such as to increase diversity in perspectives and expertise and decrease the likelihood of deference to the strong opinions of one panel member. To provide the Office with flexibility, the revised Guidelines provide that panels may be comprised of either three or five reviewing officials.

Timelines for Appeals

The FDIC solicited comment on whether the proposed timelines for appeals properly balance the goals of resolving appeals as expeditiously as possible and providing adequate time for preparation and review. Commenters generally stated that the proposed timeframes were reasonable, but a few commenters recommended allowing institutions to petition for expedited review of material supervisory determinations in certain circumstances.

Staff believes that, in general, the proposed timeframes are appropriate. However, certain circumstances may warrant expedited consideration of an appeal. Accordingly, the revised Guidelines provide that an institution may request expedited review in its appeal to the Office.

Appeals of Determinations Relating to Formal Enforcement Actions

The FDIC proposed changes to the timeline that would apply to supervisory appeals in instances in which the FDIC is also evaluating whether a formal enforcement action is merited. In any case where the FDIC has provided notice to an IDI that it is determining whether a formal enforcement action is merited based on an examination, the FDIC would have 120 days to issue an order of investigation, a notice of charges (or notice of assessment, as applicable), or provide the institution with a draft consent order. If the FDIC fails to do so within the 120-day timeframe, the IDI's supervisory appeal rights would be made available. However, if the FDIC provides an IDI with a draft consent order, the parties would have an opportunity to negotiate the details of a potential settlement without a fixed time limit. At any time, if the IDI believes that further negotiations would not be productive, it could notify the Division of its decision in writing, at which point the Division would have 90 days to issue a notice of charges (or assessment) or to open an order of investigation. If the Division failed to produce a notice of charges (or assessment) or to open an order of investigation within those 90 days, the IDI's supervisory appeal rights to the Office would be made available. The IDI would have 60 days to file an appeal, consistent with the standard timeline following a material supervisory determination. Several commenters stated that the proposed timeframes were appropriate.

Transition Period

If the Board adopts the revised Guidelines, staff expects that a period of time will be necessary to establish and staff the Office. The current Guidelines, which permit appeals of Division Directors' decisions to the SARC, would apply until the Office is fully operational. The FDIC would publish a notice to inform institutions when this occurs.

Conclusion

Staff recommends that the Board adopt the attached Notice of Guidelines and authorize its publication in the *Federal Register*.

Staff Contacts

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