Federal Deposit Insurance Corporation
550 17th Street NW, Washington, D.C. 20429-9990

May 17, 2022

MEMORANDUM TO: The Board of Directors

FROM: Harrel Pettway
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 Amendments to the Guidelines for Appeals of Material Supervisory Determinations and authorize the publication in the *Federal Register* of the Notice and Request for Comment on the Amendments. Through this Notice, the FDIC would amend the Guidelines for Appeals of Material Supervisory Determinations (Guidelines), restoring the Supervision Appeals Review Committee (SARC) as the final level of review in the supervisory appeals process. The Notice would also solicit comment on all aspects of the revised Guidelines, with a comment period of 30 days.

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.[1] To satisfy this requirement, the Board established the SARC and adopted the Guidelines to govern the appellate process.[2] The Board has periodically amended the Guidelines, often through notice and comment.

In January 2021, the FDIC revised the Guidelines to generally replace the SARC as the final level of review in the appellate process with a standalone office within the FDIC, designated the Office of Supervisory Appeals (Office).[3] This Office has been granted the delegated authority to review and decide appeals of material supervisory determinations, and is staffed with reviewing officials that have bank supervisory or examination experience. If a material supervisory determination is appealed to the Office, a three- or five-member panel of reviewing officials considers the appeal and issues a written decision to the institution. The Guidelines do not provide for additional review beyond the Office.

Prior to the establishment of the Office, the FDIC's supervisory appeals process had always provided for Board-level review by including a Board member on the SARC. Staff's experience suggests that the FDIC's longstanding practice of providing Board-level review of material supervisory determinations would better promote independence and accountability in the appellate process. Board-level review has ensured that accountability for the FDIC's

---

[1] 12 U.S.C. 4806(a).
[2] 60 Fed. Reg. 15923 (Mar. 28, 1995).
[3] 86 Fed. Reg. 6880 (Jan. 25, 2021).

supervisory determinations remains with the FDIC's Board of Directors, consistent with sound corporate governance principles.

Lastly, the restoration of the SARC will address staffing concerns inherent in the Office's structure that may negatively affect the appellate process going forward. The Office is staffed with reviewing officials hired for terms on a part-time, intermittent basis. These constraints could make it challenging to recruit and retain individuals with sufficient expertise and judgment to make final supervisory decisions on behalf of the agency. Inability to adequately staff the Office would prevent the FDIC from fulfilling its statutory responsibility to expeditiously hear and decide appeals of material supervisory determinations. By contrast, vacancies on the SARC can be filled more promptly through existing routine internal processes, minimizing potential impact on the administration of appeals. Reliance on existing staff rather than employees dedicated solely to the appeals function (even on a part-time basis) is also a more cost-effective use of the Deposit Insurance Fund, given the historically infrequent nature of supervisory appeals.[4]

Revised Guidelines

Restoration of the SARC

The revised Guidelines restore the SARC as the final level of review of material supervisory determinations made by the FDIC. Consistent with the composition of the SARC as it stood in 2021, the SARC will include: one inside member of the FDIC's Board of Directors (serving as Chairperson); a deputy or special assistant to each of the other inside Board members; and the General Counsel as a non-voting member. Also consistent with the prior structure of the SARC, the Chairperson of the FDIC's Board of Directors will have the authority to designate alternate members in the event of vacancies.

Procedural Provisions

The revised Guidelines would change relevant procedural provisions to align with the restoration of the SARC structure in the appeals process. For example, the current Guidelines provide the Chairperson's Office with the authority to extend the timeframes where supervisory appeal rights are suspended while a formal enforcement action is being pursued. The revised Guidelines would grant such authority to the SARC Chairperson.

[4] In the fifteen years prior to the establishment of the Office, 51 appeals were submitted to the SARC out of 113,448 examinations. Some of these appeals were withdrawn prior to a decision, raised issues that were not reviewable under the Guidelines, or became moot because the institution had failed.

Communications with Supervisory Staff

In 2021, the FDIC added a provision to the Guidelines requiring that communications between the Office and either supervisory staff or the appealing institution, including materials submitted to the Office for review, are also shared with the other party to the appeal. As a conforming change, and given the broad responsibilities SARC members have in their normal duties, this provision limiting communications with supervisory staff is no longer appropriate and would be eliminated.

Formal Enforcement-Related Decisions

In the revised Guidelines, staff would generally retain the provisions for considering formal enforcement-related decisions (and their underlying facts and circumstances) that were previously adopted to clarify the intersection of the supervisory appeals process and the administrative enforcement process. The revised Guidelines include one enhancement to these provisions. Specifically, the Guidelines previously stated that if the FDIC provided written notice to an institution that it is determining whether a formal enforcement action is merited, the FDIC would have 120 days from the date of the notice to issue an Order of Investigation, a Notice of Charges, or to provide the institution with a draft consent order; if the FDIC failed to do so, supervisory appeal rights would be made available. In some instances, however, when the FDIC provides notice that it is determining whether a formal enforcement action is merited, it invites the institution to provide additional information. This can serve as an important channel of communication between institutions and supervisory staff, but the timeframes contained in the Guidelines did not account for the possibility of an institution providing information in response to the FDIC's notice. Staff believes that the process should provide ample opportunity to review information provided by the institution before taking enforcement action. Accordingly, the revised Guidelines provide that the FDIC has 120 days to take action from the date of its notice to the institution or the date of the most recent submission of information from the institution, whichever is later.

Other Aspects of the Appeals Process

Aside from the substitution of the SARC for the Office as the final level of review, most aspects of the supervisory appeals process remain unchanged. The revised Guidelines continue to encourage institutions to make good-faith efforts to resolve disputes with the on-site examiner and/or the appropriate Regional Office. While such efforts are not required under the process, the FDIC's experience suggests that they may narrow the matters in dispute or eliminate the need for an appeal in some instances.

The revised Guidelines also continue to provide for review by the appropriate Division Director before the submission of an appeal to the SARC. The Division Director will have 45 days to consider the appeal and issue a written decision on the supervisory matters at issue.

In addition, the revised Guidelines continue to include provisions for considering formal enforcement-related decisions (and their underlying facts and circumstances) that were adopted in 2021 to clarify the intersection of the supervisory appeals process and the administrative enforcement process. These provisions were intended to allow sufficient time to review the facts and circumstances that lead to formal enforcement actions and ensure that such actions were not brought prematurely, and to allow sufficient time for institutions to consider and execute consent orders. Staff believes these clarifying provisions have been beneficial and should be retained.

Effective Date

If the Board approves the attached resolution, the revised Guidelines would take effect immediately. Taking this action quickly minimizes the potential for confusion among insured depository institutions regarding the process they must follow in the event they wish to appeal a material supervisory determination.

Request for Comment

While the revised Guidelines would take effect immediately upon the Board's approval, the Notice prepared by staff also includes a request for comment on all aspects of the revised Guidelines. In particular, comment would be solicited on the role of the Ombudsman in the process.

When the FDIC amended the Guidelines in 2021, it formalized its process for including the Ombudsman's views in the consideration of appeals. The current Guidelines state that copies of appeals are provided to the Ombudsman, who can submit views to the reviewing panel for consideration. The revised Guidelines do not change this process, and continue to allow the Ombudsman to submit views regarding an appeal to the SARC. The Notice requests comment regarding other enhancements to the process to include the Ombudsman's perspective while remaining consistent with the Ombudsman's role as a neutral liaison between supervised institutions and the FDIC.

Conclusion

Staff recommends that the Board approve the attached Notice and Request for Comment for publication in the *Federal Register.* Upon the Board's approval, the revised Guidelines would take effect immediately, and comment would be solicited for a period of 30 days.

Staff Contacts

Patricia Colohan, Associate Director, Division of Risk Management Supervision, x87283
Tara Oxley, Associate Director, Division of Depositor and Consumer Protection, x86722
James Watts, Counsel, Legal Division, x86678