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October 19, 2020

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

Re: Guidelines for Appeals of Material Supervisory Determinations (RIN 3064-ZA20)

Dear Mr. Feldman:

The Independent Community Bankers of America ("ICBA")[1] appreciates this opportunity to provide feedback to the Federal Deposit Insurance Corporation's ("FDIC") request for comments in response to its Notice of Proposed Rulemaking ("NPR") on the Guidelines for Appeals of Material Supervisory Determinations. ICBA believes that the best approach to reviewing material supervisory decisions is the creation of separate appeals office under the Federal Financial Institutions Examination Council (FFIEC) that would be independent of all three federal prudential banking regulators. Nevertheless, we support the steps taken by the FDIC in this proposal to increase the independence of the current appeals process within that agency.

Furthermore, as the FDIC observes in the NPR, this guidance is a matter of agency management, and is not subject to the mandatory notice and comment requirements of the Administrative Procedure Act. Nevertheless, the supervisory appeals process is an important issue to community banks, and we commend the FDIC for providing the public an opportunity to provide input.

Background

Under current FDIC guidelines, material supervisory determinations are reviewed by the Supervision Appeals Review Committee (SARC). SARC was created pursuant to the Riegle Community Development and Regulatory Improvement Act, which required the FDIC to create an "independent intra-agency appellate process"[2] to review material supervisory determinations. Originally, SARC was set up with five members, but under the current guidelines the SARC consists of a panel of one of the FDIC's three inside directors (who serve as the SARC

[1] The Independent Community Bankers of America® creates and promotes an environment where community banks flourish. With more than 52,000 locations nationwide, community banks constitute 99 percent of all banks, employ more than 760,000 Americans and are the only physical banking presence in one in five U.S. counties. Holding more than $4.9 trillion in assets, $3.9 trillion in deposits, and $3.4 trillion in loans to consumers, small businesses and the agricultural community, community banks channel local deposits into the Main Streets and neighborhoods they serve, spurring job creation, fostering innovation and fueling their customers' dreams in communities throughout America. For more information, visit ICBA's website at www.icba.org.
[2] 12 U.S.C. 4806(a).

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Chairperson), and one deputy or special assistant to each of the other two inside directors for a total of three members.[3]

Review by SARC is the second step of a two-step review process of material supervisory determinations. The first step, which is not being changed by the proposal, is a review by the appropriate FDIC Division Director. If a bank is dissatisfied with the review by the Division Director, it may proceed to the second stage of the process, which is a review by SARC, a standing committee of the FDIC's Board of Directors.

The FDIC proposes to replace SARC with a new Office of Supervisory Appeals. The Office of Supervisory Appeals is a new, standalone office within the FDIC that would be staffed by individuals with bank supervisory or examination experience (such as retired bank examiners). These individuals would be externally recruited and employed on a "part-time or intermittent, time-limited basis."[4] Appeals would be heard by a three-member panel of the Office's employees who would issue a written decision. Both the appealing institution and the FDIC staff would have the right to an oral hearing, if requested.

Unlike the FDIC Board and its designees, it would not be the role of the Office of Supervisory Appeals to set policy. Therefore, "the Office would not consider aspects of an appeal that seek to change or modify FDIC policy or rules."[5] The FDIC's Legal Division would advise the office on FDIC policy and ensure that no decision made by the Office modifies FDIC policy or rules.

It is important to note that even under the new proposal, banks would continue to be encouraged to make good-faith efforts to resolve disagreements with examiners and/or the Regional Office. If these efforts are not successful, banks could submit a request for review with the appropriate Division Director. Upon receiving a request for review, the Division Director would have the option of issuing a written decision or sending the appeal directly to the new Office of Supervisory Appeals. Banks that disagree with a decision made by the Division Director could also submit an appeal to the Office of Supervisory Appeals.

The FDIC proposal defines a wide group of material supervisory determinations that would be subject to appeal including CAMELS ratings, IT ratings, CRA ratings, consumer compliance ratings, and trust ratings. Appealable supervisory determinations would also include classifications of loans, determinations relating to the adequacy of the loan loss reserves, determinations relating to capital or earnings, decisions to initiate informal enforcement actions, and matters requiring board attention. However, appealable supervisory determinations would not include decisions to appoint a conservator or receiver, decisions to take prompt corrective actions, and formal enforcement related actions.

ICBA Position

ICBA has consistently advocated for increased independence in the review of appeals of material supervisory determinations. **In our view, the best way to ensure that these reviews are truly**

[3] 69 Fed. Reg. 41479, 41480.
[4] 85 Fed. Reg. 54378.
[5] 85 Fed. Reg. 54379.

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independent is to establish an Office of Supervisory Appeals as part of the FFIEC. This Office could draw upon the expertise of all the federal banking regulators as well as the financial services industry and legal profession to create an appellate review process independent of the banking agencies.

Under ICBA's vision of a FFIEC Office of Supervisory Appeals, an administrative law judge subject to the Administrative Procedure Act would conduct a de novo hearing and would issue decisions expeditiously so as not to unduly delay the examination process. All decisions by the administrative law judge could be reviewed by the DC Court of Appeals or the federal appellate court where the bank was located. Many other regulatory agencies including the Securities and Exchange Commission, the U.S. Food and Drug Administration and the Social Security Administration have such an independent administrative appeals process. In addition to promoting independence, this process would lead to more consistent supervision between banking regulators. ICBA supported the Financial Choice Act of 2017 which passed the House of Representatives and included such an appeals process.

However, while this is our broader recommendation to the federal banking regulators, it is impossible for the FDIC to undertake this alone since setting up an appellate process under the umbrella of the FFIEC would require legislation. Therefore, we commend the FDIC for its steps to increase the independence of its own intra-agency appeals process. **We support the creation of the proposed internal Office of Supervisory Appeals and believe it is an improvement over SARC because it introduces a more independent perspective into the review of agency decisions.**

<u>**Composition of the Office**</u>

While ICBA fully supports the creation of an FDIC Office of Supervisory Appeals, **we recommend that the proposed reviewing panel be expanded from three members to five and that two of the five members be either former community bankers and/or practicing attorneys that have represented community banks with regard to supervisory issues.** This community banking representation on the panel will ensure that the panel remains objective and independent and will make the appeals process less intimidating for other community banks. While individuals with supervision and examination experience offer an important perspective and should be represented on the reviewing panel, they are one side of the examination equation. To bring balance to the process, we recommend that both the industry perspective and the examiner perspective be represented. Furthermore, since the overwhelming number of FDIC-regulated banks are community banks, they should be the financial institutions that primarily represent the industry side of the equation.

We agree with the FDIC that the Office should be staffed with professionals who have bank supervisory and examination experience that can assist the reviewing panel on a wide range of issues. This will ensure that the reviewing panel has the relevant knowledge to decide an appeal and that the process remains consistent over time. **However, it should be the reviewing panel and not the staff that should ultimately make the decisions and render opinions for the Office of Supervisory Appeals.** Furthermore, the staffing should be scalable so that during periods when there are many appeals, staffing can be increased to handle the workload.

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Safeguards Against Retaliation

Community banks consistently report that they are reluctant to appeal supervisory decisions out of fear of retaliation. While the current guidelines prohibit such retaliation, the enforcement of these guidelines must be rigorous. Additionally, the FDIC should ensure that the Ombudsman is sufficiently empowered to independently investigate and respond to complaints of retaliation or bias. **We believe that some fear of retaliation will be eliminated if the appeals process is made more independent and transparent and if community banks understand that at least two of the reviewing panel members will either be former community bankers or attorneys that have represented community banks.**

Burden of Proof

The proposed guidelines state, "The burden of proof as to all matters at issue in the appeal, including timeliness of the appeal if timeliness is at issue, rests with the institution."[6] Since it is banks that will request review, it is consistent with appellate practice that the burden of proof should rest with them. **However, we believe the guidelines should clarify that the standard of proof is a preponderance of the evidence, and not some higher standard of deference to the examiner's conclusions.**

Responses to Agency Questions

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?*

ICBA does not believe that review of Office decisions by the FDIC Chairperson or Board is necessary. The potential for Office decisions to be unilaterally reversed by the Chairperson or Board would undermine the independence of the process. The job of the Office is not to set FDIC policy, only to ensure that supervision is consistent with existing policy. If the process is sufficiently robust, the chance of the Office acting in a way that is contrary to agency policy is small. Furthermore, if the Office acts in a way that the Chair or Board feels is contrary to FDIC policy, they can always respond by reinstating or clarifying the existing agency policy.

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?*

Bank supervisory and examination experience is appropriate experience, but it is not the only category of experience appropriate to participate in this process. As we stated above, ICBA believes the process could be improved by including two members on the reviewing panel who are either former community banks or who are attorneys that have represented community banks on supervisory issues. Given the importance of a fair process, we are confident that individuals

[6] 85 Fed. Reg. 54382.

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from the private sector would make a good faith effort to set aside any industry bias and make sure that their peers are appropriately supervised.

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

We recommend staggered terms for panel members so that no panel member would serve more than five years. We also recommend that decisions be publicized so that bankers are aware of the process and will understand that it is a viable and independent way to seek an appeal. One of the reasons that few bankers pursue an appeal to SARC is because they know their chances of success are small. The FDIC should promote this process as a viable way to seek an appeal.

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?*

As stated above, a panel of five reviewing officials is the appropriate number. This would ensure that both industry and supervisory perspectives are adequately represented. Furthermore, if one or two panel members have conflicts or for some reason are unable to serve, there would be enough remaining panel members to hear the appeal and render a decision.

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

We believe that appeals should first be reviewed by the appropriate Division Director, as is the process now, and then, at either the bank's or the FDIC's option, progress to review by the Office. We believe that decisions made by the Office should be final and we would not support further levels of review – for example by the Board of Directors of the FDIC. If an institution is still unhappy with a decision of the Office, the appropriate course of action would be to challenge the decision in federal court.

Unlike the existing SARC review process, the proposed changes do not include direct representation for the Board of Directors of the FDIC. ICBA does not believe that direct representation for the Board is necessary. While it is undoubtedly the role of the Board to set agency policy, the Office is not a policy-making body. Its role should be to interpret agency rules, as they are written, in an unbiased way.

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?*

ICBA believes the timeline changes proposed in the NPR are appropriate. The current Guidelines provide that "if the FDIC does not commence a formal enforcement action within 120 days after giving written notice to an IDI of a recommended or proposed formal enforcement action, the IDI may appeal the facts and circumstances underlying the formal enforcement action to the SARC, unless the SARC Chairperson agrees to extend the 120-day period."[7]

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[7] 82 FR 34522, 34526.

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As the FDIC observed in its NPR, this left some confusion regarding when a formal enforcement action is commenced and when determinations become appealable. Therefore, ICBA appreciates the clarification that, "a formal enforcement-related action commences – and appeal rights become temporarily unavailable – when the FDIC initiates a formal investigation, issues a notice of charges (or notice of assessment, as applicable), provides the IDI with a draft consent order, or otherwise provides written notice to the IDI that the FDIC is reviewing the relevant facts and circumstances to determine whether a formal enforcement action is merited."[8]

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?*

The FDIC should publish a chart on its website that lists the outcome of supervisory appeals with a short summary of the case and issues so that stakeholders could easily see how often the Office sides with the examiner or the appealing institution. This would increase the transparency of supervisory appeals and deter institutional bias.

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?*

We agree with the FDIC's conclusion that the institution and the relevant FDIC Division should be allowed to mutually agree to extend the timeframes when appropriate.

Conclusion

ICBA supports the FDIC's efforts to replace SARC with an independent Office of Supervisory Appeals. While we believe that the appellate process can only be truly independent if it is established as a separate FFIEC office independent of the banking agencies, we still feel that the creation of an independent office within the FDIC is a positive step towards a more transparent and independent appeals process within the agency. Finally, we urge the FDIC to expand the reviewing panel from three to five members and require that two of the members be either former community bankers or attorneys that have represented community banks on supervisory issues.

[8] 85 Fed. Reg. 54381

ICBA appreciates the opportunity to comment on this proposal. If you have any questions or would like additional information, please do not hesitate to contact me at (202) 659-8111 or Chris.Cole@icba.org.

Sincerely,
/s/ Christopher Cole

Christopher Cole
Executive Vice President and Senior Regulatory Counsel

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