Speeches and Testimony

Statement by FDIC Board Member Martin J. Gruenberg on the Guidelines for Appeals of Material Supervisory Determinations

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In August 2020, the FDIC Board adopted for comment a proposal to amend its Guidelines for Appeals of Supervisory Determinations to replace the existing Supervision Appeals Review Committee (SARC) with a standalone office within the FDIC, to be known as the Office of Supervisory Appeals (Office).[1] Today, the FDIC Board is being asked to approve the establishment of that Office.

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."[2]

Under the Act, the term "independent appellate process" means "a review by an agency official who does not directly or indirectly report to the agency official who made the material supervisory determination under review."[3] "Material supervisory determinations" under the statute include determinations relating to: (1) examination ratings; (2) the adequacy of loan loss reserve provisions; and (3) classifications on loans that are significant to an institution.[4]

The FDIC Board established the SARC and adopted *Guidelines for Appeals of Material Supervisory Determinations* (Guidelines) governing the appellate process in order to satisfy the statutory requirement soon after it was enacted.[5] Over the years, the Board has periodically amended the Guidelines, often after soliciting public comment on proposed changes.

The SARC is typically composed of one internal FDIC Board member acting as Chairman, and representatives of the other two internal Board members.[6] The General Counsel acts as a nonvoting member.[7] The SARC's review and deliberations are supported by staff of the Legal Division who are not involved in the underlying supervisory determinations that may form the basis for appeals.

This approach has ensured review at the most senior levels of the FDIC, a diversity of views, and independence from the supervisory function, while also maintaining independence from the banking industry interest as well.

The final Guidelines before the Board today would eliminate Board-level review of these appeals by the SARC and instead provide for review by a three- or five-member panel of reviewing officials under the new Office of Supervisory Appeals. These reviewing officials would be required to have prior bank supervisory or examination experience and would serve in term or temporary appointments as FDIC employees.[8]

In addition, the preamble to the final Guidelines states that as background for review panelists, "the FDIC appreciates that industry perspective can be valuable and accordingly will generally view relevant industry experience favorably."[9] As a result, the final Guidelines would allow former bankers, during their temporary term of employment, to review the material supervisory determinations of career FDIC examiners and substitute their own judgment.[10]

Few additional details are provided regarding the establishment of the Office of Supervisory Appeals. The Guidelines do not indicate where the new Office would be located organizationally within the FDIC, who would appoint the Director of the Office, or who would be responsible for selecting the review panel members and evaluating their qualifications.

The striking vagueness in the establishment of this Office makes it difficult to evaluate the proposal. Its purpose, according to the preamble, is "to establish an independent office that would replace the existing Supervision Appeals Review Committee."[11] Yet, without more specifics, it is really not possible to assess that objective.

Further, implicit in the statute's requirement that "independent appellate process" means "a review by an agency official who does not directly or indirectly report to the agency official who made the material supervisory determination under review" is independence from the supervisory process and independence from the banking industry interest seeking the review.

This proposal is seeking to circumvent that objective by utilizing term, likely part-time employees who may have had supervisory experience, but also may have deep ties to industry. This would fundamentally undermine the independence and integrity of the review process.

This is a vague, deeply flawed proposal that may well have a chilling effect on the FDIC's safety and soundness and consumer protection examinations. While the current process may not be perfect, it at least meets the threshold of independence and accountability envisioned by the statute.

For these reasons, I will vote against these revised Guidelines.

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

[2] 12 U.S.C. § 4806(a).

[3] 12 U.S.C. § 4806(f)(2).

[4] 12 U.S.C. § 4806(f)(1)(A).

[5] Preamble to the final Guidelines at 11.

[6] "In the event of a vacancy, the Guidelines authorize the FDIC Chairperson to designate alternate member(s) to the SARC, so long as the alternate member was not directly or indirectly involved in making or affirming the material supervisory determination under review." Preamble to the final Guidelines at 12.

[7] Preamble to the final Guidelines at 12.

[8] Preamble to the final Guidelines at 19; Final Guidelines, Paragraph B.

[9] Preamble to the final Guidelines at 18-19.

[10] Under the final Guidelines, if an appeal seeks to change or modify FDIC policies or rules, or raises a policy matter of first impression, the Office will, with the Legal Division's concurrence, refer the matter to the Chairperson's Office. In addition, the Legal Division would review decisions of the Office for consistency with applicable laws, regulations, and policies of the FDIC prior to their issuance. If the Legal Division determines that an Office decision is contrary to a law, regulation, or FDIC policy, the Office will be required to revise the decision to conform with relevant laws, regulations, or policies. The Legal Division will not exercise supervisory judgment or opine on the merits of an appeal. Preamble to the final Guidelines at 20.

[11] Preamble to the final Guidelines at 9.