FEDERAL DEPOSIT INSURANCE CORPORATION

RIN 3064–ZA20

Guidelines for Appeals of Material Supervisory Determinations

AGENCY: Federal Deposit Insurance Corporation.

ACTION: Notice of Guidelines.

SUMMARY: On December 13, 2022, the Federal Deposit Insurance Corporation adopted revised Guidelines for Appeals of Material Supervisory Determinations (Guidelines). The revisions expand and clarify the role of the agency's Ombudsman, adding the Ombudsman to the Supervision Appeals Review Committee as a non-voting member, and require that materials considered by the Supervision Appeals Review Committee be shared with both parties to the appeal on a timely basis, subject to applicable legal limitations on disclosure. In addition, the revised Guidelines allow insured depository institutions to request a stay of a material supervisory determination while an appeal is pending.

DATES: The revised Guidelines become effective December 13, 2022.

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SUPPLEMENTARY INFORMATION:

I. Background

Section 309(a) of the Riegle Community Development and Regulatory Improvement Act of 1994 (Riegle Act) required the FDIC (as well as the other Federal banking agencies and the National Credit Union Administration) to establish an

"independent intra-agency appellate process" to review material supervisory determinations.[1] The statute defines the term "independent appellate process" to mean "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."[2] In the appeals process, the FDIC is required to ensure that: (1) an IDI's appeal of a material supervisory determination is heard and decided expeditiously; and (2) appropriate safeguards exist for protecting appellants from retaliation by agency examiners.[3]

In 1995, the FDIC adopted Guidelines for Appeals of Material Supervisory Determinations to implement section 309(a). At that time, the FDIC's Board of Directors established the SARC to consider and decide appeals of material supervisory determinations.[4] The Board has modified the composition of the SARC over the years, but as of 2021, the SARC included: one inside member of the FDIC's Board of Directors (serving as Chairperson); one deputy or special assistant to each of the other inside Board members; and the General Counsel as a non-voting member.

In January 2021, the FDIC adopted Guidelines that replaced 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).[5] After appealing a material supervisory determination to the relevant Division Director, an IDI would have had the option to appeal to the Office. If a material supervisory determination was appealed to the Office, a three- or five-member panel of reviewing officials would consider the

[1] 12 U.S.C. 4806(a).
[2] 12 U.S.C. 4806(f)(2).
[3] 12 U.S.C. 4806(b).
[4] 60 FR 15923 (Mar. 28, 1995).
[5] 86 FR 6880 (Jan. 25, 2021).

appeal and issue a written decision to the IDI. The Guidelines did not provide for additional review beyond the Office.

Earlier this year, the FDIC revised the Guidelines by restoring the SARC as the final level of review of material supervisory determinations made by the FDIC.[6] The revised Guidelines reconstituted the SARC as it existed in 2021. The revised Guidelines also included procedural changes to reflect the restoration of the SARC structure, such as granting specific authorities to the SARC Chairperson. The FDIC also eliminated a provision that had been added specifically to accommodate an independent Office of Supervisory Appeals, which required communications between the Office and either supervisory staff or the appealing IDI, including materials submitted to the Office for review, to be shared with the other party to the appeal.

The FDIC invited comments on all aspects of the revised Guidelines, including, in particular, how the process could be further enhanced to include the Ombudsman's perspective. Commenters generally disagreed with the restoration of the SARC structure, but supported expanding the Ombudsman's role in the appeals process. In addition, commenters recommended changes to other aspects of the appeals process, including the sharing of information with an appealing institution, the standard of review, and staying supervisory actions while an appeal is pending.

II. October 2022 Proposal to Amend the Guidelines

In October 2022, the FDIC proposed further amendments to the Guidelines to incorporate certain suggestions made by commenters and address concerns raised by the commenters. Recognizing the need for a balance of perspectives to be reflected in the

[6] 87 FR 30942 (May 20, 2022).

appellate process, the FDIC proposed to add the Ombudsman to the SARC as a non-voting member. Adding the Ombudsman to the SARC as a non-voting member would minimize any potential for conflict with the Ombudsman's statutory role as a liaison between the agency and any affected person. As a non-voting member, the Ombudsman would be expected to attend SARC meetings, participate in discussions, and offer views, opinions, and advice to the SARC during its deliberations based on the Ombudsman's perspective as a neutral advocated for a fair process, and as a party independent of the supervisory process. Under the proposed Guidelines, the Ombudsman would also have access to all materials reviewed by the SARC.

The FDIC also recognized that adding the Ombudsman to the SARC could cause IDIs to reconsider whether they should share confidential information with the Ombudsman, given that the Ombudsman could be involved in deciding a potentially related supervisory appeal. The FDIC proposed to address this by allowing a SARC member to designate any member of his or her staff within the member's area of responsibility to serve on the SARC on his or her behalf. For example, if the Ombudsman were unable to serve as a SARC member with respect to a particular appeal because of information learned from meeting with the institution, he or she might designate a Regional Ombudsman who has not been involved in the matter to serve on the SARC instead.

To address concerns expressed by commenters about possible retaliatory actions if an IDI submits a supervisory appeal, the proposal required the Ombudsman to monitor the supervisory process following an IDI's submission of an appeal, and noted that the Ombudsman will be expected to report to the Board on these matters periodically.

The FDIC also sought to address commenters' concerns regarding the elimination of a provision that generally required communications between the Office and supervisory staff to be shared with the appealing institution. The FDIC agreed that basic notions of fairness support a requirement that both parties to the appeal are aware of the information considered by the decision-maker. The proposal required that all materials considered by the SARC be shared with both parties to the appeal, subject to applicable legal limitations on disclosure.[7] The Ombudsman would oversee this aspect of the process, verifying that both parties have received all materials considered by the SARC.

Related to the proposed addition of the Ombudsman as a non-voting member of the SARC, the FDIC proposed to make certain conforming changes to other provisions of the Guidelines in section G.4 and prior section J. The FDIC also proposed to amend section G.1 of the Guidelines to require copies of all relevant materials related to an appeal to be provided to the Office of the Ombudsman.

The FDIC further proposed to amend the Guidelines to expressly permit IDIs to request a stay of an action or determination from the appropriate Division Director while its appeal is pending. The request would be in writing and include the reasons for the stay. The Division Director would have discretion to grant a stay, and would generally decide whether a stay is granted within 21 days of receiving the IDI's request. The Division Director could grant a stay subject to certain conditions where appropriate; for example, a stay could be time-limited.

III. Discussion of Comments

[7] For example, the disclosure of confidential supervisory information and certain other types of information is restricted under 12 CFR part 309. Thus, to the extent that materials shared with the SARC include such confidential supervisory information relating to another IDI, for example, that material could be redacted.

The FDIC received three comment letters in response to the proposed Guidelines: (1) a joint letter from six banking industry trade associations; (2) a letter from a bank holding company; and (3) a letter from a nonprofit think tank. While commenters were appreciative of some of the FDIC's proposed changes, they all had further suggestions.

SARC Membership

Commenters were generally supportive of including the Ombudsman as a member of the SARC. While commenters viewed this change as an improvement, one commenter questioned why the Ombudsman would be made a non-voting member, rather than a voting member, of the SARC.

A commenter suggested that the Guidelines specify the criteria for minimum qualifications to serve as a voting member of the SARC when an individual is designated by an FDIC Director, stating that this would promote greater credibility and trust in the process. The commenter also recommended that the FDIC develop and maintain a list of qualified candidates outside the FDIC to serve on the SARC, including current state supervisors (from states and regions outside of where the appeal originated) and retired examiners, and allow FDIC Directors to appoint individuals from this list to serve on the SARC.

Stay of a Supervisory Decision or Action

Commenters generally appreciated the proposal to allow institutions to request a stay of a material supervisory determination while an appeal is pending. However, one commenter suggested requiring the SARC, rather than the appropriate Division Director, to decide requests for stays. The commenter recommended that the FDIC set specific standards for evaluating stay requests, and making public the basis for denial of any stay

request (subject to the protection of confidential information). Another commenter suggested that a stay should be automatic unless the relevant Division Director can make a showing in writing that a stay would pose a threat to the safety and soundness of the bank or otherwise adversely impact the banking system.

Appeal Directly to SARC and SARC Standard of Review

One commenter suggested giving institutions the option to bypass the Division Director level review and appeal directly to the SARC. This commenter also suggested requiring the SARC to conduct a *de novo* review and prohibiting the SARC from relying on the opinions and conclusions of the Division Directors, including their findings of facts.

Sharing of Information

One commenter suggested that the FDIC prohibit *ex parte* communications (including oral communications) and require any *ex parte* communications that inadvertently occur to be memorialized in writing and made available to both the SARC and the appealing bank on a timely basis.

Additionally, the commenter suggested that the FDIC clarify that both parties will receive the information considered by the SARC on a timely basis prior to the issuance of the SARC's decision, so that both parties will have an opportunity to correct the factual record prior to a SARC decision.

Burden of Proof

A commenter stated that the burden of proof in appeals proceedings should not be on the institution, noting that this is not required by statute, and the appellate process is not governed by the Administrative Procedure Act or other formal judicial review

procedures. The commenter stated that this reinforces a structure under which an appeal cannot succeed unless the decision maker rules that the people they supervise are not merely wrong, but clearly wrong.

Inspector General Review

One commenter recommended that the FDIC instruct the FDIC's Office of the Inspector General (OIG) conduct periodic reviews of the appellate process as well as the decisions or outcomes of appeals, and publish these findings on the FDIC's website. The commenter stated that the FDIC Board should annually review and approve the OIG's findings and make them public.

IV. Final Guidelines

The FDIC is amending the Guidelines generally as proposed, with additional changes intended to address certain areas raised by the commenters. As discussed further below, the revised Guidelines would include the following changes: 1) adding the Ombudsman as a non-voting member of the SARC, 2) requiring all materials considered by the SARC to be shared with both parties to the appeal on a timely basis, subject to applicable legal limitations on disclosure, and 3) requiring the Division Director, when deciding whether to issue a stay with respect to a material supervisory determination, to provide the institution with the reason(s) for his or her decision in writing.

Ombudsman's Role

The revised Guidelines include the Ombudsman as a non-voting member of the SARC. The FDIC believes that this provides for a balance of perspectives while minimizing potential for conflict with the Ombudsman's statutory role that may result if the Ombudsman were a voting member. The FDIC's Ombudsman has a longstanding

commitment to neutrality that could be compromised if the Ombudsman were to serve as a voting member of the SARC. If the Ombudsman were a voting member, he or she might decide a matter against the institution, and this possibility could affect IDIs' willingness to utilize the Ombudsman's services. As a non-voting member, the Ombudsman will attend SARC meetings, participate in discussions, and offer views, opinions, and advice to the SARC during its deliberations based on the Ombudsman's perspective as a neutral advocate for a fair process, and as a party independent of the supervisory process. As a SARC member, the Ombudsman will have access to all materials reviewed by the SARC. Consistent with these changes, the Guidelines include conforming amendments in sections G.4 and J.[8]

In addition, the FDIC is adopting the proposed provision of the Guidelines that would require the Ombudsman to monitor the supervisory process following an IDI's submission of an appeal. This should help to alleviate concerns regarding potential retaliation. The Ombudsman will be expected to report to the Board on these matters periodically.

Consistent with the proposal, the revised Guidelines allow a SARC member to designate any member of his or her staff within the member's area of responsibility to serve on the SARC on his or her behalf. For example, if the Ombudsman is unable to serve as a SARC member with respect to a particular appeal because of information

[8] Specifically, G.4 is amended to eliminate the reference to the Ombudsman submitting views in writing to the SARC. As explained in the proposal, a separate mechanism for providing views to the SARC is not necessary because the Ombudsman will now be a SARC member. Section J of the Guidelines states that the subject matter of a material supervisory determination is not eligible for consideration by the Ombudsman, and is also being eliminated to accommodate the Ombudsman's membership on the SARC.

learned from meeting with the institution, he or she might designate a Regional Ombudsman who has not been involved in the matter to serve on the SARC instead.

The Ombudsman also oversees the sharing of information considered by the SARC in connection with the appeal, as described in further detail below.

Sharing of Information

As noted above, a commenter appreciated the proposed provision that would require information considered by the SARC to be shared with both parties to the appeal, subject to applicable legal limitations on disclosure. However, the commenter suggested that the FDIC clarify the timing of when parties will receive this information. The FDIC agrees that such clarification would be useful. The revised Guidelines state that information considered by the SARC (subject to applicable legal limitations on disclosure) will be shared on a timely basis. This information will be provided in time for the appealing institution to prepare for a meeting with the SARC, if oral presentation is requested. The Ombudsman will oversee this aspect of the process, verifying that both parties have received all materials considered by the SARC.

Stay of Material Supervisory Determinations

As discussed above, commenters raised concerns relating to the proposed provision of the Guidelines that would allow institutions to request a stay of a supervisory determination while an appeal is pending, requesting that the SARC decide requests for stays. The revised Guidelines provide that requests for a stay should be directed to and decided by the Division Director. In order to preserve the SARC's independent judgment based on the complete record of the appeal as provided by the appealing bank and the responsible supervisory staff, decision-making authority regarding a request for a stay

will remain with the appropriate Division Director. The FDIC also appreciates the recommendation that any decision with respect to a stay include the reason(s) for the decision in writing, and is including this in the revised Guidelines. This is consistent with current practice. In terms of standards for evaluating a request for a stay, the FDIC expects that the decision may be based on a number of factors, including the likelihood of irreparable and/or material harm. The resolution of procedural requests, including a request for a stay, will typically be set forth in the SARC's decision with respect to an appeal, which will be published as provided by the Guidelines.

The FDIC further notes that if an institution is concerned about the impact of a supervisory determination, section G of the Guidelines also provides for expedited review by the SARC under appropriate circumstances. In some circumstances, this course of action may be more appropriate than requesting a stay of a supervisory decision or action.

V. Responses to Other Comments

SARC Membership

A commenter suggested that the Guidelines specify the criteria for minimum qualifications to serve as a voting member of the SARC when an individual is designated by an FDIC Director, stating that this would promote greater credibility and trust in the process. SARC members that have been designated by Directors are special assistants or deputies to that Director and have a broad view of FDIC policy due to their positions. They are agency officials independent from the staff that carry out day-to-day supervisory responsibilities, but have substantial exposure to the supervisory process, providing a strong foundation for reviewing material supervisory determinations.

Appeal Directly to SARC

A commenter suggested giving institutions the option to bypass the Division Director level review and appeal directly to the SARC. The FDIC has previously noted, however, that its experience in administering the appellate process suggests that Division-level review resolves issues, narrowing the matters in dispute prior to SARC review or eliminating the need for an appeal to the SARC.[9] Division-level review also ensures that arguments are more fully developed for the SARC's review, and allows the Division Director to correct errors and maintain consistency across the organization. The Division Director also has the authority to refer an appeal directly to the SARC under the current Guidelines.

Structure of Appeals Process

As noted above, the commenters did not support the approach reflected in the proposed Guidelines, with two commenters recommending that the either FDIC reinstate the Office of Supervisory Appeals or develop and maintain a list of qualified candidates outside the FDIC to serve on the SARC. The Riegle Act requires appeals to be decided by agency officials, as it defines "independent appellate process" as "review by an agency official who does not directly or indirectly report to the agency official who made the material supervisory determination under review."[10] Review of material supervisory determinations by a Board-level committee such as the SARC also promotes accountability in the supervisory appeals process. Ultimate responsibility for the FDIC's supervision function is vested in the agency's Board of Directors by statute, and the

[9] *See* 82 FR 34522, 34525 (July 25, 2017).
[10] 12 U.S.C. 4806(f)(2).

SARC structure ensures that the Board remains accountable for the agency's supervisory determinations. Hiring individuals from outside the agency to make final supervisory decisions was a significant departure from the FDIC's established approach for more than 25 years of reliance on a Board-level committee and could undermine accountability for supervisory determinations. Moreover, this approach differed significantly from how the other agencies subject to the Riegle Act carry out their responsibilities under the Act. While there is some diversity of approach, the Federal Reserve Board of Governors, the Office of the Comptroller of the Currency, and the National Credit Union Administration utilize full-time, internal staff or Board members in their appeals processes.

While reinstatement of the SARC was not the subject of the proposal, one commenter asserted that the rescission of the Office of Supervisory Appeals without notice and comment was inconsistent with the Administrative Procedure Act (APA) and that the proposed Guidelines do not meaningfully address concerns about the appeals process. Taking action to restore the SARC structure quickly avoided a situation in which an appeal might be filed while the Guidelines and the appropriate appeals structure were under review. The FDIC also notes that while notice and comment was not required, the FDIC requested comment, and subsequently further solicited comment on additional changes.

SARC Standard of Review

A commenter suggested requiring the SARC to conduct a *de novo* review and prohibiting the SARC from relying on the opinions and conclusions of the Division Directors, including their findings of facts. The SARC reviews an appeal for consistency with the policies, practices, and mission of the FDIC and the overall reasonableness of,

and the support offered for, the positions advanced. The FDIC believes this standard of review is appropriate at the final level of review, and is retaining it in the revised Guidelines. The FDIC also notes that use of a *de novo* standard at the final level of review would be inconsistent with the appeals processes used at other banking agencies, such as the Board of Governors of the Federal Reserve System. However, the Division Director considers whether material supervisory determinations are consistent with applicable laws, regulations, and policy, and makes his or her own supervisory determination without deferring to the judgments of either party. The FDIC has previously noted that this approach may reasonably be characterized or described as a *de novo* standard of review, while in fact providing more specificity on the actual considerations to be applied.

Burden of Proof

Section G.3 of the current Guidelines provides that the burden of proof as to all matters at issue in the appeal rests with the institution. A commenter raised concern with this provision, stating that an appeal cannot succeed unless the decision maker finds that a determination is not merely wrong, but clearly wrong. This conflates the burden of proof with the standard of review. The burden of proof only provides that the institution must come forward with evidence or arguments in order to make its case. The standard of review provides the level of proof demanded to satisfy that burden. The Guidelines do not require the institution to demonstrate that the determination is clearly wrong. Rather, the SARC reviews whether a material supervisory determination is consistent with the established policies, practices, and mission of the FDIC, as well as the overall reasonableness of, and the support offered for, the positions advanced.

Inspector General Review

As noted above, a commenter recommended that the FDIC instruct the FDIC's Office of the Inspector General to conduct periodic reviews of the appellate process, and recommended that the FDIC's Board annually review and approve the OIG's findings and make them public. The FDIC appreciates this suggestion, but notes that the OIG is an independent office that conducts audits, evaluations, investigations, and other reviews of FDIC programs and operations. The FDIC generally does not instruct the OIG to initiate particular reviews. With respect to review of OIG findings, the FDIC's Audit Committee reviews all reports from the OIG relating to FDIC's operations. However, the FDIC is not in a position to approve the findings of the OIG, which is an independent office.

For the reasons set out in the preamble, the Federal Deposit Insurance Corporation adopts Guidelines for Appeals of Material Supervisory Determinations as set forth below.

Guidelines for Appeals of Material Supervisory Determinations

A. Introduction

Section 309(a) of the Riegle Community Development and Regulatory Improvement Act of 1994 (Public Law No. 103-325, 108 Stat. 2160) (Riegle Act) required the Federal Deposit Insurance Corporation (FDIC) to establish an independent intra-agency appellate process to review material supervisory determinations made at insured depository institutions that it supervises. The Guidelines for Appeals of Material

Supervisory Determinations (Guidelines) describe the types of determinations that are eligible for review and the process by which appeals will be considered and decided. The procedures set forth in these Guidelines establish an appeals process for the review of material supervisory determinations by the Supervision Appeals Review Committee (SARC).

B. SARC Membership

The following individuals comprise the three (3) voting members of the SARC: (1) One inside FDIC Board member, either the Chairperson, the Vice Chairperson, or the FDIC Director (Appointive), as designated by the FDIC Chairperson (this person would serve as the Chairperson of the SARC); and (2) one deputy or special assistant to each of the inside FDIC Board members who are not designated as the SARC Chairperson. The General Counsel and the Ombudsman are non-voting members of the SARC. The FDIC Chairperson may designate alternate member(s) to the SARC if there are vacancies so long as the alternate member was not involved in making or affirming the material supervisory determination under review. A member of the SARC may designate and authorize a member of his or her staff within the member's area of responsibility related to cases before the SARC to act on his or her behalf.

C. Institutions Eligible to Appeal

The Guidelines apply to the insured depository institutions that the FDIC supervises (i.e., insured State nonmember banks, insured branches of foreign banks, and state savings associations), and to other insured depository institutions for which the FDIC makes material supervisory determinations.

D. Determinations Subject to Appeal

An institution may appeal any material supervisory determination pursuant to the procedures set forth in these Guidelines.

(1) Material supervisory determinations include:

(a) CAMELS ratings under the Uniform Financial Institutions Rating System;

(b) IT ratings under the Uniform Rating System for Information Technology;

(c) Trust ratings under the Uniform Interagency Trust Rating System;

(d) CRA ratings under the Revised Uniform Interagency Community Reinvestment Act Assessment Rating System;

(e) Consumer compliance ratings under the Uniform Interagency Consumer Compliance Rating System;

(f) Registered transfer agent examination ratings;

(g) Government securities dealer examination ratings;

(h) Municipal securities dealer examination ratings;

(i) Determinations relating to the appropriateness of loan loss reserve provisions;

(j) Classifications of loans and other assets in dispute the amount of which, individually or in the aggregate, exceeds 10 percent of an institution's total capital;

(k) Determinations relating to violations of a statute or regulation that may affect the capital, earnings, or operating flexibility of an

institution, or otherwise affect the nature and level of supervisory oversight accorded an institution;

(l) Truth in Lending Act (Regulation Z) restitution;

(m) Filings made pursuant to 12 CFR 303.11(f), for which a request for reconsideration has been granted, other than denials of a change in bank control, change in senior executive officer or board of directors, or denial of an application pursuant to section 19 of the Federal Deposit Insurance Act (FDI Act), 12 U.S.C. 1829 (which are contained in 12 CFR 308, subparts D, L, and M, respectively), if the filing was originally denied by the Director, Deputy Director, or Associate Director of the Division of Depositor and Consumer Protection (DCP) or the Division of Risk Management Supervision (RMS);

(n) Decisions to initiate informal enforcement actions (such as memoranda of understanding);

(o) Determinations regarding the institution's level of compliance with a formal enforcement action; however, if the FDIC determines that the lack of compliance with an existing formal enforcement action requires an additional formal enforcement action, the proposed new enforcement action is not appealable;

(p) Matters requiring board attention; and

(q) Any other supervisory determination (unless otherwise not eligible for appeal) that may affect the capital, earnings, operating

flexibility, or capital category for prompt corrective action purposes of an institution, or that otherwise affects the nature and level of supervisory oversight accorded an institution.

(2) Material supervisory determinations do not include:

(a) Decisions to appoint a conservator or receiver for an insured depository institution, and other decisions made in furtherance of the resolution or receivership process, including but not limited to determinations pursuant to parts 370, 371, and 381, and section 360.10 of the FDIC's rules and regulations;

(b) Decisions to take prompt corrective action pursuant to section 38 of the FDI Act, 12 U.S.C. 1831*o*;

(c) Determinations for which other appeals procedures exist (such as determinations of deposit insurance assessment risk classifications and payment calculations); and

(d) Formal enforcement-related actions and decisions, including determinations and the underlying facts and circumstances that form the basis of a recommended or pending formal enforcement action.

(3) 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) (Order of Investigation), issues a notice of charges or a notice of assessment under 12 U.S.C. 1818 or other applicable laws (Notice of Charges), provides the institution with a draft consent order, or otherwise provides written notice to the institution that the FDIC is

reviewing the facts and circumstances presented to determine if a formal enforcement action is merited under applicable statutes or published enforcement-related policies of the FDIC, including written notice of a referral to the Attorney General pursuant to the Equal Credit Opportunity Act (ECOA) or a notice to the Secretary of Housing and Urban Development (HUD) for violations of ECOA or the Fair Housing Act (FHA). Such notice may be provided in the transmittal letter accompanying a Report of Examination. For the purposes of these Guidelines, remarks in a Report of Examination do not constitute written notice that the FDIC is reviewing the facts and circumstances presented to determine if a proposed enforcement action is merited. Commencement of a formal enforcement-related action or decision will not suspend or otherwise affect a pending request for review or appeal that was submitted before the commencement of the formal enforcement-related action or decision.

(4) Additional Appeal Rights:

(a) In the case of any written notice from the FDIC to the institution that the FDIC is determining whether a formal enforcement action is merited, the FDIC must issue an Order of Investigation, issue a Notice of Charges, or provide the institution with a draft consent order within 120 days of such a notice, or the most recent submission of information from the institution, whichever is later, or appeal rights will be made available pursuant to these Guidelines. If the FDIC timely provides the institution with a draft consent order and the institution rejects the draft consent order in writing, the FDIC must issue an Order of Investigation or a Notice

of Charges within 90 days from the date on which the institution rejects the draft consent order in writing or appeal rights will be made available pursuant to these Guidelines. The FDIC may extend these periods, with the approval of the SARC Chairperson, after the FDIC notifies the institution that the relevant Division Director is seeking formal authority to take an enforcement action.

(b) In the case of a referral to the Attorney General for violations of the ECOA, beginning on the date the referral is returned to the FDIC, the FDIC must proceed in accordance within paragraph (a), including within the specified timeframes, or appeal rights will be made available pursuant to these Guidelines.

(c) In the case of providing notice to HUD for violations of the ECOA or the FHA, beginning on the date the notice is provided, the FDIC must proceed in accordance within paragraph (a), including within the specified timeframes, or appeal rights will be made available pursuant to these Guidelines.

(d) Written notification will be provided to the institution within 10 days of a determination that appeal rights have been made available under this section.

(e) The relevant FDIC Division and the institution may mutually agree to extend the timeframes in paragraphs (a), (b), and (c) if the parties deem it appropriate.

E. Good-Faith Resolution

An institution should make a good-faith effort to resolve any dispute concerning a material supervisory determination with the on-site examiner and/or the appropriate Regional Office. The on-site examiner and the Regional Office will promptly respond to any concerns raised by an institution regarding a material supervisory determination. Informal resolution of disputes with the on-site examiner and the appropriate Regional Office is encouraged, but seeking such a resolution is not a condition to filing a request for review with the appropriate Division, either DCP, RMS, or the Division of Complex Institution Supervision and Resolution (CISR), or to filing a subsequent appeal with the SARC under these Guidelines.

F. Filing a Request for Review with the Appropriate Division

(1) An institution may file a request for review of a material supervisory determination with the Division that made the determination, either the Director, DCP, the Director, RMS, or the Director, CISR (Director or Division Director), 550 17th Street, NW, Room F-4076, Washington, DC 20429, within 60 calendar days following the institution's receipt of a report of examination containing a material supervisory determination or other written communication of a material supervisory determination. Requests for review also may be submitted electronically. To ensure confidentiality, requests should be submitted through *securemail.fdic.gov*, directing the message to *DirectorReviewRequest@fdic.gov*. A request for review must be in writing and must include:

(a) A detailed description of the issues in dispute, the surrounding

circumstances, the institution's position regarding the dispute and any arguments to support that position (including citation of any relevant statute, regulation, policy statement, or other authority), how resolution of the dispute would materially affect the institution, and whether a good-faith effort was made to resolve the dispute with the on-site examiner and the Regional Office; and

(b) A statement that the institution's board of directors or senior management has considered the merits of the request and has authorized that it be filed. Senior management is defined as the core group of individuals directly accountable to the board of directors for the sound and prudent day-to-day management of the institution. If an institution's senior management files an appeal, it must inform the board of directors of the substance of the appeal before filing and keep the board of directors informed of the appeal's status.

(2) Within 45 calendar days after receiving a request for review described in paragraph (1), the Division Director will:

(a) review the appeal, considering whether the material supervisory determination is consistent with applicable laws, regulations, and policy, make his or her own supervisory determination without deferring to the judgments of either party, and issue a written determination on the request for review, setting forth the grounds for that determination; or

(b) refer the request for review to the SARC for consideration as an appeal under Section G and provide written notice to the institution that the request for review has been referred to the SARC.

(3) No appeal to the SARC will be allowed unless an institution has first filed a timely request for review with the appropriate Division Director.

(4) In any decision issued pursuant to paragraph (2)(a) of this section, the Director will inform the institution of the 30-day time period for filing with the SARC and will provide the mailing address for any appeal the institution may wish to file.

(5) The Division Director may request guidance from the SARC Chairperson or the Legal Division as to procedural or other questions relating to any request for review.

G. Appeal to the SARC

An institution that does not agree with the written determination rendered by the Division Director may appeal that determination to the SARC within 30 calendar days after the date of receipt of that determination. Failure to file within the 30-day time limit may result in denial of the appeal by the SARC.

1. Filing with the SARC

An appeal to the SARC will be considered filed if the written appeal is received by the FDIC within 30 calendar days after the date of receipt of the Division Director's written determination or if the written appeal is placed in the U.S. mail within that 30-day period. The appeal should be sent to the address indicated on the Division Director's determination being appealed, or sent via e-mail to *ESS_Appeals@fdic.gov*. An

acknowledgment of the appeal will be provided to the institution, and copies of the institution's appeal will be provided to the Office of the Ombudsman and the appropriate Division Director. Copies of all relevant materials related to an appeal will be provided to the Office of the Ombudsman.

2. Contents of Appeal

The appeal should be labeled to indicate that it is an appeal to the SARC and should contain the name, address, and telephone number of the institution and any representative, as well as a copy of the Division Director's determination being appealed. If oral presentation is sought, that request should be included in the appeal. If expedited review is requested, the appeal should state the reason for the request. Only matters submitted to the appropriate Division Director in a request for review may be appealed to the SARC. Evidence not presented for review to the Division Director is generally not permitted; such evidence may be submitted to the SARC only if approved by the SARC Chairperson and with a reasonable time for the Division Director to review and respond. The institution should set forth all of the reasons, legal and factual, why it disagrees with the Division Director's determination. Nothing in the SARC administrative process shall create any discovery or other such rights.

3. Burden of Proof

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.

4. Submission from the Division Director

The Division Director may submit views regarding the appeal to the SARC within

30 calendar days of the date on which the appeal is received by the SARC.

5. Oral Presentation

The SARC will, if a request is made by the institution or by FDIC staff, allow an oral presentation. The SARC may hear oral presentations in person, telephonically, electronically, or through other means agreed upon by the parties. If an oral presentation is held, the institution and FDIC staff will be allowed to present their positions on the issues raised in the appeal and to respond to any questions from the SARC.

6. Consolidation, Dismissal, and Rejection

Appeals based upon similar facts and circumstances may be consolidated for expediency. An appeal may be dismissed by the SARC if it is not timely filed, if the basis for the appeal is not discernable from the appeal, or if the institution moves to withdraw the appeal. The SARC will decline to consider an appeal if the institution's right to appeal is not yet available under Section D(4), above.

7. Scope of Review and Decision

The SARC will be an appellate body and will make independent supervisory determinations. The SARC will review the appeal for consistency with the policies, practices, and mission of the FDIC and the overall reasonableness of, and the support offered for, the positions advanced. The SARC's review will be limited to the facts and circumstances as they existed prior to, or at the time the material supervisory determination was made, even if later discovered, and no consideration will be given to any facts or circumstances that occur or corrective action taken after the determination was made. The SARC will not consider any aspect of an appeal that seeks to change or

modify existing FDIC rules or policy. The SARC, after consultation with the Legal Division, will refer any appeals that raise policy matters of first impression to the Chairperson's Office for its consideration. The SARC will notify the institution, in writing, of its decision concerning the disputed material supervisory determination(s) within 45 days after the date the SARC meets to consider the appeal, which meeting will be held within 90 days after either the date of the filing of the appeal or the date that the Division Director refers the appeal to the SARC.

8. Other Communications

Materials considered by the SARC will be shared with both parties to the appeal, subject to applicable legal limitations on disclosure, on a timely basis. The Ombudsman will verify that both parties have received all materials considered by the SARC.

H. Publication of Decisions

Decisions of the SARC will be published as soon as practicable, and the published decisions will be redacted to avoid disclosure of the name of the appealing institution and any information exempt from disclosure under the Freedom of Information Act and the FDIC's document disclosure regulations found in 12 CFR part 309. In cases in which redaction is deemed insufficient to prevent improper disclosure, published decisions may be presented in summary form. Published SARC decisions may be cited as precedent in appeals to the SARC. Annual reports on the SARC's decisions and Division Directors' decisions with respect to institutions' requests for review of material supervisory determinations also will be published.

I. Appeal Guidelines Generally

Appeals to the SARC will be governed by these Guidelines. The SARC, with the concurrence of the Legal Division, will retain discretion to waive any provision of the Guidelines for good cause. Supplemental rules governing the SARC's operations may be adopted.

Institutions may request extensions of the time period for submitting appeals under these Guidelines from either the appropriate Division Director or the SARC Chairperson, as appropriate. If a filing under these Guidelines is due on a Saturday, Sunday, or a Federal holiday, the filing may be made on the next business day.

Institutions may request a stay of a supervisory action or determination from the Division Director while an appeal of that determination is pending. The request must be in writing and include the reason(s) for the stay. The Division Director has discretion to grant a stay and will generally decide whether to grant a stay within 21 days of receiving the institution's request, providing the institution with the reason(s) for his or her decision in writing. A stay may be granted subject to conditions, including time limitations, where appropriate.

J. Coordination with State Regulatory Authorities

In the event that a material supervisory determination subject to a request for review is the joint product of the FDIC and a State regulatory authority, the Director, DCP, the Director, RMS, or the Director, CISR, as appropriate, will promptly notify the appropriate State regulatory authority of the request, provide the regulatory authority with a copy of the institution's request for review and any other related materials, and solicit

the regulatory authority's views regarding the merits of the request before making a determination. In the event that an appeal is subsequently filed with the SARC, the SARC will notify the institution and the State regulatory authority of its decision. Once the SARC has issued its determination, any other issues that may remain between the institution and the State regulatory authority will be left to those parties to resolve.

K. Effect on Supervisory or Enforcement Actions

The use of the procedures set forth in these Guidelines by any institution will not affect, delay, or impede any formal or informal supervisory or enforcement action in progress during the appeal or affect the FDIC's authority to take any supervisory or enforcement action against that institution.

L. Effect on Applications or Requests for Approval

Any application or request for approval made to the FDIC by an institution that has appealed a material supervisory determination that relates to, or could affect the approval of, the application or request will not be considered until a final decision concerning the appeal is made unless otherwise requested by the institution.

M. Prohibition on Examiner Retaliation

The FDIC has an experienced examination workforce and is proud of its professionalism and dedication. FDIC policy prohibits any retaliation, abuse, or retribution by an agency examiner or any FDIC personnel against an institution. Such behavior against an institution that appeals a material supervisory determination constitutes unprofessional conduct and will subject the examiner or other personnel to

appropriate disciplinary or remedial action. In light of this important principle, the Ombudsman will monitor the supervision process following an institution's submission of an appeal under these Guidelines. The Ombudsman will report to the Board on these matters periodically.

Institutions that believe they have been retaliated against are encouraged to contact the Regional Director for the appropriate FDIC region. Any institution that believes or has any evidence that it has been subject to retaliation may file a complaint with the Director, Office of the Ombudsman, Federal Deposit Insurance Corporation, 3501 Fairfax Drive, Suite E-2022, Arlington, Virginia, 22226, explaining the circumstances and the basis for such belief or evidence and requesting that the complaint be investigated and appropriate disciplinary or remedial action taken. The Office of the Ombudsman will work with the appropriate Division Director to resolve the allegation of retaliation.

Federal Deposit Insurance Corporation.

By order of the Board of Directors.

Dated at Washington, DC, on December 13, 2022.

James P. Sheesley,

Assistant Executive Secretary.

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