NYLIB | NEW YORK LEAGUE OF INDEPENDENT BANKERS

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October 20, 2020

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

Dear Mr. Feldman:

The New York League of Independent Bankers ("NYLIB") appreciates the opportunity to comment on the Federal Deposit Insurance Corporation's ("FDIC's") proposed amendments to its Guidelines for Appeals of Material Supervisory Determinations ("Guidelines"). NYLIB commends the FDIC for undertaking a review of the appeals process to determine what is working and what can be improved, for hosting in-person listening sessions with industry, and for proposing enhancements to the appeals process. A robust, independent, and fair appeals process ensures the accuracy of material supervisory determinations and, by doing so, improves the supervisory relationship between the FDIC and supervised financial institutions.

NYLIB submits the following comments on the eight questions posed by the FDIC.

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?

No. Review of the Office's decisions by the FDIC Chairperson and/or other Board members before issuance could be perceived as compromising the independence of the Office.

If it is felt that review of the Office's decisions by the FDIC Chairperson or FDIC Board could be beneficial (*e.g.*, to ensure consistency across decisions by panels from the Office), such review should occur after the Office's issuance of decisions. The Board could allow institutions that disagree with a decision of the Office to appeal the Office's decision to the FDIC Chairperson and/or the FDIC Board.

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?

Members of the Office should have bank supervisory or examination experience, but the Guidelines should be more specific in terms of the qualifications and experience required. Members of the Office should have bank supervisory or examination experience as retired senior field examiners from the FDIC, the Office of the Comptroller of the Currency ("OCC"), or the Board of Governors of the Federal Reserve System ("FRB"); as retired senior FDIC, OCC, or FRB officials; and/or as current or former bank executives or private practice bank regulatory attorneys.

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

Yes. NYLIB believes that it is critical that the federal banking agencies, including the FDIC, strengthen their intra-agency appeals processes. While some financial institutions have had success in challenging erroneous or unwarranted material supervisory determinations through the agencies' appeals processes, many financial institutions do not submit appeals because they believe the appeals process is not robust and that filing an appeal may subject them to retaliation from examiners. *See* Julie Anderson Hill, *When Bank Examiners Get It Wrong: Financial Institution Appeals of Material Supervisory Determinations*, 92 Wash. Univ. L. Rev. 1101, 1167 (2015) ("[S]urvey data suggest that the [intra-agency] appeals processes are not functioning properly. Some financial institutions believe that appealing is futile. Others fear retaliation.").

In order to promote industry confidence in the independence of the appeals process, at least one member of every panel should be a current or former bank executive or private practice bank regulatory attorney. In addition, members of the Office should not have been employed by the FDIC for at least two years prior to joining the Office. Measures should be taken to ensure that members of the Office are not retaliated against (*e.g.*, in terms of being terminated, not selected for future panels, and/or not re-hired) for issuing decisions in favor of supervised financial institutions. Time-limited, non-renewable terms and clear procedures for assigning reviewing officials to panels could assist with this.

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?

Three should be an appropriate number of reviewing officials in most circumstances.

On a three-person panel, NYLIB believes that it would make sense to have persons with a mix of experience, such as one retired senior field examiner from the FDIC, OCC, or FRB; one retired senior FDIC, OCC, or FRB official; and one current or former bank executive or private practice bank regulatory attorney. NYLIB strongly believes that there should be at least one current or former bank executive or private practice bank regulatory attorney on each panel to promote confidence in the independence of the appeals process.[1]

If the number of reviewing officials is increased to five for some or all panels, at least two members of the panel should be current or former bank executives or private practice bank regulatory attorneys.

[1] It may be sensible to provide that a banker serving on a panel should not be affiliated with a bank located in the same standard metropolitan statistical area ("SMSA") or region as the appealing bank and should not have recently been employed by the appealing bank.

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

If review by the Office at the second level of appeal is fair and robust, two levels of review should be sufficient.

As noted above, if it is believed that decisions of the Office should be subject to review (*e.g.*, by the FDIC Chairperson, Board, or Ombudsman), the FDIC should allow institutions that disagree with a decision of the Office to appeal the Office's decision to a third, final appellate authority.

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?

NYLIB believes that several improvements to the proposed timelines should be incorporated in the final Guidelines.

The Guidelines should provide that extensions of the 60-calendar-day initial appeal deadline and the 30-calendar day second-level appeal deadline may be granted for good cause. The FRB allows such extensions. *See* 85 Fed. Reg. 15,175, 15,180-81 (Mar. 17, 2020).

When a deadline falls on a weekend or federal holiday, the deadline for the appeal should move to the next business day. The FRB provides that deadlines move to the next business day in such circumstances. *See* 85 Fed. Reg. at 15,179.

The Division Director's written decision should identify the information (*e.g.*, examiner work papers) that he or she relied upon in reaching the decision, and the Division Director should be required to promptly provide that information ("reliance materials") to the appealing institution upon request. This change would make the FDIC's appeals procedures consistent with those of the FRB. *See* 85 Fed. Reg. at 15,180 ("The notice of decision shall identify the information upon which the panel relied in reaching its conclusion, and the panel shall promptly provide that information to the institution upon the institution's request to the extent permitted by law."). In order to review and respond to information contained in the reliance materials, an appealing institution should have 30 calendar days after the receipt of such reliance materials to submit an appeal to the Office.

An appealing institution should have the right to review and respond to any written comments, briefs, or materials submitted by the Division Director or the Ombudsman to the Office in connection with the appeal. An appealing institution cannot be expected to respond effectively to secret arguments or evidence.

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 continue to publish SARC/Office decisions on its website in full with appropriate redactions, such as for the name of the institution, to preserve confidentiality.

The FDIC should also publish data on the number of first-level appeals that are filed, redacted versions of successful first-level appeals decisions, and information on whether and how appeals have been resolved outside of the formal appeals process. Currently, there is no way for the industry to assess whether first-level appeals are successful or whether appeals are resolved in an institution's favor outside of the formal appeals process (*e.g.*, because the FDIC withdraws or revises a report of examination). This may lead to an inaccurate impression that the deck is stacked against financial institutions and that it would be futile to file an intra-agency appeal due to the low number of successful published SARC decisions. Information about successful first-level appeals and the number of appeals that are resolved without a formal written decision would encourage the use of the appeals process.

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?

The proposal states at page 26: "The FDIC may extend these periods, with the approval of the Chairperson's Office, after the FDIC notifies the institution that the relevant Division Director is seeking formal authority to take an enforcement action." "These periods" presumably refers to the 120-day period after which appeal rights become available if the FDIC has not provided an institution with a draft consent order or issued an Order of Investigation or a Notice of Charges, as well as the 90-day period, after the FDIC's issuance and the institution's written rejection of a draft consent order, after which appeal rights become available if the FDIC does not issue an Order of Investigation or a Notice of Charges.

The FDIC should not be permitted to extend the 120-day period[2] that prevents an institution from appealing an erroneous or unwarranted material supervisory determination without the institution's consent. The current proposal would allow the FDIC to indefinitely prevent an institution from being able to appeal a material supervisory determination, without the FDIC ever actually issuing a draft consent order, Order of Investigation, or Notice of Charges, because the relevant Division Director is purportedly "seeking formal authority to take an enforcement action." If the FDIC does not issue a draft consent order, Order of Investigation, or Notice of Charges within 120 calendar days, an institution should be able to challenge an erroneous or unwarranted material supervisory determination through the appeals process without delay.

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[2] It should be specified that all time periods are measured in calendar days. The proposal speaks of "within 120 days" and "within 90 days" without specifying whether those time periods are measured in calendar days.

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Similarly, after the institution has rejected a draft consent order in writing, the FDIC should not be permitted to extend the proposed 90-day period that would prevent an institution from filing an appeal without the institution's consent. The current proposal would allow the FDIC to indefinitely prevent an institution that has rejected a draft consent order from being able to appeal a material supervisory determination because the relevant Division Director is purportedly "seeking formal authority to take an enforcement action." If the FDIC does not issue an Order of Investigation or a Notice of Charges within 90 calendar days, an institution should be able to challenge an erroneous or unwarranted material supervisory determination through the appeals process without delay.

Given that an institution's time to appeal is measured in calendar days, the FDIC should inform an institution in writing of the date that appellate rights become available.

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NYLIB offers the following additional suggestion.

The Guidelines appropriately note that a financial institution should make a good-faith effort to resolve a dispute concerning a material supervisory determination with the on-site examiner and/or the appropriate Regional Office. NYLIB believes that the Guidelines should also note that the on-site examiner and the appropriate Regional Office should make a good-faith effort to resolve any disputes concerning material supervisory determinations with the financial institution.

One action that would help greatly in terms of improving the accuracy of examination reports – and that would reduce the need for appeals of erroneous or unwarranted material supervisory determinations – would be to require that Regional Offices provide financial institutions with copies of draft reports of examination and allow them to comment on the draft reports prior to finalization. This would facilitate the correction of factual inaccuracies that would otherwise make their way into a final examination report and allow for financial institutions to bring additional relevant information to the attention of the on-site examiners and Regional Offices in appropriate circumstances. It would have the added benefit of allowing financial institutions to begin to remediate issues identified by examiners more quickly based upon their receipt of draft reports.

In closing, NYLIB appreciates the FDIC's efforts to enhance the Guidelines as well as the opportunity to comment on the FDIC's proposed amendments the Guidelines. Please do not hesitate to contact me at elutz@nylib.org if NYLIB can be of further assistance.

Respectfully yours,

/s/*Edward T. Lutz*

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