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The Federal Deposit Insurance Corporation Significantly Revises Intra-Agency Appeals Guidelines by Instituting an Independent, Standalone Office of Supervisory Appeals

*By Dustin N. Nofziger, Pinchus D. Raice and David Abramowicz**

In this article, the authors explain that revised guidelines adopted recently by the Federal Deposit Insurance Corporation may lead to more successful intra-agency appeals by insured depository institutions.

The Federal Deposit Insurance Corporation (FDIC) has adopted revised “Guidelines for Appeals of Material Supervisory Determinations” (2026 Guidelines).¹ The 2026 Guidelines represent a substantial evolution in the FDIC’s appeals process that benefits insured depository institutions.

Additional categories of determinations are now explicitly appealable, including in some cases the facts and circumstances underlying pending or proposed enforcement actions. Transparency is enhanced with respect to supervisory staff’s submissions to the highest appellate authority. Decisions on stays of the supervisory determinations being appealed must now weigh the potential harm of the determinations to the appealing institution during the pendency of the appeal. The FDIC also has clarified, in the preamble to the 2026 Guidelines, that institutions considering appeals may disclose confidential supervisory information to their outside counsel without requesting authorization from the FDIC – a sea change in the FDIC’s interpretation of Part 309 of its regulations.

Most important, appeals will now be heard, at the second and final level of appeal, by reviewing officials from an independent, standalone Office of Supervisory Appeals (Office) who are not otherwise employed by the FDIC – in contrast to the prior system, in which final appeals were decided by high-ranking FDIC officials. Moreover, each three-person reviewing panel from the Office will include at least one individual with “industry experience,” such as a former banker, bringing a diversity of perspectives to decision-making. The reviewing panels also are – for the first time – charged with applying a standard of review that does not defer to the judgments of examiners.

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¹ Guidelines for Appeals of Material Supervisory Determinations, 91 Fed. Reg. 3,184, 3,184 (Jan. 26, 2026).

These developments signal a broader trend among federal banking regulators toward creating appeals processes that are fairer and whose decisionmakers are more independent – and thus, toward creating appeals processes in which financial institutions are more likely to be successful. In fact, as the Office of the Comptroller of the Currency (OCC) has moved in tandem with the FDIC by proposing similar changes to its appeals process, it has predicted that 50% of appeals will be successful under its proposed process.

Time will tell if 50% of appeals will be successful under the FDIC’s 2026 Guidelines. In the meantime, the fairer and more independent process may fundamentally change the calculus for insured depository institutions considering whether to challenge adverse FDIC supervisory determinations.

A BRIEF HISTORY OF THE FDIC’S APPEALS PROCESS

Section 309(a) of the Riegle Community Development and Regulatory Improvement Act of 1994 (Riegle Act) required the FDIC and the other federal banking agencies to each establish an “independent intra-agency appellate process” to review material supervisory determinations.² “Independent appeals process” was defined as “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

The FDIC first adopted appeals Guidelines to implement Section 309(a) in 1995. From 1995 to 2021, the Guidelines provided that the final level of review would be by the Supervision Appeals Review Committee (SARC), which, as it came to be comprised, was composed of one inside FDIC Board member (either the FDIC Chairperson, Vice Chairperson, or Director), who served as the SARC Chairperson, and two Deputy or Special Assistants to the two inside FDIC Board members who did not serve on the particular SARC panel.

Under the leadership of an FDIC Board nominated in the first Trump administration, the Guidelines changed dramatically in January 2021 (2021 Guidelines). No longer would the final appellate authority be comprised of a panel of high-level FDIC officials. Instead, the SARC would be replaced by an independent, standalone Office of Supervisory Appeals, and the reviewing panels at the second and final level of appeal would be comprised of reviewing officials from the Office who were not otherwise employed by the FDIC.

² 12 U.S.C. § 4806(a).

³ 12 U.S.C. § 4806(f)(2).

As written in *The Banking Law Journal* at the time, “the establishment of a new, independent Office comprised of individuals not otherwise employed by the FDIC appear[ed] to be a win for banks.”⁴

The 2021 Guidelines also included numerous other changes, including some that were clear wins for banks. There was specification that the FDIC Division Director who heard first-level appeals should not defer to the judgments of examiners; a new right for appealing institutions to receive any communications between FDIC supervisory staff and the final appellate authority (the new Office) “subject to limitations on disclosure”; clarifications that banks could request extensions of deadlines and that appeals deadlines did not fall on weekends or holidays; and a provision for the annual publication of new statistical data, including data regarding outcomes at the first (Division Director) level of appeal that had not been previously reported.⁵

In May 2022, however, an FDIC Board dominated by Biden nominees abruptly promulgated new Guidelines (May 2022 Guidelines) without first noticing the public of any proposed changes or soliciting any comments.⁶ While many of the bank-friendly changes from 2021 were retained, the new Office was disbanded before it had heard a single appeal, and the SARC (comprised again of the same high-level agency officials) was restored as the highest appellate authority. In addition, the new right that had been adopted in 2021 for appealing institutions to receive communications between FDIC supervisory staff and the final appellate authority (now again the SARC) was eliminated.

Fortunately, the right to receive communications between FDIC supervisory staff and the final appellate authority was restored in revised Guidelines promulgated in December 2022 (December 2022 Guidelines). The FDIC acknowledged in the preamble to the December 2022 Guidelines that “basic notions of fairness support a requirement that both parties to the appeal are aware of the information considered by the decisionmaker.”⁷ This acknowledgment was appropriate because an appealing institution cannot be expected to respond effectively to secret arguments or evidence. Yet the FDIC Board,

⁴ Jeffrey Alberts, Pinchus Raice, and Dustin Nofziger, FDIC Significantly Revises Intra-Agency Appeals Guidelines, *The Banking Law Journal* 329, 333 (June 2021).

⁵ See Guidelines for Appeals of Material Supervisory Determinations, 86 Fed. Reg. 6,880, 6,885–88 (Jan. 25, 2021).

⁶ Guidelines for Appeals of Material Supervisory Determinations, 87 Fed. Reg. 30,942 (May 20, 2022).

⁷ Guidelines for Appeals of Material Supervisory Determinations, 87 Fed. Reg. 77,112, 77,113 (Dec. 16, 2022).

then dominated by Democratic appointees, declined to restore the independent, standalone Office comprised of reviewing officials who were not otherwise employed by the FDIC that had been briefly established in January 2021 under prior leadership.⁸

THE APPEALS PROCESS UNDER THE 2026 GUIDELINES

The new 2026 Guidelines establish a comprehensive framework for appealing material supervisory determinations that culminates in an appeal to the Office of Supervisory Appeals – a standalone, independent body – where appeals are heard by a reviewing panel of officials not otherwise employed by the FDIC, and who are charged with applying a standard of review that does not defer to the judgments of examiners.

The Office of Supervisory Appeals

The Office is staffed with reviewing officials hired for fixed terms. Reviewing officials serve on three-person panels for second-level appeals (described below) or first-level appeals that are escalated to the Office by the appropriate Division Director. At least one official on each three-person panel must have bank supervisory or examination experience. Current FDIC employees and current employees of insured depository institutions are not eligible to serve as reviewing officials. Background information on the Office's reviewing officials will be published on the FDIC's website in order to allow appealing institutions to raise any concerns about the independence of paneling members.⁹

At least one member of each three-person reviewing panel also must have "industry experience." The 2026 Guidelines define "industry experience" as "having worked at a bank or for a company that provides services to banks or banking-related services."¹⁰ The FDIC's preamble notes that it will view community bank experience favorably in considering applicants with industry experience in light of the fact that historically, "the vast majority of banks that have filed appeals have been community banks."¹¹

Institutions Eligible to Appeal

As under prior iterations, the 2026 Guidelines apply to insured depository institutions that the FDIC supervises, including insured state nonmember

⁸ 87 Fed. Reg. at 77,113.

⁹ 91 Fed. Reg. at 3,191.

¹⁰ 91 Fed. Reg. at 3,191.

¹¹ 91 Fed. Reg. at 3,186.

banks, insured branches of foreign banks, and state savings associations, as well as other insured depository institutions for which the FDIC makes material supervisory determinations.¹²

Determinations Subject to Appeal

An institution may appeal any “material supervisory determination” under the 2026 Guidelines. Material supervisory determinations continue to include CAMELS ratings; IT ratings; trust ratings; CRA ratings; consumer compliance ratings; determinations relating to loan loss reserve provisions; asset classifications exceeding 10 percent of total capital; determinations relating to violations of statutes or regulations; decisions to initiate informal enforcement actions (such as memoranda of understanding); determinations regarding an institution’s level of compliance with formal enforcement actions (such as cease-and-desist and consent orders); “matters requiring attention” (formerly “matters requiring board attention”); and “[a]ny 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.”¹³

The 2026 Guidelines, however, clarify the definition of “material supervisory determination” by enumerating additional categories of appealable determinations. The definition of “material supervisory determination” now explicitly includes determinations not only regarding compliance with formal enforcement actions, but also compliance with informal enforcement actions such as memoranda of understanding. The 2026 Guidelines also add determinations regarding an institution’s level of compliance with conditions imposed through the supervision or application process as an explicitly-enumerated category of material supervisory determination.¹⁴

Certain determinations remain ineligible for appeal, including decisions to appoint a conservator or receiver, decisions to take prompt corrective action, and determinations for which other appeals procedures exist.¹⁵

The 2026 Guidelines, however, make a significant change with respect to formal enforcement actions and decisions. Prior iterations of the Guidelines made unappealable “[f]ormal enforcement-related actions and decisions, in-

¹² 91 Fed. Reg. at 3,191.

¹³ 91 Fed. Reg. at 3,191-92.

¹⁴ 91 Fed. Reg. at 3,192.

¹⁵ 91 Fed. Reg. at 3,192.

cluding determinations and the underlying facts and circumstances that form the basis of a recommended or pending formal enforcement action.”¹⁶ “Formal enforcement-related actions and decisions” were defined broadly to include not only the issuance of a notice of charges or notice of assessment, but also the initiation of a formal investigation, provision to the institution of a draft consent order, or even provision of other written notice that the FDIC was “reviewing the facts and circumstances presented to determine if formal enforcement action [was] merited.”¹⁷ This was problematic, as in such circumstances the institution potentially was blocked from filing a meritorious appeal of a material supervisory determination (e.g., a CAMELS rating downgrade) based on the same facts and circumstances as the recommended or pending formal enforcement action.

In contrast, the 2026 Guidelines “permit the facts and circumstances that form the basis for certain formal enforcement actions to be in scope for consideration by the Office as part of an appeal of a material supervisory determination.”¹⁸ Specifically, facts and circumstances underlying a pending or proposed formal enforcement action are now unappealable only if the FDIC provides written notice that the action is based, in whole or in part, on (1) unsafe or unsound practices under Section 8 of the Federal Deposit Insurance Act, or (2) violations of laws or regulations relating to an institution’s anti-money laundering and countering the financing of terrorism (AML/CFT) program or an institution’s sanctions compliance.¹⁹ Otherwise, such facts and circumstances are now appealable, although the appeal will be considered on an expedited basis and the institution will be required to sign an agreement tolling the relevant statute of limitations on an enforcement action.²⁰

Optional Attempt for Good-Faith Resolution Prior to Filing Appeal

Before initiating a formal appeal, the 2026 Guidelines continue to encourage institutions to make a good-faith effort to resolve disputes concerning material supervisory determinations with the on-site examiner and the appropriate Regional Office. Institutions may also try to reach an agreeable outcome through the Ombudsman. Seeking informal resolution is not a precondition to filing an appeal, however.²¹

¹⁶ See, e.g., 87 Fed. Reg. at 77,117.

¹⁷ 87 Fed. Reg. at 77,117.

¹⁸ See 91 Fed. Reg. 3,188.

¹⁹ 91 Fed. Reg. 3,188; see also *id.* at 3,192 (corresponding text of Guidelines).

²⁰ 91 Fed. Reg. 3,188; see also *id.* at 3,192 (corresponding text of Guidelines).

²¹ 91 Fed. Reg. at 3,192.

First-Level Appeal to the Division Director

A first-level appeal is made by filing a request for review with the Director of the Division that made the determination – either the Director of the Division of Consumer Protection (DCP), the Director of the Division of Risk Management Supervision (RMS), or the Director of the Division of Complex Institution Supervision and Resolution (CISR). The institution must file this request within 60 calendar days after receiving a report of examination or other written communication containing the material supervisory determination.

The request for review must include a detailed description of the issues in dispute, the institution's position and supporting arguments, how resolution would materially affect the institution, whether good-faith efforts were made to resolve the dispute informally, and a statement that the institution's board of directors or senior management has authorized the filing. (Since – as discussed below – new evidence generally is not permitted at the second and final level of appeal, an appealing institution should append all supporting documentation to the request for review.)

Within 45 calendar days, the Division Director will review the appeal; consider whether the determination appealed 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 that sets forth the grounds for the decision. Alternatively, the Division Director may refer the request for review directly to the Office.²²

Second-Level Appeal to the Office of Supervisory Appeals

An institution that does not agree with the Division Director's determination may appeal to the Office within 30 calendar days after receipt of that determination. The appeal must be labeled to indicate it is an appeal to the Office and should include the contact information for the institution and its representative, a copy of the Division Director's determination being appealed, and all reasons – legal and factual – why the institution disagrees with the determination.

If the appealing institution seeks to make an oral presentation, that request should be included in the appeal. The Office will allow oral presentation if requested. At an oral presentation, the institution and FDIC staff both will be allowed to present their positions on the issues and may be questioned by the reviewing panel.

²² 91 Fed. Reg. at 3,193.

Only matters previously submitted to the Division Director are appealable to the Office. New evidence generally is not permitted unless approved by the reviewing panel, making it critical that the first-level appeal is comprehensive and well-supported.

As to all matters at issue, the institution bears the burden of proof. The panel reviews the appeal for consistency with the policies of the FDIC – including regulations, guidance, policy statements, examination manuals, and other written publications – and the overall reasonableness of, and the support offered for, the positions advanced. The panel’s review is limited to the facts and circumstances that existed at the time the material supervisory determination being appealed was made.

The 2026 Guidelines include the requirement that materials submitted to the Office by supervisory staff and that substantive communications between the Office and supervisory staff will be shared with the appealing institution “subject to applicable legal limitations on disclosure.” They add that such disclosure will be timely.

During the notice-and-comment process, commenters pointed out that an appealing institution would be unable to challenge the FDIC’s improper withholding of materials on the basis of “applicable legal limitations on disclosure” without being informed that such materials had been withheld and without being provided with a privilege log. The 2026 Guidelines provide that “the Office will provide the reasons for any redactions to the appealing institution.”²³

The 2026 Guidelines also add a specification that the reviewing panel will make its own supervisory determination without deferring to the judgments of either party. The prior Guidelines specified only that the Division Director would make his or her determination without deferring to the judgments of either party at the first level of appeal.

The reviewing panel will meet to consider the appeal within 90 days after the filing of the appeal or the date the Division Director refers the appeal to the Office. The panel will notify the institution of its written decision within 45 days after the meeting.²⁴

Supervisory Stays

The 2026 Guidelines retain a provision, added in December 2022, providing that an institution can request a stay of a supervisory action or determination

²³ 91 Fed. Reg. at 3,192.

²⁴ 91 Fed. Reg. at 3,193.

from the Division Director while an appeal is pending. The request must be in writing and must explain why a stay is appropriate. The Division Director will issue a decision in writing, generally within 21 days. The 2026 Guidelines add that the Division Director’s decision “should include a weighing of potential harms.”²⁵

THE MOST SIGNIFICANT CHANGES IN THE 2026 GUIDELINES

The 2026 Guidelines represent a substantial evolution in the FDIC’s approach to supervisory appeals – an evolution that favors appealing institutions. Described below are the most significant changes and why they matter for depository institutions.

Replacement of the SARC with an Independent Office of Supervisory Appeals

The most fundamental change is the replacement of the SARC with an independent, standalone Office of Supervisory Appeals that reports directly to the FDIC Chairperson’s Office. Under the prior Guidelines, the SARC was composed of FDIC Board members and senior FDIC officials, raising concerns about the true independence of the review. The new Office operates independently of the FDIC Divisions that make supervisory determinations and has delegated authority from the FDIC Board to consider and resolve appeals.

This structural change addresses the perception – and perhaps the reality – that appeals to the SARC were reviewed by individuals too closely connected to the supervisory functions being challenged. By establishing a standalone office with delegated authority, the FDIC has taken a meaningful step towards better satisfying the Riegle Act’s requirement for an independent intra-agency appeals process.

Requirement for Industry Experience on Reviewing Panels

Under the 2026 Guidelines, each three-member reviewing panel must include at least one reviewing official with bank supervisory or examination experience and at least one reviewing official with “industry experience” as a banker or service provider.

This new requirement facilitates a diversity of perspectives on reviewing panels, which will promote fairness and instill confidence in the Office’s independence. The inclusion of industry professionals, such as former bankers, consultants, or regulatory attorneys in private practice, is significant because it brings perspectives from outside the supervisory community into the decision-making process. The FDIC’s statement that it will look favorably on applicants

²⁵ 91 Fed. Reg. at 3,194.

with community banking experience also is positive given the unique issues faced by community banks, which face challenges due to regulatory overburden and limited resources. An industry professional may have firsthand experience with how supervisory determinations affect bank operations and may be more attuned to the practical challenges banks face in responding to regulatory requirements. Including an industry viewpoint on the reviewing panels may lead to more balanced decision-making and more favorable outcomes for appealing institutions.

Expanded Appeal Rights

The 2026 Guidelines significantly expand institutions' ability to appeal supervisory determinations in several respects.

First, they enumerate two additional categories of material supervisory determinations that may be appealed: determinations regarding compliance with informal enforcement actions, and determinations regarding an institution's level of compliance with conditions imposed through the supervision or application process. While some practitioners have taken a broad view of the determinations that may be appealed – particularly in light of the Guidelines' longstanding provision that “[a]ny other supervisory determination” may be appealed – the explicit enumeration of additional categories of appealable determinations is helpful. After the publication of the 2026 Guidelines, depository institutions are more likely to be aware that determinations regarding compliance with informal enforcement actions and regarding an institution's level of compliance with conditions imposed through the supervision or application process may be appealed.

Second, the 2026 Guidelines enact a material change related to certain pending and proposed formal enforcement actions. Under the prior Guidelines, the facts and circumstances underlying “formal enforcement-related actions” were broadly excluded from appeal. If the FDIC provided an institution with a draft consent order or merely indicated in writing that it was considering whether a formal enforcement action was merited, for example, an appeal potentially was blocked.²⁶

The 2026 Guidelines permit the facts and circumstances underlying a proposed formal enforcement action to be in scope for an appeal if the FDIC

²⁶ Under the 2026 Guidelines, if the FDIC notices that a pending enforcement action is based on unsafe or unsound practices, AML/CFT, or sanctions compliance, appeal rights become available after 120 days if the FDIC does not issue an order of investigation, notice of charges, or draft consent order. This deadline may be extended, however, with the approval of the FDIC Chairperson, if the FDIC notifies the institution that the relevant Division Director is seeking formal authority to take an enforcement action. 91 Fed. Reg. at 3,192.

has not provided written notice that the pending or proposed enforcement action is based, in whole or in part, on unsafe or unsound practices under Section 8 of the Federal Deposit Insurance Act, violations of AML/CFT laws and regulations, or violations of sanctions compliance requirements.

While many potential appeals may continue to be blocked by this narrower definition of the facts and circumstances that are unappealable, it is a definite improvement. The FDIC appropriately has recognized that the facts underlying a proposed enforcement action are often relevant to material supervisory determinations, such as ratings downgrades, that an institution may have a meritorious case to appeal. By bringing additional categories of consequential supervisory determinations within the scope of the appeals process, the 2026 Guidelines provide institutions with recourse in situations where they previously had none.

The 2026 Guidelines continue to note that an appeal will not delay a supervisory or enforcement action already in progress, nor affect the FDIC's authority to take any supervisory or enforcement action.²⁷ Interestingly, however, the FDIC's preamble also notes that “[a]s a general matter, the FDIC expects to delay the initiation of the [formal] enforcement action until the conclusion of the appeal.”²⁸ This is eminently sensible, as an appeal that successfully challenges the facts and circumstances underlying a potential formal enforcement action negates the rationale for that enforcement action. Delaying the initiation of a formal enforcement action while an appeal is pending also may provide an institution with the opportunity to address substantive FDIC concerns, potentially obviating the need for that action.

Non-Deferential Standard of Review

The 2026 Guidelines make explicit that the Office will make an independent supervisory determination “without deferring to the judgments of either party” (e.g., to the judgments of the FDIC's supervisory staff). While the prior Guidelines contained similar language regarding the Division Director's standard of review at the first level of appeal, they did not provide that the SARC would decide appeals without “without deferring to the judgments of either party.” The 2026 Guidelines extend this non-deferential standard expressly to the Office's review at the second and final level of appeal.

This change signals that the Office's review is intended to be genuinely independent rather than a mere rubber stamp of the examiners' conclusions. While the burden of proof remains on the institution, the non-deferential

²⁷ 91 Fed. Reg. at 3,194.

²⁸ 91 Fed. Reg. at 3,188.

standard of review provides a fairer framework for evaluating whether supervisory determinations were appropriate.

Enhanced Transparency and Information Sharing

The 2026 Guidelines continue to require that any *ex parte* communications concerning the substance of an appeal between supervisory staff and the Office must be shared with the appealing institution (subject to “applicable limitations on disclosure”). Disclosure of submissions to the Office gives the appealing institution insight into opposing arguments, as well as an opportunity to respond to or rebut them, potentially through a supplemental letter, the provision of additional documents, or arguments made at oral presentation.

The 2026 Guidelines add a new requirement for the Office to provide the reasons for any redactions made to the appealing institution. This ameliorates the concern that if materials were withheld from an appealing institution on the basis of “applicable legal limitations on disclosure,” the appealing institution would not know of, nor be able to challenge, such withholding. The new disclosure provision will, hopefully, ensure that appealing institutions are informed of the existence of any materials or communications shared with the Office by supervisory staff that are withheld from them, as well as the opportunity to challenge such withholding.

The new disclosure provision addresses concerns that the prior appeals processes operated too much as a “black box.” In fact, before the 2021 Guidelines required disclosure of communications from supervisory staff to the SARC, appealing institutions were not provided with submissions from supervisory staff to the SARC in opposition to their appeals. Thus, they had no opportunity to rebut or address the secret arguments or evidence that supervisory staff submitted to the SARC. By requiring disclosure of *ex parte* communications and requiring the reasons for any redactions to be provided to appealing institutions, the 2026 Guidelines promote fairness and allow institutions to more meaningfully participate in the appeals process.

Decisions on Stays of Supervisory Determinations Require a Weighing of Potential Harms, Favoring Institutions

The 2026 Guidelines add a provision requiring that when an institution requests a stay of a supervisory determination pending appeal, the Division Director’s decision regarding the stay request must include a weighing of potential harms. While the Division Director retains discretion to grant stays, this framework provides more structure to the analysis.

This change is significant because supervisory determinations can have immediate adverse consequences for institutions – for example, potential negative market reactions following a restatement of a bank’s Call Report or

adverse changes in deposit classifications resulting from a ratings downgrade. A structured approach to stay requests that requires the Division Director to consider the potential harm to the appealing institutions caused by the supervisory determination being appealed is more likely to produce a stay of the determination pending the institution's appeal.

Disclosure of Confidential Supervisory Information to Outside Counsel Permitted

Material supervisory determinations are, invariably, contained in confidential supervisory information (CSI), such as reports of examination and supervisory letters. Although the FDIC has for years insisted that Part 309 of its regulations requires appealing institutions to obtain its authorization to disclose the CSI to outside counsel that contains the material supervisory determinations they might appeal, the preamble to the 2026 Guidelines clarifies that such authorization is no longer required.

Under Part 309 of the FDIC's regulations, an insured depository institution must submit a request to the FDIC to disclose CSI "to anyone who is not a director, officer or employee of the depository institution" that "specif[ies], with reasonable particularity, the record sought, the party's interest therein, and the party's relationship to the depository institution to which the record relates."²⁹ As outside counsel are not "director[s], officer[s], or employee[s]" of their clients, Part 309 could be read to prohibit depository institutions from disclosing CSI to their counsel absent ad hoc FDIC authorization.

In fact, the FDIC has for years insisted that Part 309 should be read that way. The FDIC's position led to an untenable situation where, in order to consult with counsel regarding whether to file an appeal of a material supervisory determination, an appealing institution first needed to request that the FDIC permit it to disclose the CSI containing that material supervisory determination to the institution's counsel. The FDIC, meanwhile, could be unreasonably slow in granting such authorization requests and also could unreasonably limit the material disclosed.

The FDIC's historical interference in the attorney-client relationship on the purported grounds of Part 309 prejudiced institutions that were considering

²⁹ 12 C.F.R. § 309.6(b)(7)(i); see also *id.* at § 309.6(a) ("Except as provided in paragraph (b) of this section or by 12 CFR part 310, no person shall disclose or permit the disclosure of any exempt records, or information contained therein, to any persons other than those officers, directors, employees, or agents of the [Federal Deposit Insurance] Corporation who have a need for such records in the performance of their official duties.") & § 309.6(b) ("Exempt records or information of the Corporation may be disclosed only in accordance with the conditions and requirements set forth in this paragraph (b).").

appeals by discouraging them from seeking informed legal advice. It also prejudiced their appeals, if they decided to move forward, given that appeals are on a short sixty-day clock.

As other banking agencies have modernized their regulations to explicitly provide that CSI can be disclosed to outside counsel, the FDIC became the sole federal banking regulator that has insisted that its regulations – which contain a general prohibition on disclosing CSI and no explicit carve-out for attorneys – forbid institutions from disclosing CSI to outside counsel for the purpose of obtaining legal advice and representation in an appeal. It is for this reason that commentators have argued that, “[t]he FDIC should join its peers by clarifying that a supervised financial institution may disclose CSI to counsel for the purpose of obtaining legal advice immediately – without the need for prior authorization from the FDIC.”³⁰

Fortunately, in the preamble to the 2026 Guidelines, the FDIC course-corrected. The FDIC clarified that requesting authorization under Part 309 to share CSI with outside counsel is unnecessary: “Disclosing supervisory information to an institution’s outside counsel regarding an appeal is part of the attorney-client relationship and is consistent with part 309 of the FDIC’s regulations.”³¹ (In contrast, disclosure to non-attorney consultants still requires prior FDIC authorization.)

This FDIC statement reflects a sea change in the FDIC’s interpretation of Part 309 that will be extremely helpful to depository institutions and their outside counsel. Hopefully, the FDIC will follow up on its helpful statement in the 2026 Guidelines by promulgating a revision to Part 309 that explicitly allows depository institutions to disclose CSI to outside counsel. In the meantime, depository institutions faced with adverse material supervisory determinations may – for the first time – immediately disclose CSI to outside counsel for the purposes of assessing the merits of an appeal according to the FDIC’s own written interpretation of Part 309 in the preamble to the 2026 Guidelines.

KEY TAKEAWAYS FOR DEPOSITORY INSTITUTIONS

The 2026 Guidelines represent a significant improvement in the FDIC’s appeals process that should give depository institutions greater confidence that their appeals will receive a fair and independent review. Several key takeaways emerge from an analysis of the 2026 Guidelines.

³⁰ Dustin N. Nofziger and Pinchus D. Raice, Federal Deposit Insurance Corporation Should Modernize Its Regulations on Confidential Supervisory Information, *The Journal of Federal Agency Action*, Jan. – Feb. 2026, at 9.

³¹ 91 Fed. Reg. at 3,191.

A Fairer Process Worth Using

The re-establishment of the Office of Supervisory Appeals, the requirement for industry experience on reviewing panels, the non-deferential standard of review at the second and final level of appeal, and the enhanced transparency provisions regarding materials redacted or withheld collectively represent a fairer and even-handed appeals process. The expanded categories of appealable determinations are also helpful. The 2026 Guidelines create a more favorable environment for institutions to challenge examination findings, and the establishment of the independent, standalone Office staffed with reviewing officials not otherwise employed by the FDIC and the non-deferential standard of review signal that a well-supported appeal has a meaningful chance of success.

Significantly, the FDIC is not alone in reforming its appeals process. The OCC also has proposed bank-friendly changes to its intra-agency appeals process. Like the FDIC, the OCC proposal would establish an appeals board to hear bank appeals, clarify a *de novo* standard of review for deciding appeals, and make other reforms. Remarkably, the OCC's notice of proposed rulemaking states that the OCC predicts that under its proposed process, "50 percent of appeals would be successful" because "because the new appeals system would not defer to supervisory determinations and because the new appeal system would not treat any party preferentially."³² The regulatory indications are not only that the FDIC and OCC appeals process will be fairer, but that appeals have more likelihood – perhaps much more likelihood – of success.

The parallel reform efforts at the FDIC and OCC signal a broader recognition that supervisory appeals processes must be perceived as fair and independent to be effective. They also likely represent an enhanced commitment to making the appeals processes operate in a fair and independent manner.

Practical Steps for Depository Institutions

Given the short timeframes for filing appeals – 60 days for an initial appeal to the Division Director – depository institutions should engage counsel promptly upon receiving adverse supervisory findings. In light of the FDIC's statement regarding Part 309 in the preamble to the 2026 Guidelines, they also

³² Bank Appeals Process, 91 Fed. Reg. 7,163, 7,174 (Feb. 17, 2026) ("The OCC assumes that the average appeal would have an equal likelihood of success or failure under then proposed rule because the new appeals system would not defer to supervisory determinations and because the new appeal system would not treat any party preferentially. Therefore, the OCC predicts that 50 percent of appeals would be successful and therefore, there would be 25 successful new appeals per year due to the proposed rule.").

should immediately share relevant CSI with counsel. Because the burden of proof rests with the institution and new evidence is generally not permitted at the second and the final level of appeal, the initial appeal should be comprehensive and well-documented, including all relevant facts, legal arguments, and supporting materials. Depository institutions pursuing appeals should also consider requesting oral presentation with the reviewing panel from the Office, which provides an opportunity to present positions directly to the panel, respond to submissions from supervisory staff, and respond to questions the panel may have.

CONCLUSION

The FDIC's 2026 Guidelines represent a meaningful enhancement to the fairness and independence of the supervisory appeals process. Combined with parallel reform efforts at the OCC – where the agency predicts a 50 percent success rate for appeals under its proposed appeals process – these developments signal that supervisory appeals may become a more viable remedy for financial institutions facing adverse examination findings. Financial institutions should give serious consideration to exercising these enhanced appellate rights when warranted, and should engage counsel early and document their positions thoroughly to maximize their chances of success.