Jennifer M. Jones
Deputy Executive Secretary
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, DC 20429

Re: *Proposed Changes to Guidelines for Appeals of Material Supervisory Determinations (RIN 3064-ZA50)*

Ladies and Gentlemen:

The Bank Policy Institute[1] and the American Association of Bank Directors[2] appreciate the opportunity to comment on the FDIC's proposed revisions to its Guidelines for Appeals of Material Supervisory Determinations (Proposed Guidelines).[3] The proposed amendments reflect thoughtful improvements to an unfortunately seldom-used formal appeals process that is in need of thorough reform. These welcome changes, along with the recommended refinements discussed below, should help to bolster the banking industry's confidence in the impartiality and consistency of the intra-agency appeals process mandated by Section 309(a) of the Riegle Community Development and Regulatory Improvement Act of 1994 (Riegle Act).[4]

The FDIC's Proposed Guidelines seek to replace the FDIC's existing Supervision Appeals Review Committee (SARC) by reconstituting an Office of Supervisory Appeals as a standalone

---

1 The Bank Policy Institute is a nonpartisan public policy, research and advocacy group that represents universal banks, regional banks, and the major foreign banks doing business in the United States. The Institute produces academic research and analysis on regulatory and monetary policy topics, analyzes and comments on proposed regulations, and represents the financial services industry with respect to cybersecurity, fraud, and other information security issues.

2 The American Association of Bank Directors is a non-profit organization that represents the interests of bank directors throughout the United States. Founded in 1989, AABD is the only trade group in the United States devoted solely to bank directors and their information, education, and advocacy needs.

3 Proposed Amendments to FDIC Guidelines for Appeals of Material Supervisory Determinations, 90 Fed. Reg. 33,942-33,949 (July 18, 2025), *Federal Register: Guidelines for Appeals of Material Supervisory Determinations*.

4 12 U.S.C. § 4806. As we have noted in previous letters to the FDIC and the other Federal banking agencies, the agencies and the industry have a common interest in getting examination results right and having banks trust the supervisory appeals process.

unit within the FDIC (Office).[5] This new Office would be the final review body for supervisory appeals and staffed with reviewing officials with appropriate experience and independence who are recruited externally to serve on a part-time basis for a fixed term. Reviewing officials would be subject to certain requirements, including conflict-of-interest and confidentiality standards, to promote the independence of the appeals process and be consistent with statutory requirements.

Based on experience and precedent, banks generally believe there is little likelihood of success in appealing a material supervisory determination and that the potential risk of retribution from within the agency (whether real or just perceived) too often outweighs any potential benefit of pursuing an appeal.

We agree with the FDIC that the proposed combined changes will provide meaningful advantages over the existing supervisory appeals process. The new structure would help avoid actual and perceived conflicts of interest while also ensuring that individuals deciding on appeals have relevant knowledge and expertise. For these reasons, we support the reestablishment of the Office and the objectives of the Proposed Guidelines to "facilitate a robust, independent supervisory appeals process that would be consistent over time."[6]

We also agree with the FDIC's view expressed in the Proposed Guidelines that institutions should have an opportunity to raise matters and to resolve disputes with on-site examiners and/or the appropriate Regional Office as part of the examination process. Robust supervisory dialogue and review processes should serve as an appropriate forum to address concerns, without banks having to resort to the formal appeals process.

***

Below, we make a number of specific recommendations for enhancements to the Proposed Guidelines that would further the FDIC's goals for providing a more transparent, efficient, and independent review process for material supervisory determinations that institutions will use in practice in appropriate circumstances. We also offer certain recommendations on how the FDIC should further strengthen examiner-bank dialogue and informal review processes in conjunction with the amendments to the FDIC's formal appeals process to further the FDIC's objectives in modifying its appeals process.

The reinstatement of the Office in conjunction with the adoption of the recommended enhancements to the Proposed Guidelines described below, holds the promise of fundamentally altering the shortcomings of the current SARC and meeting the expectations of Congress when it enacted Section 309(a) of the Riegle Act.

---

[5] According to the Proposed Guidelines, the structure of the Office is largely consistent with that of the independent appeals office with the same name established in 2021 and summarily disbanded shortly thereafter in 2022.

[6] *See* 90 Fed. Reg. at 33943.

***

I. The FDIC Should Reestablish the Office on an Expedited Basis

A. A principal advantage of the Proposed Guidelines is that the new standalone Office would operate independently from FDIC supervision staff and Board members, increasing impartiality and consistency.

Currently, review of supervisory appeals determinations by the SARC, which is comprised of FDIC Board members and senior FDIC officials, suffers from the reality that the review cannot be impartial. The current appeals framework as well as the fear of retaliation have served to deter banks from availing themselves of the FDIC's exam appeal function.[7] For these reasons, we have strongly argued in favor of an independent Office of Appeals.[8]

Perhaps the most significant change from current practice is that the Proposed Guidelines would enable the Office to make its determinations independent of influence by the FDIC's Chairperson, Board or full-time staff. This independence is important for banks and the principle of due process, as supervisory determinations may affect a bank's supervisory rating and regulatory treatment, and thus, operations and public standing.

B. We agree that at least one member of the panel should have direct bank supervisory or examination experience whereas other members of a panel could have other relevant experience either from government or industry.

We agree with the Proposed Guidelines that bank supervisory or examination experience would be an appropriate background for a reviewing official.[9] At the same time, however, we also agree that former supervisors are not the only individuals who may be qualified to serve. For that reason, we agree with the FDIC that there are other candidates who

---

7 The available data reveals that banks rarely challenge material supervisory determinations and seldom win their appeals. As explained by literature on this topic, this cannot be explained fully by bank concurrence with agency material supervisory determinations. *See*, *e.g.*, Julie Andersen Hill, *When Bank Examiners Get It Wrong: Financial Institution Appeals of Material Supervisory Determinations*, 92 Wash. U. L. Rev. 1101, 1106, (2015), http://openscholarship.wustl.edu/law_lawreview/vol92/iss5/5.

8 *See, e.g.,* ABA, AABD, BPI, ICBA, MBCA letters to the FDIC, dated November 21 and June 21, 2022, BPI and Trade Coalition Comment on FDIC Guidelines for Appeals of Material Supervisory Determinations - Bank Policy Institute. *See also* The Clearing House and Financial Services Roundtable letter to the Federal Reserve Board, dated April 27, 2018 ("Since the financial crisis, the scope of regulation and supervision has expanded exponentially – thus providing more actions that may warrant an appeal – and the implications of adverse supervisory actions, including ratings downgrades, have grown more severe. Thus, the availability of a substantive appeals process for institutions to obtain an independent review of significant supervisory matters is more important than ever before.")

9 As discussed in Part II.C.i below, we recommend a cooling off period of three years for former FDIC officials.

may have skills and experience suitable for the role. The FDIC should ensure that the members of the Office reflect a diverse range of experience and views that promote the exercise of independent judgment and fairness.

Since the Office will be asked to resolve highly technical matters, in addition to those with agency supervisory or examination experience, other candidates with appropriate experience may include those who previously had involvement in a banking organization's interactions with regulators, such as former bank officers and board members, attorneys, and other industry experts.[10] A key to the fairness, independence, and quality of the Office's process and decisions will be the variety of professional backgrounds within the available pool of reviewing officials. Moreover, we believe that the FDIC must ensure that it sets out a hiring process that enables the selection of individuals capable of exercising the independent judgment necessary to overturn examiner determinations when it is appropriate to do so. This hiring process must not unfairly eliminate candidates with differing perspectives or favor the hiring of reviewing officials that are predisposed to affirming the work of examiners without sufficient critical review.

Making a concerted effort to hire individuals with a variety of professional backgrounds will instill confidence in the independence of the Office. To draw a parallel, no defendant in a lawsuit would ever be comfortable adjudicating before a court system that only permitted judges drawn from the ranks of plaintiff's lawyers and government prosecutors. Indeed, our nation's judicial system in no way limits individuals on the basis of their former professional affiliations. That same logic should govern here.

Taking into account the foregoing, the FDIC should use reasonable best efforts to: (i) include at least one individual with banking industry experience on each panel, and (ii) exclude from eligibility current federal banking agency employees serving in supervisory or enforcement functions (provided such exclusions do not unacceptably narrow the pool of applicants to a degree that it becomes unworkable to adequately staff the Office with eligible and capable individuals.)

II. The FDIC Should Adopt Targeted Changes to the Proposed Guidelines

We believe the following additional suggestions would improve the fairness, effectiveness and independence of the process described in the Proposed Guidelines.

A. Additional steps that the FDIC should take to promote due process

[10] As discussed in detail below, the FDIC must, of course, ensure that all potential conflicts of interest are adequately addressed.

i. Provide Banks with a Reasonable Period of Time to Seek Office Review of Any Material Supervisory Determination Prior to the FDIC's Commencement of An Enforcement Action Premised on the Determination

We recommend against the Proposed Guidelines' temporary suspension of a bank's appeal rights with respect to material supervisory determinations while the FDIC considers whether a formal enforcement action is merited. While we recognize that the FDIC has a strong interest in exercising its enforcement powers when appropriate, we do not believe these Proposed Guidelines have properly weighed the bank's interest in an independent review of supervisory determinations against the FDIC's enforcement interests, particularly because our recommendation does not undermine the FDIC's enforcement interests in any material way.[11] We hold this view because the Proposed Guidelines retain the bar for banks from challenging the factual basis for a contemplated formal enforcement action, no matter how flawed, except through the extraordinarily difficult and rarely used administrative process under Section 8 of the Federal Deposit Insurance Act.[12]

When erroneous supervisory determinations lead to formal enforcement actions, or a review is undertaken to determine whether a formal enforcement action is merited, banks will have been denied an independent review from the Office. Currently, material supervisory determinations that are appealable include both (1) CAMELS ratings; and (2) 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 to an institution.[13] Suspending an insured depository institution's appeal rights once an examiner decides that the matter under dispute merits review to determine whether to bring a formal enforcement action could undermine the Proposed Guidelines' appeal rights (i.e., since the enforcement action is premised on the material supervisory determination). This is particularly the case where the notice of intent to bring an enforcement action is first provided to the institution in a transmittal letter accompanying the report of examination.[14]

---

[11] We are also unaware of any inherent reason why a possible informal enforcement action would not create an appeals hiatus but a formal enforcement action would.

[12] In responding to proposed enforcement actions pursuant to 12 USC §1818(b) and other actions, a bank faces a Hobson's choice. Most banks enter into the order even if they may believe that the alleged facts supporting the action are flawed. If the bank refuses to consent, it will face a challenging, time consuming and expensive process. Some recent pending cases have been unresolved for more than ten years. The administrative law judge will frequently defer to the supervisory staff and examiners; the FDIC board to the findings of the ALJ; and an appeals court will normally defer to the FDIC board.

[13] For example, a less than satisfactory CAMELS management and composite rating now is self-enforcing, with dramatic and automatic consequences for the bank and its parent holding company (*e.g.*, the loss of "financial holding" company status).

This all leads to the conclusion that the system is out of balance in this respect. That can lead to a flawed process and inequitable results. An improved appeals process can help to diminish the one-sidedness.

The final Guidelines should require the supervisory and enforcement offices to provide notice to banks to allow them at least a four-week period in which to challenge material supervisory determinations after the institution receives notice that the FDIC is considering whether a formal enforcement action is merited. Where the institution opts to seek an appeal within the four-week window, there should be no enforcement action taken until the Office has provided the supervisory and enforcement offices with its findings.[15] The adoption of a process for review of all material supervisory determinations would not interfere with the FDIC taking emergency action to close a bank or to take prompt corrective action (which are excluded from the definition of "material supervisory determinations").[16]

In some sense, concern with the current approach (adopted in the Proposed Guidelines) is acknowledged in the commentary to the Proposed Guidelines where it states that "the Guidelines' enforcement-related provisions have been confusing to some institutions, leading to some uncertainty as to which determinations are subject to appeal."[17] We believe a clearer system that does not suspend the appeal rights of institutions but rather expedites an independent review of consequential matters would be a considerable improvement. An enforcement action should not be commenced until requests to resolve disagreements over the facts have been resolved by the Office. We recognize that not every matter of disagreement will merit an expedited review by the Office, but there may be viability in a more limited "special petition" that banks could submit directly to the Office and that the Office would have the discretion to review on an expedited basis. This could help protect financial institutions from an enforcement action based on supervisory findings that would have been overturned by an independent panel.

---

[14] Often the issue arises at the time that a bank first receives the report of examination but at the same time also receives a letter informing the bank that the FDIC is considering a formal enforcement action. Under current and Proposed Guidelines, the bank is foreclosed from appealing material supervisory determinations in the report to the Office no matter how inaccurate or imbalanced they are.

[15] The FDIC may be relying on Section 12 U.S.C. 4806(g) for apparently staying the appeals process when an enforcement action is considered. This provision reads as follow: "Nothing in this section shall affect the authority of a federal banking agency … to take enforcement or supervisory action." To read the reference to 'authority' as precluding an appeals process, however, is not required by the words of the text, is inconsistent with clause (f)(1)(B) and imposes a sweeping limitation that would undermine the basic purpose of this provision. At a minimum, Section 309(a) of the Riegle Act does not affect the authority of a banking agency to modify the appeals process to allow improved communication with the subject bank to help assure the most fair results. The FDIC currently allows a bank to utilize the appeals process relating to informal enforcement actions.

[16] *See* 12 U.S.C. 4806(f)(1)(B).

[17] *See* Proposed Guidelines at 54,380.

ii. The Timeframes Applicable to Any Automatic Stays of Supervisory Appeals Pending FDIC Enforcement-Related Decisions Should Only be Subject to Extension with Bank Consent

The FDIC expects the procedures and timeframes applicable to formal enforcement-related decisions to be effective for the majority of enforcement actions. The Proposed Guidelines provide that the FDIC may extend the timeframes with the approval of the FDIC Chairperson where warranted. We believe that the FDIC should require the approval (or non-objection) of the bank to invoke the provisions allowing for an extension of the timeframes in these cases.[18]

We believe that if the FDIC and bank agree that the 120-day timeline is not enough time to resolve a disagreement, it may well be appropriate to extend that timeline. However, we also believe that matters capable of waiting over 120 days to resolve are likely good candidates for the application of a proper appeals process. When such an extended discussion over a potential enforcement matter takes place, it may be evidence that the matter in question is not a clear instance of ongoing consumer harm or risk to the Deposit Insurance Fund that might otherwise justify special procedures with respect to a bank's right to appeal.

iii. Empower the Office with a *De Novo* Standard of Review Where Both Parties are on Equal Footing by Clarifying that Supervised Institutions May Challenge an Examiner's View of "Reasonableness" and Placing the Initial Burden of Proof on the FDIC as to Matters at Issue in the Appeal

In its Proposed Guidelines, the FDIC states that a reviewing panel of the Office will "review the appeal for consistency with the policies (including regulations, guidance, policy statements, examination manuals, and other written publications) of the FDIC and the overall reasonableness of, and the support offered for, the positions advanced, consistent with the existing standard of review for the SARC."[19] The Proposed Guidelines, like the existing SARC Guidelines, state that "[t]he 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."[20]

In addition, similar to the current SARC Guidelines and the 2021 Office of Supervisory Appeals Guidelines, the Office would make an independent supervisory determination. However, unlike the current Guidelines or the 2021 Guidelines, the Proposed Guidelines would specify that the Office will make its determination "without deferring to the judgments of either party".

---

[18] This change is particularly essential if the Guidelines are not revised as recommended in Section II.A.ii of this letter (i.e., the previous section).

[19] *See* Proposed Guidelines at 33,944.

[20] *See* Guidelines for Appeals of Material Supervisory Decisions. Paragraph J. available at: https://www.fdic.gov/regulations/laws/sarc/sarcguidelines.html.

We agree with the FDIC that by not deferring to the judgment of either party, the proposed standard of review would underscore the independence of the review by the Office. Accordingly, we believe that the FDIC should explicitly adopt this evenhanded standard to give the Office full discretion to fairly review and consider the relevant facts and circumstances at hand and, when appropriate, overturn erroneous supervisory determinations.

At the same time, the Proposed Guidelines provide little explanation on the standards of review against which banks are judged other than noting that the "[Division Director] and [Office] would review the appeal by considering whether the material supervisory determination is consistent with applicable laws, regulations, and policy and reasonable." Limiting the review to whether the material supervisory determination is consistent with applicable laws, regulations, and policy and reasonableness may not reflect the realities of the examination process, which grants wide discretion to examiners on inherently subjective judgments which can result in severe consequences such as formal enforcement actions, removal actions, limitations on bank activities, requirements for capital raises, etc.

Accordingly, the Guidelines should clarify that supervised institutions may challenge an examiner's view of reasonableness and set forth specific parameters around "reasonableness". At a minimum, the final version of the Guidelines should clarify the following in this regard:

- First, that reasonableness cannot be based merely on examiner preferences (*e.g.*, process or procedural oriented preferences that an examiner may have) and discretion.

- Second, it is never "reasonable" (i.e., appropriate) for the FDIC staff to make a material supervisory determination on account of a bank's non-conformance with non-binding agency guidance or "supervisory expectations".[21]

Moreover, to more effectively accomplish the objective of independence of the review by the Office, the burden of proof should not be placed on the institution. In effect, by placing "the burden of proof as to all matters at issue in the appeal" on the institution, the Proposed Guidelines continue to reinforce a structure under which an appeal cannot succeed unless the appellate decision-maker rules that the examiners are not merely wrong, but clearly wrong.[22] This standard sharply reduces the prospects of success on appeal and increases the fear of retribution because of the "clearly wrong" argument that the appealing banks must make.

---

[21] In 2018, the federal banking agencies clarified that guidance does not have the force of law. This important clarification was codified as a regulation in 2021. *See* 12 CFR Part 302, Appendix A, 86 Fed. Reg. 12,079 (March 2, 2021) available at: FDIC Adopts Rule on the Role of Supervisory Guidance | FDIC.gov.

[22] A requirement that the institution has the burden of proof is not required by statute and is unnecessarily prescriptive because the SARC process is not (and the Office process will not be) governed by the Administrative Procedure Act or other formal judicial review procedures.

Indeed, the initial burden should be placed on the FDIC to show (i) the FDIC has legal authority to make the supervisory determination in question, (ii) the officials who made the determination were acting within such authority, and (iii) their findings are consistent with that authority, with the bank having an opportunity to rebut. So long as the burden is placed on the defendant, the parties will not truly be on equal footing.

iv. Expand and Clarify the Scope of Material Supervisory Determinations Subject to Appeal

The statutory definition of "material supervisory determination" (12 USC 4806) includes three specific items but provides the Federal banking agencies with flexibility to delineate additional types of determinations within the meaning of the term.[23] The FDIC should use this authority to clarify that the following fall within the scope of the term:

- resolution plan-related determinations,[24]
- compliance with commitments and conditions (through supervision or applications processes) enforceable in proceedings under applicable law, and
- compliance with or remediation of issues covered in an informal enforcement action (i.e., not merely decisions to initiate informal enforcement actions as set out in Section D(n) of the Proposed Guidelines).

The Office should also be empowered to make determinations relating to procedural fairness in the examination process. For example, the FDIC enforcement action against Calcutt evidences the potential bias that examiners may have that can influence how they conduct the examination that can lead to flawed conclusions upon which further agency action is based.[25] Accordingly, procedural matters (*e.g.*, if an FDIC examiner demands that an FDIC supervised institution produce information relating to its management of reputational risk notwithstanding FDIC policies that it will no longer consider reputational risk as a stand-alone supervisory category) should be considered a supervisory determination for these purposes.

---

[23] The definition of "material supervisory determination" (12 USC 4806(f)(1)(A)) includes (but is not limited to) determinations relating to—(i) examination ratings; (ii) the adequacy of loan loss reserve provisions; and (iii) loan classifications on loans that are significant to an institution." The conclusion that 'includes' is used to provide examples rather than as a word of limitation is confirmed by clause (f)(1)(B). Clause (f)(1)(B) explains that clause (f)(1)(A) does not apply to certain regulatory determinations. If clause (f)(1)(A)'s use of 'includes' had been intended as words of limitation, clause (f)(1)(B) would have been unnecessary (so-called 'surplusage').

[24] *See* FDIC resolution planning rule for insured depository institutions 12 C.F.R. Part 360.10. See also BPI letter to the FDIC, dated August 18, 2025 (The FDIC should eliminate the subjective credibility determination that was inserted into the IDI Rule in 2024.)

[25] *Calcutt v. Federal Deposit Insurance Corporation*, 598 US _____ (2023)

v. The Guidelines Should Enhance Transparency with Respect to the Basis for a Division Director's Decision to Affirm a Material Supervisory Determination in Order to Allow Banks to Better Tailor Their Appeal Submissions

When a Division Director decides to affirm an examiner's judgment and a bank decides to appeal, the FDIC should consider establishing processes that are timely and that give appealing banks sufficient insight into what formed the basis for the Division Director's decision to affirm. We believe that sharing a documented basis for the decision, will allow banks to better tailor their appeal submission and may expedite resolution.

vi. The Guidelines Should Permit a Bank to Provide All Available Evidence to the Office

The Proposed Guidelines would provide the reviewing panel with discretion to decide whether to permit evidence not previously submitted by the institution to the Division Director. In this regard they note that "evidence not presented for review to the Division Director is generally not permitted". While it makes sense that the Office may only consider the facts and circumstances as they existed prior to, or at the time the material supervisory determination was made, the final Guidelines should clarify that the Office should review any relevant evidence – including evidence that was not available at the time of the Division Director's consideration of the appeal or evidence that formed the basis of the Division Director's documented decision – consistent with fundamental principles of fairness and due process. To not allow available evidence to be considered would be at odds with the FDIC's objective to provide institutions with a fair assessment of a material supervisory determination.

In this regard, we note the following:

- First, the supervisory appeals process should not be used as a shield for examiners to stop doing their BAU work to *e.g.*, continue to evaluate whether a material supervisory determination should be changed based on remediation efforts when and as appropriate.

- Second, the appealing institution should, as a matter of right, be given an opportunity to provide evidence to the Office (including any exculpatory evidence) as it becomes available.

vii. The Guidelines Should Prohibit *Ex Parte* Communications Involving the Office and Ensure that Both Parties Have an Opportunity to Correct the Factual Record Prior to a Decision by the Office

We support the provision in the Proposed Guidelines providing that both parties will receive all information considered by the Office (subject to applicable confidentiality

restrictions) but believe that it does not go far enough to ensure fundamental rights and a level playing field.

- First, the FDIC should prohibit *ex parte* communications (including oral communications not only written materials) during an appeal and require any *ex parte* communications that inadvertently occur to be memorialized in writing and made available to both the Office and the appealing bank on a timely basis. As the preamble to the Proposed Guidelines recognizes, the requirement that information be shared with both parties in the appeal is a fundamental right to ensure that both parties are aware of information shared with the decision-maker.[26]

- Second, the Proposed Guidelines should clarify the timing of when information considered by the Office will be shared with both parties. If information is shared following a decision, the parties will not have an opportunity to respond to (*e.g.*, to correct the record), as appropriate. Accordingly, the Guidelines should clarify that both parties will receive all information on a timely basis prior to the issuance of the Office's decision. Moreover, parties should have a fair opportunity to present their case that the information is factually incorrect or irrelevant/misleading to the controversy at issue.

- Third, the Proposed Guidelines should clarify that the appealing bank should receive a copy of any information that a state regulatory authority provides the FDIC in terms of its views on an appeal (i.e., in the event that the material supervisory determination at issue is the joint product of the FDIC and a state regulatory authority).

viii. The Office Should Consider Requests for Stays of Material Supervisory Determinations Pending Appeal and Reasonable Standards for Evaluating Requested Stays of Material Supervisory Determinations Should be Memorialized and Applied

We agree in principle with the provision of the Proposed Guidelines that provides an institution with the ability to request a stay of a FDIC supervisory decision or action while a supervisory appeal is pending.[27] Unlike the approach in the Guidelines, however, we

---

[26] For example, the Proposed Guidelines state that "The Ombudsman and the Division Director may submit views regarding the appeal to the Office within 30 calendar days of the date on which the appeal is received by the Office." As per the *ex parte* policy, these views should also be provided to the institution.

[27] "Institutions may request from the appropriate Division Director a stay of a supervisory action or determination 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."

recommend that the Office – rather than the applicable Division Director – be the decision-maker where the appeal is pending at the Office.

The ability to petition for a stay is especially important because, absent a stay pending the final determination, institutions could suffer many, or even all, the consequences of a final determination, thus rendering the appeal worthless as a practical matter. Under the Proposed Guidelines, Division Directors have unfettered discretion to grant or reject requests for stays. Since the Division Directors perform the first level of review in the supervisory appeals process, the Director may have already determined that the appeal should be dismissed. Accordingly, allowing Division Directors to decide requests for stays is a less independent process than allowing the Office to decide these requests.

Additionally, to best preserve due process rights, the FDIC should adopt the following recommendations:

a. Reasonable Standards for Decision Makers to Follow in Evaluating Stay Requests

When considering requests for stays pending appeal in analogous contexts, decision-makers such as courts are required to evaluate the request with reasonable standards in mind. More specifically, decision-makers often evaluate whether there is a likelihood of irreparable, immediate and/or material harm. Absent these circumstances, a stay of a material supervisory determination should generally be deemed appropriate. Accordingly, rather than providing the decision-maker unfettered discretion in evaluating a request for a stay, we recommend that the final version of the amended Guidelines establish a rational basis on which the decision-maker (*e.g.*, the Office or Division Director, as appropriate) analyzes the relevant interests served by an appeal (*e.g.*, in general, a lack of irreparable, immediate and/or material harm often should be consistent with granting a stay while an appeal is pending).

b. Option to Bypass FDIC Division Director Level Review and Instead Appeal Directly to the Office in Connection with Stay Requests

Over time, the number of appeals filed with the FDIC have been few – reflecting the reality that many banks do not believe the process afforded any reasonable chance of success and it could be cumbersome and timely for appellants. Division Directors may themselves be conflicted with the examination teams they directly supervise. By the nature of the position (i.e., as a mentor and supervisor for examiners) a Division Director is almost certainly inclined to support his or her staff against a challenge to their decision-making. Moreover, in complex or contentious matters, they are often deeply involved, directly or indirectly, in managing and advising the bank's examiners on material supervisory determinations even before an appeal is filed.

Accordingly, particularly where an institution makes a stay request, the FDIC should revise the Guidelines to expressly permit banks to bypass initial review by Division Directors and instead file an appeal directly with the Office.

ix. Amend the FDIC's CSI Rules to Allow an Institution to Automatically Disclose CSI Relating to a Material Supervisory Determination to Outside Counsel and Other Third-Party Advisers in Relation to an Appeal or Prospective Appeal

The FDIC, unlike the OCC and Federal Reserve, require specific FDIC approval to share CSI with outside counsel. This restriction could place a supervised institution in a compromised position if the FDIC denies a request (or just takes a long time to process a request) to share CSI with counsel for the purposes of either preparing for, or evaluating whether to go forward with, an appeal of a supervisory determination. We seek a rules-based authorization to allow an institution to disclose CSI to outside counsel or third-party advisers to promote the FDIC's goals of fairness. The bank should not have to commit to an appeal to share CSI, only that they are sharing the CSI with eligible parties for the purpose of making a good faith determination whether to appeal. An institution should not require the FDIC's permission to most effectively and thoughtfully use an appeals process established by the FDIC to promote transparency and fairness.

x. The Guidelines Should Require the Rationale Behind Key Legal Division Determinations to be Memorialized in Writing and Made Available to the Appealing Institution

The FDIC Legal Division acts as counsel to the Office. In that capacity, the Proposed Guidelines provide the Legal Division with the authority to revise an Office decision "to conform with relevant laws, regulations, or policies". In addition, the Legal Division has the authority to determine that an issue raised in an appeal is ineligible for review. In the interest of transparency, these actions should be accompanied by a written determination accessible to the appealing institution which should have an opportunity to seek clarification and review of the determinations.

B. Additional steps that the FDIC should take to promote the efficiency and operation of the Office

We have several suggestions that, if adopted, should further enhance the efficiency and effectiveness of the Office:

i. Ensure that the Panel has Access to Sufficient Support Staff to Facilitate Timely Review

Especially in light of the fact that the Guidelines appropriately provide for the Office to conduct a *de novo* review, the FDIC should ensure that the Office is appropriately staffed, and has the resources necessary, to perform a *de novo* review.

The FDIC should consider the type of support staff that would be appropriate and helpful for the Office to have and necessary independence of the support staff. In addition, the FDIC should include in the final Guidelines additional detail regarding how it will manage conflicts of interest at the staff level.

ii. Ensure that the Office Hires Enough Reviewing Officials

Regardless of the size of the panels, our members believe that the FDIC should ensure that the Office hires enough reviewing officials to manage the workload and account for employee attrition, conflicts of interest, incidences of recusal, and any other instances where reviewing officials may prove unavailable for any particular appeal.

C. Additional steps the FDIC should take to promote independence of the Office and confidence in the Office

We have several suggestions that, if adopted, should further enhance the independence of the Office:

i. Provide the Appealing Bank with Information about Members of the Panel and Identify Conflicts that Would Disqualify an Individual from Serving on a Panel

The final Guidelines should clarify that the appealing institution will be provided with information about the panel members so the bank can be certain that they are independent, and have the ability to raise any concerns about independence.

The FDIC should clearly articulate the specific criteria and conflicts of interest that would disqualify an individual from serving on the panel for a particular bank.

For example, there should be a three-year cooling-off period between the time when any individual was an FDIC examiner to when he/she can serve on a panel. In addition, individuals should be prohibited from serving on a specific panel if they have ever worked as an examiner for or at the appealing bank

Provided that Office personnel are clear of conflicts, the panel members for any particular appeal should be chosen at random to ensure impartiality.

ii. Review and Certify the Office's Independence

The FDIC should promote independence by undertaking a regular, formal review of the Office to substantiate its independence, just as financial institutions verify the independence of their internal audit function. This responsibility to audit the independence of the Office should

fall to the FDIC's Office of Inspector General. The findings of the Inspector General as to the Office's independence should be reviewed and approved by the FDIC Board annually and once approved, should be made available to the public.

iii. Public Decisions and Annual Reports on the Office's Decisions Should Provide Transparency to the Public on Those Decisions While Not Allowing Individual Appealing Banks to be Identifiable

The Proposed Guidelines provide that the decisions of the Office would be made public. We agree with the FDIC that publishing decisions in summary or redacted form (where *any* information that could potentially reveal the identity of the appealing institution would be redacted from the published decision) as proposed would serve the important goal of providing institutions with greater transparency regarding the standards and analyses that the Office employs in considering appeals while not creating a disincentive to initiate an appeal.

Importantly, we recommend that the final Guidelines specify that:

(i) the panel's written decision will include details regarding the reasoning of the panel and, where applicable, any dissenters on the panel will have an opportunity to include a brief statement of reasoning for their disagreement with the decision, and

(ii) the appealing bank will receive a copy of the decision before the FDIC makes it publicly available.

In no case should the FDIC publish decisions where a redacted version or summary can not be sufficiently anonymized. Importantly, as part of the bank's review of the decision, the appealing bank should have the right to object to publication on grounds of inadequate redaction (i.e., if the bank believes that the identity of the institution can be discerned from the published decision, then it should have the right to seek appropriate changes).

Finally, the FDIC's annual reports described in the commentary to the Proposed Guidelines should provide insight into how the Office is being used by banks. In particular, the FDIC's annual reports should include anonymized appeals data regarding how many appeals have been adjudicated and the outcomes of those appeals. The FDIC should make data available on the number of Matters Requiring Board Attention (MRBA) appeals that banks file, broken down by subject and Regional Office.

D. Additional safeguards against potential FDIC staff retaliation against institutions that pursue appeals

While the FDIC's Proposed Guidelines and appeals process provide for a "Prohibition on Examination Retaliation" policy, there is little clarity regarding those safeguards other than statements that the (i) Ombudsman will monitor the supervision process following an institution's submission of an appeal and periodically report to the FDIC's Board, (ii) retaliatory 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, (iii) institutions that believe they have been retaliated against are encouraged to contact the Regional Director for the appropriate FDIC region, and (iv) the Office of the Ombudsman will work with the appropriate Division Director to resolve the allegation of retaliation.

The FDIC should clearly articulate its procedures for educating examination staff about the types of actions that would constitute retaliation and the penalties to which retaliating staff will be subject. Furthermore, instances in which such disciplinary action is taken should be made known to supervisory and examination staff to serve as a deterrent for future retaliatory actions.

III. We Urge the FDIC to Strengthen Supervisory Communications, Review and Transparency Processes in Conjunction with the Amendments to the FDIC's Formal Appeals Process

As noted above, we agree with the FDIC's view expressed in the Proposed Guidelines that institutions should have an opportunity to raise matters and to resolve disputes with on-site examiners and/or the appropriate Regional Office as part of the examination process.[28] It is important that banks have meaningful opportunities to engage with FDIC staff—both on-site examiners and FDIC subject-matter experts—on a regular basis and throughout the supervisory cycle.

Accordingly, the FDIC should institute a process to provide institutions with regular interim updates from on-site examiners and FDIC subject-matter experts during the course of an inspection or examination. Such updates would allow banks to clarify factual misunderstandings and remediate issues in real time, as opposed to deferring all findings to the end of the examination cycle. For example, the FDIC should require that the examination team for each bank provide a draft of any MRBA as well as the ratings determination to the bank a reasonable period of time (for example, four weeks) before the ratings letter is formally issued. The draft would be provided with the understanding that the bank would be permitted to correct any factual misstatements and have an opportunity to respond to any proposed adverse findings (including by challenging any draft MRBAs, particularly those that do not relate

[28] The Proposed Guidelines provide that: "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".

to core financial risks), and to request that the FDIC staff reconsider any MRBAs and specific component ratings before they are formally issued.[29] Further, while the opportunity to engage with the examination team on these topics would be a welcome improvement, consistent with the motivation underlying the Proposed Guidelines, the FDIC should consider the extent to which the opportunity to correct any factual misstatements or challenge a draft MRBA would *also* benefit from review by an independent and disinterested decisionmaker (for example, the Ombudsman).

Second, the FDIC should institute a process whereby on-site examiners and/or the Regional Office are expected to respond within a certain number of days (we recommend three business days) to a request for a meeting to resolve a dispute while at the same time noting that a bank at all times retains discretion to raise the issues with the senior FDIC staff without first consulting or notifying on-site examiners/Regional Office.

Finally, the supervisory process would benefit from a more thorough, transparent explanation of findings (*e.g.*, in MRBAs and/or other supervisory communications), so banks can make reasoned determinations whether to exercise their rights to appeal and/or develop action plans to resolve their supervisory issues in an efficient manner.[30]

***

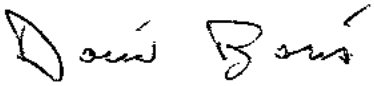
[29] *See* statement by Acting FDIC Chairman Travis Hill available at https://www.fdic.gov/news/speeches/2025/statement-acting-chairman-travis-hill (stating that the FDIC is expected to "improve the supervisory process to focus more on core financial risks and less on process, and reevaluate the supervisory appeals process"). See also https://www.fdic.gov/speech-vice-chairman-travis-hill-preliminary-thoughts-fdic-policy-issues-1-10-2025pdf

[30] *See* BPI letter to the Federal Reserve Board on Revisions to the Large Financial Institution Rating System and Framework for the Supervision of Insurance Organizations, dated August 14, 2025, available at https://www.govinfo.gov/content/pkg/FR-2025-07-18/pdf/2025-13506.pdf.

Both BPI and AABD appreciate the opportunity to share our views with the FDIC through this request for comment. If you have any questions, please contact Gregg Rozansky, by email at gregg.rozansky@bpi.com or David Baris by email at dbaris@aabd.org.

Sincerely,

Gregg Rozansky
Senior Vice President
Senior Associate General Counsel
Bank Policy Institute



David Baris
President
American Association of Bank Directors

Annex – Executive Summary of Recommendations

I. The FDIC Should Reestablish the Office on an Expedited Basis

- ***A principal advantage of the Proposed Guidelines is that the new standalone Office would operate independently from FDIC supervision staff and Board members, increasing impartiality and consistency.***
- ***We agree that at least one member of the panel should have direct bank supervisory or examination experience whereas other members of a panel could have other relevant experience either from government or industry.***

II. The FDIC Should Adopt Targeted Changes to the Proposed Guidelines

- ***Additional steps that the FDIC should take to promote due process***
  - Provide Banks with a Reasonable Period of Time to Seek Office Review of Any Material Supervisory Determination Prior to the FDIC's Commencement of An Enforcement Action Premised on the Determination
  - The Timeframes Applicable to Any Automatic Stays of Supervisory Appeals Pending FDIC Enforcement-Related Decisions Should Only be Subject to Extension with Bank Consent
  - Empower the Office with a *De Novo* Standard of Review Where Both Parties are on Equal Footing by Clarifying that Supervised Institutions May Challenge an Examiner's View of "Reasonableness" and Placing the Initial Burden of Proof on the FDIC as to Matters at Issue in the Appeal
  - Expand and Clarify the Scope of Material Supervisory Determinations Subject to Appeal.
  - The Guidelines Should Enhance Transparency with Respect to the Basis for a Division Director's Decision to Affirm a Material Supervisory Determination in Order to Allow Banks to Better Tailor Their Appeal Submissions.
  - The Guidelines Should Permit a Bank to Provide All Available Evidence to the Office.
  - The Guidelines Should Prohibit *Ex Parte* Communications Involving the Office and Ensure that Both Parties Have an Opportunity to Correct the Factual Record Prior to a Decision by the Office.
  - The Office Should Consider Requests for Stays of Material Supervisory Determinations Pending Appeal and Reasonable Standards for Evaluating

Requested Stays of Material Supervisory Determinations Should be Memorialized and Applied
  - Amend the FDIC's CSI Rules to Allow an Institution to Automatically Disclose CSI Relating to a Material Supervisory Determination to Outside Counsel and Other Third-Party Advisers in Relation to an Appeal or Prospective Appeal
  - The Guidelines Should Require the Rationale Behind Key Legal Division Determinations to be Memorialized in Writing and Made Available to the Appealing Institution

- ***Additional steps that the FDIC should take to promote the efficiency and operation of the Office***
  - Ensure that the Panel has Access to Sufficient Support Staff to Facilitate Timely Review
  - Ensure that the Office Hires Enough Reviewing Officials

- ***Additional steps the FDIC should take to promote independence of the Office and confidence in the Office***
  - Provide the Appealing Bank with Information about Members of the Panel and Identify Conflicts that Would Disqualify an Individual from Serving on a Panel
  - Review and Certify the Office's Independence
  - Public Decisions and Annual Reports on the Office's Decisions Should Provide Transparency to the Public on Those Decisions While Not Allowing Individual Appealing Banks to be Identifiable

- ***Additional safeguards against potential FDIC staff retaliation against institutions that pursue appeals***

III. We Urge the FDIC to Strengthen Supervisory Communications, Review and Transparency Processes in Conjunction with the Amendments to the FDIC's Formal Appeals Process