June 21, 2022

James P. Sheesley
Assistant Executive Secretary
Attention: Comments – RIN 3064-ZA20
Federal Deposit Insurance Corporation
550 17th Street NW
Washington, DC 20429

Re: Guidelines for Appeals of Material Supervisory Determinations

Dear Mr. Sheesley:

We, the undersigned banking trade associations[1], write to collectively voice our concern with the FDIC's recent decision to summarily eliminate the Office of Supervisory Appeals ("the OSA") and reinstate the agency's Supervision Appeals Review Committee ("the SARC").[2] The Associations strongly object to the FDIC's decision on substantive and procedural grounds. Not only do we believe the SARC is a flawed forum and decisionmaker for the intra-agency supervisory appeals process, but the agency's announcement of this decision without any prior notice to the public or opportunity to comment fails to take into account fundamental due process rights.

On December 6, 2021, the FDIC issued a Financial Institution Letter (FIL-77-2021) announcing that the OSA is now fully operational, and that the revised Guidelines for Appeals of Material Supervisory Determinations are fully in effect (the "Appeals Guidelines").[3] Only five months later, and

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[1] The American Association of Bank Directors, The American Bankers Association, the Bank Policy Institute, the Consumer Bankers Association, the Independent Community Bankers of America, and the Mid-size Bank Coalition of America (collectively, "the Associations").

[2] 87 Fed. Reg. 30942 (May 20, 2022).

[3] FDIC, Financial Institution Letter, FIL-77-2021, *FDIC Launches Office of Supervisory Appeals* (Dec. 6, 2021) available at: https://www.fdic.gov/news/financial-institution-letters/2021/fil21077.html.

notwithstanding the FDIC's multi-year efforts to establish, fund, staff, and operationalize the OSA, and the public's submission of comments two years ago that overwhelmingly supported the creation of the OSA as an alternative to the SARC, the FDIC Board eliminated the OSA. The OSA was disbanded by summary agenda vote at the Board's May 17, 2022 meeting without substantive discussion and without providing any advance public notice of its intended action.[4] These actions are inconsistent with the "Trust through Transparency" initiatives the FDIC championed in recent years and are a significant and troubling departure from the FDIC's historical practice of promoting open dialogue through the notice and comment process, irrespective of administration. Furthermore, the FDIC's decision to eliminate the OSA, only five months after its implementation, and reconstitute the SARC was effective immediately and did not afford the public any opportunity to supply comments in advance. The FDIC opened this comment period to solicit feedback from the public only after the change had taken effect.

Plainly stated, opening a public comment period following an effective date does not appear to be a reasonable attempt to encourage input from all affected sources and take such feedback into account, especially in the absence of exigent circumstances that warrant immediate agency action. Nevertheless, the Associations strongly encourage the FDIC to reconsider its decision to eliminate the OSA.

BACKGROUND

Section 309(a) of the Riegle Community Development and Regulatory Improvement Act of 1994 ("Riegle Act")[5] mandates that the FDIC establish an "independent intra-agency appellate process" to review material supervisory determinations. When Congress enacted the Riegle Act, it intended to protect the integrity of an intra-agency appeals process by expressly codifying safeguards to promote independent review and protect appellants from bias and retaliation by agency staff. For example, the Riegle Act requires that the FDIC's review must be conducted by an agency official who "does not directly or indirectly report to the agency official who made the material supervisory determination under review."[6] Additionally, the FDIC is required to ensure "(1) any appeal of a material supervisory determination . . . is heard and decided expeditiously; and (2) appropriate safeguards exist for protecting the appellant from retaliation by agency examiners."[7]

In 1995, the FDIC's Board of Directors adopted the Appeals Guidelines to implement the Riegle Act and establish the SARC as an oversight body composed of members: (1) the FDIC's Chairperson (as Chairperson of the SARC); (2) the Director of the Division of Supervision; (3) the Director of Compliance

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[4] As explained by the FDIC in its Sunshine Notice for the Board meeting, when an item is included on the Board's summary agenda, "no substantive discussion of the following items is anticipated. These matters will be resolved with a single vote unless a member of the Board of Directors requests that an item be moved to the discussion agenda." FDIC, *Sunshine Act Meeting,* (June 2, 2022) available at: https://www.fdic.gov/news/boardmatters/2022/2022-05-17-notice.html.

[5] 12 U.S.C. § 4806(a).

[6] 12 U.S.C. § 4806(f)(2).

[7] 12 U.S.C. § 4806(b).

and Consumer Affairs; (4) the FDIC Ombudsman; and (5) the General Counsel.[8] However, in response to persistent criticisms that SARC's composition and processes were not fair and impartial, and therefore did not comply with the Riegle Act's requirements, the FDIC subsequently amended the Guidelines in 2004 to change the structure and composition of the SARC to consist of: (1) one of the FDIC's three inside directors (to serve as the SARC Chairperson); (2) one deputy or special assistant to each of the other two inside directors; and (3) the General Counsel (serving as a nonvoting member of the SARC)[9]. The FDIC also amended the Guidelines in 2017 to more clearly articulate the circumstances in which an insured depository institution could appeal a formal enforcement action.[10]

The criticisms of the SARC process continued, however, and in 2019, the FDIC began exploring potential, additional improvements to the supervisory appeals process and hosted in-person listening sessions in each of the FDIC's seven regions to solicit feedback on topics including: (1) perceived barriers to, or concerns about, resolving disagreements between bankers and the FDIC; (2) timeframes and procedures for pursuing reviews and appeals; (3) information publicly available on appeals and examination disagreements; and (4) composition of the SARC and opportunities to further enhance the independence of the appeals process.[11] In response to this feedback, and due to ongoing criticisms of the SARC, the FDIC published for comment a proposal to replace the SARC with the OSA as an independent, standalone office within the FDIC.[12] The overwhelming sentiment of the commenters – 86% of commenters, or 13 out of 15 commenters – supported the formation of the OSA to better promote independent supervisory reviews and bolster confidence in the process governing appeals of material supervisory determinations. Based on the strong and nearly unified public feedback the FDIC received through its listening sessions and notice and comment, the agency ultimately retired the SARC in favor of the OSA.[13]

After working for nearly eleven months to transition away from the SARC and to form a new, independent office, the FDIC published a Financial Institution Letter announcing the new OSA was fully operational, staffed, and prepared to begin reviewing and deciding appeals of material supervisory determinations.[14] Five months later (less than half the time the agency devoted to create the office), the FDIC Board summarily voted to immediately dismantle the OSA and reconstitute a SARC. Notably, the

[8] 60 Fed. Reg. 15923, 15930 (Mar. 28, 1995).

[9] 69 Fed. Reg. 41479 (July 9, 2004).

[10] 82 Fed. Reg. 34522 (July 25, 2017).

[11] FDIC, FIL-52-2019, *Listening Sessions on Supervisory Appeals and Dispute Resolution Processes* (Sept. 24, 2019) available at: https://www.fdic.gov/news/financial-institution-letters/2019/fil19052.html.

[12] 85 Fed. Reg. 54377 (Sep. 1, 2020).

[13] 85 Fed. Reg. 15175 (March 17, 2020).

[14] FDIC, FIL-77-2021, *FDIC Launches Office of Supervisory Appeals*, (Dec. 6, 2021) available at: https://www.fdic.gov /news/financial-institution-letters/2021/fil21077.html. The FDIC has altered the attachment to the December 6, 2021 adoption of the OSA guidelines on its website by replacing the guidelines attached to the issuance at the time with the May 17, 2022 guidelines.

memorandum and resolution regarding the amended Guidelines were not made available to the public in advance of the meeting and were included only in the Board's summary agenda.[15] The FDIC did not publicly announce (via a press release or otherwise) or publicize the Board's significant action.[16] Subsequently, the FDIC opined only that the SARC is a "more sensible approach" and "from the standpoint of accountability, at the end of the day, we thought a board level committee was really the appropriate approach."[17]

I. The SARC has a long tradition of being an underutilized forum for supervisory appeals because it is not an independent or impartial decision-making body.

During the decades in which the FDIC relied on the SARC to process and decide appeals of material supervisory determinations a remarkably small percentage of banks utilized the SARC review process. This fact has been made clear both by the FDIC and the FDIC's Office of Inspector General. Between 2017 and 2021, nine appeals were filed with the SARC out of 18,413 exams, an average of less than three appeals per year.[18] Similarly, as discussed in the FDIC Office of Inspector General's 2012 report, "[a] total of 23 appeals were filed with the SARC during the 5-year period ended December 31, 2011."[19] Between January 2012 and December 2016, only 17 appeals were filed.[20] Overall, in more than 13 years from January 2007 to 2020, 50 appeals were filed out of 111,516 exams.[21] The low number of appeals submitted to the SARC during its multi-decade tenure is indicative of a flawed appeals process. When the FDIC conducted its 2019 listening sessions, the agency confirmed directly from participants that the SARC was underutilized due to "concerns about bankers' fear of retaliation by FDIC examiners, notwithstanding existing provisions in the Guidelines prohibiting such retaliation. This concern was

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[15] The FDIC did not provide active hyperlinks to the memorandum and resolution regarding the amended guidelines until after the Board meeting, and the FDIC did not otherwise publish these materials in advance of the meeting.

[16] https://www.fdic.gov/news/press-releases/2022/.

[17] FDIC, Quarterly Banking Profile, First Quarter 2022, available at: https://www.youtube.com/watch?v=Crlyv UaLeDY&t=17s.

[18] Jelena McWilliams, *Statement by FDIC Chairman Jelena McWilliams on the Request for Comment on Changes to Supervisory Appeals Process* (Aug. 21, 2020) available at: https://www.fdic.gov/news/speeches/2020/spaug2120 .html.

[19] FDIC Office of the Inspector General, *the FDIC's Examination Process for Small Community Banks*, AUD-20-11 (August 2012) available at: https://www.fdicoig.gov/sites/default/files/publications/12-011AUD.pdf.

[20] Jelena McWilliams, *Statement by FDIC Chairman Jelena McWilliams on the Request for Comment on Changes to Supervisory Appeals Process* (Aug. 21, 2020) available at: https://www.fdic.gov/news/speeches/2020/spaug2120 .html.

[21] *Id*.

cited as a basis for causing bankers to be reluctant to fully engage with the FDIC on material areas of disagreement."[22]

A significant difference between the OSA and the SARC is that the OSA had the ability to make its determinations independent of influence by the FDIC's leadership. Along with the elimination of the OSA, critical due process protections, such as Guidelines that would have restricted *ex parte* communications between FDIC supervisory staff and the OSA, are also being eliminated.[23] The requirement that *ex parte* information be shared with both parties in the appeal is a fundamental right to assure that both parties are aware of information shared with the decision-maker and have an opportunity to respond, as appropriate. The members of the SARC can be expected to have an ongoing relationship with the examination staff making it difficult for the SARC to opine upon material supervisory matters with necessary objectivity and impartiality. Moreover, banks may not have a fair opportunity to present their case as they may not be aware of the entire factual basis for the FDIC initiating the material supervisory determination.

There are serious questions whether the SARC as currently constituted can operate in a fair and impartial manner, or fulfill the Riegle Act's mandate for independent review, when the most senior insiders of the agency are reviewing the actions of – and often interacting with – their subordinate examiners and scrutinizing the internal processes previously developed and/or approved by these same individuals. According to the FDIC's 2020 proposed revisions to the Guidelines, the OSA would help avoid "actual and perceived conflicts of interest" while also ensuring "that individuals deciding on appeals have relevant knowledge and expertise, and would facilitate a robust and responsive supervisory appeals process that will be consistent over time."[24]

II. The FDIC has not sufficiently explained why the OSA could or should no longer function.

In a memorandum that was not published to the FDIC website until after the meeting, the FDIC stated "restoration of the SARC will address staffing concerns inherent in the OSA's structure that *may* negatively affect the appellate process going forward. The OSA is staffed with reviewing officials hired for terms on a part-time, intermittent basis. These constraints *could* make it challenging to recruit and retain individuals with sufficient expertise and judgment to make final supervisory decisions on behalf of the agency. Inability to adequately staff the OSA *would* prevent the FDIC from fulfilling its statutory responsibility to expeditiously hear and decide appeals of material supervisory determinations. By contrast, vacancies on the SARC can be filled more promptly through existing internal processes . . . Reliance on existing staff rather than employees dedicated solely to the appeals function (even on a part-time basis) is also a more cost-effective use of the Deposit Insurance Fund, given the historically

[22] 86 Fed. Reg. 6880, 6881 (Jan. 25, 2021).

[23] 86 Fed. Reg. 6880, 6883 (Jan. 15, 2021) ("The FDIC understands this concern and is addressing it in the final Guidelines by requiring that communications between the Office and either supervisory staff or the appealing institution, including materials submitted to the Office for review, are also shared with the other party to the appeal, subject to limitations on disclosure."); 86 FR 6880, 6887 ("Any communications between the Office and either supervisory staff or the appealing institution will be shared with the other party to the appeal, subject to limitations on disclosure").

[24] 85 Fed. Reg. 54377 (Sep. 1, 2020).

infrequent nature of supervisory appeals."[25] Notably, the memorandum fails to address such issues as the low level of appeals under the SARC, widespread support for its replacement and, except in a conclusory fashion, the threshold issue of independence.

The memorandum lacks an evident factual basis to support the recommendation to eliminate the OSA, and no additional facts were supplied during the May 17, 2022 meeting to justify the Board's abrupt decision to restore a process that is not independent. For example, there is no discussion of an actual staffing shortage that negatively impacted the appellate process, or cited an actual difficulty in recruiting or retaining individuals with sufficient experience, or referenced specific budget constraints that warranted a more cost-effective approach. Each of the hypothetical concerns articulated in the memorandum was previously contemplated by public commentors and the FDIC, and thoughtfully deliberated by the agency when it finalized its 2021 amended Guidelines. Therefore, even if the FDIC were experiencing a staffing shortage only five months after fully operationalizing the office, the FDIC could have referred to any number of alternative solutions it considered in establishing the OSA rather than eliminating the Office entirely. For example, the FDIC could have chosen to form a pool of qualified individuals who could readily fill vacancies in the Office on an as-needed basis. Alternatively, the FDIC could have chosen to broaden the criteria for qualified individuals who could serve in the Office. Or the FDIC could have chosen to fund OSA staff on a part-time or hourly contractual basis rather than full-time basis. The FDIC could and should have explored alternatives.

III. The FDIC should resurrect the OSA, or at a minimum delay action on the SARC to allow for a notice and comment period and the adoption of measures to provide for greater due process, independence and the avoidance of discouragement of use of the appellate process.

Examiners are often asked to make complex judgments on matters such as loan quality and the capabilities of management and the board. They cannot be expected to always get it right and if they are wrong, the consequences to banks can be severe. The FDIC and the industry have a common interest in getting examination results right and having banks trust the appeals process.

The memorandum prepared in advance of the May 17 FDIC board meeting neither acknowledges the weaknesses in the SARC that the FDIC itself highlighted during its extensive review on the topic over the course of several years, nor does it explain how the FDIC is attempting to further enhance the independence and effectiveness of the SARC notwithstanding that the administrative record clearly showed it is a seldom-used appeals process in need of refinement.

The rights to appeal government actions and have those appeals adjudicated by a fair and impartial decisionmaker are essential, foundational tenets of due process. We urge the FDIC to re-adopt the carefully considered and then hastily replaced OSA. At the very least, the FDIC should delay action until there is a comment period where the public has a legitimate opportunity to express its views and the FDIC clearly explains its rationale for its decisions. If the FDIC nonetheless insists on moving forward, we believe that changes should be made to provide greater independence and avoid inappropriate discouragement of use of the appellate process.

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[25] Memo. from Harrel Pettway, General Counsel, to the Board of Directors, *Amendments to the Guidelines for Appeals of Material Supervisory Determinations* (May 17, 2022) available at: https://www.fdic.gov/news/board-matters/2022/2022-05-17-notice-sum-b-mem.pdf (emphasis added).

Sincerely,

David Baris
President
American Association of Bank Directors

David Androphy
Senior Manager
Prudential Regulation & Asset Management
American Bankers Association

Gregg Rozansky
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American Association of Bank Directors: The American Association of Bank Directors (AABD), founded in 1989 in the midst of the S&L crisis, provides directors of U.S. banks and savings institutions with the educational, informational and training resources to serve their institutions effectively and in a manner that will minimize risk of personal liability. It also represents their interests before federal and state legislative bodies, banking supervisory agencies and judicial bodies. It has established a Task Force of former banking agency senior officials, bank directors and CEOs, bank counsel, and academics to study how changes in law, regulation, and bank regulatory practices may minimize the risk of personal liability of bank directors consistent with safe and sound banking.

American Bankers Association: The American Bankers Association is the voice of the nation's $24 trillion banking industry, which is composed of small, regional and large banks that together employ more than 2 million people, safeguard $19.9 trillion in deposits and extend $11.4 trillion in loans.

Bank Policy Institute: BPI is a nonpartisan public policy, research and advocacy group, representing the nation's leading banks and their customers. Our members include universal banks, regional banks, and the major foreign banks doing business in the United States. Collectively, they employ almost two million Americans, make nearly half of the nation's small business loans, and are an engine for financial innovation and economic growth.

Consumer Bankers Association: The Consumer Bankers Association is the only national financial trade group focused exclusively on retail banking and personal financial services—banking services geared toward consumers and small businesses. As the recognized voice on retail banking issues, CBA provides leadership, education, research, and federal representation for its members. CBA members include the nation's largest bank holding companies as well as regional and super-community banks that collectively hold two-thirds of the total assets of depository institutions.

Independent Community Bankers of America: The Independent Community Bankers of America® creates and promotes an environment where community banks flourish. With nearly 50,000 locations nationwide, community banks constitute roughly 99 percent of all banks, employ nearly 700,000 Americans and are the only physical banking presence in one in three U.S. counties. Holding nearly $5.9 trillion in assets, over $4.9 trillion in deposits, and more than $3.5 trillion in loans to consumers, small businesses and the agricultural community, community banks channel local deposits into the Main Streets and neighborhoods they serve, spurring job creation, fostering innovation and fueling their customers' dreams in communities throughout America. For more information, visit ICBA's website at www.icba.org.

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