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FDIC Creates Office of Supervisory Appeals

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As bankers know, challenging agency decisions and actions can be fraught with concern over the potential, whether justified or not, for agency “retribution.” As a result, the Federal Deposit Insurance Corporation (FDIC) has undertaken a comprehensive review of potential alternatives and has sought and received substantial industry input on the issue. That input included conducting industry “listening sessions” in the various FDIC offices, culminating in the issuance of Revised Guidelines for Appeals of Material Supervisory Determinations through an FIL dated January 19, 2021. On December 6, 2021, the FDIC issued a follow-up FIL announcing the formal opening of its Office of Supervisory Appeals (OSA).

The process results from mandates contained in the Riegle Community Development and Regulatory Improvement Act, which included directives to establish a process for review of material supervisory determinations arising in conjunction with FDIC oversight. Establishment of the OSA represents further recognition by the FDIC of the issues pertaining to reluctance of bankers to engage in appeals of material supervisory determinations, which include such things as CAMELS ratings, IT ratings, Trust ratings, CRA ratings, consumer compliance ratings, reserve allocations, loan classifications, alleged violations of law or regulation, Truth in Lending, enforcement actions such as MOU's/MRA's, and a variety of other supervisory findings and actions. A variety of other agency actions are expressly excluded.

Here are few items of note:

- Attempts at good-faith resolution of issues with examiners and the appropriate FDIC Regional Office prior to submission to the OSA are encouraged but not necessary.
- The FIL provides procedural directions for the appeal process. The FDIC Ombudsman process remains in effect, and the OSA process provides a further avenue of redress for institutions.

- Decisions by the OSA will be published (with redaction of appropriate identifying information) and will therefore be available for consideration by institutions considering an appeal.
- Actions under appeal that also involve determinations by state banking authorities will be disclosed to state authorities and their input will be sought if appropriate.
- Appeals will not serve to delay or impede any formal or informal supervisory action or enforcement action in progress during the appeal or the FDIC's authority to take such actions.
- Pending applications to the FDIC that may be affected by matters under appeal will be stayed by a pending application to the OSA.
- Examiner retribution or retaliation is, of course, prohibited.
- The OSA will be staffed with "reviewing officials" with bank supervisory or examination experience.

Only former and not current government officials will be eligible to serve. Panels of three or five reviewing officials with no conflicts will review and decide the appeals.

Establishment of the OSA provides a new vehicle for bankers and institutions to utilize in good faith for review of important matters where there is a true concern with regard to material agency findings. The stated goal of the FDIC in establishing and staffing the OSA as stated in the December 6 FIL is "... ensuring consistency and accountability in the examination process." While it will be difficult to overcome natural concerns with regard to the impact of undertaking an OSA appeal, hopefully institutions will in fact do so and take advantage of the new appeals process, when and if they feel that doing so is appropriate and justified, without fear of retribution.