

transaction surveys; opt-out web surveys); and in-person observation testing (e.g., website or software usability tests).

Request for Comment

Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the FDIC's functions, including whether the information has practical utility; (b) the accuracy of the estimates of the burden of the information collection, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. All comments will become a matter of public record.

Federal Deposit Insurance Corporation.

Dated at Washington, DC, on March 12, 2020.

Robert E. Feldman,
Executive Secretary.

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FEDERAL RESERVE SYSTEM

[Docket No. OP-1696]

Internal Appeals Process for Material Supervisory Determinations and Policy Statement Regarding the Ombudsman for the Federal Reserve System

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Final policy.

SUMMARY: The Board is revising its internal appeals process for institutions wishing to appeal an adverse material supervisory determination and its policy regarding the Ombudsman for the Federal Reserve System.

DATES: The amendments and policy are applicable on April 1, 2020.

FOR FURTHER INFORMATION CONTACT:

Jason A. Gonzalez, Senior Special Counsel, (202) 452-3275, Jay Schwarz, Special Counsel, (202) 452-2970, or Lucas E. Beirne, Counsel, (202) 452-2933, Legal Division, Ryan Lordos, Deputy Associate Director, (202) 452-2961, Division of Supervision & Regulation, or Jeremy Hochberg, Managing Counsel, (202) 452-6496, or Maureen Yap, Senior Counsel, (202) 452-2642, Division of Consumer and Community Affairs, for matters relating to the appeals process; and Margie Shanks, Ombudsman, (202) 452-3584,

or Jay Schwarz, Special Counsel, (202) 452-2970, or Lucas E. Beirne, Counsel (202) 452-2933, Legal Division, for matters relating to the functions of the Ombudsman. Telecommunications Device for the Deaf (TDD) users may call (202) 263-4869.

SUPPLEMENTARY INFORMATION:

I. Background

In February 2018, the Board of Governors of the Federal Reserve System ("Board") invited public comment on proposed amendments to its intra-agency process for appeals of material supervisory determinations and to its policy regarding the Ombudsman of the Federal Reserve System ("Federal Reserve").¹

A. Prior Appeals Process and Ombudsman Policy

The Board first established guidelines for an appeals process in March 1995, when, after providing the opportunity to comment, the Board published final guidelines to implement section 309 of the Riegle Community Development and Regulatory Improvement Act of 1994 (the "Riegle Act"), 12 U.S.C. 4806. Section 309 requires the Federal banking agencies, including the Board, to maintain an independent, intra-agency appellate process for review of material supervisory determinations.

In general, the prior guidelines provided that all institutions that are subject to Federal Reserve oversight, including bank holding companies, U.S. agencies and branches of foreign banks, and Edge corporations, may appeal any material supervisory determination.² Appeals were decided within a specified time frame by a review panel selected by the Reserve Bank, in consultation with Board staff, that was composed of persons who were not employed by the Reserve Bank and had not participated in, or reported to the persons who made the material supervisory determination under review. An institution was granted the further right to appeal an adverse decision by the review panel first to the President of the Reserve Bank that made the material supervisory determination and ultimately to a member of the Board. The prior guidelines also had safeguards to protect institutions that filed appeals from examiner retaliation.

The prior guidelines applied to any "material supervisory determination," which included any material matter relating to the examination or inspection process. The only matters excluded from this appeals process were

those matters for which an alternative, independent process of appeal exists, such as the imposition of a Prompt Corrective Action directive or a cease and desist order or other formal actions. As noted in the prior guidelines, institutions were encouraged to express questions or concerns about supervisory determinations during the course of an inspection or examination, consistent with the longstanding Federal Reserve practice of resolving problems informally during the course of the inspection or examination process.

The Board's prior Ombudsman policy was adopted in August 1995. It specified the responsibilities of the Ombudsman, which include serving as a point of contact for complaints regarding any Federal Reserve action, referring complaints to the appropriate person, and investigating and resolving complaints of retaliation.

B. Proposed Appeals Process and Ombudsman Policy

The Board proposed to amend its appeals process for material supervisory determinations in several ways. Specifically, the Board proposed to reduce the levels of appeal from three to two and to enhance independent review of the matter by providing that Federal Reserve and Board staff not affiliated with the affected Reserve Bank review the matter at both appeal levels. The Board proposed establishing specific standards of review to be applied in the two levels of appeal. The panel that reviews the initial appeal would be required to approach the determination being appealed as if no determination had previously been made by Federal Reserve staff. The initial review panel would consider a record that includes any relevant materials submitted by the appealing institution and Federal Reserve staff, and have the discretion to augment the record in appropriate circumstances. The final review panel would consider whether the decision of the initial review panel is reasonable and supported by a preponderance of the evidence in the record, but would not seek to augment the record with new information. To maximize transparency, the decision of the final review panel would be made public. Finally, the Board proposed to establish an accelerated process for appeals that relate to or cause an institution to become critically undercapitalized under the Prompt Corrective Action ("PCA") framework to better assure that a review of an adverse material supervisory determination occurs within the PCA time frame of 90 days.

The Board also proposed changes to the Ombudsman policy. The proposed

¹ 83 FR 8391 (Feb. 27, 2018).

² 60 FR 16470 (Mar. 30, 1995).

revisions would formalize many of the current practices of the Ombudsman, including receiving supervisory-related complaints and material supervisory determination appeals. In addition, the proposed revisions would allow the Ombudsman to attend meetings or deliberations relating to an appeal as an observer, if requested by the institution or Federal Reserve staff. The proposed changes also would formalize the Ombudsman's role as the decision-maker with respect to claims of retaliation.

Additional details of the proposed process and policy are described further below in connection with the comments that relate to them.

II. Overview of Changes to the Proposal

General Summary of Comments

The Board received five comment letters regarding the proposal from industry trade associations and a law firm. While commenters generally expressed support for the proposed amendments, most commenters recommended revisions to the proposed amendments. Among the suggestions made by the commenters are that the proposal be revised to:

- Clarify that Matters Requiring Attention ("MRAs") and Matters Requiring Immediate Attention ("MRIAs") are appealable material supervisory determinations;
- Permit an institution's senior management to decide whether to appeal a material supervisory determination instead of requiring the board of directors to approve filing an appeal;
- Permit extensions of the time to file an appeal of a material supervisory determination;
- Permit an institution to meet with the review panels when the institution makes the request in a timely manner;
- Articulate a clear and unequivocal *de novo* standard of review;
- Empower the Ombudsman to act as the decision-maker in the appeals process; and
- Empower the Ombudsman to decide whether an examiner should be excluded from future examinations for substantiated claims of retaliation.

In response to the comments, the Board has revised the final appeals process in a number of significant ways. In particular, as discussed below, the Board has modified the proposal to:

- Clarify that MRAs and MRIAs are appealable material supervisory determinations;
- Permit an institution's senior management to file an appeal, provided that management informs the

institution's board of directors of their decision to file an appeal and keeps the board informed of the status of the appeal;

- Permit an institution to request an extension of time to file an appeal in appropriate circumstances; and
- Clarify that, at an institution's request, the initial review panel must schedule a meeting with the institution.

The final appeals process will apply to all material supervisory determination appeals initiated after the effective date.

Appeals Process

Since 1995, the Board has had the opportunity to observe the operation of the appeals guidelines over a significant period of time and receive feedback from supervised institutions. Based on that experience and feedback, the Board proposed to amend its appellate process in several ways. In particular, the proposal was designed to improve and expedite the appeals process, particularly for institutions that are in troubled condition. In doing so, the proposal attempted to strike an equitable balance among accommodating the interests of the institutions the Federal Reserve supervises in a substantive review of material supervisory determinations, the institutions' due process rights, the institutions' interest in achieving a swift resolution of any material supervisory determination in dispute, and the interests of both an appealing institution and the Federal Reserve in the efficient use of limited resources. In addition, the proposal was intended to lay out a more explicit process that will allow more uniform application than has occurred under the existing guidelines.

Definition of Material Supervisory Determination

The proposal included a detailed description of what constitutes a material supervisory determination in order to promote a better understanding of whether a supervisory determination is material.

Commenters suggested that the proposal be clarified with respect to what qualifies as a material supervisory determination. In particular, commenters indicated that MRAs and MRIAs should be specifically listed as appealable material supervisory determinations. That Board agrees that MRAs and MRIAs are material by definition and the final appeals process has been modified to clarify that they will all be appealable as material supervisory determinations. The Board recognizes, however, that some examination findings are issued jointly

with other agencies. In these circumstances, the Board will consider an appeal to the extent the material supervisory determination was issued by the Board, unless an independent right of appeal has been established, such as with respect to Shared National Credit program determinations. Likewise, actions by the Board to refer matters to other relevant government agencies, such as a written notice of a referral to the Attorney General pursuant to the Equal Credit Opportunity Act ("ECOA") or a notice of a referral to the Secretary of Housing and Urban Development ("HUD") for violations of the ECOA or the Fair Housing Act are not appealable material supervisory determinations because they are referrals of information upon which another agency may make a determination. In addition, the Board is clarifying that it only issues material supervisory determinations in writing.

Who Must Approve an Appeal

The proposal maintained the requirement in the Board's current appeals process that the decision to bring an appeal must be made by an institution's board of directors. One commenter suggested that the Board should permit senior management to bring an appeal because the decision to pursue an appeal falls within management's role of conducting the day-to-day operations of the institution, and it would be appropriate for management to keep the institution's board of directors apprised of any such decision, consistent with the board of directors' oversight role. The Board has revised the appeals process to adopt this suggestion because it is consistent with an efficient and timely appeals process and reflects a reasonable balance of responsibilities between senior management and the institution's board of directors. To reflect the significance, however, of the decision to bring an appeal, the process imposes an obligation on senior management to inform the institution's board of directors of the decision, and to keep the board of directors informed of the status of the appeal.

Timing of Appeals and Levels of Review

The Board's current appeals process was designed with three levels of appeal in an attempt to ensure objectivity in the appeals process. However, experience has shown that objectivity can be ensured with a more streamlined and efficient process. With these goals in mind, the proposal reduced the levels of appeal from three to two and enhanced independent review of the matter by providing that Federal Reserve and

Board experts not affiliated with the affected Reserve Bank review the matter at both appeals levels.

In addition to removing one level of appeal, the proposal addresses a timing conflict between the PCA framework under section 38 of the Federal Deposit Insurance Act and the Board's existing appeals process.³ The PCA framework requires that, no later than 90 days after an insured depository institution becomes critically undercapitalized, the appropriate Federal banking agency must either appoint a receiver for the institution or take such other action that the agency determines, with the concurrence of the Federal Deposit Insurance Corporation ("FDIC"), would better achieve the purposes of PCA.⁴ Although the banking agency's decision to appoint a receiver for a critically undercapitalized institution is not appealable under the Riegle Act, some material supervisory determinations (such as reclassifications of loans) may cause an institution to become critically undercapitalized and, unless reversed, result in receivership.

The proposal described an accelerated process for appeals that relate to or cause an institution to become critically undercapitalized under the PCA framework in order to better assure that a review of such an adverse material supervisory determination occurs within the PCA time frame of 90 days. The goal of this accelerated process is to provide a thorough, adequate, and independent review of the material supervisory determination that places the institution at risk of receivership. Notwithstanding the proposal's timeline, situations may arise that would prevent an appeal from being completed before the PCA framework requires a receivership to be imposed. In these situations, the existence of an outstanding appeal would not prevent the Board from meeting its statutorily mandated obligation under the PCA framework to appoint a receiver, in which case an appeal would become moot.

One commenter suggested that an institution be permitted to seek a 30-day extension of the time to file an initial appeal or a final appeal. Given that the appeals process is intended to be efficient and provide a swift resolution of disputes, in most circumstances extensions will not be warranted. Nevertheless, the final appeals process has been revised to permit an institution to seek reasonable extensions of time to file the initial appeal or the final appeal for good cause, which may be granted in

the discretion of the appropriate division director in consultation with the Board's General Counsel or his designee. Relatedly, there may also be situations where, given the facts, circumstances, or complexity of an appeal, the final review panel may need additional time to consider the matter. The final guidelines have been modified, therefore, to permit the final review panel to grant itself an extension in appropriate circumstances.

One commenter further suggested that the proposal be clarified to include more detail regarding how deadlines are calculated. The final appeals process has been revised to clarify that days mean calendar days, and that when a deadline falls on a weekend or federal holiday, the deadline moves to the following business day.

Contents of Appeal, Record, and Scope

The proposal provided that prior to a material supervisory determination being made, it is expected that the institution will have provided all available information it believes to be relevant to the examination staff to assist them in making the determination. That is, generally, the initial review panel should be able to reach its decision based on the facts and data developed during the examination process. To clarify this point, the final appeals process has been revised to state that, absent good cause, as determined in the discretion of the initial review panel, any facts or data submitted by the institution in connection with the appeal will be limited to those which were made available to examination staff prior to the date on which the written material supervisory determination was delivered to the institution. However, as noted in the proposal, the initial review panel may, in its discretion, conduct additional fact-finding.

One commenter suggested that the final review panel be permitted to review evidence that was not available at the time of the initial review panel's consideration of the appeal. Given the final review panel's more circumscribed and deferential review, the final review panel will be confined to the record before it. Accordingly, the institution should take all necessary steps to insure that all relevant information has been presented to the initial review panel in a timely manner.

Initial Review Panel

The proposal provided that the initial review panel be composed of three Reserve Bank employees. For certain matters, however, the panel may benefit from the specialized expertise of a

Board employee to aid evaluation of the appropriateness of the material supervisory determination. Accordingly, the final appeals process has been revised to allow the division director, in appropriate circumstances, to appoint a Board employee as one of the three members of the initial review panel.

Meetings With Appeals Panels

The proposal provided that the initial review panel and the final review panel could choose to meet with the appealing institution. One commenter suggested that the institution be permitted to meet with each review panel in all instances in which an institution timely requests such a meeting. The final appeals process has been revised to provide that the initial review panel must schedule a meeting with the institution if requested by the institution. The initial review panel should consult with the institution with respect to the selection of the time and date of the meeting; however, the final decision of a time and date for the informal meeting remains at the discretion of the initial review panel. Even if the institution does not request a meeting with the initial review panel, the panel retains the discretion to schedule such a meeting. Given the more circumscribed review conducted by the final review panel and the tighter deadlines for issuing the decision, whether an informal meeting with the institution should occur is left to the discretion of the final review panel.

Standard of Review

The proposal described specific standards of review to be applied at each level of appeal. The panel that reviews the initial appeal would make its own supervisory determination and not defer to the judgment of the Reserve Bank staff that made the material supervisory determination. Under this standard, the panel would have the discretion to rely on examination workpapers and other materials developed by Federal Reserve staff during an examination or materials submitted by the institution if it determines it is reasonable to do so. In addition, the standard was clarified to reflect that the support provided by the record is to be evaluated for a preponderance of the evidence. As noted by a few commenters, this approach may be considered a *de novo* standard of review.

The proposal provided that the final review panel will consider whether the decision of the initial review panel is reasonable. One commenter suggested that the final review panel standard of review should be *de novo*. The role of

³ 12 U.S.C. 1831o.

⁴ See 12 U.S.C. 1831o.

the final review panel in the proposal is to serve a role analogous to that of an appeals court that corrects errors in the decision made by the initial review panel. Accordingly, a *de novo* standard is not appropriate given the panel's function.

Notice of Decision

One commenter suggested that the appealing institution be provided the record on appeal from the initial review panel. In many instances, the record will include the voluminous and confidential examination work papers, the majority of which are not pertinent to the determination being appealed and not appropriate for dissemination to the appealing institution. The final appeals process has been revised to require that the initial review panel be precise in identifying the information upon which it relied in reaching its conclusion, and that it promptly provide such information to the institution upon the institution's request to the extent permitted by law.

Final Decisionmaker

The proposal provided that if the appealing institution continues to have concerns regarding the material supervisory determination following the initial review panel's decision, the appealing institution may request a subsequent final review conducted by a review panel composed primarily of Board staff. One commenter suggested that the final decision should rest with the Ombudsman or a Governor. The revised policy, however, relies on the decisionmakers having specialized subject matter expertise. Moreover, the policy permits either the institution or Federal Reserve personnel to request that the Ombudsman observe the appeals process.

Publication of Decisions

In order to maximize transparency, the proposal provided that the decision of a final review panel would be made public with appropriate redactions. Several commenters asked that any information that could potentially reveal the identity of the appealing institution be redacted from published decisions and summaries of decisions. Redaction of identifying information will generally be appropriate, particularly when disclosure would cause harm to the institution. Moreover, where redaction would be inadequate to ensure the confidentiality of the appealing institution, the proposal provided the Board the discretion to publish a summary of the decision instead. The final appeals process retains discretion for the Board to

determine what types of redactions are appropriate or if a summary should be published instead. Several commenters requested that a centralized location on the Board's website be dedicated to published decisions. The published decisions will be made available on the Board's public website in a findable, searchable manner. One commenter further suggested that redacted initial review panel decisions also be published. The majority of initial review panel members are not Board staff or policymakers, and accordingly, their decisions should not be available for citation or precedent.

Ombudsman Policy

The Board finalized a revised Ombudsman policy in conjunction with finalizing the changes to the appeals process. Currently, the Ombudsman receives complaints related to the Federal Reserve's supervisory process, which may include an appeal request. The revisions to the policy formalize the Ombudsman's role with respect to appeals and provide that the Ombudsman may attend meetings or deliberations relating to the appeal as an observer, if requested by the institution or Federal Reserve personnel. In addition, the revisions formalize the Ombudsman's role as the decisionmaker with respect to claims of retaliation. The revisions also emphasize the Ombudsman's availability to facilitate the informal resolution of concerns that could ultimately lead to formal appeals and provide for tracking of complaints made by regulated institutions. Finally, the Board has updated the policy with respect to the Ombudsman's role in consumer complaint appeals. The revisions add detail regarding the consumer complaint appeal process and align current practices with the policy. In particular, the policy now explains with whom a consumer may file an appeal, who reviews appeals, and how the Ombudsman collaborates with other Board staff on certain appeals.

One commenter suggested that the Board should articulate procedures for educating examiners about the types of actions that would constitute retaliation and the penalties that would result for retaliation. This comment is well taken, but the Ombudsman policy is not the appropriate place for it to be addressed. The Board expects to take this comment into consideration as it develops training materials for its examiners.

Similarly, a commenter suggested that the Ombudsman should be empowered to decide whether an examiner should be excluded from future examinations of the institution where a finding has been made that the examiner retaliated

against that institution. The Ombudsman's role is to investigate claims of retaliation, and to make factual findings. The Ombudsman may also recommend to the appropriate division director(s) that the next examination of the institution that may lead to a material supervisory determination exclude personnel involved in the claim of retaliation. However, the ultimate responsibility for the assignment of examiners correctly rests with the appropriate division director at the Board.

Other Issues

In addition to the comments received regarding the appeals process and Ombudsman policy, the Board also received several comments unrelated to either proposal. First, one commenter suggested that the Board examine why the internal appeals process has historically not been used by Board regulated institutions. One of the Board's goals in putting revisions to the appeals process out for public comment was to identify changes that would make the process more useful and approachable for institutions. The Board encourages institutions to make use of the revised process.

Next, a commenter suggested that the Board suspend the supervisory framework over insurance savings and loan holding companies pending a complete review of how best to supervise such institutions. This comment is outside the scope of the appeals process and Ombudsman policy and will not be addressed here. Relatedly, a commenter asked that the Board provide institutions with regular interim updates by on-site examiners and provide drafts of ratings determinations before formally issuing ratings letters. These comments are also outside the scope of the appeals process and Ombudsman policy; however, the Board believes that on-site examiners ordinarily engage in updates and communications throughout the course of the examination.

Process for Appeals of Material Supervisory Determinations

The Board is committed to maintaining an independent, intra-agency process to review appeals of material supervisory determinations that complies with section 309 of the Riegle Community Development and Regulatory Improvement Act of 1994, 12 U.S.C. 4806.

The purpose of this document is to establish a comprehensive appellate process for material supervisory determinations. In order to ensure that institutions will be granted the same

appellant rights regardless of the Federal Reserve district in which they reside, appeals will be administered using procedures that are consistent with this process. This process includes an accelerated review process to improve its alignment with the Prompt Corrective Action (“PCA”) framework under section 38 of the Federal Deposit Insurance Act (“FDI Act”).

A. In General

Any institution about which the Federal Reserve makes a written material supervisory determination is eligible to utilize the appeals process. An eligible institution includes a state member bank, bank holding company and its nonbank subsidiaries, U.S. agency or branch of a foreign bank, Edge and agreement corporation, savings and loan holding company, third party electronic data processing servicer, systemically important nonbanking financial organization identified by the Financial Stability Oversight Council, and any other entity examined or inspected by the Federal Reserve.

An appeal under this process may be made of any written material supervisory determination. A “material supervisory determination” includes, but is not limited to, any material determination relating to examination or inspection composite ratings, material examination or inspection component ratings, the adequacy of loan loss reserves and/or capital, significant loan classification, accounting interpretation, Matters Requiring Attention (“MRAs”), Matters Requiring Immediate Attention (“MRIAs”), Community Reinvestment Act ratings (including component ratings), and consumer compliance ratings. The term does not include any supervisory determination for which an independent right of appeal exists or a referral to another government agency. Excluded actions include, for example, PCA directives issued pursuant to section 38 of the FDI Act; an action to impose administrative enforcement actions under the FDI Act, the Home Owners’ Loan Act of 1933, the Dodd-Frank Wall Street Reform and Consumer Protection Act, the Bank Holding Company Act of 1956 (“BHC Act”) or other applicable act; a capital directive; an order related to approval or denial of a transaction issued pursuant to section 3 or 4 of the BHC Act; written notice of a referral to the Attorney General pursuant to the Equal Credit Opportunity Act (“ECOA”) or a notice to the Secretary of Housing and Urban Development for violations of the ECOA or the Fair Housing Act; and determinations made under the Shared National Credit Program.

B. General Procedures for Appealing a Material Supervisory Determination

In general, the appeals process is an informal process that is not subject to the adjudicative provisions of the Administrative Procedures Act (5 U.S.C. 554, 556–557). An appeal of a material supervisory determination shall be filed and considered pursuant to the following procedures:

(1) Authorization to File. Any appeal must be approved by the board of directors of the eligible institution or by its senior management in consultation with its board of directors. Senior management is defined as the core group of individuals directly accountable to the board of directors for the sound and prudent day-to-day management of the firm, or in the case of a U.S. agency or branch of a foreign bank, responsible for the bank’s U.S. operations. Senior management shall inform the board of directors of the substance of the appeal before filing the appeal and shall keep the board of directors informed of the status of the appeal.

(2) Timelines and Contents. The institution must file the appeal in writing with the Board’s Ombudsman within 30 calendar days of the earlier of the date the material supervisory determination was sent electronically, the date the institution received the written determination, or the date the Reserve Bank received confirmation that the institution received the determination, with a copy to the officer in charge of supervision at the appropriate Reserve Bank. When the deadline for filing an appeal falls on a weekend or federal holiday, the deadline for the appeal shall be the next business day. The institution may file a written request for an extension of the time to file an appeal with the Ombudsman, which request shall state good cause for granting the extension. Such request shall be granted in the sole discretion of the director of the appropriate division of the Board in consultation with the Board’s General Counsel or his designee. The appeal must include a clear and complete statement of all relevant facts and issues, as well as all arguments that the institution wishes to present, and must include all relevant and material documents that the institution wishes to be considered. Prior to a material supervisory determination being made, it is expected that the institution will have provided all available information it believes to be relevant to the examination staff to assist them in making the determination. Accordingly, absent good cause, as determined in the

discretion of the initial review panel, any facts or data submitted by the institution in connection with the appeal shall be limited to those that were made available to examination staff prior to the date on which the written material supervisory determination was delivered to the institution.

(3) Distribution of Appeal. After receipt of a request for an appeal, the Board’s Ombudsman shall promptly notify the director of the appropriate division of the Board and the Board’s General Counsel of the appeal.

(4) Initial Review Panel. Within ten calendar days of receipt of a timely appeal, the director of the appropriate division of the Board or an officer designated by the appropriate division director must appoint three Reserve Bank employees to serve as an initial review panel to consider the appeal and an attorney to advise the initial review panel in the exercise of its responsibilities. In appropriate circumstances, the appropriate division director may appoint a Board employee as one of the three members of the initial review panel. The members of the initial review panel and the appointed attorney must not have been substantively involved in any matter at issue; must not directly or indirectly report to any person(s) who made the material supervisory determination under review; must not be employed by the Reserve Bank that made the material supervisory determination under review; and must have relevant experience to contribute to the review of the material supervisory determination. An individual shall be considered to have been substantively involved in a material supervisory determination if the individual was personally consulted regarding the issue being determined and provided guidance regarding how it should be resolved. The initial review panel shall determine all procedural issues regarding the initial review.

(5) Initial Review Meeting. The initial review panel shall conduct an informal appeal meeting if the institution requests such a meeting at the time it files its appeal or if the panel, in its discretion, decides to hold such a meeting. If such a meeting is to be conducted, the panel should, in consultation with the institution, schedule a meeting for a date that is no later than 21 calendar days after the date the appeal is received. The panel shall notify the institution in writing of the date, time, and place of the meeting. The institution may appear at the appeal meeting personally or through counsel to make an oral presentation to the panel. Panel members may ask

questions of any person participating in the meeting. The institution and the Reserve Bank may not cross-examine persons participating in the meeting. A verbatim transcript of the meeting may be taken if the institution requests a transcript and agrees to pay all expenses, and if the initial review panel determines that a transcript would assist the panel in carrying out its responsibilities. The meeting provided under this process is not governed by formal rules of evidence. No formal discovery is required or permitted. The initial review panel may make any rulings reasonably necessary to facilitate the effective and efficient operation of the meeting.

(6) Record. The record of the appeal shall at a minimum include the original material supervisory determination being appealed, the materials submitted by the institution in connection with the appeal, and the materials identified by Federal Reserve staff as relevant to the material supervisory determination being appealed, including workpapers. In addition, the initial review panel may, in its discretion, conduct additional fact finding. For example, the initial review panel may supplement the record by soliciting the views of outside parties, including staff from the Board, the Reserve Banks, other supervisory agencies (for example, in cases of joint examinations or inspections), and the Federal Reserve staff who participated in making the material supervisory determination being appealed. The entire record of the appeal, including the decision of the initial review panel and any meeting transcripts or material(s) submitted in connection with any subsequent final review, shall be considered confidential supervisory information of the Board.

(7) Standard of Review Applied by Initial Review Panel. The initial review panel shall conduct a review of the material supervisory determination on appeal. The panel must consider whether the Reserve Bank's material supervisory determination is consistent with applicable laws, regulations, and policy, and supported by a preponderance of the evidence in the record. In doing so, the panel shall make its own supervisory determination and shall not defer to the judgment of the Reserve Bank staff that made the material supervisory determination though it may rely on any examination workpapers developed by the Reserve Bank or materials submitted by the institution if it determines it is reasonable to do so.

(8) Notice of Decision. Within 45 calendar days after the date the appeal is received, the initial review panel

shall provide written notice of its decision to the senior management and the board of directors of the institution. A copy of the decision will be provided to the director of the appropriate division of the Board, the officer in charge of supervision at the appropriate Reserve Bank, and the Board's Ombudsman. The notice of decision shall contain a statement of the basis for the initial review panel's decision to continue, terminate, or otherwise modify the material supervisory determination(s) at issue or to remand consideration of the material supervisory determination at issue to the examiners that made the determination to allow them to consider additional evidence presented in connection with the appeal. The notice of decision shall identify the information upon which the panel relied in reaching its conclusion, and the panel shall promptly provide that information to the institution upon the institution's request to the extent permitted by law. Such request must be made within seven calendar days of receipt of the notice of decision. The notice of decision shall also indicate that the institution may request a final review as set forth in this subpart by filing a written request with the Board's Ombudsman. The initial review panel may extend the period for issuing a decision by up to 30 calendar days if the panel determines that the record is incomplete and additional fact-finding is necessary for the panel to issue a decision.

(9) Use of Confidential Supervisory Information. If the Reserve Bank or the Board has confidential supervisory information from another regulated institution that is pertinent to the appeal, they may elect to use that information, provided that the information is entered into the record for the appeal and provided to the appealing institution, subject to limitations on disclosure, including those imposed by the Board's applicable regulations,⁵ and redaction of all information not relevant to the appeal.

(10) Request for Final Review. Within 14 calendar days after notice of decision by the initial review panel, the institution, at the direction of its board of directors or senior management in consultation with the board of directors, may appeal that decision to a final review panel by filing a written request for final review with the Board's Ombudsman, with a copy to the officer in charge of supervision at the appropriate Reserve Bank. Senior management shall inform the board of

directors of the substance of the appeal before filing the appeal and shall keep the board of directors informed of the status of the appeal. The request for final review must state all the reasons, legal and factual, the institution disagrees with the initial review panel's decision. The institution may file a written request for an extension of the time to file an appeal with the Ombudsman, which request shall state good cause for granting the extension. The decision to grant such a request shall be in the sole discretion of the director of the appropriate division of the Board in consultation with the Board's General Counsel or his designee.

(11) Waiver of Final Review. Failure to timely request final review in a manner consistent with this process shall constitute a waiver of the opportunity for final review, and the decision of the initial review panel shall constitute a final and unappealable material supervisory determination.

(12) Distribution of Final Review Request. After receipt of a request for final review, the Board's Ombudsman shall promptly notify the director of the appropriate division of the Board and the Board's General Counsel of the request for final review.

(13) Final Review Panel. When an institution files a request for final review, the director of the appropriate division of the Board shall promptly appoint three individuals to serve as a final review panel to permit completion of the appeal within the applicable period. The final review panel shall include at least two Board employees, at least one of whom must be an officer of the Board at the level of associate director or higher. The Board's General Counsel shall appoint an attorney to advise the final review panel in the exercise of its responsibilities. The members of the final review panel and the appointed attorney must not be employed by the Reserve Bank that made the material supervisory determination under review; must not have been members of the initial review panel; and must not have been personally consulted regarding the issue being determined and provided guidance regarding how it should be resolved, or directly or indirectly report to the person(s) who made the material supervisory determination under review. The final review panel shall determine all procedural issues regarding the final review.

(14) Final Review Meeting. The final review panel may determine in its discretion to have an informal appeal meeting at which a representative of the institution or counsel may appear

⁵ See 12 CFR 261.20.

personally to make an oral presentation to the panel. No facts may be introduced in this meeting that are not contained in the record upon which the initial review panel made its decision. In the event the panel decides to have a meeting with the appealing institution, panel members may ask questions of any person participating in the meeting. The institution may not cross-examine persons participating in the meeting. A verbatim transcript of the meeting may be taken at the cost of the Board if the final review panel determines that a transcript would assist the panel in carrying out its responsibilities. A meeting provided under this process is not governed by formal rules of evidence. No formal discovery is required or permitted. The final review panel may make any procedural rulings reasonably necessary to facilitate the effective and efficient operation of the meeting.

(15) *Scope of Final Review.* The scope of the final review shall be confined to the record upon which the initial review panel made its decision.

(16) *Standard of Review of Final Review.* The final review panel shall determine whether the decision of the initial review panel is reasonable. In reaching this determination, the panel should consider whether the decision was based on a consideration of the applicable law, regulations, and policy, and whether there has been a clear error of judgment. The final review panel may affirm the decision of the initial review panel even if it is possible to draw a contrary conclusion from the record presented on appeal.

(17) *Notice of Final Review Decision.* Within 21 calendar days of the filing of a request for final review, the director of the appropriate division of the Board shall provide written notice of the decision of the final review panel to the senior management and the board of directors of the institution. The final review panel may continue, terminate, or otherwise modify the material supervisory determination(s) at issue or remand consideration of the material supervisory determination at issue to the examiners who made the determination to allow them to consider additional evidence presented in connection with the appeal. The notice of decision shall contain a statement of the basis for the final review panel's decision. A copy of the decision will be provided to the director of the appropriate division of the Board, the officer in charge of supervision at the appropriate Reserve Bank, and the Board's Ombudsman. A copy of the decision will be published on the Board's public website as soon as

practicable, and the published decision will be redacted to avoid disclosure of exempt information. In cases in which redaction is deemed insufficient to prevent improper disclosure, the published decision may be presented in summary form. The final review panel may extend the period for issuing a decision by up to 30 calendar days if the panel determines that, based on the facts and circumstances of the appeal, an extension is appropriate.

(18) *Ombudsman Participation.* The Board's Ombudsman may attend, as an observer, meetings or deliberations relating to the appeal at either level if requested by either the institution or System personnel. The Ombudsman will not have substantive involvement in or act as a decision-maker with respect to the appeal.

C. Expedited Procedures for Appealing a Material Supervisory Determination

When a material supervisory determination relates to or causes an institution to become critically undercapitalized, as defined by section 38 of the FDI Act, the review of any appeal of that supervisory determination will be processed on an expedited basis.

Notwithstanding any other provision in this process, a matter processed under expedited review will be subject to the same policies that govern all appeals except that the initial review panel will issue a decision within 35 calendar days following the date the appeal is received (such period may be extended by up to an additional 7 calendar days if the initial review panel decides that such time is required to supplement the record and to consider any additional information received), the institution shall have 7 days to file an appeal of the initial review panel's decision, and the final review panel will issue a decision within 10 calendar days.

D. Effect of Appeal on Material Supervisory Determinations

A material supervisory determination shall remain in effect while under appeal unless and until such time as it is modified or terminated through the appeals process. An appeal does not prevent or suspend the Federal Reserve or any other appropriate agency from taking any supervisory or enforcement action—either formal or informal—it deems appropriate to discharge the agency's supervisory responsibilities. In such cases, the rights of appeal provided for in the statutes and regulations concerning those actions shall govern.

In addition, an appeal does not prevent or suspend the operation of the

PCA framework under section 38 of the FDI Act, prevent or suspend an appropriate authority from appointing a receiver for the institution or otherwise causing the closure of an institution, or prevent or suspend an appropriate authority from taking any other action under the PCA framework. If the institution is placed into receivership while an appeal is outstanding, the appeal will be considered moot and will not be completed.

E. Safeguards Against Retaliation

Neither the Federal Reserve nor any employee of the Federal Reserve may retaliate against an institution or person, including based on the filing or outcome of an appeal under this process. In accordance with longstanding Federal Reserve practice, the appeals framework is intended to foster an environment where concerns and issues may be freely and openly discussed.

Each Reserve Bank shall provide institutions with notice of the Board's anti-retaliation policy in connection with each Federal Reserve led examination.

An institution that believes that it has suffered retaliation or any other form of unfair treatment is encouraged to contact the appropriate Reserve Bank, and may file a claim of retaliation with the Board's Ombudsman. The Ombudsman may attempt to resolve a claim of retaliation informally by engaging in discussions with the concerned institution and the appropriate Board or Reserve Bank staff.

Nothing in this guidance is intended to prevent the Ombudsman from initiating a factual inquiry into alleged retaliation at any time. The Ombudsman may initiate a factual inquiry into a claim of retaliation, at any time, by providing notice to the director of the appropriate division of the Board and appropriate Board committee, and the officer in charge of supervision at the appropriate Reserve Bank. As part of the inquiry, the Ombudsman may collect and review documents, interview witnesses, and consult Board and Reserve Bank staff with subject matter expertise. The Ombudsman also may request that the director of the appropriate division of the Board authorize or assign such additional resources as necessary to assist the Ombudsman in fully reviewing the matter.

Upon the completion of a factual inquiry into a claim of retaliation, if the Ombudsman concludes that retaliation has occurred, the Ombudsman will forward the claim of retaliation, along with the Ombudsman's factual findings to the director of the appropriate

division of the Board. These officials will take appropriate action consistent with the Board's or relevant Reserve Bank's policies and procedures to resolve the matter. In addition, to prevent future retaliation for an appeal, the Ombudsman may recommend to the director of the appropriate division of the Board that the next examination of the institution or review that may lead to a material supervisory determination exclude personnel involved in the claim of retaliation. The division director(s) will make the final decision as to whether any examination staff should be excluded.

The Board's Ombudsman will contact institutions within six months after a material supervisory determination appeal has been decided to inquire whether the institution believes retaliation has occurred.

F. Availability of Procedures

The Federal Reserve, through the Board and Reserve Banks, shall make this process readily available on its public website and to any member of the public who requests it.

Ombudsman for the Federal Reserve System

Policy Statement

Section 309 of the Riegle Community Development and Regulatory Improvement Act of 1994, 12 U.S.C. 4806, requires each of the Federal banking agencies to appoint an Ombudsman. Section 309 provides that the Ombudsman:

(1) Is to act as a liaison between the agency and any affected person with respect to any problem such party may have in dealing with the agency resulting from the regulatory activities of the agency; and

(2) Is to assure that safeguards exist to encourage complainants to come forward and preserve confidentiality.

Mission of the Ombudsman. The Ombudsman is charged with performing three major functions: (1) Serving as a facilitator and moderator for the fair and timely resolution of complaints related to the Federal Reserve System's regulatory activities; (2) reporting to the Board on issues that are likely to have a significant impact on the Federal Reserve System's missions, activities, or reputation that arise from the Ombudsman's review of complaints, such as patterns of issues that occur in multiple complaints; and (3) receiving, reviewing, and deciding claims of retaliatory conduct by Federal Reserve System staff. The Ombudsman also serves as the initial recipient for appeals of material supervisory determinations and plays a role in resolving appeals of

some consumer complaints. In addition, the Ombudsman ensures that safeguards exist to encourage complainants to come forward and to protect confidentiality.

Serving as a Complaint Facilitator. The Ombudsman assists institutions with issues and questions related to Reserve Bank or Board regulatory activities. In doing so, the Ombudsman shall operate independently of the supervisory process to the extent necessary to ensure that appropriate safeguards exist to encourage complainants to come forward and preserve confidentiality.

In situations where the Board has not established a process for addressing a certain type of question or complaint, the Ombudsman is available to facilitate the resolution of the question or complaint. Although the Ombudsman does not have decision-making authority regarding any substantive matters, including supervisory determinations and regulatory action (other than for retaliation claims), the Ombudsman is available to assist institutions, and particularly community banks, in locating the correct Federal Reserve System staff person to address or resolve such a question or complaint and may coordinate meetings and facilitate discussions between the institution and System staff, including senior officials, as necessary. In order to facilitate this process, the Ombudsman may investigate the situation in order to identify the relevant facts and circumstances. The Ombudsman may also participate in meetings or discussions related to the matter if requested by either the institution or System staff, and may require updates from System staff, as appropriate, until the matter is resolved. If the Ombudsman believes such a complaint has not been satisfactorily addressed, the Ombudsman may raise the matter with the appropriate division director or Board committee, as appropriate.

When an issue is brought to the attention of the Ombudsman for which the Board's rules or procedures provide an avenue of appeal or another appropriate forum for resolution, the Ombudsman will explain the process to the complaining party, and direct the party to the appropriate appeals process or forum for the complaint.⁶ In addition,

⁶ For example, the Ombudsman may explain some of the existing mechanisms for resolutions of complaints, such as: Material supervisory determinations pursuant to section 309(a) of the Riegle Act; actions delegated to the Reserve Banks or Board staff pursuant to 12 CFR part 265; prompt corrective action directives under section 38 of the FDI Act; denials or partial denials of Freedom of Information or Privacy Act requests; issuance of

the Ombudsman is also available to facilitate informal discussions between a potential appellant and the appropriate Reserve Bank or Board staff in order to explore solutions before an appeal is filed. Such discussions do not stay or otherwise alter any of the deadlines under the Board's rules or procedures.

The Ombudsman will serve as the initial recipient for an appeal of a material supervisory determination and may attend, as an observer, meetings or deliberations relating to the appeal if requested by either the institution or System personnel. In any event, the Ombudsman will not have any substantive involvement in or act as a decision-maker with respect to the appeal.

Providing Feedback on Patterns of Issues. The Ombudsman is in a unique position to identify and report patterns of issues arising from complaints related to Reserve Bank or Board regulatory activities. The Ombudsman will track inquiries and complaints based on relevant characteristics, such as geographic location, scope, policy implications, and final disposition, to help identify any such trends, including trends that implicate differently sized institutions disproportionately. This tracking will be conducted in a manner designed to preserve confidentiality of the complainant to the maximum extent possible. As appropriate, the Ombudsman will report findings of patterns of issues to the appropriate Board committee or division director and Reserve Bank or Board staff. The Ombudsman will also report any issue stemming from a complaint that is likely to have a significant impact on the Federal Reserve System's mission, activities, or reputation.

Retaliation Claims by Supervised Persons. The Board does not tolerate retaliation by Federal Reserve System staff against a supervised institution or its employees ("supervised persons"). Retaliation is defined as any action or decision by Reserve Bank or Board staff that causes a supervised person to be treated differently or more harshly than other similarly situated institutions because the supervised person attempted to resolve a complaint by filing an appeal of a material supervisory determination or utilized any other Board mechanisms for resolving complaints. Retaliation includes, but is not limited to, delaying or denying action that might benefit a

capital directives pursuant to 12 CFR 263.80–263.85; decisions with respect to applications; and matters within the jurisdiction of the Board's Inspector General or Federal or State investigatory or prosecutorial authorities.

supervised person without a sound supervisory reason or subjecting a supervised institution to heightened examination standards without a sound supervisory reason.

The Ombudsman is authorized to receive, review, and determine the merits of complaints of retaliatory conduct by Reserve Bank or Board staff. The Ombudsman may attempt to resolve retaliation claims informally by engaging in discussions with the concerned supervised person and the appropriate Board or Reserve Bank staff. If a complaint cannot be resolved informally, the Ombudsman may initiate a full investigation into the underlying facts and circumstances.

To commence a factual investigation of a complaint of retaliatory conduct, the Ombudsman should provide written notice to the appropriate Board committee and division director and the appropriate Reserve Bank officer in charge of supervision. As part of the investigation, the Ombudsman may, among other things, collect and review documents, interview witnesses, and seek any other relevant information. The Ombudsman may also consult Board and Reserve Bank staff with subject matter expertise. Where necessary, the appropriate Board committee or division director may authorize or assign such additional resources as may be needed to assist the Ombudsman in fully reviewing the matter.

Upon completion of the factual investigation of a complaint of retaliatory conduct, the Ombudsman will decide whether a member of Federal Reserve System staff retaliated, as defined above. The Ombudsman will report this determination to the appropriate Board committee or Governor and division director and the appropriate Reserve Bank officer in charge of supervision and may make recommendations for resolution of the matter to those parties. In addition, to prevent future retaliation for an appeal, the Ombudsman may recommend to the appropriate division director(s) that the next examination of the institution or review that may lead to a material supervisory determination exclude personnel involved in the claim of retaliation. The division director(s) will make the final decision as to whether any examination staff should be excluded. However, the Ombudsman shall not make recommendations regarding disciplinary action against a Federal Reserve System staff member. The appropriate staff will consider further action consistent with the Board's and relevant Reserve Bank's policies and procedures. The Ombudsman's determination regarding

retaliation will be communicated in writing to the supervised person.

To further ensure that supervised persons are not subjected to retaliation, as defined above, the Ombudsman will contact a supervised institution within six months after an appeal has been decided to inquire whether the institution believes retaliation occurred. Where possible, the Ombudsman will also contact the institution after the next examination following an appeal. In the event an institution complains of retaliation, the Ombudsman will initiate the process outlined above to informally review the matter or initiate a factual investigation.

Consumer Complaints and Appeals. Independent of the Ombudsman function, the Federal Reserve System operates a consumer complaint and inquiry program to assist members of the public who are experiencing problems with their financial institution. If the Ombudsman receives a consumer complaint directly, the Ombudsman will refer the complaint to the Board's Division of Consumer and Community Affairs ("DCCA") to determine handling and send appropriate consumer complaints to the Federal Reserve Consumer Help Center ("FRCH") for processing.

A request for an independent review of a consumer complaint previously investigated by a Reserve Bank is treated as an appeal. Consumers should be advised that they can file an appeal through FRCH or with the Ombudsman if the consumer requests confidential treatment of the appeal or prefers that the Ombudsman handle the appeal.

If an appeal is received by the Ombudsman, he or she will consult with DCCA to determine who will handle the appeal, unless the consumer has requested confidential treatment or that the Ombudsman's Office handle the appeal. In many instances, DCCA will be responsible for investigating and responding to the appeal. For the appeals referred to DCCA by the Ombudsman, DCCA will consult with the Ombudsman during the appeal investigation to help ensure that the matter is fully and fairly addressed and provide a final copy of the response letter to the Ombudsman.

The Ombudsman handles appeals seeking further investigation of DCCA's handling of an initial appeal, appeals where the consumer requests confidential treatment, and appeals where the consumer requests that the Ombudsman's Office handle the initial appeal. The Ombudsman may handle other appeals, as determined in collaboration with DCCA. The Ombudsman will send an

acknowledgement letter for each appeal it receives.

With respect to appeals seeking further investigation of DCCA's handling of an initial appeal or where the consumer requests that the Ombudsman handle the appeal, the Ombudsman will typically consult with DCCA during the investigation. For appeals where the consumer requests confidential treatment, the Ombudsman typically will not consult with DCCA during the investigation.

For all appeals the Ombudsman handles, the Ombudsman will review the matter. In doing so, the Ombudsman will collect and review the complaint documents from DCCA and seek any other relevant information, unless confidential treatment is requested. The Ombudsman may also consult Board and Reserve Bank staff to discuss the details of the previous complaint investigations. The Ombudsman is responsible for responding to the complainant with its determination. As appropriate, the Ombudsman will contact the appropriate Board division director and Reserve Bank staff with feedback or concerns.

Safeguards. These policies, processes, and practices are intended as safeguards to encourage complainants to come forward with issues or complaints related to the Federal Reserve System's supervisory activities.

To the extent possible, the Ombudsman will honor requests to keep confidential the identity of a complaining party. It must be recognized, however, that it may not be possible for the Ombudsman to resolve certain complaints, including complaints of retaliation, if the Ombudsman cannot disclose the identity of the complaining party to other members of Federal Reserve staff.

Procedures. A party may contact the Ombudsman at any time regarding concerns or issues resulting from the regulatory activities of the Board or the Reserve Banks by calling 1-800-337-0429, by sending a fax to 202-530-6208, by writing to the Office of the Ombudsman, Board of Governors of the Federal Reserve System, Washington, DC 20551, or by sending an email to Ombudsman@frb.gov.

By order of the Board of Governors of the Federal Reserve System, March 12, 2020.

Ann Misback,

Secretary of the Board.

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