September 16, 2025

Jennifer M. Jones
Deputy Executive Secretary
Attn: Comments—RIN 3064-ZA50
Federal Deposit Insurance Corporation
550 17th Street NW
Washington, DC 20429

Re: Guidelines for Appeals of Material Supervisory Determinations

Dear Acting Chairman Travis Hill:

On behalf of the American Fintech Council (AFC),[1] I am submitting this comment letter in response to the Federal Deposit Insurance Corporation's (FDIC) notice of proposed rulemaking regarding Guidelines for Appeals of Material Supervisory Determinations (Proposed Rule).[2]

AFC's mission is to promote an innovative, transparent, inclusive, and customer-centric financial system by fostering responsible innovation in financial services and encouraging sound public policy. AFC members are at the forefront of fostering competition in consumer finance and pioneering ways to better serve underserved consumer segments and geographies. Our members are improving access to financial services and increasing overall competition in the financial services industry by supporting the responsible growth of lending and lowering the cost of financial transactions, allowing them to help meet demand for high-quality, affordable financial products. On behalf of our members, AFC would like to thank the FDIC for this important update to the Supervisory Appeals Process. We believe this Proposed Rule will allow the industry to continue to innovate and growth under the FDIC's supervision.

I. The Proposed Rule's Enhancements to the FDIC's Supervisory Appeal Process Are Necessary to Continue to Protect the Safety and Soundness of the Banking System while also Ensuring a Level-Playing Field for FDIC-Regulated Banks

AFC commends the FDIC on proposing to bring back the Office of Supervisory Appeals, an important step to promoting independent supervisory appeals and increasing confidence in the process surrounding supervisory appeals. We strongly agree with the FDIC's noted benefits of creating an independent department, "staffed with former industry professionals and those with bank supervisory experience."[3] This will allow the process to operate more independently and

[1] AFC is the premier trade association representing the largest fintech companies and innovative banks. Its membership spans lenders, banks, payments providers, loan services, credit bureaus, and personal financial management companies.
[2] Guidelines for Appeals of Material Supervisory Determinations, 90 Fed. Reg. 33942 (FDIC July 18, 2025).
[3] Proposed Rule, 90 Fed. Reg. at 33943.

without potential bias or conflicts of interest from individuals who have already reviewed certain information prior to the bank's receipt of a material supervisory determination and subsequent submission of a formal appeal." Today, without a meaningful and independent review process, few banks are willing or able to challenge exam findings, due to costs or resource limitations, even when there are material disagreements. Under the current SARC process, even in the best case scenario for a bank, experience shows that there is a less than a 10% chance of success for the bank. Such minimal chances of success through the SARC process created *de facto* barriers to banks' efforts to seek legally permissible remedies, and, in turn, removed a crucial check upon the accountability of examiners and their processes. Thus, we support the FDIC's effort to create independence, transparency, and objectivity to the Supervisory Appeals process.

II. The Proposed Rule Should Be Updated to Grant Banks Broader Rights to Appeal Any Material Supervisory Determinations that Meaningfully Impacts Their Business Activities, Even If It Serves as the Basis for Formal Enforcement-Related Actions

While AFC applauds the Proposed Rule, we believe that the Proposed Rule could be enhanced to further improve the Supervisory Appeal Process. In particular, the FDIC should further clarify and modify how the Proposed Rule would work when a material supervisory determination relates to a potential enforcement action.

Under both the FDIC's current appeals process and the Proposed Rule, "material supervisory determination" is defined to exclude "[f]ormal enforcement-related actions and decisions, including determinations and the underlying facts and circumstances that form the basis of a recommended or pending formal enforcement action."[4] The Proposed Rule further explains:

> A formal enforcement-related action or decision commences, and becomes unappealable, when the FDIC initiates a formal investigation under 12 U.S.C. 1820(c) (Order of Investigation), issues a notice of charges or a notice of assessment under 12 U.S.C. 1818 or other applicable laws (Notice of Charges), provides the institution with a draft consent order, or otherwise provides written notice to the institution that the FDIC is reviewing the facts and circumstances presented to determine if a formal enforcement action is merited under applicable statutes or published enforcement related policies of the FDIC . . . .[5]

Simply put, the Proposed Rule does not go far enough in its efforts to make supervisory appeals accessible to banks. The FDIC should clearly separate the supervision and enforcement process, and allow insured depository institutions (*i.e.*, banks) to use the appeals process for *any* material supervisory determination, regardless of whether the same facts underlie a potential enforcement action. This approach would ensure that 1) banks are afforded the right to receive meaningful reviews of material supervisory determinations (as intended by the Riegle Community Development and Regulatory Improvement Act of 1994 ("Riegle Act")), 2) enforcement staff are making decisions based on the right understanding of the bank, and 3) the FDIC's appeals process is aligned with the approach of other federal banking agencies.

[4] Proposed Rule, 90 Fed. Reg. at 33946.
[5] Proposed Rule, 90 Fed. Reg. at 33946.

Banks should be able to appeal any material supervisory determination in their report of examination or other supervisory communication.[6] This was the clear intent of section 309 of the Riegle Act, which required each federal banking agency to "establish an independent appellate process" to ensure that "any appeal of a material supervisory determination . . . is heard and decided expeditiously[.]"[7] Although the Riegle Act excludes determinations to "appoint a conservator or receiver" and notes that this process does not "affect the authority of an appropriate Federal banking agency . . . to take enforcement or supervisory action[,]"[8] nothing in the Riegle Act indicates that banks should be denied the opportunity to appeal just because the federal banking agency was considering or actually issuing an enforcement action based on the same facts the underly a material supervisory determination.

Indeed, if the Riegle Act had intended to exclude such material supervisory determinations, it would render the contemplated appeals process meaningless for many banks. As the FDIC is aware, most enforcement actions are driven by findings that there are less than satisfactory conditions at a bank. These findings are, of course, the same driver of ratings downgrades and other material supervisory determinations. Denying banks the opportunity to appeal these findings when an enforcement action is being contemplated by the FDIC effectively insulates ratings from review and denies banks due process.

III. A Bank Contesting an Enforcement Action Is Not an Appropriate Substitute for a Supervisory Appeal

An enforcement action is not the appropriate avenue for challenging a rating or the findings underlying a rating. Few banks are willing to contest an enforcement action, given that the resulting notice of charges or notice of assessment is a public document that sets forth the FDIC's view of the facts in the most negative light. In addition, a contested enforcement action may take years to resolve and creates enormous expenses, as well as a severe overhang on the relationship between the FDIC and the Bank.

Even if a bank is willing to contest an enforcement action, the federal banking agencies, and their administrative law judges, have repeatedly indicated that—in contested enforcement actions—conclusions of bank examiners on matters of safety and soundness "are entitled to a significant measure of deference[.]"[9] This means that material supervisory determinations by examiners are reviewed on a highly deferential basis in the course of a contested enforcement action. By contrast, review is not deferential in the appeals process under the Proposed Rule.[10] It is therefore particularly problematic to not address disputes over material supervisory

[6] It is important that the FDIC interprets supervisory communication broadly. The AFC is aware of instances where Banks have faced interim downgrades from FDIC staff based on verbal feedback or letters with minimal support or rationale, without any formal report of examination ever issuing. Accordingly, banks should be able to appeal supervisory decisions, even if they are based upon unwritten conclusions or statements from examiners or supervisory staff because these decisions would likely have meaningful impacts on the business activity of a bank.
[7] 12 U.S.C. § 4806(b).
[8] 12 U.S.C. § 4806(f)-(g).
[9] *In the Matter of: Frank William Bonan II*, FDIC-16-0254e, at 9 n.48 (OFIA Jan. 9, 2023) (discussing examiner deference), *available at https://www.ofia.gov/decisions/2023-01-09-fdic-16-0254e-34.pdf*; *In the Matter of Steven Ellsworth*, Nos. AA-EC-11-41 & -42, 2016 WL 11597958, at *11 (Mar. 23, 2016) (OCC final decision); *see also In the Matter of Patrick Adams*, No. AA-EC-11-50, 2014 WL 8735096, at *36 (Sep. 30, 2014) (OCC final decision) ("The conclusion that given conduct is an unsafe or unsound practice is ultimately an application of a legal standard to evidence, including examiner judgment, and deference is due that judgment.").
[10] *See* Proposed Rule, 90 Fed. Reg. 33944 (explaining that "the proposed Guidelines would specify that the Office will make its determination *without deferring to the judgments of either party*") (emphasis added).

determinations before a contested enforcement action. Delaying review of such material supervisory determinations is not only unfair but also denies the FDIC an opportunity to course correct errors in judgment by examiners.

IV. The FDIC Should also Consider Adopting Processes for Expedited Review of Disputed Material Supervisory Determinations

AFC and its members believe that an expedited review process is critical to the success of the Supervisory Appeal process. There may be circumstances where an enforcement action and a material supervisory determination are critically intertwined and rapid action is appropriate. For example, if a material supervisory determination results in a bank becoming critically undercapitalized under the Prompt Correct Action (PCA) framework, the FDIC is obligated to issue a PCA directive.[11] Although these are unusual and rare circumstances, the FDIC should also consider adopting processes for expedited review of disputed material supervisory determinations within 90 days. The Board of Governors of the Federal Reserve System (FRB), for example, has adopted an expedited appeals framework for these instances.[12]

The timing of the Appeals process is incredibly important. The Supervisory Appeal process must be completed before any enforcement action against a Bank goes into effect. Allowing banks to appeal material supervisory determinations regardless of a contemplated enforcement action would encourage (or could require) enforcement staff to wait until appeals are resolved and to be more fully informed when making enforcement decisions. As noted above, enforcement actions are rarely rapid processes. The decision as to whether an enforcement action is warranted takes substantial time and analysis, as does any negotiation (or litigation). Delaying those decisions until appeals are decided would ensure that enforcement staff are fully informed about a bank's condition. A bank's component or composite rating is often a primary driver in the type of action that is pursued—for instance, a written agreement versus a cease-and-desist order—or whether any enforcement action is warranted. Indeed, very few "1" and "2" rated banks are subject to public enforcement actions. An appeal that results in a rating upgrade may, therefore, have a significant impact on enforcement staff's decision.

This approach would align with the approach taken by the FRB in its process for appeals of material supervisory determinations (MSD Appeals Process). In its MSD Appeals Process, the FRB only excludes "an action to impose administrative enforcement actions" from its definition of material supervisory determinations.[13] Notably, it does not suspend any appeals right simply because the FRB is considering an enforcement action; instead, the FRB rightly considers its MSD Appeals Process as separate and apart from its enforcement process. Similarly, the Office of the Comptroller of the Currency (OCC) excludes "formal enforcement-related actions or decisions" from its Bank Appeals Process, but does not suspend appeals right when the agency is contemplating an enforcement action.[14]

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[11] *See* 12 U.S.C. § 1831*o*(h)(3).

[12] *See* Internal Appeals Process, 85 Fed. Reg. at 15181.

[13] Internal Appeals Process for Material Supervisory Determinations and Policy Statement Regarding the Ombudsman for the Federal Reserve System, 85 Fed. Reg. 15175, 15179 (Mar. 17, 2020).

[14] *See* Appeals Process for National Banks and Federal Savings Associations (OCC Nov. 2020), *available at* https://www.occ.gov/publications-and-resources/publications/banker-education/files/pub-appeals-process-nat-banks-fed-savings-assoc.pdf.

AFC believes that clearly separating the supervision and enforcement process, and allowing banks to use the appeals process for *any* material supervisory determination, regardless of whether the same facts underlie a potential enforcement action, would meet the FDIC's stated objectives of objective and timely decision making in the Supervisory Appeals process. Allowing all material supervisory determinations would avoid confusion, avoid piecemeal appeals, ensure that all available facts can be included in the record, and avoid insulating supervisory determinations from appellate review.

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AFC appreciates the opportunity to comment on the Proposed Rule. Again, AFC remains supportive of the Proposed Rule's principles, but recognizes the need for further modification to ensure banks have the proper level of recourse. We welcome continued engagement with the FDIC on this matter and thank you for your consideration of our views.

Sincerely,

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American Fintech Council