American Bankers Association
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Shaun Kern
Counsel
Center for Securities, Trust & Investments
P 202-663-5253
skern@aba.com

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Mr. Robert E. Feldman
Executive Secretary
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, DC 20429

Re: *Revisions to Guidelines for Appeals of Supervisory Determinations*

Dear Mr. Feldman:

The American Bankers Association[1] (ABA) appreciates the opportunity to comment on the FDIC's proposed revisions to its Guidelines for Appeals of Material Supervisory Determinations (Guidelines).[2] Upon release of the proposed Guidelines, the FDIC stated that these revisions were changes intended to respond to "matters identified by the [FDIC's] Office of Inspector General (OIG) in its report issued in February 2016 related to the FDIC's supervision of banks engaged in making refund anticipation loans…."[3] The examination problems identified by the OIG echo numerous concerns we have heard for a number of years from our banks, particularly from our community banks that often feel too intimidated to appeal or even object to supervisory excesses and errors.

We support these revisions as an acknowledgment of the need to improve the avenue for redress of regulatory excesses and errors in the examination process. We also offer a constructive suggestion to the FDIC. We believe that more needs to be done to address the serious concerns, illustrated by the problems outlined by the OIG. The inadequacies of the proposed Guidelines reinforce the need for legislative action to provide an effective process for appeal of examination excesses and errors.

Lack of Redress within FDIC Demonstrates the Need for Independent Appeal

The FDIC's OIG report on refund anticipation loans is not available to the public, though the executive summary was publicly released on March 15, 2016.[4] As reported by the *Wall Street*

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[1] The American Bankers Association is the voice of the nation's $16 trillion banking industry, which is composed of small, regional and large banks that together employ more than 2 million people, safeguard $12 trillion in deposits and extend more than $8 trillion in loans.

[2] Guidelines for Appeals of Material Supervisory Determinations, 81 Fed. Reg. 51,441 (August 04, 2016). *Available at:* https://www.gpo.gov/fdsys/pkg/FR-2016-08-04/pdf/2016-18507.pdf

[3] See FDIC Press Release, "FDIC Seeks Comment on Bank Appeals Guidelines, Third-Party Lending guidance as Part of Package of Updated Policies and Procedures." July 29, 2016. [The changes respond to matters identified by the Office of Inspector General in its report issued in February 2016 related to the FDIC's supervision of banks engaged in making refund anticipation loans as well as by commenters who provided input during the recent Economic Growth and Regulatory Paperwork Reduction Act (EGRPRA) process.] *Available at*: https://www.fdic.gov/news/news/press/2016/pr16061.html

[4] See Report of Inquiry into the FDIC's Supervisory Approach to Refund Anticipation Loans and the Involvement of FDIC Leadership and Personnel (Executive Summary). *Available at*: https://www.fdicig.gov/reports16%5COIG-16-001.pdf

Journal, "the inspector general for the FDIC blamed some agency staff members for an 'abusive' supervisory attitude that forced banks to stop offering loans based on consumers' tax refund checks."[5] It is important to understand that these credit products were not banned or otherwise prohibited by law or FDIC regulations. It is nevertheless clear in the OIG report that senior officials at the FDIC at the time held these legal products in disfavor and wanted their offering stopped, despite their legal status.

It cannot be ignored that the OIG labeled the FDIC's behavior abusive, with an articulated rationale that morphed over time and whose basis was not fully transparent. When senior FDIC principals and management were made aware of these abusive supervisory actions, no adequate steps were taken to address the abuses. There was effectively no remedy, no meaningful appeal from what were clearly supervisory excesses. The OIG instead found that, "the behavior was widely known internally, and in effect, condoned." The OIG continued by saying "other complaints from banks languished and ultimately were not addressed or investigated independently." The need for independent review, and its absence, are important to recognize.

The FDIC asserts that it did not depart from its policies in any respect, an admission that demonstrates the necessity for independent review. The fact is that the FDIC did not correct the problem, even while acknowledging that it did not condone the FDIC employee who "communicated with external parties in an overly aggressive manner." This failure to correct abusive supervisory action underscores the value of an appeal process that is not confined exclusively to officials within the agency.

The extent of FDIC correction did not rise above removing the term "moral suasion" from its guidance. The OIG stated that "more needs to be done to subject the use of moral suasion, and its equivalents, to meaningful scrutiny and oversight, and to create equitable remedies for institutions should they be subject to abusive treatment."[6]

Proposed Guideline Reforms Are Minor but Positive

Currently under consideration are Guideline revisions that would permit banks to appeal their level of compliance with an existing formal enforcement action,[7] remove the FDIC's decision to initiate informal enforcement actions from the list of determinations not subject to the Guidelines, and permit an institution to appeal within 120 days referrals or proposed enforcement actions the FDIC does not initiate, unless the FDIC and the bank mutually agree to extend that timeframe.

These Guideline adjustments are minor, but positive revisions. We support them and their intention. For the benefit of clarity, ABA believes that the FDIC should consider supplementing the removal of informal enforcement actions (such as memoranda of understanding) from the list of determinations not appealable by *expressly* providing that such informal enforcement actions are appealable.

[5] 'Abusive' Attitude at FDIC Prompted Banks to Drop Tax-Refund Loans: Inspector General, Wall St. J., Mar 16, 2016. *Available at*: http://www.wsj.com/articles/inspector-general-blames-fdic-staff-for-banks-dropping-tax-refund-loans-1458070919
[6] See OIG Executive Summary. Page iv. *Available at*: https://www.fdicig.gov/reports16%5COIG-16-001.pdf
[7] The FDIC notes, however, that "if the FDIC determines that the lack of compliance with an existing enforcement action requires additional enforcement action, the proposed new enforcement action is not appealable."

Further, ABA believes that the FDIC should expressly provide that Matters Requiring Board Attention (MRBAs) are appealable items. Arguably, current language permitting "any other supervisory determination… that may affect the capital, earnings, operating flexibility, or capital category for prompt corrective action purposes of an institution, or otherwise affect the nature and level of supervisory oversight accorded an institution" would encompass MRBAs. However, to ensure that banks are aware of their ability to appeal MRBAs, the FDIC should include a statement or Guideline addition to that effect.

Appeals Process Falls Short on Independence

The Guidelines proposed fall well short of establishing an independent appeals process that would allow prompt and adequate correction of examination excesses and errors, such as those identified by the OIG. In the report, some abuses were identified as coming from the FDIC's Washington headquarters over the objection of those examiners in the field. We are aware of other cases where errors from the field are not corrected by their supervisors. There is no independent avenue for appealing this internal review process when it proves inadequate. In fact, these Guideline revisions not only do not address these concerns, but they leave larger issues untouched, such as the high standard of review for banks to meet to seek redress and the difficulty of using an appeals process that can be terminated by FDIC action.

Such deficiencies bolster the case for an independent appellate process removed from the Supervision Appeals Review Committee structure currently in place. Legislation to do so is pending before Congress. We encourage the FDIC to support those legislative changes. An effective program of bank supervision rests upon its integrity, an essential element of which must be the recognized ability of aggrieved institutions to have an appeals process that they feel confident will lead to an impartial review. Should you have any questions, please do not hesitate to contact the undersigned at skern@aba.com or (202) 663-5253.

Sincerely,

Shaun Kern

Shaun Kern
Counsel
Center for Securities, Trust & Investments