

As seen in...

**BankNews**

Reprinted with permission of BankNews Media. Contents of *BankNews* are, and remain, the property of BankNews, Inc.

## Agree to Disagree

### An Overview of Appeals of Material Supervisory Determinations

It is no secret that banks are under increased scrutiny in their examinations, with many institutions that have historically enjoyed CAMELS ratings of 1 and 2 striving to prevent being rated a 3 or worse. In the current regulatory environment, situations often arise where a bank disagrees with positions taken on matters that affect the bank's rating and, ultimately, whether an enforcement action will be imposed. The federal banking regulators strongly encourage open communication of disagreements with the examiners and the appropriate regional office to attempt informal resolution. We often recommend that our clients focus on issues of disagreement where the bank has solid arguments to support its posi-

tion, and to make its case to the regulators as early in the examination process as possible. These include but are not limited to preliminary examination conclusions before a final report is issued, decisions to issue formal agreements or orders and the matters underlying such decisions, civil money penalties and appointment of receivers.

In many of the matters considered not to be appealable material supervisory determinations, an institution is afforded an opportunity for an administrative hearing or other review based on a procedure specific to the type of agency action.

Each of the regulators prohibits its employees from retaliating against appealing parties to encourage banks to be comfortable exercising the right of appeal. But despite the prohibition of retaliation, banks should keep in mind that they operate in a heavily regulated industry in which good working relationships with regulators can be beneficial. Therefore, while an institution has every right to use the regulatory appeal process, it may be best to voice disagreement but forgo filing an appeal unless the institution determines, in consultation with its advisers, that the issue is sufficiently important and the likelihood of success great enough to make an appeal worthwhile.

The following is an overview of the appeals processes of each of the primary federal regulators. With respect to state-regulated institutions, there may be separate state procedures to follow, as appeals to your primary federal regulator will not resolve any open issues with the applicable state agency. The informal appeals processes described below provide an opportunity to present arguments to a third party and, in most instances, make an oral presentation. The filing of an appeal generally will not limit a federal regulator's authority to take supervisory or enforcement action against an institution or avoid compliance with the agency's decision while the appeal is pending.

#### Office of the Comptroller of the Currency

A national bank may seek review of appealable material supervisory determinations by filing a written appeal

**“We often recommend that our clients focus on issues of disagreement where the bank has solid arguments to support its position, and to make its case to the regulators as early in the examination process as possible.”**

tion, and to make its case to the regulators as early in the examination process as possible. If informal discussions do not work, the federal regulators have adopted appeals processes for material supervisory determinations.

The federal banking regulators generally allow an appeal of any material supervisory determination, such as adequacy of loan loss reserve provisions, classification of loans and component or composite CAMELS ratings. There are several notable exceptions that are not

with the OCC Office of the Ombudsman submitted by the bank's president or CEO and approved by the bank's board of directors. An appeal should generally be filed within 30 days of the determination being appealed. A written response to the appeal is typically issued within 45 days of filing the appeal.

In lieu of appealing directly to the ombudsman, a national bank may first appeal to the deputy comptroller representing the applicable supervisory office and, if the bank disagrees with the response from the deputy comptroller, further appeal to the ombudsman within 30 days of receipt of the initial appeal decision. The ombudsman will typically issue a written response to an appeal from a deputy comptroller decision within 30 days of filing. For further information, see OCC Bulletin 2002-9.

## **FDIC**

Appealable material supervisory determinations of the FDIC may be appealed to the Supervision Appeals Review Committee. In contrast with the OCC appeal process, where a bank typically has the option of initial review by the supervisory office in lieu of appealing directly to the ombudsman, the FDIC requires that a bank first file a request for review with the FDIC Division of Supervision and Consumer Protection within 60 days of a material supervisory determination before appealing to the SARC. The request must be sent to the division director in writing, together with a statement that the bank's board of directors has considered the merits of the request for review and authorized the filing. Within 45 days, the division director will issue a written determination or refer the matter directly to the SARC. It is only after this step that the SARC will review an appeal. A bank will have 30 days to appeal a division director's decision to the SARC in writing. The SARC will have up to 90 days to consider the appeal, after which it will have 45 days to issue its decision. For further information, see the FDIC's Guidelines for Appeals of Material Supervisory Determinations.

## **Federal Reserve**

The Federal Reserve appeals process for bank holding companies and state member banks has three levels of review. An appeal of an appealable material supervisory determination must first be filed in writing with the secretary of the appropriate Reserve Bank within 30 days of the determination, unless the time for filing is extended by the Reserve Bank. The appeal will be considered by a review panel selected by the Reserve Bank consisting of persons not involved in making the material supervisory determination. The review panel has 30 days after filing of an appeal to make a decision, unless both sides agree to extend the time period.

A review panel decision may be appealed to the appropriate Reserve Bank president within 30 days of receipt of the panel's decision. The Reserve Bank president will have 30 days to decide the appeal, after which the institution can use a third level of review by appealing to the appropriate governor of the Federal Reserve Board within 30 days of receipt of the Reserve Bank president's decision. This final level of appeal will be decided within 60 days. For further information, see the Federal Reserve's Internal Appeals Guidelines issued March 24, 1995.

## **Office of Thrift Supervision**

OTS-regulated depository institutions and holding companies may appeal an appealable material supervisory determination to the OTS ombudsman's office for review by the OTS Appeals Committee. The appeal must be in writing and include a copy of a resolution of the institution's board of directors authorizing the appeal. Appeals must be received within 60 days from the date the institution was notified of a material supervisory decision. The OAC will issue its decision to an appealing party within 60 days of acceptance of an appeal. For further information, see Thrift Bulletin 68b. **BN**