

the defaulted issue, which brings about a heightened risk of being sued. In addition, the administrative demands in such a situation can result in the incurrence of significant expenses and the distraction of managerial time and attention from other areas of the trust department. Thus, to monitor and better understand the risk profile of trust institutions serving as an indenture trustee for debt securities and changes therein, the agencies are proposing to require trust institutions to report the number of such issues that are in substantive default and the principal amount outstanding for these issues.

In addition, the agencies are proposing to revise the instructions for reporting on corporate trust accounts to state that issues of trust preferred stock for which the institution is trustee should be included in the amounts reported for corporate and municipal trusteeships.

#### F. Instructional Clarifications

The instructions for reporting the managed and non-managed assets and number of managed and non-managed accounts for defined contribution plans and defined benefit plans in items 5.a and 5.b of Schedule RC-T, respectively, would be revised to indicate that employee benefit accounts for which the trust institution serves as a directed trustee should be reported as non-managed accounts.

The instructions for reporting on the number of and market value of assets held in collective investment funds and common trust funds in Memorandum item 3 would be clarified by stating that the number of funds should be reported, not the number of assets held by these funds, the number of participants, or the number of accounts invested in the funds.

#### V. Request for Comment

Public comment is requested on all aspects of this joint notice. Comments are invited on:

(a) Whether the proposed revisions to the Call Report collections of information are necessary for the proper performance of the agencies' functions, including whether the information has practical utility;

(b) The accuracy of the agencies' estimates of the burden of the information collections as they are proposed to be revised, including the validity of the methodology and assumptions used;

(c) Ways to enhance the quality, utility, and clarity of the information to be collected;

(d) Ways to minimize the burden of information collections on respondents,

including through the use of automated collection techniques or other forms of information technology; and

(e) Estimates of capital or start up costs and costs of operation, maintenance, and purchase of services to provide information.

Comments submitted in response to this joint notice will be shared among the agencies and will be summarized or included in the agencies' requests for OMB approval. All comments will become a matter of public record.

Dated: September 17, 2008.

**Michele Meyer,**

*Assistant Director, Legislative and Regulatory Activities Division, Office of the Comptroller of the Currency.*

Board of Governors of the Federal Reserve System, September 17, 2008.

**Jennifer J. Johnson,**

*Secretary of the Board.*

Dated at Washington, DC, this 16th day of September 2008.

Federal Deposit Insurance Corporation.

**Robert E. Feldman,**

*Executive Secretary.*

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## FEDERAL DEPOSIT INSURANCE CORPORATION

### Guidelines for Appeals of Material Supervisory Determinations

**AGENCY:** Federal Deposit Insurance Corporation.

**ACTION:** Notice of guidelines.

**SUMMARY:** On September 16, 2008, the Federal Deposit Insurance Corporation (FDIC) Board of Directors (Board) adopted revised Guidelines for Appeals of Material Supervisory Determinations (Guidelines). The revisions to the Guidelines were adopted to better align the FDIC's Supervisory Appeals Review Committee (SARC) process with the material supervisory determinations appeals procedures at the other Federal banking agencies. The amendments modify the supervisory determinations eligible for appeal to eliminate the ability of an FDIC-supervised institution to file an appeal with the SARC with respect to determinations or the facts and circumstances underlying a recommended or pending formal enforcement-related action or decision, including the initiation of an investigation and the referral to the Attorney General or a notice to the Secretary of Housing and Urban Development for apparent violations of the Equal Credit Opportunity Act or the Fair Housing Act. The amendments also include limited technical amendments.

The revised Guidelines are effective upon adoption.

**DATES:** The Guidelines became effective on September 16, 2008.

#### FOR FURTHER INFORMATION CONTACT:

Frank Gray, Section Chief, FDIC, 550 17th Street, NW., Washington, DC 20429 [F-4054]; on detail; *telephone:* (678) 916-2200; or *electronic mail:* [fgray@fdic.gov](mailto:fgray@fdic.gov); Patricia A. Colohan, Section Chief, FDIC, 550 17th Street, NW., Washington, DC 20429 [F-4080]; *telephone:* (202) 898-7283; or *electronic mail:* [pcolohan@fdic.gov](mailto:pcolohan@fdic.gov); or Richard Bogue, Counsel, FDIC, 550 17th Street, NW., Washington, DC 20429 [MB-3014]; *telephone:* (202) 898-3726; *facsimile:* (202) 898-3658; or *electronic mail:* [rbogue@fdic.gov](mailto:rbogue@fdic.gov).

**SUPPLEMENTARY INFORMATION:** On May 27, 2008, the FDIC published in the **Federal Register**, for a 60-day comment period, a notice and request for comments respecting the proposed revisions to the Guidelines for Appeals of Material Supervisory Determinations. (73 FR 30393). The comment period closed July 28, 2008. The FDIC considered it desirable in this instance to garner comments regarding the Guidelines, although notice and comment rulemaking was not required and need not be employed should the FDIC make future amendments.

The FDIC received five comment letters in total from one depository institution, three banking associations, and one lawyer on behalf of interested clients, all of whom opposed the proposed revisions. The comments received, and FDIC's responses, are summarized below.

#### Background

Section 309(a) of the Riegle Community Development and Regulatory Improvement Act of 1994 (Pub. L. 103-325, 108 Stat. 2160) (Riegle Act), required the FDIC (as well as the other Federal banking agencies and the National Credit Union Administration Board (NCUA)) to establish an independent intra-agency appellate process to review material supervisory determinations. The Riegle Act defines the term "independent appellate process" to mean a review by an agency official who does not directly or indirectly report to the agency official who made the material supervisory determination under review. In the appeals process, the FDIC is required to ensure that (1) an appeal of a material supervisory determination by an insured depository institution is heard and decided expeditiously; and (2) appropriate safeguards exist for

protecting appellants from retaliation by agency examiners.

The term "material supervisory determinations" is defined in the Riegle Act to include determinations relating to: (1) Examination ratings; (2) the adequacy of loan loss reserve provisions; and (3) loan classifications on loans that are significant to an institution. The Riegle Act specifically excludes from the definition of "material supervisory determinations" a decision to appoint a conservator or receiver for an insured depository institution or to take prompt corrective action pursuant to section 38 of the Federal Deposit Insurance Act (FDI Act), 12 U.S.C. 1831o. Finally, section 309(g) (12 U.S.C. 4806(g)) expressly provides that the Riegle Act's requirement to establish an appeals process shall not affect the authority of the Federal banking agencies to take enforcement or supervisory actions against an institution.

On March 21, 1995, the FDIC's Board of Directors adopted the original Guidelines for Appeals of Material Supervisory Determinations, which established and set forth procedures governing the SARC, whose purpose was to consider and decide appeals of material supervisory determinations as required by the Riegle Act.

On March 18, 2004, the FDIC published in the **Federal Register**, for a 30-day comment period, a notice and request for comments respecting proposed revisions to the Guidelines. (69 FR 12855). On July 9, 2004, the FDIC published in the **Federal Register** a notice of guidelines which, effective June 28, 2004, adopted the revised Guidelines changing the composition and procedures of the SARC. (69 FR 41479). The revised Guidelines were disseminated to FDIC-supervised financial institutions through a Financial Institution Letter, FIL-113-2004, issued October 13, 2004.

#### **Comments Filed in Response to the May 27, 2008 Federal Register Notice**

One comment was filed by a bank. That bank opposes the proposed amendments. Stating that there "needs to be an effective and non-biased appeals process for banks," and concludes that the proposal "to further reduce the \* \* \* ability, to appeal FDIC supervisory determinations is completely over-reaching, and should not be enacted into law."

One of the trade groups that oppose the proposed amendments believes that the FDIC's original decision to allow appeals of underlying determinations was the correct interpretation of the Riegle Act and "helps assure banks of

fundamental fairness and due process in connection with material supervisory determinations made by the FDIC." The WBA asserts that "there is no requirement under the Riegle Act that the FDIC march in lock step with the other Federal Banking Agencies regarding the appeals process," and that the proposed amendments are unnecessary and would "remove one of the few efficient opportunities available to banks for an independent review of those underlying facts and circumstances that exist at the time of an examination."

Another trade group opposes the proposed amendments while advocating an increased role for the FDIC Ombudsman in the appeals process. This group states that "independent review of the underlying facts, circumstances, and determinations is necessary to preserve the integrity of the regulatory system and perceived fairness of the process while maintaining a necessary level of accountability." This group believes that "the proposed changes would reduce opportunities to resolve issues in a constructive manner at a time of increasing need for such opportunities." "It will diminish the utility of appeals processes and force more disputes to be resolved through an adversarial enforcement process." This group advocates changes to the appeals process "that vest the FDIC Ombudsman with more authority to resolve disputes through comparatively quick and inexpensive informal appeals."

A third trade group also opposes the proposed changes and argues for an increased role for the FDIC Ombudsman. This group supports an FDIC appeals process that is "generally unrestricted in scope," so long as "the appellate process does not get overloaded or interfere with the FDIC's ability to bring formal or informal enforcement actions." This group believes that the FDIC has failed to justify the proposed changes and argues that the proposed changes would "unnecessarily restrict and complicate the SARC process and further discourage bankers from filing appeals." This group also recommends that the FDIC consider ways to further involve the FDIC Ombudsman in the SARC appeals process which "would make the process more impartial and user friendly, and could encourage banks to pursue appeals."

The lawyer opposes the proposed changes advocating that the current process works well and the industry needs more opportunities for informal review.

The commenters uniformly expressed support for an independent review of underlying facts, circumstances, and determinations, and that there needs to be "an effective and non-biased appeals procedure for banks." We believe that the numerous informal exchanges of views between banks and the FDIC in the supervisory process prior to pursuit of any enforcement action, plus the numerous reviews of proposed enforcement actions prior to their initiation ensure the independent and impartial review advocated by the commenters. In addition, the administrative hearing process and the right to court review of final enforcement orders have uniformly been found to provide all required due process.

The bank comment states that "making changes based on the anti-bank mentality of other agencies should never be grounds for the FDIC to further reduce the rights of the banks it supervises," and one of the trade groups noted that the FDIC is not required to "march in lock step" with the other banking agencies. The interpretation of the Riegle Act requirements by the other agencies is not being used to support a reduction in rights of FDIC-supervised banks, but rather supports the conclusion that the Riegle Act never required review of determinations underlying formal enforcement-related actions in the first instance. In the absence of such a requirement, substantial uniformity among the various banking agencies promoting equal treatment of all banks and thrifts appealing material supervisory determinations is a desirable goal which is served by the final amendments adopted herein.

Proposals for an increased role for the FDIC Ombudsman in the supervisory appeals process have been advanced by several organizations, including trade association commenters here, for a number of years. These proposals have been considered and have been consistently rejected by the FDIC because a decisional role for the Ombudsman would potentially conflict with the Ombudsman's statutory mandate as an independent liaison with aggrieved institutions. Given this, and that this portion of the comments in substance suggest an alternative to the SARC procedures, the recommended change is not warranted.

#### **Proposed Amendments**

##### *1. Amendment of Determinations Eligible for Review*

Determinations underlying enforcement actions, such as the

citation of apparent violations of law or regulation, have been appealable under the FDIC's Guidelines since their adoption in 1995. The final amendments to the Guidelines eliminate the ability of an FDIC-supervised institution to file an appeal with the SARC with respect to determinations or the facts and circumstances underlying a recommended or pending formal enforcement-related actions or decisions, including the initiation of a formal investigation and the referral to the Attorney General or a notice to the Secretary of Housing and Urban Development for apparent violations of the Equal Credit Opportunity Act or the Fair Housing Act. The final amendments to the Guidelines satisfy the requirements of the Riegle Act and better align the FDIC's material supervisory determination appeals procedures with those of the other Federal banking agencies.

#### A. Independent Review Requirement

Section 309(a) of the Riegle Act required the FDIC to establish an appellate process to review material supervisory determinations. The SARC must make its decision based on "facts of record," which are limited to the Report of Examination, the FDIC-supervised institution's appeal, an FDIC staff response, and, in some cases, a brief oral presentation before the SARC. The SARC appeals process does not involve any further factual development through discovery.

Decisions to proceed with a formal enforcement action, on the other hand, must be supported by facts demonstrating both the existence of the violation at issue as well as facts that satisfy all of the required elements of the enforcement action to be pursued. All FDIC formal enforcement actions are reviewed by a number of high-level FDIC officials both prior and subsequent to their initiation. Ultimately, the FDIC Board of Directors (the Board) decides the outcome of any contested enforcement action and that decision is fully supported by a factual record compiled through investigation, discovery, and an administrative hearing held before an impartial administrative law judge who makes findings of facts, conclusions of law and recommends a decision to the Board.

The FDIC's current procedures for initiating formal enforcement actions ensure review of material supervisory determinations that underlie those enforcement actions by impartial, high-level FDIC officials. Thus, there is no legal requirement or other need for determinations underlying formal

enforcement-related actions to be separately reviewable by the SARC.

#### B. Parity With Other Federal Agencies

As previously noted, the Riegle Act required all of the Federal banking agencies and the NCUA to establish appellate processes to review material supervisory determinations. While the various appellate processes adopted by the Federal banking agencies differ in substance and procedure, no Federal banking agency, other than the FDIC, expressly allows review of determinations that underlie formal enforcement actions.

OCC Bulletin 2002-9, National Bank Appeals Procedures (February 25, 2002) (OCC Guidelines), exempts from its definition of appealable matters "any formal enforcement-related actions or decisions, including decisions to: (a) Seek the issuance of a formal agreement or cease and desist order, or the assessment of a civil money penalty pursuant to Section 8 of the [FDI Act] \* \* \* and (d) commence formal investigations pursuant to 12 U.S.C. 481, 1818(n) and 1820(c).]" Additionally, the OCC Guidelines define the term "formal enforcement-related actions or decisions" as including "the underlying facts that form the basis of a recommended or pending formal enforcement action, the acts or practices that are subject of a pending formal enforcement act, and OCC determinations regarding compliance with an existing formal enforcement action."

The supervisory determinations that may be reviewed on appeal by the OTS, as defined by Thrift Bulletin TB 68a (June 10, 2004), do not include decisions relating to "formal enforcement-related action" such as "[i]nitiating a formal investigation[.]" "[f]iling a notice of charges[.]" and "[a]ssessing civil money penalties."

During the adoption of its internal appeals process, the Board of Governors of the Federal Reserve System (Federal Reserve) specifically rejected a suggestion received through comment that institutions consenting to the issuance of a formal enforcement action, such as a cease and desist order, be allowed to use the internal appeals process to challenge the material supervisory determinations that led to the enforcement action. The Federal Reserve found this suggestion to be inconsistent with the intent of the Riegle Act, which was to "provide an avenue for the review of material supervisory determinations and not contest enforcement actions for which an alternative appeals mechanism exists." (60 FR 16472, March 30, 1995).

The National Credit Union Association (NCUA) limits the type of determinations eligible for review under its appeals process to the specific determinations expressly stated in the Riegle Act. (60 FR 14795, March 20, 1995).

#### C. Notice of Enforcement-Related Action or Decision

At present, only the OCC's Guidelines explicitly provide that a decision to pursue a formal enforcement action will cut off rights to file a material supervisory determination appeal. In this regard, OCC Bulletin 2002-9 states that a formal enforcement-related action or decision "commences when a Supervision Review Committee determines that the OCC will pursue a formal action," at which time the matter becomes unappealable. The OCC has Supervision Review Committees at both the Regional and Washington offices with delegations of authority to initiate different types of formal enforcement actions. The FDIC structure of enforcement matter decision-making is different, generally vesting authority to initiate formal enforcement actions in designated DSC officials, and in some cases following oversight by the Case Review Committee in Washington.

The essence of the OCC's cut-off point is that a decision has been made by appropriately authorized officials that a formal enforcement action will be pursued. In order to mirror the cut-off point as closely as possible, the final amendments establish the FDIC's cut-off point as the date when "the FDIC initiates a formal investigation \* \* \* or provides written notice to the bank indicating its intention to pursue available formal enforcement remedies \* \* \*, including written notice of a referral to the Attorney General or a notice to the Secretary of Housing and Urban Development for apparent violations of the Equal Credit Opportunity Act or the Fair Housing Act."<sup>1</sup> Operational procedures will be established that provide that when an FDIC official with authority to initiate a formal enforcement action decides that the facts and circumstances then known warrant initiation of such action, a letter to the bank will be sent notifying the bank of the decision to pursue formal

<sup>1</sup> When the OCC determines that there is reason to believe an instance or pattern or practice of discrimination exists that will result in either a referral to the Department of Justice or notification to the Department of Housing and Urban Development, the appropriate senior deputy comptroller will provide written notice to the bank of this finding. National banks may file an appeal to the ombudsman for reconsideration of this decision within 15 calendar days of the date of this letter.

action. Such notice will render the underlying facts and circumstances that form the basis of the enforcement action unappealable.

## II. Additional Technical Amendments

Paragraph C of the Guidelines (Institutions Eligible to Appeal) stated that the Guidelines apply to insured depository institutions that the FDIC supervises “(i.e., insured State nonmember banks (except District banks) and insured branches of foreign banks).” The 2004 District of Columbia Omnibus Authorization Act, Public Law No. 108–386, § 8, extended to the FDIC regulatory and supervisory authority over District of Columbia banks. Consequently, the parenthetical “except District banks” has been stricken from Paragraph C of the Guidelines.

Paragraph D of the Guidelines (Determinations Subject to Appeal), at subsection (b), permitted the appeal of “EDP ratings.” The current equivalent is “IT ratings,” and the substitution is made in the Paragraph D.

Paragraph G of the Guidelines (Appeal to the SARC) provided that the Director of the Division of Supervision and Consumer Protection may, with the approval of the SARC Chairperson, transfer a request for review directly to the SARC if the Director determines that the institution is entitled to relief that the Director lacks delegated authority to grant. This provision expedites the SARC process by eliminating the need for the Division Director to deny relief to an institution to enable it to file its appeal to the SARC. In order to further facilitate the prompt resolution of requests for review, a mechanism through which the Division Director may seek guidance from the SARC Chairperson has been added to Paragraph G. The addition to Paragraph G reads: “The Division Director may also request guidance from the SARC Chairperson as to procedural or other questions relating to any request for review.”

Paragraph N of the Guidelines (Publication of Decisions) provided that SARC decisions will be published, and that published decisions will be redacted to avoid disclosure of exempt information. Because there are circumstances where no amount of redaction of the full-text SARC decision would be sufficient to prevent improper disclosure, while at the same time providing a meaningful statement of what the SARC decided, Paragraph N has been revised to state that: “In cases where redaction is deemed to be insufficient to prevent improper

disclosure, published decisions may be presented in summary form.”

\* \* \* \* \*

## Proposed Amended Guidelines for Appeals of Material Supervisory Determinations

### A. Introduction

Section 309(a) of the Riegle Community Development and Regulatory Improvement Act of 1994 (Public Law 103–325, 108 Stat. 2160) (“Riegle Act”) required the Federal Deposit Insurance Corporation (“FDIC”) to establish an independent intra-agency appellate process to review material supervisory determinations made at insured depository institutions that it supervises. The Guidelines for Appeals of Material Supervisory Determinations (“guidelines”) describe the types of determinations that are eligible for review and the process by which appeals will be considered and decided. The procedures set forth in these guidelines establish an appeals process for the review of material supervisory determinations by the Supervision Appeals Review Committee (“SARC”).

### B. SARC Membership

The following individuals comprise the three (3) voting members of the SARC: (1) One inside FDIC Board member, either the Chairperson, the Vice Chairperson, or the FDIC Director (Appointive), as designated by the FDIC Chairperson (this person would serve as the Chairperson of the SARC); and (2) one deputy or special assistant to each of the inside FDIC Board members who are not designated as the SARC Chairperson. The General Counsel is a non-voting member of the SARC. The FDIC Chairperson may designate alternate member(s) to the SARC if there are vacancies so long as the alternate member was not involved in making or affirming the material supervisory determination under review. A member of the SARC may designate and authorize the most senior member of his or her staff within the substantive area of responsibility related to cases before the SARC to act on his or her behalf.

### C. Institutions Eligible To Appeal

The guidelines apply to the insured depository institutions that the FDIC supervises (i.e., insured State nonmember banks and insured branches of foreign banks) and also to other insured depository institutions with respect to which the FDIC makes material supervisory determinations.

### D. Determinations Subject to Appeal

An institution may appeal any material supervisory determination pursuant to the procedures set forth in these guidelines. Material supervisory determinations include:

(a) CAMELS ratings under the Uniform Financial Institutions Rating System;

(b) IT ratings under the Uniform Interagency Rating System for Data Processing Operations;

(c) Trust ratings under the Uniform Interagency Trust Rating System;

(d) CRA ratings under the Revised Uniform Interagency Community Reinvestment Act Assessment Rating System;

(e) Consumer compliance ratings under the Uniform Interagency Consumer Compliance Rating System;

(f) Registered transfer agent examination ratings;

(g) Government securities dealer examination ratings;

(h) Municipal securities dealer examination ratings;

(i) Determinations relating to the adequacy of loan loss reserve provisions;

(j) Classifications of loans and other assets in dispute the amount of which, individually or in the aggregate, exceed 10 percent of an institution's total capital;

(k) Determinations relating to violations of a statute or regulation that may impact the capital, earnings, or operating flexibility of an institution, or otherwise affect the nature and level of supervisory oversight accorded an institution;

(l) Truth in Lending (Regulation Z) restitution;

(m) Filings made pursuant to 12 CFR 303.11(f), for which a Request for Reconsideration has been granted, other than denials of a change in bank control, change in senior executive officer or board of directors, or denial of an application pursuant to section 19 of the FDI Act (which are contained in 12 CFR 308, subparts D, L, and M, respectively), if the filing was originally denied by the DSC Director, Deputy Director or Associate Director; and

(n) Any other supervisory determination (unless otherwise not eligible for appeal) that may impact 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.

Material supervisory determinations do not include:

(a) Decisions to appoint a conservator or receiver for an insured depository institution;

(b) Decisions to take prompt corrective action pursuant to section 38 of the Federal Deposit Insurance Act, 12 U.S.C. 1831o;

(c) Determinations for which other appeals procedures exist (such as determinations of deposit insurance assessment risk classifications and payment calculations);

(d) Decisions to initiate informal enforcement actions (such as memoranda of understanding); and

(e) Formal 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, and FDIC determinations regarding compliance with an existing formal enforcement action.

A formal enforcement-related action or decision commences, and therefore becomes unappealable, when the FDIC initiates a formal investigation under 12 U.S.C. 1820(c) or provides written notice to the bank indicating its intention to pursue available formal enforcement remedies under applicable statutes or published enforcement-related policies of the FDIC, including written notice of a referral to the Attorney General or a notice to the Secretary of Housing and Urban Development for apparent violations of the Equal Credit Opportunity Act or the Fair Housing Act. For the purposes of these guidelines, remarks in a Report of Examination do not constitute written notice of intent to pursue formal enforcement remedies.

#### *E. Good Faith Resolution*

An institution should make a good faith effort to resolve any dispute concerning a material supervisory determination with the on-site examiner and/or the appropriate Regional Office. The on-site examiner and the Regional Office will promptly respond to any concerns raised by an institution regarding a material supervisory determination. Informal resolution of disputes with the on-site examiner and/or the appropriate Regional Office is encouraged, but seeking such a resolution is not a condition to filing a request for review with the Division of Supervision and Consumer Protection or an appeal to the SARC under these guidelines.

#### *F. Filing a Request for Review With the FDIC Division of Supervision and Consumer Protection*

An institution may file a request for review of a material supervisory determination with the Director, Division of Supervision and Consumer Protection, 550 17th Street, NW., Room F-4076, Washington, DC 20429, within 60 calendar days following the institution's receipt of a report of examination containing a material supervisory determination or other written communication of a material supervisory determination. A request for review must be in writing and must include:

(a) A detailed description of the issues in dispute, the surrounding circumstances, the institution's position regarding the dispute and any arguments to support that position (including citation of any relevant statute, regulation, policy statement or other authority), how resolution of the dispute would materially affect the institution, and whether a good faith effort was made to resolve the dispute with the on-site examiner and the Regional Office; and

(b) A statement that the institution's board of directors has considered the merits of the request and authorized that it be filed.

The Director, Division of Supervision and Consumer Protection, will issue a written determination of the request for review, setting forth the grounds for that determination, within 30 days of receipt of the request. No appeal to the SARC will be allowed unless an institution has first filed a timely request for review with the Division of Supervision and Consumer Protection.

#### *G. Appeal to the SARC*

An institution that does not agree with the written determination rendered by the Director of the Division of Supervision and Consumer Protection must appeal that determination to the SARC within 30 calendar days from the date of that determination. The Director's determination will inform the institution of the 30-day time period for filing with the SARC and will provide the mailing address for any appeal the institution may wish to file. Failure to file within the 30-day time limit may result in denial of the appeal by the SARC. If the Director of the Division of Supervision and Consumer Protection determines that an institution is entitled to relief that the Director lacks delegated authority to grant, the Director may, with the approval of the Chairperson of the SARC, transfer the matter directly to the SARC without issuing a

determination. Notice of such a transfer will be provided to the institution. The Division Director may also request guidance from the SARC Chairperson as to procedural or other questions relating to any request for review.

#### *H. Filing With the SARC*

An appeal to the SARC will be considered filed if the written appeal is received by the FDIC within 30 calendar days from the date of the division director's written determination or if the written appeal is placed in the U.S. mail within that 30-day period. If the 30th day after the date of the division director's written determination is a Saturday, Sunday or Federal holiday, filing may be made on the next business day. The appeal should be sent to the address indicated on the determination being appealed.

#### *I. Contents of Appeal*

The appeal should be labeled to indicate that it is an appeal to the SARC and should contain the name, address, and telephone number of the institution and any representative, as well as a copy of the determination being appealed. If oral presentation is sought, that request should be included in the appeal. Only matters previously reviewed at the division level, resulting in a written determination or direct referral to the SARC, may be appealed to the SARC. Evidence not presented for review to the DSC Director may be submitted to the SARC only if authorized by the SARC Chairperson. The institution should set forth all of the reasons, legal and factual, why it disagrees with the determination. Nothing in the SARC administrative process shall create any discovery or other such rights.

#### *J. Burden of Proof*

The burden of proof as to all matters at issue in the appeal, including timeliness of the appeal if timeliness is at issue, rests with the institution.

#### *K. Oral Presentation*

The SARC may, in its discretion, whether or not a request is made, determine to allow an oral presentation. The SARC generally grants a request for oral presentation only if it determines that oral presentation is likely to be helpful or would otherwise be in the public interest. Notice of the SARC's determination to grant or deny a request for oral presentation will be provided to the institution. If oral presentation is held, the institution will be allowed to present its positions on the issues raised in the appeal and to respond to any questions from the SARC. The SARC

may also require that FDIC staff participate as the SARC deems appropriate.

#### *L. Dismissal and Withdrawal*

An appeal may be dismissed by the SARC if it is not timely filed, if the basis for the appeal is not discernable from the appeal, or if the institution moves to withdraw the appeal.

#### *M. Scope of Review and Decision*

The SARC will review the appeal for consistency with the policies, practices and mission of the FDIC and the overall reasonableness of and the support offered for the positions advanced, and notify the institution, in writing, of its decision concerning the disputed material supervisory determination(s) within 60 days from the date the appeal is filed, or within 60 days from oral presentation, if held. SARC review will be limited to the facts and circumstances as they existed prior to or at the time the material supervisory determination was made, even if later discovered, and no consideration will be given to any facts or circumstances that occur or corrective action taken after the determination was made. The SARC may reconsider its decision only on a showing of an intervening change in the controlling law or the availability of material evidence not reasonably available when the decision was issued.

#### *N. Publication of Decisions*

SARC decisions will be published, and the published SARC decisions will be redacted to avoid disclosure of exempt information. In cases where redaction is deemed to be insufficient to prevent improper disclosure, published decisions may be presented in summary form. Published SARC decisions may be cited as precedent in appeals to the SARC.

#### *O. SARC Guidelines Generally*

Appeals to the SARC will be governed by these guidelines. The SARC will retain the discretion to waive any provision of the guidelines for good cause; the SARC may adopt supplemental rules governing SARC operations; the SARC may order that material be kept confidential; and the SARC may consolidate similar appeals.

#### *P. Limitation on Agency Ombudsman*

The subject matter of a material supervisory determination for which either an appeal to the SARC has been filed or a final SARC decision issued is not eligible for consideration by the Ombudsman.

#### *Q. Coordination With State Regulatory Authorities*

In the event that a material supervisory determination subject to a request for review is the joint product of the FDIC and a State regulatory authority, the Director, Division of Supervision and Consumer Protection, will promptly notify the appropriate State regulatory authority of the request, provide the regulatory authority with a copy of the institution's request for review and any other related materials, and solicit the regulatory authority's views regarding the merits of the request before making a determination. In the event that an appeal is subsequently filed with the SARC, the SARC will notify the institution and the State regulatory authority of its decision. Once the SARC has issued its determination, any other issues that may remain between the institution and the State authority will be left to those parties to resolve.

#### *R. Effect on Supervisory or Enforcement Actions*

The use of the procedures set forth in these guidelines by any institution will not affect, delay, or impede any formal or informal supervisory or enforcement action in progress or affect the FDIC's authority to take any supervisory or enforcement action against that institution.

#### *S. Effect on Applications or Requests for Approval*

Any application or request for approval made to the FDIC by an institution that has appealed a material supervisory determination which relates to or could affect the approval of the application or request will not be considered until a final decision concerning the appeal is made unless otherwise requested by the institution.

#### *T. Prohibition on Examiner Retaliation*

The FDIC has an experienced examination workforce and is proud of its professionalism and dedication. FDIC policy prohibits any retaliation, abuse, or retribution by an agency examiner or any FDIC personnel against an institution. Such behavior against an institution that appeals a material supervisory determination constitutes unprofessional conduct and will subject the examiner or other personnel to appropriate disciplinary or remedial action. Institutions that believe they have been retaliated against are encouraged to contact the Regional Director for the appropriate FDIC region. Any institution that believes or has any evidence that it has been subject to retaliation may file a complaint with the

Director, Office of the Ombudsman, Federal Deposit Insurance Corporation, 550 17th Street, Washington, DC 20429, explaining the circumstances and the basis for such belief or evidence and requesting that the complaint be investigated and appropriate disciplinary or remedial action taken. The Office of the Ombudsman will work with the Division of Supervision and Consumer Protection to resolve the allegation of retaliation.

For the reasons stated in the Preamble, the Board has adopted the Guidelines for Appeals of Material Supervisory Determinations as set forth above

By Order of the Board of Directors.

Dated at Washington, DC, the 17th day of September, 2008.

Federal Deposit Insurance Corporation.

**Robert E. Feldman,**

*Executive Secretary.*

[FR Doc. E8-22148 Filed 9-22-08; 8:45 am]

BILLING CODE 6714-01-P

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## FEDERAL RESERVE SYSTEM

### **Change in Bank Control Notices; Acquisition of Shares of Bank or Bank Holding Companies**

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. The notices also will be available for inspection at the office of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than October 7, 2008.

**A. Federal Reserve Bank of Chicago** (Burl Thornton, Assistant Vice President) 230 South LaSalle Street, Chicago, Illinois 60690-1414:

1. *Nicholas J. Burns, Jr.*, Almond, Wisconsin, to acquire additional votings shares of River Cities Bancshares, Inc., and thereby indirectly acquire additional voting shares of River Cities Bank, both of Wisconsin Rapids, Wisconsin.

**B. Federal Reserve Bank of San Francisco** (Kenneth Binning, Director, Regional and Community Bank Group)