PRYOR CASHMAN LLP

New York | Los Angeles

7 Times Square, New York, NY 10036-6569 Tel: 212-421-4100 Fax: 212-326-0806 www.pryorcashman.com

Pinchus D. Raice
Partner

Direct Tel: 212-326-0104
Direct Fax: 212-798-6948
PRaice@PRYORCASHMAN.com

Jeffrey Alberts
Partner

Direct Tel: 212-326-0800
Direct Fax: 212-326-0806
JAlberts@PRYORCASHMAN.com

Dustin N. Nofziger
Associate

Direct Tel: (212) 326-0448
Direct Fax: (212) 798-6385
DNofziger@PRYORCASHMAN.com

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VIA E-MAIL (REGS.COMMENTS@FEDERALRESERVE.GOV)

Ann E. Misback
Secretary
Board of Governors of the Federal Reserve
System
20th Street and Constitution Avenue NW
Washington, DC 20551

Re: Docket No. OP-1597 - Comments of the New York League of Independent Bankers on the Board's Proposed Guidelines for Appeals of Material Supervisory Determinations

Dear Ms. Misback:

We write on behalf of the New York League of Independent Bankers ("NYLIB") to express NYLIB's comments regarding the proposed amendments of the Board of Governors of the Federal Reserve System (the "Board") to the Board's guidelines for appeals of adverse material supervisory determinations. See Board, Guidelines for Appeals of Material Supervisory Determinations, 83 Fed. Reg. 8,392, 8,392-94 (Feb. 27, 2018) (the "Proposed Guidelines").

Specifically, NYLIB suggests that the Proposed Guidelines be modified to:

1. Continue to acknowledge that extensions of the 30-day initial appeal deadline may be granted in appropriate circumstances;

2. Continue to allow 30 days, rather than 14 days, to appeal from the decision of the initial review panel;

3. Incorporate a method for the construction of time limits similar to that found in 12 C.F.R. § 263.12;

4. Provide that the record on appeal will be provided to the appealing financial institution;

5. Provide that the final level of review is to the Ombudsman or the Board; and

6. Provide for de novo review at the final level of review.

NYLIB believes these to be sensible suggestions that will enhance the effectiveness of the appeals process, improve the capacity for reasoned decision-making, and increase the confidence of financial institutions in the integrity of the appeals process.

NYLIB also writes to offer its support for the proposal in the Proposed Guidelines that final review decisions be published in redacted form, and to offer two additional suggestions with respect to this proposal.

I. THE PROPOSED GUIDELINES SHOULD CONTINUE TO ACKNOWLEDGE THAT EXTENSIONS OF THE 30-DAY INITIAL APPEAL DEADLINE MAY BE GRANTED IN APPROPRIATE CIRCUMSTANCES

The Board's guidelines currently provide that the 30-calendar day deadline for filing an initial appeal may be extended by the Reserve Bank in appropriate circumstances. See Board, Guidelines for Appeals of Material Supervisory Determinations, 60 Fed. Reg. 16,472, 16,472 (Mar. 30, 1995) (the "Guidelines") (requiring filing of appeal "within 30 calendar days of receipt of the material supervisory determination, unless the time for filing is extended by the Reserve Bank"). The Proposed Guidelines, in contrast, do not acknowledge the possibility of extensions of the 30-calendar day deadline for filing an initial appeal. See Proposed Guidelines, 83 Fed. Reg. at 8,393 ("The institution must file the appeal with the Board's Ombudsman within 30 calendar days of the date of the relevant written material supervisory determination, with a copy to the Officer in Charge of Supervision at the appropriate Reserve Bank."). Nor does the Board's commentary to the Proposed Guidelines offer an explanation as to why the Proposed Guidelines omit any reference to extensions.

NYLIB respectfully submits that the Proposed Guidelines be amended to continue to acknowledge that extensions of the 30-day deadline for filing an initial appeal may be granted in appropriate circumstances. NYLIB makes this comment primarily for four reasons.

First, it is without question that submitting an initial appeal within 30 days will be in many cases a challenging task. According to the Proposed Guidelines, the initial appeal is a full and complete appeal that "must include a clear and complete statement of all relevant facts and issues, as well as all arguments the institution wishes to present, and must include all relevant and material documents that the institution wishes to be considered." Id. at 8,393. Submitting a comprehensive initial appeal will be especially challenging when an institution is appealing multiple material supervisory determinations, such as composite and component examination ratings, and when the issues presented are complex. Providing an institution with 60 days to submit an initial appeal, rather than 30 days, would not be unreasonable. See OCC, OCC Bull. No. 2013-15, Bank Appeals Process: Guidance for Bankers, https://www.occ.treas.gov/news-issuances/bulletins/2013/bulletin-2013-15.html (June 7, 2013) (the "OCC Guidance") ("Banks requesting an appeal must file their appeal within 60 days of receipt of the final written agency decision in dispute."); FDIC, Guidelines for Appeals of Material Supervisory Determinations, 82 Fed. Reg. 34,526, 34,527 (July 25, 2017) (the "FDIC Guidelines") (providing for 60 calendar days from receipt of material supervisory determination to file initial appeal).

Second, institutions who receive adverse material supervisory determinations often need time to locate and engage counsel who can assist them in evaluating the merits of a potential appeal, and, if the institution so decides, in prosecuting the appeal. While NYLIB understands that some institutions may choose to file appeals without the assistance of counsel, NYLIB believes that the advice of counsel is often invaluable. "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." Goldberg v. Kelly, 397 U.S. 254, 270 (1970).

Third, once counsel is retained, additional time is often needed to obtain authorization to disclose relevant federal and/or state confidential supervisory information to counsel. This is particularly the case when the material supervisory determinations being appealed are found in joint federal-state reports of examination. State financial regulatory agencies sometimes take several weeks (or longer) to grant financial institutions' requests to disclose relevant confidential supervisory information, including joint federal-state reports of examination, to counsel. It would be unreasonable to expect financial institutions to file intra-agency appeals within 30 calendar days of the receipt of adverse material supervisory determinations in such circumstances, where they have been prevented from obtaining the advice and assistance of counsel by a state agency's delay in authorizing the disclosure of relevant confidential supervisory information to counsel.

Fourth, there may be other legitimate reasons for reasonable extensions of the 30-day deadline as well, including but not limited to illness, bereavement, or natural disaster affecting a financial institution or its counsel.

In short, there are a number of legitimate reasons why a financial institution may require more than 30 days to file an initial appeal. Some of these – such a state agency's delay in granting

a financial institution's request for authorization to share relevant federal-state confidential supervisory information with the financial institution's own counsel – are entirely outside of a financial institution's control. NYLIB believes that the Proposed Guidelines should continue to provide – as the Guidelines do currently – that extensions of the initial appeal deadline may be granted in appropriate circumstances.

II. A FINANCIAL INSTITUTION SHOULD CONTINUE TO HAVE 30 DAYS TO APPEAL FROM A DECISION OF THE INITIAL REVIEW PANEL

The Board's Guidelines, which provide for a three-step appeals process, currently provide a financial institution with 30 calendar days to appeal the decision of the initial review panel to the Reserve Bank President, as well as 30 calendar days to appeal the decision of the Reserve Bank President to the appropriate Governor of the Board. Guidelines, 60 Fed. Reg. at 16,472-73. The Proposed Guidelines would reduce the timeframe for appealing a decision of the initial review panel by reducing the timeframe from 30 calendar days to 14 calendar days. See Proposed Guidelines, 83 Fed. Reg. at 8,393. The Board's commentary to the Proposed Guidelines does not explain the rationale for reducing a financial institution's time to appeal a decision of the initial review panel by more than 50 percent.

NYLIB respectfully submits that the Board should continue to allow a financial institution 30 calendar days to appeal a decision of the initial review panel. The Proposed Guidelines would provide the initial review panel with 45 to 70 calendar days to provide written notice of its decision. Id. 14 calendar days from the receipt of the initial review panel's decision would be too short a period of time, in many circumstances, to allow a financial institution to thoroughly review the initial review panel's decision and to craft a comprehensive response that coherently "state[s] all the reasons, legal and factual, the institution disagrees with the initial review panel's decision." Id. This may particularly be the case where the 14-day period in question encompasses holidays (e.g., Veterans Day and Thanksgiving Day, which are separated by seven calendar days in November 2018), pre-planned voluntary or mandatory vacations of key financial institution staff, and/or on-site state or federal examinations that demand the attention of key financial institution staff. A period of 30 calendar days is more reasonable, especially in light of the fact that the initial review panel has 45 to 70 calendar days to render its decision. For the foregoing reasons, NYLIB recommends that the Proposed Guidelines continue to provide for 30 days to appeal a decision of the initial review panel.

III. THE PROPOSED GUIDELINES SHOULD SPECIFY HOW TIME LIMITS ARE CONSTRUED

Neither the Guidelines nor the Proposed Guidelines specify how calendar days are to be counted, the consequences if submission deadlines fall on federal holidays or weekends, or

whether appeal papers are deemed to be filed by a financial institution upon transmission by the financial institution or upon receipt by the Federal Reserve.

NYLIB respectfully submits that the Proposed Guidelines should clarify that procedures for the construction of time limits similar to those found in 12 C.F.R. § 263.12 apply to intra-agency appeals. The Board's procedures set forth in 12 C.F.R. § 263.12 are thoughtful. NYLIB believes that the Proposed Guidelines should make clear that a financial institution is not required to file an appellate document on a Saturday, Sunday, or Federal holiday. The Proposed Guidelines should also explain that a financial institution's filing of appeal papers is effective when the financial institution either emails the papers to the Ombudsman or deposits or delivers them with an overnight commercial delivery service or the U.S. Postal Service.

IV. THE RECORD ON APPEAL SHOULD BE PROVIDED TO THE FINANCIAL INSTITUTION BY THE RESERVE BANK

The Proposed Guidelines would provide that the initial review panel "may rely on any workpapers developed by the Reserve Bank," and would also provide that the initial review panel may supplement the record by soliciting the views of outside parties. Proposed Guidelines, 83 Fed. Reg. at 8,393. Meanwhile, the final review panel would be "confined to the record upon which the initial review panel made its decision" – suggesting that the final review panel would be provided with a copy of the record by the initial review panel. Id. at 8,394.

NYLIB respectfully submits that the record upon which the initial review panel made its decision should also be provided to the financial institution contemporaneously with the initial review panel's decision. NYLIB appreciates that the Board wishes to avoid creating discovery rights that would impose cost and burden on the Reserve Bank whose material supervisory decision is being appealed. At the same time, however, NYLIB believes that a financial institution cannot be expected to intelligently respond to evidence of which it is unaware – or, for that matter, to a decision of the initial review panel that is based on such evidence. Reasoned decision-making and fairness would be promoted if the initial review panel is required to provide the appealing financial institution with a copy of the record. Given that the initial review panel is already providing the record to the final review panel, the additional cost or burden posed by requiring the initial review panel to provide the record to the financial institution would be minimal.

V. THE FINAL LEVEL OF APPEAL SHOULD BE TO THE OMBUDSMAN OR THE BOARD

The Guidelines provide that the third and final level of review is by "an appropriate Governor" of the Board. Guidelines, 60 Fed. Reg. at 16,473. The Proposed Guidelines would provide that the second and final level of review would be conducted by three individuals hand-

picked by the "director of the appropriate division of the Board" for the specific appeal. Proposed Guidelines, 83 Fed. Reg. at 8,393-94.

NYLIB respectfully submits that the final level of review should be by the Ombudsman or the Board for three reasons: to promote consistency and predictability of decision-making; to provide a final review that is "independent," as required by the Riegle Community Development and Regulatory Improvement Act of 1994 (the "Riegle Act"), 12 U.S.C. § 4806; and to enhance the confidence of financial institutions in the integrity of the appeals process.

First, the final review should be conducted by the Ombudsman or the Board to promote consistency and predictability of decision-making. If the final review panel for every appeal has a unique composition, there is a real risk that the relief available to financial institutions may vary depending on the composition of the panel. This risk would be reduced if the final review is conducted by the Board or the Ombudsman. See Julie Andersen Hill, Improving Appeals of Material Supervisory Determinations, https://www.theclearinghouse.org/banking-perspectives/2017/2017-q3-banking-perspectives/articles/improving-supervisory-appeals (last visited Apr. 30, 2018) ("[C]onsistent decisions are more likely to come from a single appellate authority.").

Second, the final review should be conducted by the Ombudsman or the Board to ensure that the appeals process is truly "an independent intra-agency appellate process," as required by Section 309 of the Riegle Act, 12 U.S.C. § 4806(a), (f)(2). The Proposed Guidelines do not explain what is meant by the "director of the appropriate division of the Board." See Proposed Guidelines, 83 Fed. Reg. at 8,393-94. Presumably, what is meant is the director of the division of the Board that was ultimately responsible for the material supervisory determination(s) being appealed, such as the Director of the Division of Supervision and Regulation in the case of appeals of examination composite or component ratings. The Proposed Guidelines thus present a serious question about the independence of the final review panel, and, consequently, the Board's entire appeals process. In the case of composite or component examination ratings, for example, the Director of the Division of Supervision and Regulation is the effective or actual head of the examination function responsible for the material supervisory determination being appealed. It would seem plausible to consider the Director – who may have even reviewed the material supervisory determination in question prior to its issuance – to be "the agency official who made the material supervisory determination under review." 12 U.S.C. § 4806(f)(2). It is thus unclear how a final review panel that is hand-picked by the Director (and possibly comprised entirely of his staff) would meet the Riegle Act's mandate that the Board establish "an independent intra-agency appellate process." 12 U.S.C. § 4806(a), (f)(2) (emphasis added).

Third, final review should be conducted by the Board or the Ombudsman to instill confidence in the integrity of the appeals process. Unfortunately, there is evidence that financial institutions are reluctant to file meritorious intra-agency appeals because of fears both that the

federal financial regulatory agencies' appeals process are not robust, and that filing an appeal will subject financial institutions to retaliation from examiners. See Julie Anderson Hill, When Bank Examiners Get It Wrong: Financial Institution Appeals of Material Supervisory Determinations, 92 Wash. Univ. L. Rev. 1101, 1167 (2015) ("[S]urvey data suggest that the [intra-agency] appeals processes are not functioning properly. Some financial institutions believe that appealing is futile. Others fear retaliation."). If the final level of review is conducted by individuals who are hand-picked by director of the division of the Board that is ultimately responsible for the material supervisory determination(s) being appealed, financial institutions' concerns that appeals may be futile and may subject institutions to potential retaliation will likely increase. Allowing appeal to an independent authority such as the Ombudsman or the Board, on the other hand, is likely to increase financial institutions' confidence in the integrity of the appeals process. See Hill, Improving Appeals ("[F]inancial institutions should have direct access to a dedicated appellate authority outside of the examination function . . . . A more independent appellate authority may increase bank confidence in the material supervisory determination appeals processes."). Moreover, allowing the final level of review to be conducted by lower-level staff rather than the Ombudsman or the Board sends the wrong message – that the Board does not take appeals seriously. It is notable in this respect that the OCC allows for direct appeals to the agency's Ombudsman, and that although the FDIC Board provides for initial appeals to the director of "the Division that made the determination," the FDIC Board also provides for final review by a three-person committee that is comprised of one inside FDIC Board member and two deputies or special assistants to the other inside FDIC Board members who do not directly serve on the review panel. See OCC Guidance; FDIC Guidelines, 82 Fed. Reg. at 34,526-27.

For the foregoing reasons, NYLIB respectfully submits that the final level of review should be performed by the Ombudsman or the Board. Centralizing the final review function in the Ombudsman or the Board will promote consistency and predictability in decision-making. It will also ensure that the Board's appeals process complies with Section 309 of the Riegle Act, and will increase financial institutions' confidence in the appeals process by allowing them recourse to a final decision-maker whom they can be confident will be independent of the examination function and who will independently and fairly evaluate the issues at hand.

VI. THE FINAL REVIEW PANEL SHOULD REVIEW THE ISSUES DE NOVO

The Guidelines do not include a standard of review at any of the three current levels of review. The Proposed Guidelines, meanwhile, would provide that the second and final review panel is to perform a deferential review that asks only "whether the decision of the initial review panel is reasonable" – "even if it is possible to draw a contrary conclusion from the record presented on appeal." Proposed Guidelines, 83 Fed. Reg. at 8,394.

NYLIB respectfully submits that rather than deferring to the initial review panel, the second and final review panel should review the record de novo. Under the Proposed Guidelines,

the initial review panel is drawn from the Reserve Bank that made the material supervisory decision(s) in question. Id. at 8,393. This means that the second and final review panel is the first and only opportunity for review outside of the Reserve Bank in question. While NYLIB appreciates the opportunity for an initial level of review at the Reserve Bank level, many financial institutions will view this first level of review with suspicion given that it takes place at the same Reserve Bank that was responsible for the adverse material supervisory determination(s) being appealed. See Hill, Improving Appeals ("Financial institutions that disagree with a determination may view the regulator's examination function with suspicion. Assigning the first step of the examination function to examination officials does little to assuage this concern."). De novo review by the final review panel would allow the final review panel to correct a "wider swath of erroneous decisions." See id. It would also enhance financial institutions' confidence in the integrity of the appeals process by assuring them that a review panel outside of the Reserve Bank that made the material supervisory determination(s) being appealed will have the opportunity to independently review the issues.

VII. THE PROPOSED GUIDELINES SENSIBLY PROVIDE FOR THE PUBLICATION OF FINAL REVIEW DECISIONS IN REDACTED FORM

The Proposed Guidelines provide that copies of final review decisions will be published "as soon as practicable," with redactions to avoid disclosure of exempt information. Proposed Guidelines, 83 Fed. Reg. at 8,394.

NYLIB writes to express its support and appreciation for this proposal. Publishing final review decisions will enhance transparency and confidence in the appeals process. It also will enable financial institutions and other regulatory agencies to better understand the Board's viewpoints on various issues.

That said, NYLIB does have two suggestions. First, final review decisions should be published in a central location on the Board's website. Second, in addition to publishing final review decisions on a going-forward basis, the Board should consider publishing copies of past final review decisions in redacted form.

VIII. CONCLUSION

NYLIB is deeply appreciative of the opportunity to submit comments on the Proposed Guidelines. While the Proposed Guidelines are thoughtful, NYLIB believes that it has outlined suggestions for improvements in several areas that merit the Board's consideration.

Very truly yours,

Pinchus D. Raice
Jeffrey Alberts
Dustin N. Nofziger

On behalf of NYLIB