

## DUE PROCESS FOR BANKS

Igler | Pearlman, P.A. recently had the opportunity to participate in a *Federal Deposit Insurance Corporation (“FDIC”) Appeal of Material Supervisory Determinations (“Appeal”)*. We represented a Florida state-chartered bank before the *Supervision Appeals Review Committee (“SARC”)*. The SARC Appeal procedures provided the bank with the opportunity to dispute cited violations of law and a CAMELS component rating assigned to the bank in its recent Safety and Soundness Examination (“Examination”), and allowed the bank the opportunity to present its position on the findings of the Examination in an open forum.

The SARC panel is comprised of three members: the Chairman of the SARC, Jelena McWilliams, Acting Deputy to Director, Philip Shively, and a third seat currently vacant. Filling the open seat during our Appeal was FDIC General Counsel Charles Yi, who served as a non-voting member. During our experience, we found the members of SARC to have reviewed our detailed brief and were very engaged, asking direct questions to the bank’s Board and management, and to the representatives of the FDIC Division of Risk Management, Senior Deputy Director James C. Watkins and Acting Section Chief, George Parkerson. Deputy Regional Director, John P. Henrie, was in attendance representing the Atlanta Regional Office. In total, the FDIC had 16 representatives present.

Chairman McWilliams was appointed in November 2017 by President Donald Trump, and was confirmed by Senate in May of 2018. Chairman McWilliams has placed the FDIC in a more open position by promoting the agency’s *Trust through Transparency* initiative. This initiative is

meant to allow banks to gain trust and confidence in the FDIC through the agency’s openness and accountability. Throughout the Appeal process, we have seen this initiative prove to be a positive one.

### *Guidelines for Appeals*

A bank may appeal a Material Supervisory Determination (“Determination”), which includes: CAMELS Ratings, CRA Ratings, Matters Requiring Board Attention, among many others. The full list can be found [here](#).

Prior to filing an Appeal, a bank should follow the procedures as set forth in the appropriate agency’s guidelines. The guidelines for FDIC supervised banks are found in *Appeals of Material Supervisory Determinations: Guidelines & Decision (“Guidelines”)*. According to the Guidelines, the bank should first make a good-faith effort to resolve any Determination with the on-site examiners and appropriate FDIC Regional Office. This can be done, for example, at the exit interview with management after a Safety and Soundness Examination. Your bank should expressly request that any disagreement with a finding be notated in the Report of Examination (“ROE”). It is also recommended that the bank schedule a meeting, through its counsel, with the Deputy Director of the FDIC Regional Office to specifically discuss management’s concerns and position.

If after the exit interview and meeting with the FDIC Regional Office, the bank receives an ROE that is still unsatisfactory as to the items being contested, the bank should *not* sign and “accept” the ROE. Instead, the bank should file a Request for Review of the Determination (“Request”). The Request is typically required to be submitted to the FDIC Director of Risk Management

Supervision (“Director”) in Washington, D.C. within sixty (60) calendar days. The Request should include a description of the Determination in dispute, an argument to support the bank’s position that such Determination is incorrect, as well as a background as to how the bank first tried to resolve the disagreement in good faith prior to filing the Request. Within forty-five (45) days, the Director will issue his or her response to the Request (“Response”).

If the Response is again unfavorable to the bank, it may appeal the Response to the SARC. This appeal must be filed within thirty (30) days of receiving the Response, and should include the bank’s position as to why the Response is incorrect based upon the facts and position presented. The bank is not allowed to enter any new evidence or supporting documentation without the SARC Chairperson’s prior approval. The bank may also request an oral presentation in front of SARC to explain its position and answer any questions that the SARC may have regarding the matters in dispute. We would encourage the bank make this request. The oral presentation, if granted, is held in the FDIC Washington D.C. Office.

### ***SARC Appeal***

Prior to the oral presentation, the SARC will have reviewed and considered all of the material previously submitted to the FDIC at each level of the process – the Determination, Request, Response, and Appeal.

The bank is typically represented by its counsel, Chief Executive Officer, and Chairman of the Board, while the FDIC is represented by the Risk Management Supervision representatives in the Washington D.C. office. The Bank will have twenty (20) minutes to present its position,

followed by the FDIC, who will have twenty (20) minutes to present the agency’s position. After the presentations conclude, the three-member SARC panel will ask questions of both the bank and the FDIC to clarify any misstatements, confusion, or to obtain new information at that time that it believes is relevant to the decision. Once questioning has concluded, representatives of the Bank and the FDIC each get five (5) minutes to present a closing argument.

When the oral presentation is concluded, the SARC has sixty (60) days to issue its findings, which cannot be later appealed.

Though the forum for the Appeal may appear to be very formal, the Appeal itself is more like an informal hearing.

### ***Our Experience***

When considering an appeal on a proposed or final CAMELS Rating a number of bankers take the position that you “can’t fight City Hall.” The truth is that the federal agencies (Federal Reserve Board, FDIC and Office of the Comptroller of the Currency) have promulgated guidelines to specifically allow banks to challenge individual CAMELS component ratings, the Composite Rating or agency findings of violations of law. The Federal Reserve Board and the FDIC encourage such appeals. These guidelines are rather streamlined and are in no manner a way to deter a bank from filing an appeal. This is important on several counts. First, the regulatory agency in question knows that the bank’s board of directors and management are engaged. Second, the Regional Office has a better understanding of the bank’s characteristics and financial condition, other than relying on Call Reports or a field examiner’s findings. Third, it gives the examiners in the field and the Regional

Office a chance to get on the same page. The ratings of the individual CAMELS components are very subjective. A thorough appeal process will better define the overall condition of the bank in the eyes of the agency involved. We have found that it also lays the foundation for future examinations. Finally, the bank, if successful on its appeal, can often decrease its deposit insurance premiums.

Bankers also fear potential retaliation from the field examiners or the Regional Office. Our experience is that the bank will not be subject to retaliation. To the contrary, we have seen the FDIC take actions to ensure that any retaliatory action is non-existent. A banker, therefore, should always consider filing an Appeal if he or she disagrees with the results of an Examination.

Our firm has been successful in a number of appeals that we have filed on behalf of our bank clients, most recently resulting in certain upgrades, withdrawal of civil money penalties, and removal of multi-provisional Enforcement Actions. If you would like our firm to talk you through your banks options, contact us [here](#).

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