THE CLS BLUE SKY BLOG
COLUMBIA LAW SCHOOL'S BLOG ON CORPORATIONS AND THE CAPITAL MARKETS

Challenging Banking Agency Examination Results

By Lucas Beirne

As part of a broader shift in the regulatory landscape, federal banking agencies are working to make exams more objective and financial in focus. For example, the Federal Financial Institutions Examination Council ("FFIEC") recently released a notice of proposed rulemaking that would revise the Uniform Financial Institutions Rating System, commonly known as the CAMELS rating system, for the first time in thirty years. The proposed revisions would ensure that the rating system "focuses on an institution's financial condition and risk profile, with emphasis on material financial risk."[1] This shift in regulatory posture represents a course correction from the previous Administration's supervisory posture, particularly following heightened regulatory scrutiny after Silicon Valley Bank and Signature Bank were placed into Federal Deposit Insurance Corporation receivership in March 2023.

It will take time for this change in posture to meaningfully affect examination work and the approach of examiners, who may be operating in line with prior regulatory approaches. This makes it an opportune time for banking organizations to push back on examiners and challenge supervisory findings. Senior agency staff may be particularly amenable to correcting findings and ratings that are out of step with the renewed focus on material risks. This [Note] explores the various considerations and processes available to challenge examiners and enforcement actions that may not align with the new regulatory landscape.

BACKGROUND

For years, banking organizations have been reluctant to push back on their examiners.[2] Yet, negative examination findings have real consequences for firms. Ratings downgrades can result in higher deposit insurance assessments[3] or limitations on permissible activities. For example, a financial holding company and all of its depository institution subsidiaries must be both "well capitalized" and "well managed" for the firm to continue to engage in expanded financial activities.[4] When a financial holding company or its subsidiary bank is in less-than-satisfactory condition, the Federal Reserve will require the firm to enter into a so-called 4(m) agreement, limiting the firm's ability to engage in new activities without prior written approval from the Federal Reserve.[5]

Material supervisory determinations may eventually be escalated into enforcement actions. Even material supervisory determinations that are not the subject of the enforcement action will be considered during the enforcement evaluation. As the Federal Reserve instructs examiners, "the volume of open MRIAs [Matters Requiring Immediate Attention] and MRAs [Matters Requiring Attention]" are one of the "important overarching considerations" in determining whether to escalate issues into enforcement actions.[6] The mere "presence of a large number of MRIAs or MRAs may indicate that . . . the initiation of a formal or informal enforcement action may be warranted."[7] When considering "the appropriate enforcement approach" for the largest banking organizations within the Federal Reserve's Large Institution Supervision Coordinating Committee, Federal Reserve staff are instructed to "consider factors such as the severity and pervasiveness of weaknesses at the institution and management's capacity to correct the weaknesses."[8] In some circumstances, an enforcement action may even be required by statute. Under Section 8(s) of the Federal Deposit Insurance Act, a federal banking agency is *required* to bring a cease and desist action where a firm "has failed to correct" any Bank Secrecy Act problem that "was previously reported to the depository institution by such agency."[9]

But examiners do not always get it right. The federal banking agencies conduct thousands of exams every year and, inevitably, mistakes will occur. Examiners may misunderstand the facts, misapply law or regulation, or inappropriately escalate issues that are relatively minor or already being effectively remediated. Additionally, as described above, examiners may be out of step with senior agency staff and the shift in regulatory approach to making examinations more objective and focused on material risks. For this reason, now is the ideal time for banking organizations—banks, bank holding companies ("BHCs"), and foreign banking organizations—to push back when examiners are wrong or continue to follow outdated regulatory paradigms. Senior agency staff will also be particularly attuned at this time to ensuring that their shift in regulatory focus is implemented, and prompting conversations between examiners and senior agency staff can have long-term benefits for banking organizations that feel a course correction may be needed in their regulatory relationship.

CHALLENGING EXAMINATION FINDINGS AND RATINGS

Informal Advocacy

Banking organizations should always begin by maintaining a positive relationship with examiners to facilitate communication and preserve regulatory goodwill. Banking organizations should provide information when requested by examiners and should avoid incomplete responses, which could complicate any efforts to challenge examination findings. When a banking organization disagrees with a proposed finding or rating, the first step should be discussing the proposed finding or rating with the examiner. At this stage, banking organizations should engage in both written and oral advocacy, providing relevant additional facts as well as analysis of applicable laws, regulations and policies. Additionally, banking organizations should consider escalating informal discussions to: their respective regional office, in the case of the FDIC; Federal Reserve Bank management, in the case of the Federal Reserve; or OCC management, respectively.

This early advocacy stage is crucial since the easiest way to change or challenge the result of an examination is to do so before the result or finding has been issued. For banking organizations not accustomed to engaging in this type of informal advocacy, experienced outside counsel can assist with advocacy work, advise on the best way to push back against proposed findings or ratings, and help prevent examination issues from progressing into more costly formal challenges or appeals.

Agency Ombudsmen

In addition to engaging directly with examiners, banking organizations can also seek assistance from the federal banking agencies' ombudsmen. As required by the Riegle Community Development and Regulatory Improvement Act of 1994, [10] the Federal Reserve Ombuds, the FDIC Ombudsman, and the OCC Ombudsman each offer to facilitate the informal resolution of problems and complaints with their respective agencies—for example, by holding informal discussions and raising unresolved complaints with senior agency staff before an appeal is filed, by facilitating negotiations with examiners over matters such as a potential component-rating downgrade,[11] or, under the OCC's February 2026 notice of proposed rulemaking (the "OCC Proposal"), by serving as an impartial liaison between the appellant and the Deputy Comptroller of the Appeals Board.[12] The ombudsmen are available to banking organizations at any time, and early engagement may help resolve communications breakdowns before they escalate into examination findings.

Formal Appeals

In addition to these informal processes, each federal banking agency has a formal process for banking organizations to appeal material supervisory determinations. A material supervisory determination generally includes determinations that relate to examination or inspection composite and component ratings (including CAMELS ratings), the adequacy of loan loss reserves, and loan classifications, as well as matters requiring attention and other supervisory findings. A material supervisory determination generally does not include decisions to appoint a conservator or receiver, to take prompt corrective action, or to pursue a formal enforcement action. Each federal banking agency has substantially revised its appeals process within the last decade. The Federal Reserve updated its policy in 2020, the FDIC finalized changes in early 2026, and the February 2026 OCC Proposal would update and clarify the OCC's appeals process. Because the OCC Proposal has not yet been finalized, the OCC framework described below remains subject to change. For the purposes of this [Note], we assume that the OCC Proposal will be adopted largely as proposed.

There are common key elements across the federal banking agencies, namely that the banking organization's appeal is heard by one or more senior staff members who were not involved in making the material supervisory determination at issue. However, there are some important differences. For example, at the Federal Reserve, there are two levels of review, with the initial review conducted by Federal Reserve Bank staff from different Reserve Banks than the one that made the original decision. This initial review is conducted *de novo*, meaning that the initial review panel does not defer to the examiners' judgment when reviewing the supervisory determination. In contrast, the FDIC assigns the first level of review to a Division Director, although that director also makes a "supervisory determination without deferring to the judgments of either party[.]" The OCC Proposal, if adopted as proposed, would clarify that initial review is conducted *de novo* by an "Appeals Board," which comprises the chief national bank examiner and two term appointees (previously, the initial review was conducted by the OCC Ombudsman).

Banking organizations have rarely availed themselves of these processes. First, there is the fear of retaliation.[13] Examiners have significant discretion and authority, both in determining the focus of an examination and whether to cite a particular perceived deficiency. Although the vast majority of examiners will strive to be impartial regardless of a banking organization's criticism, it is natural for banking organizations to be concerned about harming the important relationships they have with their examiners. This risk can be mitigated by existing anti-retaliation policies and by each Ombudsman's commitment both to investigate reports of retaliation and to contact banking organizations following their appeals to ask whether any retaliation has occurred. Banking organizations can also help mitigate any risk of retaliation by hiring outside counsel to bring their appeal and to make the difficult arguments about whether an examiner made a mistake, rather than having the banking organization itself make these arguments.

Second, some banking organizations may believe that appeals are futile. Few banking organizations have filed appeals, and few of those appeals were successful. Nonetheless, in some instances, appealing banking organizations have achieved significant success. For example, in 2012, the Federal Reserve Board reversed a material supervisory determination issued by the Federal Reserve Bank of Richmond, allowing a bank to recognize $8.4 million of proceeds from a preferred stock sale as regulatory capital.[14] More recently, in 2023, the FDIC reversed a material supervisory determination that a bank violated Regulation O by making certain extensions of credit to the chairman of the bank's board of directors.[15] Additionally, the recent OCC Proposal explicitly flags the limited number of appeals made by supervised banks as a concern and invites more appeals by updating its process and attempting to make it more impartial.[16]

Banking organizations should actively consider whether and how to push back on material supervisory determinations. The groundwork for filing an effective appeal begins early by ensuring that all relevant information has been provided to the examiners. Each federal banking agency's appeals process circumscribes, at least in part, the record on appeal to the information furnished to the examiners at the time the material supervisory determination was made. In addition, the timeline for filing an appeal is short, ranging from 10 days[17] to 60 days, and, for national banks and thrifts, the approval of the bank's board of directors is required before filing.[18]

Of course, filing an appeal may come with significant costs. Banking organizations must commit internal resources, including senior management, to make key strategic decisions and to put together the supporting documents and materials. Banking organizations should also consider using outside counsel who are familiar with bank supervision, enforcement, and the appeals process to present the strongest possible case. Despite these costs, supervisory appeals may well be worthwhile, particularly given the risks of future ratings downgrades, increased insurance assessments, and enforcement actions. Finally, even during the course of a formal appeal process, banking organizations should continue informal engagement efforts with their regulators to find mutually agreeable outcomes.

Conclusion

Despite recent shifts in the regulatory landscape that seek to make examinations more objective and financial in focus, bank examiners may not yet be in alignment with the renewed focus on institutions' financial condition and risk profile. This, as well as the fact that senior agency staff will be particularly attuned to implementing their new policies, makes it an ideal time to push back on examiners and challenge enforcement actions. Although banking organizations should consider the costs associated with challenging proposed findings or ratings, such challenges can have significant long-term benefits, including cost savings, and can encourage conversations between examiners and senior agency staff that bring examiners into alignment with current regulatory policy.

ENDNOTES

1. Uniform Financial Institutions Rating System, 91 Fed. Reg. 29128, 29131 (May 19, 2026).

2. *See* Julie Andersen Hill, When Bank Examiners Get It Wrong: Financial Institution Appeals of Material Supervisory Determinations, 92 Wash. U. L. Rev. 1101, 1105 (2015) (noting that appeals processes are seldom used).

3. *See* 12 CFR Part 327; FDIC, Risk-Based Assessments (last visited June 26, 2026), https://www.fdic.gov/deposit-insurance-assessments/risk-based-assessments (establishing base assessment rates with weighting for composite ratings).

4. *See* 12 U.S.C. § 1843(m).

5. *See* Large Institution Supervision Coordinating Committee Program Manual, LISCC Program Supervisory Cycle at 17 (Fed. Res. Sys. Mar. 2, 2023), https://www.federalreserve.gov/publications/files/liscc-program-manual-202302.pdf.

6. Commercial Bank Examination Manual § 1001.1, at 22.

7. *Id.*

8. Large Institution Supervision Coordinating Committee Program Manual, supra note 5, at 17.

9. 12 U.S.C. § 1818(s)(3).

10. *See* § 309 (requiring that each of the federal banking agencies and the National Credit Union Administration Board establish "an independent intra-agency appellate process," appoint an Ombudsman, and ensure that "appropriate safeguards exist for protecting the appellant from retaliation by agency examiners").

11. Federal Reserve Board, Ombuds Policy Statement, Apr. 1, 2020, https://www.federalreserve.gov/aboutthefed/ombpolicy.htm; FDIC, Examples of Assistance Provided by the Office of the Ombudsman, Dec. 7, 2023, https://www.fdic.gov/about/examples-assistance-provided-office-ombudsman.

12. Bank Appeals Process, 91 Fed. Reg. 7163, 7171 (Feb. 17, 2026). Previously, the OCC Ombudsman served as a more formal decision maker in appeals. *Id.*

13. *See* Hill, supra note 2, at 1167; Scott Polakoff, Fear of Retaliation Stifles Banks' Appeals to Regulators, American Banker, Apr. 8, 2015, https://www.americanbanker.com/opinion/fear-of-retaliation-stifles-banks-appeals-to-regulators.

14. *See* Office of the Inspector General for the Board of Governors of the Federal Reserve System, Review of the Failure of Waccamaw Bank, 2015-SR-B-005, at 3 (Mar. 26, 2015). As a result of the Waccamaw Bank failure and the recommendations of the Inspector General, the Federal Reserve overhauled its supervisory appeals process.

15. *See* Decision of the Supervision Appeals Review Committee, In the Matter of * * *, No. 2023-01 (Sept. 19, 2023), https://www.fdic.gov/resources/regulations/appeals-of-material-supervisory-determination/appeals/sarc202301.pdf.

16. *See* Bank Appeals Process, 91 Fed. Reg. at 7165 ("[T]he OCC is concerned that this low rate of appeals could be attributable to a sense on the part of OCC supervised entities that the appeals process is not structured to guarantee fair consideration of the matters appealed or a fear that a formal appeal could damage the bank's relationship with its regulator.").

17. The OCC provides only 10 days for the filing of an informal appeal to the local supervisory office. *See* Appeals Process for National Banks and Federal Savings Associations, Office of the Comptroller of the Currency, Nov. 2020, https://www.occ.treas.gov/publications-and-resources/publications/banker-education/files/pub-appeals-process-nat-banks-fed-savings-assoc.pdf.

18. *Id.* (requiring the appeal submission to "include the board's approval of the action"). The OCC Proposal has requested comment as to whether this requirement is necessary. *See* Bank Appeals Process, 91 Fed. Reg. at 7168.

Lucas Beirne is of counsel at the law firm of Cravath, Swaine & Moore LLP.