

# Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

## FEDERAL RESERVE SYSTEM

### 12 CFR Chapter II

[Docket No. OP-1597]

#### Internal Appeals Process for Material Supervisory Determinations and Policy Statement Regarding the Ombudsman for the Federal Reserve System

**AGENCY:** Board of Governors of the Federal Reserve System.

**ACTION:** Proposed policy statement; request for comments.

**SUMMARY:** The Board of Governors of the Federal Reserve System (“Board”) is inviting comments on proposed amendments to its guidelines on an internal appeals process for institutions wishing to appeal an adverse material supervisory determination and to its policy regarding the Ombudsman for the Federal Reserve System.

**DATES:** Comments should be received April 30, 2018.

**ADDRESSES:** You may submit comments, identified by Docket No. OP-1597 by any of the following methods:

- **Agency Web Site:** <http://www.federalreserve.gov>. Follow the instructions for submitting comments at <http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm>.
- **Email:** [regs.comments@federalreserve.gov](mailto:regs.comments@federalreserve.gov). Include the docket number in the subject line of the message.
- **Fax:** (202) 452-3819 or (202) 452-3102.
- **Mail:** Ann E. Misback, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue NW, Washington, DC 20551.

All public comments will be made available on the Board’s website at <http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm> as submitted, unless modified for technical reasons. Accordingly, your comments will not be edited to remove any identifying or contact information. Public comments may also be viewed

electronically or in paper form in Room 3515, 1801 K Street (between 18th and 19th Streets NW), Washington, DC 20006 between 9:00 a.m. and 5:00 p.m. on weekdays.

#### FOR FURTHER INFORMATION CONTACT:

Jason A. Gonzalez, Special Counsel, (202) 452-3275, or Jay Schwarz, Senior Counsel, (202) 452-2970, Legal Division, Ryan Lordos, Deputy Associate Director, (202) 452-2961, Supervision & Regulation, or Suzanne Killian, Senior Associate Director, (202) 452-2090, or Carol Evans, Associate Director, (202) 452-2051, Division of Consumer and Community Affairs, for matters relating to the appeals process; and Margie Shanks, Ombudsman, (202) 452-3584, or Jay Schwarz, Senior Counsel, (202) 452-2970, Legal Division, for matters relating to the functions of the Ombudsman. Telecommunications Device for the Deaf (TDD) users may call (202) 263-4869.

#### SUPPLEMENTARY INFORMATION:

##### I. Background

The Board of Governors of the Federal Reserve System (“Board”) is committed to maintaining an effective independent, intra-agency appellate process to allow institutions to seek review of material supervisory determinations. The Board is also committed to maintaining an effective Ombudsman to serve as a resource for individuals and institutions that are affected by the Federal Reserve’s regulatory and supervisory actions.

The Board first established guidelines for an appeals process in March 1995, when after a period of public notice and comment, the Board published final guidelines to implement Section 309 of the Riegle Community Development and Regulatory Improvement Act of 1994 (the “Riegle Act”), 12 U.S.C. 4806, which governs the appeals requirements for Federal banking agencies. The existing guidelines provide that all institutions that are subject to Federal Reserve oversight, including bank holding companies, U.S. agencies and branches of foreign banks and Edge corporations, may appeal any material supervisory determination (60 FR 16470 (March 30, 1995)).

In general, the existing guidelines provide that any institution supervised by the Federal Reserve System (“Federal Reserve”) may file a written appeal of any material supervisory determination.

Appeals will then be decided within a specified time frame by a review panel selected by the Reserve Bank, in consultation with Board staff, and comprised of persons who are not employed by the Reserve Bank and have not participated in, or reported to the persons who made the material supervisory determination under review. An institution is granted the further right to appeal an adverse decision by the review panel to the Reserve Bank President and ultimately to a member of the Board. The existing guidelines also have safeguards to protect institutions that file appeals from examiner retaliation.

The guidelines apply to any “material supervisory determination,” which includes any material matter relating to the examination or inspection process. The only matters excluded from this appeals process are those matters, such as the imposition of a prompt corrective action directive or a cease and desist order or other formal actions, for which an alternative, independent process of appeal exists. As noted in the existing guidelines, institutions are encouraged to express questions or concerns about supervisory determinations during the course of an inspection or examination, consistent with the longstanding Federal Reserve practice of resolving problems informally during the course of the inspection or examination process.

The Board’s existing Ombudsman policy was adopted in August 1995. It specifies the responsibilities of the Ombudsman, which include serving as a point of contact for complaints regarding any System action, referring complaints to the appropriate person, and investigating and resolving complaints of retaliation.

##### II. Overview of Proposed Changes

###### *Appeals Guidelines*

Since 1995, the Board has had the opportunity to observe the operation of the appeals guidelines over a significant period of time and receive feedback from supervised institutions. Based on that experience and feedback, the Board is now proposing to amend its appellate guidelines in several ways. In particular, the proposed revisions are designed to improve and expedite the appeals process, particularly for institutions that are in troubled condition. In doing so, the proposed revisions attempt to strike

an equitable balance among accommodating the interests of the institutions the Federal Reserve supervises in a substantive review of material supervisory determinations, the institutions' interest in achieving a swift resolution of any material supervisory determination in dispute, and the interests of both an appealing institution and the Federal Reserve in the efficient use of limited resources.

The Board's current appeals process was designed with three levels of appeal in an attempt to ensure objectivity in the appeals process. However, experience has shown that objectivity can be ensured with a more streamlined and efficient process. With these goals in mind, the proposal reduces the levels of appeal from three to two and enhances independent review of the matter by providing that System and Board experts not affiliated with the affected Reserve Bank review the matter at both appeals levels.

In addition to removing one level of appeal, the proposed revisions address a timing conflict between the Prompt Corrective Action ("PCA") framework under section 38 of the Federal Deposit Insurance Act and the Board's existing appeals process. PCA requires that, no later than 90 days after an insured depository institution becomes critically undercapitalized, the appropriate Federal banking agency must either appoint a receiver for the institution or take such other action that the Board determines, with the concurrence of the Federal Deposit Insurance Corporation ("FDIC"), would better achieve the purposes of PCA. Although the banking agency's decision to appoint a receiver for a critically undercapitalized institution is not appealable under the Riegle Act, some material supervisory determinations (such as reclassifications of loans) may cause an institution to become critically undercapitalized and, unless reversed, result in receivership.

The revised process would establish an accelerated process for appeals that relate to or cause an institution to become critically undercapitalized under the PCA framework to better assure that a review of an adverse material supervisory determination occurs within the PCA time frame of 90 days. The goal of this accelerated process is to provide a thorough, adequate, and independent review of the material supervisory determination that places the institution at risk of receivership. Notwithstanding the proposed changes, situations may arise that would prevent an appeal from being completed before PCA requires a receivership to be imposed. In these situations, the existence of an

outstanding appeal would not prevent the Board from meeting its statutorily mandated obligation under PCA to appoint a receiver, in which case an appeal will become moot.

The revised process also establishes specific standards of review to be applied in the two levels of appeal. The panel that reviews the initial appeal must approach the determination being appealed as if no determination had previously been made. The initial review panel will consider a record that includes any relevant materials submitted by the appealing institution and Federal Reserve staff. Under this standard, the panel will have the discretion to rely on examination workpapers and other materials developed by Federal Reserve staff during an examination.

If the appealing institution continues to have concerns regarding the material supervisory determination following the initial review panel's decision, the appealing institution may request a subsequent final review conducted by a review panel comprised primarily of Board staff. The final review panel will consider whether the decision of the initial review panel is reasonable and supported by a preponderance of the evidence in the record, but will not seek to augment the record with new information. In order to maximize transparency, the decision of the final review panel will be made public.

The Board welcomes comment on all aspects of the revised guidelines, including, in particular, on (i) the standards of review that are proposed for the two review panels, (ii) the nature and composition of the review panels, (iii) the record that the panels may consider, and (iv) the timeline that is proposed to take PCA into account.

#### *Ombudsman Policy*

The Board is considering making changes to the Ombudsman policy in conjunction with the changes to the appeals guidelines. Currently, the Ombudsman is the initial recipient of all complaints pertaining to the supervisory process, which may include an appeal request. The proposed revisions would formalize this practice and allow the Ombudsman to attend hearings or deliberations relating to the appeal as an observer, if requested by the institution or Federal Reserve personnel. In addition, the proposed revisions specify that the Ombudsman's role is to be the decision-maker with respect to claims of retaliation. The proposal also emphasizes the Ombudsman's availability to facilitate the informal resolution of concerns that could ultimately lead to formal appeals,

clarifies the Ombudsman's role in addressing complaints regarding appeals of consumer complaints, and provides for tracking of complaints made by regulated institutions.

The Board welcomes comment on all aspects of the Ombudsman policy.

The Appeals guidelines and Ombudsman policy for the Federal Reserve System are attached as Exhibit A and Exhibit B, respectively.

By order of the Board of Governors of the Federal Reserve System, February 21, 2018.

*Ann E. Misback,  
Secretary of the Board.*

Exhibit A

#### **GUIDELINES FOR APPEALS OF MATERIAL SUPERVISORY DETERMINATIONS**

The Board is committed to maintaining an independent, intra-agency process to review appeals of material supervisory determinations that complies with Section 309 of the Riegle Community Development and Regulatory Improvement Act of 1994, 12 U.S.C. 4806.

The purpose of these guidelines is to establish a comprehensive appellate process for material supervisory determinations. In order to ensure that institutions will be granted the same appellant rights regardless of the Federal Reserve district in which they reside, appeals will be administered using procedures that are consistent with these guidelines. These guidelines include an accelerated review process to improve their alignment with the PCA framework under section 38 of the Federal Deposit Insurance Act.

#### **A. In General**

Any institution about which the Federal Reserve makes a material supervisory determination is eligible to utilize the appeals process. An eligible institution includes a state member bank, bank holding company and its nonbank subsidiaries, U.S. agency or branch of a foreign bank, Edge and agreement corporation, savings and loan holding company, third party electronic data processing servicer, systemically important nonbanking financial organization identified by the Financial Stability Oversight Council, and any other entity examined or inspected by the Federal Reserve.

An appeal under these guidelines may be made of any material supervisory determination. A "material supervisory determination" includes, but is not limited to, any material determination relating to examination or inspection composite ratings, material examination or inspection component ratings, the adequacy of loan loss reserves and/or capital, significant loan classification, accounting interpretation, and Community Reinvestment Act (including component ratings) and consumer compliance rating. The term does not include any supervisory determination for which an independent right of appeal exists. Excluded actions include PCA directives issued pursuant to section 38 of the Federal Deposit Insurance Act (the FDI Act), an action to impose administrative enforcement actions

under the FDI Act, the Home Owners' Loan Act of 1933, the Dodd-Frank Wall Street Reform and Consumer Protection Act, the Bank Holding Company Act of 1956 (the BHC Act) or other applicable act, a capital directive, and an order related to approval or denial of a transaction issued pursuant to section 3 or 4 of the BHC Act. Prior to a material supervisory determination being made, it is expected that the supervised institution will have provided all available information it believes to be relevant to the examination staff to assist them in making the determination.

#### B. General Procedures for Appealing a Material Supervisory Determination

In general, the appeals process is an informal process that is not subject to the adjudicative provisions of the Administrative Procedures Act (5 U.S.C. 554–557). An appeal of a material supervisory determination shall be filed and considered pursuant to the following procedures:

(1) **Authorization to File.** Any appeal must be approved by the board of directors of the eligible institution, or in the case of a U.S. agency or branch of a foreign bank, the senior management or person(s) responsible for the bank's U.S. operations.

(2) **Timelines and Contents.** The institution must file the appeal in writing 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. The appeal must include a clear and complete statement of all relevant facts and issues, as well as all arguments that the institution wishes to present, and must include all relevant and material documents that the institution wishes to be considered.

(3) **Distribution of Appeal.** After receipt of a request for an appeal, the Board's Ombudsman shall promptly notify the director of the appropriate division of the Board and the Board's General Counsel of the appeal.

(4) **Initial Review Panel.** Within ten calendar days of receipt of a timely appeal, the director of the appropriate division of the Board or an officer designated by the appropriate division director must appoint three Reserve Bank employees to form an initial review panel to consider the appeal and an attorney to advise the initial review panel in the exercise of its responsibilities. The members of the initial review panel and the appointed attorney must not have been substantively involved in any matter at issue; must not directly or indirectly report to any person(s) who made the material supervisory determination under review; must not be employed by the Reserve Bank that made the material supervisory determination under review; and must have relevant experience to contribute to the review of the material supervisory determination. An individual shall be considered to have been substantively involved in a material supervisory determination if the individual was personally consulted regarding the issue being determined and provided guidance regarding how it should be resolved. The initial review panel shall determine all

procedural issues that are governed by the appeals guidelines.

(5) **Initial Review Meeting.** The initial review panel may, in its discretion, conduct an informal appeal meeting. If the panel decides to conduct such a meeting it shall notify the institution in writing of the date, time and place of the meeting, to be set no later than 21 calendar days after the date the appeal is received. The institution may appear at the appeal meeting personally or through counsel to make an oral presentation to the panel. Panel members may ask questions of any person participating in the meeting. The institution and the Reserve Bank may not cross examine persons participating in the meeting. A verbatim transcript of the meeting may be taken if the institution requests a transcript and agrees to pay all expenses, and if the initial review panel determines that a transcript would assist the panel in carrying out its responsibilities. The meeting provided under these guidelines is not governed by formal rules of evidence. No formal discovery is required or permitted. The initial review panel may make any rulings reasonably necessary to facilitate the effective and efficient operation of the meeting.

(6) **Record.** The record of the appeal shall at a minimum include the original decision being appealed, the materials submitted by the institution in connection with the appeal and the materials identified by Federal Reserve staff as relevant to the material supervisory determination being appealed, including workpapers. The initial review panel may, in its discretion, supplement the record in the manner described below. The entire record of the appeal, including the decision of the initial review panel and any meeting transcripts or material(s) submitted in connection with any subsequent final review, shall be considered confidential supervisory information of the Board.

(7) **Standard of Review Applied by Initial Review Panel.** The initial review panel shall conduct a review of the material supervisory determination on appeal. The panel must consider whether the Reserve Bank's material supervisory determination is consistent with the Board's policies, consistent with applicable laws and regulations, and supported by the record. In doing so, the panel shall make its own supervisory determination and shall not defer to the judgment of the Reserve Bank staff that made the material supervisory determination though it may rely on any examination workpapers developed by the Reserve Bank or materials submitted by the institution if it determines it is reasonable to do so. The panel may supplement the record described above by soliciting the views of outside parties, including staff from the Board, the Reserve Banks, and other supervisory agencies (for example, in cases of joint examinations or inspections), including the Federal Reserve staff who participated in making the material supervisory determination being appealed, prior to issuing a decision. The panel may, in its discretion, conduct additional fact-finding.

(8) **Notice of Decision.** Within 45 calendar days after the date the appeal is received, the initial review panel shall provide written

notice of its decision to the board of directors of the institution. The notice of decision shall contain a statement of the basis for the initial review panel's decision to continue, terminate, or otherwise modify the material supervisory determination(s) at issue or to remand consideration of the material supervisory determination at issue to the examiners that made the determination to allow them to consider additional evidence presented in connection with the appeal. The notice of decision shall also indicate that the institution may request a final review as set forth in this subpart by filing a written request with the Ombudsman of the Board. The initial review panel may extend the period for issuing a decision by up to 30 calendar days if the panel determines that the record is incomplete and additional fact-finding is necessary for the panel to issue a decision.

(9) **Ombudsman Participation.** The Ombudsman may attend, as an observer, hearings or deliberations relating to the appeal. The Ombudsman will not have substantive involvement in or act as a decision-maker with respect to the appeal.

(10) **Use of Confidential Supervisory Information.** If the Reserve Bank or the Board have confidential supervisory information from another regulated institution that is pertinent to the appeal, they may elect to use that information, provided that the information is entered into the record for the appeal and provided to the appealing institution, subject to limitations on disclosure, including those imposed by the Board's applicable regulations,<sup>1</sup> and redaction of all information not relevant to the appeal.

(11) **Request for Final Review.** Within 14 calendar days after notice of decision by the initial review panel, the institution, with the consent of its board of directors, or in the case of a U.S. agency or branch of a foreign bank, the senior management person(s) responsible for the bank's U.S. operations, may appeal that decision to a final review panel by filing a written request for final review with the Ombudsman. The request for final review must state all the reasons, legal and factual, the institution disagrees with the initial review panel's decision.

(12) **Waiver of Final Review.** Failure to timely request final review in a manner consistent with these guidelines shall constitute a waiver of the opportunity for final review, and the decision of the initial review panel shall constitute a final and unappealable material supervisory determination.

(13) **Distribution of Final Review Request.** After receipt of a request for final review, the Board's Ombudsman shall promptly notify the director of the appropriate division of the Board and the Board's General Counsel of the request for final review.

(14) **Final Review Panel.** When an institution files a request for final review, the director of the appropriate division of the Board shall promptly appoint three individuals to form a final review panel to permit completion of the appeal within the applicable period. The final review panel

<sup>1</sup> See 12 CFR 261.20.

shall include at least two Board employees, at least one of whom must be an officer of the Board at the level of associate director or higher. The Board's General Counsel shall appoint an attorney to advise the final review panel in the exercise of its responsibilities. The members of the final review panel and the appointed attorney must not be employed by the Reserve Bank that made the material supervisory determination under review; must not have been members of the initial review panel; and must not have been personally consulted regarding the issue being determined and provided guidance regarding how it should be resolved, or directly or indirectly report to the person(s) who made the material supervisory determination under review. The final review panel shall determine all procedural issues regarding the final review.

(15) **Final Review Meeting.** The final review panel may determine in its discretion to have an informal appeal meeting at which a representative of the institution or counsel may appear personally to make an oral presentation to the panel. No facts may be introduced in this meeting that are not contained in the record upon which the initial review panel made its decision. In the event the panel decides to have a meeting with the appealing institution, panel members may ask questions of any person participating in the meeting. The institution may not cross examine persons participating in the meeting. A verbatim transcript of the meeting may be taken at the cost of the Board if the final review panel determines that a transcript would assist the panel in carrying out its responsibilities. The meeting provided under these guidelines is not governed by formal rules of evidence. No formal discovery is required or permitted. The final review panel may make any procedural rulings reasonably necessary to facilitate the effective and efficient operation of the meeting.

(16) **Scope of Final Review.** The scope of the final review shall be confined to the record upon which the initial review panel made its decision.

(17) **Standard of Review of Final Review.** The final review panel shall determine whether the decision of the initial review panel is reasonable. In reaching this determination, the panel should consider, among other things, whether the decision was based on a consideration of the relevant factors, whether there has been a clear error of judgment, and whether the decision is supported by a preponderance of the evidence. The final review panel may affirm the decision of the initial review panel even if it is possible to draw a contrary conclusion from the record presented on appeal.

(18) **Final Review Decision.** Within 21 calendar days of the filing of a request for final review, the director of the appropriate division of the Board shall provide written notice of the decision of the final review panel to the board of directors of the institution. The final review panel may continue, terminate, or otherwise modify the material supervisory determination(s) at issue or remand consideration of the material supervisory determination at issue to the examiners that made the determination to allow them to consider additional evidence

presented in connection with the appeal. A copy of the decision will be provided to the director of the appropriate division of the Board and the Officer in Charge of Supervision at the appropriate Reserve Bank. A copy of the decision will be published as soon as practicable, and the published decision will be redacted to avoid disclosure of exempt information. In cases in which redaction is deemed insufficient to prevent improper disclosure, the published decision may be presented in summary form.

#### C. Expedited Procedures for Appealing a Material Supervisory Determination

When a material supervisory determination relates to or causes an institution to become critically undercapitalized, the review of any appeal of that supervisory determination will be processed on an expedited basis.

Notwithstanding any other provision in these guidelines, a matter processed under expedited review will be subject to the same policies that govern all appeals except that the initial review panel will issue a decision within 35 calendar days following the date the appeal is received (such period may be extended by up to an additional 7 calendar days if the initial review panel decides that such time is required to supplement the record and to consider any additional information received), the institution shall have 7 days to file an appeal of the initial review panel's decision, and the final review panel will issue a decision within 10 calendar days.

#### D. Effect of Appeal on Material Supervisory Determinations

A material supervisory determination shall remain in effect while under appeal and until such time as it is modified or overturned through the appeals process. An appeal does not prevent or suspend the Federal Reserve or any other appropriate agency from taking any supervisory or enforcement action—either formal or informal—it deems appropriate to discharge the agency's supervisory responsibilities. In such cases, the rights of appeal provided for in the statutes and regulations concerning those actions shall govern.

In addition, an appeal does not prevent or suspend the operation of the PCA framework under section 38 of the Federal Deposit Insurance Act, prevent or suspend an appropriate authority from appointing a receiver for the institution or otherwise causing the closure of an institution, or prevent or suspend an appropriate authority from taking any other action under the PCA framework. If the institution is placed into receivership while an appeal is outstanding, the appeal will be considered moot and will not be completed.

#### E. Safeguards Against Retaliation

Neither the Federal Reserve nor any employee of the Federal Reserve may retaliate against an institution or person based on the filing or outcome of an appeal under this guidance. In accordance with longstanding Federal Reserve practice, the appeals framework is intended to foster an environment where concerns and issues may be freely and openly discussed.

Each Reserve Bank shall provide institutions with notice of the Board's anti-retaliation policy in connection with each Federal Reserve led examination.

An institution that believes that it has suffered retaliation or any other form of unfair treatment is encouraged to contact the appropriate Reserve Bank, and may file a claim of retaliation with the Board's Ombudsman. The Ombudsman may attempt to resolve a claim of retaliation informally by engaging in discussions with the concerned institution and the appropriate Board or Reserve Bank staff.

Nothing in this guidance is intended to prevent the Ombudsman from initiating a factual inquiry into alleged retaliation at any time. The Ombudsman may initiate a factual inquiry into a claim of retaliation, at any time, by providing notice to the appropriate Board division director(s) and the appropriate Reserve Bank officer in charge of supervision. As part of the inquiry, the Ombudsman may collect and review documents, interview witnesses, and consult Board and Reserve Bank staff with subject matter expertise. The Ombudsman also may request that the appropriate division director authorize or assign such additional resources as necessary to assist the Ombudsman in fully reviewing the matter.

Upon the completion of a factual inquiry into a claim of retaliation, if the Ombudsman concludes that retaliation has occurred, the Ombudsman will forward the claim of retaliation, along with the Ombudsman's factual findings to the appropriate division director(s) of the Board. These officials will take appropriate action to resolve the matter. In addition, to prevent future retaliation for an appeal, the Ombudsman may recommend to the appropriate division director(s) that the next examination of the institution or review that may lead to a material supervisory determination exclude personnel involved in the claim of retaliation. The division director(s) will make the final decision as to whether any examination staff should be excluded.

The Board's Ombudsman will contact institutions within six months after a material supervisory determination appeal has been decided to inquire whether retaliation has occurred.

#### F. Availability of Procedures

The Federal Reserve, through the Board and Reserve Banks, shall make these guidelines readily available on its public website and to any member of the public who requests them.

Exhibit B

#### Ombudsman for the Federal Reserve System Policy Statement

Section 309 of the Riegle Community Development and Regulatory Improvement Act of 1994, 12 U.S.C. 4806, requires each of the federal banking agencies to appoint an Ombudsman. Section 309 provides that the Ombudsman:

(1) is to act as a liaison between the agency and any affected person with respect to any problem such party may have in dealing with the agency resulting from the regulatory activities of the agency; and

(2) is to ensure that safeguards exist to encourage complainants to come forward and preserve confidentiality.

**Mission of the Ombudsman.** The Ombudsman is charged with performing three major functions: (1) serving as a facilitator and moderator for the fair and timely resolution of complaints related to the Federal Reserve System's regulatory activities; (2) reporting to the Board on issues that are likely to have a significant impact on the Federal Reserve System's missions, activities, or reputation that arise from the Ombudsman's review of complaints, such as patterns of issues that occur in multiple complaints; (3) receiving, reviewing, and deciding claims of retaliatory conduct by Federal Reserve System staff. The Ombudsman also serves as the initial recipient for an appeal of a material supervisory determination and plays a role in resolving appeals of some consumer complaints. In addition, the Ombudsman ensures that safeguards exist to encourage complainants to come forward and to protect confidentiality.

**Serving as a Complaint Facilitator.** The Ombudsman assists institutions with issues and questions related to Reserve Bank or Board regulatory activities. In doing so, the Ombudsman shall operate independently of the supervisory process to the extent necessary to ensure that appropriate safeguards exist to encourage complainants to come forward and preserve confidentiality.

In situations where the Board has not established a process for addressing a certain type of question or complaint, the Ombudsman is available to facilitate the resolution of the question or complaint. Although the Ombudsman does not have decision-making authority regarding any substantive matters, including supervisory determinations and regulatory action (other than for retaliation claims), the Ombudsman is available to assist institutions, and particularly community banks, in locating the correct System staff person to address or resolve such a question or complaint and may coordinate meetings and facilitate discussions between the institution and System staff, including senior officials, as necessary. In order to facilitate this process, the Ombudsman may investigate the situation in order to identify the relevant facts and circumstances. The Ombudsman may also participate in meetings or discussions related to the matter if requested by either the institution or System staff, and may require updates from System staff, as appropriate, until the matter is resolved. If the Ombudsman believes such a complaint has not been satisfactorily addressed, the Ombudsman may raise the matter with the appropriate Division Director or Board committee, as appropriate.

When an issue is brought to the attention of the Ombudsman for which the Board's rules or procedures provide an avenue of appeal or another appropriate forum for resolution, the Ombudsman will explain the process to the complaining party, and direct the party to the appropriate appeals process or forum for the complaint.<sup>1</sup> In addition, the

Ombudsman is also available to facilitate informal discussions between a potential appellant and the appropriate Reserve Bank or Board staff in order to explore solutions before an appeal is filed. Such discussions do not stay or otherwise alter any of the deadlines under the Board's rules or procedures.

The Ombudsman will serve as the initial recipient for an appeal of a material supervisory determination and may attend, as an observer, hearings or deliberations relating to the appeal if requested by either the institution or System personnel. In any event, the Ombudsman will not have any substantive involvement in or act as a decision-maker with respect to the appeal.

**Providing Feedback on Patterns of Issues.** The Ombudsman is in a unique position to identify and report patterns of issues arising from complaints related to Reserve Bank or Board regulatory activities. The Ombudsman will track inquiries and complaints based on relevant characteristics, such as geographic location, scope, policy implications, and final disposition, to help identify any such trends, including trends that implicate differently sized institutions disproportionately. This tracking will be conducted in a manner designed to preserve confidentiality of the complainant to the maximum extent possible. As appropriate, the Ombudsman will report findings of patterns of issues to the appropriate Board committee or division director and Reserve Bank or Board staff. The Ombudsman will also report any issue stemming from a complaint that is likely to have a significant impact on the Federal Reserve System's mission, activities, or reputation.

**Retaliation Claims by Supervised Persons.** The Federal Reserve Board does not tolerate retaliation by System staff against a supervised institution or its employees ("supervised persons"). Retaliation is defined as any action or decision by Reserve Bank or Board staff that causes a supervised person to be treated differently or more harshly than other similarly situated institutions because the supervised person attempted to resolve a complaint by filing an appeal of a material supervisory determination or utilized any other Board mechanisms for resolving complaints. Retaliation includes, but is not limited to, delaying or denying action that might benefit a supervised person without a sound supervisory reason or subjecting a supervised institution to heightened examination standards without a sound supervisory reason.

The Ombudsman is authorized to receive, review, and determine the merits of complaints of retaliatory conduct by Reserve Bank or Board staff. The Ombudsman may

such as: material supervisory determinations pursuant to section 309(a) of the Act; review of actions delegated to the Reserve Banks or Board staff pursuant to 12 CFR part 265; prompt corrective action directives under section 38 of the Federal Deposit Insurance Act; denials or partial denials of Freedom of Information or Privacy Act requests; issuance of capital directives pursuant to 12 CFR 263.80–263.85; decisions with respect to applications; and matters within the jurisdiction of the Board's Inspector General or Federal or State investigatory or prosecutorial authorities.

attempt to resolve retaliation claims informally by engaging in discussions with the concerned supervised person and the appropriate Board or Reserve Bank staff. If a complaint cannot be resolved informally, the Ombudsman may initiate a full investigation into the underlying facts and circumstances.

To commence a factual investigation of a complaint of retaliatory conduct, the Ombudsman should provide written notice to the appropriate Board committee and division director and the appropriate Reserve Bank officer in charge of supervision. As part of the investigation, the Ombudsman may, among other things, collect and review documents, interview witnesses, and seek any other relevant information. The Ombudsman may also consult Board and Reserve Bank staff with subject matter expertise. Where necessary, the appropriate Board committee or division director may authorize or assign such additional resources as may be needed to assist the Ombudsman in fully reviewing the matter.

Upon completion of the factual investigation of a complaint of retaliatory conduct, the Ombudsman will decide whether a member of System staff retaliated, as defined above. The Ombudsman will report this determination to the appropriate Board committee or Governor and division director and the appropriate Reserve Bank officer in charge of supervision and may make recommendations for resolution of the matter to those parties. However, the Ombudsman shall not make recommendations regarding disciplinary action against a System staff member. The Ombudsman's determination regarding retaliation will be communicated in writing to the supervised person.

To further ensure that supervised persons are not subjected to retaliation, as defined above, the Ombudsman will contact a supervised institution within six months after an appeal has been decided to inquire whether retaliation occurred. Where possible, the Ombudsman will also contact the institution after the next examination following an appeal. In the event an institution complains of retaliation, the Ombudsman will initiate the process outlined above to informally review the matter or initiate a factual investigation.

**Consumer Complaints and Appeals.** Independent of the Ombudsman function, the Federal Reserve System operates a consumer complaint and inquiry program to assist members of the public who are experiencing problems with their financial institution. In accordance with this program, the Ombudsman will refer all consumer complaints to the Division of Consumer and Community Affairs (DCCA). DCCA will review the complaint to determine appropriate handling. If a new complaint is received, DCCA will refer the complaint to the Federal Reserve Consumer Help Center (FRCH) for processing. If the complainant requested an independent review of a previously filed complaint, the Ombudsman will refer the complaint to DCCA, who will perform the review and respond to the complainant. The Ombudsman will consult with DCCA during the appeal investigation, and in some instances, suggest additional

<sup>1</sup> The Board's rules provide existing mechanisms for resolutions of complaints in many instances.

actions, including further investigations that should be taken to ensure that the matter is fully and fairly addressed. When responding to the complainant, DCCA will also provide a final copy of the response letter to the Ombudsman.

If the Ombudsman receives a complaint regarding DCCA's review of an appeal, the Ombudsman will collect and review the complaint documents and seek any other relevant information. The Ombudsman may also consult Board and Reserve Bank staff to discuss the details of the previous complaint investigations. The Ombudsman is responsible for responding to the complainant with its determination. As appropriate, the Ombudsman will contact the appropriate Board division director and Reserve Bank staff with feedback or concerns.

**Safeguards.** These policies, processes, and practices are intended as safeguards to encourage complainants to come forward with issues or complaints related to the Federal Reserve System's regulatory activities.

To the extent possible, the Ombudsman will honor requests to keep confidential the identity of a complaining party. It must be recognized, however, that it may not be possible for the Ombudsman to resolve certain complaints, including complaints of retaliation, if the Ombudsman cannot disclose the identity of the complaining party to other members of Federal Reserve staff.

**Procedures.** A party may contact the Ombudsman at any time regarding concerns or issues resulting from the regulatory activities of the Board or the Reserve Banks by calling 1-800-337-0429, by sending a fax to 202-530-6208, by writing to the Office of the Ombudsman, Board of Governors of the Federal Reserve System, Washington, D.C. 20551, or by sending an email to [Ombudsman@frb.gov](mailto:Ombudsman@frb.gov).

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BILLING CODE 6210-01-P

## DEPARTMENT OF EDUCATION

### 34 CFR Part 300

RIN 1820-AB77

[Docket ID ED-2017-OSERS-0128]

#### Assistance to States for the Education of Children With Disabilities; Preschool Grants for Children With Disabilities

**AGENCY:** Office of Special Education and Rehabilitative Services (OSERS), Department of Education.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** In order to ensure the Department's "Equity in IDEA" or "significant disproportionality" regulations effectively address significant disproportionality, the Department proposes to postpone the compliance date by two years, from July 1, 2018, to July 1, 2020. The Department

also proposes to postpone the date for including children ages three through five in the analysis of significant disproportionality with respect to the identification of children as children with disabilities and as children with a particular impairment from July 1, 2020, to July 1, 2022.

**DATES:** We must receive your comments on or before May 14, 2018.

**ADDRESSES:** Submit your comments through the Federal eRulemaking Portal or via postal mail, commercial delivery, or hand delivery. We will not accept comments by fax or email. To ensure that we do not receive duplicate copies, please submit your comments only once. In addition, please include the Docket ID at the top of your comments.

- **Federal eRulemaking Portal:** Go to [www.regulations.gov](http://www.regulations.gov) to submit your comments electronically. Information on using *Regulations.gov*, including instructions for accessing agency documents, submitting comments, and viewing the docket is available on the site under the "Help" tab.

- **Postal Mail, Commercial Delivery, or Hand Delivery:** The Department strongly encourages commenters to submit their comments electronically. However, if you mail or deliver your comments in response to this request, address them to Johnny W. Collett, Assistant Secretary, Office of Special Education and Rehabilitation Services, U.S. Department of Education, 400 Maryland Avenue SW, Room 5107, Potomac Center Plaza, Washington, DC 20202-2500.

**Privacy Note:** The Department's policy is to make all comments received from members of the public available for public viewing in their entirety on the Federal eRulemaking Portal at [www.regulations.gov](http://www.regulations.gov). Therefore, commenters should be careful to include in their comments only information that they wish to make publicly available.

**FOR FURTHER INFORMATION CONTACT:** Kate Friday, U.S. Department of Education, 400 Maryland Avenue SW, Room 5104, Potomac Center Plaza, Washington, DC 20202-2500. Telephone: (202) 245-7605, or by email at: [Kate.Friday@ed.gov](mailto:Kate.Friday@ed.gov).

If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call the Federal Relay Service, toll free, at 1-800-877-8339.

#### SUPPLEMENTARY INFORMATION:

**Invitation to Comment:** We invite you to submit comments regarding this notice of proposed rulemaking. We will consider comments on proposed delayed compliance dates only and will not consider comments on the text or

substance of the final regulations. See **ADDRESSES** for instructions on how to submit comments.

During and after the comment period, you may inspect all public comments about this notice of proposed rulemaking by accessing *Regulations.gov*. You may also inspect the comments in person in Room 5104, 400 Maryland Avenue SW, Potomac Center Plaza, Washington, DC, between 8:30 a.m. and 4:00 p.m. Washington, DC time, Monday through Friday of each week, except Federal holidays. If you want to schedule time to inspect comments, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

**Assistance to Individuals with Disabilities in Reviewing the Rulemaking Record:** On request, we will provide an appropriate accommodation or auxiliary aid to an individual with a disability who needs assistance to review the comments or other documents in the public rulemaking record for this notice of proposed rulemaking. If you want to schedule an appointment for this type of accommodation or auxiliary aid, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

On February 24, 2017, President Trump signed Executive Order 13777, "Enforcing the Regulatory Reform Agenda," which established a policy "to alleviate unnecessary regulatory burdens" on the American people. Section 3(a) of the Executive Order directed each Federal agency to establish a regulatory reform task force, the duty of which is to evaluate existing regulations and "make recommendations to the agency head regarding their repeal, replacement, or modification." On June 22, 2017, therefore, the Department published a notice in the **Federal Register** (82 FR 28431) seeking input on regulations that may be appropriate for repeal, replacement, or modification.

As part of that regulatory review exercise, OSERS is reviewing the Assistance to States for the Education of Children With Disabilities; Preschool Grants for Children With Disabilities regulations (the "Equity in IDEA" or "significant disproportionality" regulations), published in the **Federal Register** on December 19, 2016 (81 FR 92376). We are, therefore, proposing to postpone the compliance by two years in order that the Department may review the regulation to ensure it effectively addresses significant disproportionality.

**Statute:** Section 618(d)(1) of IDEA (20 U.S.C. 1418(d)(1)) requires every State that receives IDEA Part B funds to