

## DO EXAM APPEALS WORK? THEY CAN

Two recent appeals illustrate the short route and the longer route to exam revisions

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Often I am asked about the appeal of examination findings. Is there an appeals process? Does it work? How do you do it? What is the drill? What is the likelihood of success? How much does it cost? Etc., etc.

The bottom line is that each one of the agencies has an appeals process, set forth either by policy or regulation. The appeals process provides that a bank can appeal "any material supervisory determination." This can include individual component ratings resulting from an examination, or the composite rating, as well as other things, such as credit classifications for larger credits, loan loss reserve provisions, allocations, alleged violations of law, and pretty much any other material supervisory determination.

Two recent appeals cases

We have had two client banks go through the appeals process lately. One was successful in moving the CAMELS rating from a 3 to a 2. Fortunately, the facts were on the bank's side and the examiner had simply made some wrong decisions. When these wrong decisions were pointed out to the Regional Office, the Regional Office agreed fairly quickly.

The other recent appeal is more interesting. This appeal resulted from an exit meeting I attended with the management of a good size multi-bank organization.

This bank holding company had some issues with respect to one of its subsidiary banks, and this was the exit meeting for that particular institution. During the course of the exit meeting, at which the Chairman of the Board was present, the examiners were extraordinarily harsh in their tone and presentation.

By the time the exam team got to the management component rating and announced it was going to be a 4, the Chairman had had enough. He jumped up, said a few choice words, and left the room.

Once everybody calmed down and the examination group left, we discussed with the senior management team the possibility of appealing various issues, including the management component rating of 4. The goal was to get it moved back up to a 3, and the like. I really believe the 4 preliminary rating was assigned to get the attention of the management

team and the Chairman, which it certainly did.

The group decided to appeal the management rating. The bank provided a significant amount of information to the primary regulator, and was recently informed that the recommendation by the contact person to his boss would be a change in the management rating from a 4 to a 3.

Appeals rarely remain local

The appeals process usually involves a move up the "regulatory food chain." As the bank progressively moves up the food chain from its preliminary contact with the agency, who will likely support the examiner, to that person's boss, to the Deputy, to the head of the Regional Office, the bank generally gets "more attention." This is because if the bank cannot settle the matter at the regional level as it moves up the food chain in the federal agency, then the next stop is the Washington Office.

My experience over the last several years has been that the Regional Office does not like D.C. looking over its shoulder and second-guessing them. So they get a lot more flexible at that point in the process.

When appeals can't fly

Of course, if your bank is a CAMELS 4 or 5 and it is anticipated that the regulators will propose some type of formal enforcement action to the bank, the bank can no longer take advantage of the appeals process. If you are an FDIC bank and designated a "troubled institution," for example, your transmittal letter for the report will probably have a paragraph that indicates:

"Under the FDIC's Guidelines for Appeals of Material Supervisory Determinations, the initiation of a formal investigation or written notification of the intent to pursue, formal enforcement action terminates a bank's right to appeal the determinations and the facts and circumstances that form the basis for the formal enforcement action to the Director of the Division of Supervision and Consumer Protection or to the FDIC's Supervision Appeals Review Committee."

In other words, if your bank is a troubled bank, it does not have a right to the formal appeals process.

But that doesn't mean that you are without alternatives.

Your bank's right is to take advantage of the formal administrative hearing process instead. That part of the appeals process is unfortunate, because some of these matters could get resolved through a fresh look without administrative litigation.

Perhaps, under today's circumstances, the appeals process will evolve further.

Share your own experiences with the appeals process below. Please do not identify your bank or yourself in the public part of the comment boxes.

MORE ON THIS: Some recent blogs of Jeff's that relate to this topic which you can check out if you missed them:

&bull; "Good faith efforts may pay off when banks fall short on a regulatory order"

&bull; "Thirty days to a better life&mdash;not!"

&bull; "The examiner from hell (a true story)"

&bull; "An order always has to be in place"

#### About the Author

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