

**Decision of the
Supervision Appeals Review Committee**

In the Matter of * * *

Case No. 2023-01

I. Summary

After consideration of the timely filed written submissions of the parties and the record of this case, and following the deliberative meeting of the Supervision Appeals Review Committee (Committee), the Committee grants the appeal. Based on the facts and circumstances contained in the record and for reasons set forth below, the Committee finds that extensions of credit made by * * * (Bank) to the Bank’s Chairman of the Board, * * *, did not violate section 337.3(c) of the FDIC’s Rules and Regulations at the time the extensions of credit were made.

II. Background and Procedural History

This appeal concerns extensions of credit made to Chairman * * * on February 12, 2020. The Bank and FDIC Division of Risk Management Supervision (RMS) are in agreement as to the relevant facts.

On [date], * * * Corporation, [city, state], became a bank holding company and acquired * * * percent ownership of the Bank. Mr. * * * was then appointed the Bank’s Chairman of the board of directors (Board). The Board adopted a resolution excluding Chairman * * * from participation (other than in the capacity of a director) in major policymaking functions of the Bank and, during the period relevant to this appeal, adopted similar resolutions annually. During the next several years, Chairman * * * served on the Board’s loan, investment, and marketing committees.

On [date], the Bank purchased two lines of credit from * * * Bank, [city, state]: a \$* * * unsecured line of credit issued directly to Chairman * * *, and a \$* * * line of credit to [Company], an entity wholly owned by Chairman * * *. The [Company] line of credit was secured by [Company] assets and personally guaranteed by Chairman * * *.

On * * *, 2023, the FDIC’s * * * Regional Office delivered to the Board a Report of Examination (ROE) that concluded that these extensions of credit violated the restrictions set forth in Regulation O and Section 337.3(c)(2) of the FDIC’s regulations regarding loans to executive officers.¹ Central to this conclusion was the determination that Chairman * * * was an “executive officer” within the meaning of Regulation O.

On April 12, 2023, the Bank filed a request for review of this determination with the Director of RMS (Director) pursuant to the FDIC’s *Guidelines for Appeals of Material Supervisory Determinations* (“Guidelines”).² On May 26, 2023, the Director issued a decision concurring in the * * * Regional Office’s determination.

On June 25, 2023, the Bank appealed the Director’s decision to the Committee. In accordance with the Guidelines, the Committee reviewed the appeal for consistency with the policies, practices, and mission of the FDIC, and the reasonableness of, and the support offered for, the positions of the parties.

III. Statutory and Regulatory Framework

Section 22(h) of the Federal Reserve Act imposes restrictions on extensions of credit to insiders, including executive officers, of a member bank.³ The Federal Reserve Board (FRB) has implemented these restrictions in Regulation O.⁴

The Federal Deposit Insurance Act provides that the restrictions on extensions of credit to insiders set forth in Regulation O apply to insured nonmember banks, and the FDIC adopted section 337.3 of its regulations for this purpose.⁵

Regulation O contains general prohibitions on extensions of credit to “insiders,” which include executive officers, directors, and principal shareholders, as well as any related interest of such a person.⁶ Regulation O also includes additional restrictions on loans to “executive officers.”⁷ Consistent with such restrictions, Section 337.3(c)(2) states, in part, that an FDIC-supervised institution is authorized to extend credit to any executive officer if the aggregate amount of such extensions of credit does not exceed at any one time the higher of 2.5 percent of the FDIC-

¹ Section 337.3(c) parallels the Federal Reserve Board’s (FRB) regulation at 12 C.F.R. § Part 215, Loans to Executive Officers, Directors, and Principal Shareholders of Member Bank (Regulation O).

² 87 FR 77112 (Dec. 16, 2022) (available at <https://www.fdic.gov/resources/regulations/appeals-of-material-supervisory-determination>).

³ 12 U.S.C. § 375b.

⁴ 12 C.F.R. Part 215.

⁵ 12 U.S.C. § 1828(j)(2); 12 C.F.R. § 337.3.

⁶ 12 C.F.R. §§ 215.4 (describing the general prohibitions), 215.2(h) (defining “insider”).

⁷ 12 C.F.R. § 215.5.

supervised institution's unimpaired capital and unimpaired surplus or \$25,000, but in no event more than \$100,000.⁸

Under Regulation O, an executive officer is defined as “a person who participates or has authority to participate (other than in the capacity of a director) in major policymaking functions of the company or bank.”⁹ This definition expressly states the chairman of a bank's board of directors is considered an executive officer, unless two requirements are satisfied: (1) the officer is excluded, by resolution of the board of directors or by the bylaws of the bank or company, from participation (other than in the capacity of a director) in major policymaking functions of the bank or company; and (2) the officer does not actually participate therein.¹⁰

IV. Discussion

The Board's annual resolutions excluded Chairman * * * from participation in major policymaking functions of the Bank,¹¹ meeting the first of Regulation O's requirements for excluding Chairman * * * as an “executive officer.” Therefore, the Bank's appeal hinges on the second factor, namely whether Chairman * * * actually participated in major policymaking functions of the Bank other than in the capacity of a director.

The Bank's Position

The Bank maintains that Chairman * * *'s participation in major policymaking functions did not extend beyond his capacity as director, advancing two main arguments. Specifically, the Bank notes that, at the time of the examination finding, Chairman * * * was not an active part of Bank management and did not supervise employees, originate or underwrite loans, evaluate securities transactions, prepare financial statements, or engage in other managerial or executive activities.¹² Instead, Chairman * * *'s participation in Bank matters was limited to his service on board committees, including performing oversight functions that are typical of board committee members in their capacity as directors, such as approving loans that exceeded bank employees' authorizations or monitoring compliance with bank policies.¹³ Therefore, the Bank

⁸ 12 C.F.R. § 337.3(c)(2).

⁹ 12 C.F.R. § 215.2(e)(1).

¹⁰ *Id.* Section 337.3(c)(3) of the FDIC's regulations provides that, for purposes of the additional restrictions on loans to executive officers, the definitions and term used in Federal Reserve Board Regulation O shall apply.

¹¹ Bank's Appeal, p. 3.

¹² *Id.*

¹³ *Id.*

maintains, the conduct of Mr. * * * and his participation in Bank policymaking was at all times within his capacity as a director.¹⁴

The Bank also argues that under [state] corporate law, board committees [may not exercise powers other than those of the board,] and that the RMS Manual of Examination Policies contemplates that board committees have “responsibility and influence over key areas of their banks.”¹⁵ Thus, the Bank argues, service on board committees is within the capacity of a director and does not exceed that capacity. The Bank generally dismisses historical staff opinions cited by the FDIC as distinguishable from the facts of the case, and, in certain instances, the Bank argues that these precedents should not be relied on for purposes of a supervisory determination.¹⁶

RMS’s Position

RMS determined that Mr. * * *’s service on the Bank’s loan and investment committees renders him an executive officer for purposes of Regulation O based on longstanding precedent of the Federal banking agencies.¹⁷ According to RMS, this determination is supported largely by the fact that Mr. * * * served on a continuous and permanent basis as member of those committees.¹⁸ RMS further maintains that excerpts from Board minutes demonstrate Mr. * * *’s participation in policymaking at the Bank involved a wide variety of matters, including providing direction and leadership regarding the Bank’s capital markets and investment strategy and its lending activities.¹⁹ RMS also cites a 1993 FRB staff opinion and a 1990 OCC interpretive letter as supportive of its determination.²⁰

The Committee’s Findings

Based on the arguments, facts, and circumstances of this case, the Committee has focused on the definition of “executive officer” in Regulation O. Particularly, as noted above, the definition of executive officer excludes the chairman of the board of directors of a bank if the chairman is excluded, by resolution, from participation (other than in the capacity of a director) in major policymaking functions, and the chairman does not actually participate therein. What is left open

¹⁴ *Id.*

¹⁵ *Id.* pp. 2-3.

¹⁶ *Id.* pp. 4-6.

¹⁷ Director’s Response to Bank’s Appeal, p. 4.

¹⁸ *Id.* p. 6.

¹⁹ *Id.*

²⁰ *Id.* p. 4.

in the regulatory definition is when a chairman's participation in policymaking functions would be *outside his/her capacity as a director*.

The Committee appreciates that there may be several ways that this definition could be interpreted. However, in the absence of definitive interpretive guidance from the FDIC or Federal banking agencies, the Committee defers to the plain meaning of the regulatory text. In this case, the clearest reading of the text suggests that a chairman of the board, in the event the resolution mentioned above is in place, must be engaged in policymaking functions beyond that of a board member. In this case, based on the facts and circumstances, as illustrated, for example, by board and committee minutes, the Committee acknowledges that Chairman * * * is engaged in various activities that could reasonably be described as "policymaking," but these activities all appear to be within his capacity as a board member.

The Committee believes that examiners and institutions could benefit from additional clarity regarding the application of Regulation O. To that end, in the absence of clarifying amendments to Regulation O by the Federal Reserve, RMS may wish to consider providing further clarity for supervised banks regarding the interpretation of "executive officer" in a clear and transparent manner, such as through interpretive guidance, ideally on an interagency basis with the other banking agencies.

V. Conclusion

For the reasons stated above, the Committee grants the Bank's appeal.

This decision is a final supervisory decision by the FDIC.