

**DECISION
OF THE
ASSESSMENT APPEALS COMMITTEE**

CASE NO. 2009-01

*** (Bank) filed an appeal with the Assessment Appeals Committee (Committee) of the Federal Deposit Insurance Corporation (FDIC) by letter dated February 26, 2009. The Bank challenged a determination issued by the FDIC's Division of Insurance and Research (DIR) on February 2, 2009. DIR denied the Bank's request to upgrade its capital evaluation from Undercapitalized to Well Capitalized for the July 1, 2008 to September 30, 2008 quarterly assessment period. The requested upgrade would place the Bank in Risk Category I for the relevant assessment period, subject to an annual assessment rate of five to seven basis points. With DIR's denial, the Bank remained in Risk Category III, subject to an annual assessment rate of 28 basis points. The Bank's quarterly deposit insurance assessment was \$567,352.10, approximately \$425,000 higher than it would have been if the Bank had not fallen below the Well Capitalized threshold. This appeal followed.

At its meeting held on May 4, 2009, after carefully considering the oral presentations, the written submissions, and the facts of this case, the Committee has determined that the Bank's appeal must be denied.

BACKGROUND

On December 12, 2008, the Bank requested DIR review of its capital evaluation for the July 1, 2008 quarterly assessment period, as provided for under 12 C.F.R. § 327.4(c). The Bank asserted that its capital ratios fell to Undercapitalized levels due to other-than-temporary losses of \$86 million realized on investments in Federal National Mortgage Association and Federal Home Loan Mortgage Corporation (the GSEs) securities. The Bank further asserted that those losses occurred because the U.S. Department of the Treasury and the Federal Housing Finance Agency had placed the GSEs into conservatorship and eliminated dividends on their common and preferred stock on September 7, 2008. The losses caused all of the Bank's capital ratios to fall to Undercapitalized levels for the quarterly assessment period ending September 30, 2008.

In its request for review, the Bank noted that within 24 hours of the Treasury's announcement of the GSEs' conservatorships, it began making arrangements to return to Well Capitalized status and that funds for additional capital were actually on deposit with the Bank on September 8, 2008. The Bank presented its capital restoration plan at a September 25, 2008 meeting with the FDIC and the *** State Banking Department. At the September 25, 2008 meeting, the Bank stated that its capital restoration proposal and statutory filings would be submitted in early October and that the Bank was desirous of a mid-October completion date for the restoration. The Bank's holding company, ***, submitted all of the required documents to the New York Federal Reserve Bank (FRBNY) on October 17, 2008, and subsequently received approval. Capital was injected on October 31, 2008, after a \$60 million stock sale by the holding company.

According to the Bank, “it was only the approval process that prevented the funding from occurring prior to the end of the third quarter” of 2008.

By letter dated February 2, 2009, DIR denied the Bank’s request for review of its capital evaluation. DIR addressed the FDIC’s regulations, specifically 12 C.F.R. § 327.9(b), which governs assignments of capital evaluations. DIR noted that the Bank did not submit documents to the FRBNY until mid-October — well after the September 30 Call Report date. DIR determined that the Bank did not satisfy the capital ratio standard for a Well Capitalized institution as of September 30, 2008, and that the capital evaluation assigned for the assessment period in question was correct.

By letter dated February 26, 2009, the Bank timely appealed to the Assessment Appeals Committee. In its appeal, the Bank argues that “unique and compelling circumstances, which were beyond [its] control, namely the enormous volume of requests and capital plans inundating the FRBNY and other regulatory agencies during September 2008” prevented the Bank from being Well Capitalized by the September 30, 2008 Call Report Date. It also argues that the facts of this case are relevantly similar to the facts in AAC Case No. 2002-01 (February 25, 2002), in which this Committee granted an appeal after determining that the bank in question and FDIC staff had reached an agreement to treat the bank as well capitalized even though the bank had fallen below Well Capitalized status as of the relevant reporting date, and that the Bank acted in reliance on that agreement. Based on this asserted similarity the Bank contends that its increased assessment for the third quarter of 2008 is inequitable.

ANALYSIS

The Bank asks the Committee to elevate it from Undercapitalized to Well Capitalized for the July 1, 2008 to September 30, 2008 assessment period. This would raise the Bank from Risk Category III to Risk Category I for that period.

Determination of Risk Categories is governed by 12 C.F.R § 327.9(a). To be in Risk Category I, an institution must be assigned to Supervisory Group A, which is defined as a financially sound institution with only a few minor weaknesses, 12 C.F.R. § 327.9(c)(1). A Risk Category I institution must also be Well Capitalized. 12 C.F.R § 327.9(a)(1). Since the Bank was assigned to Supervisory Group A, the issue presented turns on whether the Bank satisfied the regulatory standards required of Well Capitalized institutions.

To be Well Capitalized, an institution must satisfy three regulatory capital ratio standards: a Total risk-based capital ratio of 10 percent or greater; a Tier 1 risk-based capital ratio of 6.0 percent or greater; and a Tier 1 leverage capital ratio of 5.0 percent or greater. 12 C.F.R § 327.9(b)(1)(i). The FDIC’s regulations require a Well Capitalized institution to meet all three of these capital standards. AAC Case No. 2004-06 (January 13, 2005). These capital evaluations are made “on the basis of data reported in the institution’s Consolidated Reports of Condition

and Income [(Call Report)] ... dated as of September 30 for the assessment period beginning the preceding July 1” 12 C.F.R § 327.9(b).

The Bank’s September 30, 2008 Call Report indicated that it met none of the Well Capitalized standards. Its Total risk-based capital ratio was 3.41 percent, its Tier 1 risk-based capital ratio was 2.60 percent, and its Tier 1 leverage ratio was 1.64 percent, well below even the Adequately Capitalized thresholds. Based on these capital ratios, the Bank was evaluated as Undercapitalized for the period in question. 12 C.F.R § 327.9(b)(3). Undercapitalized institutions in Supervisory Group A are assigned to Risk Category III, 12 C.F.R § 327.9(a)(3), and are subject to a higher deposit insurance assessment rate than Category I institutions (28 basis points versus 5 to 7 basis points). 12 C.F.R § 327.10(b). The Bank seeks treatment as a Well Capitalized institution and reassignment to Risk Category I for the July 1, 2008 assessment period.

In considering past requests for similar relief, the Committee has looked to whether unique circumstances (generally circumstances beyond the bank’s control) prevented the bank from complying with the regulations or whether application of the capital regulations to the facts of the case would be inequitable. AAC Case No. 2008-02 (April 4, 2008); AAC Case No. 2004-06. The Bank bases its claim to relief on the grounds that it was Undercapitalized on the September 30, 2008 Call Report date only as a result of regulatory delay in approving its capital restoration plan. At the May 4, 2008 Committee meeting, the Bank also argued that its capital loss was a result of unique circumstances outside of its control. Finally, it argues that the outcome should be governed by the decision in AAC Case No. 2002-01. None of these arguments is persuasive.

According to the Bank, the enormous volume of requests and capital plans inundating the FRBNY and other regulatory agencies during September 2008 prevented the Bank from consummating the stock transaction by September 30. This Committee has found no unusual delay in the approval process; only two weeks passed from the time the Bank submitted its application to the FRBNY until the time it received its capital injection. Moreover, the Bank’s argument ignores the fact that the Bank did not file its regulatory request until mid-October, approximately two weeks after the September 30, 2008 capital evaluation date for the third quarter assessment period. In fact, even if the FRBNY approval process had been instantaneous, the Bank would have been Undercapitalized on September 30, 2008.

Nor does the Committee find that the circumstances presented are either unique or outside the Bank’s control. Certainly the Bank had no control over whether its investments in the GSEs remained profitable, but it did decide to hold those securities. Indeed, many other institutions found themselves similarly Undercapitalized after the GSEs were placed into conservatorship (although none of these institutions appealed their assessments). Like the Bank, most of these institutions returned to Well Capitalized status in the next assessment period. Consequently, while the Bank’s lowered capital levels may have resulted from declining GSE stock values, there nevertheless appears to be no inequity in the consistent application of the FDIC’s capital regulations under these circumstances.

Finally, our decision in AAC Case No. 2002-01 does not support granting the relief requested by the Bank. The decision in AAC Case No. 2002-01 turned on a finding by the Committee of a *specific agreement* to treat the bank as Well Capitalized despite its lower capital levels. Here, the evidence does not disclose any such agreement regarding regulatory treatment, and therefore the rationale of AAC Case No. 2002-01 does not apply. Moreover, regulations promulgated subsequent to the Committee's decision in AAC No. 2002-01 explicitly reserve to the FDIC Board of Directors the authority to waive the regulations in Chapter III of the Code of Federal Regulations, which includes Part 327 and the FDIC's capital regulations. 12 C.F.R. § 303.12(a). Accordingly, this Committee notes that its decision in AAC Case No. 2002-01 has in effect been superseded by these more recent regulations and the Committee no longer regards that case as binding precedent.

The factual background shows that the Bank made great efforts to return quickly to a Well Capitalized status, and the Committee commends the Bank for those efforts. But moving quickly to restore Well Capitalized status does not excuse the Bank's failure to comply with the regulatory requirements of section 327.9(a)(1). In that vein, the Committee has previously ruled that, where a holding company moves quickly to restore an institution's capital rating, this does not excuse failure to comply with the FDIC's capital regulations. AAC No. 2008-01, at 3 (April 4, 2008).

After considering all of the facts and arguments presented by the Bank in its written submission and its oral presentation, the Committee finds that the circumstances presented are not unique nor is application of the capital regulations in this instance inequitable.

CONCLUSION

The Bank's capital evaluation for the July 1, 2008 assessment period was based on data reported in its September 30, 2008 Call Report. The Bank was correctly evaluated as Undercapitalized and assigned to Risk Category III for that period. While the Committee is sympathetic to the Bank's position and commends its efforts to return quickly to Well Capitalized status, no basis for granting the requested relief is presented here. Accordingly, for the reasons set forth in this decision, the Bank's appeal is denied.

By direction of the Assessment Appeals Committee, dated June 4, 2009.

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