

How Proposed Bipartisan Bill Would Reform Bank Exams

By **Arthur Long, Parag Patel and Barrie VanBrackle** (February 12, 2024, 2:42 PM EST)

A recent bipartisan bill, if enacted, would particularly benefit small lenders and bank-fintech partnerships by promoting transparency, appellate rights and examiner accountability.

On Dec. 14, 2023, a bipartisan group of senators introduced^[1] the Fair Audits and Inspections for Regulators' Exams Act, or FAIR Exams Act, which seeks to increase transparency in the bank examination process.

The proposed legislation would require examining agencies to act quickly and transparently, while creating an independent review and appeals process under the Federal Financial Institutions Examination Council,^[2] which would allow banks to seek independent review of material examiner findings.

Key Provisions

The FAIR Exams Act would amend the Federal Financial Institutions Examination Council Act of 1978 in three primary ways.

1. Enhance Timeliness and Transparency of Examination Reports

A federal financial institution's regulatory agency would need to provide a final examination report to a financial institution within 60 days after the later of (1) the exit interview for an examination of the institution, or (2) the provision of additional material information by the institution relating to the examination. Such regulatory agencies include the Federal Reserve Board, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corp., the U.S. Consumer Financial Protection Bureau and the National Credit Union Administration.

The exit interview would generally occur by the end of the nine-month period from the start of the examination, unless the examining agency provided written notice to the institution describing with particularity why it needed more time to complete the examination.

Upon the request of a financial institution, the examining agency would need to include, with the final report, an appendix listing all examination or other factual information that it relied on in support of a



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material supervisory determination.

2. Establish Independent Examination Review Office and Director

The FAIR Exams Act would establish an office of independent examination review, along with an independent examination review director role appointed by the FFIEC, and a staffing and funding mandate.

The director would be tasked with receiving and investigating certain complaints from financial institutions, their representatives or another entity acting on behalf of such institutions concerning examinations, examination practices or examination reports.

Quarterly meetings with financial institutions would be required in order to discuss examination procedures, practices and policies.

FFIEC examination procedures would need to be reviewed by the director to ensure the written examination policies of those agencies were being followed in practice and applied consistently.

Additionally, the director would need to conduct a continuing and regular program of examination quality assurance for all examination types conducted by the examining agencies.

3. Establish Right to Independent Review of Material Supervisory Determinations

A financial institution would generally have the right to obtain an independent review of a material supervisory determination in a final report of examination, if proper notice and justification were given to the director.

Importantly, the financial institution could request any information that the examining agency relied on in the final report that was not in the financial institution's possession.

The examining agency would be required to promptly deliver such information to the financial institution.

The director would determine the merits of the appeal, or, at the election of the financial institution, refer the appeal to an administrative law judge appointed by the FFIEC to conduct a hearing.

In any hearing, neither the director nor the administrative law judge could defer to the opinions of the examiner or agency. They would need to independently determine the appropriateness of the agency's decision based on the relevant statutes, regulations, other appropriate guidance and evidence presented at the hearing.

The director would need to reach a decision within 60 days of the record's closing. The decision would be deemed the final agency action, binding the agency whose supervisory determination was the subject of the review and the financial institution requesting the review.

A financial institution could appeal the decision within 60 days in the U.S. Court of Appeals for the District of Columbia Circuit or in the circuit where the financial institution is located.

A federal financial institution's regulatory agency would not be able to retaliate against a financial

institution for exercising its appellate rights under this bill. The protection against retaliation would extend to the financial institution's service providers and affiliated parties.

Conclusion

If enacted, the bill would be particularly valuable to small lenders and bank-fintech partnerships seeking more efficient examination processes, transparent responses from banking regulators and protection of due process rights.

Various industry groups, such as the American Bankers Association, the Independent Community Bankers of America and the American Fintech Council, which represents banking-as-a-service^[3] institutions, have voiced support for the FAIR Exams Act. They are generally aligned with its goal to make the banking examination process fairer and envision that it will strengthen the financial system.

The proposed legislation comes at a time when bank regulators are said to be taking a tougher line with the institutions they supervise, both as a general matter and particularly with banks involved in fintech partnerships.

According to the bill's sponsors, the FAIR Exams Act "will help bring much-needed transparency to the examination process to make certain all banks ... are treated fairly and afforded due process through a rigorous appeals process."

Whether the bill will garner enough support in Congress to become law remains to be seen.

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[1] <https://www.congress.gov/bill/118th-congress/senate-bill/3541/text?s=1&r=1>.

[2] The FFIEC members are the Board of Governors of the Federal Reserve System (FRB), the Office of the Comptroller of the Currency (OCC), the Federal Deposit Insurance Corporation (FDIC), the Consumer Financial Protection Bureau (CFPB), the National Credit Union Administration (NCUA), and the State Liaison Committee.

[3] Banking as a Service (BaaS) is a model that enables fintechs and other non-bank businesses to connect with banks' systems via application programming interfaces (APIs), allowing them to integrate and offer financial services such as account management, money transmission, payment processing, card issuance, and lending.