

Handbook: Thrift Activities
Subject: Enforcement Actions

Section: 150
RB 18-1

September 27, 1989

General Enforcement Policy

RESCINDED

Summary: This Regulatory Bulletin describes the formal enforcement powers of the Office of Thrift Supervision (OTS), successor to the Federal Home Loan Bank Board (FHLBB), and provides general guidelines for the utilization of those powers.

OTS Identification:

Resolution No. 88-264
EP-002
April 11, 1988

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Supplementary Information:

The statements in this Regulatory Bulletin for Enforcement Policies are not rules or interpretations of one office or division of the OTS, but are official FHLBB adopted resolutions. The continued effectiveness of FHLBB resolutions and their use by OTS are addressed in Title IV of FIRREA and the OTS Statement of Organization, Functions and Delegations of Authority (54 Fed. Reg. 34637 (August 21, 1989)).

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I. Purpose

This Bulletin contains a general description of the OTS's formal enforcement powers and provides general guidelines for the utilization of those powers. It is the policy of the OTS that prompt, firm, fair and appropriate action be taken to ensure correction of violations of laws and regulations, unsafe or unsound practices or other events

that unnecessarily expose the Savings Association Insurance Fund (SAIF) to risk. The OTS further intends that such actions be taken on a consistent basis across the country. The proper use of the OTS's formal enforcement powers or informal supervisory responses is critical for the OTS to meet its responsibilities to ensure the safety and soundness of the thrift industry and that industry's compliance with laws and regulations and to maintain the soundness of the SAIF.

II. The OTS's Formal Enforcement Powers and Supervisory Responses

The OTS directly, or through its staff or agents, uses a number of tools to carry out its supervisory and enforcement goals and objectives. These tools range from informal advice and moral suasion to formal enforcement action.

The OTS's formal enforcement powers include the following:

1. Cease-and-desist orders against savings associations, holding companies, service corporations and/or officials of such companies;
2. Temporary cease-and-desist orders in emergency cases;
3. Removal and/or prohibition orders;

4. Immediate suspensions during removal and prohibition proceedings;
5. Temporary suspensions for certain criminal indictments and removals for certain criminal convictions;
6. Enforcement of orders in U.S. District Court;
7. Civil money penalties;
8. Capital directives;
9. Injunctive actions; and
10. In a limited number of cases, conservatorships and receiverships.

In order to determine if formal enforcement actions should be pursued, the OTS's staff often conducts formal examinations and investigations, and, in conducting such examinations and investigations, the staff may enforce subpoenas in U.S. District Court. In addition, the OTS's staff and agents have a number of informal supervisory responses to violations of laws and regulations and unsafe or unsound practices. These include, but are not limited, to meetings with management and/or boards of directors, supervisory letters or directives, special examinations and supervisory or consent merger agreements.

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III. Utilization of Enforcement Powers and Supervisory Responses

General

The OTS uses its enforcement powers and supervisory responses for three purposes: (1) prevention, (2) remedial/corrective action or (3), in the case of civil money penalties, punitive redress. The goals sought in a particular supervisory response or enforcement action are determined on a case-by-case basis by the considerations set out herein.

The OTS and its staff and agents will respond promptly and firmly to address actual or potential problems in or concerning an individual savings association or group of savings associations by utilizing its formal enforcement powers or informal supervisory responses consistent with the overall condition of the savings association and other relevant circumstances.

Factual Basis and Statutory Grounds

Before taking or initiating formal enforcement, a determination must be made that the facts establish the applicable statutory grounds for initiating the action. It is not the policy of the OTS to initiate any formal enforcement action unless the statutory grounds for such action exist. Similarly, before taking or initiating any supervisory response that may lead to or ultimately result in a formal enforcement action, a determination must be made that there is an appropriate factual basis for taking such action.

Allegations of misconduct raised in the supervisory and enforcement process should be supported with specific instances of such misconduct or sufficient factual evidence to believe reasonably that such misconduct may have occurred or is likely to occur in the future. However, the OTS will not permit illegal conduct (i.e., violations of any law or regula-

tion or of any agreement with or condition imposed by the OTS) or unsafe or unsound conduct that is harmful or potentially harmful to a savings association to continue while its staff and agents document all of the details of such conduct. The OTS expects its staff and agents to utilize supervisory responses and enforcement actions to protect insured savings associations, and ultimately the SAIF, from loss or other harm. Therefore, it is imperative that the staff and agents move promptly to correct or remedy illegal or unsafe or unsound conduct upon forming a reasonable factual basis of the details of such conduct, as well as a reasonable belief that it must be redressed.

Form of Action

Of course, the appropriate form of action depends in part on against whom the proposed action is to be brought (for example, a savings association or a management official) and the nature of the illegal or unsafe or unsound conduct. More specifically, there is a distinction between situations warranting the use of formal enforcement authority and those for which one of the many available forms of supervisory response may be sufficient to redress the illegal or unsafe or unsound conduct. This choice of the appropriate action or response to correct illegal or unsafe or unsound conduct involves a careful balancing of a number of factors and a careful exercise of discretion. The use of formal enforcement action or informal supervisory response is not mutually exclusive. Some situations may warrant the use of one or more formal and/or informal actions.

Among the factors to consider when determining whether certain illegal or unsafe or unsound conduct warrants the use of formal enforcement action and/or an informal supervi-

sory response are the following:

1. The severity of the actual or potential violation or unsafe or unsound conduct.
2. The materiality of the actual or potential violation or unsafe or unsound conduct.
3. Whether the illegal or unsafe or unsound conduct has been done repeatedly or there is a substantial amount of illegal or unsafe or unsound conduct discovered at one time.
4. Whether there have been previous warnings with respect to the illegal or unsafe or unsound conduct.
5. The existence of prior supervisory responses, particularly supervisory agreements or directives.
6. The record of management in taking remedial or corrective action in the past.
7. The extent of damage, harm or loss to the savings association as a result of the actual or potential illegal or unsafe or unsound conduct.
8. The savings association's capital level and quality.
9. The need for an immediate resolution of the problem.
10. Whether adequate corrective action has been taken already.
11. The likelihood that the conduct may occur again.
12. The impact of the illegal or unsafe or unsound conduct on other savings associations or other situations.
13. The extent to which the identified problems were

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caused predominantly by the savings association's management or an individual, especially by conflicts of interest or insider abuse, rather than by the local economy or other external factors.

14. The presence of unique circumstances that might tend to require formal enforcement action.

The weight or importance of each of these factors depends on the conduct or problems discovered, the person or entity against whom an action would be taken and the type of action or actions available.

In analyzing these factors, certain legal matters, in addition to meeting the statutory grounds, must be considered. In analyzing the facts and statutory grounds, the likelihood of success in litigation and the existing precedent on the issues involved should be considered. In addition, when choosing the form of action, it is important to consider the remedy for violations of the available actions. For example, if choosing between a cease-and-desist order and a supervisory agreement, it is important to consider that violations of cease-and-desist orders may be redressed with court enforcement or civil money penalties, whereas violations of supervisory agreements constitute grounds for seeking a cease-and-desist order. The desire to have a stronger remedy available for subsequent violations may be relevant in choosing the appropriate present action.

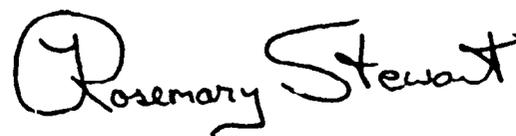
IV. General Procedure for Formal Enforcement Actions

The Board created an Enforcement Review Committee (ERC) to consider issues of appropriate enforcement and supervisory policy and actions to be taken by the board. The ERC consists of the following individuals: (1) the Senior Deputy Director for Supervision/Operations, (2) the General Counsel, (3) the Senior Deputy Director for Congressional Relations and Communications, (4) the Director of Enforcement, and (5) one of the twelve District Directors on a rotating basis for a minimum six-month term. Three members of the ERC may vote to initiate or approve particular enforcement investigations or actions: (1) the Senior Deputy Director Supervision/Operations, (2) the General Counsel or, at his designation, the Director of Enforcement, and (3) the District Director serving at the time of the vote. Among its other responsibilities, the ERC has been directed to prepare enforcement and supervisory policies for OTS consideration.

Enforcement is responsible for the management and conduct of all formal enforcement activities, including the conduct of formal examinations and investigations. Requests or referrals for enforcement action from the District Offices, Supervision/Operations, OGC or other divisions of the OTS shall be sent to Enforcement, which is responsible for determining whether evidence supporting the referral or recom-

mendation is present and for recommending to the OTS or the ERC that formal enforcement action or an investigation be instituted. These determinations and recommendations by Enforcement are reviewable by the ERC.

In connection with initiating a cease-and-desist or removal/prohibition action involving a state-chartered insured institution, the OTS is required by statute to provide the appropriate state supervisor with notice of its intention to institute such proceeding and the grounds therefor. The OTS may proceed with the proposed action in such time as it deems appropriate under the circumstances (with such time frame to be communicated to the state supervisor), unless it determines that satisfactory corrective action has been taken by the state authority. The OTS encourages this requirement to be met through informal communications between its supervisory agents at the District Offices and the state, such as by conducting joint examinations and supervisory meetings and copying the state supervisor with correspondence concerning specific savings associations. All requests from the District Offices for formal enforcement action made to Enforcement, Supervision/Operations, or the ERC shall contain a statement about the position of the state supervisory authority with respect to the recommended action involving state-chartered insured institutions.



Rosemary Stewart, Secretary, Enforcement Review Committee