

RB 18-1b was rescinded 6/6/03 by RB 32-28. Click [HERE](#) to link to RB 32-28.

Handbook: Thrift Activities  
Subject: Enforcement Actions

Section: 150  
RB 18-1b

April 18, 1994

# RESCINDED

## General Enforcement Policy

*Summary:* This Regulatory Bulletin describes the enforcement powers of the Office of Thrift Supervision (“OTS”) and provides guidance on their use to further OTS’s mission. Regulatory Bulletins 18-1a, 18-2 and 18-4 are hereby rescinded.

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### *Regulatory Bulletin 18-1b*

**Supplementary Information:** This Regulatory Bulletin also supersedes EP-002A, General Enforcement Policy, Resolution No. 90-331, dated February 12, 1990.

### **I. Purpose**

This Bulletin describes OTS’s enforcement powers and the circumstances when OTS will use them to achieve its supervisory responsibilities. Our objective in issuing this Bulletin is to establish an OTS enforcement policy in keeping with the current condition of the savings and loan industry. When OTS was created in 1989, the savings and loan industry was in crisis. OTS responded by closing over 700 thrifts and pursuing those responsible for the crisis in the savings and loan industry.

OTS now regulates a sounder and much smaller industry. Since 1989, both the number of problem thrifts (those with MACRO ratings of 4 or 5) and their proportion of the total savings and loan industry has declined dramatically. An industry that was unprofitable is now profitable.

As the number of savings associations declines, OTS must maximize its efficiency. Enforcement actions often consume substantial resources. Our focus must be on preventing future problems. For example, a restitution claim that would have a material beneficial impact on the finances of a savings association will be accorded a high priority since an OTS enforcement action may prevent a potential failure. Furthermore, OTS enforcement actions involving closed institutions will focus on actions against dishonest or untrustworthy individuals to prevent future harm to the industry.

This Bulletin contains statements of general policy and internal agency procedures. The statements in the Bulletin are not rules or rulemaking by the OTS and do not create substantive or procedural rights enforceable by law or in any proceeding. The Bulletin does not limit in any way positions the OTS or any OTS representative may take in any proceeding.

### **II. General Policy**

A primary mission of the OTS is to maintain a sound and healthy thrift industry that serves the public and complies with law. OTS seeks to achieve this objective through effective supervision. Each action the agency takes—including enforce-

ment activities—should be in service of this mission.

Enforcement actions are designed to achieve specific supervisory objectives. Those objectives generally will fall into the following categories:

- improvement of the financial condition of a thrift;
- elimination of an unsafe or unsound condition or practice (including violations of laws or regulations);
- elimination of material violations of consumer protection and compliance laws and regulations;
- removal from an institution or prohibition of an individual from the bank and thrift business; or
- action designed to correct the behavior of an institution-affiliated party.

### **III. Contents of Enforcement Actions**

Enforcement actions should be specifically tied to the achievement of specific supervisory objectives and should address substantive supervisory problems. Enforcement actions do not need to address every supervisory issue identified. Enforcement actions should state clearly the activities they prohibit or

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restrict. Enforcement actions should also specify any remedial measures and a specific time within which the association<sup>1</sup>, its board of directors, or management must act. While the language in enforcement actions may be similar, each enforcement action should be tailored to the specific violations, practices or conditions to be remedied.

## IV. Guidance for Determining Whether to Initiate a Formal Enforcement Action

### A. General Factors to Consider

To determine if an enforcement action is warranted, and the type of action most appropriate in a particular case, the Regional Director should consider the following factors:

- The extent of actual or potential damage, harm or loss to the association because of the action or inaction;
- Whether the illegal action, unsafe or unsound conduct or failure to correct deficiencies has been repeated;
- The likelihood similar conduct may recur;
- The record of taking or failing to take prompt and effective remedial or corrective action;
- The extent to which the identified problems were preventable and not solely the result of external factors;

<sup>1</sup>“Association” means federally insured savings associations, their subsidiaries and their holding companies or other affiliates.

- The effect of the illegal or unsafe or unsound conduct on other institutions;
- The examination rating of the association (see further guidance below);
- Whether the agency’s objective has been or is likely to be achieved because of action taken or contemplated by other government agencies or private litigation;
- The presence of unique circumstances.

### B. Consideration of Examination Ratings in Deciding Whether an Enforcement Action is Appropriate

#### 1. 4 and 5 Rated Associations

There is a presumption formal enforcement action is warranted if an association receives a composite rating of 4 or 5 for the latest thrift, compliance, trust or Electronic Data Processing (“EDP”) examination or Unsatisfactory (“U”) for the latest Holding Company examination. A recommendation for enforcement action should be initiated promptly. A recommendation should be made within 60 days of sending to an association an examination rating of 4 or 5 unless the appropriate Regional Director documents in the regulatory plan for the association or the supervisory files, within this 60-day time period, that the association’s problems have been corrected or are likely to be corrected promptly. If the Regional Director makes such a determination and waives enforcement action, the situation must be closely monitored and the determination not to initiate enforcement action reviewed regularly in writing.

#### 2. 1, 2, and 3 Rated Associations

There is no presumption for a 1, 2, or 3 rated association that formal enforcement action is warranted. The Regional Director should consider resolving substantive problems by obtaining a commitment from the association’s senior management and board of directors (e.g., correspondence from senior management or the Board of Directors) to correct all violations of law and regulation fully and promptly. In evaluating such a commitment, the Regional Director should consider the capability, cooperation, integrity and commitment of the association’s management, its board of directors, or ownership to correct OTS’s supervisory concerns without the need for a formal enforcement action. The Regional Director should also consider whether the association’s condition is improving or deteriorating and the degree of confidence he or she has in the ability of the association to correct all identified deficiencies and return the association to a safe and sound condition. If the Regional Director determines that an enforcement action is necessary, the nature of the enforcement action will be determined by the seriousness of the deficiency, and by the commitment and ability of management and the board of directors to correct identified deficiencies.

#### 3. An Enforcement Action Is Presumed Warranted for Significant Violations

Formal enforcement action is presumed to be warranted (without regard to the rating of the association) whenever:

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- a. The association has significant problems or material deficiencies in its systems, controls, books and records, programs, operating policies and methods of operations, or management information areas (i.e., the association is operating in an unsafe and unsound manner). The Regional Director should consider a formal enforcement action even if these problems have not yet resulted in a change of rating or been reflected in the association's financial performance or condition; or
- b. There is significant insider abuse even if the association is not immediately or directly harmed; or
- c. There are significant and ongoing uncorrected compliance problems (e.g., a pattern or practice of discrimination in mortgage lending) or other substantial violations of law or regulation (e.g., the Bank Secrecy Act); or
- d. The association or its officers or directors have disregarded supervisory efforts to correct serious or repetitive supervisory problems; or
- e. There has been a material violation of securities laws or the Change in Control Act.

This list is not exclusive. Regional Directors are responsible for taking or recommending appropriate enforcement actions whenever they determine such action is warranted.

## V. Public Disclosure of Enforcement Actions

The law requires OTS to disclose publicly many enforcement actions. 12 U.S.C. § 1818(u). OTS must disclose all final cease and desist orders, civil money penalties, removal orders, capital directives, and any modification to or termination of such actions. OTS must also disclose written agreements under 12 U.S.C. § 1818(b), and any conditions imposed in writing in connection with an application enforceable under 12 U.S.C. § 1818(b), unless OTS, in its discretion, determines that publication would be contrary to the public interest. OTS must also disclose any final Prompt Corrective Action ("PCA") directives, reclassification under 12 U.S.C. § 1831o(g) or safety and soundness orders under 12 U.S.C. § 1831p-1(e). OTS will consider public disclosures beyond those the law requires if OTS, in its discretion, determines it is in the public interest to disclose the action to the public.

## VI. Types of Enforcement Remedies

### A. General

The OTS has both **informal** and **formal** enforcement tools to carry out its supervisory objectives. These tools range from advice and moral suasion to the appointment of a conservator or receiver. OTS will take vigorous enforcement action when, in its judgment, such action is necessary to ensure the safe, sound, and lawful operation of associations.

### B. Informal Actions

OTS's informal enforcement tools include, among other things, the use of supervisory directives, supervisory correspondence, meetings with boards of directors, board of dire-

tors' resolutions, requests for voluntary management changes or reorganizations and personal contacts. The effectiveness of these informal tools depends in part on the willingness and ability of regulated institutions to bring their activities into compliance. If informal tools do not resolve the problem, the appropriate staff response, in nearly all instances, is to recommend the use of one or more formal enforcement tools. An association's unwillingness to comply with an appropriate informal remedy, such as a supervisory directive, is a significant factor in deciding that a formal enforcement response is appropriate. The decision to use an informal as opposed to a formal mechanism to achieve supervisory or enforcement goals is a matter solely within the discretion of OTS.

### C. Formal Actions

OTS's formal enforcement tools include the following:

#### Supervisory Agreement

A voluntary written agreement with OTS that typically would address any existing violations, management or operating deficiencies, or other unsound practices, mandate corrective actions and limit activities of associations and their institution-affiliated parties. A Supervisory Agreement is enforceable under 12 U.S.C. § 1818.

#### Cease and Desist Order

A Cease and Desist Order is issued under 12 U.S.C. § 1818(b). A Cease and Desist Order often orders remedial measures similar to those in a Supervisory Agreement, but unlike a Supervisory Agreement, a Cease and Desist Order may be enforced through application to a U.S. district court under 12 U.S.C. § 1818(i).

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Additionally, a Cease and Desist Order may require affirmative actions such as restitution or indemnification to correct conditions resulting from violations or practices. 12 U.S.C. §1818(b)(6). A Cease and Desist Order is imposed on a non-voluntary basis after issuing a formal Notice of Charges and affording an opportunity for a hearing by the party before an Administrative Law Judge and a final decision and order issued by the OTS Director. OTS may also issue a Consent Cease and Desist Order to a party who agrees to its issuance.

## Temporary Cease and Desist Order

A Temporary Cease and Desist Order, issued under 12 U.S.C. § 1818(c), is immediately effective upon service and remains effective and enforceable pending the completion of administrative proceedings to determine if a "Cease and Desist Order" should be entered. The Temporary Order is issued with a Notice of Charges and an opportunity for a hearing. OTS issues such orders to preserve assets or to prevent other ongoing or expected harm to an association. The issuance of a Temporary Cease and Desist Order is not routine. For example, OTS may issue a Temporary Cease and Desist Order when, among other things, OTS is concerned that a respondent may dissipate assets that rightfully belong to an OTS-regulated institution.

## Injunctive Action

In the case of a violation or threatened violation of, or failure to obey, a Temporary Cease and Desist Order, OTS may seek an injunction in United States District Court to enforce the Order under 12 U.S.C. § 1818(d).

## Order of Removal and Prohibition

OTS may issue an Order under 12 U.S.C. § 1818(e) removing an institution-affiliated party from his or her position with an association and prohibiting any further participation in any manner in the conduct of the affairs of any insured depository institution industry-wide. Some orders are issued by consent and others are issued after a Notice of Charges is filed affording the institution-affiliated party an opportunity for a hearing before an Administrative Law Judge and a decision and final Order of the OTS Director. Anyone convicted of a criminal offense involving dishonesty or breach of trust, or who has agreed to enter into a pre-trial diversion or similar program in connection with such a prosecution, is subject to an industry-wide prohibition by operation of law. 12 U.S.C. § 1829; 12 U.S.C. § 1785(d) (prohibiting anyone convicted of any criminal offense involving dishonesty or breach of trust from participating in the affairs of an insured depository institution or an insured credit union).

## Suspension Order

OTS is empowered to suspend an institution-affiliated party if the suspension is necessary to protect the association or the interests of its insured depositors. 12 U.S.C. § 1818(e)(3). A suspension order is effective upon service and remains in effect until the administrative proceeding to remove and prohibit the individual is complete. An individual charged with a felony may also be suspended if the statutory criteria are met. 12 U.S.C. § 1818(g).

## Civil Money Penalties

OTS may assess civil money penalties against institution-affiliated par-

ties for violations of laws, regulations, written agreements, orders, conditions imposed in writing and, under some circumstances, unsafe or unsound practices or breaches of fiduciary duty. OTS may also assess civil money penalties for failing to maintain adequate records, or for failing to file, or filing late or inaccurate OTS-required reports. OTS's policy, procedure and guidance for assessing civil money penalties are described in RB 18-3a.

## Capital Directive

OTS may issue an Order, under 12 U.S.C. § 1464(s), directing an association to increase its capital levels. A Capital Directive may also impose operating and other restrictions on an association. A Capital Directive may be used where capital adequacy is the overriding consideration and other problems do not rise to the level where other formal enforcement actions are needed. Capital directives are issued according to the procedures for a written hearing process under 12 C.F.R. § 567.4 and are enforceable in United States District Court. 12 U.S.C. § 1464(s)(4)(B).

## Individual Minimum Capital Requirement ("IMCR")

Under 12 U.S.C. § 1464(s)(2), OTS may establish the minimum level of capital for an association at such amount or at such ratio of capital to assets as the OTS Director determines to be necessary or appropriate considering the particular circumstances of the association. An IMCR is a special capital requirement set case-by-case for associations with unacceptably high risk profiles. OTS promulgated a regulation describing appropriate circumstances for establishing individual minimum capital requirements, standards for determining appro-

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priate individual minimum capital requirements and appropriate procedures. 12 C.F.R. § 567.3.

## Directives to Take Prompt Corrective Action (“PCA”)

These are issued under 12 U.S.C. § 1831o and generally order an insured depository institution to resolve its problems. The purpose of a PCA Directive is to resolve the problems of an insured depository institution at the least possible long-term loss to the deposit insurance fund. Under PCA, an association’s capital levels are the primary criteria for regulatory intervention, although non-capital supervisory standards may also influence agency action. Generally, PCA imposes increasingly severe restrictions depending on the severity of an institution’s capital deficiency. OTS may seek an institution’s consent to a PCA Directive, but the institution’s consent is not necessary for the directive to be final and effective. OTS will endeavor to include within a PCA Directive all remedial actions required of the institution in question, whether those requirements are imposed under the authority of 12 U.S.C. § 1831o or another authority such as 12 U.S.C. § 1818. A PCA Order will generally require an institution to comply with its capital restoration plan or to produce such a plan if

one does not exist. A PCA Directive generally remains in effect unless OTS rescinds or modifies it. 12 C.F.R. § 565.7(f).

## Orders Enforcing Safety and Soundness Standards

Any association that fails to comply with any established safety and soundness standard must file a plan with OTS to correct the deficiency. 12 U.S.C. § 1831p-1(e)(1). If an association fails to submit a timely, acceptable plan or fails in any material respect to implement an OTS approved plan, OTS is required to order the association to correct the deficiency. 12 U.S.C. § 1831p-1(e)(2). OTS may also, by order, require the association to take any other action OTS determines will better carry out the purposes of 12 U.S.C. § 1831o. OTS is required to take additional action against an association that has not corrected a deficiency if the association has also undergone either extraordinary growth or a change in control. Such orders have the force and effect of final orders issued under 12 U.S.C. § 1818.

## Part 513 Actions

These are administrative enforcement actions initiated against professional service providers practicing before the OTS pursuant to 12 C.F.R. Part 513. OTS may issue a

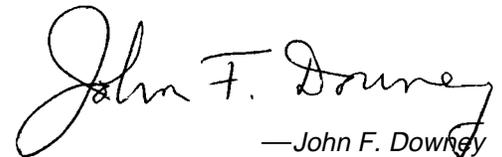
suspension or debarment order by consent or after issuing a Notice of Charges and providing an opportunity for a hearing under 12 C.F.R. Part 509.

## Consent to the Appointment of a Conservator or Receiver

This is a written consent by an association, through its board of directors, under which OTS may, in its discretion, appoint a conservator or receiver for that association or negotiate the terms of a merger or acquisition of the association. Often, these consents are part of agreements restricting the operations of an association. Such restrictions limit the risk of additional losses to the insurance fund pending the appointment of a conservator or receiver, or merger or acquisition.

## **VII. Termination or Modification of Enforcement Actions**

The Director or a Regional Director, as appropriate, may terminate or modify an enforcement action when doing so is consistent with OTS’s supervisory objectives. The decision to terminate or modify an enforcement action must be made in writing explaining the reasons therefor. An OTS examination documenting compliance with the enforcement action is a prerequisite to removal of the action.

  
—John F. Downey  
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