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Handbook: Thrift Activities
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Section: 150
RB 18-4

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RESCINDED

Enforcement Policy Statement on Use of Formal Examination and Investigation Authority

Summary: This Regulatory Bulletin describes the Office of Thrift Supervision's (OTS) powers, policies and procedures used in initiating and pursuing formal examinations and investigations, and the procedures used in seeking enforcement of subpoenas issued pursuant to these examination and investigation powers.

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Purpose

This policy describes the Office of Thrift Supervision's (OTS) statutory powers and the procedures used in initiating and pursuing formal investigations and examinations (Investigations). This policy also discusses the procedures used in seeking enforcement of subpoenas issued pursuant to these investigation and examination powers. These policies and procedures are guidelines for the use of the OTS, its staff and agents; they do not create substantive or procedural rights enforceable at law or in any administrative proceeding.

Summary of Policy

OTS expects its examiners and supervisors to exhaust all informal means of obtaining information before requesting a formal investi-

gation. That is, District personnel are required to seek and utilize reliable information from savings associations and their affiliates, employee, agents, and such outside sources as borrowers, joint venturers, county land record offices, and other governmental authorities.

When these avenues are exhausted, formal investigations can do several things including: (1) enhance regular examinations when necessary to compel uncooperative sources to produce documents or statements; (2) enhance special examinations conducted to determine whether enforcement action is warranted, where subpoena power is necessary; and (3) produce "discovery" for contemplated litigation of an enforcement action.

Statutory and Regulatory Criteria

Section 5(d)(1)(B)(v) of the Home Owners' Loan Act (HOLA) as amended by the Financial Institutions, Reform, Recovery, and Enforcement Act of 1989 (FIRREA), and Sections 8(n) and 10(c) of the Federal Deposit Insurance Act, as amended by FIRREA (collectively referred to hereinafter as HOLA and FDIA) contain the statutory power of the OTS to conduct formal examinations concerning the affairs or ownership of savings associations and their affiliates.¹ Section 5(d)(1)(B)(v) provides, in part, as follows:

In connection with examinations of savings associations and affiliates thereof, the Director [or his delegated representatives] may administer oaths and affirmations and examine and to take and preserve testimony under oath as to any matter in respect of the affairs or ownership of any such savings association or affiliate, and issue subpoenas ...

(to be codified at 12 U.S.C. § 1464 (d)(1)(B)(v)).

The OTS holds closely corresponding investigative authority for savings and loan holding companies at Section 10(g)(2) of the HOLA, as amended by FIRREA:

The Director [or his designated representatives] may make such investigations as the Director [or his designated representatives] deems necessary or appropriate to determine whether the provisions of this section, and regulations and orders thereunder, are being and have been complied with by savings and loan holding companies and subsidiaries and affiliates thereof. For the purpose of any investigation under this section, the Director [or his designated representatives] may administer oaths and affirmations, issue subpoenas, take evidence, and require the production of any books, papers, correspondence, memorandums, or other records which may be relevant or material to the inquiry.

(to be codified at 12 U.S.C. § 1467a (g)(2).)

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Section 7(j) of the FDIA, as amended by FIRREA, provides authority to conduct investigations into acquisitions of control over savings associations "to determine whether any person has filed inaccurate, incomplete, or misleading information under this subsection or otherwise is violating, has violated, or is about to violate any provisions of this subsection or any regulation prescribed under this subsection." 12 U.S.C. § 1817(j)(15)(A).

OTS has broad authority to conduct examinations under HOLA and FDIA particularly when conducting formal examinations. The OTS may take testimony under oath and issue subpoenas and subpoena duces tecum to any person on any matter related to the affairs or ownership of savings associations and their affiliates, and enforce such subpoenas in the United States District Courts. Generally, the courts will compel compliance with investigative subpoenas if the information sought is relevant to the inquiry or is likely to lead to the discovery of relevant information. See, *Sandsend Financial Consultants, Ltd. v. Federal Home Loan Bank Board*, 878 F.2d 875 (5th Cir. 1989); *FSLIC v. First National Development Corp.*, 497 F. Supp. 724, 731 (S.D. Texas 1980).

In *Sandsend*, the Court considered whether to enforce a subpoena duces tecum issued by the FHLBB Office of Enforcement to a commercial bank seeking records of a deposit account maintained by Sandsend at that bank. The subpoena sought to trace loan proceeds obtained by Sandsend, from a FSLIC-insured institution. Sandsend was not a borrower and had no other direct connection with the institution. The Court, in ordering enforcement of the subpoena gave a liberal interpretation to the scope of the agency's investigative authority, finding that the statutory grant of power in 12 U.S.C. § 1730(m)(2)² is a broad-sweeping power to issue sub-

poenas to any person, so long as he has information "as to any matter, in respect of the affairs or ownership" of [an] institution or affiliate.

The results of this investigative authority — the power to issue subpoenas for documents and sworn statements — is a valuable tool for OTS in carrying out its examining, supervisory and enforcement responsibilities.

The procedures applicable to the conduct of investigations are contained in the OTS's regulations at 12 C.F.R. Part 512 (1989), as amended at 54 Fed. Reg. 49411 (November 30, 1989). Among other things, the OTS's rules provide that all formal examinations and investigative proceedings are private and for the confidential use of the OTS and its staff, unless the OTS orders otherwise. A person who offers sworn testimony is entitled to review a copy of the transcript of his testimony, and may request permission to purchase a copy. To do so, the individual may send a written request to the Director or a Deputy Director of Enforcement, or to the District Director for the district in which the institution is located. The request can be denied for good cause, such as where a sensitive investigation may be jeopardized. However, such requests generally are granted on the condition that the individual maintain the confidentiality of the document.

Specific procedures apply to subpoenas for information covered by the Right to Financial Privacy Act of 1978, 12 U.S.C. §§ 3401-3422 (1982) (RFPA). The RFPA requires that when subpoenas are served on financial institutions other than institutions supervised by the OTS for records of individuals or partnerships of five or fewer individuals, a special notice must be sent to the individual bank customer, along with a standardized District Court motion and a copy of the subpoena.

The customer then has ten days to challenge the subpoena in court; if he does not, or if he challenges the subpoena and the Court upholds the OTS subpoena, the financial institution is obligated to turn over the subpoenaed records to the agency.

The discussion below with respect to HOLA and FDIA Investigations applies also to investigations and examinations related to a holding company and subsidiaries and affiliates thereof under Section 10 (g)(2) of the HOLA, as amended by FIRREA, or a change in control of a savings association under Section 7 (j) of the FDIA, as amended by FIRREA.

Procedures

In most cases, requests for authority to initiate an Investigation are made by the district offices in whose district the subject association is located. Requests for Investigations relating to savings and loan holding companies and changes in control of a savings association frequently come from the Corporate and Securities Division of OTS's legal staff (CASD). In addition, the Director of OTS or another OTS official may request an Investigation as a result of information coming to his/her attention from other activities of the agency. Also, Enforcement may recommend an investigation with district office concurrence.

The timing of a request for an Investigation is a function, in part, of the purpose that would initiate the Investigation. An examination report need not be in final form for an Investigation to be started. As described hereafter, some Investigations are conducted concurrently with a regular examination, others are initiated after the examination and supervisory processes are underway, in an effort to determine whether formal enforcement actions are necessary. Investigative author-

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ity may also be used for other appropriate factfinding purposes.

It is expected that personnel from District Offices will direct an increasing number of investigations. However, District Directors are still required to refer recommendations that Investigations be conducted to Enforcement. Recommendations for Investigations may be made in a short memo to Enforcement containing the following information (to the extent available and known):

- 1) The name, address, and docket number of the savings association(s),
- 2) A brief description of facts causing the request (including reference to the provision violated, if known),
- 3) A brief description of the information sought in the Investigation,
- 4) The purpose of the Investigation (e.g., obtaining documents to complete a regular examination, obtaining sworn testimony about the relationship between an officer and a borrower, obtaining information to determine whether an enforcement action is necessary, etc.),
- 5) Whether the District Director wants his own District Counsel to direct or to participate in the Investigation and the names and titles of the district office employees to be representatives of the OTS in the Investigation, and
- 6) The primary contact person at the district office for communications with Enforcement concerning the Investigation.

The Director of Enforcement promptly will concur or disagree with the proposed investigation and advise the District Director whether District Counsel or OTS Enforcement will direct the proposed inquiry. Disagreements with the Director of Enforcement's decisions

may be appealed to the Enforcement Review Committee.

District offices making referrals for possible violations of the Control Act, the Holding Company Act, federal securities laws, or other areas of the law where CASD provides legal advice, should also send a copy of the submitted request for Investigation to CASD. In addition, the notification form "FIRREA Enforcement and Supervisory Action Referral Form from OTS District Offices to FDIC," (see Exhibit "A") must be filled out and sent to the FDIC (with a copy to Enforcement) to notify the FDIC that a formal investigation has been requested, as required by 12 U.S.C. § 1818(t)(4).

Furthermore, to facilitate the drafting and mailing of any subpoenas, examiners who are going to be involved in the Investigation should prepare accurate lists of persons and entities on whom they recommend subpoenas be served, as early as possible, together with the mailing addresses for those persons and entities and a brief description of what documents or sworn testimony each person or entity might provide in the investigation. Enforcement will review the Investigation request and, if the Director of Enforcement concurs, draft a resolution that would initiate the Investigation. That draft resolution, together with the Investigation request, and other relevant documents will be transmitted to the District Director. If he/she concurs with the recommendation, the District Director will issue the resolution, which customarily names Enforcement and/or District attorneys and other district office personnel to act as designated representatives of the Director of the OTS to execute the Investigation powers and duties in connection with the examination and investigation of the named institution(s) and any affiliates. The resolution also gives

either the District Director or the Director of Enforcement the power to designate additional representatives as required.

Policy

A. Initiation of an Investigation Proceeding

An Investigation proceeding is an extension of the examination process, although it may not always be accompanied or immediately preceded by an examination. It enables the OTS to obtain access to information (in the form of subpoenaed documents or sworn testimony) that it has not obtained through the usual means of information gathering (e.g., the examination process and other requests by examiners and district directors for information). An Investigation is a means to obtain information that is otherwise unavailable. In the past, Investigations were sometimes initiated without first utilizing all possible avenues of less formal information gathering. OTS has determined, as a matter of policy, to shift the emphasis to "field" investigations, as a means of obtaining information either within or outside the association prior to considering the use of formal investigative authority. District Directors and their staffs now are expected to exhaust all informal means of obtaining such information before requesting the initiation of an Investigation proceeding.

Because of the OTS's authority to examine the records of any savings association and that association's affiliates — Section 5(d)(1)(B)(i) of the HOLA as amended by FIRREA (to be codified at 12 U.S.C. § 1464(d)(1)(B)(i)) subpoenas are not necessary to compel the production of the records of savings associations or their affiliates. Informal requests by examiners to interview persons outside the association or to review records of a borrower or other entity

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that is not a savings association or an affiliate thereof often can achieve the same effect. Information may also be obtained from publicly available sources of information, such as land record offices or state corporation commissions. Sufficient information may be received in these interviews and from informal requests for documents either to make an Investigation unnecessary or, if still necessary, to enable the Investigation to be limited in scope. District office staff contemplating a request that an Investigation be authorized should consider the advantages and timing of formal or informal approaches to obtaining information. Discussions of the merits of each approach with Enforcement will often be useful.

In addition, District office staff may also find it useful and are encouraged to consult with the CASD in those instances where assistance may be needed in interpreting the law with regard to possible violations of the Control Act, the Holding Company Act, the federal securities laws, or such other areas of the law where CASD provides legal advice.

The OTS's investigative powers may *not* be used to conduct a criminal investigation or to gather documents for the purpose of making a criminal referral. The OTS's investigative powers are civil and administrative in nature and are designed for use in carrying out the OTS's examining, supervisory, regulatory and enforcement responsibilities. However, when information obtained for an authorized civil purpose is sufficient to provide a reasonable factual basis for a belief that a crime has been or may have been committed and no criminal referral, or an inadequate referral, has been made by a savings association, OTS personnel in the District or in Enforcement will make appropriate criminal referrals, using the OTS's Form 366. In this regard, special

units in each OTS district office perform a critical function in making referrals, providing assistance to criminal investigators and prosecutors in areas within their specialized knowledge, providing liaison between OTS and the criminal authorities, and at times serving as agents of the grand jury.

It also is improper for OTS to exercise its investigative powers to conduct unfocused "fishing expeditions." OTS must be able to demonstrate a reasonable basis for compelling citizens to testify and turn over their documents to the Agency.

Pursuant to 5(d)(1)(B) of the HOLA as amended by FIRREA, an examiner is entitled to prompt and complete access to *all* association personnel and agents and to *all* association documents. Any refusal to supply association records or otherwise to obstruct the progress of an OTS examination should be brought to the attention of Enforcement. Said section 5(d)(1)(B) grants the OTS specific authority to go to Federal Court to obtain an order requiring that such access be provided.

B. Types of Investigations

An Investigation can be initiated to accomplish a number of different objectives. These objectives will guide the conduct and direction of the Investigation. Some formal examinations are initiated simply to supplement an ongoing regular examination by subpoenaing records outside the control of the association being examined. The role of Enforcement or District counsel in this type of Investigation generally is to prepare the package of information needed to base a decision on whether to initiate the Investigation, to draft the necessary subpoena(s), and to respond to inquiries from counsel for the recipient(s) of the subpoenas. The actual review of documents and requests

for additional information needed to complete the examination is typically made by the examiners following consultation with legal staff, although on occasion the information may be reviewed by legal staff directly. The results of these formal examinations may be incorporated into the regular examination report and, depending on their nature, may end the Investigation or result in further formal enforcement inquiry and/or action. Requests for this type of formal examination should be made immediately after an examiner has been denied access to information that he believes is necessary to properly complete his examination; such requests should not be delayed until the regular exam is completed.

Another use of an Investigation is to expand the scope of an inquiry initiated during a regular examination to uncover facts needed to determine whether other formal enforcement action should be recommended or initiated. Generally this type of Investigation concerns matters which, if the results of the Investigation so warrant, could result in initiation of a cease-and-desist or removal and prohibition proceeding or a securities/control case. These Investigations involve the active participation of Enforcement and/or District counsel in conjunction with the District's examinations and supervision personnel. Such Investigations usually involve the issuance of subpoenas for documents and for sworn testimony. Depending on the information discovered in these Investigations, formal or informal enforcement action may be initiated, a criminal referral prepared, and/or a conservatorship or receivership recommended. Investigations also may be conducted to prepare for administrative or civil litigation. In some instances where OTS's law enforcement objectives are to be accomplished through litigation, an Investigation will be used by Enforcement trial attorneys as the pre-trial "discovery" tool.

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C. Interviews, Information Requests and Subpoenas

The most common means of conducting an investigation are by interview or document request. These can be accomplished voluntarily or by compulsion through the issuance of a subpoena. While HOLA and FDIA authority is not needed to interview a witness, interviews will sometimes be conducted in preference to sworn statements under the following circumstances: (1) when it is not believed necessary that the information sought or the witness's views of that information be recorded, (2) where the witness is cooperative, (3) when the information is of a preliminary nature and/or (4) when it must be collected very quickly. Conversely, sworn recorded testimony will be favored: (1) when the testimony is anticipated to be central to the Investigation, (2) when it is desired that the witness be placed under oath and be bound by his statement, and/or (3) when the investigator is concerned that the complexity of the information is such that it would not be fully understood unless recorded and reviewed.

If he desires, any witness may be accompanied by his personal counsel when interviewed under oath. Counsel for the savings association or for other witnesses are *not* entitled to be present and, in order to assure the independence of a witness's recollection, their presence is not permitted. See 12 C.F.R. § 512.5.

Witnesses in a formal Investigation do, of course, have the right to assert privileges such as the privilege against self-incrimination. In such a case, the examining attorney or other OTS representative may ask questions of the witness for the purpose of determining the breadth of the area of testimony in which the privilege is asserted. Witnesses who intend to assert the privilege against self-incrimination as to substantially

all matters in which they anticipate inquiry are urged to contact the OTS's representative requesting or subpoenaing their testimony prior to the date testimony is scheduled.

The OTS's rules regarding service of a subpoena in connection with an Investigation are contained at 12 C.F.R. § 512.7 (1989). These rules apply both to subpoenas for testimony and for documents or other tangible evidence. Prior to the time specified in the subpoena for compliance, but in no event more than 10 days after the date of service of the subpoena, any person to whom it is directed may apply to the Director or any Deputy Director of Enforcement to quash or modify the subpoena. The Director or the Deputy Director, as appropriate, responds to and rules upon such motions in a timely manner so that the Investigation will not be unreasonably delayed.

If a subpoena is not fully complied with, Enforcement may file a petition in the United States District Court for its enforcement. Enforcement, appearing before the Court on behalf of the OTS files such petitions and supporting briefs under delegated authority from the OTS Director. Generally, Enforcement seeks to expedite the Court's decision by requesting that it issue an order to show cause, requiring the individual or entity subpoenaed to appear before the Court to provide any support for his failure to comply. The Courts have generally responded positively to such requests and set such cases for hearing in very short periods of time.

In a subpoena enforcement hearing, the Enforcement attorney offers evidence to satisfy the Court that the investigation is being conducted for a legitimate purpose. While the OTS's resolution containing the finding that an Investigation is necessary in a particular case is often accorded substantial weight in dem-

onstrating the legitimacy of the agency purpose, the Enforcement attorney nonetheless will describe why the particular subpoena is necessary and reasonable. This generally will require a brief recital of the facts and concerns the OTS and its representatives already have gathered about the subject(s) of the investigation.

Typically, the District Court will enforce an administrative subpoena if three concerns are satisfied. First, the administrative investigation must be conducted for a lawful purpose. Second, the information sought by the subpoena must be relevant to the investigation. Third, the agency must comply with any statutes governing the issuance of subpoenas. *United States v. Powell*, 379 U.S. 48, 57-58 (1964).

Enforcement attorneys also respond to any challenges to subpoenas filed under the RFPA. In these court proceedings, it is the OTS's burden to prove that the records subpoenaed from the financial institution are reasonably related to a legitimate agency inquiry.

D. Role of District Offices in Formal Investigations

A close working relationship between examiners and legal staff, whether Enforcement or District counsel, is critical in investigations involving allegations of unsafe or unsound lending, investments, and operations and regulatory violations. The examiner's participation is vital both in reviewing subpoenaed documents and in identifying and pursuing areas for further inquiry. In those Investigations in which examiners are to review the documents subpoenaed or attend the taking of sworn statements, it is imperative that their time be scheduled to accommodate this additional workload. As noted above, District counsel will be increasingly participating actively in OTS investiga-

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tions and directing a growing number of such inquiries. When an investigation is directed by District counsel, he/she will have the same responsibility as Enforcement attorneys for maintaining the effective working relationship with examining and other District personnel.

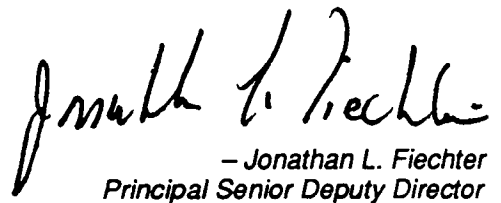
The utilization of Investigation powers is a powerful governmental tool that must be employed with experience, sensitivity and care. For this reason experienced legal staff work together with examiners, supervisory personnel and District Counsel in conducting Investigations. If they desire, examiners and supervisory personnel that are experienced in formal enforcement matters will question witnesses along with Enforcement attorneys or District Counsel during the taking of sworn statements. If the witness or his counsel objects to having more than one individual asking questions, then the person responsible for directing the particular investigation shall determine how best to proceed.

Without the express approval of the Director of Enforcement and the OTS Chief Counsel, fee counsel will not be involved in or designated as representatives of the OTS in Investigations or other formal Investigations authorized by statutes that the OTS implements.

When an Investigation is ongoing, the assigned Enforcement attorney or District counsel directing the investigation will forward copies of all non-routine correspondence to the supervisory staff involved with the Investigation. Similarly, the supervisory staff will consult with the assigned Enforcement attorney or District counsel before sending non-routine supervisory letters, directives, agreements or other supervisory correspondence to the association that could impact on the investigation or on possible enforcement proceedings. Enforcement or District counsel will respond immediately to any such inquiries so that supervisory correspondence will not be unreasonably delayed.

1 The powers contained in the HOLA and the FDIA essentially duplicate one another, thus only the referenced HOLA section is set forth above.

2 This statutory grant of power was identical to the previously cited authority now held by the OTS and contained in the HOLA and FDIA, as amended by FIRREA.


- Jonathan L. Fiechter
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