

Handbook: Thrift Activities
Subjects: Enforcement Actions; Oversight by the Board of Directors

Sections: 150; 140
RB 18-2

September 27, 1989

ERC Policy Statement on Pursuing Administrative Prohibition Actions vs. Former S&O Officials

RESCINDED

Summary: This Regulatory Bulletin discusses the authority of the Office of Thrift Supervision (OTS), successor to the FHLBB, to initiate removal and/or prohibition actions against former officials in open and failed institutions, and sets out guidance for pursuing such cases.

For Further Information Contact:

Your District Office or Enforcement, Office of Thrift Supervision, Washington, DC: Rosemary Stewart, Director, (202) 906-7622 or John Downing, Assistant Director, (202) 906-7154.

Supplementary Information:

The statements in this Regulatory Bulletin are not rules or interpretations of one office or division of the Office of Thrift Supervision (OTS), but bear the official approval of the OTS's Enforcement Review Committee (ERC).

The Enforcement Review Committee (ERC) intends to insert the statement below into its larger policy statement on Removal and Prohibition Actions, which, upon clearance by the ERC, will go forward to the Director of the OTS for approval. Because the timing of this effort is unknown, Enforcement did not want to delay distribution of the shorter policy statement approved by the ERC.

Regulatory Bulletin 18-2

Under the Bank Board's statutes, the agency is authorized to "remove" and/or "prohibit" institution-affiliated parties.¹ Existing officials are "removed" from office and "prohibited" from further participation in the affairs of any insured depository institution. Persons who are participating in the affairs in a manner other than serving as officials,

are similarly prohibited, as are former officials who no longer hold an official position or office.

The Bank Board's authority to initiate prohibition actions against former officials was clearly resolved in the Bank Board's favor in *Anaya v. FHLBB*, 839 F.2d 1349, (9th Cir. 1988). In that case, the Court concurred with the Bank Board's finding that it was irrelevant that Mr. Anaya was not an officer or director of the financial institution when he was served with a notice of charges in a removal-prohibition proceeding because the alleged offenses all occurred when he was affiliated with the institution in question. The federal banking agencies had taken the same position and similarly were pursuing former officials in a limited number of appropriate cases.² However, in the Financial Institutions Reform, Recovery and Enforcement Act, Congress changed the law, allowing OTS and the federal banking agencies to bring enforcement actions against individuals who have resigned, terminated or otherwise separated from insured depository institutions provided that a notice is served on the party within 6 years after his separation.

Which former individuals to pursue with administrative prohibition action requires a careful application of "prosecutorial discretion." Many times, individuals resign from their positions at institutions after learn-

ing that the agency or the institution's board of directors is considering removing them, or after they learn that the supervisory authorities have significant concern about their activities. Still other potential prohibition actions involve individuals that were affiliated with failed institutions, but about whom evidence of seriously violative or unsound conduct is not documented until after the failure of the institution. It is the ERC's policy to pursue such cases — irrespective of one's resignation, termination or other separation from an insured institution — where the nature of the person's believed misconduct or negligence reaches a sufficiently significant level. In making this decision about former officials, a case-by-case analysis will be made, however, factors such as the following are relevant:

- The severity and/or materiality of the actual or potential violation(s), breach(es) of fiduciary duty, or unsafe or unsound practice(s), with materiality being measured in terms of the particular transaction(s) at issue (not, for example, in terms of the size of the savings association) (the first of the three required grounds for initiating a prohibition action);
- Whether the misconduct was obviously wrongful in nature or was repeated after previous warnings;

Regulatory Bulletin

RB 18-2

- The extent of resulting loss to the financial institution or gain to the individual (the second required ground), and the effect of these losses on the financial institution's condition;
- The possible impact of the illegal or unsafe or unsound conduct or losses resulting therefrom on other institutions or others involved in the transactions at issue; and/or
- Evidence of personal dishonesty or "willfulness" exhibited by the individual; or a level of continuing disregard for safety and soundness that is more than bad business judgment or incompetence (the third required ground).

Open Institutions:

In open institutions, the preliminary decision about which savings and loan officials — former or those currently in office — are candidates for a removal/prohibition proceeding rests with the examining and supervisory personnel at the District Offices. Upon reaching a decision that such persons should be pursued, the District Offices should make such a recommendation to Enforcement whose responsibility it is to determine if the statutory grounds and requisite evidence are present to pursue the recommended remedy. Enforcement also may determine that formal investigative work is required before determining whether such a case may be pursued.

Also relevant to the decision about whether to pursue former officials — clearly an application of prosecutorial discretion — are practical concerns about whether it makes sense to expend resources for the particular case. Attorneys for the Bank Board and the federal banking agencies have long argued, and the Courts have concurred, that the

removal/prohibition statutes are remedial, not punitive, in nature. It is for the protection of and prevention of further damage to the particular savings association involved, the remainder of the thrift industry, and the insurance fund that such actions are pursued. Legally, they are not "punishment" as are criminal convictions and sentences and criminal and civil money penalty assessments. Thus, for example, a former official who is terminally ill and near death presents no continuing threat to the thrift industry, and despite the seriousness of that person's offenses, would not be a candidate for proceeding with an administrative prohibition action.

Another of the considerations involved in making these decisions therefore, is whether the individual is likely to cause similar damage to any other insured financial institution at any time in the future. Relevant here are obvious questions such as the age and health of the individual, as well as questions relating to the nature of the person's separation and whether other outside events will restrain future misconduct. For example, a criminal conviction of such a person will automatically bar the person's future employment in the thrift industry, except with the prior written consent of the agency — a nearly identical remedy to that which results statutorily from a successful prohibition action — so there is good reason, unless the person remains in a position to harm an insured institution, to await the results of a criminal prosecution where such a person is under indictment or where the agency has been advised by criminal law enforcement authorities that he/she will be indicted in the immediate future.

As a matter of policy, any cases involving individuals who have engaged or are continuing to engage in unacceptable conduct and who are still actively involved in a sav-

ings association's affairs — even though they claim to hold no official office — will receive top priority.³ Of these cases, those that involve a potential exercise of the temporary suspension authority will receive the highest priority. These are the most serious or egregious cases and should be designed to stop or prevent a threatened or potential immediate and/or irreparable injury to the savings association. The second highest priority will be assigned to the removal of individuals who are still actively involved in their own or a second savings association, but whose actions do not necessarily warrant use of the temporary suspension authority. Third-level priority will attach to individuals who have left the savings association in question but whose conduct warrants prohibition action based on factors such as those set out in the considerations above, and whose reappearance in the thrift industry is believed to be a significant likelihood if a formal order is not sought.

Utilizing the priorities outlined above, and to the extent consistent with the 6 year limitation of the statute, the staff generally should continue to pursue removal/prohibition actions against individuals who resign or leave their positions, or otherwise sever their affiliation with a savings association after being advised that the agency is considering pursuing an action against them. Such notice will generally be deemed to have been given when an official of the OTS or a District Office specifically notifies the individual that the agency is contemplating removal proceedings or other action against that person individually, or when the savings association or individual has been the object of a cease-and-desist proceeding or other supervisory action based at least in part on the individual's conduct, and removal proceedings are instituted within a reasonable time thereafter. Such notice to the person is not meant to be a pre-

Regulatory Bulletin

RB 18-2

requisite to pursuit of prohibition action, but generally will be expected to have been given in any case where the wrongful conduct was known to supervisory officials before the person's departure.

If, during the course of an examination, information is gathered sufficient to indicate that an individual should be the subject of a removal action, and the examiners specifically make a written recommendation to that effect to the appropriate Supervisory Agent prior to the individual's leaving his position or otherwise terminating affiliation with the savings association, removal/prohibition proceedings generally will be pursued providing that the matter is processed expeditiously by responsible offices. Generally, proceedings or negotiations for removal and prohibition should be initiated as soon as feasible but in no event later than twelve months from the date of discovery of the misconduct. Delays beyond the twelve month period are justified only if based on the need to complete formal investigations or other extensive evidence-gathering.

Failed Savings Associations:

With respect to failed savings associations, the ERC expects that staff will continue their practice of evaluating both possible prohibition actions and civil recovery actions to recoup losses experienced by the Savings Association Insurance Fund

(SAIF). In some circumstances, it may be preferable to pursue such civil actions for monetary relief and not also pursue a prohibition action (for example, where there is little or no likelihood that the individual will return to the savings and loan industry). However, where the findings of fee counsel's investigation indicate that the grounds for pursuing removal/prohibition actions are present, fee counsel and/or OGC Litigation are expected to refer such findings to Enforcement. In connection with conservatorships, the District Offices' supervisory staff is expected to continue its normal procedure for identifying and referring possible candidates for prohibition action.

If the priorities discussed above do not indicate that a prohibition action will be pursued against a former official of a failed institution, the staff nonetheless will be expected to retain the records generated in the damages action for the agency's later use in a removal/prohibition proceeding should the individual again appear in the savings and loan industry.⁴ Similarly, when a decision not to proceed with an action is made for any other reason, evidentiary materials should be retained by the appropriate District Office and other OTS offices for at least five years for potential use in removal/prohibition proceedings should the individual again appear in the savings and loan industry.

The ERC believes that pursuing removal/prohibition actions promptly and expeditiously will ensure timely and appropriate results, and aid in the prosecution of cases through better preservation of evidence and location of witnesses. In addition, following the guidelines set out herein for former officials should result in better utilization of resources by focusing on the more critical cases.

1 The required grounds for pursuing prohibition actions and a discussion of the legal meaning of each ground will be contained in the Enforcement Policy Statement on Removal/Prohibition Orders.

2 In *Stoddard v. Board of Governors*, CA 88-1148 (March 8, 1989), 868 F2d 1308 (D.C. 1989), the Court of Appeals found the Comptroller of the Currency without authority to pursue an order of removal and prohibition against a former bank official.

3 Included in this category are individuals who are major stockholders at institutions and who have demonstrated an inclination to become involved in the company's affairs, and thus are in a position to exercise an influence over the institution's operations, even though they may not be actively serving as directors or officers.

4 Under the OTS' statutes, prohibition actions clearly may be brought against a management official of Institution B based on his prior misconduct at Institution A. Thus, it is entirely appropriate to suggest that such removal/prohibition powers would be pursued if the miscreant later accepts a position in another insured institution.



Rosemary Stewart, Secretary, Enforcement Review Committee