

---

## CHAPTER: Examination Administration

### SECTION: Enforcement Activities

### Section 080

---

#### Introduction<sup>1</sup>

It is the policy of the Office of Thrift Supervision (OTS) to fully use its statutory authority to take prompt and vigorous enforcement action where warranted to ensure the safety and soundness of thrift institutions. Proper use of OTS's formal enforcement powers as well as informal supervisory responses is critical in helping OTS meet its responsibilities to: ensure the safety and soundness of the thrift industry; ensure that thrifts comply with applicable law and fiduciary principles; maintain the soundness of the Savings Association Insurance Fund (SAIF); and protect consumers. To enforce its powers, OTS may take action against a thrift, its holding company, affiliates, service corporations or operating subsidiaries. At a minimum, an institution with a composite rating of 4 or 5 in its last trust and asset management examination is presumed to warrant formal enforcement action unless the regional director documents that the problems are satisfactorily corrected or in the process of full correction.

Regulators have available to them a number of informal responses to violations of applicable law and/or unsafe or unsound practices. Those actions include, but are not limited to:

- Meetings with management;
- Meetings with boards of directors;
- Supervisory letters and directives;
- Special examinations; and
- Requests for voluntary management changes or reorganizations.

The OTS office of enforcement (OE) and regional litigation and enforcement counsel, working closely with the referring regional or area office, will initiate and direct formal enforcement actions.

Formal response powers include:

- Supervisory agreements;
- Consent merger agreements;
- Cease-and-desist orders (C&Ds);
- Temporary C&Ds;
- Injunctive actions;
- Removal and/or prohibition orders;
- Immediate suspensions during removal and prohibition proceedings;
- Temporary suspensions for certain criminal indictments;

---

<sup>1</sup> This section is substantially an adaptation of Section 370 of the Thrift Activities Handbook. Certain items have been deleted to focus more on enforcement issues arising in connection with trust and asset management examinations. Trust and asset management examiners should follow the examination procedures in Section 370 of the Thrift Activities Handbook when proceeding with enforcement action recommendations.

- Temporary suspension of insurance;
- Termination of insurance<sup>2</sup>;
- Civil money penalties;
- Capital directives;
- Capital plans (temporary operating restrictions);
- Individual Minimum Capital Requirement (IMCR) directives;
- Prompt Corrective Action (PCA) directives; and
- Conservatorships and receiverships.

In addition, OTS has authority to conduct formal examinations, commonly referred to as investigations that include the powers to: (1) issue subpoenas that are enforceable in the United States District Court and (2) take sworn testimony.

### **When to Use Enforcement Actions**

OTS uses its enforcement powers primarily to halt unlawful acts or practices and to require corrective action. Also, in the case of civil money penalty assessments, enforcement powers are used as a strong deterrent to violations of applicable law, orders, breaches of fiduciary duty and/or unsafe or unsound practices. The following are discussions of the more frequently used enforcement actions, OTS's administrative hearing process and OTS's informal action authority.

#### **Orders to Cease and Desist**

A C&D order normally requires a halt to illegal, unsafe or unsound activities. An order may also require affirmative corrective action, including, for example, the adoption of new policies and procedures, filing special reports, rescinding prior transactions or making restitution.

OTS has the authority to issue a C&D if it is of the opinion that one of the following factors is present: an unsafe or unsound practice or a violation of applicable law; any condition imposed in writing in connection with the granting of an application; or any written agreement with OTS or the Federal Deposit Insurance Corporation (FDIC). An order may also be issued if OTS has reasonable cause to believe that such a practice or violation will occur. The statutory basis for issuing C&Ds is in the Federal Deposit Insurance Act (FDIA), 12 USC §1818(b).

Historically, the types of violations most likely to be remedied by C&Ds include: failure to maintain adequate books and records, deficient appraisal reports, transactions involving conflicts of interest and improper accounting. C&Ds may also be used in the trust and asset management area in response to violations of applicable law or fiduciary principles. Thrift regulators are urged to use C&D authority promptly to remedy any potentially unsafe or unsound situation that could threaten the integrity or viability of an institution.

C&Ds are issued either with the consent of the party named in the order or after the conclusion of a hearing, initiated by OTS serving a notice of charges on the institution or individual.

---

<sup>2</sup> Termination of insurance accounts is an action taken by the FDIC but may be recommended by the OTS.

C&Ds can be issued against a savings association or an institution-affiliated party<sup>3</sup>. C&Ds may also be issued against an affiliate service corporation, savings and loan holding company or holding company subsidiary.

### **Violations of C&Ds**

If an institution or individual fails to comply with a final order, OTS or FDIC may seek enforcement through federal district court. The court's jurisdiction is limited to ordering the enforcement of and compliance with effective and outstanding orders. (An institution or an individual may challenge the merits of a C&D in an appropriate federal court of appeals.)

In addition, any savings association or individual that violates the terms of any final C&D can be ordered by OTS to pay a civil money penalty of up to \$1,000,000 a day for each day the violation continues, provided that specific statutory criteria are met.

### **Temporary C&Ds**

In situations requiring immediate action, thrift regulators use temporary C&Ds. To issue a temporary order, OTS or FDIC must also issue a notice of charges initiating a proceeding to obtain a permanent C&D. It must also determine that the violation, unsafe or unsound practice or threatened violation or practice charged in the notice is likely to: (1) cause insolvency or significant dissipation of assets; (2) weaken the institutions' condition; or (3) prejudice the interests of its depositors prior to the completion of the C&D proceeding. (Certain additional determinations are necessary if the purpose of the temporary C&D is to prevent an institution-affiliated party from dissipating or otherwise disposing of assets.) A temporary C&D may order affirmative action to prevent such insolvency, dissipation, condition or prejudice pending the completion of the C&D proceedings. In addition, if OTS determines that an insured depository institution's books and records are so incomplete or inaccurate that OTS is unable, through the normal supervisory process, to determine the financial condition of the institution or the details of a transaction that may have a material effect on the financial condition of the institution, it can issue a temporary C&D requiring: (1) the cessation of any activity or practice that gave rise to the incomplete or inaccurate books or records or (2) affirmative action to restore the books and records to a complete and accurate state, until the completion of the proceeding initiated by the notice of charges.

---

<sup>3</sup> 12 U.S.C. §1813(u)

The term "institution-affiliated party" means:

- a. Any director, officer, employee, or controlling stockholder (other than a savings and loan holding company) of, or agent for, an insured depository institution;
- b. Any other person who has filed or is required to file a change-in-control notice with OTS under 12 USC § 1817(j);
- c. Any shareholder (other than a savings and loan holding company), consultant, joint venture partner or any other person as determined by OTS (by regulation or case-by-case) who participates in the conduct of the affairs of an insured depository institution; and
- d. Any independent contractor (including any attorney, appraiser, or accountant) who knowingly or recklessly participates in:
  1. Any violation of any law or regulation;
  2. Any breach of fiduciary duty; or
  3. Any unsafe or unsound practice

which caused or is likely to cause more than a minimal financial loss to, or have a significant adverse effect on, the insured depository institution.

After a temporary C&D is issued, an institution or individual has ten days to apply to the federal district court to set aside, limit or suspend the order. The court is guided by traditional tests for determining whether to enjoin an agency order. Though the standard varies slightly from circuit to circuit, generally the applicant for an injunction must show the court that there is a substantial likelihood of success on the merits and that irreparable harm would flow from denial of the request for relief. The court also considers the public interest and the harm to the agency from the injunction.

If a temporary C&D is violated, OTS may apply to a district court for enforcement. If the court determines that a violation, threatened violation or failure to obey has occurred, by law the court must enforce the order. A temporary C&D terminates automatically when the charges in the notice initiating the proceeding for the permanent C&D are dismissed by the agency or when a permanent C&D against the same party becomes effective.

### **Orders of Removal and Prohibition**

In appropriate circumstances, a removal and/or a prohibition order may be issued, depending upon the role of the individuals who are the subjects of the order. Officers and directors may be removed from office and prohibited from further participation in the institution's affairs. Persons, who participate in the affairs of an institution but hold no office, including former officers and directors, may be simply prohibited from further participation.

A discussion of OTS's grounds for issuing orders for removal and prohibition follows. The grounds are identical for both state- and federally chartered institutions. 12 USC §1818(e).

### **Institution-Affiliated Parties**

Under the FDIA, an institution-affiliated party can be removed from office and prohibited from further participation in an institution's affairs if:

- The institution-affiliated party directly or indirectly has: (1) committed any violation of a law, regulation or final C&D; (2) violated any condition imposed in writing by the appropriate federal banking agency in connection with the grant of any application or other request by the depository institution; (3) violated any written agreement between the depository institution and the agency; (4) engaged or participated in any unsafe or unsound practice with respect to any insured depository institution or business institution; or (5) committed or engaged in any act, omission or practice that constitutes a breach of such party's fiduciary duty;
- As a result of the violation, unsafe or unsound practice, or breach of fiduciary duty described above: (1) the insured depository institution or business institution has suffered or will probably suffer financial loss or other damage; (2) the interests of the insured depository institution's depositors have been or could be prejudiced; or (3) such party has received financial gain or other benefit from such violation, practice, or breach; and
- The violation, unsafe or unsound practice, or breach of fiduciary duty: (1) involves personal dishonesty or (2) demonstrates a willful or continuing disregard for the safety or soundness of the insured depository institution or business institution.

**Temporary Suspensions**

An order temporarily suspending an individual from a position may be issued only in conjunction with a notice of intention to remove or prohibit which commences a formal adjudicatory proceeding. By statute, OTS can issue a temporary suspension only if the suspension is necessary to protect the interests of the depository institution or its depositors. The suspension remains in effect pending the removal or prohibition proceeding initiated by the notice, unless it is stayed by a district court as provided by the FDIA 12 USC §1818(e)(3)(A).

The subject of the temporary suspension may apply to the district court, within ten days of service of the suspension, for an injunction or stay of the suspension. The court will consider both the reasonableness of OTS's decision to issue the suspension and the traditional standards for injunctive relief. Because OTS will have only a short time to respond to any application for relief, it must have in hand documentation of the violation or unsound practices. This documentation should be presented to OTS (regional office and in Washington) for its consideration at the time of OTS enforcement counsel's request for the suspension. It may be used to demonstrate the reasonableness of OTS's action to a reviewing court. Examination reports or other materials documenting a decline in an institution's financial violations of applicable law or personal gain of any individual, are particularly helpful. If a formal examination (see discussion below) has been conducted, excerpts from testimony implicating the respondent in illegal or unsound activities should be included in the package to OTS.

**Supervisory Agreements**

Supervisory agreements may address any applicable law violation or unsafe or unsound practice by an institution or institution-affiliated party. Supervisory agreements may require the cessation of any statutory or regulatory violation or unsafe or unsound practice. They may require affirmative corrective action to address any existing violations, management or operational deficiencies or other unsound practices. In short, they may include the same broad range of provisions that may be incorporated into C&D orders.

Regional directors and their designees have the authority to negotiate and execute supervisory agreements and they should determine whether an insured institution's problems are serious enough to warrant a supervisory agreement or, instead, can be adequately addressed by a board of directors' resolution, supervisory meeting or correspondence. The decision to obtain a supervisory agreement should be based on:

- an analysis of the facts;
- the institution's supervisory history;
- the type of management involved;
- the results of a meeting with the board of directors;
- an evaluation of whether management will take appropriate corrective action;
- an assessment of the potential harm to the institution if corrective action is not effected;
- an assessment of whether a matter is so serious that it warrants more formal action than a supervisory agreement; and
- the OTS's general policy guidelines on enforcement actions (Table 1).

Under the FDIA, the OTS may initiate C&D proceedings for violations of its written agreements. To clarify that supervisory agreements are enforceable by C&D action, each one explicitly states that it is an “agreement with OTS.” Violations of supervisory agreements (unlike C&Ds) do not form the basis for court enforcement. However, such violations do form the basis for the possible assessment of civil money penalties, C&D actions and removal or prohibition actions.

<b>Table 1</b>	
<b>Considerations for Determining Whether Enforcement Action is Warranted:</b>	
Among the factors to consider when determining whether certain illegal, unsafe or unsound conduct warrants the use of formal enforcement action or an informal supervisory response are the following:	
1.	The extent of actual or potential damage, harm, or loss to the thrift institution as a result of the action or inaction;
2.	Whether the illegal action or unsafe or unsound practices has been repeated;
3.	The likelihood that the conduct may occur again;
4.	The institution’s record for taking remedial or corrective action in the past;
5.	The extent to which the identified problems were preventable and not solely the result of external factors;
6.	The effect of the illegal or unsafe or unsound conduct on other institutions;
7.	The examination rating of the institution;
8.	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; and
9.	The presence of unique circumstances.

When considering a supervisory agreement with a state-chartered institution, OTS regulators should consult with the state supervisor and solicit concurrence.

### **Civil Money Penalties**

OTS possesses statutory authority under the FDIA and other statutes to assess civil money penalties against savings associations, their service corporations or operating subsidiaries, savings and loan holding companies and institution-affiliated parties for: (1) violations of any law or regulation; (2) violations of the terms of any final order or temporary order issued pursuant to Section 902 of FIRREA; (3) violations of any condition imposed in writing by OTS in connection with the granting of any application or other request by the association; (4) violations of any written agreement between the association and OTS; (5) breaches of fiduciary duty; and (6) unsafe or unsound practices. OTS may also assess civil money penalties for failing to maintain adequate records, for failing to file, or filing late or inaccurate OTS-required reports.

The assessment of a civil money penalty provides a strong deterrent to violations of applicable law, OTS orders, breaches of fiduciary duty and unsafe or unsound practices.

When assessing a civil money penalty, consideration should be given to the size of financial resources and good faith of the person, association or company being assessed; the gravity of the violation; the history of previous violations; and such other matters as justice may require. OTS uses the civil money penalty form as

guidance in considering and assessing civil money penalties. The form consists of a civil money penalty tier matrix that is used to determine the tier of a violation and a civil money penalty calculation sheet that is used to assess a penalty amount for the violation. Two tier matrices have been prepared: a general tier matrix and a reporting violation tier matrix. A tier matrix (if applicable to the violation) and calculation sheet should be completed before any penalty is assessed.

While these matrices are expected to be used in all cases where an assessment is being considered, they are not substitutes for sound supervisory judgment. Individual cases may possess particularly egregious or mitigating characteristics that have not been included as factors in the matrices.

For more detailed information on the application of civil money penalties, refer to Regulatory Bulletin (RB) 18-3a, "Enforcement Policy Statement on Civil Money Penalties," dated July 30, 1993.

### **Openness of Administrative Proceedings**

OTS institutes administrative proceedings pursuant to the FDIA in order to obtain enforcement orders. Federal banking agencies conduct public hearings on the record for any notice of charges issued, unless holding a public hearing would be contrary to the public interest. A transcript that includes all testimony and other documentary evidence given or submitted during these hearings must be prepared and made available to the public.

### **Consent Orders**

Prior to the initiation of an investigation or formal examination, a regional director may, with the concurrence of the deputy chief counsel for enforcement, enter into any consent orders providing for a C&D, removal or prohibition, civil money penalty or professional disciplinary relief. In each instance, a determination shall be made whether the facts of the case warrant a demand for restitution or other affirmative corrective action. All consent orders that involve unresolved legal or policy issues, raise matters of special significance or sensitivity for the agency or involve total amounts of \$100,000 or more for restitution, civil money penalties or other affirmative corrective relief shall require the prior concurrence of the director of examination policy and chief counsel.

### **Formal Enforcement and Investigative Authority**

Generally, OTS expects its examiners and supervisors to exhaust informal means of obtaining information before requesting a formal investigation. OTS staff should seek and use reliable information from savings associations and their affiliates, employees, agents, and such outside sources as borrowers, joint venturers, county land record offices and other government authorities.

When informal avenues have been exhausted, formal investigations can serve several objectives, including: (1) enhance regular examinations when necessary to compel uncooperative sources to produce documents or statements and (2) enhance special examinations where subpoena power is necessary to determine whether enforcement action is warranted.

OTS has broad authority to conduct examinations under HOLA and FDIA, particularly when conducting formal investigations. The OTS may take testimony under oath and issue subpoenas and subpoena *duces tecum* to any person on any matter related to the affairs of ownership of savings associations and their affiliates, and enforce such subpoenas in 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.

The result 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 discussion below with respect to HOLA and FDIA investigations applies also to investigations and examinations related to a thrift's holding company, subsidiaries and affiliates.

### **Initiation of a Formal Investigation Proceeding**

A formal examination or investigation may be initiated upon the recommendation of the deputy chief counsel for enforcement and the appropriate regional director with the concurrence of chief counsel and the director of examination policy. The documents supporting the request for an investigation are drafted by the legal department and should include a short summary of the facts giving rise to the investigation.

Within two weeks of initiation of the investigation, a written plan of investigation should be provided to chief counsel. The plan should be developed in consultation with the appropriate OTS staff and should identify the major investigative steps contemplated. The plan should call for the completion of the investigation within timeframes and other guidelines established by chief counsel. Such timeframes and guidelines are for administrative purposes only and do not affect the authority of the staff to continue to conduct such investigations or the obligation of any party to respond to subpoenas for testimony or production of documents.

A formal 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 regional directors, for information. An investigation is a means to obtain information that is otherwise unavailable. 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 its formal investigative authority.

Subpoenas are not necessary to compel the production of the records of savings associations or their affiliates as OTS has the authority to examine these records. Informal requests by examiners to interview persons outside the association or to review records of a borrower or other entity that is not a savings association or an affiliate often can achieve the same effect. Information may also be obtained from publicly available sources of information, such as land records or state corporation commissions. Sufficient information may be received in these interviews and from document requests either to make an investigation unnecessary or, if still necessary, to enable the investigations to be limited in scope. Regulatory staff contemplating a request that an investigation be authorized should consider the advantages and timing of formal or informal approaches to obtaining information. The merits of each approach should be discussed with regional counsel.

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. OTS's investigative powers are civil and administrative in nature and are designed for use in carrying out 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 Suspicious



Activity Report (SAR), or an inadequate SAR has been filed by a savings association with FinCEN, OTS personnel will file using the OTS's Form 1601. In this regard, special units in each OTS regional office perform a critical function in making referrals, providing assistance to criminal investigators and prosecutors in areas within their specialized knowledge, providing a liaison between OTS and the criminal authorities, and at times serving as agents of the grand jury.

Pursuant to 5(d)(1)(B) of the HOLA as amended by FIRREA, an examiner is entitled to prompt and complete access to all savings association personnel and agents and to all documents. Any refusal to supply records or otherwise to obstruct the progress of an OTS examination should be brought to the attention of the OTS enforcement division. 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.

### **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 savings association being examined. The role of enforcement 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 legal staff may review the information 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 or action. Requests for this type of formal examination should be made immediately after an examiner has been denied access to information that is believed necessary to properly complete the 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 that, if the results of the investigation so warrant, could result in initiation of a C&D order, removal and prohibition proceeding or a securities/control case. These investigations involve the active participation of enforcement counsel in conjunction with examination 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 or a conservatorship or receivership recommended. Investigations also may be conducted to prepare for administrative or civil litigation.

### **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 to record the information sought or the witness' views of that information; (2) where the witness is cooperative; (3) when the information is of a preliminary nature; 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 or her statement; 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.

### **Role of Regional Offices in Formal Investigations**

A close working relationship between examiners and OTS legal staff is critical in investigations involving allegations of unsafe or unsound practices or violations of fiduciary practices or applicable law. 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.

The use of investigative powers is a powerful government tool that must be used with experience, sensitivity and care. For this reason, experienced legal staff work together with examiners and supervisory personnel in conducting investigations. If they desire, examiners and supervisory personnel experienced in formal enforcement matters may question witnesses along with attorneys during the taking of sworn statements.

When an investigation is ongoing, the OTS attorney directing the investigation shall keep supervisory staff closely informed of all events pertaining to the investigation. Similarly, the supervisory staff will consult with the assigned attorney before sending the association nonroutine supervisory letters, directives, agreements, or other supervisory correspondence that could have an effect on the investigation or on possible enforcement proceedings. OTS attorneys will respond immediately to any such inquiries so that supervisory correspondence will not be unreasonably delayed.

### **Procedures**

In most cases, requests for authority to initiate an investigation are made by the regional office where the savings 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 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, the office of enforcement may recommend an investigation with regional office concurrence.

The timing of a request for an investigation is a function, in part, of the reason the investigation was initiated. 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, while others are initiated after the examination and supervisory processes, in an effort to determine whether formal enforcement actions are necessary. Investigative authority may also be used for other appropriate fact-finding purposes.

Recommendations for investigations may be made in a short memo to regional enforcement counsel or to the enforcement division in Washington, D.C., 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 regional director wants the regional counsel to direct or to participate in the investigation and the names and titles of the OTS employees that will represent the OTS in the investigation.
6. The primary contact person at the regional office for communications with the office on enforcement concerning the investigation.

This list is not exhaustive. Appropriate enforcement action should be taken in any other situation in which it is determined such action is warranted.

The deputy chief counsel for enforcement promptly will concur or disagree with the proposed investigation and advise as to whether regional counsel or OTS enforcement will direct the proposed inquiry.

Furthermore, to facilitate the drafting and mailing of any subpoenas, examiners who are going to be involved in the investigation should, as early as possible, prepare accurate lists of persons and entities on whom they recommend subpoenas be served. They should also include 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.

## **Regulatory Considerations**

### **Selecting the Appropriate Tool**

It is the policy of OTS to fully use its statutory authorities to take prompt and vigorous enforcement action against thrift institutions, their directors, officers, agents, holding companies, service corporations or their officials where warranted to ensure the safety and soundness of such thrift institutions; the thrift industry in general; as well as to uphold applicable law. Also, as previously noted, it is OTS policy that, when the requirements of law have otherwise been satisfied, thrift institutions with a composite rating of 4 or 5 for the latest trust and asset management examination are presumed to warrant formal enforcement action unless the regional director documents that the problems are satisfactorily corrected or in the process of full correction.

Enforcement action against institutions should be promptly initiated regardless of examination ratings, when there is a basis to believe that:

1. There is serious insider abuse, even if the institution is not immediately or directly harmed.
2. The institution has committed a significant violation of applicable law.
3. An institution or any individual involved has disregarded or refused to respond to prior supervisory efforts to correct serious problems.
4. Any unsafe or unsound practice or any violation of conditions or agreements has occurred resulting in a significant risk or substantial loss.
5. A serious violation of the change in control act has occurred.

Choosing the appropriate supervisory or enforcement tool involves the careful balancing of factors and the exercise of discretion. Table 1 lists the general considerations for determining whether to use a formal enforcement action or an informal supervisory response.

Before taking or initiating formal action, it must be determined that the facts support the applicable statutory grounds for initiating the action. Allegations of misconduct that are raised in the examination, supervisory or enforcement processes must be supported with evidence of specific instances that would reasonably lead to the belief that such misconduct occurred or is likely to occur.

Of course, OTS will not permit the continuation of an illegal, unsafe or unsound conduct that is harmful or potentially harmful to an insured institution while regulators document all details. OTS expects regulators to use supervisory responses and enforcement actions in a timely and effective manner to protect insured institutions and, ultimately the insurance fund.

### **Checking for Compliance with Outstanding Agreements**

The recurrence of a problem that has been addressed by an informal method of supervision, such as a supervisory agreement, raises a presumption that a C&D action or assessment of a civil money penalty should be pursued. A material violation of a supervisory agreement should cause a regulator to immediately consider pursuing a C&D action or assessing a civil money penalty unless there are substantial mitigating factors.

Therefore, it is essential that during every examination, regulators expressly check for compliance with each outstanding agreement or order. The terms of the agreement or order should dictate the scope of the inquiry. For example, an agreement requiring an institution to develop and adopt effective, written lending procedures necessitates that the regulators review them for clarity, effectiveness and proof that the board of directors has adopted them. An agreement that the institution shall comply fully with new procedures requires a review for compliance with those procedures. This review should be in addition to the normal review for compliance with applicable regulations and safety and soundness.

### **Documentation**

Throughout this handbook section, there is mention of the documentation required for taking supervisory and enforcement action. In general, prior to any formal investigation, regulatory staff is responsible for obtaining the documentation necessary to seek supervisory or enforcement action. In the event of a violation of a final order that may have to be enforced by bringing court action, the regulator should be particularly careful to determine if the noncompliance (or other conduct) is due to the association's administrative oversight, lack of knowledge or skill or willful disregard. In all cases, regional personnel should obtain clear documentary evidence of the violations or conduct. OTS enforcement attorneys will need that evidence in the event that OTS issues an order or if it must enforce the order in District Court. The regulator should summarize discussions with management in a written report, which should also include management's explanations of why such violations have occurred and the regulator's opinion as to the necessity of further enforcement action.

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

Decisions to terminate or modify an enforcement action must be made in writing explaining the reasoning. An OTS examination documenting compliance with the enforcement action is a prerequisite to removal of the action.