BALANCING PUBLIC CONFIDENCE AND CONFIDENTIALITY: ADJUDICATION PRACTICES AND PROCEDURES OF THE FEDERAL BANK REGULATORY AGENCIES*

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I. INTRODUCTION

This article examines certain formal enforcement practices and procedures of the federal regulators of depository institutions.[1] The focus is the hearing

1. In this context, the term "depository institution" is used to refer to commercial banks, sav-

practices and procedures of the federal regulators in the enforcement context, under the Administrative Procedure Act ("APA"). Ironically, the first feature one identifies is that there are few hearings ever conducted, whether judged in terms of absolute numbers of hearings, or even relative to the number of enforcement actions undertaken by these regulators.

The second prominent feature of this enforcement context is a natural result of the first. Regulatory enforcement proceeds to a significant extent in shadowy, informal ways, outside of public view and, usually, without judicial review.

This obscure enforcement process has important practical consequences for the few enforcement actions which proceed to an APA hearing or judicial review. These consequences are evident from the third prominent feature of the regulatory enforcement actions: publicly available data about the operative legal and policy principles in the enforcement actions of the regulatory agencies are limited, and the body of case law is small. For administrative law judges ("ALJs"),[2] trial and appellate judges, and affected depository institutions, the agencies' enforcement practices and policies almost seem to require a leap of faith.

In order to analyze and assess the adjudication practices and procedures of these agencies from a properly informed perspective, this article reviews the statutory authorities available to the agencies primarily with respect to enforcement of federal "banking"[3] laws.[4] Because these authorities are applied almost exclusively within the administrative setting, the article analyzes the implementing regulations of each agency with respect to enforcement practices and APA hearings.[5]

Since few of these enforcement actions reach a public forum, particular attention will be given to what little is available by way of judicial interpretation of

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ings banks and savings and loan associations, and credit unions. On the general meaning of the term, *see* 1 M.P. MALLOY, THE CORPORATE LAW OF BANKS 5-8 (1988). *See also* 12 U.S.C. § 461(b)(1)(A) (1982) (statutory definition of "depository institution"). Unless otherwise noted, all subsequent citations to the U.S.C. are to the current 1982 version and/or supplements III and IV.

2. The regulatory agencies involved (*see infra* notes 20-48 and accompanying text for a survey of the regulators), generally do not carry ALJs. *Cf.* 5 U.S.C. § 3105 (each agency shall appoint ALJs as necessary for APA proceedings). Hence, in those situations where an administrative hearing is required, an ALJ must be detailed from some other federal agency. *See id.* § 3344 (details of ALJs). *Cf.* FHLBB v. Long Beach Fed. Sav. & Loan Ass'n, 295 F.2d 403, 411 (9th Cir. 1961) ("hearing examiner" (now ALJ) not validly appointed). Not surprisingly, the end result has been that ALJs are expected to give a high degree of deference to the recommendations of agency examiners. *See* Sunshine State Bank v. FDIC, 783 F.2d 1580, 1581 (11th Cir. 1986) (unique experience of examiners entitles them to deference).

3. The unfortunate, and potentially misleading, use of the term "banking" in this regard may be unavoidable given customary usage. What is intended, of course, within the scope of this article, is the body of federal laws concerning the regulation of depository institutions generally. *See* M.P. MALLOY, *supra* note 1, at 5-8 for the meaning of "depository institutions."

4. *See infra* notes 81-194 and accompanying text for a discussion of the statutory enforcement authority.

5. *See infra* notes 195-290 and accompanying text for a discussion of enforcement regulations of the agencies.

these statutory authorities.[6] The discussion will include both consideration of the applicable standard of judicial review of administrative enforcement actions,[7] and an analysis of judicial interpretations with respect to specific problem areas.[8] In addition, the article also reviews and analyzes the practical experience of the agencies in utilizing their statutory enforcement authority.[9]

The article concludes with an evaluation of the effectiveness, efficiency, and accessibility of agency enforcement adjudication practices and procedures and formulates recommendations for the improvement of these practices and procedures and related aspects of the hearings process.[10]

A. Nature of the Inquiry

> The regulation of national banks has been characterized as being more intensive than the regulation of any other industry, . . . [for] it extends to all major steps in the establishment and development of a national bank, including not only entry into business, changes in status, consolidations, reorganizations, but also the most intensive supervision of operations. . . .[11]

This observation applies to many participants in the financial services industry[12] as well. Because participants in this industry have historically facilitated the transfer of money and credit within society, government has traditionally sought to regulate banking functions and the activities undertaken by financial institutions generally. Another historical tradition intersects this concern with the regulation of the credit transfer system: the apparent inability or unwillingness of the government to initiate regulation except in reaction to dramatic financial crises.[13]

The result of these historical influences has been that, in addition to the expected focus upon primary and secondary entry restrictions for the industry,[14] federal regulation of depository institutions has repeatedly focused upon the problem of monitoring and neutralizing situations involving possible threats to the stability and safety of participants in the industry or to the industry as a

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6. *See generally infra* notes 291-483 and accompanying text for a discussion of judicial interpretations.

7. *See infra* notes 296-339 and accompanying text for a discussion of the standard of review.

8. *See infra* notes 340-483 and accompanying text for a discussion of interpretative problems.

9. *See infra* notes 484-500 and accompanying text for a discussion of empirical data.

10. *See generally infra* notes 501-22 and accompanying text for an assessment of enforcement adjudication practices and procedures, and recommendations.

11. 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE 247 (1958). *See also* M.P. MALLOY, *supra* note 1, at 2-4, 21-28 (regulatory environment; survey of the regulators).

12. On the "financial services industry," *see generally* TASK GROUP ON REGULATION OF FINANCIAL SERVICES, BLUEPRINT FOR REFORM: THE REPORT OF THE TASK GROUP ON REGULATION OF FINANCIAL SERVICES 16 (1984) [hereinafter TASK GROUP REPORT] (use of term "financial services industry").

13. *See, e.g.*, 2 L. LOSS, SECURITIES REGULATION 1162 (2d ed. 1961) ("reform" legislation in times of crisis).

14. *See generally* M.P. MALLOY, *supra* note 1, at 22 n.1 (primary and secondary entry restrictions).

whole. Increasingly, legislators have addressed this problem by providing the regulators with broader enforcement powers for neutralizing such threats.[15]

The current range of enforcement powers in the hands of five (more or less) independent regulatory entities raises some natural concerns about the manner in which these powers have been mobilized across the spectrum of depository institutions. Such concerns may be called systemic concerns. In addition, the resultant increase in enforcement power in the hands of the regulators raises concerns regarding the practical effect that these developments have had on the regulated entities that are subject to the various regulators. Such concerns may be called fairness concerns. This article explores both systemic and fairness concerns implicated by the broad range of enforcement powers available to the federal regulators of depository institutions.

1. Consistency and uniformity

One concern arises from the fact that five different federal agencies administer identical, or substantially similar, formal enforcement statutory provisions, each with respect to a different portion of the depository institutions industry.[16] Are these agencies implementing and applying the authorities, substantively and procedurally, in a uniform manner? A major problem is that the respective implementing regulations of the five agencies do not exhibit uniformity even though they are each implementing identical or virtually identical statutory authorities.[17]

2. Accessibility of decisions and *rationes decidendi*

Another concern arises from the institutional bias of these federal agencies towards confidentiality in their supervision and regulation of the institutions subject to their authority.[18] This is particularly true of APA enforcement hearings.[19] The confidentiality limits access to administrative decisions under statutory enforcement authority, and minimizes the likelihood that the public will gain an accurate understanding of the *ratio dicendi* of a particular action. This concern affects both ALJs presiding over APA hearings and nonagency participants.

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15. *See infra* notes 81-95 and accompanying text for a discussion of the trend toward broader enforcement authorities.

16. These agencies are: The Comptroller of the Currency; the Board of Governors of the Federal Reserve System; the Federal Deposit Insurance Corporation; the Federal Home Loan Bank Board (with the Federal Savings and Loan Insurance Corporation); and the National Credit Union Administration. *See infra* notes 20-48 and accompanying text for a survey of the regulators.

17. *See infra* notes 144-94 and accompanying text for a discussion of these statutory authorities.

18. *See, e.g.*, Huber, *Mandatory Disclosure of Information About Banks*, 6 ANN. REV. BANKING L. 53, 75-76 (1987) (tradition of nondisclosure).

19. *See* Letter from Robert B. Serino, OCC Deputy Chief Counsel, to Professor Michael P. Malloy (September 1, 1987) (information concerning formal administrative enforcement actions "is not normally made available to the public").

3. Effectiveness and efficiency of the adjudicatory structure

A third concern involves the effectiveness and efficiency of the current adjudicatory structure. ALJs, detailed from other, nonbanking federal agencies, are utilized from case to case when an enforcement action actually proceeds to a formal stage. Given the general inaccessibility of administrative decisions (formal and informal), and the *rationes decidendi* of such decisions, it is reasonable to question whether, as a practical matter, the learning curve of an ALJ detailed to a banking agency for a particular hearing may make for an inefficient or ineffective process. The Office of Administrative Law Judges at the Office of Personnel Management ("OPM") has attempted to address this concern through informal arrangements instituted on an ad hoc, year-to-year basis, but a more permanent arrangement needs to be created.

B. Survey of Regulators and Functions

1. The Regulators

a. Office of the Comptroller of the Currency ("OCC")

The OCC is a bureau of the Department of the Treasury charged with the chartering, supervision and regulation of national banking associations, or national banks.[20] Congress has conferred broad powers on the Comptroller and the office to enable performance of supervisory and regulatory functions.[21]

The Comptroller is required to examine periodically each national bank and to undertake corrective action necessary to maintain the bank's safety and soundness.[22] The Comptroller's statutory authority, broadly discretionary, implies a "birth to death" approach to regulatory authority, ranging from the decision to charter a new national bank to the decision to declare it insolvent.[23] The Comptroller also has statutory authority to recommend the suspension or removal of a national bank officer or director under certain conditions.[24] Generally, because of the Comptroller's wide discretion and expertise, the Comptroller's decisions are not disturbed in judicial review unless the exercise of authority is found to have been arbitrary, capricious, abusive, or contrary to law.[25]

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20. *See* 12 U.S.C. §§ 1, 2, 21-24, 26, 27, 481 (powers of the Comptroller of the Currency). *See also* M.P. MALLOY, *supra* note 1, at 28-40 (responsibilities of the Comptroller of the Currency).

21. *See* First Nat'l Bank of Lamarque v. Smith, 610 F.2d 1258, 1264 (5th Cir. 1980) (discussion of Comptroller's functions).

22. *See* 12 U.S.C. § 481 (bank examinations by Comptroller of the Currency). *See also infra* notes 340-403 and accompanying text for a discussion of the concept of "safety and soundness."

23. *See, e.g.*, 12 U.S.C. § 21 and 12 U.S.C. § 1814 (chartering); 12 U.S.C. § 191 (appointment of receiver).

24. *See* 12 U.S.C. § 1818(b), (c), (e) (termination of status as insured bank). *See also infra* notes 241-43 and accompanying text for a discussion of removal procedures.

25. *First Nat'l Bank of Lamarque*, 610 F.2d at 1264 (Comptroller's wide discretion); First Nat'l Bank of Eden v. Department of the Treasury, 568 F.2d 610, 611 (8th Cir. 1978) (discretion of the Comptroller). *Cf. Sunshine State Bank*, 783 F.2d at 1584 (substantial evidence required for findings; arbitrary, capricious standard for determination of remedies).

b. Board of Governors of the Federal Reserve System ("Fed")

The Fed, as the central bank of the United States, is primarily charged with the responsibility of implementing monetary and credit policies and acting as "lender of last resort" to the financial system.[26] The Fed also administers federal laws concerning the reserves required to be held by member banks against their deposits.[27]

While the Fed does not generally perform a chartering function,[28] it does have certain supervisory and examination functions with respect to state-chartered banks that are members of the Federal Reserve System.[29] In the enforcement area, aside from its regulation of bank holding companies and nonbanking affiliates, the Fed's statutory authority parallels that of the OCC. The Fed, however, has the additional statutory authority to issue suspension and removal orders against officers and directors of national banks, on the Comptroller's recommendation.[30]

c. Federal Deposit Insurance Corporation ("FDIC")

The FDIC was established in 1933 to help restore public confidence in the banking system by providing a federal system of deposit insurance.[31] The FDIC is managed by a three-member board of directors, including the Comptroller of the Currency.[32]

The FDIC directly serves the twin goals of bank regulation: to maintain public confidence in the banking system by ensuring the viability of banks, and to protect individual depositors. Under the Federal Deposit Insurance Act ("FDIA"),[33] virtually all national banks and all state-chartered Fed-member banks must maintain FDIC insurance; as a matter of federal law, insurance is otherwise optional for state-chartered banks.[34]

In addition, it is the function of the FDIC to maintain the viability of the banking system by providing regulatory supervision over state-chartered, nonmember insured banks and by providing deposit insurance on a consistent, national basis. Since most banks fall into the category which the FDIC

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26. *See, e.g.*, 12 U.S.C. § 225a (responsibility of Fed to maintain long-run growth of monetary and credit aggregates); 12 U.S.C. § 461(b)(4)(A)(i) (supplementary reserve requirement to conduct monetary policy). *See also* M.P. MALLOY, *supra* note 1, at 40-47 (responsibilities of the Fed).

27. *See* 12 U.S.C. § 461 (reserve requirements). This authority has been expanded to apply fully to the required reserves of all depository institutions by March 1988. 12 U.S.C. § 461(b)(8). *See also* Pub. L. 96-221, § 108, 94 Stat. 132, 141 (1980) (effective date provisions).

28. *But cf.* 12 U.S.C. §§ 601, 611 (foreign branches, Edge Act corporations established pursuant to Fed approval).

29. The member banks include all national banks in "the continental United States," as required by law, and those state-chartered banks and trust companies which have chosen to apply for, and have received, membership. *See* 12 U.S.C. §§ 221, 222, 321 (national banks; federal reserve districts; state banks).

30. *See infra* notes 241-43 and accompanying text for a discussion of removal proceedings.

31. *See* M.P. MALLOY, *supra* note 1, at 47-48 for a discussion of the establishment of the FDIC.

32. 12 U.S.C. § 1811 (FDIC board of directors).

33. *Id.* §§ 1811-1832.

34. *Id.* § 1814(b).

supervises,[35] the federal government acts primarily "through the FDIC to achieve [its] goals of providing a safe and sound banking system."[36]

d. Federal Home Loan Bank Board ("FHLBB") and the Federal Savings and Loan Insurance Corporation ("FSLIC")

The FHLBB, originally created in 1932,[37] was authorized to establish and supervise a national system of federal home loan banks, through which federally chartered savings and loan associations and other specified thrift institutions could be supervised and regulated. The FSLIC, an integral part of this regulatory system, is intended to provide deposit insurance for thrift institutions on the general model of the FDIC deposit system,[38] with supervisory authority over state-chartered, FSLIC-insured thrift institutions.

Hence, the FHLBB and the FSLIC serve regulatory functions analogous to those of the OCC and the FDIC, and, through the Home Loan Bank System, the FHLBB also provides central bank functions with respect to thrift institutions which are members of that system. In the context of this article, it should be emphasized that the FHLBB and the FSLIC essentially protect the regulatory interest in the stability and safety of the thrift industry, particularly through the deposit insurance function.[39] Their statutory enforcement authority essentially parallels that of the federal bank regulators,[40] in addition to regulation of savings and loan holding companies and affiliates.

e. National Credit Union Administration ("NCUA")

The NCUA is yet another legacy of the financial crisis that beset the country beginning in 1929, but its creation under the Federal Credit Union Act of 1934 ("FCUA")[41] was not specifically prompted by any systematic failure of credit unions.[42] Nevertheless, the NCUA currently presides over a federal regulatory system which includes all federally chartered credit unions and state-chartered credit unions of which the shares or deposits are federally insured.

Chartering, insuring, supervisory and examining functions, as well as the liquidity function of a "central bank," are each the responsibilities of the NCUA and its constitutive units. The share or deposit insurance for both state and

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35. *See* TASK GROUP REPORT, *supra* note 12, at 18 n.6 (most commercial banks, including state-chartered mutual savings and industrial banks, are FDIC insured).

36. Rauscher Pierce Refsnes, Inc. v. FDIC, 789 F.2d 313, 315 (5th Cir. 1986).

37. *See* 12 U.S.C. § 1437(a) (establishment of FHLBB). *See also* M.P. MALLOY, *supra* note 1, at 52-54.

38. *See* 12 U.S.C. §§ 1724-1730 (role of FSLIC). *See also* M.P. MALLOY, *supra* note 1, at 54-55.

39. *See* Gulf Fed. Sav. & Loan Ass'n v. FHLBB, 651 F.2d 259, 262 (5th Cir. 1981) (duty of FHLBB), *cert. denied*, 458 U.S. 1121 (1982).

40. *See infra* notes 126-36 and accompanying text for a discussion of the enforcement authority of the FHLBB and FSLIC.

41. 12 U.S.C. §§ 1751-1795. *See* M.P. MALLOY, *supra* note 1, at 60-61 (responsibilities of NCUA).

42. *See, e.g.*, Barany v. Buller, 670 F.2d 726, 733 & n.16 (7th Cir. 1982) (establishment of NCUA not caused by failures).

federally chartered credit unions is provided by the NCUA through its Office of Examination and Insurance.[43] As with commercial banks and thrifts, insurance is required for federally chartered credit unions[44] and is voluntary in the case of state-chartered credit unions.[45] Since 1978, there has existed a National Credit Union Central Liquidity Facility[46] which assists credit unions experiencing liquidity problems by granting them loans.[47] The NCUA has statutory enforcement powers that generally parallel those of the federal banking agencies.[48]

2. Enforcement functions

a. Cease and desist powers

After the power to revoke the charter[49] or to terminate the deposit insurance of a depository institution,[50] the oldest formal regulatory enforcement power of the regulators is the power to issue a cease and desist order,[51] an administrative functional equivalent of an injunction which requires an APA hearing.[52] As to depository institutions, this power has been granted under the FDIA to the Comptroller, with respect to national banks; to the Fed, with respect to state-chartered member banks; and, to the FDIC, with respect to state-chartered, nonmember insured banks.[53] A parallel power has been granted under the Home Owners' Loan Act of 1933 ("HOLA"),[54] with respect to federally chartered thrift associations, to the FHLBB,[55] and under the National Housing Act ("NHA"),[56] with respect to insured thrift institutions,[57] to the FSLIC.[58] Substantially similar power has been granted under the FCUA, with respect to federally chartered or insured credit unions, to the NCUA Board.[59]

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43. 12 C.F.R. § 790.2(b)(7).

44. 12 U.S.C. § 1781(a).

45. *Id.*

46. *Id.* § 1795b. *See also* 12 C.F.R. § 790.2(d) (1988).

47. *See* 12 U.S.C. §§ 1795, 1795(e) (extensions of credit to member credit unions).

48. *See infra* notes 137-43 and accompanying text for a discussion of NCUA's enforcement provisions.

49. *See, e.g.*, 12 U.S.C. § 93 (forfeiture of national bank charter); *id.* § 1766 (Board's power to revoke federal credit union charter).

50. *See id.* § 1730(a) (termination of deposit insurance, FSLIC); *id.* § 1818(a) (parallel provision, FDIC).

51. *See generally id.* § 1464(d)(2) (federal thrift associations); *id.* § 1730(e)(1) (insured thrift associations); *id.* § 1786(e)(1) (insured credit unions); *id.* § 1818(b)(1) (insured banks).

52. *See, e.g.*, 12 U.S.C. § 1818(b)(1) (notice of charges and hearing required).

53. *See id.* §§ 1813(q), 1818(b) (cease and desist powers granted to "appropriate Federal banking agency").

54. *Id.* §§ 1461-1470 (HOLA provides for regulation of federally chartered thrift associations).

55. *See id.* § 1464(d)(2) (cease and desist proceedings by FHLBB).

56. *Id.* §§ 1701-1750.

57. For the definition of "insured institution" in this context (which includes federally chartered and federally insured, state-chartered savings and loan associations), *see* 12 U.S.C. § 1724(a) ("insured institution"); *id.* § 1726(a) (duty of FSLIC to insure accounts of all federal savings and loans, mutual savings banks; may insure state-chartered savings and loans).

58. *See* 12 U.S.C. § 1730(e)(1) (cease and desist proceedings by FSLIC).

59. *See id.* § 1786(e)(1) (NCUA Board's power to give notice and charges if unsound condition).

These grants of authority include the power to issue temporary cease and desist orders, the administrative functional equivalent of a temporary restraining order. This power is available in situations in which a violation or threatened violation of law or unsafe or unsound practice "is likely to cause insolvency or substantial dissipation of assets or earnings" of a depository institution, or, "is likely to seriously weaken [its] condition . . . or otherwise seriously prejudice the interests of its depositors" prior to completion of the cease and desist proceedings.[60]

b. Suspension and removal powers

The regulatory authority to suspend or remove directors and officers of depository institutions,[61] subject to an APA hearing and limited review,[62] is intended to increase the flexibility and effectiveness of the regulators' enforcement efforts by the direct targetting of those efforts against individuals who participate in the management of depository institutions.[63] This power has been granted under the FDIA to the Comptroller and the Fed, with respect to national banks;[64] to the Fed, with respect to state-chartered member banks; and, to the FDIC, with respect to state-chartered, nonmember insured banks.[65] A parallel power has been granted under the HOLA, with respect to federally chartered thrift associations, to the FHLBB,[66] and under the NHA, with respect to insured thrift institutions, to the FSLIC.[67] Substantially similar power has been granted under the FCUA to the NCUA Board.[68]

In addition, there is also specific statutory authority in the Comptroller, the Fed and the FDIC to suspend or remove a director or officer of an insured bank charged with a felony.[69] This summary authority was questioned on due process grounds[70] and was subsequently amended to provide for a non-APA hearing or appeal of any such notice of suspension or removal order.[71] Parallel

60. *Id.* § 1818(c)(1) (temporary cease and desist order, FDIC). *See also id.* § 1464(d)(3) (parallel provision, FHLBB); *id.* § 1730(f) (parallel provision, FSLIC); *id.* § 1786(f) (parallel provision, NCUA).

61. *See id.* § 1464(d)(4) (removal of officers, FHLBB); *id.* § 1730(g) (parallel provision, FSLIC); *id.* § 1786(g) (parallel provision, NCUA); *id.* § 1818(e) (parallel provision, FDIC).

62. *See, e.g.*, 12 U.S.C. § 1818(e)(5). *See infra* notes 157-60 and accompanying text for a discussion of removal procedures.

63. *See infra* notes 87-91 and accompanying text for a discussion of statutory grounds for removal.

64. The Comptroller initiates removal proceedings, but the Fed has the exclusive statutory authority to determine whether an order should issue. 12 U.S.C. § 1818(e)(4). *Cf. infra* notes 104-05 and accompanying text for a discussion of the rationale for this procedural division of responsibility.

65. *See* 12 U.S.C. § 1818(e).

66. *See id.* § 1464(d)(4).

67. *See id.* § 1730(g).

68. *See id.* § 1786(g).

69. *See id.* § 1818(g).

70. *See* Feinberg v. FDIC, 420 F. Supp. 109, 120 (D.D.C. 1976) (minimum process is immediate post-suspension hearing).

71. *See* 12 U.S.C. § 1818(g)(1), (3) (opportunity for hearing). *See also infra* note 92 and accompanying text for a discussion of suspension and removal.

authority has been granted under the HOLA, with respect to federally chartered thrift associations, to the FHLBB,[72] and under the NHA, with respect to insured thrift institutions, to the FSLIC.[73] Substantially similar authority has been granted under the FCUA to the NCUA Board.[74]

c. Civil money penalties

The power to assess civil money penalties,[75] subject to an APA hearing on the timely request of the assessed party,[76] is a relatively recent addition to the regulator's menu of enforcement powers. This power has been granted under the FDIA to the Comptroller, with respect to national banks; to the Fed, with respect to state-chartered member banks; and, to the FDIC, with respect to state-chartered, nonmember insured banks.[77] A parallel power has been granted under the HOLA, with respect to federally chartered thrift associations, to the FHLBB,[78] and under the NHA, with respect to insured thrift institutions, to the FSLIC.[79] Substantially similar power has been granted under the FCUA to the NCUA Board.[80]

II. ANALYSIS OF STATUTORY AUTHORITIES

A. Introduction

In the course of congressional consideration of the problem of administra-

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72. *See* 12 U.S.C. § 1464(d)(5).

73. *See id.* § 1730(h).

74. *See id.* § 1786(h).

75. *See id.* §§ 1464(d)(8)(B), 1730(k)(3), 1786(j)(2), 1818(i)(2). *See also* 12 U.S.C. §§ 504, 505 (parallel provisions; Federal Reserve Act).

76. *See, e.g.*, 12 U.S.C. § 1818(i)(2)(iii). *See infra* notes 185-86 and accompanying text for a discussion of requirements as to filing request.

77. *See* 12 U.S.C. § 1818(i)(2).

78. *See id.* § 1464(d)(8)(B).

79. *See id.* § 1730(k)(3).

80. *See id.* § 1786(j)(2). For the most part, except for historical perspective, this article does not discuss the relatively drastic (and, consequently, rarely used) powers to revoke charters or to terminate deposit insurance. The article also does not give attention to the body of enforcement powers that the Comptroller, the Fed, the FDIC, and the FHLBB possess under section 12(i) of the Securities Exchange Act of 1934 ("1934 Act"), 15 U.S.C. § 78*l*(i), with respect to the securities of institutions registered under that act. *See generally* M.P. MALLOY, *supra* note 1, at 491-93 (1934 Act gives federal banking and thrift regulators authority to administer act with respect to bank- and thrift-issued securities). *See also* 15 U.S.C. § 12(a), (b), (g). *Cf.* M.P. MALLOY, *supra* note 1, at 498-501 (registration requirements for securities issued by banks).

Finally, it should be noted that there are a number of specialized areas of regulatory enforcement, such as the Depository Institutions Management Interlocks Act ("DIMIA"), 12 U.S.C. §§ 3201-3208, that are generally outside the scope of this article, but which nevertheless may interact with the enforcement powers under consideration in the present context. *See generally* M.P. MALLOY, *supra* note 1, at 244-45 (discussion of DIMIA's prohibitions of directors and officers serving in same capacity with more than one depository institution in same geographical area). *See also, e.g.*, 12 U.S.C. § 1464(d)(15) (meanings of "officer" and "director" in enforcement involving interlocking relationships, FHLBB); *id.* § 1730(r)(4) (parallel provision, FSLIC); *id.* § 1818(e)(5) (parallel provision, bank regulatory agencies). *See infra* notes 260-61, 274, 282 and 286 for examples of statutory authorities with respect to other specialized areas of regulatory enforcement.

tive enforcement of bank regulatory policy, we can observe a fairly consistent and longstanding pattern of statutory development. The historical trend is toward a wider range of enforcement devices, diversified in their relative intensity, dating from the early, drastic remedy of deposit insurance termination[81] to the relatively recent authority for the imposition of civil money penalties.[82] Related to this line of development as a *leitmotif* is the continual emphasis throughout these legislative developments on the need to increase the flexibility and discretion available to the regulators in responding to enforcement problems.[83] Finally, there has been a relative shift in emphasis at the statutory level towards a

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81. On June 16, 1933, the Glass-Steagall Act was signed into law. Pub. L. No. 73-65, 48 Stat. 162 (1933). *See generally* 2 M.P. MALLOY, THE CORPORATE LAW OF BANKS 559-75 (1988) (legislative history of the Glass-Steagall Act). Section 8 of the new act amended the Federal Reserve Act ("FRA") by inserting a new section 12B, which provided for the creation of the FDIC. 48 Stat. at 168 (codified at 12 U.S.C. § 264). Section 12B(i) provided authority for cancellation of FDIC stock as an enforcement remedy. *Id.* at 171-72 (codified at 12 U.S.C. § 264(i)). Two years later, after considerable debate, section 12B(i) was amended to substitute the insurance termination power for the stock cancellation power. *See* 79 CONG. REC. 13,655, 13,711 (1935).

Section 12B of the FRA only saw relatively minor amendments until 1950. *See generally* Pub. Res. No. 74-83, 49 Stat. 1237 (1936) (amending 12 U.S.C. § 264(n)(4)); Pub. L. No. 75-544, 52 Stat. 442 (1938) (amending 12 U.S.C. § 264(*l*)(7)); Pub. Res. No. 75-116, 52 Stat. 767 (1938) (amending 12 U.S.C. § 264(n)(4)); Pub. L. No. 76-135, 53 Stat. 842 (1939) (amending 12 U.S.C. § 264(y)); Pub. L. No. 78-37, § 1, 57 Stat. 65 (1943) (amending 12 U.S.C. § 264(h)(1)); Pub. L. No. 80-363, 61 Stat. 773 (1947) (amending 12 U.S.C. § 264 and directing FDIC to retire its capital stock). The next significant congressional action with respect to the insurance provisions contained in section 12B occurred in 1950, with the withdrawal of the provision from the FRA and its redesignation as a separate enactment, the FDIA. Pub. L. No. 81-797, 64 Stat. 873 (1950) (codified at 12 U.S.C. §§ 1811-1832). Paragraph 12B(i) itself had been amended only once prior to the enactment of Pub. L. No. 81-797. *See* Pub. L. No. 81-706, 64 Stat. 457 (1950) (minor technical amendment to 12 U.S.C. § 264(i)(2)). Paragraph (i) of FRA section 12B was recodified as section 8 of the new FDIA. *See* Pub. L. No. 81-797, 64 Stat. 873, 879-81 (1950) (codified as 12 U.S.C. § 1818(i)). Moreover, the board's power to terminate involuntarily a bank's deposit insurance was slightly modified. H.R. REP. NO. 2564, 81st Cong., 2d Sess., *reprinted in* 1950 U.S. CODE CONG. & ADMIN. NEWS 3765, 3771 [hereinafter H.R. REP. NO. 2564]. Section 8(c), for example, inserted a new provision authorizing the board to terminate the insured status of a bank that did not receive deposits, excluding trust funds. Pub. L. No. 81-797, 64 Stat. at 880-81.

82. The civil money penalty device became even more modest and fine-tuned with the passage of the Garn-St Germain Depository Institutions Act of 1982 ("DIA"), Pub. L. No. 97-320, 96 Stat. 1469 (1982). Aside from many technical amendments to and refinements of the statutory provisions concerning bank regulatory enforcement, *see* S. REP. NO. 536, 97th Cong., 2d Sess., *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS 3054, 3080, the DIA gave the agencies explicit discretionary authority to assess, compromise, modify or remit civil money penalties. *See* Pub. L. No. 97-320, § 424(c), (d)(6) (amending 12 U.S.C. § 1818(i)(2)(i)). The DIA also increased the time available for appeal from a civil money penalty order, from ten to twenty days. *See id.* § 424(e) (amending 12 U.S.C. § 1818(i)(2)(iv)).

83. This search for flexible responses and a range of diversified enforcement devices has been expanded by administrative resort to interim measures, short of cease and desist orders, such as the informal agreement or the "memorandum of understanding" (a creature of administrative practice, *see infra* notes 484-85 and accompanying text), as well as the "formal agreement" (statutorily based, *see, e.g.*, 12 U.S.C. § 1818(b)(1); *see also infra* note 489 and accompanying text), to resolve enforcement problems outside of the formal procedural context contemplated by the statutes. In addition, the dominant administrative practice of administrative consent orders (*see infra* note 490 and accompanying text) has further removed practice from the formalities contemplated by the statutes.

targetting of enforcement devices at individuals who stand in some control relationship to banks that are the subject of enforcement concerns.

Thus, there has been a sense expressed throughout congressional consideration of these measures that there was a need to afford the regulators the authority to tailor enforcement actions to the needs of particular cases,[84] and that it was not necessarily appropriate or reasonable to limit the availability of the cease and desist power in particular to actions against a bank alone.[85] Likewise, the regulators have obtained clarification of the availability of the temporary cease and desist power as well in actions involving individuals.[86]

This increased congressional attention on individuals as objects of regulatory enforcement can also be seen in congressional treatment of the removal authority.[87] Prior to the enactment of the Financial Institutions Regulatory and Interest Rate Control Act of 1978 ("FIRA"),[88] the agencies had particularly complained that the extant provision was unduly restrictive, and that it hampered their efforts to act in a timely manner.[89] FIRA responded to these concerns by authorizing removal not only for dishonest conduct, but also for a willful or continuing disregard for safety and soundness of a bank.[90] In addition, the Comptroller was finally given the authority to initiate removal proceedings against directors and officers of national banks, though the Fed still retained the authority to issue the removal orders in such cases.[91] At the same time, however, counterbalancing this greater facility for exercising the removal power were new provisions for non-APA hearings before the appropriate federal banking agency prior to summary suspension or removal of a director of officer on account of criminal charges.[92]

To this theme of increased attention and flexibility with respect to enforcement actions directed at individuals, FIRA added a broader theme of flexibility in the range of enforcement devices available to the regulators. Power was granted to the regulators to assess civil money penalties of not more than one-thousand dollars per day, for each violation of an outstanding cease and desist order,[93] subject to certain specific procedural and substantive conditions.[94] This

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84. *See, e.g.*, 124 CONG. REC. 36,146 (1978) (remarks of Senator Proxmire). *See also* H.R. REP. NO. 1383, 95th Cong., 2d Sess., *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 9273, 9279-80 [hereinafter H.R. REP. NO. 1383] (need for flexible powers).

85. *See, e.g.*, H.R. Rep. No. 1383, *supra* note 84, at 9289-90 (need to expand cease and desist power).

86. *See* Pub. L. No. 95-630, § 107(c)(1) (to be codified at 12 U.S.C. § 1818(c)(1)-(2)) (grounds and procedures for temporary cease and desist orders).

87. 12 U.S.C. § 1818(e) (grounds and procedures for suspension or removal of officer or director).

88. Pub. L. No. 95-630, 92 Stat. 3641 (1978).

89. *See, e.g.*, H.R. REP. NO. 1383, *supra* note 84, at 9290 (restrictiveness of ground for removal).

90. Pub. L. No. 95-630, § 107(d)(1) (amending 12 U.S.C. § 1818(e)).

91. *Id.*

92. *Id.* § 111(a)(1) (amending 12 U.S.C. § 1818(g)). *See also* H.R. REP. NO. 1383, *supra* note 84, at 9290 for a summary of the suspension and removal procedures. *See infra* notes 171-73 and accompanying text for a discussion of amended procedures for summary suspension and dismissal.

93. Pub. L. No. 95-630, § 107(e)(1) (amending 12 U.S.C. § 1818(i)).

power was specifically intended to afford the regulators more flexibility to secure compliance by individuals and institutions without resort to the relatively severe penalties that would otherwise have been available.[95]

Thus, what has emerged from over forty years of legislative attention to the problems of bank regulatory enforcement is a delicately balanced structure of administrative enforcement. This structure gives institutional value to the availability of a flexible array of carefully targetted enforcement powers, while offering protection of the interests of targetted individuals, primarily through the availability of APA hearings (except in the case of summary suspension/removal on account of criminal charges) and limited judicial review of administrative enforcement action.

In practice, however, this structure has not been fully realized. Consent orders and informal means of enforcement abound in bank regulatory enforcement; APA hearings are decidedly the exception. The rules of practice applicable to APA hearings are somewhat sketchy, and formal administrative decisions, as well as the *rationes decidendi* for such decisions, are not readily accessible to the public. Underscoring the relatively minor role actually played by APA hearings in bank regulatory enforcement, the agencies do not employ their own ALJs, but rely instead on detailed ALJs, seconded on an ad hoc basis. Thus, the institutional bias of the agencies, in favor of informality, confidentiality and speed, has pushed the flexibility inherent in congressional enactments in this area far beyond what was contemplated by those enactments themselves.

B. Legislative History: Selected Aspects

1. First steps toward flexibility

In March 1966, the Johnson Administration submitted to the Senate a bill granting the federal banking regulators[96] the authority to issue cease and desist orders and orders of suspension and removal, subject to specific limitations.[97] The stated purpose of the bill was to provide these agencies with the power to prevent unsafe and unsound practices and violations of law or regulation through a means less drastic than termination of deposit insurance, or through conservatorship, or receivership.[98] Thus, the sponsoring agencies argued:

> [O]ur financial system has not been entirely free from supervisory problems, and unlawful, unsound, or irregular practices have appeared in some cases. Even though few in number, improperly conducted institutions could cause public concern that might extend to the entire industry. In such cases, it is essential that the Federal supervisory agencies have the statutory and administrative facility to move quickly

94. *Id.* *See infra* notes 185-95 and accompanying text for a discussion of procedures and conditions for civil money penalties.

95. *See* H.R. REP. NO. 1383, *supra* note 84, at 9289 (flexible civil money penalty powers).

96. The federal banking regulators were in this instance the Comptroller, the Fed, the FDIC, and the FHLBB.

97. *See* S. REP. NO. 1482, 89th Cong., 2d Sess., *reprinted in* 1966 U.S. CODE CONG. & ADMIN. NEWS 3532, 3534 [hereinafter S. REP. NO. 1482] (discussion of proposed powers).

98. *Id.* at 3536.

> and effectively to require adherence to the law and cessation and correction of unsafe or improper practices.
>
> Existing remedies have proven inadequate. On the one hand they may be too severe for many situations, such as taking custody of an institution or terminating its insured status. On the other they may be so time consuming and cumbersome that substantial injury occurs to the institution before remedial action is effected.[99]

The Senate Committee essentially agreed that the proposed legislation was needed. However, it did revise the bill in certain respects, in order to reconcile the competing interests of those affected by the proposed legislation. First, the committee proposed to restrict the issuance of suspension and removal orders to cases involving personal dishonesty on the part of directors or officers, not just differences of opinion between bank officials and regulators over management problems. This limitation, together with the individual's right to seek judicial review of the order and another amendment requiring the APA hearing to be private unless the agency and the individual agreed otherwise, appeared to reduce the potential for administrative abuse.[100]

Second, the committee was concerned with the effect the bill would have on the dual banking system,[101] and it therefore endorsed a proposal to the effect that, in cases involving state-chartered institutions, the appropriate state supervisory authority was to be notified and given an opportunity to take corrective supervisory action of its own. The proposal would not only protect individuals from arbitrary and capricious federal government action, but would also recognize the importance of state supervisory authorities in the dual banking system.[102]

Third, the original version of the bill authorized the Comptroller, the only one of the four affected federal supervisory agencies consisting of a single individual rather than a collegial body, to suspend or remove officials of a national bank.[103] The committee concluded that this quasi-judicial function should be entrusted to a collegial body rather than a single official.[104] Accordingly, it rec-

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99. *Id.*

100. *Id.* at 3539. The committee noted that "the power to suspend or remove an officer or director of a bank . . . is an extraordinary power, which can do great harm to the individual affected and to his institution and to the financial system as a whole. [Therefore,] [i]t must be strictly limited and carefully guarded." *Id.*

101. On the dual banking system, *see* M.P. MALLOY, *supra* note 1, at 29, 31-33 (National Bank Act of 1863 created bifurcation of banking system by establishing federally-chartered national banks without eliminating state banking system). *See generally* Kreider, *American Banking: Structure, Supervision and Strengths*, 92 BANKING L.J. 437 (1975) (commenting on concentration and centralization in banking system); Scott, *Patchwork Quilt: State and Federal Roles in Banking Regulation*, 32 STAN. L. REV. 687 (1980) (analysis of federal-state relationships); Scott, *Dual Banking System: Model of Competition in Regulation*, 30 STAN. L. REV. 1 (1977) (examination of dual banking system).

102. S. REP. NO. 1482, *supra* note 97, at 3538. The committee stated that this proposal "emphasizes the role of the State chartering and supervisory authorities, and in no way lessens the status of these State authorities." *Id.* at 3539.

103. *Id.* at 3539.

104. *Id.* at 3539-40.

ommended that the Comptroller be required to obtain approval of the Fed before proceeding to suspend or remove an officer of a national bank.[105]

The final compromise version of the bill provided that hearings would be private unless the agency, in its discretion, determined that a public hearing was necessary in order to protect the public interest.[106] It also extended the expiration date of the new authorities to June 30, 1972.[107] Furthermore, the Senate accepted a House amendment providing "for the violation of a condition imposed in writing by an agency to be grounds for the issuance of a cease and desist order the condition must have been imposed in connection with the granting of an application or other request by the institution."[108] The Senate bill had not contained such a provision.[109]

The Conference Report was accepted by both houses.[110] On October 16, 1966, the bill was enacted into law as the Financial Institutions Supervisory Act of 1966 ("FISA").[111]

2. Coverage of bank holding companies and foreign banks

In 1974 Congress again addressed the authorities granted by FISA. It adopted an amendment to section 8(b) of the FDIA[112] which expanded the scope of the cease and desist powers to include bank holding companies and their nonbanking subsidiaries.[113] The Senate Committee on Banking, Housing and Urban Affairs noted in its report that "[u]nder present law, the only available means of dealing with unsafe and unsound practices or violations on the

105. *Id.* at 3535, 3540. However, the Senate Subcommittee on Financial Institutions deleted the provision requiring the Comptroller to obtain Fed approval before issuing a suspension or removal order. Instead, it preferred that the Fed itself should exercise the power to remove national bank officials, as under the authority of section 30 of the Banking Act of 1933, 12 U.S.C. § 77, *repealed*, Pub. L. No. 89-695, § 207, 80 Stat. 1055 (1966), and it would make the Comptroller a member of the Fed board in such cases. S. REP. NO. 1482, *supra* note 97, at 3535, 3540. The subcommittee also adopted an amendment proposed by Senator Thurmond, requiring that the notice given to state supervisory authorities specify the time within which corrective supervisory action must be taken. *Id.* at 3535.

106. H.R. CONF. REP. NO. 2232, 89th Cong., 2d Sess., *reprinted in* 112 CONG. REC. at 26,212 (1966).

107. *Id.*

108. 112 CONG. REC. 26,476 (1966). Violation of a "written agreement entered into with the agency" also constituted a basis for a cease and desist order. 12 U.S.C. § 1818(b)(1).

109. 112 CONG. REC. 26,476 (1966).

110. *Id.* at 26,212, 26,476.

111. Pub. L. No. 89-695, 80 Stat. 1046 (1966). Title IV of the act, which made the authorized powers temporary, was repealed by Pub. L. No. 91-609, tit. IX, § 908, 84 Stat. 1811 (1970).

112. 12 U.S.C. § 1818(b)(3).

113. Pub. L. No. 93-495, tit. I, § 110, 88 Stat. 1506 (1974). Title I was entitled Amendments to and Extensions of Provisions of Law Relating to Federal Regulation of Depository Institutions. The act was the result of various individual bills from both houses which were consolidated and incorporated as an amendment to the House bill, H.R. 11221. Sen. Comm. Print, 93d Cong., 2d Sess. 27 (1974). The addition of section 8(b)(3) was first introduced by the Senate bill. H.R. CONF. REP. NO. 1429, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 6148, 6150 (joint explanatory statement of the Committee of Conference). Although the House bill did not have a comparable provision, the House acceded to the Senate version. *Id.*

part of a parent holding company is through the sanctions contained in criminal law."[114] The committee took the position that the cease and desist authority allowed supervisory agencies "to move quickly and effectively to correct unsound . . . practices . . . and the extension of this authority [would] better equip the agencies to assure that financial institutions are not endangered . . . [by the activities of] parent holding companies or . . . [their nonbanking] subsidiaries."[115] The committee emphasized, however, that it did not expect the agencies to "use this authority to interfere unduly in the affairs of nonbank subsidiaries."[116]

Four years later, the Senate Banking Committee noted that

> [t]he growth in number and size of foreign banking operations, and their ever-increasing importance to the structure of the banking system and to the functioning of money and credit markets has created the need for both Federal monetary policy controls and for a Federal presence in the regulation and supervision of their activities in the United States. . . .[117]

With regard to section 8 of the FDIA, the Senate version of the bill responding to this perceived need for further federal regulation added only one paragraph, section 8(b)(4), empowering the federal bank agencies to issue cease and desist orders "to any foreign bank or [holding] company to which subsection (a) of section 8 of the International Banking Act of 1978 applies and to any [nonbank] subsidiary . . . of any such foreign bank or company."[118] Unlike the original bill,[119] the Senate version did not include a separate paragraph extending the cease and desist authority to "any branch, agency, and commercial lending company controlled by foreign banks."[120]

The bill was considered and passed by the Senate as amended.[121] Subsequently, the House concurred in the Senate amendments,[122] and on September

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114. S. REP. NO. 902, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 6119, 6128.

115. *Id.*

116. *Id.*

117. S. REP. NO. 1073, 95th Cong., 2d Sess., *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 1421, 1422.

118. H.R. 10,899, § 11, 95th Cong., 2d Sess., *as amended*, 124 CONG. REC. 26,128 (1978). Section 8(a) of the International Banking Act of 1978, 12 U.S.C. § 3106(a), provides as follows:

> Except as otherwise provided in this section[,] (1) any foreign bank that maintains a branch or agency in a State, (2) any foreign bank or foreign company controlling a foreign bank that controls a commercial lending company organized under State law, and (3) any company of which any foreign bank or company referred to in (1) and (2) is a subsidiary shall be subject to the provisions of the Bank Holding Company Act of 1956 [12 U.S.C. § 1841 *et seq.*], and to section 1850 of this title [concerning right of possible competitors of an applicant before the Fed to participate in proceedings] and [*id.* §§ 1971-1978, concerning prohibited tying arrangements,] to the same manner and to the same extent that bank holding companies are subject thereto. . . .

Id.

119. 124 CONG. REC. 3000 (1978).

120. *Id.* at 9,089, 26,128.

121. *Id.* at 24,885, 26,123.

122. *Id.* at 26,726. Representative Reuss stated that the Senate version of H.R. 10,899 refined

17, 1978, the International Banking Act of 1978 ("IBA") was signed into law.[123]

3. Further attention to individuals

The IBA was followed in short order by FIRA.[124] Among other things, FIRA expanded the scope of the cease and desist remedy to include not only banks but also individuals such as directors, officers, controlling shareholders and other persons acting for an insured bank.[125]

4. Thrift institutions and credit unions

The legislative history of the major enforcement authorities of the FHLBB, the FSLIC and the NCUA generally parallels that of the FDIA. The 1966 amendments to the HOLA[126] reorganized the basic enforcement provision, adding the cease and desist,[127] temporary cease and desist,[128] and suspension and removal authorities[129] corresponding to those granted to the federal bank regulators. At the same time, similar authority was granted to the FSLIC in amendments to the NHA.[130]

The next significant amendment of the HOLA for present purposes occurred in 1978,[131] which, among other things, (*i*) extended the cease and desist[132] and temporary cease and desist powers[133] to cover individuals participating in the management of federally chartered associations, (*ii*) amended the grounds for suspension and removal of officers and directors,[134] and (*iii*) added civil money penalty authority.[135] Similar changes were

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the original version, yet retained the intent of the House bill in all important respects. That is, it not only reaffirmed the principle of "national treatment" of foreign banks operating within the United States, but also recognized the unique character of foreign banking. *Id.* at 26,733.

123. Pub. L. No. 95-369, 92 Stat. 607 (1978).

124. Pub. L. No. 95-630, 92 Stat. 3641 (1978).

125. *Id.* § 107(a)(1) (to be codified at 12 U.S.C. § 1818(b)(1)). Further steps toward flexibility are evident from the amendments to the regulator's enforcement powers in the DIA. *See supra* note 82 for a discussion of DIA amendments of civil money penalty powers.

126. Pub. L. No. 89-695, § 101(a), 80 Stat. 1028 (1966) (to be codified at 12 U.S.C. §§ 1464(d)(2)-(5), (7)-(10), (12)(A)-(B), (13), (14)).

127. 12 U.S.C. § 1464(d)(2).

128. *Id.* § 1464(d)(3).

129. *Id.* § 1464(d)(4)-(5).

130. *See* Pub. L. No. 89-695, § 102(a), 80 Stat. at 1036 (to be codified at 12 U.S.C. § 1730(b)-(q)) (FSLIC enforcement authorities).

131. Pub. L. No. 95-630, §§ 107, 111, 208, 92 Stat. at 3651-52, 3668-70, 3675 (to be codified at 12 U.S.C. § 1464(d)(2)-(5), (7)-(8), (12)-(13), (15)). Minor modifications were also made in these authorities by the DIA in 1982. *See* Pub. L. No. 97-320, §§ 114(b), (c), 351, 424, 427(a), 96 Stat. at 1475, 1507, 1522, 1524-29 (to be codified at 12 U.S.C. § 1464(d)) (HOLA enforcement authorities); *id.* §§ 115, 424, 425(a), 427(b), 96 Stat. at 1475-76, 1522-25 (to be codified at 12 U.S.C. § 1730) (NHA enforcement authorities).

132. *See* 12 U.S.C. § 1464(d)(2)(A).

133. *Id.* § 1464(d)(3)(A)-(B).

134. *Id.* § 1464(d)(4)(A)-(B).

135. *Id.* § 1464(d)(8)(B).

made in the FSLIC's authority under the NHA.[136]

The basic enforcement provisions of the FCUA were added in 1970,[137] and they were substantially similar to the corresponding authorities which the federal bank regulators possessed at that time. Aside from a modest adjustment in the language of the removal provisions in 1977,[138] the next significant development for present purposes was the enactment of amendments to the FCUA enforcement provisions in 1978.[139] As with the contemporaneous amendments to the authorities of the other federal regulators, the 1978 FCUA amendments had the effect of, among other things, (*i*) extending the cease and desist[140] and temporary cease and desist powers[141] to cover individuals participating in the management of federally chartered associations, (*ii*) amending the provisions of the suspension and removal authority,[142] and (*iii*) adding civil money penalty authority.[143]

C. Major Authorities

1. Cease and desist powers

The FDIA authorizes the regulators to initiate cease-and-desist proceedings whenever, in the opinion of the regulator,

> any insured bank, bank which has insured deposits, or any director, officer, employee, agent, or other person participating in the conduct of the affairs of such bank is engaging or has engaged, or the [regulator] has reasonable cause to believe . . . is about to engage, in an unsafe or unsound practice[144] in conducting the business of such bank, or is violating or has violated, or the [regulator] has reasonable cause to believe . . . is about to violate, a law, rule or regulation, or any condi-

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136. *See* Pub. L. No. 95-630, §§ 107(a)(2), (c)(2), (d)(2), 111(b)(1), 92 Stat. at 3650-51, 3654-55, 3658-59, 3667-68 (to be codified at 12 U.S.C. § 1730(e)(1), (f)(1)-(2), (g)(1)-(2), (h)(1)-(2)).

137. Pub. L. No. 91-468, § 1(3), 84 Stat. 1003 (1970) (to be codified at 12 U.S.C. § 1786).

138. *See* Pub. L. No. 95-22, § 307, 91 Stat. 52 (1977) (to be codified at 12 U.S.C. § 1786(g)(1)-(2)).

139. Pub. L. No. 95-630, §§ 107(a)(4), (c)(4), (d)(4), (e)(4), 111(d), 502(b), 92 Stat. at 3652-53, 3656, 3659-60, 3663-64, 3670-71, 3681 (to be codified at 12 U.S.C. § 1786(e)-(o)). Minor modifications were also made in these authorities by the DIA in 1982. *See* Pub. L. No. 97-320, §§ 132(a), (c), (d), (e), (f), 141(a)(8), 424(a), (d)(9), (e), 427(c), 96 Stat. at 1487-89, 1522-24 (to be codified at 12 U.S.C. § 1786(g)(3)-(6), (h)-(p)).

140. 12 U.S.C. § 1786(e)(1).

141. *Id.* § 1786(f).

142. *Id.* § 1786(h).

143. *Id.* § 1786(j)(2).

144. *See* Gulf Fed. Sav. & Loan Ass'n v. FHLBB, 651 F.2d 259, 264 (5th Cir. 1981) (meaning of term "unsafe or unsound practice" with respect to financial soundness), *cert. denied*, 458 U.S. 1121 (1982); First Nat'l Bank of Lamarque v. Smith, 610 F.2d 1258, 1265 (5th Cir. 1980) (accepted standards of operation); Independent Bankers Ass'n of America v. Heimann, 613 F.2d 1164, 1168-69 (D.C. Cir. 1979) (discretion to regulate), *cert. denied*, 449 U.S. 823 (1980); First Nat'l Bank of Eden v. Department of the Treasury, 568 F.2d 610, 611 n.1 (8th Cir. 1977) (examples of "unsafe and unsound practices"). *See also infra* notes 340-403 and accompanying text for a discussion of the term "unsafe and unsound practice." *Cf.* Groos Nat'l Bank v. Comptroller of the Currency, 573 F.2d 889, 897 (5th Cir. 1978) (progressive definition of term). *See generally* E.L. SYMONS & J.J. WHITE, BANKING LAW 574-77 (2d ed. 1984) (use of concept as "wildcard").

> tion imposed in writing by the [regulator] . . . or any written agreement entered into with the [regulator]. . . .[145]

A notice would be served upon the bank or the director, officer or other person involved, stating the facts constituting the violation or practices and setting an administrative hearing.[146] Upon findings on the record (or upon consent of the noticed parties), an order to cease and desist from the practice or violation will issue.[147] The order generally becomes effective thirty days after service of the order on the bank or other person involved,[148] except to the extent it is stayed, modified, terminated or set aside by the regulator or a reviewing court.[149] The FDIA also provides authority for temporary cease-and-desist orders to meet exigencies prior to completion of the cease-and-desist proceedings.[150]

2. Suspension and removal powers

The FDIA specifically provides for suspension or removal of directors and officers of insured banks and for prohibition of further participation in management of the affairs of an insured bank by any individual. The FDIA authorizes the regulator to initiate such proceedings against a director, officer or other controlling individual whenever, in the opinion of the regulator,

> any director or officer of an insured bank has committed any violation of law, rule, or regulation or of a cease-and-desist order which has become final, or has engaged or participated in any unsafe or unsound practice[151] in connection with the bank, or has committed or engaged

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145. 12 U.S.C. § 1818(b)(1). Parallel provisions of the statutory authorities are identical in all material aspects. *See* 12 U.S.C. §§ 1464(d)(2)(A), 1730(e)(1), 1786(e)(1). *See also* Deal, *Bank Regulatory Enforcement—Some New Dimensions*, 40 BUS. LAW. 1319 (1985) (status of "formal agreements" in relation to the cease and desist powers).

146. *See infra* note 196 and accompanying text for a discussion of the procedures involved in cease and desist hearings. *See also* 12 C.F.R. §§ 19.0-19.21 (1988) (OCC); *id.* §§ 263.1-263.21, 263.35-263.40 (1988) (Fed); *id.* §§ 308.1-308.22, 308.32-308.38 (1988) (FDIC). These APA hearings must take place in the federal judicial district in which the home office of the bank is located. 12 U.S.C. § 1818(h)(1). *See also* 12 C.F.R. §§ 509.1-509.22 (1988) (FHLBB; cease-and-desist proceedings under 12 U.S.C. §§ 1464(d)(2), 1730(e)); *id.* §§ 747.101-747.121, 747.301-747.306 (1988) (NCUA; cease-and-desist proceedings under 12 U.S.C. § 1786(e)-(f)). For cases reviewing cease-and-desist orders, *see, e.g.*, First Nat'l Bank of Bellaire v. Comptroller, 697 F.2d 674 (5th Cir. 1983) (partially invalid basis for cease and desist order); First Nat'l Bank of Scotia v. United States, 530 F. Supp. 162 (D.D.C. 1982) (cease and desist order upheld). *See generally* M.A. COBB, FEDERAL REGULATION OF DEPOSITORY INSTITUTIONS ¶ 5.08 (1984) (cease and desist procedures).

147. 12 U.S.C. § 1818(b)(1). *See also id.* §§ 1464(d)(2) (parallel power, FHLBB), 1730(e)(1) (parallel power, FSLIC), 1786(e)(1) (parallel power, NCUA).

148. *Id.* § 1818(b)(2). Consent orders become effective according to their own terms. *Id.* Parallel provisions of the statutory authorities of the other regulators are identical in all material respects. *Id.* §§ 1464(d)(2)(B), 1730(e)(2), 1786(e)(2).

149. *Id.* § 1818(b)(2). *See also id.* §§ 1464(d)(2)(B), 1730(e)(2), 1786(e)(2). On judicial review and enforcement of cease-and-desist orders, *see id.* §§ 1464(d)(7)(B), (8)(A), 1730(j)(2), (k)(2), 1786(j)(2), (k)(1), 1818(h), (i).

150. *Id.* § 1818(c), (d). Parallel provisions of the statutory authorities of the other regulators are identical in all material respects. *See id.* §§ 1464(d)(3)(A), 1730(f), 1786(f).

151. *See supra* note 144 for cases discussing "unsafe and unsound" practices.

> in any act, omission or practice which constitutes a breach of his fiduciary duty as such director or officer, and the agency determines that the bank has suffered or will probably suffer substantial financial loss or other damage or that the interests of its depositors could be seriously prejudiced by reason of such violation or practice or breach of fiduciary duty or that the director or office[r] has received financial gain by reason of such violation or practice or breach of fiduciary duty, and that such violation or practice or breach of fiduciary duty is one involving personal dishonesty on the part of such director or officer, or one which demonstrates a willful or continuing disregard for the safety or soundness of the bank. . . .[152]

Similar authority has also been conferred on the regulators with respect to the removal of a director, officer, or other person participating in the management of an insured bank because of sanctioned conduct with respect to that bank or any other insured bank.[153] In addition, as a result of the 1982 amendment of the FDIA[154] the regulators are authorized to institute removal proceedings "[w]henever, in the opinion of the appropriate Federal banking agency, any director or officer of an insured bank has committed any violation of the [DIMIA],"[155] without reference to the other elements usually required for removal proceedings.[156]

If the regulator decides to initiate removal proceedings, a notice must be served on the management official involved which states the facts constituting the grounds for removal and sets an APA hearing.[157] Upon findings on the record (or upon consent of the noticed parties), an order to suspend or remove

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152. 12 U.S.C. § 1818(e)(1). Parallel provisions of the statutory authorities of the other regulators are identical in all material respects. *See id.* §§ 1464(d)(4)(A), 1730(g)(1), 1786(g)(1). For a critique of recent uses of the removal authority, *see* Fisher, *Bank Enforcement Actions: Usurping Legislative Prerogatives*, 104 BANKING L.J. 215, 237-43 (1987) (removal authority and possible augmentation to deal with individuals who resign prior to being served with removal order).

153. *See* 12 U.S.C. § 1818(e)(2). Parallel provisions of the statutory authorities of the other regulators are identical in all material respects. *See id.* §§ 1464(d)(4)(B), 1730(g)(2), 1786(g)(2).

154. DIA, § 427(d)(1)(A), 96 Stat. 1525-26 (1982).

155. 12 U.S.C. § 1818(e)(3). Parallel provisions of the statutory authorities of the other regulators are identical in all material respects. *See id.* §§ 1464(d)(4)(C), 1730(g)(3), 1786(g)(3). The DIMIA, 12 U.S.C. §§ 3201-3207, generally prohibits directors and executive officers from serving in such capacity with more than one depository institution in the same geographical area. *See generally* M.P. MALLOY, *supra* note 1, at 206-15 (discussion of DIMIA).

156. *See supra* notes 151-52 and accompanying text for a discussion of grounds for removal.

157. 12 U.S.C. § 1818(e)(5). *See infra* notes 241-43 and accompanying text for a discussion of the procedures involved in a suspension or removal hearing. *See also* 12 C.F.R. §§ 19.0-19.17, 19.26-19.29 (1988) (Comptroller of the Currency Proceedings); *id.* §§ 263.1-263.21 (1988) (Federal Reserve System Proceedings); *id.* §§ 308.01-308.22, 308.39-308.46 (1988) (FDIC Procedures and Practices). Normally, the hearing will be scheduled for a date thirty to sixty days after service of the notice, but the director, officer or other person, or the Attorney General, may request that the hearing take place sooner or later than the normal time limits for a removal hearing. 12 U.S.C. § 1818(e)(5). These APA hearings must take place in the federal judicial district in which the home office of the bank is located. *Id.* § 1818(h)(1). *See also* 12 C.F.R. §§ 509.1-509.22 (FHLBB rules of practice and procedure for removal and prohibition proceedings under 12 U.S.C. §§ 1464(d)(4) and 1730(g)); *id.* §§ 747.01, 747.101-747.121, 747.501-747.506 (NCUA rules and procedures for suspension and removal actions under 12 U.S.C. § 1786(g)).

will issue.[158] The order generally becomes effective thirty days after service on the director, officer or other persons involved,[159] except to the extent it is stayed, modified, terminated or set aside by the regulator or a reviewing court.[160]

The FDIA also provides authority for temporary orders suspending or otherwise prohibiting a director, officer or other person from participating in the management of the bank's affairs, to meet exigencies prior to completion of the suspension or removal proceedings.[161] Persons subject to a temporary order may apply to the federal district court for a stay of the temporary suspension or prohibition, within ten days of the issuance of the order.[162]

In addition, the FDIA authorizes summary suspension or removal of any

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158. 12 U.S.C. § 1818(e)(5). Parallel provisions of the statutory authorities of the other regulators are identical in all material respects. *Id.* §§ 1464(d)(4)(E), 1730(g)(5), 1786(g)(5). In the case of suspension or removal proceedings initiated by the Comptroller, the findings and conclusions of the ALJ who presided at the hearing are certified to the Fed for its determination of whether or not a suspension or removal order should issue. *Id.* § 1818(e)(5). This curious certification procedure appears to be a congressional attempt to guard against possible abuse of power, since the Office of the Comptroller was the only regulator governed by a single individual, rather than a collegial body. *See* S. REP. NO. 1482, *supra* note 97, at 3539-40 (discussion of summary suspension and removal power).

159. 12 U.S.C. § 1818(e)(5). *See id.* §§ 1464(d)(4)(E) (parallel authority, FHLBB), 1730(g)(5) (parallel authority, FSLIC), 1786(g)(5) (parallel authority, NCUA). Consent orders become effective according to their own terms. *See also* 12 U.S.C. § 1818(e)(5) (FDIA provision).

160. *Id.* § 1818(e)(5). *See also id.* §§ 1464(d)(4)(E), 1730(g)(5), 1786(g)(5). On judicial review of suspension and removal orders, *see id.* §§ 1464(d)(7)(B), (d)(8)(A), 1730(j)(2), (k)(2), 1786(j)(2), (k)(l), 1818(h), (i). Federal district courts have been held to be generally without jurisdiction to enjoin removal proceedings. *See, e.g.*, Somerfield v. FDIC, 609 F. Supp. 128, 130 (E.D. Tenn. 1985) (district court asserts lack of jurisdiction to grant injunctive relief arising out of FDIC's notice of removal of bank officers).

161. 12 U.S.C. § 1818(e)(4). The section provides in pertinent part:

> [T]he appropriate Federal banking agency may, if it deems it necessary for the protection of the bank or the interests of the depositors, by written notice to such effect served upon such director, officer or other person, suspend him from office, or prohibit him from further participation in any manner in the conduct of the affairs of the bank. Such suspension or prohibition shall become effective upon service of such notice and, unless stayed by a court . . . , shall remain in effect pending the completion of the administrative proceedings . . . and until such time as the agency shall dismiss the charges specified in such notice, or, if an order of removal or prohibition is issued against the director or officer or other person, until the effective date of any such order. Copies of any such notice shall also be served upon the bank of which he is director or officer or in the conduct of whose affairs he has participated.

Id.

Parallel provisions of the statutory authorities of the other regulators are identical in all material respects. *See id.* §§ 1464(d)(4)(D), 1730(g)(4), 1786(g)(4). On the effect of a temporary or "interim" suspension order, *see* Alper, *FDIC Suspension and Removal Powers: An Industrywide Bar*, 104 BANKING L.J. 539 (1987) (industry-wide bar against participation of individual in affairs of any federally insured bank attaches at time of interim suspension order).

162. 12 U.S.C. § 1818(f). The section provides in pertinent part:

> Within ten days after any director, officer, or other person has been suspended from office and/or prohibited from participation in the conduct of the affairs of an insured bank . . . such director, officer, or other person may apply to the United States district court for the judicial district in which the home office of the bank is located, or the United States District Court for the District of Columbia, for a stay of such suspension and/or prohibition pending the completion of the administrative proceedings pursuant to the notice served

director or officer of an insured bank, or other person participating in its management, whenever the individual is charged with the commission of or participation in a felony involving dishonesty or breach of trust.[163] It would appear that this provision is only activated by criminal conduct contemporaneous with the director's or officer's service in that capacity with an insured bank; previous conviction for criminal conduct alone would not be sufficient.[164] Under this authority, the regulator may suspend, or prohibit management participation by, any such individual by service of written notice, upon the regulator's determination that "continued service or participation by the individual may pose a threat to the interests of the bank's depositors or may threaten to impair public confidence in the bank. . . ."[165]

As originally enacted in 1966,[166] this provision did not contemplate any hearing for individuals suspended because of felony charges.[167] In *Feinberg v. FDIC*,[168] the provision was successfully attacked as an unconstitutional denial of due process in light of the fact that it did not even provide for a post-suspension hearing to protect the property interests of the charged individual to vote his stock in favor of his election as a director.

With little discussion of these due process implications,[169] Congress amended the provision to provide for a post-suspension hearing.[170] Accord-

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upon such director, officer, or other person . . . , and such court shall have jurisdiction to stay such suspension and/or prohibition.

Id.

Parallel provisions of the statutory authorities of the other regulators are identical in all material respects. *See id.* §§ 1464(d)(4)(F), 1730(g)(6), 1786(g)(6).

163. *Id.* § 1818(g)(1). Parallel provisions of the statutory authorities of the other regulators are identical in all material respects. *See id.* §§ 1464(d)(5)(A), 1730(h)(1), 1786(i)(1).

164. *See* Manges v. Camp, 474 F.2d 97, 100-01 (5th Cir. 1973) (statute only applies to person convicted of felony involving breach of trust while at *same time* participating in bank affairs).

165. 12 U.S.C. § 1818(g)(1). *See also id.* §§ 1464(d)(5)(A) (parallel provision, FHLBB), 1730(h)(1) (parallel provision, FSLIC), 1786(i)(1) (parallel provision, NCUA).

166. FISA, Pub. L. No. 89-695, § 202, 80 Stat. 1046-53 (1966).

167. *See* S. REP. NO. 1482, *supra* note 97, at 3533-34, 3537-39. Cobb has suggested that "hearings were not provided for because of the need for speedy action to avert a run on the deposits of the institution following public awareness of the criminal charges." M.A. COBB, *supra* note 146, at ¶ 5.01[1][b].

168. 420 F. Supp. 109 (D.D.C. 1976) (12 U.S.C. § 1818(g)(1) held unconstitutional as it contained no provision for minimum due process). *Cf. Manges*, 474 F.2d at 100-01 (12 U.S.C. § 1818(g)(1) is only section that could subject individual to arbitrary or capricious judgment of another).

169. *See* H.R. REP. NO. 1383, *supra* note 84, at 9290-91 (discussion of post-suspension hearing requirement).

170. *See* Financial Institutions Regulatory and Interest Rate Control Act of 1978, Pub. L. No. 95-630, § 111(a)(1), 92 Stat. 3641, 3665-66 (1978), requiring agency determination of threat to depositors or public confidence, and adding paragraph (3) to 12 U.S.C. § 1818(g). *See also* 12 C.F.R. §§ 19.0-19.17, 19.30-19.33 (1988) (OCC rules of practice and procedure); *id.* § 263.30-263.34 (1988) (Federal Reserve rules of practice and procedure); *id.* § 308.55-308.63 (1988) (FDIC rules of practice and procedure). These hearings are not subject to the requirements of the APA. *See* 12 U.S.C. § 1818(h)(1). *See also* 12 C.F.R. part 509a (1988) (FHLBB suspension, removal, and prohibition proceedings under 12 U.S.C. §§ 1464(d)(5), 1730(h)); 12 C.F.R. §§ 747.601-747.611 (1988) (NCUA suspension and prohibition proceedings under 12 U.S.C. § 1786(i)). The constitutionality of this

ingly, within thirty days of the service of the suspension notice, the charged individual may request a hearing, for the purpose of showing "that the continued service to or participation in the conduct of the affairs of the bank by such individual does not, or is not likely to, pose a threat to the interests of the bank's depositors or threaten to impair public confidence in the bank."[171] The regulator must then set a hearing, generally not later than thirty days after receipt of such a request, either by written submissions or, in the regulator's discretion, by oral testimony, and oral argument.[172] The decision on the hearing must issue within sixty days of the hearing.[173]

Unless a hearing is requested and results in agency termination of the suspension, the suspension or prohibition will remain in effect until the information, indictment or complaint containing the felony charge is finally disposed of.[174] Once the director, officer or other person is convicted and time for appeal is exhausted, the regulator may issue an order of removal or prohibition, on its determination that "continued service or participation by the individual may pose a threat to the interests of the bank's depositors or may threaten to impair public confidence in the bank. . . ."[175] However, a finding of not guilty, or other disposition of the criminal charge, does not preclude the regulator from initiating general removal proceedings as previously described.[176] Felony suspension, removal and prohibition orders are subject to judicial review in accordance with the provisions of the FDIA.[177] Subsequent violation of final orders carries criminal sanctions.[178]

3. Civil Money Penalties

If an insured bank or any director, officer, employee, agent, or other man-

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amended provision of the FDIA was upheld in First Nat'l Bank of Grayson v. Conover, 715 F.2d 234, 237 (6th Cir. 1983) (statute affords full and fair opportunity to be heard and protects due process rights). The provision was, however, challenged successfully at the trial court level in Mallen v. FDIC, [Current] Fed. Banking L. Rep. (CCH) ¶ 86,916 (N.D. Iowa 1987), *reversed*, 56 U.S.L.W. 4464 (U.S. May 31, 1988) (No. 87-82).

171. 12 U.S.C. § 1818(g)(3). Parallel provisions of the statutory authorities of the other regulators are identical in all material aspects. *See* 12 U.S.C. §§ 1464(d)(5)(C) (FHLBB), 1730(h)(2) (FSLIC), 1786(i)(3) (NCUA).

172. 12 U.S.C. § 1818(g)(3). *See also id.* §§ 1464(d)(5)(C) (parallel provision, FHLBB), 1730(h)(2) (parallel provision, FSLIC), 1786(i)(3) (parallel provision, NCUA).

173. *Id.* § 1818(g)(3). *See also id.* §§ 1464(d)(5)(C), 1730(h)(2), 1786(i)(3).

174. 12 U.S.C. § 1818(g)(1). *See also id.* §§ 1464(d)(5)(A) (parallel provision, FHLBB), 1730(h)(1) (parallel provision, FSLIC), 1786(i)(1) (parallel provision, NCUA).

175. *Id.* § 1818(g)(1). *See also id.* §§ 1464(d)(5)(A), 1730(h)(1), 1786(i)(1).

176. *Id.* § 1818(g)(1). *See also id.* §§ 1464(d)(5)(A), 1730(h)(1), 1786(i)(1). *Cf., e.g.*, 12 U.S.C. § 1818(e)(1)-(e)(4) (FDIA suspension and removal powers subject to APA hearings). *See also supra* notes 157-62 and accompanying text for a discussion of procedures for suspension and removal subject to APA hearings.

177. 12 U.S.C. § 1818(h), (i). *See also* 12 U.S.C. §§ 1464(d)(7)(B), (d)(8)(A) (parallel provision, FHLBB), 1730(j)(2), (k)(2) (parallel provision, FSLIC), 1786(j)(2), (k)(1) (parallel provision, NCUA).

178. *See id.* § 1818(j). *See also id.* §§ 1464(d)(12)(A), 1730(p)(1), 1786(k).

agement participant violates[179] the terms of any final order issued pursuant to the cease and desist or temporary cease and desist authority,[180] the bank or individual "*shall* forfeit and pay a civil penalty of not more than $1,000 per day for each day during which the violation continues."[181] Despite this mandatory statutory language, the FDIA now provides that the penalty "*may* be assessed and collected by the appropriate Federal banking agency by written notice,"[182] and further provides that the agency "may, in its discretion, compromise, modify, or remit any civil money penalty which is subject to imposition or has been imposed."[183]

The formula of "per violation/per day" leaves much room for the operation of the agencies' discretion. The FDIA gives only general, nonquantitative guidance for the use of this discretion. It requires that, in determining the amount of a penalty, the agency "take into account" the following qualitative factors:

> the appropriateness of the penalty with respect to the size of financial resources and good faith of the insured bank or person charged, the gravity of the violation, the history of previous violations, and such other matters as justice may require.[184]

These guidelines leave a potential for wide variation in determinations from agency to agency, or even from case to case within a given agency. The bank or person who is the subject of a notice of assessment has ten days from the issuance of the notice to request an agency hearing.[185] If no hearing is requested, the order imposing the penalty constitutes a final and unappealable order.[186]

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179. *Id.* § 1818(i)(2)(i). For the purposes of the statute, the FDIA indicates that "the term 'violates' includes without limitation any action (alone or with another or others) for or toward causing, bringing about, participating in, counseling, or aiding or abetting a violation." *Id.* Parallel provisions of the statutory authorities of the other regulators are identical in all material respects. *See id.* §§ 1464(d)(8)(B)(i), 1730(k)(3)(A), 1786(k)(2)(A). The civil money penalty authority is available with respect to a past violation, as well as a continuing violation. *See* Abercrombie v. Office of Comptroller of Currency, 641 F. Supp. 598, 601-02 (S.D. Ind. 1986) (upholding authority as to past and continuing violations), *aff'd*, 833 F.2d 672 (7th Cir. 1987).

180. This penalty also applies to violations of an order issued pursuant to 12 U.S.C. §§ 1464(d)(16), 1730(s), 1786(q), 1818(s), concerning requirements for recordkeeping and reporting with respect to monetary transactions.

181. 12 U.S.C. § 1818(i)(2)(i) (emphasis added). Parallel provisions of the statutory authorities of the other regulators are identical in all material respects. *See id.* §§ 1464(d)(8)(B)(i), 1730(k)(3)(A), 1786(k)(2)(A).

182. *Id.* § 1818(i)(2)(i) (emphasis added). *See also id.* §§ 1464(d)(8)(B)(i), 1730(k)(3)(A), 1786(k)(2)(A).

183. *Id.* § 1818(i)(2)(i). *See also id.* §§ 1464(d)(8)(B)(i), 1730(k)(3)(A), 1786(k)(2)(A).

184. *Id.* § 1818(i)(2)(ii). Parallel provisions of the statutory authorities of the other regulators are identical in all material respects. *See id.* §§ 1464(d)(8)(B)(ii), 1730(k)(3)(B), 1786(k)(2)(B). *See generally* Nicholas, *FIRA: Emerging Patterns of Director Liability*, 103 BANKING L.J. 151, 174 (1986) (penalty provisions set no standards for director liability except referring to factors to be taken into consideration in assessing a penalty).

185. 12 U.S.C. § 1818(i)(2)(iii). Parallel provisions of the statutory authorities of the other regulators are identical in all material respects. *See id.* §§ 1464(d)(8)(B)(iii), 1730(k)(3)(C), 1786(k)(2)(C). The issues are to be determined on the record, *per* 5 U.S.C. § 554. *See* 12 U.S.C. § 1818(i)(2)(iii). *See also id.* §§ 1464(d)(8)(B)(iii), 1730(k)(3)(C), 1786(k)(2)(C).

186. 12 U.S.C. § 1818(i)(2)(iii). *See also id.* §§ 1464(d)(8)(B)(iii), 1730(k)(3)(C), 1786(k)(2)(C). *Cf. id.* §§ 1464(d)(8)(B)(v), 1730(k)(3)(E), 1786(k)(2)(E), 1818(i)(2)(v) (validity and appropriateness

In the case of an order entered after an agency hearing, the exclusive judicial review[187] provided by the FDIA is before the court of appeals for the circuit in which the bank's home office is located, or before the Court of Appeals for the District of Columbia Circuit.[188] The bank or individual may obtain review by filing a notice of appeal with the appropriate court of appeals within twenty days of service of the order.[189] The substantial evidence standard[190] is applied in the judicial review of the agency's findings.[191] If the court enters a final judgment in favor of the agency,[192] but the bank or individual fails to pay the assessment, the agency is required to refer the matter to the attorney general, for recovery of the assessment by action in the appropriate district court.[193] The validity and appropriateness of the underlying order are not subject to judicial review at this stage.[194]

III. REGULATORY IMPLEMENTATION

The regulators are charged with the implementation of essentially identical statutory enforcement authorities. Yet the fact remains that the respective implementing regulations of the regulators manifest some divergences among them. (See Illustration 1). These regulations generally share certain shortcomings, however. Procedural provisions for pretrial motion practice tend to be rather unspecific. Provisions governing discovery procedures are likewise uninformative. Little or no guidance is given as to applicable rules of evidence.

For purposes of convenience, the discussion which follows focuses particularly upon the OCC regulations. Consideration is given to the corresponding regulations of the other regulators by way of comparison only.

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of final penalty order not subject to review in district court action by attorney general to collect penalty).

187. *See id.* § 1818(i)(2)(iii). *See also id.* §§ 1464(d)(8)(B)(iii), 1730(k)(3)(C), 1786(k)(2)(C). *But cf. id.* §§ 1464(d)(8)(B)(v), 1730(k)(3)(E), 1786(k)(2)(E), 1818(i)(2)(v) (district court action by attorney general to collect penalty).

188. *Id.* § 1818(i)(2)(iv). *See also id.* §§ 1464(d)(8)(B)(iv), 1730(k)(3)(D), 1786(k)(2)(D). *See Abercrombie*, 641 F. Supp. at 600 (federal district court generally without jurisdiction in penalty cases).

189. *Id.* § 1818(i)(2)(iv). A copy of this notice must be sent simultaneously to the agency involved. *Id.* The agency is required promptly to certify and file with the court the record upon which the penalty was imposed, *per* 28 U.S.C. § 2112. 12 U.S.C. § 1818(i)(2)(iv). Parallel provisions of the statutory authorities of the other regulators are identical in all material respects. *See id.* §§ 1464(d)(8)(B)(iv), 1730(k)(3)(D), 1786(k)(2)(D).

190. *See* 5 U.S.C. § 706(2)(E) (findings unsupported by substantial evidence held unlawful).

191. 12 U.S.C. § 1818(i)(2)(iv). *See also id.* §§ 1464(d)(8)(B)(iv) (parallel provision, FHLBB), 1730(k)(3)(D) (parallel provision, FSLIC), 1786(k)(2)(D) (parallel provision, NCUA).

192. This provision also applies to cases in which a penalty order becomes final as a result of failure of the bank or individual to request an agency hearing. *Id.* § 1818(i)(2)(v). *See also id.* §§ 1464(d)(8)(B)(v) (parallel provision, FHLBB), 1730(k)(3)(E) (parallel provision, FSLIC), 1786(k)(2)(E) (parallel provision, NCUA).

193. *Id.* § 1818(i)(2)(v). *See also id.* §§ 1464(d)(8)(B)(v), 1730(k)(3)(E), 1786(k)(2)(E). Any penalty collected is covered into the Treasury. *Id.* § 1818(i)(2)(vii). *See also id.* §§ 1464(d)(8)(B)(vii), 1730(k)(3)(G), 1786(k)(2)(G).

194. *Id.* § 1818(i)(2)(v). *See also id.* §§ 1464(d)(8)(B)(v), 1730(k)(3)(E), 1786(k)(2)(E).

Illustration 1

COMPARISON OF AGENCY REGULATIONS

++++++
++++++ Refer to "General Provisions"

////////////
//////////// No separate provision; refer to "Formal Hearings: Generally Applicable Rules"

XXXXXXXX
XXXXXXXX No corresponding provision

Provision	OCC	Fed	FDIC	FHLBB	NCUA
General Provisions					
General scope of regulations	XXXXXXX XXXXXXX	XXXXXXX XXXXXXX	XXXXXXX XXXXXXX	XXXXXXX XXXXXXX	747.01[a]
Generally applicable definitions	XXXXXXX XXXXXXX	XXXXXXX XXXXXXX	308.01	XXXXXXX XXXXXXX	XXXXXXX XXXXXXX
Rules of construction	XXXXXXX XXXXXXX	XXXXXXX XXXXXXX	308.02	XXXXXXX XXXXXXX	XXXXXXX XXXXXXX
Formal Hearings: Generally Applicable Rules					
Definitions	19.0	263.2	++++++ ++++++	509.2	XXXXXXX XXXXXXX

Illustration 1 — continued

Provision	OCC	Fed	FDIC	FHLBB	NCUA
Authority	XXXXXXX XXXXXXX	263.1(a)	XXXXXXX XXXXXXX	XXXXXXX XXXXXXX	XXXXXXX XXXXXXX
Purpose	XXXXXXX XXXXXXX	263.1(b)	XXXXXXX XXXXXXX	XXXXXXX XXXXXXX	XXXXXXX XXXXXXX
Scope	19.1	263.1(b)	308.03	509.1	747.101
Commencement: notice and answer	19.2	263.4 263.5	308.05 308.06	509.4 509.5	747.103 747.104
Opportunity for informal settlement	XXXXXXX XXXXXXX	263.5(e)	308.07(1)	509.5a	747.104(e)
Appearance and practice	19.3	263.3	308.04	509.3, pt. 513	747.102
Failure to appear	XXXXXXX XXXXXXX	XXXXXXX XXXXXXX	XXXXXXX XXXXXXX	XXXXXXX XXXXXXX	747.105
Filing and service	19.4	263.16 263.17 263.19	308.19(a) 308.21 308.22(b)	509.17 509.18 509.20(b)	747.116 747.117 747.119(b)
Form and signature of papers	19.5	263.21	308.19(b)	509.22	747.121
Copies	XXXXXXX XXXXXXX	263.18	308.19(c)	509.19	747.118
Time (computation and time limits)	19.6	263.19	308.22	509.20	747.119
Briefs	XXXXXXX XXXXXXX	263.13	308.15	509.13	747.112
Motions	19.7	263.10	308.12	509.10	747.109

Illustration 1 — *continued*

Provision	OCC	Fed	FDIC	FHLBB	NCUA
Subpoenas	19.8	263.7	308.08	509.7	747.107
Depositions	19.9	263.8	308.09 308.10	509.8	747.107(f) -(h)
Rules of evidence	[19.10(d)[b]]	263.9	308.11	509.9	747.108
Conduct of formal hearing	19.10	263.6	308.07	509.6	747.106
Proposed findings and conclusions, recommended decision	19.11	263.11	308.13	509.11	747.110
Exceptions to proposed findings and conclusions or recommended decision	19.12	263.12	308.14	509.12	747.111
Oral argument before regulator[c]	19.13	263.14	308.17	509.14	747.113
Notice of submission to regulator[c]	19.14	XXXXXXX XXXXXXX	308.16	509.15	747.114
Decision of regulator[c]	19.15	263.15	308.18	509.16	747.115
Confidentiality of proceedings or documents	19.16	263.20	308.20	509.21	747.120
Retention of investigative authority	19.17	XXXXXXX XXXXXXX	XXXXXXX XXXXXXX	XXXXXXX XXXXXXX	XXXXXXX XXXXXXX
Cease and Desist Proceedings					
Scope	19.18	////////// //////////	308.32	////////// //////////	747.301
Grounds	XXXXXXX XXXXXXX	XXXXXXX XXXXXXX	308.33	XXXXXXX XXXXXXX	747.302

Illustration 1 — continued

Provision	OCC	Fed	FDIC	FHLBB	NCUA
Notice to state supervisor	XXXXXXX XXXXXXX	XXXXXXX XXXXXXX	308.34	XXXXXXX XXXXXXX	747.101(c)
Notice of charges and answer	19.19	////////// //////////	308.35	////////// //////////	747.303
Notice of hearing	XXXXXXX XXXXXXX	////////// //////////	308.35	////////// //////////	747.303
Consent	XXXXXXX XXXXXXX	XXXXXXX XXXXXXX	308.35	XXXXXXX XXXXXXX	XXXXXXX XXXXXXX
Temporary cease and desist orders	19.20	////////// //////////	308.37	////////// //////////	747.306
Cease and desist orders	19.21	////////// //////////	308.36	////////// //////////	747.304 747.305
Extraterritorial acts of foreign bank or official	XXXXXXX XXXXXXX	XXXXXXX XXXXXXX	308.38	XXXXXXX XXXXXXX	XXXXXXX XXXXXXX
Removals, Suspensions and Prohibitions[d]					
Scope	19.26	////////// //////////	308.39	////////// //////////	747.501
Grounds	XXXXXXX XXXXXXX	XXXXXXX XXXXXXX	308.40 308.44	XXXXXXX XXXXXXX	747.502
Notice of intention and answer	19.27	////////// //////////	308.42	////////// //////////	747.503
Consent	XXXXXXX XXXXXXX	XXXXXXX XXXXXXX	308.42	XXXXXXX XXXXXXX	XXXXXXX XXXXXXX

Illustration 1 — continued

Provision	OCC	Fed	FDIC	FHLBB	NCUA
Suspension or prohibition by notice	19.28	////////// //////////	308.45	////////// //////////	747.505
Notice to state supervisor	XXXXXXX XXXXXXX	XXXXXXX XXXXXXX	308.41	XXXXXXX XXXXXXX	XXXXXXX XXXXXXX
Removal/prohibition by order	19.29	////////// //////////	308.43	////////// //////////	747.504
Remainder of board of institution	XXXXXXX XXXXXXX	XXXXXXX XXXXXXX	XXXXXXX XXXXXXX	XXXXXXX XXXXXXX	747.506
Extraterritorial act of official of foreign bank	XXXXXXX XXXXXXX	XXXXXXX XXXXXXX	308.46	XXXXXXX XXXXXXX	XXXXXXX XXXXXXX
Civil Money Penalties					
Purpose	XXXXXXX XXXXXXX	263.22	XXXXXXX XXXXXXX	XXXXXXX XXXXXXX	XXXXXXX XXXXXXX
Scope	19.22	263.22	308.64	////////// //////////	747.401
Grounds	XXXXXXX XXXXXXX	XXXXXXX XXXXXXX	308.65 308.66 308.67	XXXXXXX XXXXXXX	747.402
Notice of assessment; request for hearing; answer	19.23	263.23 263.26	308.69	////////// //////////	747.404 747.407
Waiver of hearing	XXXXXXX XXXXXXX	XXXXXXX XXXXXXX	308.70	XXXXXXX XXXXXXX	XXXXXXX XXXXXXX
Hearing order	XXXXXXX XXXXXXX	263.27	308.71	////////// //////////	747.408

Illustration 1 — continued

Provision	OCC	Fed	FDIC	FHLBB	NCUA
Opportunity for informal hearing	XXXXXXX XXXXXXX	263.24	XXXXXXX XXXXXXX	XXXXXXX XXXXXXX	XXXXXXX XXXXXXX
Relevant considerations	XXXXXXX XXXXXXX	263.25	308.68	XXXXXXX XXXXXXX	747.403
Notice of hearing	19.24	////////// //////////	308.71	////////// //////////	747.406
Assessment order	19.25	263.28	308.71	////////// //////////	747.408
Payment of penalty	XXXXXXX XXXXXXX	263.29	308.72	XXXXXXX XXXXXXX	747.405

[a] All references are to 12 C.F.R.

[b] OCC "Hearing rules."

[c] *I.e.*, the Comptroller, the Fed Board of Governors, the FDIC Board of Directors, the FHLBB, or the NCUA Board.

[d] Includes only suspensions, removals and prohibitions subject to APA hearing. For rules concerning summary suspension/removal with respect to criminal charges, *see* 12 C.F.R. §§ 19.30-19.33 (OCC), §§ 263.30-263.34 (Fed), §§ 308.55-308.63 (FDIC), §§ 747.601-747.611 (NCUA); *id.* part 509a (FHLBB).

A. OCC Regulations

Proceedings in any formal hearing are commenced by a notice served upon the party[195] or parties afforded the formal hearing.[196] The notice, like a com-

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195. For purposes of these regulations, the term "party" is defined to mean:
a bank or person named as a party in any notice which commences proceedings, or any person who is admitted as a party or who has filed a written request and is entitled as of right to be a party. The Comptroller's interested division shall be deemed to be a party. . . .
12 C.F.R. § 19.0(c).

In this context, "bank" is defined to mean "a national bank, District [of Columbia] bank, or a foreign bank operating at a Federal branch or agency." *Id.* § 19.0(a). The "interested division" is defined to mean "those staff members who are engaged in investigative or prosecutorial functions in connection with a [12 C.F.R.] Part 19 proceeding." *Id.* § 19.0(b). On the procedural rules applicable to formal investigations, *see id.* §§ 19.42-19.46.

196. *Id.* § 19.2(a). This rule is a procedural requirement generally applicable to all OCC formal hearings. *See id.* § 19.1 (scope of generally applicable procedural rules). However, the generally applicable procedural rules do not apply to (*i*) informal hearings with respect to removal where a crime is charged or proven (*id.* §§ 19.30-19.33); (*ii*) exemption hearings under section 12(h) of the Securities Exchange Act of 1934, 15 U.S.C. § 78*l*(h) (12 C.F.R. §§ 19.37-19.41); (*iii*) informal hearings with respect to corporate activities applications (*id.* § 5.11); or (*iv*) any other informal hearing that might be ordered by the Comptroller. *Id.* § 19.1.

Depending on the particular type of formal enforcement action, the "notice" itself may be (*i*) a notice of charges, in a cease and desist proceeding (*id.* § 19.19); (*ii*) a notice of assessment, in a civil money penalty proceeding (*id.* § 19.23); or (*iii*) a notice of intention to remove, in a removal proceeding (*id.* § 19.27). *Id.* § 19.2(a).

It should be noted that the bank regulators do not generally follow the administrative enforcement practice of the Securities and Exchange Commission ("SEC"), *see* Sec. Ex. Act Rel. No. 9796, [1972-1973 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 97,010 (September 27, 1972), of providing an enforcement target with an opportunity to make a formal written presentation to the SEC at the time the SEC staff recommends injunctive action. *See, e.g.*, Conversation with Ronald Glancz, Assistant General Counsel (Open Bank & Corporate Litigation), FDIC (November 10, 1987) (Wells submission procedure not followed by FDIC). *But cf.* 12 C.F.R. § 263.24 (rules of Fed give opportunity for "informal proceeding" in civil money penalty cases). The advisory Wells Committee had recommended to the SEC that this practice be made mandatory in all cases by formal rule. *Report of the Advisory Committee on Enforcement Policies and Practices* (June 1, 1972), *summarized in* [1972-1973 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 79,266 (June 29, 1972). The SEC has not adopted that recommendation. R.W. JENNINGS & H. MARSH, SECURITIES REGULATION 1528 (6th ed. 1987). *See generally* SEC v. National Student Marketing Corp., 538 F.2d 404, 407 (D.C. Cir. 1976) (effect of internal SEC rule), *cert. denied*, 429 U.S. 1073 (1977).

The utility of such a procedure for bank enforcement actions, which tend to be purely informal, confidential and administrative, is doubtful. Arising typically out of the examination and supervision context, the process of bank enforcement provides many informal opportunities for exchanges of views throughout. *See, e.g.*, OCC, *The Director's Book: The Role of a National Bank Director* 70-71 (1987) (OCC procedure). Indeed, before anything as formal as an administrative enforcement action were decided upon, a bank and its directors would generally be given an opportunity to meet with regulatory personnel and discuss alternatives. *See, e.g., id.* at 71.

Accordingly, the author does not make any recommendation in his conclusions to this article with respect to the adoption of a practice analogous to the SEC Wells submission. It is the author's view that introduction of such a practice would be of limited utility and might well disturb the balance of the overall context of bank regulatory enforcement, which counterpoises the need for swift, flexible regulatory responses, ideally taken at a very early stage, against the interests of banks and their insiders in due process in those relatively few cases where an accommodation cannot be reached. In such cases, it should be noted, the next step is a confidential APA hearing, at which time the views of the bank or other target would be fully aired in any event, and not limited to a written

plaint, includes allegations of fact and law pertinent to the particular type of formal enforcement proceeding being undertaken.[197] However, the regulations indicate that "[t]he matters of fact and law alleged in a notice may be amended by the Comptroller at any stage of the proceedings, and such amended notice *may* require an answer from the party or parties served and *may* set a new hearing date."[198] The rules do not require any motion for leave to amend in this regard, nor do they on their own terms specify the limits of this authority or the scope of the Comptroller's discretion in this regard.[199]

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submission. Nevertheless, it should be noted, the ACUS Special Committee on Financial Services did approve a recommendation that a Wells-type procedure be considered by the regulators. Special Committee on Financial Services, Minutes of Meeting of November 20, 1987. The ACUS approved at its plenary session in December 1987 a softer version of this committee recommendation, calling for a "precomplaint notice" procedure in the following terms:

> The agencies should explore, in their circumstances, the utility of establishing a formal or informal procedure to allow targets of investigations an opportunity to file a submission with the appropriate agency official before official action is taken to initiate an enforcement proceeding.

52 Fed. Reg. 49,141, 49,152 (1987) (to be codified at 1 C.F.R. § 305.87-12).

197. *See* 12 CFR §§ 19.19 (specify violations or practices being complained of), 19.23 (statement of facts constituting alleged violation), 19.27 (statement of grounds for removal or prohibition). *Cf. id.* § 19.2(a) (notice and amended notice).

The notice will also specify the hearing date. In the case of cease and desist proceedings, this generally must be a date 30 to 60 days after service of the notice. *Id.* § 19.19. The notice of charges is also the stage at which a temporary cease and desist order, if any, would likely come into play. *See id.* § 19.20 (violation or practice specified in notice likely to cause insolvency or substantial dissipation of assets or earnings, weaken condition of bank, or prejudice interest of depositors). The temporary cease and desist order, like a temporary restraining order, is intended to maintain the situation in dispute "prior to completion of administrative proceedings." *Id.* However, the temporary cease and desist order is issued not pursuant to a hearing, but on the Comptroller's own determination, and it is effective upon service. *Id.* It remains effective and enforceable "pending the completion of the administrative proceedings and until the Comptroller dismisses the charges, or if a cease-and desist order is issued . . . , until the effective date of any such order." *Id.*

In the civil money penalty context, two notices are contemplated. The notice of assessment includes the alleged violation and the amount being assessed. *Id.* § 19.23. The party being assessed has ten days from service to request a hearing. *Id.* If no hearing is requested within the requisite period, the assessment order becomes a final and unappealable order. *Id.* If a hearing is requested, a separate notice of hearing is issued which specifies a date at least thirty days after the issuance of the notice. *Id.* § 19.24.

In the suspension and removal context, the notice of intention to remove from office, or to prohibit the individual from participation in the affairs of a bank, generally must fix a time and place for the hearing, within a period of 30 to 60 days after service. *Id.* § 19.27. As with temporary cease and desist orders, in the removal context the Comptroller may also issue a notice suspending or prohibiting participation by an individual pending administrative removal proceedings. *Id.* § 19.28. *See also id.* § 19.26 (scope of removal procedures includes suspension by notice). This suspension or prohibition by notice is effective upon service and generally remains in effect "until the charges are dismissed and the administrative proceedings are completed, or until the effective date of any final order of removal or prohibition." *Id.* § 19.28.

198. *Id.* § 19.2(a) (emphasis added).

199. The rules do provide that an answer to a subsequent notice containing amended allegations generally must be filed within twenty days of service of the amended notice. *Id.* § 19.2(b).

In the absence of consent to the order by the party served with a notice,[200] the party generally must file[201] an answer within twenty days[202] after service[203] of the notice.[204] The answer must specifically admit or deny each allegation of the notice[205] and must "concisely state any defenses."[206]

The party has the right to be represented in the proceedings by an attorney[207] or other duly authorized representative.[208] Attorneys and other representatives are required to file a notice of appearance[209] and are generally subject to the discipline of the Comptroller or ALJ in the course of the proceeding.[210]

As a practical matter, much of the practice in formal procedures is essentially motion practice,[211] and as a result the procedural provisions with respect to motions are of particular importance.[212] In this regard, the rules are rather

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200. *See infra* note 485 and accompanying text for an analysis of empirical data, although consent, particularly in the cease and desist area, has been the norm.

201. *See* 12 C.F.R. § 19.4(a) for the formal requirements of filing. On the formal requirements with respect to the form and requisite signature of filings, *see id.* § 19.5.

202. *See id.* § 19.6(a) for the rules for calculation of time in this regard. The ALJ has the authority to extend time limits or approve stipulations of the parties changing the time limits. *Id.* § 19.6(b). Both before the ALJ is appointed and after the ALJ's recommended decision has been filed, the Comptroller may exercise authority to grant extensions of time. *Id.*

203. *Id.* § 19.4(b)-(c) (formal requirements of service and proof of service).

204. *Id.* § 19.2(b). Failure to file a timely answer constitutes a waiver of the right to appear and contest the allegations of the notice. *Id.* § 19.2(d). Under these circumstances, the ALJ would be authorized to find the facts as alleged and to file a recommended decision. *Id.* However, the rules also provide that either the Comptroller or the ALJ may for good cause shown permit the filing of a delayed answer. *Id.*

Cf. id. § 19.19 (notice of charges and answer in cease and desist proceedings), which provides in pertinent part as follows: "Any party . . . who does not appear personally or by a duly authorized representative shall be deemed to have consented to the issuance of a cease-and-desist order." *Id.* An identical rule applies in the civil money penalty context, *id.* § 19.24, and removal context. *Id.* § 19.27.

205. *Id.* § 19.2(c). Any allegation which is not specifically denied in the answer is deemed to be admitted. *Id.*

206. *Id.* The rules do not specifically indicate what the effect would be of a failure to state defenses in the answer as required by this provision.

207. *Id.* § 19.3(a). *See id.* § 19.3(b) (limitations on multiple representation of parties).

208. *Id.* § 19.3(a), which provides in pertinent part:

> Any . . . person [other than an authorized attorney who is a member in good standing of the bar] desiring to act in a representative capacity may be required to file a power of attorney showing authority to act in such capacity and to show to the satisfaction of the Comptroller the possession of requisite qualifications.

Id.

209. *See id.*

210. *See id.* § 19.3(c).

211. Interview with Richard V. Fitzgerald, Chief Counsel, OCC, April 17, 1987. *Cf.* Interview with Robert M. Fenner, General Counsel, NCUA, June 11, 1987 (similar experience at NCUA). On a related issue, the Comptroller's rules specifically provide for and encourage the practice of prehearing conferences and memoranda, intended to expedite the proceedings. *See* 12 C.F.R. § 19.10(b) (use of prehearing conferences and memoranda to expedite proceedings). Any agreement reached among the parties as a result becomes part of the record and is generally binding on the parties. *Id.*

212. The ALJ, however, does not have the authority under the rules to decide a motion to dismiss or any other motion "which would result in a final determination of the merits of the proceedings." 12 C.F.R. § 19.10.

sparse. Except when made during a hearing session, applications or requests for an order or ruling must be made by written motion supported by a memorandum concisely stating the grounds of the motion.[213] Generally within five days of service of the motion,[214] any party to the proceedings may file a memorandum in opposition.[215] Oral arguments are not provided for under the rules, except as granted by the Comptroller or the ALJ.[216] All such orders and rulings on motions become part of the record.[217] Interlocutory review by the Comptroller of an ALJ ruling is possible, but only on the ALJ's certification on a party's request and showing of good cause.[218]

The ALJ has the authority to issue subpoenas, on written application of a party and a showing of "general relevance and reasonable scope of the testimony or other evidence sought."[219] Conversely, the ALJ may make a determination that the requested subpoena may be unreasonable, oppressive, excessive in scope, or unduly burdensome,[220] in which case the application may be denied or granted on conditions "as fairness requires."[221]

Aside from general provisions for depositions,[222] the rules do not address the specific questions of the scope of or procedures for discovery. Furthermore, while the rules do speak to general questions of evidence,[223] they do not provide any guidance as to applicable rules of evidence, or, for that matter, as to specific rules of procedure in connection with the conduct of formal hearings.[224] The absence of such specific guidance clearly results in the potential for inconsistent practice from case to case on specific procedural and evidentiary issues.[225]

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213. *Id.* § 19.7(a).

214. *See supra* note 204 on service of the motion.

215. 12 C.F.R. § 19.7(b). The movant does not have a right of reply, except as permitted by the ruling authority (*e.g.*, the Comptroller or the ALJ, *per id.* § 19.7(c)). *See id.* § 19.7(b).

216. *Id.* § 19.7(b).

217. *Id.* § 19.7(d). *Cf. id.* §§ 19.4(a) (filings to commence proceedings), 19.10(e) (transcript of formal hearing).

218. *Id.* § 19.7(d).

219. *Id.* § 19.8(a). During hearing sessions, application for a subpoena may be made orally on the record. *Id. See id.* § 19.8(c)-(d) (service of subpoenas and attendance of witnesses). *See also id.* § 19.8(b) (motions to quash subpoena).

220. *Id.* § 19.8(a). The rules provide that, in reaching this determination, the ALJ has the discretionary authority to "inquire of the other parties [to the proceeding] whether they will concede the facts sought to be proved. Such inquiry shall not disclose the identity of the person sought to be subpoenaed except with permission of the party requesting the subpoena." *Id.* In contrast, the procedures for application to take a deposition and for subpoenas in connection therewith provide for service of the application on the other parties and notice of the issuance of such a subpoena to them. *Id.* § 19.9(a)-(b). The procedural requirements for an application and notice may be waived by agreement among the parties. *Id.* § 19.9(c).

221. *Id.* § 19.8(a).

222. *See id.* § 19.9(d)-(e) (procedural rules for depositions).

223. *See id.* §§ 19.9(e) (introduction of depositions as evidence), 19.10(d) (hearing rules provide for exclusion of irrelevant or unduly repetitious evidence and for objections thereto).

224. *But cf. id.* § 19.10(d) (general hearing rules regarding type of evidence to be used, means of objections thereto, and type of arguments).

225. This potential problem may be heightened by the fact that ALJs presiding over formal hearings are drawn from various other agencies and may have differing perspectives or experience.

At the conclusion of a formal hearing, however conducted, the official reporter is required to certify the transcript of the hearing.[226] The transcript, together with all exhibits received in evidence, is then filed,[227] with copies furnished to the ALJ and the interested OCC division.[228] Within thirty days of this filing, any party to the proceedings is permitted to file proposed findings of fact and conclusions of law.[229] Within thirty days of the expiration of this time period, the ALJ is required to file a recommended decision and findings of fact and conclusions of law.[230] Copies of this filing are required to be served promptly on the parties to the proceedings.[231]

Within fifteen days of service of the copy of the filing, a party may file exceptions to the recommended decision, findings and conclusions, or to any failure to adopt a proposed finding or conclusion.[232] Within this fifteen-day period, at the written request of any party, or upon his own initiative, the Comptroller may order and hear oral argument on the recommended decision, findings and conclusions.[233]

Thereafter the case is submitted to the Comptroller for final decision, and the parties are so notified.[234] Copies of the Comptroller's decision and order in the case must be served upon the parties.[235]

In the cease and desist context, the Comptroller may issue and serve upon a bank or individual an order to cease and desist a violation or practice, pursuant to either consent of the parties or the Comptroller's appropriate findings on the record filed by the ALJ.[236] The order is effective thirty days after service, except in the case of consent orders, which are effective as of whatever time specified in

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See Interview with Mr. Fitzgerald, *supra* note 211; Interview with Mr. Fenner, *supra* note 211; Interview with Douglas Jones, Office of the General Counsel, FDIC, May 27, 1987. *But cf. infra* notes 519-22 and accompanying text for a discussion of current OPM loan program with respect to ALJs. The regulators are not unaware of the shortcomings of the current procedural rules for formal hearings. The OCC and the FDIC have already begun an internal review of these rules, with a view to their substantial revision. Interview with Richard V. Fitzgerald, Chief Counsel, OCC, June 10, 1987; Interview with Mr. Jones, *supra*.

226. 12 C.F.R. § 19.10(e).

227. *See supra* note 201. Parties to the proceedings are required to be notified of this filing. 12 C.F.R. § 19.10(e).

228. 12 C.F.R. § 19.10(e). Copies are made available to the other party or parties to the proceeding upon payment of the cost thereof. *Id.*

229. *Id.* § 19.11(a).

230. *Id.* § 19.11(b). Additional time for this filing may be permitted by the Comptroller on a showing of good cause. *Id.*

231. *Id.*

232. *Id.* § 19.12.

233. *Id.* § 19.13.

234. *Id.* § 19.14. In considering the case and reaching a decision, the Comptroller may be advised and assisted by "[s]taff who have not engaged in the performance of investigative or prosecuting functions in the case." *Id.* § 19.15.

235. *Id.* § 19.15. In the cease and desist context, issuance of the Comptroller's final order will affect the continuing effectiveness of any temporary cease and desist order issued in the course of the proceedings. *See supra* note 197.

236. *Id.* § 19.21.

the order itself.[237] The orders tend to be crafted quite specifically around the particular circumstances of the violations or unsafe and unsound practices alleged and found. In general, the orders tend either to mandate specified corrective action on the part of the bank or individuals or to prohibit the continuation of specified acts or both.[238]

In the civil money penalty context, the Comptroller may issue and serve upon a bank or individual an order of assessment of penalty, pursuant to either consent of the parties or the Comptroller's appropriate findings on the record filed by the ALJ.[239] The order is effective immediately upon service, except as otherwise specified in the order itself.[240]

In the context of removal proceedings with respect to national bank directors, officers and other individuals participating in a national bank's affairs, the findings and conclusions on the record are certified by the Comptroller to the Fed for its determination of whether any final order of removal or prohibition should be issued.[241] The Fed may issue such an order, either upon the consent of the parties or its finding that the charges have been established.[242] The order is effective thirty days after service, except in the case of consent orders, which are effective as of whatever time specified in the order itself.[243]

These procedural rules were promulgated primarily on the rulemaking authority granted under FDIA section 8(n).[244] The OCC has also promulgated regulations[245] identifying certain types of activities that it deems to be unsafe or unsound practices. In promulgating the regulations, the Comptroller specifically relied upon, *inter alia*, the power to make rules and regulations conferred upon the agencies by FDIA section 8(n).[246]

In *Independent Bankers Association v. Heimann*,[247] the OCC regulations

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237. *Id.*

238. *See id.* § 19.21, which provides in pertinent part:

> Such order may . . . require the bank or its directors, officers, employees, agents, and other persons participating in the conduct of the affairs of the bank to cease and desist from [any violation or practice] and, further, to take affirmative action to correct the conditions resulting from any such violation or practice.

Id.

239. *Id.* § 19.25.

240. *Id.*

241. *Id.* § 19.26.

242. *Id.* § 19.29.

243. *Id.*

244. *See* 44 Fed. Reg. 19,376 (1979). *See also* 12 U.S.C. § 1818(n):

> In the course of or in connection with any proceeding under [12 U.S.C. § 1818], . . . the agency conducting the proceeding . . . is empowered to make rules and regulations with respect to any such proceedings. . . .

245. *See* 42 Fed. Reg. 48,518 (1977), *as amended*, 12 C.F.R. part 2 (1987) (credit life insurance regulations). For other examples of this use of interpretive rulemaking authority, *see* 12 C.F.R. § 7.8000(b) (safety and soundness of service charges); *id.* part 337 (FDIC; unsafe and unsound banking practices); *id.* § 563g.10 (FHLBB; unsafe or unsound practices in connection with securities offerings). *Cf. id.* § 250.103(d)(2) (Fed; proposed dividends, danger to bank's capital structure).

246. *See* 42 Fed. Reg. at 48,523-24.

247. 613 F.2d 1164 (D.C. Cir. 1979), *cert. denied*, 449 U.S. 823 (1980).

concerning credit life insurance sold to borrowers of national banks were challenged by the Bankers Association as exceeding the Comptroller's authority in that regard. In effect, the problem involved the agency's creation of substantive rules of conduct based in part upon statutory authority which might reasonably be read to be concerned only with procedural rules.[248]

The Comptroller argued that receipt by bank insiders of personal commissions from credit life insurance sales, which was prohibited by the regulations,[249] could stimulate overselling and result in an unsound form of self-dealing.[250] The court noted that, under the rulemaking authority, the Comptroller was empowered to make rules and regulations with respect to any proceeding initiated pursuant to FDIA section 8.[251] Preferring to read this grant of authority broadly, the court expanded on this theme as follows:

> There is little room for doubt, however, that the Comptroller is proceeding as Congress contemplated. National banks are perhaps as meticulously regulated as any industry. Every aspect of their affairs is scrutinized to assure financial soundness and ethical practice. The Comptroller's statutory duties require the closest monitoring and continuous supervision of these institutions. Thus, the Comptroller's discretionary authority to define and eliminate "unsafe and unsound" conduct is to be liberally construed.[252]

First National Bank of Lamarque v. Smith[253] involved a similar challenge to previous informal directives of the Comptroller restricting credit life insurance activities.[254] In upholding the Comptroller's authority to issue such a directive, the Fifth Circuit accepted the proposition that "the payment to and retention by loan officers of commissions derived from the sale of credit life insurance involves an inherent conflict of interest."[255] In the court's view, the directives "represented an attempt . . . to minimize conflicts of interest, self-dealing, and unsafe and unsound banking practices among national banks"[256] and were therefore within the legitimate authority of the Comptroller under FDIA section 8.

The consequences of this liberal construction of the section 8(n) rulemaking authority are noteworthy. In a sense, the determination of the unsafe and unsound quality of an identified practice is removed from the context of an administrative proceeding against a particular bank for a particular activity. The narrow question in any subsequent cease and desist proceeding becomes whether or not the bank or an insider "is violating or has violated, or . . . is about to violate, a . . . rule or regulation,"[257] rather than the underlying question of

248. *See supra* note 244 for the statutory authority.
249. *See* 12 C.F.R. §§ 2.2(b)(1), 2.4(a).
250. *Independent Bankers Ass'n*, 613 F.2d at 1168.
251. *Id.* at 1169.
252. *Id.* at 1168-69.
253. 610 F.2d 1258 (5th Cir. 1980).
254. *Id.* at 1260-61 & nn.3, 4.
255. *Id.* at 1265.
256. *Id.*
257. 12 U.S.C. § 1818(b)(1).

whether or not the bank or an insider "is engaging or has engaged . . . or is about to engage, in an unsafe or unsound practice."[258] It may be argued that cases like *Independent Bankers Association*, in answering the broad question of statutory authority, resolve the underlying question generically for all such cease and desist proceedings.[259]

B. Fed Regulations

The Fed's procedural rules are based upon a broad range of statutory authority[260] and a diverse assortment of adjudicatory contexts.[261] For present purposes, the focus is upon the Fed's implementation of the enforcement authorities granted by FDIA section 8. While many of the Fed's rules in this regard are relatively more elaborate than those of the Comptroller, overall they are more abbreviated in structure.

Proceedings in an APA hearing are initiated by issuance of a notice to the parties.[262] Generally, an answer to the notice is required to be filed within twenty days of service.[263] Rules similar to those of the OCC regulations apply as to required admissions and denials in the answer.[264] The Fed rules are relatively more specific and detailed than the OCC regulations as to such matters as the conduct of the hearings and the authority of the presiding officer,[265] and prehearing practice.[266] However, the Fed rules are nevertheless rather unspecific on rules of discovery.[267]

In the civil money penalty context, proceedings are initiated by the issuance of a notice of assessment.[268] Among other things, the notice must indicate the

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258. *Id.*

259. *See supra* notes 245-52 and accompanying text for a discussion of *Independent Bankers Ass'n*.

260. *See* 12 C.F.R. §§ 262.4, 263.1(a). In addition to the FDIA, 12 U.S.C. §§ 1817(j), 1818(n), authority in this regard includes (*i*) the Federal Reserve Act, *id.* §§ 248(i), 504, 505; (*ii*) the Bank Holding Company Act of 1956, *as amended*, *id.* §§ 1844(b), 1847(b); (*iii*) the anti-tying provisions, *id.* § 1972(2)(F); (*iv*) the International Banking Act of 1978, *id.* § 3108; and, (*v*) the Securities Exchange Act of 1934, *as amended*, 15 U.S.C. § 78o-4.

261. *See* 12 C.F.R. § 263.1(b) (scope of procedural rules). In addition to the adjudicatory context of FDIA section 8, 12 U.S.C. § 1818, these include: (*i*) suspension of member banks from use of Fed credit facilities, *per id.* § 301; (*ii*) termination of Fed membership, *per id.* § 327; (*iii*) change in control disapprovals, *per id.* § 1817(j); (*iv*) merger applications, *per id.* § 1828(c); (*v*) holding company adjudications, *per id.* §§ 1841-1843; (*vi*) holding company divestiture orders, *per id.* § 1844(e); (*vii*) antitrust cease and desist proceedings, *per* 15 U.S.C. § 21; (*viii*) municipal securities dealer sanctions, *per id.* § 78o-4; and, (*ix*) civil money penalty assessments under a variety of statutory authorities. 12 C.F.R. § 263.1(b)(10).

262. 12 C.F.R. § 263.4.

263. *Id.* § 263.5(a).

264. *Id.* § 263.5(b)-(d). *Cf. supra* notes 200-06 and accompanying text for a discussion of OCC procedures with respect to answers.

265. *See* 12 C.F.R. § 263.6(a)-(b). *See also id.* § 263.6(g), (h) (further evidence; ex parte communications).

266. *Id.* §§ 263.5(e), 263.6(c). *See id.* §§ 263.8 (depositions), 263.10 (motions).

267. *But cf. id.* § 263(c)(4) (prehearing conference; disclosure of witnesses); *id.* § 263.8 (depositions).

268. *Id.* § 263.23. The Fed rules recite the statutory considerations to be taken into account in

time limit within which a request for a formal hearing must be made.[269] If a request is made in a timely fashion, an order for a hearing, to commence within thirty days of the date of the order, is issued.[270]

Upon consent to the notice of assessment[271] or appropriate finding by the Fed on a hearing record that the grounds of the notice have been established, the Fed may issue an order of assessment.[272] This order is generally effective upon issuance.[273]

C. FDIC Regulations

As with the Fed regulations, the FDIC general rules for APA hearings cover a wide range of statutory authorities.[274] For present purposes, the focus is upon the FDIC's implementation of the enforcement authorities granted by FDIA section 8.

In this regard, the FDIC rules are essentially similar to those of the Fed.[275] The rules do give relatively specific guidance as to the conduct of hearings[276] and pre-hearing practice.[277] Nevertheless, the rules are characteristically thin on such matters as rules of evidence and discovery.[278]

D. FHLBB Regulations

Formal adjudications, whether arising under the authority of section 5(d) of the HOLA[279] or section 407 of the NHA,[280] are governed by a unified, but rather abbreviated, set of procedural provisions promulgated by the FHLBB.[281]

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determining the amount of the penalty. *See id.* § 263.25. *Cf. supra* note 184 and accompanying text for statutory factors. The Fed rules also provide for an opportunity for an informal proceeding, prior to the issuance of the formal notice. *See* 12 C.F.R. § 263.24.

269. *Id.* § 263.23(f). Failure to request a hearing in a timely fashion constitutes a waiver, "and the notice of assessment shall constitute a final and unappealable assessment order." *Id.* § 263.26.

270. *Id.* § 263.27.

271. Consent in this context would include constructive consent from failure of the assessed party to appear at a hearing. *Id.* § 263.28(a).

272. *Id.*

273. *Id.* § 263.28(b). However, the notice of assessment will normally designate a date for payment of the penalty 60 days from the issuance of the notice. *Id.* § 263.29(a).

274. *See id.* § 308.03. *See also id.* §§ 308.23-308.31 (termination of deposit insurance), 308.47-308.54 (special examinations), 308.73-308.77 (change in control; disapprovals), 308.78-308.83 (change in control; civil penalties), 308.84-308.89 (municipal securities dealer sanctions), 308.90-308.95 (exemption proceedings, *per* 15 U.S.C. § 78*l*(h)).

275. *See generally id.* §§ 308.04-308.22 (generally applicable procedural rules), 308.32-308.38 (cease and desist proceedings), 308.39-308.46 (suspension and removal), 308.55-308.63 (suspension and removal; felony charges), 308.64-308.72 (civil money penalties).

276. *Id.* § 308.07(b).

277. *See id.* § 308.07(e) (prehearing conferences). *Cf. id.* §§ 308.08 (subpoenas), 308.09 (depositions), 308.12 (motions).

278. *But cf. id.* §§ 308.07(b)(10) (hearing procedure), 308.09 (depositions), 308.11 (rules of evidence).

279. 12 U.S.C. § 1464(d).

280. *Id.* § 1730.

281. *See* 12 C.F.R. part 509. However, informal adjudications in connection with the removal, suspension or prohibition of a director, officer or other person participating in an institution's affairs,

As with the Fed and FDIC regulations, the FHLBB's general rules for formal hearings cover a wide range of statutory authorities.[282] For present purposes, the focus is upon the FHLBB's implementation of the enforcement authorities granted by HOLA section 5(d) or NHA section 407.

In this regard, the FHLBB rules are essentially similar to those of the banking agencies.[283] Accordingly, they give relatively specific guidance as to the conduct of hearings[284] and pre-hearing practice.[285] However, as with those of the other agencies, the FHLBB rules are relatively unspecific on such matters as rules of evidence and discovery.

E. NCUA Regulations

As with the Fed and FDIC regulations, the NCUA rules for APA hearings cover a wide range of statutory authorities.[286] For present purposes, the focus is upon the NCUA's implementation of the formal enforcement authorities granted by FCUA section 206.[287]

In this regard, the NCUA rules are essentially similar to those of the FDIC, rather than following the relatively more abbreviated pattern of those of the Fed or the FHLBB. Thus, the rules give relatively specific guidance as to the conduct of hearings[288] and prehearing practice.[289] There are also provisions for notice to interested state authorities with respect to state-chartered credit unions that are to be the subject of formal enforcement actions, to allow for corrective action by the state authorities before the institution of proceedings by the NCUA.[290]

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where a crime is charged or proven, *per* 12 U.S.C. §§ 1464(d)(5), 1730(h), are subject to the procedures of a separate part of the FHLBB regulations. *See* 12 C.F.R. part 509a.

282. *See* 12 C.F.R. § 509.1. Aside from cease and desist, suspension and removal and related civil money penalty authorities, the statutory authorities in this regard include: (*i*) removal of an FHLB-member institution from membership, *per* 12 U.S.C. § 1426(i); (*ii*) depriving any nonmember borrower of FHLB advances, *per id.*; (*iii*) termination of deposit insurance, *per id.* § 1730(b) (*iv*) controlling influence determinations, *per id.* § 1730(a)(2)(D); (*v*) change in control determinations, *per id.* § 1730(q)(4); (*vi*) holding company termination proceedings, *per id.* § 1730a(h)(5)(A); and, (*vii*) holding company civil penalty, *per id.* § 1730a(j)(4)(C).

283. *See generally* 12 C.F.R. §§ 509.2-509.22 (FHLBB procedural provisions).

284. *See id.* § 509.6.

285. *See id.* §§ 509.5a (informal settlements), 509.6(b) (prehearing conferences), 509.8 (depositions), 509.10 (motions).

286. *See id.* § 747.101(a) (scope of procedural rules). Aside from cease and desist, suspension and removal and related civil money penalty authorities granted under FCUA section 206, 12 U.S.C. § 1786, the statutory authorities in this regard include: (*i*) charter suspension or revocation, *per id.* § 1766; (*ii*) termination of deposit insurance, *per id.* § 1786(b); and, (*iii*) termination of membership in the NCUA Central Liquidity Facility, *per id.* § 1795c(e)(3).

287. 12 U.S.C. § 1786.

288. 12 C.F.R. § 747.106.

289. *See id.* §§ 747.104(e) (informal settlements), 747.106(c) (prehearing conferences), 747.107(e)-(h) (depositions), 747.109 (motions).

290. *Id.* § 747.101(c). The corrective action must be taken by the state authorities "within such time as the [NCUA] Board deems appropriate in light of the circumstances of the case" as specified in the notice to the state authorities. *Id.* In addition, the regulations expressly provide that this

IV. JUDICIAL INTERPRETATIONS

While it is clear that the federal judiciary is cognizant of the expertise of the federal regulators,[291] in the area of bank regulatory enforcement the courts appear to have taken their review role quite seriously.[292] In this regard, the statutory framework authorizing bank regulatory enforcement actions provides an integral, if limited, role for judicial review in the enforcement area.[293]

This section first considers the standard of judicial review applicable to formal enforcement actions.[294] The section then examines the results of judicial decisions concerning a range of interpretive issues raised by these enforcement actions.[295]

A. Standard of Judicial Review

In *First National Bank of Eden v. Department of Treasury*,[296] the Eighth Circuit relied upon the APA in determining that its review of the Comptroller's findings with respect to a cease and desist order was limited to the question of whether or not the findings were supported by substantial evidence on the record as a whole.[297] Moreover, having determined that there was such supporting evidence,[298] the court took the position that, in light of the Comptroller's expertise and discretion in this area, his decision as to the appropriate corrective action to be taken was not to be disturbed unless it was shown to be arbitrary or capricious.[299] The court therefore concluded that the order was a valid exercise of the Comptroller's authority and that no abuse of discretion had occurred.[300]

While the federal regulators have been granted significant authority in the enforcement area and are usually accorded a high degree of judicial deference, the case law indicates that this deference is far from uncritical. *First National Bank of Bellaire v. Comptroller of the Currency*,[301] is illustrative of a challenge to an OCC determination that the bank's capital position involved unsafe and

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requirement is not available to the credit union or individual subject to a notice or order as a ground for attacking the validity of the notice or order. *Id.*

291. For a compelling discussion of the extent to which the judiciary has deferred to the regulators in light of this cognizance, specifically in the chartering area, *see* Scott, *In Quest of Reason: Licensing Decisions of the Federal Banking Agencies*, 42 U. CHI. L. REV. 235, 268 (1975).

292. *See infra* notes 301-28 and accompanying text for a discussion of judicial review of the regulators.

293. *See supra* note 149 and accompanying text for a discussion of the effects of judicial review.

294. *See infra* notes 296-339 and accompanying text.

295. *See infra* notes 340-483 and accompanying text.

296. 568 F.2d 610 (8th Cir. 1978).

297. *Id.* at 611. *See also* Bank of Dixie v. FDIC, 766 F.2d 175 (5th Cir. 1985) (FDIC determination of unsafe and unsound practices supported by substantial evidence).

298. 568 F.2d at 611. *Cf.* Larimore v. Conover, 775 F.2d 890, 895 (7th Cir. 1985), *rev'd en banc sub nom.* Larimore v. Comptroller of the Currency, 789 F.2d 1244 (7th Cir. 1986) (lack of statutory authority).

299. 568 F.2d at 611-12. *See* Dakota Nat'l Bank & Trust Co. v. First Nat'l Bank & Trust Co., 554 F.2d 345, 350-51 (8th Cir.) (standard of review; question of law), *cert. denied*, 434 U.S. 877 (1977); *Larimore*, 775 F.2d at 895-96 (standards of review; findings of fact and choice of remedies).

300. *First Nat'l Bank of Eden*, 568 F.2d at 611.

301. 697 F.2d 674 (5th Cir. 1983).

unsound practices. Although acknowledging the wide latitude afforded the Comptroller, the Fifth Circuit held that "[t]he Comptroller must be able to articulate a correlation between the action taken and the reason given for the action."[302] Reasons that are in fact mere rhetoric were not sufficient and indicated arbitrary action.[303] The *Bellaire* court reasoned:

> In reviewing the Comptroller's findings we must not substitute our judgment for that of the Comptroller. This Court must determine if the Comptroller made a reasonable finding, not whether it [*sic*] made a correct finding. The findings are unreasonable if there is no rational connection between the evidence as a whole and the findings.[304]

Addressing the appropriate standard of judicial review, the court explained the two-stage process to be applied in reviewing bank regulatory enforcement action:

> Judicial review of statutory cease and desist orders is a two-part process. First the court must satisfy itself that there is substantial evidence to support the order. Next the court must test the remedy against the arbitrary and capricious standard.[305]

Two decisions by the Eighth Circuit, involving a cease and desist order issued by the FDIC against an insured state nonmember bank, also illustrate the application of the APA in assessing the adequacy of the agency's procedures. The decisions concerned a cease and desist order arising out of violations of the Truth in Lending Act ("TILA")[306] and the Fed's Regulation Z,[307] implementing TILA.

In *Citizens State Bank of Marshfield, Missouri v. FDIC ("Marshfield I")*,[308] the court remanded to the FDIC for further consideration of the Regulation Z matters, after concluding that the FDIC had not sufficiently articulated its reasons and basis for its order.[309] In its second decision, *Marshfield II*,[310] after remand, the court concluded that the FDIC had adequately corrected the deficiencies noted in *Marshfield I*.[311] However, the *Marshfield II* court went on to hold that the order was arbitrary and capricious insofar as it related to conduct that had once constituted a technical violation of TILA, but which had subsequently become lawful under the 1980 amendments to TILA.[312]

In setting aside the cease and desist order, the court reasoned:

> Common sense and fairness dictate that Citizens Bank not be exposed to such liability on the basis of practices, now lawful, which once con-

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302. *Id.* at 680.

303. *Id.*

304. *Id.* at 685 (citations omitted).

305. *Id.* at 686 (*citing* Groos Nat'l Bank v. Comptroller of the Currency, 573 F.2d 889 (5th Cir. 1978) (judicial review of statutory cease and desist order is two-part process)).

306. 15 U.S.C. §§ 1601-1614.

307. 12 C.F.R. part 226 (1982).

308. 718 F.2d 1440 (8th Cir. 1983).

309. *Id.* at 1444.

310. 751 F.2d 209 (8th Cir. 1984).

311. *Id.* at 214.

312. *Id.* at 214-15 & nn.6-8.

> stituted technical violations of legislation that Congress has amended expressly because of its concern with imposing penalties for disclosure errors such as many of those before us.[313]

To similar effect is *Anonymous v. FDIC*,[314] in which the court remanded to the FDIC because of the agency's failure to provide a statement of reasons sufficiently detailed to permit the court to review the FDIC's exercise of its discretion in the administrative proceeding.[315] The FDIC had instituted an action pursuant to section 8(e) of the FDIA[316] to suspend and remove a bank director. In response, the director brought an action, pursuant to section 8(f),[317] seeking a temporary restraining order and a stay of the suspension order.[318]

The *Anonymous* court noted that the FDIC had provided neither its employees nor the courts any guidance as to the use of the agency's suspension and removal powers under section 8(e)(4) of the FDIA.[319] Rejecting the FDIC's argument that the section provides the agency with "unfettered discretion" on the basis of its regulatory expertise,[320] the court emphasized that "[o]ne of the most elementary principles of judicial review of discretionary agency action is that the agency must provide a statement of reasons that is sufficiently detailed to permit a reviewing court to determine whether that discretion was exercised properly."[321]

In *Anonymous*, the evidence considered by the FDIC consisted largely of untested affidavits by the respective parties. Consequently, the court held, the plaintiff director satisfied the traditional criteria for preliminary injunctive relief under the circumstances.[322]

With respect to questions of statutory construction, the Seventh Circuit, sitting *en banc*,[323] has applied the "contrary to law" standard in holding that the Comptroller lacked statutory authority under section 8(b)(1) of the FDIA[324] to impose personal liability on bank directors for losses resulting from approval of loans in excess of statutory lending limits.[325] The appropriate remedy was instead an action under the National Bank Act ("NBA").[326] To this extent, then, there are statutory limits to the broad enforcement powers granted the regulators.

In *Gulf Federal Savings & Loan v. FHLBB*,[327] the Fifth Circuit rejected an

313. *Id.* at 216.
314. 617 F. Supp. 509 (D.D.C. 1985).
315. *Id.* at 513-14.
316. 12 U.S.C. § 1818(e).
317. *Id.* § 1818(f).
318. *Anonymous*, 617 F. Supp. at 511.
319. *Id.* at 513-14.
320. *Id.* at 514.
321. *Id.* (citations omitted).
322. *Id.* at 515.
323. *See* Larimore v. Comptroller of the Currency, 789 F.2d 1244 (7th Cir. 1986).
324. 12 U.S.C. § 1818(b)(1).
325. *See id.* § 84.
326. *Larimore*, 789 F.2d at 1253.
327. 651 F.2d 259 (5th Cir. 1981), *cert. denied*, 458 U.S. 1121 (1982).

FHLBB argument for broad statutory discretion in the enforcement area, in accordance with a "cradle to grave" approach to the regulation of thrift institutions. Rather, the court argued, the statutory formula of "unsafe or unsound" practices was restricted to practices with a reasonably direct effect on a thrift institution's financial soundness.[328]

The jurisdiction of federal district courts to review agency determinations with respect to unsafe and unsound banking practices has been addressed in *Mid America Bancorp. v. Board of Governors*.[329] In 1979 Mid America, a multibank holding company located in Minnesota, filed notice of a stock redemption plan with the Fed. The Fed concluded that the plan would "unduly burden the earnings and capital of Mid America's subsidiary banks and would constitute an unsafe and unsound practice."[330] Mid America amended the plan to comply with the Board's recommendations.[331] Thereafter, however, the majority shareholders of the holding company announced a plan to liquidate it.[332] The Fed instituted both permanent and temporary cease and desist proceedings, as well as civil money penalty proceedings against Mid America.[333] In turn, Mid America sought to enjoin the proceedings in federal district court.[334]

The court recognized that section 8(i) of the FDIA[335] withdrew from the district courts the jurisdiction to enjoin or otherwise review administrative proceedings under section 8.[336] In the court's view, there had been no deviation by the Fed from its statutory authority, and the court therefore lacked jurisdiction to enjoin the cease and desist proceedings.[337] Consequently, all administrative remedies had to be exhausted before resort to the courts.[338] Finally, with respect to the temporary cease and desist order, the court denied injunctive relief, reasoning that the alleged potential harm to the plaintiffs was not irreparable.[339]

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328. *Id.* at 265.

329. 523 F. Supp. 568 (D. Minn. 1980).

330. *Id.* at 570.

331. *Id.* at 571-72.

332. *Id.* at 572.

333. *Id.* at 572-73.

334. *Id.* at 573.

335. 12 U.S.C. § 1818(i)(1) provides:

> The appropriate Federal banking agency may in its discretion apply to the United States district court . . . within the jurisdiction of which the home office of the bank is located, for the enforcement of any effective and outstanding notice or order issued under this section, and such courts shall have jurisdiction and power to order and require compliance herewith; but *except as otherwise provided in this section no court shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement of any notice or order under this section, or to review, modify, suspend, terminate, or set aside any such notice or order.*

Id. (emphasis added).

336. 523 F. Supp. at 575.

337. *Id.* at 577. In addition, the court determined that the notice of assessment of a civil money penalty was within the Fed's authority under the Bank Holding Company Act, 12 U.S.C. § 1847. *See Mid America*, 523 F. Supp. at 577.

338. 523 F. Supp. at 577.

339. *Id.* at 578.

B. Analysis of Judicial Interpretations

1. The concept of "unsafe and unsound" practices

Potentially one of the most effective powers of the "appropriate regulator"[340] is its ability to terminate an activity of a bank that the regulator determines to be an "unsafe or unsound" practice in conducting the business of the bank.[341] The concept of an unsafe or unsound banking practice is therefore one of the key triggering concepts for federal bank supervisory powers. It serves multiple purposes, including: the basis on which a significant number of bank supervisory actions are taken, at least in part;[342] the legal basis on which federal agencies have determined that certain practices are *per se* improper;[343] and, in general, a basis for agency rulemaking.[344]

The concept is one that touches the entire operation of a bank.[345] Consequently, it is difficult to articulate an all-inclusive definition of the activities that are covered by the concept. Nevertheless, courts at both the federal and state level have delineated the meaning of the concept within the context of supervisory actions.

The concept has a pedigree that markedly predates its introduction into section 8(b) of the FDIA. A 1908 California case, *People v. Bank of San Luis Obispo*,[346] is illustrative. There the court held that the term "unsafe" had a broad and expansive meaning, reasoning as follows:

> It is true that the phrase "unsafe . . . to continue to transact business," as used in the act,[347] is broader than the term "insolvent," and that a finding that it is unsafe for a banking corporation to continue business does not necessarily mean that it is insolvent. But the converse of this is not true. The act clearly contemplates that it is unsafe for an insolvent banking corporation to continue business. . . .[348]

Indeed, state courts have often addressed the concept of bank safety and soundness. The majority of these cases have arisen within the context of state banking statutes designed to ensure a sound financial system,[349] and the concept is a familiar one. The recent California case of *Perdue v. Crocker National*

340. *Cf. supra* note 53 (statutory powers of "appropriate regulators").

341. *See, e.g.*, 12 U.S.C. §§ 1464(d)(2)(A) (HOLA provision), 1818(a), (b),(e) (FDIA provisions). *See also supra* note 147 for a discussion of the meaning of the term.

342. *See, e.g., infra* notes 496-98 and accompanying text for a discussion of unsafe or unsound practices that formed the basis for enforcement actions.

343. *See, e.g.*, 12 C.F.R. 563g.10 (FHLBB, unsafe or unsound practices in connection with securities offerings).

344. *See supra* notes 254-59 and accompanying text for a discussion of agency rulemakings.

345. *But cf.* Gulf Fed. Sav. & Loan Ass'n v. FHLBB, 651 F.2d 259 (5th Cir. 1981) (limiting concept to financial soundness), *cert. denied*, 458 U.S. 1121 (1982).

346. 154 Cal. 194, 97 P. 306 (1908).

347. Act of Mar. 24, 1903, ch. 266, § 10, 1903 Cal. Stat. 365, 368, *repealed by* Financial Code of 1951, ch. 364, 1951 Cal. Stat. 829.

348. 154 Cal. at 201, 97 P. at 309.

349. *See, e.g.*, City of Pittsburgh v. Allegheny Valley Bank of Pittsburgh, 488 Pa. 544, 551, 412 A.2d 1366, 1369 (1980) (safe and sound conduct); Ann Arbor Bank and Trust Co. v. R. Francis, 85 Mich. App. 131, 144, 270 N.W.2d 725, 733 (1978) ("destructive and unsound"); Cross County Sav.

Bank,[350] affords an interesting example of the interplay of state and federal regulatory policies. In *Perdue*, the California Supreme Court addressed the validity of the defendant bank's practice of assessing charges for processing checks drawn on commercial checking accounts without sufficient funds. The *Perdue* court held that the bank's customer signature card, authorizing the charges, was a valid contract.[351] Although the court held that plaintiff's claim that the signature card was employed in a deceptive and misleading manner failed to state a cause of action, the depositor was granted leave to amend the complaint.[352]

Within the context of bank safety and soundness, the court also examined the validity of a challenged California law prohibiting unreasonable charges or unconscionable penalties.[353] Significantly, the court concluded that the application of state law to bank service charges was not preempted by a comprehensive federal statutory scheme governing this field.[354] The court rejected the argument of the California Bankers Association as *amicus*, to the effect that the provisions of FDIA section 8(e)[355] created an actual conflict between state and federal law sufficient to preempt the state law.[356] The court reasoned that, if the mere possibility that bank directors might deem compliance with a state law to be an unsound banking practice was sufficient to trigger liability under FDIA section 8(e) (and hence preemption), the nation's dual banking system would disappear for all practical purposes.[357]

Of course, the regulatory term "unsafe or unsound" has long since been codified into federal law, with the result that the contours of the concept are of singular importance to federal supervisory efforts. The various affected federal regulators have often expressed concern over the need to clarify and elaborate upon the concept. So, for example, the FDIC Chairman made the following observations in testimony before the Senate Banking Committee:

> A particular activity not necessarily unsafe or unsound in every instance may be so when considered in light of all relevant facts. Like many other generic terms widely used in the law, such as "fraud," "negligence," "probable cause" or "good faith," the term "unsafe or unsound practices" has a central meaning which can and must be applied to constantly changing factual circumstances. Generally speaking, an unsafe or unsound practice embraces any action or lack of action, which is contrary to generally accepted standards of prudent operation, the possible consequences of which, if continued, would be abnormal risk of loss or damage to an institution, its shareholders, or

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& Loan Ass'n v. Siebert, 93 Misc. 2d 609, 610-11, 403 N.Y.S.2d 864, 865-67 (1978) ("safe and sound conduct;" "unsound and destructive competition").

350. 38 Cal. 3d 913, 702 P.2d 503, 216 Cal. Rptr. 345 (1985), *appeal dismissed*, 475 U.S. 1001 (1986).

351. *Id.* at 922, 702 P.2d at 509-10, 216 Cal. Rptr. at 351.

352. *Id.* at 944, 702 P.2d at 525, 216 Cal. Rptr. at 367.

353. *Id.* at 932, 702 P.2d at 516, 216 Cal. Rptr. at 358.

354. *Id.* at 942, 702 P.2d at 523, 216 Cal. Rptr. at 358.

355. 12 U.S.C. § 1818(e).

356. *Perdue*, 38 Cal. 3d at 933, 702 P.2d at 517, 216 Cal. Rptr. at 359.

357. *Id.* at 942, 702 P.2d at 524, 216 Cal. Rptr. at 366.

the [FDIC] insurance fund.[358]

Similarly, the OCC has taken the position that unsafe or unsound practices may be defined as those which "may be generally viewed as conduct deemed contrary to accepted standards of banking operations which might result in abnormal risk of loss to a banking institution or shareholder."[359] This formulation was cited with approval by the Fifth Circuit in *Groos National Bank v. Comptroller of the Currency*.[360] There the court noted:

> The phrase "unsafe or unsound banking practice" is widely used in the regulatory statutes and in case law, and one of the purposes of the banking acts is clearly to commit the progressive definition and eradication of such practices to the expertise of the appropriate regulatory agencies.[361]

With the relatively increasing use of cease and desist orders, courts have more frequently been called upon to delineate the scope of the term "unsafe or unsound practice." In general, the experience has been favorable to the discretion of the bank regulators. One reason for this may be the comparatively favorable standard of judicial review which the courts have applied in reviewing agency orders.[362]

The courts have been relatively flexible in interpreting the scope of the "unsafe and unsound" enforcement provisions. In *First State Bank of Wayne County v. FDIC*,[363] for example, the Sixth Circuit held that, despite the fact that the bank had improved its loan policy, a cease and desist order was warranted to prevent future abuses.[364] Indeed, the courts have generally recognized that voluntary cessation of a prohibited practice is not a sufficient ground for challenging the issuance of a cease and desist order.[365] In upholding the FDIC's order, the Sixth Circuit adopted the reasoning of the ALJ:

> The facts of this case support the issuance of a cease and desist order. Such an order is an appropriate instrument to deter and prevent future abuses, to correct conditions which have resulted from the unsafe and unsound practices and violations, and to protect the shareholders of the Bank and insure their security in the future. . . . It is also significant to recognize that this is not a case where the Bank voluntarily ceased the complained of practices; rather, the cessation of the activities were directly related to the examination undertaken by the FDIC

358. George LeMaistre, Chairman, FDIC, Testimony before the Senate Committee on the Subject of Overdrafts and Correspondent Banking Practices, CIS, S-241-25 (1977). *Cf. First Nat'l Bank of Bellaire*, 697 F.2d at 674, 685 ("unsafe and unsound" practice generally contrary to accepted standards of operation that might result in abnormal risk of loss).

359. *First Nat'l Bank of Eden*, 568 F.2d at 611 n.2.

360. 573 F.2d 889 (5th Cir. 1978).

361. *Id.* at 897. *See also* Independent Bankers Ass'n v. Heimann, 613 F.2d 1164, 1168-69 (D.C. Cir. 1979) (upholding Comptroller's credit life insurance regulations, 12 C.F.R. part 2 (1979), as authorized under 12 U.S.C. § 1818(n) and endorsing liberal construction of authority to define and eliminate unsafe and unsound conduct), *cert. denied*, 449 U.S. 823 (1980).

362. *See, e.g., First Nat'l Bank of Eden*, 568 F.2d 610.

363. 770 F.2d 81 (6th Cir. 1985).

364. *Id.* at 82-83.

365. *See First Nat'l Bank of Bellaire*, 697 F.2d at 681; *Marshfield II*, 751 F.2d at 215.

and that agency's action.[366]

There are, however, some absolute limits to this flexibility, delineated by the limits of the statutory grant of authority as interpreted by the courts. In *Gulf Federal Savings & Loan Association*,[367] for example, the Fifth Circuit addressed the limits of the FHLBB's statutory authority to issue cease and desist orders. Gulf Federal had challenged the FHLBB order requiring it to cease and desist from calculating interest on loans under the 365/360 method,[368] when the loan agreements called for the 365/365 method.[369]

Gulf Federal argued that the challenged order was unrelated to the FHLBB's traditional function of assuring the financial integrity of thrift institutions.[370] To the contrary, the FHLBB asserted that it had "cradle to grave"[371] authority to regulate thrifts under its supervisory authority and that the order was a legitimate exercise of that authority.[372]

In the *Gulf* court's view, the FHLBB argument for judicial deference was misplaced, for the delimitation of the FHLBB's cease and desist powers required judicial, not administrative, expertise.[373] In this regard, the court reasoned, the "breadth of the unsafe or unsound practice formula is restricted by its limitation to practices with a reasonably direct effect on the [Savings & Loan's] financial soundness."[374] The court also stressed the definition of unsafe practices discussed in congressional testimony at the time of the enactment of the FHLBB's cease and desist authority:

> Generally speaking, an "unsafe or unsound practice" embraces any action, or lack of action, which is contrary to generally accepted standards of prudent operation, the possible consequences of which, if continued, would be abnormal risk or loss or damage to an institution, its shareholders, or the agencies administering the insurance funds.[375]

In the court's view, the risks the FHLBB identified with respect to Gulf Federal's use of inconsistent contract terms[376] bore only the most remote relationship to the Savings & Loan's financial soundness or to the risk to the deposit insurance fund.[377] In holding that the cease and desist order was unauthorized under the FHLBB's statutory powers, the court expressly limited unsafe and unsound practices to practices affecting an institution's financial condition.[378]

An interesting variation on this problem is presented by *Otero Savings &*

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366. *First State Bank*, 770 F.2d at 82-83.

367. 651 F.2d 259 (5th Cir. 1981), *cert. denied*, 458 U.S. 1121 (1982).

368. 651 F.2d at 261.

369. *Id.* at 262.

370. *Id.*

371. *Id.*

372. *Id.*

373. *Id.* at 263.

374. *Id.* at 264.

375. *Id.* (citing 112 CONG. REC. 26,474 (1966) (remarks of FHLBB Chair John Horne)).

376. *Gulf Federal Savings*, 651 F.2d at 264.

377. The estimated overcharges totaled approximately $80,000 on assets of approximately $75 million. 651 F.2d at 264 n.4.

378. *Id.* at 265.

Loan Association v. FHLBB,[379] in which a cease and desist order based upon a violation of law, rather than an unsafe or unsound practice, was challenged and the appropriateness of the remedy questioned. The order found the Savings & Loan's "Check-In" program in violation of a federal law prohibiting deposit in or withdrawal from interest-bearing accounts through negotiable or transferable third-party instruments.[380] The order directed the Savings & Loan to close such accounts held by for-profit corporations and partnerships and to cease offering such instruments.[381]

Otero Savings & Loan argued that it had not violated the statutory prohibition in question,[382] and that in any event the regulatory agencies had no authority to require the remedy mandated by the order.[383] To the contrary, the Savings & Loan argued, only the Attorney General had the authority to enforce the prohibition.[384] In response, the FHLBB and the FSLIC relied upon the general cease and desist authority available to them.[385] In this view, the FSLIC had the statutory authority to initiate cease and desist proceedings to prevent the violation of any law.[386]

In concluding that the FHLBB and the FSLIC had statutory authority under the cease and desist provisions to enforce the prohibition, the court rejected the Savings & Loan's assertion that a successful challenge to the exercise of that authority on the facts of the case would not "weaken the FSLIC's ability to 'discharge its basic mission of ensuring the safe and sound operation of insured institutions.' "[387] In this regard, the court reasoned:

> [T]he coherence of the regulatory scheme would be disrupted by a holding that § 1832 can only be enforced by the Attorney General. Given the broad language of § 1730(e) [the cease and desist authority], we hold that the FSLIC, with its expertise in financial matters, may use its cease-and-desist powers to remedy violations of § 1832 which expresses an important policy on regulation of the operation of state chartered insured institutions, along with others covered by the Act.[388]

The courts have in fact found it possible to work with the flexible concept of "unsafe and unsound" practices, and to give it definite content. So, for example, among the kinds of specific actions or activities that have been held to represent unsafe or unsound banking practices may be included the following:

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379. 665 F.2d 279 (10th Cir. 1981).

380. *Id.* at 281. *See* 12 U.S.C. § 1832(a) (1976) (restrictions on interest-bearing accounts).

381. 665 F.2d at 281.

382. *Id.* at 282.

383. *Id.* at 284.

384. *Id.* (citing 28 U.S.C. § 516 (1976) (conduct of litigation generally reserved to Department of Justice)).

385. *Id.* at 283 (citing 12 U.S.C. § 1730(e)(1) (1976) (regulator may issue and serve notice of charges where insured institution has violated law, rule, or regulation)).

386. 665 F.2d at 283-84.

387. *Id.* at 286.

388. *Id.*

(*i*) a pattern of loans made with inadequate security;[389]

(*ii*) inordinate concentration of extensions of credit to one borrower and the borrower's related interests;[390]

(*iii*) excessive volume of low quality assets in relation to total equity capital, due to hazardous lending and lax collection practices;[391]

(*iv*) excessive volume of overdue loans in relation to gross loans, due to hazardous lending and lax collection practices;[392]

(*v*) inadequate loan policies;[393]

(*vi*) accumulation of an inordinate amount of unsafe assets, in relation to gross capital;[394]

(*vii*) failure to implement adequate internal controls and auditing procedures;[395]

(*viii*) failure to maintain adequate credit information on certain debt obligations in bank's investment portfolio;[396]

(*ix*) payment of excessive bonuses to bank officers;[397]

(*x*) payment of excessive salaries to bank officers;[398]

(*xi*) conflicts of interest and self-dealing by bank officials;[399]

(*xii*) undue burden on earnings and capital resulting from proposed stock redemption;[400]

(*xiii*) violations of lending limits;[401] and,

(*xiv*) unconscionable service charges.[402]

Presumably, charges of unsafe and unsound practices may also be interrelated to violations of statutory restrictions as well.[403]

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389. *See Bank of Dixie*, 766 F.2d at 176 (value of collateral securing loans had declined so that loans no longer adequately protected).

390. *See id.* at 176 n.1 (extensions of credit aggregating 47% of bank's total equity capital); *Groos Nat'l Bank*, 573 F.2d at 896-97 (extensions of credit in violation of written agreement with agency).

391. *See Bank of Dixie*, 766 F.2d at 176 n.1.

392. *See id.*

393. *See* First State Bank v. FDIC, 770 F.2d 81, 82 (6th Cir. 1985) (FDIC can issue cease and desist order even though bank has voluntarily ceased unsound banking practices).

394. *See First Nat'l Bank of Eden*, 568 F.2d at 611 n.1 (unsafe assets representing 37% of gross capital funds).

395. *See id.*

396. *See id. Cf.* 12 C.F.R. § 1.8 (OCC investment securities regulations; credit information requirements).

397. *See First Nat'l Bank of Eden*, 568 F.2d at 611 n.1.

398. *See id.*

399. *Independent Bankers Ass'n*, 613 F.2d at 1168 (personal commissions for sales of credit life insurance in connection with extensions of credit by bank); *First Nat'l Bank of Lamarque*, 610 F.2d at 1265 (distribution of credit life insurance commissions to bank insiders).

400. *Cf. Mid America Bancorp.*, 523 F. Supp. at 570-71 (no prohibition by Board of proposed stock redemption transaction following bank's amendment of initial proposal).

401. *See del Junco*, 682 F.2d at 1341 (lending limitations under 12 U.S.C. § 84).

402. *Cf. Perdue*, 38 Cal.3d at 933 n.20, 702 P.2d at 517 n.20, 216 Cal. Rptr. at 359 n.20 (Comptroller of Currency can enjoin bank service charge which he considers unsound practice).

403. *See First Nat'l Bank of Bellaire*, 697 F.2d at 678 (violations of 12 U.S.C. §§ 29, 375).

2. Violations of written agreements

It should be noted that the cease and desist power may also be triggered by violation of a written agreement with the appropriate regulator.[404] Presumably, the material terms of the underlying agreement should relate to conduct which itself would arguably be unsafe or unsound. However, this is not spelled out in the legislation itself, and is not fully tested by judicial reaction to cease and desist orders issued on the basis of violations of such agreements. *Groos National Bank* illustrates the point.[405] There the court held that extensions of credit by a bank in violation of a previous written agreement between the bank and the OCC constituted unsafe and unsound practices.[406]

A 1973 bank examination had revealed several apparently illegal and unsafe practices, including a high percentage of high-risk loans to Clinton Manges, a controlling shareholder of the bank.[407] After the institution of cease and desist proceedings, the parties entered into an agreement, under which the bank was to deconcentrate its loans and to render them less risky.[408] Article II of the agreement precluded all loans and extensions of credit, direct or indirect, to any shareholder owning five percent or more of the bank's voting securities, as well as to such a shareholder's "related companies or individually."[409]

In 1976 the Comptroller discovered that three extensions of credit had apparently been made to Manges in violation of the 1973 agreement.[410] Before the Comptroller instituted cease and desist proceedings, the bank brought an action for declaratory judgment that the agreement was invalid.[411] Thereafter, the Comptroller issued a temporary cease and desist order.[412] After hearings before an ALJ, a final cease and desist order was entered and the bank appealed.[413]

The Fifth Circuit affirmed the Comptroller's order and rejected the bank's argument that the 1973 agreement was invalid because of a lack of consideration.[414] In the court's view, the statutory provision in question "provides that a cease and desist order may issue upon any violation of an agreement between the agency and a bank and says nothing of consideration."[415] Accordingly, the court concluded, the challenged 1975 extensions of credit violated a valid agreement within the meaning of the statute and the violations were unsafe and unsound practices.[416]

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404. *See supra* notes 145-50 and accompanying text for a discussion of statutory authority.

405. *Groos Nat'l Bank*, 573 F.2d at 896 (cease and desist order may issue upon any violation of an agreement between agency and bank even where agreement lacks consideration).

406. *Id.* at 896-97.

407. *Id.* at 892.

408. *Id.*

409. *Id.*

410. *Id.* at 892-93.

411. *Id.* at 893.

412. *Id.*

413. *Id.*

414. *Id.* at 896.

415. *Id.* (citing 12 U.S.C. § 1818(b) (1976)).

416. *Id.* at 897.

3. Scope of suspension and removal powers

With regard to the suspension and removal powers of the regulators, the results have been mixed. In *Manges v. Camp*,[417] for example, the OCC had issued an order prohibiting Manges, a controlling shareholder of a national bank, from participation in the affairs of the bank, in light of past felony charges.[418] Manges brought suit challenging the order and seeking an injunction restraining the OCC from enforcing the order.[419]

The issue in *Manges* was, therefore, whether the OCC had acted within the scope of its authority under 12 U.S.C. § 1818(g)(1).[420] The Comptroller argued that the provision covered not only present conduct but also past felony charges and convictions.[421] The purpose of the provision, in the court's view, was to the contrary "to routinely eliminate any person who is convicted or charged with a felony involving a breach of trust while he is at the same time participating in the affairs of a national bank."[422] Accordingly, the court reversed the trial court and directed that the injunction be issued.[423]

The suspension and removal provisions may also be triggered by a failure to act, as well as by improper conduct. This point is illustrated in *Brickner v. FDIC*,[424] where an assistant cashier and a vice president appealed from an FDIC order removing them from their positions.[425] The underlying facts involved the improper conduct of the cashier of the bank, who had repeatedly made unauthorized extensions of credit in excess of the bank's lending limit.[426] The cashier had resigned at the request of the FDIC.[427] Thereafter, the FDIC determined that the collateral securing the unauthorized extensions of credit no longer existed.[428] Removal proceedings were subsequently initiated against the assistant cashier and the vice president, based upon their failure to act with respect to the cashier's activities.[429]

The FDIC had charged that in tolerating the cashier's activities the two officers had breached their fiduciary duties to the bank and had demonstrated a willful or continuing disregard for the safety and soundness of the bank.[430] The

417. 474 F.2d 97 (5th Cir. 1973).

418. *Id.* at 98.

419. *Id.*

420. *Id.* at 99-100. *Cf. supra* notes 163-65 and accompanying text for a discussion of the statutory authority.

421. 474 F.2d at 100.

422. *Id.* at 100-01.

423. *Id.* at 101. This was not the end of Mr. Manges' difficulties, however. As was noted earlier, his activities were later the subject of a cease and desist order upheld by the Fifth Circuit in *Groos Nat'l Bank*, 573 F.2d 889 (5th Cir. 1978).

424. 747 F.2d 1198 (8th Cir. 1984).

425. *Id.* at 1201. *See* 12 U.S.C. § 1818(e)(1) (where director or officer of insured bank breaches fiduciary duty, agency may serve notice of intention to remove from office).

426. *See Brickner*, 747 F.2d at 1200.

427. *Id.*

428. *Id.*

429. *Id.* at 1200-01.

430. *Id.* at 1200.

Eighth Circuit upheld the removal order, reasoning that

> petitioners admittedly knew for months that [the cashier] was engaging in unsafe and unsound banking practices, yet they failed to disclose this knowledge to the other directors or to take suitable action to prevent substantial losses to the Bank. We find no error in the FDIC's determination that petitioners' conduct demonstrated the sort of "continuing disregard" contemplated by the statute.[431]

Thus, continuing inactivity on the part of officers, in the face of known unsafe and unsound practices on the part of another officer, constitutes improper "conduct" for purposes of the removal authority of the FDIA. It should be noted, however, that the court appears to be working not with a notion of derivative or vicarious liability, but rather with an implicit affirmative fiduciary duty to disclose, or otherwise act to correct, unsafe or unsound practices within their knowledge. Failure to act in face of this duty constitutes improper behavior.

4. Administrative discretion to fashion remedies

One issue that has arisen in judicial review of formal adjudications has been the scope of the agencies' discretion in fashioning remedies for criticized activities of banks. Generally, the agencies have been accorded a wide degree of discretion in this regard, subject to minimal judicial review. So long as predicate factual findings are supported by substantial evidence,[432] the decision of an agency as to the appropriate remedy to be imposed is left to the regulatory expertise and discretion of the agency, unless it is shown to be arbitrary or capricious.[433] Certain particular situations have on occasion strained the limits of judicial deference in this regard.

It should be emphasized that there are clear indications in the case law in this area that the courts have treated the issue of bank regulators' administrative discretion as to remedies in accordance with generally applicable principles of administrative law. Thus, in *Otero Savings & Loan Association*,[434] on the issue of the substantive terms of the cease and desist order in that case, the Savings & Loan argued that the FSLIC's remedial power did not extend to requiring that an insured institution refrain from conduct once prohibited but currently lawful.[435] To the contrary, Otero Savings & Loan argued that the agency's authority was limited to ordering a cessation of unlawful conduct.[436] In examining this argument, the Tenth Circuit endorsed the views expressed in such cases as *American Power & Light Co. v. SEC*[437] and *Phelps Dodge Corp. v. NLRB*,[438] to the effect that " 'the relation of remedy to policy is peculiarly a matter for ad-

431. *Id.* at 1203.

432. *See, e.g., First Nat'l Bank of Eden*, 568 F.2d at 611 (court's review is limited to determination of whether Comptroller's findings are supported by substantial evidence on record as whole).

433. *See, e.g., id.* at 611 (decision as to remedy in discretion of agency).

434. Otero Sav. & Loan Ass'n v. FHLBB, 665 F.2d 279 (10th Cir. 1979).

435. *Id.* at 288.

436. *Id.*

437. 329 U.S. 90 (1946).

438. 313 U.S. 177 (1941).

ministrative competence,' "[439] and that the agency's knowledge, expertise and choice of remedy must be given special respect.[440]

Nevertheless, on the peculiar facts of *Otero Savings & Loan Association* itself, the court determined that the FHLBB order could not be upheld.[441] The court had noted that congressional intent in creating cease and desist powers was to provide regulatory agencies supervising depository institutions "additional flexible and effective supervisory powers . . . , within carefully guarded limits, in order to make sure that [such institutions] would continue to serve the Nation effectively and well."[442] Further, the *Otero* court looked to the general guidance of *FSLIC v. Fielding*,[443] where the District Court of Nevada had stated that "[t]he Congressional reports repeatedly emphasized the importance of the division of regulatory power between the national and state governments. The purpose of the enforcement provisions is to quickly stop fraudulent practices, not to affirmatively recover for them."[444]

Accordingly, the *Otero* court stated that the FHLBB's enforcement power authorized the agency only to ensure that institutions conducted their affairs in a legal, safe and sound manner.[445] The power did not provide a mandate to employ any means necessary to maintain a competitive balance among institutions.[446]

This is not to say that, assuming the presence of unlawful or unsafe and unsound conduct, the agencies will not be afforded judicial deference to fashion appropriate, flexible remedies. In *Brickner*,[447] for example, the Eighth Circuit rejected arguments of removed bank officers challenging the remedy, to the effect that the FDIC had abused its discretion in applying such a drastic remedy for their failure to act.[448] In doing so, the *Brickner* court expressly relied upon the general principles enunciated in such cases as *American Power*[449] and *Canadian Tarpoly Co. v. United States International Trade Commission*,[450] to the effect that "administrative agencies have considerable latitude to shape their remedies within the scope of their statutory authority. The relation of remedy to statutory policy is peculiarly a matter for special competence of the administrative agency."[451]

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439. *Otero*, 665 F.2d at 289 (citing *American Power & Light Co.*, 329 U.S. at 112 (quoting *Phelps*, 313 U.S. at 194 (remedy related to policy))).

440. *Id.* (citing NLRB v. Gissell Packing Co., 395 U.S. 575, 612 n.32 (1969)).

441. *Id.*

442. *Id.* at 288 (quoting 1966 U.S. CODE CONG. & ADMIN. NEWS 3532, 3538 (legislative intent to stop fraudulent banking practices)).

443. 309 F. Supp. 1146 (D. Nev. 1969), *cert. denied*, 400 U.S. 1009 (1971).

444. *Id.* at 1149.

445. *Otero*, 665 F.2d at 289.

446. *Id.*

447. 747 F.2d 1198 (8th Cir. 1984).

448. *Id.* at 1203-04.

449. 329 U.S. 90 (1946).

450. 640 F.2d 1322 (C.C.P.A. 1981).

451. *Brickner*, 747 F.2d at 1203 (quoting *American Power*, 329 U.S. at 112; *Canadian Tarpoly*, 640 F.2d at 1326).

Similarly, in *del Junco v. Conover*,[452] the Ninth Circuit reviewed a remedy fashioned by the Comptroller, pursuant to section 8(b)(1) of the FDIA,[453] with respect to a violation of the lending limits of the NBA.[454] The Comptroller had required, among other things, that the bank directors reimburse the bank for its costs of collection and for the attorneys' fees it had paid for the directors' defense.[455] The court asserted that the Comptroller had broad discretion to fashion a remedy and to cure the effect of the violation.[456] Finally, as to the attorneys' fees, the court concluded that "[d]eference is due to the Comptroller's interpretation of the law under which he operates."[457]

The Fifth Circuit, in *First National Bank of Bellaire v. Comptroller*,[458] appeared more critical of the Comptroller's remedial powers under section 8(b)(1). Although the court acknowledged the Comptroller's wide discretion,[459] it stressed that "the Comptroller must be able to articulate a correlation between the action taken and the reason given for the action. Reasons which are in substance mere rhetoric are not sufficient and indicate arbitrary action."[460] The court also emphasized that the Comptroller must attempt to maintain a balance among the interests of depositors, the interest of well managed banks, and the interest of the regulators.[461]

In *First National Bank of Bellaire*, the Comptroller had charged the bank with violations of statutory limitations on bank ownership of real estate[462] and restrictions on lending to insiders.[463] In the court's view, there was a direct relationship between the charged violations and bank safety, and as a result the cease and desist orders were upheld as to these violations.[464] However, with respect to the Comptroller's allegation that "contrary to safe and sound banking practices, the Bank had been operating with inadequate capital,"[465] the court concluded that the cease and desist order was not supported by substantial evidence, and that the remedy imposed by the order therefore could not be upheld.[466] In this regard the court reasoned:

> In reviewing the Comptroller's findings we must not substitute our judgment for that of the Comptroller. This Court must determine if the Comptroller made a reasonable finding, not whether it made a cor-

452. 682 F.2d 1338 (9th Cir. 1982), *cert. denied*, 459 U.S. 1146 (1983).

453. 12 U.S.C. § 1818(b)(1).

454. *See id.* § 84 (lending limitations applicable to national banks). *See also* 12 C.F.R. part 32 (OCC regulations; lending limitations).

455. 682 F.2d at 1339-40.

456. *Id.* at 1343.

457. *Id.* at 1344.

458. 697 F.2d 674 (5th Cir. 1983).

459. *Id.* at 679-80.

460. *Id.*

461. *Id.* at 681.

462. *Id. See* 12 U.S.C. § 29 (restrictions on national bank ownership of real estate).

463. 697 F.2d at 682. *See* 12 U.S.C. § 375a(2) (no bank may extend credit to its own executive officers).

464. 697 F.2d at 681, 683.

465. *Id.* at 684.

466. *Id.* at 687.

> rect finding. The findings are unreasonable if there is no rational connection between the evidence as a whole and the findings.[467]

The variant degrees of tolerance evident in the *del Junco* and *Bellaire* cases are set in direct opposition in *Larimore v. Conover*.[468] *Larimore* involved a challenge to an OCC cease and desist order which required directors to indemnify the bank for all losses incurred on account of excessive loans made in violation of the lending limitations of the NBA.[469] In upholding the order, a panel of the Seventh Circuit determined that the Comptroller's findings were supported by substantial evidence and that the remedy was not arbitrary or capricious.[470] Moreover, the court noted:

> The violations here were not minimal oversights or a mere failure to implement obscure banking regulations. As bank directors, the petitioners were responsible for conducting the business of the [national bank] in a safe and sound manner and in accordance with the law. The directors had been previously warned of the need to comply with loan limits by the [OCC] during [a] 1980 audit.[471]

After a rehearing *en banc*, however, the Seventh Circuit reversed and held that the Comptroller lacked the statutory authority to impose personal liability on the directors for the losses.[472] In the court's view, the legislative history of FDIA section 8[473] did not support the argument that the flexible authority to fashion remedies under the cease and desist provisions extended so far as to afford the Comptroller power to impose personal liability on directors for violations of lending limitations.[474]

In reaching this conclusion, the Seventh Circuit distinguished two factually similar cases. In *First National Bank of Eden v. Department of the Treasury*,[475] the Comptroller had issued an order requiring bank officers to reimburse the bank for bonuses paid to them.[476] Drawing the finest of distinctions, the *Larimore* court distinguished this remedy as being "in the nature of an order of restitution, rather than damages, to recover bonuses traced to the bank's president and vice-president who had unjustly enriched themselves."[477] Similarly, in *del Junco*,[478] while the court did uphold an order to directors to indemnify the bank for losses resulting from illegal extensions of credit, it had not specifically addressed the question of the Comptroller's authority unilaterally to impose per-

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467. *Id.* at 685 (citations omitted).

468. 775 F.2d 890 (7th Cir. 1985), *rev'd en banc sub nom.* Larimore v. Comptroller of the Currency, 789 F.2d 1244 (7th Cir. 1986).

469. *See* 12 U.S.C. § 84 (NBA limits on loans and extensions of credit).

470. 775 F.2d at 891.

471. *Id.*

472. Larimore v. Comptroller of the Currency, 789 F.2d 1244, 1251 (7th Cir. 1986).

473. 12 U.S.C. § 1818(b) (procedures for cease and desist orders). *See supra* notes 97-125 and accompanying text for a discussion of the legislative history of the FDIA.

474. *Larimore*, 789 F.2d at 1251.

475. 568 F.2d 610 (8th Cir. 1978).

476. *Id.* at 611.

477. *Larimore*, 789 F.2d at 1254.

478. 682 F.2d 1338 (9th Cir. 1982), *cert. denied*, 459 U.S. 1146 (1983).

sonal liability.[479]

The *Larimore* court's treatment of *First National Bank of Eden* and the difference between restitution and damages seems to be a distinction without a difference. In any event, in the context of a question of statutorily based authority to fashion an administrative remedy, reliance on the distinction seems misplaced. There is no indication in the legislative history that the scope of administrative discretion to fashion a remedy was to be artificially constrained by such notions.[480]

The court's treatment of *del Junco* is even less satisfying. It asserts that the two cases are distinguishable, but it does not adequately explain the difference between the two. In point of fact, the Seventh Circuit is rejecting the *del Junco* approach. In part, this rejection is undoubtedly based upon the *Larimore* court's understanding of the appropriate relationship between the general enforcement remedies of FDIA section 8 and the specific cause of action created by the NBA[481] with respect to violations of the NBA's provisions (including the lending limitations).

In this regard the *Larimore* court noted that the NBA authorized the Comptroller to institute an action against bank officers in their individual capacities for damages resulting from a knowing violation of the lending limits of the NBA.[482] Consequently, the court concluded, the "clear intent of [section 93 of the NBA] would be cast aside if [FDIA section 8(b)(1)] were to be interpreted as granting the Comptroller the authority to act as prosecutor, judge, and jury."[483]

V. Summary and Analysis of Practical Data

A. Relative Numbers of Proceedings

The annual aggregate total numbers of administrative enforcement actions for all agencies is considerable. These aggregate numbers conceal, however, a rather uneven set of trends when the data are considered in terms of types of enforcement actions. In addition, the level of activity varies markedly when the data are viewed from the perspective of individual agencies.

Comparing results in the period 1982 through 1986 (See Illustrations 2-6), there has been a marked increase overall in enforcement actions,[484] with something of a peak in 1985 in particular. (See Illustration 5). Consistently throughout this period, the OCC and the FDIC have been the most active—or, at least, have had the most enforcement actions—of the five agencies. They have been

479. 789 F.2d at 1255.

480. *See generally supra* notes 97-125 and accompanying text for a discussion of the legislative history of the FDIA.

481. 12 U.S.C. § 93(a) (participating director shall be liable for damages in personal and individual capacity).

482. *Larimore*, 789 F.2d at 1255.

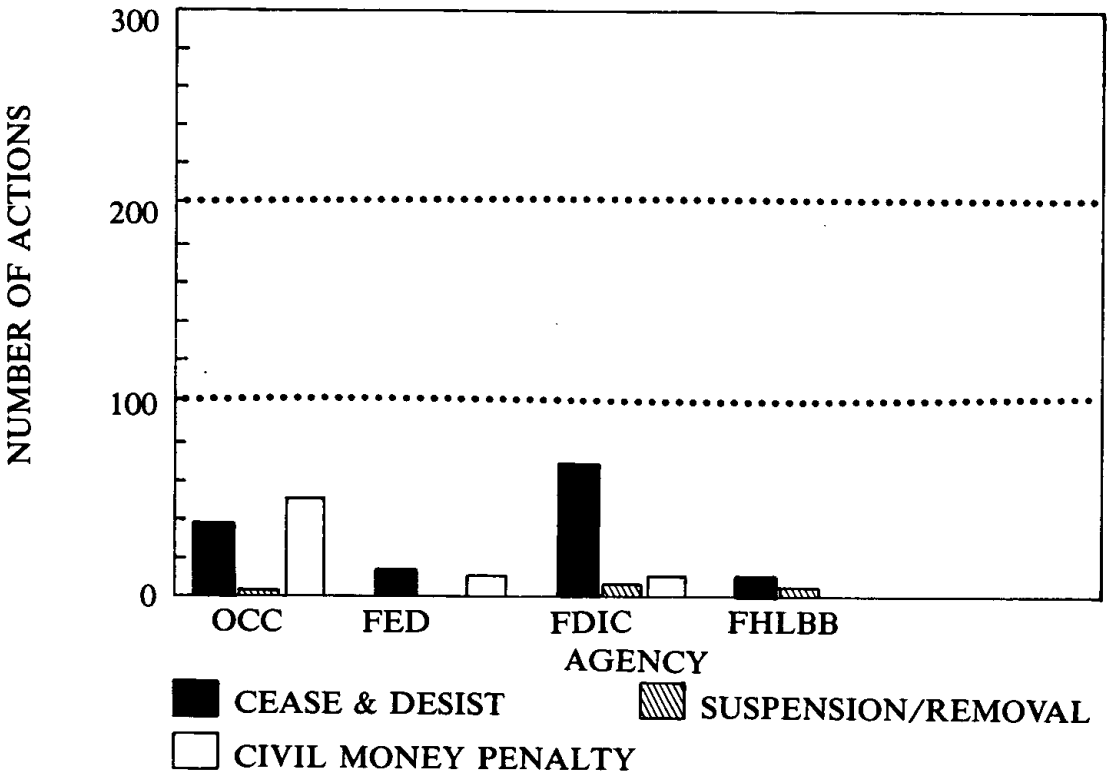
483. *Id.* at 1255-56. For an interesting case rejecting an argument for extending the *Larimore* rationale to the imposition of civil money penalties, *see Abercrombie*, 641 F. Supp. at 601-02.

484. For purposes of this analysis, the term "enforcement actions" is used generically to refer to the issuance of cease and desist orders, the initiation of suspension, removal and prohibition proceedings, and the assessment of civil money penalties.

followed by the Fed and the FHLBB, with their relative positions varying from year to year. The NCUA has been the least active in this regard.

Illustration 2

ENFORCEMENT ACTIONS: 1982



Sources: Agency reports and memoranda

a. Figures reported for cease and desist orders include temporary and amended orders issued in 1982.

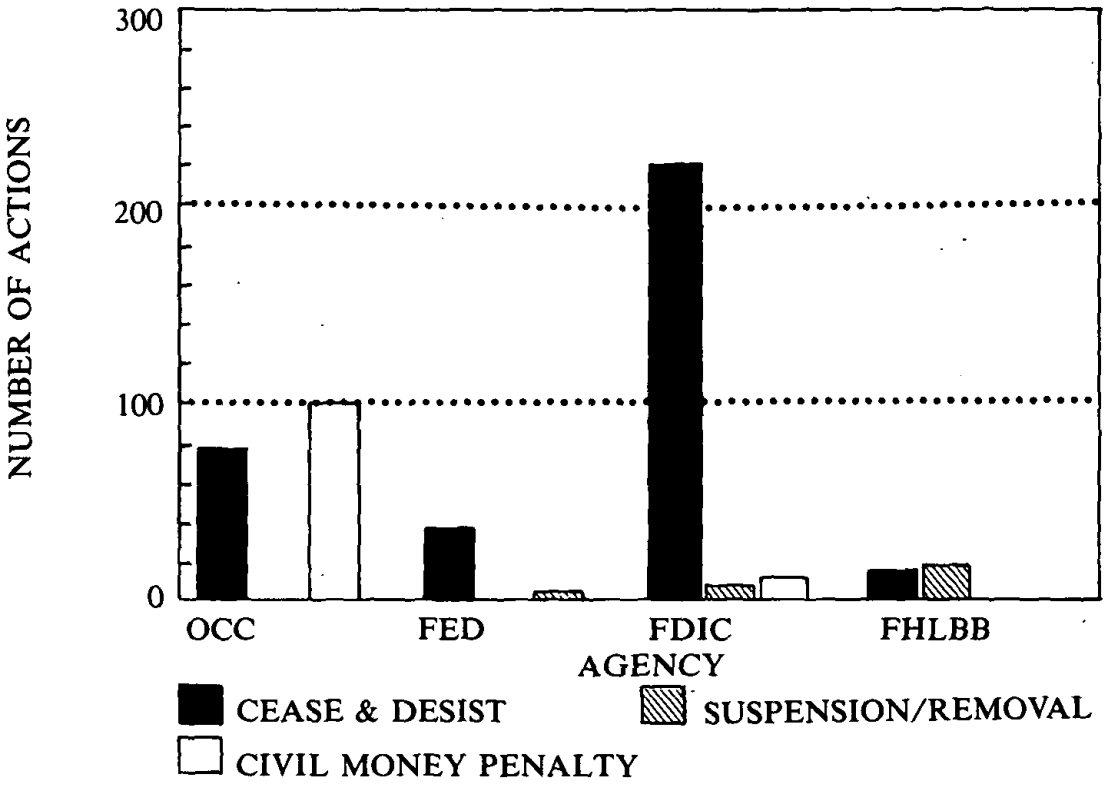
b. Figures reported for "suspension/removal" include all suspensions, prohibitions on participation, and removal proceedings initiated in 1982.

c. Figures reported for civil money penalties represent total number of penalties assessed in 1982.

d. NCUA data not available for 1982.

Illustration 3

ENFORCEMENT ACTIONS: 1983



Sources: Agency reports and memoranda

a. Figures reported for cease and desist orders include temporary and amended orders issued in 1983.

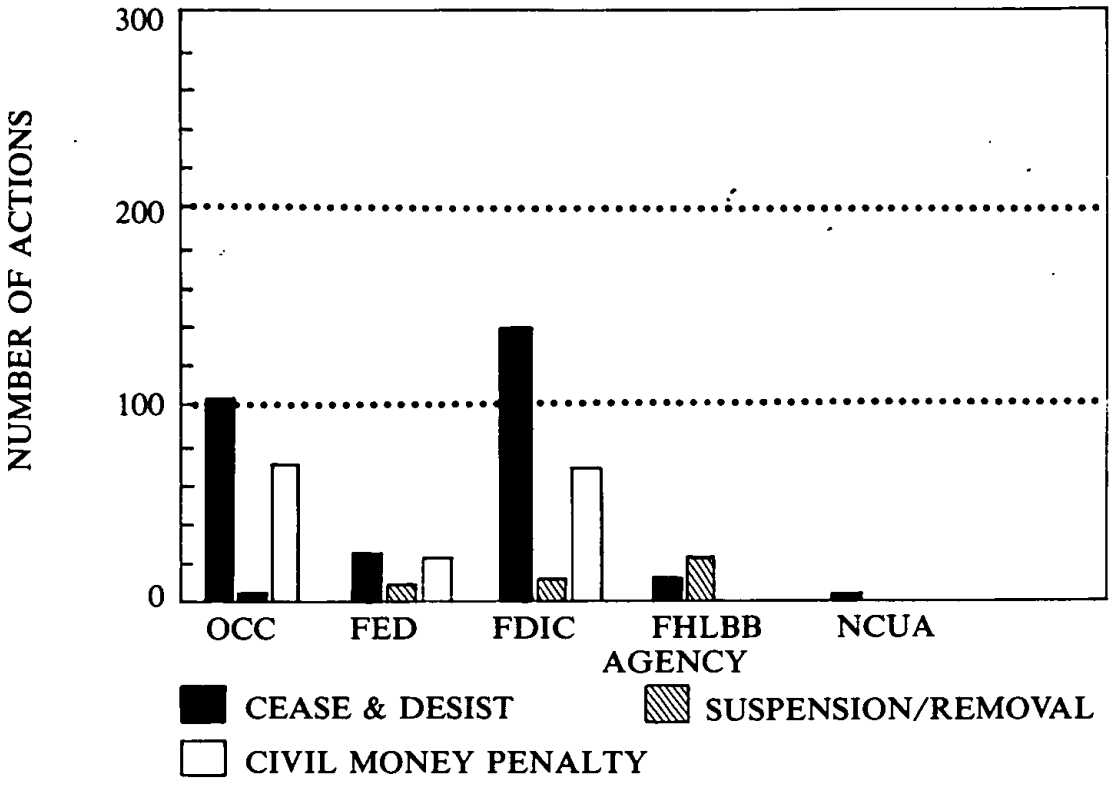
b. Figures reported for "suspension/removal" include all suspensions, prohibitions on participation, and removal proceedings initiated in 1983.

c. Figures reported for civil money penalties represent total number of penalties assessed in 1983.

d. NCUA data not available for 1983.

Illustration 4

ENFORCEMENT ACTIONS: 1984



Sources: Agency reports and memoranda

a. Figures reported for cease and desist orders include temporary and amended orders issued in 1984.

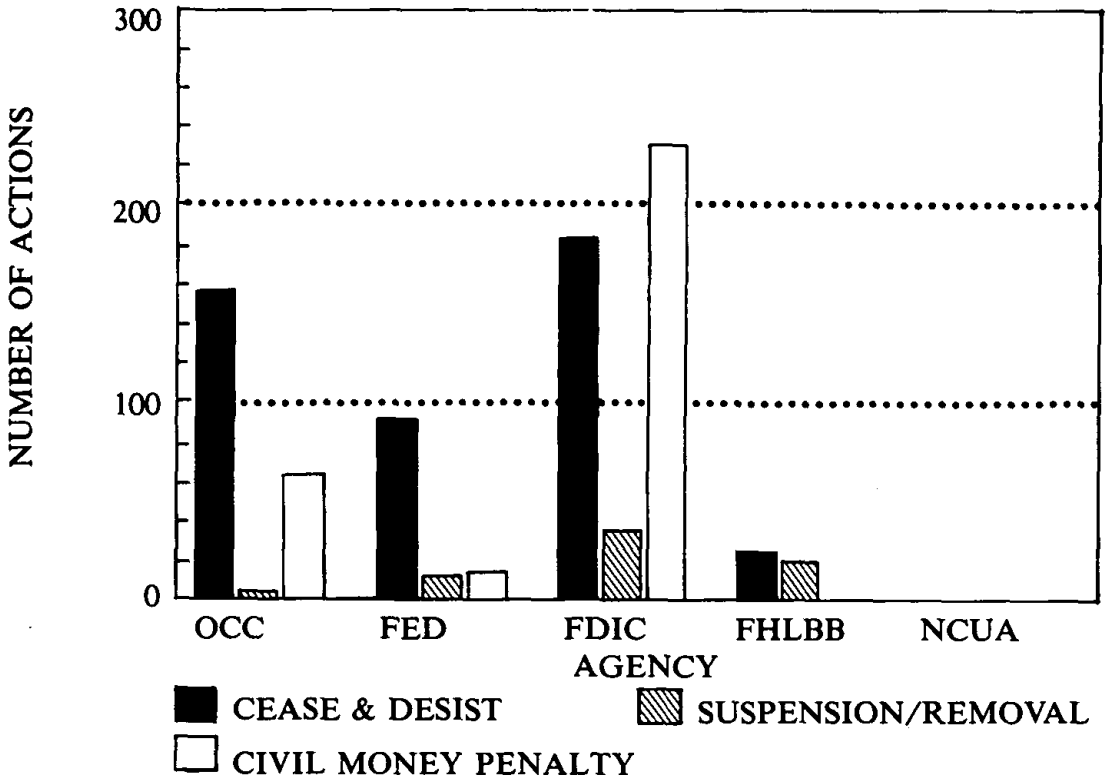
b. Figures reported for "suspension/removal" include all suspensions, prohibitions on participation, and removal proceedings initiated in 1984.

c. Figures reported for civil money penalties represent total number of penalties assessed in 1984.

d. NCUA entries include one cease and desist order and three suspension/removal actions.

Illustration 5

ENFORCEMENT ACTIONS: 1985



Sources: Agency reports and memoranda

a. Figures reported for cease and desist orders include temporary and amended orders issued in 1985.

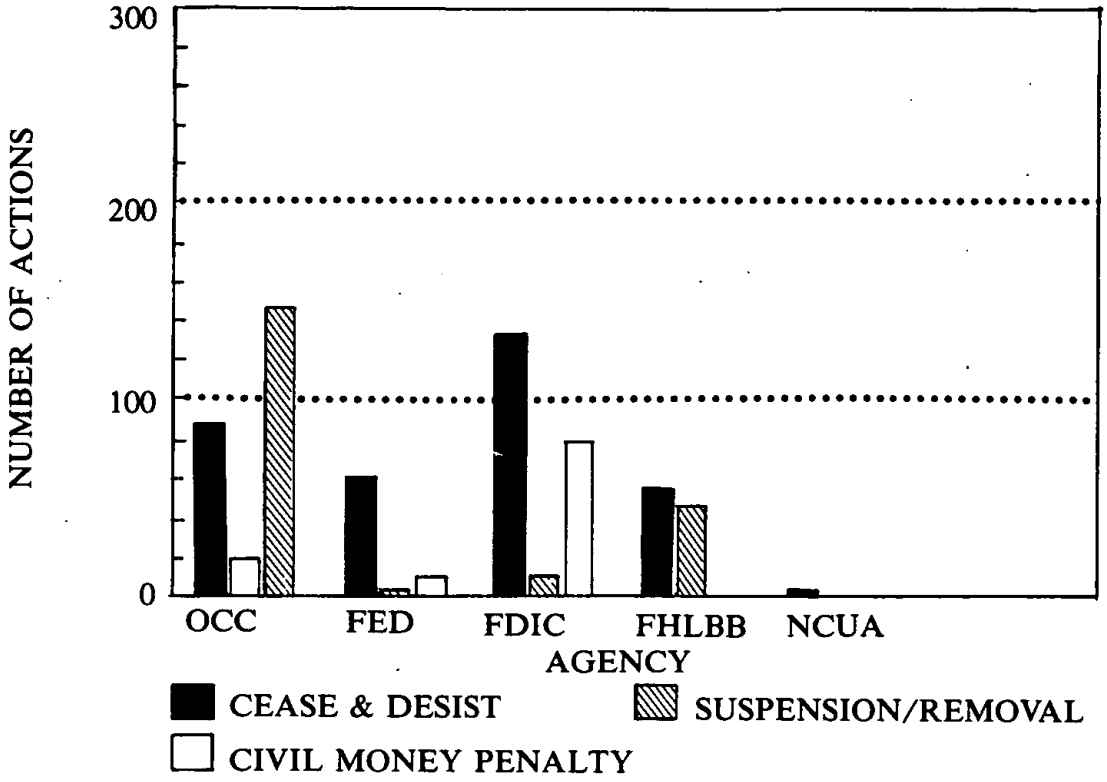
b. Figures reported for "suspension/removal" include all suspensions, prohibitions on participation, and removal proceedings initiated in 1985.

c. Figures reported for civil money penalties represent total number of penalties assessed in 1985.

d. OCC entries do not include six agreements for removal.

Illustration 6

ENFORCEMENT ACTIONS: 1986



Sources: Agency reports and memoranda

a. Figures reported for cease and desist orders include temporary and amended orders issued in 1986.

b. Figures reported for "suspension/removal" include all suspensions, prohibitions on participation, and removal proceedings initiated in 1986.

c. Figures reported for civil money penalties represent total number of penalties assessed in 1986.

d. OCC entries do not include four agreements for removal.

e. NCUA entries represent five cease and desist orders.

Even this articulated representation of enforcement activity is a misleading one, however, for two reasons. First, almost all of the actions reported in the preceding illustrations were the result of consents or waivers on the part of the respondents, with no formal (or even informal) administrative adjudication taking place.[485]

Indeed, formal administrative adjudication has been a rarity. For example, in 1986, with 88 cease and desist orders issued,[486] the OCC held only 11 APA

485. *See, e.g.*, FDIC, *Annual Report* 12, 14 (1986) (majority of enforcement actions initiated were settled by consent agreement); FDIC, *Annual Report* 22, 23 (1985) (over 95% settled by consent). *See also* FHLBB, *Annual Report* 49 (1986) (office typically imposes remedies on informal basis); FHLBB, *Annual Report* 47 (1985) (same).

486. It should be noted, however, that this figure includes a small number of temporary cease and desist orders (two) and amended cease and desist orders (six).

hearings.[487] Likewise, the FDIC, with 135 cease and desist orders issued in the same year, held only 16 hearings.[488] The other agencies averaged one hearing each.[489] The experience of 1986 is representative of agency practice in this regard.

Second, and perhaps even more significant, is the fact that a relatively small number of enforcement problems are resolved through the use of formal enforcement measures at all. To the contrary, there seems to be a preference for the use of formal agreements,[490] "memoranda of understanding,"[491] and other similarly informal compliance devices.[492] A fair representation of agency reliance on such informal devices as the formal agreement and the memorandum of understanding, as opposed to the cease and desist order, is afforded by the experience of OCC administrative actions in 1986. (See Illustration 7).

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487. Data included with Letter from Mary Wildemann, staff attorney, Enforcement and Compliance Division, Office of the Chief Counsel, OCC, to Professor Michael P. Malloy (October 30, 1987).

488. FDIC, *Annual Report* 12 (1986).

489. *See, e.g.*, FHLBB data provided with Letter from Nancy Kreitzer, Paralegal Specialist, Office of Enforcement, FHLBB, to Professor Michael P. Malloy (June 4, 1987); NCUA data provided with Letter from Allan H. Meltzer, Assistant General Counsel, NCUA, to Professor Michael P. Malloy (July 8, 1987).

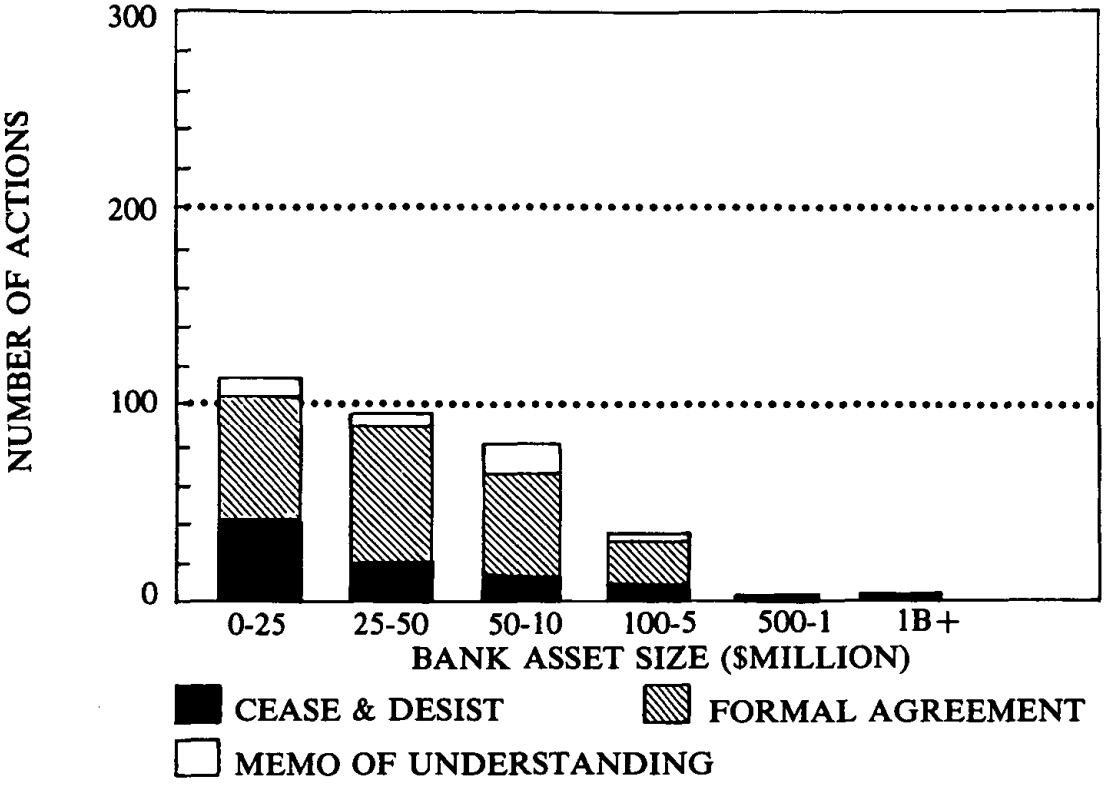
490. The formal agreement is statutorily based. *See* 12 U.S.C. § 1818(b)(1) (procedures for cease and desist orders). The conclusion of a formal agreement, however, neither requires nor contemplates any particular formal procedures. It is significant, however, in that a formal agreement once concluded can be enforced through the issuance of a cease and desist order and subsequent judicial enforcement of the order. *Id. See* OCC, *The Director's Book: The Role of a National Bank Director* 72 (1987) (effect of formal agreement).

491. Unlike the formal agreement, *see supra* note 490, the memorandum of understanding is entirely a creature of agency practice. Violation of a memorandum of understanding does not, as a matter of law, in itself trigger the imposition of formal sanctions such as the issuance of a cease and desist order. *See* OCC, *The Director's Book, supra* note 490, at 72.

492. These other informal devices, entirely creatures of agency practice, carry a variety of more or less arbitrary labels, such as "commitment letter." *See generally* OCC, *The Director's Book, supra* note 490, at 71-72.

Illustration 7

OCC: ADMINISTRATIVE ACTIONS 1986



Source: OCC *Quarterly Journal*

One other interesting feature is evident from Illustration 7, and this feature seems to be consistently present in administrative enforcement activities. Taking the categories of memoranda of understanding, formal agreements, and cease and desist orders, in each category the trend was towards the imposition of administrative sanctions of each type more often in the case of relatively small institutions (in terms of asset size).

In sum, while the annual aggregate total number of administrative enforcement actions for all the agencies is considerable, particularly for the OCC and the FDIC, the vast majority of these represent cases in which the final action was taken on the basis of either consent or waiver of formal hearings. In addition, those aggregate totals do not reflect the preference of the agencies for alternative enforcement devices which do not trigger the procedural requirements of the statutory enforcement authorities generally available to the agencies. The resolution of most enforcement problems involve the conclusion of formal agreements or "memoranda of understanding" (or "informal agreements"),[493] rather than, for example, cease and desist orders.[494] Current administrative practice tends to avoid the use of formal administrative adjudication, either by leveraging

493. *See supra* note 491 for a discussion of informal agreements.

494. *See* Illustration 7.

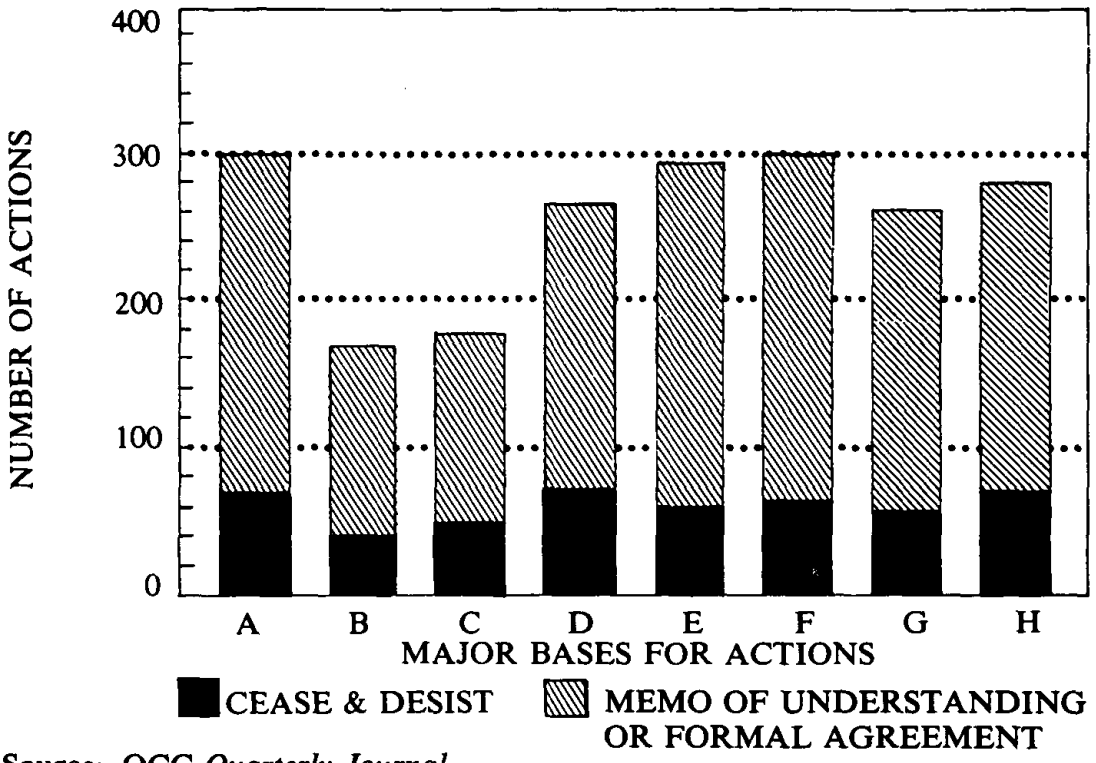
consent to an order from the respondent or by hammering out an informal, and procedurally unspecified, agreement with the respondent.[495]

B. Decisional Trends

One predominant basis for action in administrative enforcement actions appears to be violations of law or previously issued final orders or formal agreements. Often this basis will be coupled with charges of "unsafe and unsound" practices. Few cases present "unsafe and unsound" practices as the sole or principal basis for administrative action. (See Illustration 8).

Illustration 8

OCC: ADMINISTRATIVE ACTIONS 1986



Source: OCC *Quarterly Journal*

a. The "major bases" for administrative actions (cease and desist orders, formal agreements and memoranda of understanding) are those involved in substantially over 50 percent of total actions (334). More than one basis may be involved in any one action. The bases are as follows:

A. Allowances for loan or lease losses	B. Asset/liability management
C. Brokered deposits	D. Capital plan
E. Credit information	F. Criticized assets
G. Internal loan review	H. Violations of law

b. Violations of law are often multiple in any one action; the chart counts only one per action.

495. *See supra* note 485 and accompanying text for a discussion of resolution by informal consents.

In particular it would appear that, for example, the OCC's enforcement efforts with respect to unsafe and unsound practices have in the past been centered on such issues as conflicts of interest, self-dealing, and insider abuses. For example, during 1977 Senate hearings, the following problem areas were identified as being practices that frequently occurred in the administrative enforcement context:

(*i*) improper bank stock loans;
(*ii*) preferential loans to favored customers;
(*iii*) improper overdrafts;
(*iv*) failures to comply with banking laws or regulations;
(*v*) improper insurance commissions;
(*vi*) double use of collateral; and,
(*vii*) insider overreaching.[496]

Of related interest, the FDIC has consistently maintained that unsafe and unsound practices may arise as a result not only of action but also of inaction of management.[497] Specific illustrations of unsafe or unsound actions or inactions based upon past FDIC enforcement proceedings would include:

(*i*) operating with an inadequate level of capital in light of the kind and quality of assets held;

(*ii*) engaging in hazardous lending or lax collection practices (*e.g.*, inadequate security, inadequate documentation of creditworthiness, inadequate controls on overdrafts, inadequate credit risk diversification);

(*iii*) operating with inadequate liquidity in light of assets and liability mix;

(*iv*) operating with inadequate internal controls (*e.g.*, no controls on official checks and unissued certificates of deposit, no segregation of duties of personnel, no reconciliation of differences in correspondent bank accounts);

(*v*) engaging in speculative hazardous investment policies;

(*vi*) excessive dividends in relation to capital, earnings capacity and asset quality;

(*vii*) inadequate supervision of officers;
(*viii*) inadequate reserves for possible loan losses;
(*ix*) failure to post the general ledger promptly;
(*x*) improper accounting for transactions;
(*xi*) failure to enforce repayment of loans;
(*xii*) failure to obtain or maintain evidence of priority of liens on loans secured by real estate.[498]

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496. *Hearings on the Subject of Overdrafts and Correspondent Banking Practices of the Senate Committee on Banking, Housing and Urban Affairs*, 95th Cong., 1st Sess. (1977).

497. *See, e.g., Brickner*, 747 F.2d at 1201 (failure to inform directors constituted breach of duty resulting in removal).

498. *See* M.A. COBB, FEDERAL REGULATION OF DEPOSITORY INSTITUTIONS: ENFORCEMENT POWERS AND PROCEDURES 3-5 to 3-6 (Supp. 1987) (bases for enforcement proceedings).

C. Incidence of Judicial Review

The incidence of judicial review has been negligible, in terms of absolute numbers. It would appear rare in any given year for the number of cases of appeals for judicial review of formal administrative sanctions to average more than one per agency, if even that. For example, in 1986 the FDIC noted one appeal from a cease and desist order.[499] The FHLBB noted two such challenges in 1986.[500]

To a great extent, this phenomenon is of course due to the attrition that occurs, from consents and waivers, between initiation of administrative enforcement and the formal adjudication stage. Judicial review is statutorily limited to the results of the latter stage. Further, many enforcement problems will never even reach the formal enforcement stage, being resolved instead through the use of informal enforcement devices.

Nevertheless, despite the relatively small incidence of judicial review, practice would seem to indicate that courts have taken the judicial review function as a matter of active concern. On the other hand, practice in this regard is probably skewed in any event, since the selective process of attrition with respect to formal administrative adjudications doubtless results in a relatively high percentage of judicial challenges concerned with extreme or pathological cases. The self interest of respondent banks and insiders will generally dictate folding at an early stage in the enforcement process, with the result that sensitive enforcement problems are veiled by the confidentiality that surrounds the process until the litigation stage.

VI. CONCLUSIONS

A. Publication of Opinions/Decisions

Data is not readily available concerning the decisions of the regulators with respect to formal adjudications.[501] However, it is one thing to keep the "papers and documents filed during the course of a proceeding"[502] confidential; it is quite another to throw a blanket of obscurity over the *rationes decidendi* of enforcement adjudications. While aggregate data concerning, and occasionally brief summaries of, enforcement actions are made available by the regulators,[503]

499. FDIC, *Annual Report* 14 (1986).

500. FHLBB, *Annual Report* 49 (1986).

501. *Cf. supra* note 19 for a discussion of confidentiality of enforcement actions. This is reinforced, as a formal matter, by the regulations themselves, which specifically impose strict confidentiality on the proceedings. *See, e.g.*, 12 C.F.R. § 19.16 (1988) which provides: "[u]nless and until otherwise ordered by the Comptroller, any information obtained and any papers and documents filed during the course of a proceeding are for the confidential use only of the Comptroller, the presiding officer, and the parties." *Id. See also id.* § 263.20 (Federal Reserve regulations providing documents in proceedings are confidential); *id.* § 308.20 (FDIC regulations, similar provision); *id.* § 509.21 (FHLBB regulations, similar provision); *id.* § 747.120 (NCUA regulations, similar provision).

502. *Id.* § 19.16.

503. For example, until 1986, the FDIC's annual reports at least informed the public that "[a] case-by-case [yearly] summary of [the] FDIC's . . . enforcement actions without banks' names may be obtained from the FDIC Corporate Communications Office." FDIC, *Annual Report* 23 (1985).

there is currently no publication or other similar public dissemination of the decisions in administrative adjudications.[504]

Such a situation hampers not only scholarly meanderings but also the practical ability of counsel to research and to advise bank and bank officer clients that may be potential respondents in possible enforcement actions.[505] In addition, it may contribute to the discomfort of ALJs in independently attempting to come to terms with an unusual area of federal law which, because of the use of detailed ALJs, is likely to be outside their immediate and continuing experience.[506]

It is not enough to respond that such "precedents," if relevant, would be made available to counsel in the course of an APA hearing. This leaves too much to chance, in terms of the relative "zeal of counsel for respondents in particular cases through discovery requests."[507] Indeed, such a response is undercut by the realities of the situation of administrative enforcement in this area.

First, discovery practice under a set of regulations that are not detailed in that regard heightens the element of chance. Second, given the fact that most administrative enforcement efforts tend to be resolved by consent or waiver, or through the use of such nonadjudicatory devices as the memorandum of understanding or the formal agreement, as a practical matter it is critical that this body of decisions be publicly accessible *before* a decision is made by client and counsel whether or not to stand firm and insist upon formal adjudication.

Accordingly, this writer recommends that the bank regulatory agencies make available, through regular publication, or similarly accessible means of

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A statement to this effect did not appear in the corresponding discussion of the 1986 annual report. The prior reports also contained the (apparently untrue) statement that "[s]ummaries of enforcement actions for prior years are included in the FDIC's annual reports, also available from the Corporate Communications Office." *Id.* In fact, the annual reports do not contain such summaries; rather, they contain no more than aggregate figures for numbers of enforcement actions undertaken in specified years. *See id.*

504. In May 1985, the FDIC proposed a policy for publication of names of banks and persons to whom final orders have been issued in bank enforcement actions, together with a description of the nature of the action and a summary of the order, but that proposal was finally abandoned in June 1987. *See* M.P. MALLOY, *supra* note 1, at 493 n.1. Agreeing with the recommendation made by this writer in his report to the ACUS, the FDIC recently initiated a program for the publication by Prentice Hall of redacted decisions of the FDIC Board of Directors and the accompanying decisions of the ALJs issued in formal enforcement adjudications. Letter from John L. Douglas, Esq., FDIC General Counsel, to ACUS, March 16, 1988, at 1. An initial two-volume publication, covering opinions from 1979 to date, has recently been issued. *Id.* In addition, a proposal has recently been introduced in the House that would require the agencies to "make available to the public redacted editions of decisions and accompanying orders with respect to formal administrative enforcement adjudications . . . through regular publication, or similar means of dissemination. . . ." Depository Institutions Insider Abuse Prevention and Enhanced Enforcement Powers Act of 1988, H.R. 3929, § 117, 100th Cong., 2d Sess. (February 9, 1988). *See* 134 CONG. REC. H277, H278 (daily ed. Feb. 9, 1988) (introduction of bill; analysis of section 117).

505. *See, e.g.,* Letter from Marvin H. Morse, Chief Administrative Law Judge, to Marshall J. Breger, Chairman, Administrative Conference of the United States, June 30, 1986, at 3 (confidentiality of enforcement proceedings leaves few systematic opportunities to study precedents).

506. *See id.* (detailing of ALJs results in "no aggregation of specialized trial judge expertise").

507. *Id.*

dissemination, redacted versions of decisions and accompanying orders with respect to formal administrative enforcement adjudications.

B. Publicity of Enforcement Actions

A related issue has to do with the publicity given to administrative enforcement actions. Quite aside from the question of the availability of formal decisions and orders rendered in such actions, there is a need for heightened public awareness of such actions. Even a general awareness of the prevalence and trends in such actions is not promoted by current agency practices. Most of the regulators periodically publish only aggregate data concerning enforcement actions, with very little in the way of useful analytical categorization of the data.

One exception in this regard, until recently, has been the practice of the OCC to publish very brief narrative summaries of each administrative enforcement action.[508] Currently, most of these narrative summaries have been reduced, almost to the point of meaninglessness, to an outline of the types of charges involved in each action.[509] A more encouraging note is sounded by the recent announcement of the establishment of OCC Advisory Letters, which are intended to alert national banks and directors to activities and situations that could contribute to or detract from safe and sound management.[510] Nevertheless, this does not necessarily substitute for regular and informative publicity of enforcement actions.

One administrative device that might also be usefully exploited in this context is the promulgation of interpretive regulations identifying types of conduct viewed as unsafe or unsound practices by the regulators. Though it is true that the determination of the unsafe and unsound nature of a particular activity or practice is a case-by-case inquiry, certain broad categories have in the past exhibited sufficient trending in this regard to be the subject of rulemaking.[511] In the interest of greater public awareness and understanding of enforcement policy, the regulators should be encouraged to use their rulemaking power more frequently in this regard.

Accordingly, this writer recommends that the bank regulatory agencies establish systems for the regular and public dissemination of information concerning enforcement policies, both through interpretive rulemaking and through public releases.

C. Uniform Procedural Regulations

The current arrangements for the regulatory implementation of the formal

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508. This practice ceased as recently as 1986. Interview with Mr. Fitzgerald, *supra* note 212. The Fed continues to make such summaries readily available through its annual report on formal enforcement actions.

509. *See, e.g.*, 6 OCC *Quarterly Journal* 81 (1987) (summaries of enforcement actions).

510. *See OCC Advisory Letters to Alert Bankers and Bank Directors to Activities That Could Contribute to Safe and Sound Bank Management*, [1987-1988 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 87,077 (August 20, 1987) (OCC Advisory Letter program established).

511. *See supra* note 245 for a discussion of agency rulemaking.

enforcement authorities of these regulators does appear to be generally effective, to the extent that practical data is available to assess the effectiveness of these arrangements. The overall substantive consistency in the way in which these authorities have been interpreted and applied, particularly as reflected in the case law, is impressive.

There are some obvious inefficiencies in these arrangements, however. Given that each of the regulators is implementing essentially the same statutory authorities, it is not readily understandable why the procedural regulations should vary to the extent that they do from agency to agency. Admittedly, there are extensive similarities among these regulations, but the significant differences in degree of detail between the OCC and FHLBB regulations and the Fed, FDIC and NCUA regulations does not seem justifiable. Further, all of these regulations are weak on details such as rules of discovery and evidence.

Accordingly, this writer recommends that the bank regulatory agencies develop a uniform set of regulations establishing rules for procedure and practice with respect to formal enforcement adjudications, with particular attention to specific rules of pretrial practice, discovery and evidence.[512]

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512. The FDIC has already proposed a complete revision of its Rules of Practice and Procedures. *See* 53 Fed. Reg. 5392 (1988) (to be codified at 12 C.F.R. part 308) (proposed Feb. 24, 1988), as corrected by 53 Fed. Reg. 9409 (March 1988).

In its consideration of this writer's study and recommendations in December 1987, the ACUS took into account the practical fact that absolute uniformity in enforcement regulations was probably not achievable or even desirable. Accordingly, in the preamble to the recommendation adopted at its Plenary Meeting in December 1987, the ACUS argued that "the five agencies jointly should be able to develop substantially similar rules of procedure and practice for formal enforcement proceedings." 1 C.F.R. § 305.87-12 (1988). In this regard the language of the first part of ACUS Recommendation 87-12 reads as follows:

> 1. *Uniform Rules of Procedures.* The [five bank regulatory] agencies should develop, so far as feasible, a uniform set of rules of practice and procedure for formal adjudications, including more explicit provisions covering prehearing practice and discovery rules and the receipt of evidence.

Id. (footnotes omitted).

Obviously, since only the FDIC has so far publicly raised the question of revising its regulations in this regard, it is not possible to assess any movement towards uniformity, "substantial" or otherwise. However, in this writer's view the FDIC's proposed revision appears to be so thorough and salutary that the other agencies should be urged to utilize the revision as a working model towards which their own future revisions, if any, should strive to conform.

As to the need for more detailed provisions with respect to prehearing practice, the pertinent provisions contained in the proposed revision appear to represent a substantial response to the concerns expressed in the study and the ACUS recommendation, particularly proposed sections concerning (*i*) appointment and powers of ALJs, 53 Fed. Reg. 5404 (1988) (to be codified at 12 C.F.R. §§ 308.06-308.07); (*ii*) maintenance of the record, *id.* at 5405 (to be codified at 12 C.F.R. § 308.11); (*iii*) filing and service of papers, *id.* (to be codified at 12 C.F.R. §§ 308.12-308.13); (*iv*) time limits, *id.* at 5405-06 (to be codified at 12 C.F.R. §§ 308.14-308.15); (*v*) witness fees and expenses, *id.* at 5406 (to be codified at 12 C.F.R. § 308.16); (*vi*) settlement offers, *id.* (to be codified at 12 C.F.R. § 308.17); (*vii*) confidentiality, *id.* (to be codified at 12 C.F.R. § 308.18); (*viii*) the requirements and contents of the notice, *id.* (to be codified at 12 C.F.R. § 308.20), and of the answer, *id.* at 5407 (to be codified at 12 C.F.R. § 308.21); (*ix*) procedural rules with respect to amendment of pleadings and intervention, *id.* (to be codified at 12 C.F.R. §§ 308.22-308.23); (*x*) consolidation and severance of actions, *id.* at 5408 (to be codified at 12 C.F.R. § 308.24); (*xi*) motion practice, *id.* at 5410-11 (to be

D. Pooling ALJs

One obvious concern is that since these regulators do not employ and maintain their own ALJs, but rely exclusively on interagency loans of detailed ALJs, the potential for inconsistency in procedure and in decisions is heightened.[513] In addition, concerned staff of the regulators have expressed the related concern that the use of detailed ALJs increases the potential danger that sophisticated regulatory issues and concerns will be submitted, in the first instance, to an inexperienced or uncertain presiding officer.[514]

There are a number of ways in which these concerns could be addressed.

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codified at 12 C.F.R. § 308.30); (*xii*) interlocutory appeals to the FDIC Board of Directors, *id.* at 5411 (to be codified at 12 C.F.R. § 308.31); and (*xiii*) prehearing submissions and conferences, *id.* at 5411-12 (to be codified at 12 C.F.R. § 308.33).

As to the need for more detailed discovery rules, the provisions of the proposed revision in this regard (53 Fed. Reg. 5408-10 (to be codified at 12 C.F.R. §§ 308.25-308.29)) do appear to represent a considerable improvement over the current provisions in terms of the level of detail and the informativeness of the provisions. Nevertheless, the general limitation of discovery to document discovery, with only very narrow availability of depositions, is no advance at all over the current provisions. *Compare* 53 Fed. Reg. 5410 (to be codified at 12 C.F.R. § 308.29(a)) (depositions only where witness will not be available for hearing) *with* 12 C.F.R. § 308.08(a)(2) (1988) (current provision) (depositions only where witness will not be available for hearing). Optimally, broader availability of depositions should prove useful in sharpening genuine disputes over factual issues in advance of the hearing and, as a result, would help in resolving the factual aspects of a case.

As to the need for more detailed provisions with respect to applicable rules of evidence, the ACUS had recently spoken to this issue in general terms, recommending in June 1986 that "[a]gencies should adopt evidentiary regulations applicable to formal adversarial adjudications that clearly confer on presiding officers discretion to exclude unreliable evidence and to use the weighted balancing test in Rule 403 of the Federal Rules of Evidence. . . ." 1 C.F.R. § 305.86-2 (1988). To this general concern, ACUS Recommendation 87-12 added the consideration that the bank regulatory agencies should give more detailed guidance as to what rules of evidence are in fact applicable to formal adjudications undertaken pursuant to their procedural regulations. 1 C.F.R. § 305.87-12 (1988).

The FDIC proposed revision generally moves in the direction of striking an appropriate balance in this regard. It would establish the basic principle that "relevant, material, and reliable evidence that is not unduly repetitive shall be admissible to the fullest extent authorized by the Administrative Procedure Act, other applicable statutes, and the common law." 53 Fed. Reg. 5414 (1988) (to be codified at 12 C.F.R. § 308.38(a)(1)) (proposed Feb. 24, 1988). Furthermore, the revision would also provide the additional guidance that evidence admissible in a United States district court under the Federal Rules of Evidence would be admissible under the revised procedures. *Id.* These revised provisions still give rather wide latitude as to rules of evidence, and on their own terms are not likely to be very informative to ALJs detailed from other non-bank-regulatory agencies. However, other more specific rules of evidence are also included in the proposed revision. *See id.* (to be codified at 12 C.F.R. §§ 308.38(a)(2), 308.38(b)-(f)) (specific rules concerning admissibility, privilege, official notice, admissibility of copies of documents, unavailability of witnesses, objections). These may provide some additional and sorely needed guidance to detailed ALJs. Nevertheless, it would be useful to include an explicit reference to Rule 403 of the Federal Rules of Evidence, which allows the exclusion of evidence the probative value of which is outweighed by other factors, such as its potential for undue consumption of time. *See* FED. R. EVID. 403.

513. *See* Letter from Judge Morse, *supra* note 505, at 3 (lack of settled rules and procedures among banking regulatory agencies leads to non-uniform application of laws).

514. *See, e.g.*, Interview with Mr. Fitzgerald, *supra* note 211; Interview with Mr. Jones, *supra* note 225; Interview with Mr. Fenner, *supra* note 211.

One alternative would be for the agencies to employ their own ALJs, as in fact literally contemplated by federal law.[515] The problem is that there does not appear to be sufficient adjudicatory traffic at any of the agencies to justify such an ongoing arrangement for individual agencies.[516]

The other alternative would be for the agencies to establish a permanent pool of ALJs from which all of them could draw as necessary. Two problems arise in this regard. First, even with pooling there may not be sufficient traffic to justify the maintenance of the pool, although this is less compelling on the available data than it would be with respect to maintenance of ALJs individually by each agency. Second, it is not clear from the statutory provisions governing ALJs whether a group of agencies, rather than "each agency,"[517] would be authorized to maintain such a pool. One way to meet this objection would be to have the pool employed by a single pool bank regulatory agency,[518] with detailing to each participating agency as needed.

Currently OPM operates a reimbursable ALJ loan program under which ALJs from the NLRB have been loaned to the banking agencies on a continuing, year-to-year basis.[519] While the same ALJ personnel tend to continue to serve the same borrowing agencies,[520] attrition in the ranks of ALJ personnel[521] could create some discontinuity for the banking agencies. In any event, this ad hoc, year-to-year arrangement does not seem to address adequately the continuing needs of the banking agencies under their permanent statutory authority.[522]

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515. *See* 5 U.S.C. § 3105 ("*Each agency* shall appoint as many administrative law judges as are necessary for proceedings required to be conducted in accordance with sections 556 and 557 of this title.") (emphasis added).

516. This was the view repeatedly expressed by regulatory staff. *See* Interview with Mr. Fitzgerald, *supra* note 211; Interview with Michael Bradfield, General Counsel, Fed (April 24, 1987); Interview with Mr. Jones, *supra* note 225; Interview with Mr. Fenner, *supra* note 211. In calculating the amount of adjudicatory traffic, however, it should be kept in mind that an ALJ may have been assigned to a particular action even though it is eventually resolved by a consent order and never goes to an APA hearing. Thus, the FDIC has obtained 72 details of ALJs in FY 1984, 132 in FY 1985 and approximately 150 in FY 1986. *See* data included with Memorandum from Craig Pettibone, Assistant Director, OPM, to Professor Michael P. Malloy (October 28, 1987). Similarly, the OCC obtained 50 details in FY 1984, 102 in FY 1985 and approximately 136 in FY 1986. *See id.*

517. *See supra* note 515 for a statute suggesting that each agency have its own ALJ staff.

518. One possible candidate for pool agency under this alternative proposal might be the Federal Financial Institutions Examination Council ("FFIEC"), established under 12 U.S.C. § 3303. However, it is not clear that FFIEC is an appropriate "agency" for purposes of 5 U.S.C. § 3105, nor is it certain that this pooling function is within the functions of FFIEC currently contemplated by statute. *See* 12 U.S.C. § 3305 (ALJ pooling not listed as function of FFIEC). Staff of the Office of Administrative Law Judges, OPM, have informally expressed similar reservations about the status of FFIEC for these purposes. Interview with Craig B. Pettibone, Assistant Director, OPM (October 28, 1987).

519. Interview with Mr. Pettibone, *supra* note 518; Memorandum from Mr. Pettibone to Chief Administrative Law Judges (September 19, 1986).

520. Interview with Mr. Pettibone, *supra* note 518.

521. *See* Memorandum from Mr. Pettibone, *supra* note 519.

522. This was the initial view expressed by staff of several of the agencies concerned. *See* Interview with Mr. Fitzgerald, *supra* note 211; Interview with Mr. Jones, *supra* note 225; Interview with Mr. Fenner, *supra* note 211.

Accordingly, this writer recommends that the bank regulatory agencies consider, in consultation with the Office of Personnel Management, the development of an appropriate permanent pooling arrangement, through administrative action or amendment of pertinent statutory authority, for the employment of administrative law judges, to be available to each pool participant as necessary for proceedings required to be conducted in accordance with sections 7 and 8 of the APA.[523]

Confidentiality in formal enforcement adjudications does, in the abstract, serve to foster public confidence in the safety and soundness of the banking system, particularly by avoiding precipitous and unwarranted public reactions against target institutions and their management officials. However, Congress has expressed a concern with the rights of such targets in a fair adjudicative process. Practices that render that adjudicative process practically opaque to individual respondents, their counsel, and even to ALJs who preside over the initial stages of the process, are therefore suspect, even when defended with the intonation of the near-mystical phrase "public confidence." Confidentiality of the individual interests at issue is a policy value almost beyond dispute, but when confidentiality embraces the details of the process itself, and even the reasoning and policies of the adjudicating agencies, then public confidence in the adjudicative process is itself in jeopardy.

523. 5 U.S.C. §§ 556-557 (APA formal adjudication procedures).