



Recommendation 87-12

Adjudication Practices and Procedures of the Federal Bank Regulatory Agencies

(Adopted December 18, 1987)

The five federal agencies that regulate the activities of depository institutions¹ have broad statutory enforcement authority, including the power to issue cease-and-desist orders, impose civil money penalties, or order the suspension and removal of officers. Such enforcement actions ordinarily allow the target of the proposed sanction to request a formal APA hearing before an administrative law judge.

In recent years, enforcement actions taken by the bank regulatory agencies have increased markedly, although the preponderance of these actions are taken without a formal hearing—based on consent agreements or waivers of formal hearing. The current level of formal hearings has, however, reached the point where attention should be paid to the procedures and practices of the bank regulatory agencies in this regard.

Three basic concerns have emerged from an evaluation of the formal hearing procedures of the bank regulatory agencies, which may be summarized as the need for: (1) Consistency and greater uniformity in the agencies' implementation of shared statutory responsibilities, (2) greater accessibility of agency decisions and the basis for decisions, and (3) more efficient use of administrative law judges.

Although the Conference study did not specifically address the need for change in the division of regulatory responsibilities among the five agencies, it did conclude that the interpretation of identical or similar regulatory authorities does not appear to be inconsistent. By contrast, the formal hearing procedures of the agencies vary significantly, both in their specific provisions and in their level of detail. Moreover, all of the regulations are lacking in detail on rules concerning prehearing practice, discovery and evidence. Given the similar

¹ The term "depository institutions" refers to commercial banks, savings banks and savings and loan associations, and credit unions. The five agencies are the Office of the Comptroller of the Currency (in the Department of the Treasury), the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Federal Home Loan Bank Board (including the Federal Savings and Loan Insurance Corporation), and the National Credit Union Administration. In the aggregate they will be referred to as the "bank regulatory agencies."



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statutory bases for these enforcement actions, the five agencies jointly should be able to develop substantially similar rules of procedure and practice for formal enforcement proceedings.

There is currently limited publication or public dissemination of the bank regulatory agencies' enforcement decisions. This hinders counsel in advising and representing clients and makes it difficult for administrative law judges (who currently are all on loan from other agencies) to apply the complicated statutes and regulations that are involved. This situation would be remedied by improved availability or publication of appropriately redacted agency decisions. Such publication would heighten public awareness of enforcement actions which now are described only in aggregate data published in annual reports. This may be especially beneficial because the agencies have not regularly supplemented or clarified their enforcement policies through interpretive rules or policy statements.

None of the five agencies employs administrative law judges (ALJs) to hear enforcement cases. Rather, they rely exclusively on the interagency ALJ loan program administered by the Office of Personnel Management (OPM) to furnish them with needed ALJs. OPM has attempted to accommodate agency concerns by providing lengthier loan periods and repeat loans. Nevertheless, the system seems to produce needless discontinuity and inefficiency. To improve this situation, the bank regulatory agencies should, in consultation with OPM, consider the advisability of an arrangement by which a pool of administrative law judges could handle all bank regulatory agencies' formal adjudications—subject to any agency's decision to have its own ALJs, should the caseload warrant. If so, ways should be explored to effect such an arrangement. For example, one or more full-time judges could be hired by one of the agencies, which would then serve as the lending agency for the others.

Finally, the Conference urges the agencies to explore whether a pre-complaint procedure (modeled on that used by the Securities and Exchange Commission) would be appropriate in their individual circumstances and should be established. This would enable targets of enforcement investigations to file a submission to the agency head or other agency official charged with the responsibility to initiate formal enforcement proceedings, before such an action is initiated.



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Recommendation

The bank regulatory agencies should take the following actions to improve their formal adjudicatory processes, with respect to regulatory enforcement actions:

1. *Uniform Rules of Procedures.* The 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 rules² and the receipt of evidence.³

2. *Availability of Decisions.* The agencies should make available through regular publication, or other accessible means of dissemination, the appropriately redacted decisions and accompanying opinions issued in formal enforcement adjudications.

3. *Policy Articulation.* The agencies should supplement and periodically clarify enforcement policies set forth in adjudicative opinions by regularly articulating their enforcement policies through rules of general applicability (including interpretive rules) and policy statements.

4. *Administrative Law Judges.* The agencies, in consultation with the Office of Personnel Management, should consider the advisability of an arrangement by which a pool of administrative law judges could handle all bank regulatory agencies' enforcement adjudications required to be conducted according to the Administrative Procedure Act, and, if so, should explore ways to develop such an arrangement.

5. *Precomplaint Notice.* 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.

Citations:

52 FR 49151 (December 30, 1987)

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² See ACUS Recommendation 70-4, *Discovery in Agency Adjudication*, 1 CFR 305.70-4.

³ See ACUS Recommendation 86-2, *Use of the Federal Rules of Evidence in Agency Adjudications*, 1 CFR 305.86-2.



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Note:

This recommendation was implemented by the Financial Institutions Reform, Recovery and Enforcement Act of 1989, Pub. L. 101-73, 101 Stat. 183, and by subsequent agency actions.