UNITED STATES OF AMERICA

Before the

OFFICE OF THRIFT SUPERVISION

DEPARTMENT OF THE TREASURY

In the Matter of DOOLIN SECURITY SAVINGS BANK, FSB, New Martinsville, West Virginia its Directors, Officers, Employees and Subsidiary	Re: Case No. OTS AP-93-74 Dated September 20, 1993 OTS Order No. AP 97-6 Dated: March 31, 1997

DECISION AND ORDER

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I. INTRODUCTION AND SUMMARY OF CONCLUSIONS

This administrative proceeding involves violations of laws and regulations governing savings associations, including 12 C.F.R. §§ 563.170(c), 563.161(a) and 563.93, and unsafe and unsound banking practices in violation of 12 U.S.C. § 1818(b)(1). The charges stem from Doolin's participation in two financing programs administered by ComServ, Inc. ("ComServ"), a third-party financial services corporation: (1) a commercial equipment leasing program; and (2) a credit insured home improvement loan ("CIHIL") program.

The Director concludes that Doolin violated 12 C.F.R. § 563.170(c) by failing to establish and maintain complete and accurate records for the commercial equipment lease and CIHIL programs. Doolin also violated 12 C.F.R. § 563.161(a) by failing to adopt and document written underwriting policies or standards to govern the programs, and 12 C.F.R. § 563.93 by exceeding lending limitations through its commitment to ComServ in the direct-funded transactions.

The Director also concludes that the conduct and practices of Doolin in relation to the commercial equipment leases and CIHIL loans were unsafe and unsound, and posed an abnormal risk to Doolin's financial stability. This finding is based on the severe credit deficiencies in Doolin's lease and CIHIL files, use of deficient Participation and Servicing Agreements, and a concentration of ComServ-related assets on Doolin's books.

II. BACKGROUND

A. Summary of the Administrative Proceedings

On September 20, 1993, the Office of Thrift Supervision Office of Enforcement ("Enforcement") issued a Notice of Charges and Hearing for Issuance of a Cease and Desist Order (the "Notice") against Doolin Security Savings Bank, FSB, New Martinsville, West Virginia ("Doolin" or "Respondent"). The Notice charged that Doolin committed or engaged in acts, omissions, and practices that constituted violations of laws and regulations governing savings associations including 12 C.F.R. §§ 563.170(c), 563.161(a) and 563.93, and unsafe and unsound banking practices in violation of 12 U.S.C. § 1818(b)(1). The charges stem from Doolin's participation in two financing programs administered by ComServ, Inc. ("ComServ"), a third-party financial services corporation.

Specifically, the Notice charged that: (i) Doolin failed to perform adequate underwriting of ComServ-related leases and loans; (ii) Doolin violated its loans-to-one-borrower limitation in connection with direct-funded equipment lease and home improvement transactions with ComServ; (iii) Doolin invested in an undue concentration of ComServ-originated leases and loans; (iv) the Participation and Servicing Agreements between Doolin and ComServ did not adequately protect Doolin's interests; and (v) Doolin maintained inadequate records of the ComServ-related

lease and loan transactions. The Notice initiated an administrative proceeding to determine whether a cease and desist order should be entered directing that Doolin undertake affirmative actions to correct the violations and practices alleged.

Doolin filed its Answer to the Notice of Charges on October 8, 1993, and filed an Amended Answer to the Notice of Charges on January 26, 1994.

Twenty-five days of oral hearings were conducted in Wheeling, West Virginia between September 19, 1994, and May 16, 1995, before Administrative Law Judge Arthur L. Shipe (the "ALJ"). On April 19, 1996, the ALJ issued a Recommended Decision, including Findings of Fact, Conclusions of Law, and a Proposed Order ("Recommended Decision").

The ALJ recommended that Doolin cease and desist from violations of laws and regulations and unsafe and unsound practices. The ALJ further required Doolin to take specified affirmative actions including: (i) submission to OTS for approval of a program to reduce and monitor concentration of assets related to ComServ to a safe and sound level; (ii) establishment of procedures to prevent future violations of Doolin's legal lending limits; (iii) submission to OTS for approval of written policies governing all involvement by Doolin in any transactions with ComServ; (iv) maintenance of proper financial documentation on all transactions involving ComServ; and (v) review of the Participation and Servicing Agreements by independent legal counsel.

On May 21, 1996, Respondent and Enforcement filed exceptions to the Recommended Decision. On June 5, 1996, Respondent and Enforcement replied to opposing party exceptions.

The record was deemed complete on October 1, 1996, and the parties were notified that the Recommended Decision was submitted to the Acting Director for review and final decision. 12 C.F.R. § 509.40(a)(1995). The Director extended the date for issuance of a Final Order to March 31, 1997. OTS Order No. AP 96-37 (December 20, 1996); OTS Order No. AP 97-2 (January 31, 1997).

B. Summary of the Facts

The Director substantially adopts the findings of fact relied on by the ALJ in his Recommended Decision, with the modifications set forth below.[1] The record also reflects

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1 Enforcement Counsel Exceptions #13, 15, 18-19, 21, 24-26, 29-30, 36-39, 41, 46-47, and 56 are adopted without discussion. These exceptions address minor revisions to the ALJ's Findings of Fact, additions and corrections to pertinent citations to the record, and several typographical errors. All other Exceptions to the Recommended Decision that are not explicitly addressed in this Final Decision are denied.

In making various findings of fact, the ALJ accorded credibility to testimony of certain witnesses. Respondent filed an exception to the ALJ's crediting of these statements. Respondent claims the Recommended Decision does not meet the requirements of the Administrative Procedure Act because the ALJ rejected conflicting probative evidence in the record without providing a reasonable evidentiary basis justifying his decision.

As a general rule, the Director will defer to an ALJ's credibility determinations unless the findings are unreasonable, self-contradictory, or based on inadequate reasoning. In re Lopez, OTS Order No. AP 94-23, at 8, n. 9 (May 17, 1994) (citing Stanley v. Board of Gov. of the Federal Reserve System, 940 F. 2d 267 (7th Cir. 1991)), aff'd per curiam, Lopez v. OTS, No. 94-1449, slip op. (D.C. Cir. Sept. 19, 1995); see also Consolo v. Federal Maritime Commission, 383 U.S. 607, 620, 86 S. Ct. 1018, 1026 (1966).

numerous instances where additional findings of fact are relevant to the final decision in this case. These facts are included in the discussion below with appropriate citations to additional supporting evidence in the record.[2]

Two programs give rise to this case: (1) a commercial equipment leasing program; and (2) a credit insured home improvement loan ("CIHIL") program.

1. The Commercial Equipment Leasing Program

The ComServ commercial equipment leasing program involved financing small-business leases located by ComServ primarily through independent brokers. These business customers contract to lease commercial equipment directly from ComServ. The equipment subject to these various leasing arrangements ranges from computer hardware and office furnishings to medical treatment and heavy construction equipment. ComServ would ordinarily execute a lease agreement with a lessee for the use of the equipment over a specified period of time for a monthly

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Here, the ALJ was presented with conflicting testimony from different witnesses. The ALJ credited certain witnesses over others, and based on "the totality of the circumstances established on the record, including [the ALJ's] observation of the evidence presented," the ALJ entered the factual findings in the Recommended Decision. RD at 2. The Director does not find that the ALJ's decision to credit certain witnesses' testimony was unreasonable, self-contradictory, or based on inadequate reasoning. The ALJ's determinations are supported by a preponderance of evidence and Respondent does not present any credible reason for the Director to reach a different conclusion on credibility. Respondent's exception is denied.

2 Citations to various documents are as follows: Tr. refers to the hearing transcript; OTS Ex. ___, and R. Ex. ___. refer to Enforcement and Respondent exhibits admitted into evidence at the hearing; and RD refers to the Recommended Decision.

principal and interest payment. ComServ would obtain financing from various financial institutions, including Doolin, to purchase the equipment to be leased.[3] ComServ also used the money to pay broker fees in connection with the leases. The broker fees represented obligations of ComServ and were not part of the underlying debt between ComServ and the lessee.[4] This direct funding essentially functioned, and was in fact utilized as, a method of interim financing to enable ComServ to complete its various lease transactions.[5] ComServ owned all leased equipment, and filed secured transactions filings in its own name. The lending financial institutions did not obtain any security or secured interest in the equipment in connection with the leases. On the direct funded transactions, Doolin received interest-only payments from ComServ, rather than the fully amortized principal and interest payments received by ComServ.[6] Although lessees paid varying interest rates based on a calculation of yield, Doolin was paid the same interest rate on

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3 Konyk Tr. at 1727.

4 Konyk Tr. at 1746.

5 Christner Tr. at 77. The direct funding transaction was one of a number of funding vehicles, along with two warehouse lines of credit, by which ComServ would purchase equipment for lease. There was opposing testimony that Doolin purchased a 100% participation in a single lease by directly funding the lease (Konyk Tr. at 1753, Stout Tr. at 4171-72); however, such testimony is not supported by the entirety of the testimony elicited at the hearing (see, e.g., Stout Tr. at 4188).

6 Christner Tr. at 118. The portion of the lease payment that represented the amortized principal was kept in a lease passbook account on ComServ's books and was commingled with funds ComServ held for other institutions (Konyk Tr. at 1741-42).

each lease.[7] The payments did not correspond to the underlying obligations and payments of the lessees to ComServ.[8]

After ComServ had executed a certain number of these commercial equipment leases, it would group them together in pools, and sell participation interests in the pools to financial institutions, including Doolin. With respect to the participations, every lease was participated 100 percent, and ComServ retained no interest or risk.[9] ComServ would continue to service the leases. The proceeds of these participation sales were not used by ComServ to pay for equipment and broker fees, but were applied against the original debt used to acquire the equipment.[10]

Doolin first entered into the commercial equipment leasing program with ComServ in late 1989. It appears that the Doolin Board of Directors (the "Board") first discussed the program at a meeting on September 13, 1989.[11] In considering this particular program, the Board received and reviewed ComServ's program documentation, as well as the complete ComServ Leasing Manual, which set forth ComServ's policies, procedures, and underwriting

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7 Christner Tr. at 123-24, Gannon Tr. at 2579, Stout Tr. at 3923.

8 Christner Tr. at 121-22, Konyk at 1653-54.

9 Stout Tr. at 4360. Although there was testimony that the leases were pooled approximately 120 days after the direct funding (Stout Tr. at 4188), further testimony showed some leases pooled and participated one and one-half years after direct funding (Gannon Tr. at 2663).

10 Christner Tr. at 77, 126.

11 Christner Tr. at 155, OTS Ex. 16.

guidelines.[12] There is no written resolution or declaration of the Board's decision to participate in the program, nor does there appear to be any documentation of the Board establishing specific policies, procedures, and internal controls that Doolin management might follow in pursuit of this investment program.[13]

There likewise appears no written evidence that officials at Doolin conducted any underwriting to determine the acceptability

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12 Christner Tr. at 801-02, McClain Tr. at 1789.

13 The testimony of Mary J. McClain, Charles Clemments, and Donald Stout, three Board members of Doolin, was that Doolin had adopted as its own the ComServ policies and procedures regarding the commercial equipment leasing and CIHIL portfolios. The relevant Board minutes never reflected the adoption of these policies or procedures (McClain Tr. at 1793-94, Clemments Tr. at 2045, 2076, Stout Tr. at 4301-02). Two of the witnesses also testified that it was general procedure for the Board to reflect adoption of underwriting policies in Board minutes (McClain Tr. at 1797-1800, and Clemments Tr. at 2043-49; see also Christner Tr. at 154, 167). The only detail that seems to be documented on the ComServ commercial equipment leasing program is an occasional reference in the Board minutes to the program funding and lending limits (Christner Tr. at 156-160, 166, OTS Ex. 16-19). One Board member also testified that there was no process of documentation for underwriting prior to Board adoption of the Review and Approval Memo in July 1992 (Clemments Tr. at 2074).

of individual lease transactions.[14] There is no indication that the institution adopted any formal standards on underwriting or that Doolin exercised its own independent judgment concerning the creditworthiness of lessees or homeowners.[15] The institution relied upon ComServ for underwriting decisions and failed to verify underwriting information obtained from ComServ.

Doolin management also did not establish and maintain complete and accurate records on each lease or its related

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14 Doolin counsel attempts to compare Fannie Mae and Freddie Mac procedures for buying loans to Doolin's situation (Christner Tr. at 484, Konyk Tr. at 1598). The Director disagrees. The Fannie Mae or Freddie Mac/seller-servicer relationships differ substantially from the Doolin/ComServ relationship (Sanders Tr. at 5252-5286). Fannie Mae and Freddie Mac are government sponsored enterprises set up with Congressional authority and with defined regulations and restrictions (Konyk Tr. at 1670-71). These enterprises purchase conforming residential mortgage loans from seller-servicers that are underwritten according to uniform standards. The loans are then packaged into mortgage participation certificates and resold in the secondary mortgage market, where there is recourse against the seller-servicers and guarantees by Fannie Mae and Freddie Mac (Sanders Tr. at 5254). OTS guidance for the industry reflects these differences: the secondary mortgage market is addressed in section 470 of the Thrift Activities Handbook while loan purchases and participations are addressed in sections 210 and 211 of the Handbook (Christner Tr. at 757-60, Konyk Tr. at 1678).

15 The Board did finally adopt a separate "Underwriting Policy" for the commercial leasing program on July 22, 1992 after its underwriting deficiencies were noted during the 1992 OTS examination (Christner Tr. at 163, OTS Ex. 20-21). The July 22 policy was similar to a policy drafted by John Konyk, Senior Vice President of ComServ upon Doolin's request (Konyk Tr. at 1693-94). OTS examiners deemed the policy inadequate because the terms were vague and not defined, the policy did not provide sufficient guidance for management in its underwriting of commercial equipment leases, and the policy criteria could easily be abused (Christner Tr. at 187-189).

business.[16] Doolin's records did not accurately reflect the true extent of its ownership in the commercial leases, and Doolin did not correctly apply payments to the lease portfolio, with the result that neither Doolin nor the OTS could accurately verify or monitor the portfolio or determine the quality and validity of Doolin's assets.[17]

A standard, essentially identical Participation and Servicing Agreement ("PSA" or "Agreement") governed the relationship between ComServ and Doolin in each of the direct-funded and participating arrangements.[18] Under the terms of the Agreement governing the participation sales, ComServ would service the lease pools (i.e. receive and collect the lease payments from the various lessees), account and apply all sums collected, remit the agreed principal and interest payments to the various participating financial institutions based on the percentage interest in those pools, and take other action necessary to ensure continued performance of the outstanding lease arrangements. Respondent testified that pursuant to the PSAs, the lease documents and any collections due to the

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16 Subsequent to the June 1992 examination, Doolin augmented its commercial equipment lease files; however such files were still lacking adequate and accurate documentation (Christner Tr. at 794-95, Konyk Tr. at 1711, OTS Ex. 29).

17 Mallory Tr. at 3317-20, 3409. Records at ComServ reflected 100% direct funding by Doolin in commercial leases that were subsequently grouped into a pool and purchased 100% by Doolin (Christner Tr. at 285, 492, 788). Also, instead of applying payments for the sale of participation pools by ComServ against specific leases, Doolin applied them against other leases, and took those leases off the books, in effect overstating some of the leases and understating others (Christner Tr. at 789-91, see also Clemments Tr. at 2017-18, Stout Tr. at 4807-13).

participant were held "in trust" for the various participants.[19] ComServ collected servicing fees for its efforts.

The PSAs were drafted and reviewed by counsel for ComServ.[20] Pursuant to the Agreements, almost all rights and benefits went to ComServ, and all obligations and risks went to Doolin. The Agreements did not grant Doolin any security interest in the collateral of the leases or CIHIL loans, nor did they secure Doolin's interest in the participations purchased, including those in which Doolin held a 100 percent interest.[21]

Within a relatively short time after embarking upon this leasing program, Doolin had committed substantial funds to the activity, both in the direct-funded lease transactions, as well

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18 R. Ex. 18.

19 There was no separate agreement clearly establishing a trust relationship. Nor were there any provisions for the accounting, distribution, and payment of any lease or loan payments ComServ received, or for the assignment of any security interests. In the event of a material breach by ComServ, or a declaration of insolvency or bankruptcy, it was unclear, under the terms of these agreements, the extent to which Doolin would be protected (Konyk Tr. at 1741-42). Doolin expert Daniel Gannon testified that the money was kept in trust for Doolin but he was not familiar with where the money was kept, whether a separate account was established and whether there was a trust agreement (Gannon Tr. at 2561-63, 2590-95).

20 Stout Tr. at 3812.

21 Respondent's proposed finding of fact and supporting testimony that Doolin never suffered any loss resulting from similar participation agreement forms used, and that Doolin has never been involved in any litigation as a result of the use of the forms, is irrelevant to this particular set of facts (Stout Tr. at 3508-11, 3776-92, 4763-67). There was testimony that similar participation agreements used by a consortium had numerous differences from the participation and servicing agreements for the commercial equipment lease and CIHIL programs, including provisions for payment, subordination, losses and expenses, indemnification and notification (Stout Tr. at 4363-4411).

as the purchase of lease pool participations. As of May 31, 1992, with total assets of approximately $60 million and total equity capital of approximately $5.2 million, Doolin had purchased direct-funded leases totaling $2.3 million and participations in pools of leases totaling an additional $1.2 million. Doolin had also issued commitments to fund leases totaling an additional $900,000, representing a total commitment to the commercial equipment lease program of approximately $4.4 million.[22] Doolin continued to increase its exposure to the program until it was directed by the OTS in a Supervisory Directive, dated July 1, 1992, to discontinue further funding of these activities because of regulatory concerns over their safety and soundness. Management at Doolin later stopped investing in any new ComServ-related commercial equipment leases.

2. The Credit Insured Home Improvement Loan ("CIHIL") Program

The CIHIL program involved relationships that ComServ had developed with contractors who performed home improvement services for homeowners. The homeowner would sign a promissory note for the service to be rendered and give the contractor a second mortgage or junior lien on the property securing the obligation.

ComServ would pay the contractor the entire price up front or at the time the work was completed and, in consideration for this payment, the contractor would assign the note and

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22 Christner Tr. at 162, McClain Tr. at 1780.

corresponding mortgage to ComServ. The CIHIL program was insured by two methods - through United Guaranty, a private mortgage insurance company that provided credit insurance to ComServ in the event of a default by a homeowner on its contract; and through self-insurance, in which case a reserve account was established to cover defaults in self-insured CIHIL loans.[23]

Doolin first entered into the CIHIL program with ComServ in October 1991. Initially, ComServ received monies from Doolin to fund not only ComServ's purchase of the promissory notes, but to fund the reserves and insurance premiums.[24] These reserves and insurance premiums were not obligations of the homeowners but insurance against borrower defaults and prepayments.[25] Prior to pooling the loans, Doolin received interest-only payments at a specific rate on the direct-funded CIHIL loans, rather than the amortized principal and interest payments made to ComServ from the homeowners.[26]

As with the commercial equipment lease program, ComServ also pooled CIHIL loans and sold participating interests to various financial institutions, including Doolin. Once the pools were established, ComServ remitted to the participants the principal

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23 Christner Tr. at 101.

24 Christner Tr. at 132, Konyk Tr. at 1746.

25 Christner Tr. at 132, Stout Tr. at 4601.

26 ComServ put the principal portion into a general account commingled with funds ComServ held for other institutions (Christner Tr. at 136-37, Konyk Tr. at 1741, Stout Tr. at 3924).

and interest payments based on the percentage purchases of the pool.[27]

The first reference to the CIHIL program was made in the July 10, 1991, Board meeting.[28] No underwriting policies were approved or adopted by the Board governing the various CIHIL credit extensions, nor did Doolin gather or verify any credit information provided by ComServ.[29] Doolin also did not establish and maintain complete and accurate records of the CIHIL loan files.[30] Finally, all of the CIHIL loan transactions between ComServ and Doolin were governed by the previously discussed PSAs.[31]

As of May 31, 1992, Doolin had invested $759,000 in direct-funded loans, and $302,000 in CIHIL participations. In addition,

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27 Christner Tr. at 97, 137.

28 Christner Tr. at 172.

29 Christner Tr. at 174-78, OTS Ex. 23-27. The first indication in the minutes of the Board's consideration or adoption of a written policy for the underwriting of CIHIL loans was on July 22, 1992 (Christner Tr. at 180; OTS Ex 20, 28). Donald Stout, the President of Doolin prepared the written policy and Review and Approval Memo with the assistance of John Konyk, a Senior Vice-President at ComServ, who, at the request of Stout, sent draft policies and Review and Approval Memos for the commercial equipment and CIHIL programs. These documents were substantially similar to the policies ultimately adopted by the Board. (Christner Tr. at 191-192, Clark Tr. at 945-947, Konyk Tr. at 1711; OTS Ex. 29-30). The Review and Approval Memos were checklists of what was reviewed and failed to provide documentation regarding the information that management considered in deciding whether to extend the credit (Christner Tr. at 218).

30 Christner Tr. at 477.

31 Doolin also received other documents prepared by ComServ, including the "CIHIL Loan Program Statement," the "Loan Program Policy," and the "Program Procedure" which outlined the rights and responsibilities between Doolin and ComServ.

Doolin had $349,000 in commitments to fund CIHIL loans, totaling $1.4 million invested in or committed by Doolin to the CIHIL program. Doolin continued to increase its exposure to the program until it was directed by the OTS in a Supervisory Directive, dated July 1, 1992, to discontinue further funding of these activities because of regulatory concerns over their safety and soundness. Management at Doolin later stopped investing in any new ComServ-related CIHIL loans.[32]

3. The 1992 Examination of Doolin

The OTS conducted a full scope safety and soundness examination of Doolin beginning on June 6, 1992.[33] The most recent full scope examination of Doolin prior to June 1992 had been conducted in October 1990.[34] The proposed final copy of the 1992 report of examination was submitted to the FDIC (as insurer

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32 Clemments Tr. at 2013-14, Stout Tr. at 3827, 4840. Doolin President Donald Stout sent a letter in March 1993 advising OTS of Doolin's intent to purchase additional CIHIL loans from ComServ in violation of the Directive. Doolin reconsidered after OTS objected on safety and soundness grounds.

33 A full scope safety and soundness examination addresses the overall condition of an institution and is not limited in any material way in terms of the examination process used (Christner Tr. at 51-52).

34 Christner Tr. at 55. A special limited examination was conducted in 1991 (Kossol Tr. at 818-21).

of Doolin) on August 14, 1992, and the final report was transmitted to Doolin and the FDIC on August 27, 1992.[35]

The June 1992 examination of Doolin was the first time that the specific aspects, and the safety and soundness, of the commercial equipment lease and CIHIL portfolios were addressed.[36] At the time of the examination, Doolin showed no losses in the commercial equipment lease or CIHIL programs, and there were no delinquencies on Doolin's books.[37] Monthly remittance reports from ComServ showed the delinquency status for each lessee or borrower in the pool.[38] ComServ continued to make payments to Doolin even when the lessees or homeowners were delinquent on their leases or contracts.[39] Although the examiners did not have information at that time on whether individual lessees or borrowers were delinquent in their payments to ComServ, OTS

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35 Christner Tr. at 62. The major difference between the August 14 and the August 27 reports is the inclusion in the August 27 report of the loans to one borrower violation (Christner Tr. at 70). Modification of prior reports of examination and editing changes of supervisory personnel during the review of a report of examination are normal OTS procedures (Christner Tr. at 60, 384-85). These reviews are consistent with the ordinary review process for a report of examination (Christner Tr. at 729-30, 773).

36 The CIHIL program did not commence until October 1991 after any prior examination (Christner Tr. at 748), and there is no evidence that OTS examiners intended the general references to policies and procedures in previous examinations to encompass the policies and procedures governing the commercial equipment lease portfolio (Christner Tr. at 382, 431, Stout Tr. at 4569).

37 Christner Tr. at 277-80, 309, Kossol Tr. at 5434.

38 Kossol Tr. at 1313-15, OTS Ex. 12-14. Provisions 9.1 and 9.2 of OTS Ex. 7 and 8A, required ComServ to advise Doolin of a lessee or homeowner default only after 31 and 45 days, respectively.

39 Christner Tr. at 277, Kossol Tr. at 5435, OTS Ex. 31.

alleged that the unsafe and unsound lending practices disclosed during the examination exposed the bank to unnecessary risks. ComServ stopped making payments on delinquent leases and loans in August, 1992. Thereafter, the amount and percentage of Doolin's actual delinquencies in the commercial equipment lease and CIHIL programs increased.[40]

The June examination resulted in the immediate issuance of a Supervisory Directive by OTS to Doolin on July 1, 1992.[41] The Supervisory Directive instructed the institution to cease to invest or commit to invest in any third party leases or loans other than to fulfill legally binding commitments already in existence. On July 8, 1992, the Board notified OTS that it had passed resolutions to abide by the Supervisory Directive.[42] A second OTS directive letter was submitted to Doolin on July 24, 1992, deeming Doolin a troubled institution and requesting Doolin to abide by additional directives.[43] On August 6, 1992, the executive committee of Doolin agreed to abide by OTS's second directive letter.[44] The Report of Examination was transmitted on August 27, 1992. In correspondence dated October 21, 1992, and November 6, 1992, Doolin notified OTS that it had rescinded the Board resolutions and would not comply with the Supervisory

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40 Kossol Tr. at 881-90, Anderson Tr. at 1971, Gannon Tr. at 2747.

41 Christner Tr. at 63, Stout Tr. at 3826, OTS Ex. 2.

42 Christner Tr. at 67, Kossol Tr. at 849-52, OTS Ex. 3, 38.

43 Kossol Tr. at 853-54, OTS Ex. 39.

44 Kossol Tr. at 855, OTS Ex. 40.

Directives. On September 20, 1993, OTS issued the Notice of Charges initiating the pending proceedings.

C. The ALJ's Recommended Decision

The ALJ found that Doolin engaged in unsafe and unsound practices and violated 12 C.F.R. § 563.161(a) by failing to adopt and document written underwriting standards or policies to govern the commercial equipment lease and CIHIL programs. The ALJ's finding was based on severe credit deficiencies in Doolin's commercial equipment lease and CIHIL files, use of deficient Participation and Servicing Agreements that were not reviewed by independent legal counsel, and a concentration of ComServ-related assets on Doolin's books. The ALJ also found that Doolin violated 12 C.F.R. § 563.170(c) by failing to establish and maintain complete and accurate records, and 12 C.F.R. § 563.93 by exceeding lending limitations through its commitment to ComServ in the direct-funded transactions.

The ALJ recommended Doolin cease and desist from the unsafe and unsound practices and violations of regulations, and further required Doolin to engage in specific affirmative actions. These actions included submission to OTS for approval of a program to reduce and monitor concentration of assets related to ComServ to a safe and sound level; establishment of procedures to prevent future violations of Doolin's legal lending limits; submission to OTS for approval of written policies governing all involvement by Doolin in any transactions with ComServ; maintenance of proper financial documentation on all transactions involving ComServ;

and review of the Participation and Servicing Agreement by independent legal counsel.

III. DISCUSSION

A. Jurisdiction

After the parties had been notified that this case had been submitted to the then Acting Director for final decision and, indeed, after Acting Director Fiechter had resigned and the current Director had been directed by the President to perform the duties of Director, Respondent filed a motion to dismiss for lack of jurisdiction and a further suggestion of lack of jurisdiction. Respondent argues that Acting Director Jonathan Fiechter lacked authority to initiate this proceeding when he signed the notice of charges on September 20, 1993, and that the current Director's authority is defective under the Vacancies Act.[45] As a consequence, Respondent contends, this case must be held in abeyance until the Senate confirms a Director of OTS, at which time the new Director must dismiss the case.

Enforcement has made several arguments in response, among them that even if Respondent's statutory arguments are correct,

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45 Respondent also makes a corollary constitutional argument, that a transfer of agency authority outside the statutory provisions can only be accomplished under the Appointments Clause, which requires a Presidential appointment and Senate confirmation. No Senate confirmation having occurred here, the statutory defects have a constitutional dimension. This concern dictates that the Director, in considering the pending motion, bear in mind the canon that where there is room to interpret a statute, it should be construed to avoid constitutional issues.

Acting Director Fiechter's issuance of the notice of charges is validated by the de facto officer doctrine.[46]

Respondent's motion, particularly as it relates to the transfer of authority to Acting Director Fiechter, requires interpretation of several provisions of the Home Owners' Loan Act ("HOLA") that were enacted as part of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA").[47] FIRREA abolished the Federal Home Loan Bank Board - a three-member independent agency charged with the regulation of the savings and loan industry - and replaced it with OTS, a bureau of the Treasury run by a single Director with a five-year term. This fundamental institutional change required Congress to address the transfer of authority from the Director to others, and it is these provisions that are the subject of Respondent's motion.

The Director addresses first the arguments regarding Acting Director Fiechter's authority and then turns to the arguments regarding his own.

1. Acting Director Fiechter

The facts relating to the authority of Acting Director Fiechter are not in dispute. On December 4, 1992, Jonathan Fiechter, then Deputy Director for Washington Operations at OTS,

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46 Among Enforcement's arguments is that Respondent's motion is untimely under OTS rules governing formal enforcement proceedings. See 12 C.F.R. § 509.104(b). In the interest of resolving all potential issues in this case, the Director will exercise discretion and consider Respondent's motion.

47 Pub. L. No. 101-73, 103 Stat. 183 (1989).

assumed the powers of Director pursuant to two orders signed by then Director Timothy Ryan, who resigned later that day. The two orders invoked the Director's designation and delegation powers under section 3(h)(4)(A)(i) and (ii), respectively, of the HOLA. The designation power under this section permits the Director to designate "who shall act as Director in the Director's absence."[48] The delegation power authorizes the Director "to delegate to any employee, representative, or agent any power of the Director."[49]

Respondent contends that Director Ryan's resignation did not create an "absence" for the purpose of the designation provision and that a delegation cannot survive the resignation of the delegator. Instead, Respondent argues, when the Director resigns, the agency must look to section 3(c)(3) of the HOLA. This section directs that when there is a vacancy in the position of the Director before the expiration of the Director's term, that vacancy shall be filled by a Presidential appointment with Senate confirmation.[50] These three HOLA provisions are discussed seriatim below.

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48 12 U.S.C. § 1462a(h)(4)(A)(i).

49 12 U.S.C. § 1462a(h)(4)(A)(ii).

50 Section 3(c)(3) states:

> A vacancy in the position of Director which occurs before the expiration of the term for which a Director was appointed shall be filled in the manner established in paragraph (1) [a Presidential appointment with Senate confirmation] and the Director appointed to fill such vacancy shall be appointed only for the remainder of such term.
>
> 12 U.S.C. § 1462a(c)(3).

Designation. Respondent contends that the designation power cannot operate to transfer authority in the event of a resignation because the triggering event, an "absence," connotes a temporary departure of the Director, not a permanent one such as caused by a resignation. What is meant by "absence" under the designation power is not entirely clear, but the Director is disinclined to give it the narrow interpretation urged by Respondent.

The word "absence" does not have a technical meaning.[51] The statute does not define "absence," and the legislative history does not discuss the term. Rather, "absence" is a broad term that on its face encompasses both temporary and permanent absences. Federal law beyond the HOLA offers limited guidance. For example, in one instance, absence is synonymous with the phrase "absent or unable to serve or when the office . . . is vacant."[52] Elsewhere, Congress may have contemplated some difference between "absence" and "vacancy." 31 U.S.C. § 306, for instance, authorizes the Secretary of the Treasury to designate

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51 We recognize that the Justice Department has suggested that the term "absence normally connotes a failure to be present that is temporary in contradistinction to the term `vacancy' caused . . . by . . . resignation" See 2 Op. Off. Legal Counsel 394, 395 (1978). In light of the other points discussed below - avoidance of a constitutional issue, giving effect to all statutory provisions, and treating comparable agencies comparably - the Director does not "normally connotes" as requiring in this case a narrow reading of the term "absence."

52 See 31 U.S.C. § 3019f)(1) Explanatory Note. This provision sets forth the organization of the Treasury Department. Paragraph (f)(1) addresses, inter alia, succession in the General Counsel's office. The Explanatory Note states that "[t]he words `is absent or unable to serve or when the Office of General Counsel is vacant' are substituted for `during the absence of' for clarity and consistency." (Emphasis added.)

another Treasury Department official to act as Fiscal Assistant Secretary when the appointed Assistant Secretary is absent or the office is vacant. Of course, as we have said, "absence" is not a term of art, and it is not clear that Congress had a different intent in the HOLA designation provision than in other designation provisions. Because the broader definition, encompassing an absence or vacancy created by a resignation avoids the constitutional issue Respondent otherwise raises, the Director believes that the broader definition is appropriate here.

Further, in addition to avoiding a constitutional issue, the broader definition of "absence," to include an opening created by a vacancy, is the only way to give effect to a provision of the Federal Deposit Insurance Act ("FDIA") that refers to a Director. Respondent's narrower interpretation would render this provision meaningless. The provision, section 2(d)(2) of the FDIA,[53] states that an "acting Director" of OTS shall be a member of the FDIC board "[i]n the event of a vacancy . . . and pending the appointment of a successor." Under the HOLA, an acting Director may be created either through the designation provision or through the delegation provision. The HOLA also is explicit, however, that the delegation power may not be invoked to create an official able to serve as a member of the FDIC Board.[54] Thus the only way for an acting Director to be created in the way Congress provided for in section 2(d)(2) of the FDIA is for the

53 12 U.S.C. § 1812(d)(2).

54 See 12 U.S.C. § 1462a(h)(4)(B)(ii).

sitting Director to exercise the designation authority, as Director Ryan did.

The Director observes as well that giving a broader interpretation to "absence" in the designation provision makes transfers of authority at OTS more comparable to transfers of authority at OTS' counterpart agency, the Office of the Comptroller of the Currency ("OCC"). The relevant statutory language for the OCC is different: it provides that the Secretary of the Treasury may designate Deputy Comptrollers of the Currency, who may exercise the Comptroller's powers after the Comptroller resigns.[55] At OTS, the broader interpretation of "absence" in the designation provision would permit the sitting Director (rather than the Secretary of the Treasury) to designate which person shall exercise his powers after resignation.[56] The Director does not presume that Congress intended to impose stricter limits on the designation of an acting head of OTS than on an acting head of OCC. Respondent's only evidence of intent to do so is Congress' use of the word "absence." Because it is a non-technical term, open to interpretation, and because the narrower interpretation urged by Respondent would pose other

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55 See 12 U.S.C. § 4.

56 Granting this power to the Director rather than to the Secretary of the Treasury is consistent with Congress' intent to limit the Secretary's authority with respect to OTS. See 12 U.S.C. § 1462a(b)(3) (Secretary may not intervene in any matter or proceeding before the Director unless otherwise specifically provided by law).

constitutional and statutory issues, the Director is unwilling to accept that narrower interpretation.[57]

Delegation. Respondent's argument is that a delegation of power cannot survive the resignation or departure of the delegator. The principle of law on delegations is directly to the contrary:

> Institutional delegations of power are not affected by changes in personnel, but rather continue in effect as long as the institution remains in existence and the delegation is not revoked or altered.

R.R. Yardmasters v. Harris, 721 F.2d 1332, 1344 (D.C. Cir. 1983). See also United States v. Wyder, 674 F.2d 224 (4th Cir.), cert. denied, 457 U.S. 1125 (1982); United States v. Messersmith, 692 F.2d 1315 (11th Cir. 1982). Railroad Yardmasters goes on to point out that "[a]ny other general rule would impose an undue burden on the administrative process." 721 F.2d at 1344. The Director therefore rejects Respondent's challenge to the delegation of authority to Acting Director Fiechter.

Filling an unexpired term. With respect to Respondent's argument that the statutory instruction in section 3(c)(3) on the filling of an unexpired term renders the designation and delegation powers unavailable in the event of a resignation, section 3(c)(3) does not by its terms purport to limit either the

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57 Olympic Federal Savings & Loan Ass'n v. Director, OTS, 732 F. Supp. 1183 (D.D.C.), dismissed as moot, 903 F.2d 837 (D.C. Cir. 1990), is not to the contrary. That decision held only that an unconstitutionally appointed Director could not name his own successor, and the holding did not involve construction of the designation power under section 4(h)(A)(i). Here, the Director exercising the designation power, Timothy Ryan, was constitutionally appointed.

designation power or the delegation power. Neither power is conditioned on section 3(c)(3).[58]

Further, the purpose of section 3(c)(3) appears not to be to limit the delegation and designation powers in section 3(h)(4) but rather to provide that a permanent appointment requires Senate confirmation.[59] This provision thus has the same substantive effect as the vacancy provision that governs the FDIC Board and that also was enacted as part of FIRREA. The FDIC provision states that a vacancy on the FDIC board shall be filled in the same manner as the original appointment was made - a statement that is in substance identical to section 3(c)(3).[60] The FDIC provision then also states explicitly that an "acting" Director of OTS may serve on the FDIC board in the event of a vacancy in the position of Director. Congress thus must have intended that in the event of a vacancy in the position of Director of OTS, that position could be filled either through the appointment and confirmation process (as stated in section

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58 Where Congress sought to have one provision of HOLA limit the applicability of another, it did so expressly. See, e.g., 12 U.S.C. § 1464(t)(5)(C)(excepting certain non-banking subsidiaries from charge to capital).

59 Enforcement correctly points out that there is a real difference between a permanent appointment under section 3(c)(3) and a temporary designation or delegation. Temporary, or acting, Directors may be replaced at any time, through a nominee confirmed by the Senate or through a Presidential direction under the Vacancies Act. A permanent appointment, one made with Senate confirmation, carries with it a fixed term, and the occupant may be removed only for cause. Section 3(c)(3) thus points out that a permanent director, whether serving his own term or an unexpired term, requires Senate confirmation. OTS has never contended, however, that either Acting Director Fiechter or the current Director is serving in a permanent position.

60 See 12 U.S.C. § 1812(d)(1).

3(c)(3) of the HOLA) or through the designation of an acting Director. If made under section 3(c)(3), however, the appointment would be a permanent one, rather than an acting one. Congress' concept of an acting Director of OTS in the event of a vacancy would be rendered a nullity if Respondent's theory of the exclusivity of section 3(c)(3) were accepted.[61]

De Facto Officer Doctrine. Enforcement argues that even if Respondent were correct in its interpretation of the designation and delegation provisions, Acting Director Fiechter's issuance of the notice of charges is validated by the de facto officer doctrine. This doctrine "confers validity upon acts performed by a person acting under the color of official title even though it is later discovered that the legality of that person's appointment or election to office is deficient." Ryder v. United States, 132 L.Ed.2d 136, 142 (1995). In Ryder, the Supreme Court declined to apply the doctrine so as to foreclose "a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case." Id. at 143.

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61 It could be argued (although Respondent has not done so) that all that Congress had in mind when it referred to an "acting Director" in section 2(d)(2) of the FDIA was a detail under the Vacancies Act, which is of course how the current Director now sits on the FDIC Board. Again, the Director is loathe to impose a restrictive interpretation on a statute where Congress has not done so explicitly and where doing so would give rise to complicated constitutional and other legal issues. Furthermore, there is reason to think that Congress was aware, in enacting section 2(d)(2) and other parts of FIRREA, that an acting Director could be created through the designation power. Congress took care to exclude from the delegation power the ability to create an acting Director capable of sitting on the FDIC Board. Congress inserted no comparable exclusion in the designation power, so it is appropriate to infer that Congress

Acting Director Fiechter clearly qualifies as a de facto officer. For nearly four years he held himself out as Director of OTS, took numerous final actions on behalf of the agency, including the appointment of conservators and receivers for failed savings associations and final decisions in contested enforcement cases. He also testified as the head of OTS on numerous occasions before both the Senate and the House, where, presumably, any doubts about his tenure without Senate confirmation might have been raised.

Respondent argues in effect that it satisfies both of Ryder's conditions for an exception to the de facto officer doctrine, i.e., the challenge is timely and it is constitutional in nature. The Director does not agree that the challenge to Acting Director Fiechter's authority is timely. In addition to being filed beyond the time limits set forth in the OTS regulations, Respondent's motion was filed over three months after Acting Director Fiechter resigned. Respondent had three years in which to seek relief from Acting Director Fiechter and evidently chose not to do so. The Director therefore does not regard Respondent as bringing itself within the confines of Ryder.[62]

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intended or understood that a designee Director would have the capacity of acting Director.

62 Respondent appears to argue that any constitutional challenge is not covered by the de facto officer doctrine, regardless of timeliness. Ryder does not so hold, and, in the circumstances of this case, the Director sees no reason to extend Ryder's holding.

Accordingly, Acting Director Fiechter's issuance of the notice of charges in this case is validated by the de facto officer doctrine.

2. Director Retsinas

On October 10, 1996, President Clinton directed Nicolas Retsinas, Assistant Secretary of Housing and Urban Development, to perform the duties of the office of the Director of OTS. The directive relied upon the Constitution and laws of the United States, specifically a provision of the Vacancies Act, 5 U.S.C. § 3347.

The Vacancies Act authorizes the President to designate a person currently serving in an executive branch position after Senate confirmation to fill another executive branch position requiring Senate confirmation "when" the occupant of that position resigns. "When," according to Respondent, limits the President to acting within a reasonable period of time. Because Acting Director Fiechter never (in Respondent's view) lawfully exercised the powers of Director, the vacancy that the President filled by appointing Director Retsinas was that created on December 4, 1992, by the resignation of Timothy Ryan. A period of close to four years fails, in Respondent's judgment, the reasonableness requirement implied by section 3347.

The Director finds no support for a time limit on Presidential action under the Vacancies Act and rejects Respondent's challenge (even accepting Respondent's assumption

that Acting Director Fiechter lacked authority).[63] On its face, section 3347 imposes no time limit. The word "when" triggers the President's ability to invoke section 3347, but once that ability exists, nothing in the language or the context of the section precludes the President from acting after a certain period. Respondent bases its argument on an Office of Legal Counsel opinion suggesting, as a prudential matter, that a Vacancies Act appointment should be of limited duration.[64] This suggestion, however, goes simply to the length of service by a person directed to serve in a position under section 3347, not to the time period in which the initial directive may be made.[65]

B. Cease and Desist Order

Under 12 U.S.C. § 1818(b), the OTS may issue a cease and desist order against any insured depository institution[66] that has been, is, or is about to be, engaged in an unsafe or unsound

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63 The Justice Department Department also takes the position that the President has inherent authority, beyond the authority stated in the Vacancies Act, to make temporary appointments necessary to ensure the continuing operation of the Executive branch. See 2 Op. Off. Legal Counsel 394, 396 (1978). The President's directive to the current Director clearly would come within this category.

64 See 1 Op. Off. Legal Counsel 150 (1977)

65 The conclusion that there is no time limit on an initial directive under section 3347 is reinforced by the principle that statutes be construed to avoid constitutional issues. Respondent here asks the Director to read into section 3347 a requirement not explicitly stated - a requirement that would in this case create a constitutional issue. Congress not having chosen to express a further limitation on Presidential power, the Director is reluctant to create one here.

66 Doolin is a Federal savings association and an "insured depository institution" as defined by Section 3(c) of the Federal Deposit Insurance Act (12 U.S.C. § 1813(c)).

practice in conducting the business of such depository institution, or is about to violate or has violated a law, rule or regulation, or any condition imposed in writing or any written agreement with the agency. The OTS may require an institution to cease or desist from a violation or practice and to take affirmative actions to correct, or prevent the recurrence of, a condition resulting from a violation or practice.[67] This authority includes the authority to place limitations on the activities or functions of an institution.[68]

Doolin contends that it voluntarily ceased transactions with ComServ at the OTS's first request and, therefore there is no basis for any affirmative relief. The Director disagrees. The numerous violations in an inherently risky portfolio, to which Doolin had committed an amount almost equal to its capital, presented a situation serious enough, by itself, to warrant a formal order.[69]

Furthermore, while Doolin may not have purchased any more lease or CIHIL participations, it has indicated its intention to resume the CIHIL program.[70] The OTS has "no valid assurance that

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67 2 U.S.C. § 1818(b)(1) and (6).

68 2 U.S.C. § 1818(b)(7).

69 OTS's own history with Doolin's efforts to cure problems voluntarily also supports the Agency determination that an order is necessary. Despite criticism during the 1991 special limited examination that Doolin had failed to document its underwriting adequately on commercial real estate loans and the Board's assurance that it would take care of the problem (OTS Ex. 36), the problem was still present two examinations later, criticized in the 1993 examination and listed as a repeat violation (OTS Ex. 37 at 9).

70 See footnote 32, infra.

if the Insured Institution were free of the [agency's] restraint it would not continue its former course."[71] Moreover, in most other regards, the need for relief continues.[72] For example, given the poor quality of the assets in the lease and CIHIL portfolios and the significant underwriting deficiencies disclosed, an order requiring Doolin to cease from any more transactions involving the ComServ lease and CIHIL programs without prior OTS approval is essential. Similarly, Doolin still does not have complete information or documentation on the underlying lessees or borrowers, making relief necessary in that regard. Because of the undue reliance on ComServ, the institution still needs a plan to reduce and maintain the concentration of transactions with ComServ to an acceptable level. Additionally, Doolin still lacks adequate policies to govern lease and CIHIL transactions, and the standard PSAs fail to adequately protect Doolin's rights and have never been reviewed by independent Doolin counsel.

The Doolin Board also has refused to meet with OTS officials to discuss the lease and CIHIL portfolios for more than three years since the problems were first uncovered during the 1992 examination. Doolin continues to refuse to meet with OTS officials except under conditions dictated by Doolin that deviate sharply from standard OTS practices.

For the reasons set forth below, the Director concludes that the record evidence supports a cease and desist order against

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71 Bank of Dixie v. FDIC, 766 F.2d 175, 178 (5th Cir. 1985).

Doolin both for violations of OTS regulations and for unsafe and unsound practices. The Director also orders specific affirmative actions to correct the condition resulting from the violations and practices.

C. Regulatory Violations

The ALJ determined that Doolin had violated OTS regulations governing loan documentation, maintenance of safe and sound management, and loans to one borrower. The Director agrees.

1. 12 C.F.R. § 563.170(c)

The 1992 Examination revealed that several required loan documents were missing from the commercial equipment lease and CIHIL loan files, including signed lease and loan applications, leases, mortgages, and documents showing sufficient cash flow to support lease or loan payments.[73] Doolin's accountant testified that in 44 of the 50 lease files reviewed, there was either no application or the application in the file was unsigned, and that this was acknowledged by Doolin.[74] Even after the Review and Approval memos were added to the files, there continued to be an absence of documentation.[75]

Doolin's president testified that the files at ComServ were Doolin's, which, by virtue of the participation, bought an

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72 Kossol Tr. at 1201-10.

73 Christner Tr. at 195-98, 237, Mallory Tr. at 3293-98, OTS Ex. 1.

74 Mallory Tr. at 3260-85.

75 Christner Tr. at 238-39, OTS Ex. 29, 30.

undivided interest in the assets and the files.[76] Doolin's expert testified that in a servicing environment, records are kept by the servicer and the agreement between ComServ and Doolin called for the records of Doolin at ComServ to be available to Doolin, so all recordkeeping needs were satisfied.[77] John Konyk of ComServ testified that in the case of pool offerings, ComServ sent an offering circular every time a pool was formed and offered for sale. The only other documents sent were the Participation and Servicing Agreement and the Participation Certificate. All of the other documents were held at ComServ's offices, available to participants at any time.[78]

The Participation and Servicing Agreements for the lease and CIHIL transactions stated that the lease and loan documents, and payments received, were to be held in trust by ComServ for the lenders. However, the Agreements contained no mechanism for establishing a trust.[79]

The former OTS loan documentation regulation at 12 C.F.R. § 563.170(c)(1)-(7) established detailed loan documentation

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76 Stout Tr. at 3926.

77 Gannon Tr. at 2231.

78 Konyk Tr. at 1630-31.

79 OTS Ex. 5C, 8A.

requirements.[80] Adopted in 1986, the loan recordkeeping provisions required savings associations, affiliates and service corporations to establish and maintain such accounting and other records as would provide a complete and accurate record of all business transactions.[81] These records facilitate the examination and evaluation of assets by the examiner, and ensure that the insured institution had before it the basic documents without which a proper assessment of the risks of making the loan cannot be made.[82]

The ALJ concluded that the regulation "does not impose a per se rule that all documents be maintained on the premises of the institution."[83] According to the ALJ's interpretation of the recordkeeping regulation, "an acceptable trust agreement would adequately satisfy an institution's recordkeeping requirement,

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80 The final rule addressing the standards for safety and soundness specified what an institution's loan documentation practices must enable the institution to do, but did not change the requirements established at 12 C.F.R. § 563.170(c) for all savings associations regulated by the OTS. 60 FR 35674(July 10, 1995). The recent Lending and Investment regulation, effective October 30, 1996, shifted the specific loan documentation requirements found in 12 C.F.R. § 563.170 to guidance in the Thrift Activities Handbook and replaced the regulation with more general documentation standards in new § 560.170 in Part 560. 61 Fed. Reg. 50951 (September 30, 1996) The revision gives lenders more flexibility to tailor loan documentation to various types of loans but allows OTS to examine loans on an individual basis and require the proper level of documentation for each specific type of loan. The cease and desist order issued today includes a requirement that Doolin comply with the revised OTS lending regulation.

81 51 Fed. Reg. 30848 (August 29, 1986).

82 51 Fed. Reg. 17634, 17637 (May 14, 1986).

83 RD at 14.

and documents need not be maintained on the premises."[84] The ALJ further concluded that no acceptable trust arrangement was shown and therefore Doolin failed to satisfy the requirement of the regulation.

The ALJ relied on a portion of 12 C.F.R. § 563.170(c) which states that "the documents, files and other material or property comprising such records shall at all times be available for such examination and audit wherever any such records, documents, files, materials, or property may be [located](emphasis added)." The ALJ also relied on language in 12 C.F.R. § 563.170(c((3)(iii) that requires a written agreement by the seller of a loan participation to provide access to all loan documentation in the seller's possession.[85]

The Director believes, and agrees with Enforcement Counsel's exception, that the ALJ did not apply 12 C.F.R. § 563.170(c) fully. The clear language of the regulation required that loan records or copies of loan records specified in the regulation be maintained at the regulated institution. The introductory language cited by the ALJ is followed by specific sections each stating that "the records (or copies of such records) of a lender with respect to each loan (in the particular category) shall

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84 Id.

85 12 C.F.R. § 563.170(c)(3)(iii) states in pertinent part: "In addition, a purchaser must retain the written agreement of the seller of the loan to provide access, upon request, to all loan documentation in its possession or control to the purchasing lender, the Office or its examinations and supervision staff, as well as the seller's written certification that copies of any documents concerning the loan provided to the loan purchaser are accurate and complete to the best of the seller's knowledge."

include . . . [listed documents]" (brackets supplied). This language requires that savings associations establish and maintain the records or copies of records necessary to "provide an accurate and complete record of all business transactions" and make these records or copies available for use in examination and evaluation of assets by the examiner.[86]

A dispersal of records at unlimited geographic locations would defeat the purpose of the recordkeeping requirements, i.e., to establish and maintain a record and to make the record available at all times. The more logical and reasonable interpretation of the regulations is that the "records of the lender" must contain the minimally required documents but the documents can be maintained at any location of the regulated institution (e.g., headquarters, branches, operating subsidiaries, service corporations).

Even if the ALJ's interpretation is accepted, there is no evidence that a trust relationship was established. There was no separate agreement, the funds ComServ purportedly held in trust for Doolin were commingled with funds ComServ held for other institutions, and there were no provisions protecting Doolin in the event of a material breach by ComServ or a declaration of insolvency or bankruptcy.

Respondent next contends that 12 C.F.R. § 563.170(c)(3)(ii) does not apply to records involved in participation or pooling transactions. This interpretation conflicts directly with the plain language of the regulation. That section sets forth the

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86 51 Fed. Reg. 17634, 17637 (May 14, 1986).

records or copies required with respect to each loan that a savings association purchases, in whole or in part, that is unsecured or secured by collateral other than real estate.[87] The clear language of 12 C.F.R. § 563.170(c)(3)(ii) points to applicability of this section to the loans and participations made.[88] Participation lending and investing requires each lender, lead or participant, to maintain complete and current documentation and credit files.[89] In addition to the specific documents, the regulation requires the purchaser to retain the written agreement of the seller of the loans or participations to provide access, upon request, to all loan documentation in its possession or control.[90] This agreement does not relieve the lender from its obligations to retain the specific documents listed in 12 C.F.R. § 563.170(c)(3)(ii), nor does it further any argument that the specific documents required can be held off premises.

Respondent also argues that 12 C.F.R. § 563.170(c) does not specifically deal with documentation for commercial leases. This contention is irrelevant in this case. Doolin has never

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87 The exception in 12 C.F.R. § 571.13 applies to a savings association's purchases of a participation interest in a pool of loans (in the nature of mortgage-backed securities). Neither the commercial equipment or CIHIL loans were mortgage related or "in the nature of mortgage-backed securities" and, therefore, 12 C.F.R. § 571.13 is inapplicable.

88 51 Fed. Reg. 17634, 17638 (May 14, 1986).

89 Christner Tr. at 760. Documentation submitted with participation sales is usually less than that with whole loan sales. Original documents are generally not submitted; instead, copies of documents are submitted. See Thrift Activities Handbook, Section 211, Christner Tr. at 477.

attempted to describe itself as a commercial lessor. The central issue is whether Doolin made direct loans pursuant to ComServ's commercial lease or CIHIL programs, or whether Doolin purchased lease or loan participations. The record establishes that Respondent initially loaned money to obtain repayment from the pooling of leases from the third party lessees by ComServ, the lessor.

2. 12 C.F.R. § 563.161(a)

During the June 1992 examination, OTS regulators were not provided with any written underwriting policies, nor did the Board minutes reflect any adoption of written policies to govern the commercial equipment leasing or CIHIL programs. The applicable OTS regulation, 12 C.F.R. § 563.161(a), states, inter alia, as follows:

> For the protection of its account holders and other savings associations each savings association and service corporation thereof shall maintain safe and sound management and shall pursue financial policies that are safe and consistent with economical home financing and the purposes of federal savings associations and are appropriate to their respective types of operations.

Written underwriting policies are necessary for the safe and sound operation of an institution[91]. The Thrift Activities Handbook expressly states that "a written lending policy provides the foundation for building a sound loan portfolio."[92] Having a

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90 12 C.F.R. 563.170(c)(3)(iii).

91 Christner Tr. at 142, 147-148.

92 Thrift Activities Handbook, Section 210.1 (January 1991).

written underwriting policy is a general standard of prudent operation in the thrift (and banking) industry.[93]

One reason for requiring underwriting policies is to allow a board of directors to fulfill its fiduciary obligation to ensure the safety and soundness of the institution by providing management with guidance and objectives on how the board wants management to go about ensuring that safe and sound underwriting decisions will be made. Underwriting policies also provide regulators with the foundation of assessing an institution's goals and objectives and ensuring that safe and sound underwriting decisions are being made.[94]

The evidence is undisputed that the Board failed to adopt its own standards or policies for the commercial equipment lease and CIHIL programs.[95] Doolin maintained that the Board adopted ComServ's manual as its own policies for their programs.[96] However, there is no credible evidence that Doolin ever adopted any written policies, including ComServ's manuals, as the

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93 Doolin argues that the standards upon which the OTS based its allegations were different from those in effect at the time of the conduct. Enforcement argued from the beginning and throughout the case that certain activities of Doolin constituted unsafe and unsound practices and violations of 12 C.F.R. § 563.161(a) and explicitly discussed the reasoning underlying these determinations. The 1993 safety and soundness regulations were inapplicable to the charges in this proceeding; however, Doolin's activities also would have violated the 1993 safety and soundness regulation.

94 Christner Tr. at 147-48, 216.

95 Christner Tr. at 184.

96 Christner Tr. at 165-166, 801, Anderson Tr. at 1909, Clemments Tr. at 2094, Gannon Tr. at 2468-69, Mallory Tr. at 3381-94, Stout Tr. at 4159-64.

standards or policies for Doolin's programs.[97] Minutes for the Board of Directors' meetings only reflect that the Board approved involvement in the programs, but not that they simultaneously or subsequently ever adopted the ComServ manuals as the institution's lending policies.[98] Furthermore, the ComServ manuals were not tailored to the requirements of a thrift lending policy,[99] with certain sections inapplicable to Doolin and, if applicable, directly contrary to Doolin's administration of the programs.[100] OTS banking/leasing expert Richard Clark testified that the written underwriting policies for both programs were inadequate because "they did not create portfolios of acceptable risks," "they did not provide for adequate reporting," "they basically did not provide adequate documentation," and "the compensation to Doolin . . . was not adequate for the risk."[101]

Moreover, Doolin's books and records fail to show documentation of the underwriting process for the commercial

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97 ComServ's Mr. Konyk testified that he had no direct knowledge of the Doolin Board's action and did not know what policies Doolin adopted with respect to its involvement in the ComServ commercial equipment lease and CIHIL programs (Konyk Tr. at 1686). Doolin expert Michael Anderson testified that when he discussed the underwriting at Doolin with Mr. Stout, Mr. Stout did not identify any specific standards, written or otherwise, that Doolin applied (Anderson Tr. at 1966).

98 Christner Tr. at 149-179. Doolin's secretary testified that the Board minutes were all inclusive with nothing usually left out (McClain Tr. at 1788-1793); see also OTS Ex. 23-27.

99 For example, no minimum standards were detailed regarding, inter alia, cash flow, profitability, sales growth, working capital ratios, credit history, or debt-to-income ratios. See Thrift Activities Handbook, Section 210.1 (January 1991).

100 Stout Tr. at 4159-4163, 4225-4276.

101 Clark Tr. at 937-38.

equipment lease and CIHIL loan transactions.[102] Written documentation is necessary to confirm that management has made its own credit decisions and to assess the quality of that decision-making. There has been a long-standing concern that purchasing or participation lenders "make their own credit decisions on information they have obtained."[103]

OTS examination staff reviewed 8 commercial equipment lease files at Doolin and an additional 267 commercial equipment lease files at ComServ, and 68 CIHIL files.[104] Although the ComServ documents contained more substantial documentation, underwriting deficiencies existed in a majority of both Doolin and ComServ files. Of the 267 files, 102 had significant underwriting deficiencies. Of the 68 CIHIL files, 45 files had underwriting problems.[105] No records of credit analysis existed, and Doolin offered nothing to support its assertion that any underwriting was done by Doolin at the time the credit decisions were made. Doolin made no independent attempt to gather credit information concerning lessees or borrowers for the commercial leases or CIHIL loans but instead accepted summaries of credit information prepared by ComServ.[106] Further, Doolin's adoption of the Review

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102 Christner Tr. at 207. In the 1991 Report of Examination, OTS reported that Doolin management had failed to document the nature of its underwriting with respect to the commercial loans serviced by ComServ (Vighetti Tr. at 1837-39).

103 See Rule Adoption for FHLBB Loan Recordkeeping Requirements, 51 Fed. Reg. 30848 (August 29, 1986).

104 Christner Tr. at 241, 259.

105 Christner Tr. at 244-45, 259.

106 Christner Tr. at 1494.

and Approval Memos at the July 1992 Board meeting were an inadequate corrective measure. These memos were prepared after the fact, and were merely a checklist of what management might have considered at the time of the credit decision.[107] The Review and Approval Memos did not provide any indication of a qualitative analysis by management, the relative importance of the listed items, the weighing process engaged in by management, or any other considerations underlying the credit decision.[108]

The evidence thus is overwhelming that Respondent failed to engage in virtually any underwriting of the loan transactions that it entered into through the commercial equipment lease and CIHIL programs. Underwriting, or credit analysis, is fundamental to the operation of a thrift, and the responsibility for doing so cannot be completely delegated, as Respondent attempted to do. Failure to engage in underwriting of loans is egregiously imprudent and, in the Director's view, unsafe and unsound. There is law to the effect that an imprudent practice rises to an unsafe and unsound level only if it also threatens the financial stability of the institution. Precisely how this factor should be analyzed remains a little unclear - the threat would appear to be affected by the degree of the imprudence as well as by the dollar amount of the practice - but in this case the Director is

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107 Christner Tr. at 212-18, Gannon Tr. at 2372, Stout Tr. at 4336, OTS Ex. 29, 30.

108 Christner Tr. at 219-20. For example, Doolin's current underwriting criteria states that a lessee/borrower must have a "clear capacity to repay" the loan, but the criteria do not define these terms and give no guidance to their meaning (Clark Tr. at 944-46).

convinced this standard has been met. Respondent's exposure through the commercial equipment lease and CIHIL programs nearly equaled its capital, so Respondent's failure to underwrite the leases and loans generated through these programs placed nearly the entire value of the institution at risk.

Respondent contends that 12 C.F.R. § 563.161(a) was not adopted in compliance with the rulemaking procedures of the Administrative Procedure Act because the regulation was not published for comment. The Federal Savings and Loan Insurance Corporation, which preceded the OTS, gave notice and solicited comments when the predecessor to 12 C.F.R. § 563.161(a) was proposed.[109] Subsequent amendments to this provision were also duly noticed and adopted.[110] These actions are all that are required for promulgation of a legislative rule under the Administrative Procedure Act.[111] Pursuant to the provisions of FIRREA, all regulations issued by OTS predecessors and in effect at the time of FIRREA, continued in effect and were enforceable after the effective date of FIRREA.[112]

Respondent also contends that its loan documentation and credit underwriting practices cannot form the basis for a violation of 12 C.F.R. § 563.161(a) because new safety and soundness standards including loan documentation and credit

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109 27 Fed. Reg. 12745, 12839 (December 27, 1962)(rule proposal); 28 Fed. Reg. 3472 (April 10, 1963)(rule adoption).

110 See, e.g., 37 Fed. Reg. 26837 (December 16, 1972)(rule proposal); 38 Fed. Reg. 26109 (September 18, 1973)(rule adoption); 41 Fed. Reg. 25812, 25814 (August 24, 1976).

111 5 U.S.C. § 553(b).

underwriting guidelines did not become final until after trial. The 1993 safety and soundness regulations were adopted after the conduct at issue and were not the basis for the claims in the Notice of Charges, and therefore are inapplicable to this case.[113]

3. 12 C.F.R. § 563.93

Respondent contends that the applicable loans to one borrower (LTOB) standards are those of the Office of the Comptroller of the Currency (OCC), that the direct funded transactions were participations, and as such, do not count as loans to ComServ under OCC regulations and interpretations, and that the direct funded transactions were not loans in accordance with OTS's own LTOB regulations.

The OTS LTOB regulation, 12 C.F.R. § 563.93, which incorporates, inter alia, the OCC LTOB regulation at 12 C.F.R. § 32, generally limits the aggregate amount that a savings association can lend to one borrower to an amount equal to fifteen percent of the institution's unimpaired capital and unimpaired surplus, or $500,000, whichever is higher.[114] Pursuant to the regulation, loans and extensions of credit mean "any direct or indirect advance of funds . . .to a person made on the basis of any obligation of that person to repay the funds, or

112 P.L. 101-73, sec. 401(h) (August 9, 1989).

113 See footnote 80, infra.

114 12 C.F.R. §§ 563.93(c) and (d).

repayable from specific property pledged by or on behalf of a person."[115]

Participations have certain basic characteristics. First, they are usually sold on a non-recourse basis. Second, there must be a pro rata sharing of the credit risk between the seller/originator and the participant.[116] In addition, in true participations, the terms between the originator and the participant and the terms between the originator and the underlying borrowers are usually identical.[117]

The direct funded transactions, even though labeled "participations" by the Respondent, were not participations as the term is interpreted in connection with the LTOB regulations.[118] The direct funded transactions (as opposed to the pooled and participated leases and loans) fit squarely within the definition of loans or other extensions of credit, under either 12 C.F.R. § 563.93 or the OCC's LTOB regulation at 12 C.F.R. § 32.2(a). Furthermore, Enforcement's interpretation of 12 C.F.R. § 563.93 and its application of the lending limits to the direct funded transaction are consistent with the principles set forth in the OCC regulations and interpretive guidelines.

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115 12 C.F.R. § 563.93(b)(4); 12 C.F.R. § 32.2(a).

116 12 C.F.R. § 32.107 (recodified at 12 C.F.R. § 32.2(j)).

117 OCC Letter dated August 15, 1978, 1978 WL 21817 (OCC).

118 Respondent argues that recent changes to 12 C.F.R. § 32.2(j)(vi)(B) mandate direct funded participations. The regulatory addition required that loan participations be funded at inception in order to avoid their being counted as loans from the originator of the participation to the borrower. The change does not in any way alter the above analysis.

Respondent looks to the language of the Participation and Servicing Agreement but does not consider the uncontested evidence of how the direct funded transactions operated in practice. Both OTS and OCC interpretive materials stress that it is how the transaction operates in practice that is the critical consideration.[119] Any transaction, even if labeled a "participation" and intended as a participation, that does not meet the characteristics of a true participation is to be treated as a loan between the lead lender and the participant for purposes of the lending limit regulations, with the entire loan amount remaining with the lead lender for LTOB purposes.[120]

In this case, the direct funded transactions functioned as a method of "interim" financing arranged by ComServ with Doolin to allow ComServ to enter into the leases or loans until they could be placed in a pool.[121] The Association received only interest payments for such funding,[122] while ComServ received payments from equipment lessees or home borrowers that fully amortized the amount of the leases or loans.[123] The payments by ComServ to Doolin did not correspond to the underlying obligations and

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119 WL FHLBB 8442 (October 16, 1973); OCC Letter No. 256, Fed. Banking L. Rep. 85,420 (April 4, 1983); OCC Letter No. 262, Fed. Banking L. Rep. 85,426 (June 27, 1983); OCC Letter 579, Fed. Banking L. Rep. 83,349 (March 24, 1992).

120 OCC Letter No. 256, Fed. Banking L. Rep. 85,420 at 77,538 (April 4, 1983), see also, 12 C.F.R. § 32.107 (recodified at 12 C.F.R. § 32.2(j)); OCC Interpretive Letter dated September 14, 1988, 1988 WL 282305 (1988).

121 Konyk Tr. at 1727-1732, 1752-1753.

122 Christner Tr. at 118, 133, Konyk Tr. at 1741, Stout Tr. at 3924.

123 Christner Tr. at 124.

payments of the lessees or borrowers.[124] Doolin and ComServ negotiated their own fixed interest rate which did not bear any relationship to the varying interest rates paid ComServ by lessees and borrowers.[125] ComServ retained large amounts of principal on the direct funded leases and loans, no separate trust agreement was provided for the funds, and the funds were commingled with funds owed to others.[126]

In connection with the directly funded lease transactions, the Association funded both the lease amount and ComServ's commission to a broker who arranged for the equipment lease.[127] In connection with the directly funded CIHIL loans, the Association contributed to reserve accounts for self-insured transactions.[128] The amount of the commissions or reserves funded by the Association was not included in the underlying amount of the equipment leases or home loans. Thus, the amounts of such brokerage fees or reserve payments were funded by the Association to ComServ, not to the underlying equipment lessees or home lenders.[129]

ComServ made payments to Doolin on delinquent loans regardless of whether ComServ had first received the payment from

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124 Christner Tr. at 121, 136, Konyk Tr. at 1653, 1741.

125 Christner Tr. at 121-24.

126 Christner Tr. at 124-25, 136-37, 140-41, Konyk Tr. at 1741-44, Stout Tr. at 3924.

127 Konyk Tr. at 1746.

128 Christner Tr. at 132, Konyk Tr. at 1746.

129 Konyk Tr. at 1727, 1746.

the underlying borrower.[130] Such a practice was held to negate the pro rata sharing of credit risk and provide recourse to the seller, making the transaction a borrowing/lending transaction rather than a true participation.[131]

The direct funded transactions were listed as "current debt" in both the 1991 and 1992 Financial Statements of ComServ, Inc. Furthermore, based on statements prepared by ComServ's own accountant, ComServ consistently treated the direct funded transactions between Doolin and ComServ as a loan with interest.[132] Doolin's external auditor also considered the arrangement comparable to a loan or line of credit.[133] Finally, the Doolin Board was aware of the accounting of the direct funded transactions but never questioned it nor disagreed with the characterization.[134]

At the time of the 1992 examination, Doolin's threshold of 15 percent of unimpaired capital and surplus for LTOB purposes was $828,000.[135] The amount owed to Doolin by ComServ under the direct funded lease programs was $2.3 million as of May 31, 1992.[136] An additional $759,000 was extended in direct funded

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130 Konyk Tr. at 1653-54.

131 12 C.F.R. § 32.107 (recodified at 12 C.F.R. § 32.2(j)); see also OCC Letter No. 256.

132 Christner Tr. at 563-571, OTS 32 at Note 8, OTS 33 at Note 8.

133 Mallory Tr. at 3275.

134 Konyk Tr. at 1735, Clemments Tr. at 2063-66, Mallory at 3275-76.

135 Christner Tr. at 142, 363.

136 Christner Tr. at 141.

transactions in the CIHIL program.[137] Doolin also made a $50,000 loan to two principals of ComServ.[138] ComServ thus owed more than $3.1 million to Doolin, approximately two million dollars in excess of Doolin's LTOB limit.[139]

D. Affirmative Defenses

Respondent contends that even assuming that its conduct could be held to have violated the three regulations cited above, three equitable principles preclude the relief sought by Enforcement. These principles are (1) inconsistent enforcement of the regulations; (2) lack of notice under the Fifth Amendment of the United States Constitution; and (3) government misconduct.

1. Inconsistent Enforcement

Respondent contends that the OTS did not apply the regulations on the same basis as it applied them to other OTS-regulated institutions doing business with ComServ and on the same basis as it applied them previously to Doolin.

The ALJ properly limited Respondent's ability to offer evidence of practices at other institutions.[140] Such evidence was legally irrelevant and factually useless to a determination of the issues in this case. The factual circumstances and financial conditions of any other institution dealing with ComServ were not the same as those at Doolin. Donald Stout, the President of

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137 Christner Tr. at 141.

138 Christner Tr. at 142.

139 Christner Tr. at 762, OTS Ex. 1, R. Ex. 10.

Doolin, testified that Doolin's transactions with ComServ were different from what Stout understood other institutions to be engaged in at that point.[141] Furthermore, the charges would still be enforceable against Doolin even if the other institutions were engaging in identical unsafe and unsound practices and violations of regulations similar to those at Doolin. OTS (and any other federal executive branch agency with enforcement authority) has broad prosecutorial discretion as to whom to seek relief for violations of its regulations. Respondent's complaint is simply that OTS exercised its discretion; without more, there is no basis for saying that there has been an abuse of this discretion.

Respondent's argument that the regulations were not applied to it on the same basis as previously applied appears without merit. The June 1992 examination was the first time that the specific aspects, and the safety and soundness, of the commercial equipment lease and CIHIL portfolios were addressed.[142]

2. Lack of Notice

Respondent next contends that 12 C.F.R. §§ 563.93, 563.161(a) and 563.170(c) are unconstitutional under the Fifth Amendment Due Process clause in that they fail to give fair

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140 Clark Tr. at 1173-78, Konyk Tr. at 1612-18.

141 Stout Tr. at 3847.

142 See footnote 36, infra.

warning of the conduct they prohibit or require.[143] None of the cases upon which respondent relies involves the situation presented in this case, i.e., the efforts by an agency to require an entity to take corrective or remedial action to prevent harm due to mismanagement. For example, in General Electric v. USEPA,[144] the court stated that, if the subject agency had not sought to impose a fine, the court would have rejected the "fair notice" claim and would have deferred to the agency's reasonable interpretation of the regulation. Adequate notice is given if the respondent could ascertain the agency's position from reading the regulations and "other public statements" issued as guides to interpretation. In particular, the court observed:

If, by reviewing the regulations and other public statements issued by the agency, a regulated party acting in good faith would be able to identify, with "ascertainable certainty," the standards with which the agency expects parties to conform, then the agency has notified a petitioner of the agency's interpretation.[145]

The present case does not involve efforts by the OTS to interpret regulations in a manner contrary to the common

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143 Respondent's challenge to 12 C.F.R. § 563.161 is essentially that the regulation is unconstitutionally vague, i.e., "does not on its face provide any clear indication of the conduct it prohibits or requires." Concepts of safety and soundness embodied in 12 C.F.R. § 563.161(a) are no more general than numerous statutory and regulatory standards that have been applied by administrative agencies and upheld by federal court. Moreover, the standards at issue in this case have long been a part of banking.

144 53 F.3d 1324 (DC Cir. 1995).

145 Id. at 1329.

understanding of the terms of those regulations, nor is this a case of the OTS attempting to select between differing reasonable interpretations. Doolin was found to have mishandled the lease and CIHIL portfolios in ways that are basic to the administration of such products -- failure to underwrite; lack of adequate policies and documentation; lack of a proper understanding of the credits; failure to address delinquencies; and excessive reliance on a servicer, among other grounds. Doolin was clearly on notice regarding the regulatory requirements challenged herein, and was aware that it had to perform adequately and in accordance with safety and soundness in such basic areas. Doolin was also on notice that excessive concentrations of credit under well-established OTS standards would be considered unsafe and unsound.

Respondent's contention that the LTOB regulation failed to provide adequate notice that it would apply to the direct funded transactions is without merit. The fact that the examiners requested a legal opinion on whether the LTOB regulations were violated does not reflect any inconsistency or shift in interpretation as was the case in General Electric. Respondent was aware that the Federal Home Loan Bank Board had concerns about the asset concentration related to ComServ's predecessor, G&R, in 1986.[146] Respondent never inquired of its OTS examiners after the Association had entered into the direct funded transactions as to whether the relationship would be considered a loan by the OTS.[147] Furthermore, the OCC interpretive letters

146 Stout Tr. at 4435-36.

147 Stout Tr. at 4795-96.

upon which Respondent relies point clearly to the conclusion that the transactions, as structured, would be treated as loans for LTOB purposes.[148]

It is also clear that Respondent had fair notice of what was required under 12 C.F.R. § 563.170. Doolin's claim that off-site location for storage of documents is typical of participations does not establish lack of fair notice of OTS's interpretation. As discussed above, Doolin's interpretation conflicts with the purpose of the regulation. In any event, Doolin's disagreement with OTS's reading of the regulation is not enough to turn the dispute over interpretation of 12 C.F.R. § 563.170 into an issue of fair notice. OTS's position must be clearly contrary to the common understanding of the language of the regulation.[149] The dispute in this case cannot be said to be one in which "no reasonable reader of this provision could have known that the [OTS's] current construction is what the agency originally must have had in mind."[150]

Respondent argues that § 563.161(a) "does not on its face provide any clear indication of the conduct it prohibits or requires." As the Supreme Court and other federal courts have made clear, the amount of precision required of statutes and regulations varies depending on the nature and the context of the

148 See footnotes 97-98, infra.

149 General Electric v. USEPA, infra.

150 Rollins Environmental Services v. EPA, 937 F.2d 645, 653 (D.C. Cir. 1991).

enactment.[151] Administrative agencies frequently use general standards that are accepted in the industry. The banking agencies employ concepts of safety and soundness and the Federal Trade Commission is empowered to eliminate "unfair competition."[152] Courts recognize that administrative agencies frequently must have latitude in developing general standards through case-by-case adjudication to effectively deal with the myriad problems that will confront the industry that is being regulated. As pointed out by the Supreme Court in SEC v. Chenery Corp., "[T]he agency must retain power to deal with problems on a case-by-case basis if the administrative process is to be effective. There is thus a very definite place for the case-by-case evaluation of statutory standards."[153]

Concepts of safety and soundness embodied in 12 C.F.R. § 563.161(a) are no more general than numerous statutory and regulatory standards that have been applied by administrative agencies and upheld by federal courts.[154] Moreover, the standards at issue in this case have long been a part of banking. Both the regulators and Congress, in considering enactment of 12 U.S.C. § 1818 and its predecessor, recognized that such concepts, though general, must be flexible and that to attempt to describe the

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151 Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498-99, 102 S. Ct. 1186, 1193-94 (1982); Breckert v. Skornicka, 711 F. 2d 1376, 1381 (7th Cir. 1983).

152 FTC v. R.F. Keppel & Bro., 291 U.S. 304 (1914).

153 332 U.S. 194, 203 (1947).

conduct required with any more precision would be impossible without thwarting the agencies' Congressional mandate.[155] Any vagueness in the term is cured by administrative and judicial interpretations of the key concepts and terms. Also significant is the long history of use and acceptance of such concepts by the industry and the ability of those regulated to consult directly with regulatory personnel or materials, such as the Thrift Activities Handbook, which is routinely sent by the OTS to provide guidance to its regulated savings institutions.[156]

3. **Government Misconduct**

Respondent also alleges that the OTS is estopped from bringing this action because of the conduct of OTS employees. Doolin cites to a number of general categories of alleged affirmative misconduct, including violation of the Paperwork Reduction Act, the intimidation of witnesses, and various other improprieties during the regulation, examination and investigation of Doolin.

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154 In Oiciyapi Federal Credit Union v. NCUA, 936 F.2d 1007 (8th Cir. 1991), the court rejected a lack of notice challenge, similar to that mounted by Doolin, to broad provisions in the Federal Credit Union Act, 12 U.S.C. § 1751.

155 See Financial Institutions Supervisory Act of 1966. Hearings on S.3158 Before the House Committee on Banking and Currency, 89th Congress, 2d Sess. At 49-50 (1966).

156 Vighetti Tr. at 1835. The Thrift Activities Handbook contains various sections on a wide range of principles that are applied by examiners in the course of their examinations. Mr. Stout testified that Doolin receives the manuals the examiners follow, including the Handbook (Stout Tr. at 3833).

Estoppel against the government is rarely appropriate. As recently summarized by the United States Court of Appeals for the Fourth Circuit:

> The Government is simply not bound by the negligent, unauthorized acts of its agents. Federal law is clear that estoppel is rarely, if ever, a valid defense against the Government absent proof of some affirmative misconduct by a Government agent, and estoppel against the Government cannot be premised on oral representations.[157]

Even those cases that have entertained the possibility of applying the unclean hands defense to the government have stressed the very high legal standards a defendant must meet. As summarized in one of the cases Doolin relies upon:

> Where courts have permitted equitable defenses to be raised against the government, they have required that the agency's misconduct be egregious and the resulting prejudice to the defendant rise to a constitutional level.[158]

Because of Respondent's inability to present any factual basis for the allegations of agency misconduct and its failure to show egregious misconduct and resulting prejudice, Doolin's defense of misconduct was stricken by the Administrative Law Judge on pre-trial motions and in the Recommended Decision.

a. Paperwork Reduction Act

Doolin claims that the OTS PERK package is an illegal form and OTS cannot use the package because it has not been adopted

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157 United States v. Vanhorn, 20 F.3d 104, 112, n. 19 (4th Cir. 1994)

158 SEC v. Electronics Warehouse, Inc. 689 F. Supp. 53, 73 (D. Conn. 1988), aff'd 891 F.2d 457 (2d Cir.), cert. den. 496 U.S. 942 (1989)

under the Paperwork Reduction Act, 44 U.S.C. §§ 3501-20. Doolin cites no legal authority for its premise, nor are we aware of any that exists. Moreover, none of the evidence relied upon by OTS on the lease and CIHIL portfolios was drawn from the 1992 PERK package.[159] Thus, Doolin has demonstrated no prejudice, nor any nexus between the conduct and the subject matter of the Notice of Charges.

b. **Intimidation of Witnesses**

Doolin claims that, in connection with the agency's actions against Doolin, OTS intimidated Nick Chikorikis, Nelson Persons,and Robert Barley. Mr. Chikorikis was an OTS compliance examiner called as a witness by Doolin.[160] Doolin did not question Mr. Chikorikis about OTS intimidation nor is there any evidence presented that Mr. Chikorikis felt such intimidation.[161] Mr. Persons, a former OTS employee, was made available at the hearing but was never called to testify; thus, no evidence exists that Mr. Person did or would have changed his testimony or testified untruthfully as a result of pressure from anyone.[162] Finally, as to Robert Barley, a Senior Vice President at the Federal Home Loan Bank of Pittsburgh, the evidence of intimidation relied on by Doolin is based on reports by Doolin counsel regarding conversations with Mr. Barley's in-house

159 Christner Tr. At 749-50, Kossol Tr. At 876-80, Tr. at 2117-18, OTS Ex. 56-58.

160 Chicorikas Tr. at 2958-2994.

161 Chicorikas Tr. at 2988-2989.

162 Tr. at 2239-42.

counsel. Doolin's findings of fact states that Mr. Barley called Mr. Eayre and expressed that he did not know why he was on the witness list. Mr. Barley testified that he did not discuss Doolin Security Savings Bank or ComServ with anyone who was employed by the OTS within the last couple of years.[163] There is no evidence that Mr. Barley was intimidated by anyone at OTS.[164]

c. Regulation, Examination and Investigation of Doolin

Doolin raises various other claims of misconduct in its Post Hearing Brief, but fails to raise any accusations that would qualify as grounds for estoppel due to unclean hands. First, there was a prank that occurred in December 1993, from which no prejudice resulted.[165] Doolin also alleges that the 1992 examination of Doolin was driven by the improper motives of Richard Pow, then the OTS Regional Director overseeing Doolin. To the extent that Mr. Pow was the catalyst for pursuing the actions against Doolin, it appears he would have been delinquent in his supervisory duties if he failed to act. As described in the evidence discussed above, the OTS had ample basis for pursuing the regulatory violations and unsafe and unsound practices outlined herein. Furthermore, there is no evidence to suggest that Mr. Pow acted improperly in pursuing the actions against Doolin. Another allegation of misconduct stems from

163 Barley Tr. at 2213.

164 Barley Tr. 2202-2220.

165 Chicorikas Tr. at 2970-2973. While on a compliance examination of Doolin, Mr. Chicorikas received a pizza delivery at his hotel room from an undisclosed source.

missing Doolin files; however, no evidence of OTS misconduct was presented to suggest agency action or involvement with respect to the files Doolin claims were missing.

In summary, Doolin has presented no real evidence of misconduct and improper motivation by OTS officials. None of the evidence of alleged misconduct that was presented or proffered rose to the level of misconduct required under applicable law. Certain allegations of misconduct, such as the claim of intimidation of witness, were never factually established at the hearing. Doolin also failed to present any evidence that OTS examiners and officials acted improperly in any way in reviewing Doolin's books and records, analyzing the information gathered, and reaching the conclusions they did about Doolin's mishandling of the commercial equipment lease and CIHIL portfolios.

E. Unsafe and Unsound Practices

In addition to violations of laws and regulations governing savings associations, the ALJ found that Doolin committed or engaged in unsafe and unsound practices in conducting the business of Doolin in violation of 12 U.S.C. § 1818(b)(1) for the following reasons: 1) Respondent failed to do adequate underwriting of the leases and loans; 2) Respondent violated its LTOB limitation; 3) Respondent invested in an undue concentration of ComServ-originated loans and leases; 4) the written agreements between Respondent and ComServ did not adequately protect Respondent's interest; and 5) Respondent maintained inadequate

and inaccurate records of the lease and home improvement loan transactions.

Respondent contends that its conduct was not unsafe and unsound because it did not pose an abnormal risk to its financial stability. Respondent argues that imprudence, alone, is insufficient to constitute an unsafe or unsound practice.

Under the most recent and authoritative caselaw, on the concept of unsafe and unsound practices, an unsafe or unsound practice is imprudent conduct, which, if continued, would pose an abnormal risk to the financial stability of the institution.[166]

The commercial equipment lease and CIHIL programs, as administered by Doolin, carried inherent credit risk and were made significantly more risky by the unsafe and unsound practices described under the previous regulatory discussion and in the following section.

As a result of Doolin's loan recordkeeping requirements and the lack of any documentation of underwriting by Doolin, OTS examiners were unable, at the time of the June 1992 examination, to assess Doolin's underwriting decisions in the commercial equipment lease and CIHIL loans files.[167] The absence of sound

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166 Johnson v. OTS, F.3d (D.C. Cir. 1996); In re Seidman, 37 F.3d 911 (3rd Cir. 1994).

167 Doolin expert Gannon testified that Doolin's decision to extend credit was not an unsafe or unsound practice but his testimony was based on what Donald Stout and William Swartling represented to him; Gannon did not review the Board minutes or policies (Gannon Tr. at 2238, 2496).

underwriting practices was deemed to pose an abnormal risk to the financial stability of Doolin.[168]

Once ComServ stopped making payments on delinquent leases in August 1992, delinquencies in the lease portfolio increased from 1.3% to 47.3% for leases 30 days or more past due and from 0.8% to 45.5% for leases 90 days or more past due as of July 31, 1994.[169] The level of delinquent leases also rose dramatically in absolute terms, reaching $1.2 million in February 1994 for leases 30 days or more past due, and $977,000 as of July 31, 1994 for leases 90 days or more past due.[170] There was also testimony of significant loss exposure resulting from a high level of classified assets.[171] These high levels of problem assets posed an abnormal risk to Respondent, which then had equity capital of only approximately $5.2 million.

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168 Christner Tr. at 251, 261. Doolin's lack of first-hand knowledge or independent involvement in the credits, even serious problem credits of which Doolin owned 100% interests, was made evident in the testimony (see Stout Tr. at 4613-15, 4623-24, Swartling Tr. at 5391-95).

169 Gannon Tr. at 2747.. Gannon testified that the delinquencies amounted to 33% for both 30 and 90 days as of July 31, 1994, and at such levels, his opinion was that the OTS examiners' position that this was a problem portfolio was not unreasonable (Gannon Tr. at 2815).

170 Christner Tr. at 881-90. Doolin expert Anderson testified that both in absolute terms and in terms of the rate of increase, the rate of 30 and 90 day delinquencies as of February 28, 1994 caused him moderately serious concern (Anderson Tr. at 1970).

171 Christner Tr. at 734.

Respondent's attempt to present evidence that the problem lease portfolio was improving was not credible.[172] Respondent presented charts on performance of the lease and loan portfolio that contained a number of errors and arbitrary classifications that undermined the assumptions and conclusions drawn therein.[173] Respondent's first chart identified one of its largest leases as "regularly paying" when it was not regularly paying and, in comparing delinquent leases for the months of July to September 1994, failed to include leases in September that had been included in the July data.[174] Instead, certain leases that were delinquent and whose condition had deteriorated since July 31, 1994, were separated from and placed in a separate list of leases.[175] Also, one of the largest problem assets was not included in totals for either repossessed assets or delinquent leases as of April 30, 1995, even though the lease belonged in one of these categories.[176]

The level of CIHIL loan delinquencies 30 days or more past due was at 23% of the portfolio at March 31, 1995.[177] Reserve accounts were being used for delinquent borrowers' payments but

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172 Doolin accountant Mallory testified that he would be more concerned as of July 31, 1994 than as of February 1994 due to the percentage increase and trending status of these portfolios (Mallory Tr. at 3390-91, OTS Ex. 37, 51).

173 Kossol Tr. at 5432-5483.

174 Christner Tr. at 737-39, Gannon Tr. at 2441, Kossol Tr. at 5455, Doolin Ex. 113-114, OTS Ex. 140-141.

175 Gannon Tr. at 2744, Stout Tr. at 4494, 5457, Doolin Ex. 112.

176 Stout Tr. at 4539, Kossol Tr. at 5472.

177 Kossol Tr. at 5434.

the reserve accounts were inadequate to cover all remaining CIHIL loans.[178]

There were significant deficiencies in the PSAs entered into by Doolin in the commercial equipment lease and CIHIL loan programs.[179] The agreements failed to provide a secured interest to Doolin and impeded Doolin's ability to gain access to the underlying collateral.[180] The agreements failed to require that Doolin be provided with sufficient information as to the status of the underlying obligations and the viability of the underlying lessees or borrowers.[181] The agreements provided for an executory assignment of ComServ's interests and left Doolin potentially unprotected in the event of the failure of ComServ.[182] Numerous ambiguities and omissions impaired Doolin's ability to protect its interest under the agreements and obscured or eliminated rights of Doolin and the responsibilities of the parties.[183] There were a substantial number of provisions that placed Doolin

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178 Kossol Tr. at 5436.

179 Doolin expert Gannon's opinion that the PSAa were no more favorable to ComServ than to Doolin was based only on generalizations and did not include an assessment of the dollar amounts being received, the interest rate spreads, the expenses involved, and whether excess payments were made (Gannon Tr. at 2584-88, 2603). Stout's testimony that these provisions were not unfavorable to Doolin was based only on the fact that Doolin had been using similar participation language and had never experienced a problem (Stout Tr. at 3948-49).

180 Christner Tr. at 832-33.

181 Provisions 9.1 and 9.2 of OTS Ex. 7 and 8A do not require ComServ to advise Doolin of a default of a lessee or homeowner until 31 and 45 days, respectively.

182 Clark Tr. at 957, 979, 1025, Gannon Tr. at 2549.

183 See provisions 1.19 of OTS Ex. 7 and 1.24 of OTS Ex. 8A, provisions 6.1 and 8.1 of OTS Ex. 7 and 8A

in a less favorable position than ComServ and skewed the risk faced by Doolin.[184] Finally, Doolin was executing the agreements prepared by ComServ without undertaking any independent legal review to protect its own interests.[185]

Furthermore, Doolin operated with an excessive concentration of loans and leases serviced or brokered by ComServ, contrary to safe and sound banking practices. The record evidence established that, at the time of its 1992 examination, Doolin had committed approximately $4.4 million to the ComServ commercial equipment lease program and approximately $1.4 million in the CIHIL loan program.[186] As of March 31, 1992, that represented 87.4% of Doolin's total equity capital.[187] At the time of the June 1992 examination, 94% of Doolin's classified assets were ComServ-originated.[188] This concentration was made worse by several additional factors, including the lack of any process by Doolin's Board or management to evaluate or monitor ComServ, the fragile financial condition of ComServ, and Doolin's undue reliance on ComServ for servicing, documenting, and overseeing the ComServ-originated assets held by Doolin.[189]

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184 OTS expert Clark testified that he found the risk and reward ratios of each portfolio to be inadequate and not a portfolio a prudent bank should have. He further testified that Doolin's aggregate exposure was quite sizeable and at some points exceeded the stated net worth of Doolin (Clark Tr. at 949). See also Kossol Tr. at 834-39.

185 Stout Tr. at 3812, 3822, 3851, 3951.

186 OTS Ex. 1 at A-14.1.

187 Christner Tr. at 266.

188 Christner Tr. at 271.

189 Christner Tr. at 270-276.

Based on these findings, the Director concludes that the conduct and practices of Respondent in relation to the commercial equipment leases and CIHIL loans were unsafe and unsound, and posed an abnormal risk to Doolin's financial stability.

F. Prehearing and Hearing Procedures

In addition to the substantive issues discussed above, Respondent raised the following six procedural issues:

1. Respondent claims it was improperly denied documents to which it was entitled under the Fifth Amendment Due Process clause and United States v. Jencks.[190] The documents cited by Doolin include one document authored by witness Christner and five memos authored by witness Kossol, dated between October 1992 and August 1993. Respondent argued that whatever privilege may have attached, when OTS witnesses testified on direct examination, all statements must be provided to Respondent under the Jencks doctrine. Enforcement argued that the documents were part of the original privilege log furnished to Respondent prior to the hearing and these documents were internal work product prepared in anticipation of litigation, not prior statements of witnesses in the supervisory area. Additionally, Enforcement argued that pursuant to OTS rules, Respondent should have requested such documents during discovery.[191] Respondent never

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190 353 U.S. § 665 (1957).

191 12 C.F.R. § 509.25(f) states that if a party withholds any documents as privileged, the requesting party may, within ten days of the assertion of the privilege, file a motion for the issuance of a subpoena compelling production.

requested, never challenged, and never sought any of these privileged documents prior to the hearing.

When the motion was made for specific documents listed on the privilege log, there was a lengthy discussion and the ALJ ruled that whether Jencks is a constitutional doctrine or not, he would allow it to be argued in this case. Briefs were filed by both parties[192] and after considering the submissions, the ALJ denied Respondent's motion.[193] The ALJ ruled that while Jencks does require that prior statements of government witnesses be furnished to the other party after the witness has testified, where documentary discovery obtains by rule in an administrative proceeding, these statements should be furnished prior to the hearing to be consistent with the purposes of discovery.[194] The ALJ ruled that there was not a fairness issue as Respondent was "furnished with enough material to see what is in issue and what the matters in dispute are."[195]

After reading the relevant portions of the record, we uphold the ruling of the ALJ. All relevant documents and statements relating to the Notice of Charges were given to Respondent.[196] We also believe that these documents went to the deliberative process and were privileged and that the privilege was not waived

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192 Tr. at 406-412, 454-55.

193 Tr. at 1279-80.

194 Tr. at 526, 1280.

195 Tr. 1280, OTS Ex. 48.

196 See, e.g., Tr. at 1861, 3691, 3879-80.

2. Respondent next argues that it was improperly denied the right to present evidence in its defense -- in particular, evidence of 16 other institutions that were involved in the ComServ program, for comparison of practices. This issue is discussed above, and we reiterate that the circumstances and financial conditions of other institutions were neither factually nor legally relevant to the charges against Doolin.

3. Repondent's third procedural claim that no privilege log was provided to Doolin and privileged documents were not made part of the record was addressed in two administrative law orders[197] and one ruling by the OTS Acting Director.[198] The ALJ determined that the privilege log prepared by the OTS in a closely related case was adequate for Doolin to make any challenge to OTS's assertions of privilege in the present proceedings.[199] Respondent presented no specific challenges to the OTS's claims of privilege with respect to any specific document. Respondent's request to have every document for which privilege is claimed filed under seal was addressed in the ALJ's August 30, 1994, Order. Upon review of the Orders and related briefs, we adopt the reasoning and orders of the ALJ in this matter.

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197 See Order On Motion for Clarification issued August 11, 1994, and Order On Motion for Production of Documents Under Seal and Motion For Reconsideration of Administrative Order, issued on August 30, 1994.

198 See Decision and Order, OTS Order No. 94-74 (May 19, 1994).

199 A privilege log was entered into evidence by Enforcement (Tr. at 544-45).

4. Respondent next claims it was denied a level playing field to which it was entitled under the Fifth Amendment Due Process clause and 4 U.S.C. § 559, and was denied discovery to which it was entitled under 12 C.F.R. § 509.25. The discovery Doolin refers to is the subpoenaed investigatory depositions of Doolin personnel and other individuals from which Doolin was excluded. Doolin's attempts to obtain the documents from the OTS's investigation were denied, in part. The rules of practice and procedure for the conduct of depositions during investigative and formal examination proceedings are prescribed at 12 C.F.R. § 512. In the depositions conducted prior to the filing of the Notice of Charges, individual deponents were entitled only to representation by personal counsel, not by Doolin's counsel.[200] Therefore, Doolin's counsel had no right to appear at such depositions. With respect to the other depositions taken after the filing of the Notice of Charges - neither the deponent's counsel nor Doolin's counsel ever filed a motion to quash these subpoenas as required by the rules.[201] Therefore, Doolin failed to present or preserve any timely objection to the taking of those depositions without Doolin's counsel in attendance. Moreover, Enforcement Counsel did provide Respondent with copies of all portions of those depositions relating to the claims in the Notice of Charges. Doolin was also provided with copies of all non-privileged documents obtained by the OTS during its

200 12 C.F.R. § 512.5(b).

201 12 C.F.R. § 512.7(b).

investigation that related to the Notice of Charges.[202] Enforcement Counsel never sought to use wrongfully obtained evidence nor was there any substantial prejudice shown by the Respondent in its initial request and in all further motions and discussions. Thus, the rulings of the ALJ should stand.

5. Respondent claims that the deliberative process privilege does not apply to the documents withheld by OTS counsel in this case. One basis for Respondent's claim is that OTS counsel failed to provide a privilege log. This issue is discussed above and we deem that the privilege log provided was adequate. The deliberative process privilege was invoked with respect to specific documents.

Respondent does not identify a single document that Doolin alleges was wrongfully denied and fails to demonstrate any prejudice from the ALJ's earlier rulings.

6. In its last procedural claim, Respondent alleges that OTS was improperly permitted to introduce written evidence. The evidence Respondent refers to is the testimony by witness Gannon regarding the deposition testimony of Mr. Swartling[203] and the opinion of ComServ's accountants.[204] Hearsay is admissible in administrative proceedings and, under the OTS Rules, "[e]vidence that would be inadmissible under the Federal Rules of Evidence may not be deemed or ruled to be inadmissible in a proceeding conducted pursuant to this subpart if such evidence is relevant,

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202 Tr. at 114-117, 253, 496, 1862-63, 1918, 2474.

203 Gannon Tr. at 2473-74.

204 Gannon Tr. at 2736.

material, reliable and not unduly repetitive."[205] Doolin has not argued, nor can it properly claim, that the deposed testimony was not relevant, material and reliable evidence on the LTOB issue.

In conclusion, Respondent claims six procedural irregularities during the pre-hearing and hearing proceedings. Each issue was exhaustively discussed and/or briefed by the parties and carefully considered by the ALJ during the pre-hearing and hearing stages. Respondent must demonstrate a procedural error by the ALJ and that the alleged procedural irregularity resulted in actual prejudice to its ability to present relevant evidence at the hearing. Doolin failed to demonstrate that the ALJ committed any error or that Respondent suffered any prejudice from the determinations made.

IV. CONCLUSION

For the reasons set forth above, the Director finds that the evidence establishes that Doolin engaged in unsafe and unsound practices and violations of regulations; and Doolin's activities, if continued, pose an abnormal risk to the institution's financial stability. The Director will issue an order directing Respondent to cease and desist from unsafe and unsound banking practices and violations of OTS regulations and, affirmative relief, as modified below, is hereby recommended.

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205 12 C.F.R. § 509.36(a)(3).

O R D E R

Upon consideration of the entire record in this matter, including the Recommended Decision of the Administrative Law Judge, the exceptions to the Recommended Decision filed by Enforcement and Respondent, the replies to exceptions filed by Enforcement and Respondent, the January 15, 1997, Motion to Dismiss for Lack of Jurisdiction filed by Respondent, the February 18, 1997, Opposition to Respondent's Motion to Dismiss filed by Enforcement, the February 27, 1997, Reply Memorandum filed by Respondent and the March 10, 1997, Sur-Reply filed by Enforcement, and for the reasons set forth in the accompanying Decision:

The Director, pursuant to his authority under 12 U.S.C. § 1818(b) finds that Doolin Security Savings Bank engaged in violations of law and unsafe and unsound practices in conducting the business of Doolin. These violations of law and unsafe and unsound practices posed an abnormal risk to the institution's financial stability. Accordingly, grounds exist under 12 U.S.C. § 1818(b) to issue a cease and desist order requiring affirmative action to correct or remedy conditions resulting from these violations and practices.

THEREFORE, IT IS HEREBY ORDERED THAT:

1. Respondent's Motion to Dismiss for Lack of Jurisdiction is denied;

2. Respondent shall cease and desist from engaging in any acts, omissions, or practices that violate the laws and

regulations or involve unsafe and unsound practices in conducting the business of an insured depository institution;

3. Respondent shall be required to engage in the affirmative actions specified in the remaining paragraphs of this Order.

4. Concentration of Credit

(a) Within thirty (30) days of the effective date of this Order, Doolin shall submit to the OTS for its approval a program to reduce the concentrations of credits related to ComServ, to a safe and sound level and to monitor such concentrations of credits. Such a program shall require management to identify, monitor and regularly report to the Board of Directors any concentrations of credits that exceed levels acceptable to the OTS. The program shall include, but not necessarily be limited to, the following:

(i) a review of the balance sheet to identify any concentrations of credit;

(ii) a written analysis of any concentration of credit identified above in order to identify and assess the inherent credit and interest rate risk;

(iii) policies and procedures to control and monitor concentrations of credit; and

(iv) an action plan approved by the Board to reduce the risk of any concentrations of credit;

(b) For purposes of this paragraph 4, a concentration of credit is as defined in Section 211 of the OTS's Thrift Activities Regulatory Handbook.

(c) The Doolin Board shall ensure that future concentrations of credit are subjected to the analysis

required by subparagraph (a)(ii) and that the analysis demonstrates that the concentration will not subject Doolin to undue credit or interest rate risk.

(d) The Doolin Board shall forward a copy of any analysis performed on existing or potential concentrations of credit to the OTS immediately following the review.

(e) A copy of the Doolin Board's program shall be submitted to the OTS for review and approval. If the program is rejected by the OTS, Doolin shall submit a revised policy addressing the OTS's criticisms within twenty (20) days.

5. LOANS OR EXTENSIONS OF CREDIT

(a) Doolin shall not lend money or otherwise extend credit to any borrower in violation of Doolin's legal limit under 12 C.F.R. § 563.93.

(b) Doolin shall cause all loans or other extensions of credit that exceed Doolin's legal lending limit under 12 C.F.R. § 563.93 as cited in the June 1992 Report of Examination to be corrected.

(c) Within thirty (30) days, the Board shall establish procedures to prevent future violations of 12 C.F.R. §563.93.

6. Within thirty (30) days, Doolin shall submit to the OTS for its approval a written policy governing all involvement by Doolin in any transactions with ComServ. This policy shall include, but not be limited to, written standards governing the particular program or type of loan, and procedures governing management's responsibilities to obtain information on a monthly basis on the status of all transactions with ComServ, and to report such information to Doolin's Board of Directors. The policy shall contain

procedures for management to verify independently information provided by ComServ.

7. Within thirty (30) days, the Doolin Board shall submit to the OTS for its approval policies and procedures to ensure that management will (a) document in writing all credit decisions in which ComServ is involved as originator, broker, or servicer, or is assisting in the work-out, and (b) monitor and report to the Board in writing on a monthly basis the status of all transactions in which ComServ is currently or was previously involved.

8. Within thirty (30) days from the date of this Order, the Doolin Board shall submit to the OTS for its approval a written policy governing management's obligation to monitor and independently evaluate the status of all delinquencies, work-outs, transfers to repossessed assets, and charge-offs. Management's independent evaluation shall include, but not be limited to:

(a) review of the status of the ComServ-related commercial equipment leases and CIHIL loans;

(b) independent verification by Doolin management of any information provided by ComServ to Doolin management to discharge its obligation to review the current status of leases and loans between ComServ and the lessees or borrowers; and

(c) independent verification by Doolin of any other information provided by ComServ on any transactions or work-outs involving leases or loans brokered, originated or serviced by ComServ.

9. CREDIT AND COLLATERAL EXCEPTIONS

(a) Doolin shall obtain current and satisfactory credit information on all transactions involving ComServ, whether as a broker, originator, or servicer or assisting in a work-out, in any listings of loans lacking such information provided to management at the conclusion of an OTS examination.

(b) The Doolin Board shall ensure proper financial documentation is maintained on all transactions referred to in the preceding paragraph and shall correct each collateral exception listed in any OTS Report of Examination or in any listings of loans lacking such information provided to management at the conclusion of an examination.

(c) Doolin may grant, extend, renew, alter or restructure any loan or other extension of credit only after:

(i) documenting the specific reason or purpose for extension of credit;

(ii) identifying the expected source of repayment in writing;

(iii) structuring the repayment terms to coincide with the expected source of repayment in writing;

(iv) obtaining and analyzing current and satisfactory credit information, including cash flow analysis where loans are to be repaid from operations; and

(v) documenting, with adequate supporting material, the value of collateral and properly perfecting Doolin's lien on it where applicable.

(d) Failure to obtain the information in subparagraph (c)(iv) shall require a majority of the full Board (or a delegated committee thereof) to certify in writing the

specific reasons why obtaining and analyzing the information in subparagraph (c)(iv) would be detrimental to the best interests of Doolin. A copy of the Doolin Board certification shall be maintained in the credit file(s) of the affected borrower(s). The certification may be reviewed by the OTS in subsequent examinations of Doolin.

10. The Board shall obtain and maintain complete and accurate books and records so that the OTS is able, through the normal supervisory process, to determine the financial condition of Doolin and the details of all transactions that may have a material effect on the condition of Doolin.

11. Doolin shall, within forty-five (45) days of the date of this Order, review all of its books and records to ensure compliance with OTS lending regulations and the guidelines specified in the OTS Thrift Activities Regulatory Handbook. Doolin's obligation to maintain accurate, complete and timely records shall include but not be limited to the general ledger, subsidiary ledgers, journals, vouchers and schedules.

Doolin shall ensure that all records and books in the institution provide accurate, complete and timely information on all assets originated, brokered or serviced by ComServ or in which ComServ is assisting in work-out.

12. Doolin shall maintain detailed minutes of all meetings of the Board and committees thereof. With respect to all matters relating to ComServ, these minutes should fully state and recite all Board motions, resolutions, discussions and decisions on any matters involving programs, whether current or proposed, or assets in which ComServ served as a

broker, originator, servicer or in which ComServ is assisting to any extent in the work-out.

13. Within sixty (60) days Doolin shall obtain and submit to the OTS a review of the Participation and Servicing Agreement For Commercial Equipment Leases and the Participation and Servicing Agreement For CIHIL Loans by Doolin's counsel and a legal opinion as to whether Doolin's rights are adequately protected under such Agreements in light of the deficiencies in those Agreements identified in the accompanying Decision.

14. Within thirty (30) days of the receipt of the review and legal opinion mentioned in the preceding paragraph, Doolin shall take all steps necessary and required by Doolin's counsel or the OTS to ensure that Doolin's rights are adequately protected under such Agreements.

15. Within thirty (30) days of the date of this Order, Doolin shall submit to the OTS for its approval an internal control policy that addresses all the concerns set forth by the OTS in the June 1992 Report of Examination and subsequent Reports of Examination prepared by OTS.

16. Within sixty (60) days, the Doolin Board shall establish a loan review system to periodically review Doolin's loan portfolio to assure the timely identification and categorization of problem credits. The system shall provide for a report to be filed with the Doolin Board after each review. Such reports shall, at a minimum include the following information:

(a) the overall quality of the loan portfolio;

(b) the identification, type and amount of problem loans;

(c) the identification and amount of delinquent loans;

(d) credit and collateral documentation exceptions;

(e) the identification and status of violations of law, rule or regulation;

(f) loans not in conformance with Doolin's lending policy, and exceptions to Doolin's lending policy;

(g) insider loan transactions; and

(h) concentrations of credit and significant economic factors and their impact on the credit quality of Doolin's loan portfolio.

17. A copy of the reports submitted to the Doolin Board under paragraph 16, as well as documentation of the action taken by Doolin to collect or strengthen assets identified as problem credits, shall be maintained.

18. The Doolin Board shall forthwith meet with officials designated by the OTS to discuss any outstanding supervisory concerns reflected in the June 1992, and any subsequent OTS Reports of Examination.

19. Within ten (10) days, the Board shall appoint a Compliance Committee of at least three (3) directors, none of whom shall be employees of Doolin or any of its affiliates. The Compliance Committee shall be responsible for monitoring and coordinating Doolin's adherence to the provisions of this Order.

20. Within thirty (30) days of the appointment of the Committee and every thirty (30) days thereafter, the

Compliance Committee shall submit a written progress report to the Board setting forth in detail:

(a) actions taken to comply with each provision in this Order; and

(b) the results of those actions.

21. The Board shall forward a copy of the Compliance Committee's report, with any additional comments by the Board, to the OTS.

22. Doolin shall immediately take all steps necessary to correct each violation of law, rule or regulation cited in any OTS Report of Examination. As each violation is corrected, the Doolin Board shall notify the OTS of the date and manner in which each correction has been effected.

23. Within sixty (60) days, the Doolin Board shall adopt and implement specific procedures to prevent future violations as cited in the June 1992 OTS Report of Examination and all subsequent OTS Reports of Examination, and shall adopt and implement general procedures addressing compliance oversight that incorporate internal control systems and education of employees regarding laws, rules and regulations applicable to their areas of responsibility.

24. Upon adoption, a copy of the procedures adopted and implemented under paragraph 23 shall be forwarded to the OTS.

25. The Doolin Board shall develop a contingency plan that addresses what steps Doolin shall take in the event ComServ files for bankruptcy or is otherwise unable to discharge satisfactorily its responsibilities as a servicer or in work-out.

26. Although the Doolin Board is by this Order required to submit certain proposed actions and programs for the review or approval of the OTS, the Doolin Board has the ultimate responsibility for proper and sound management of Doolin.

27. It is expressly and clearly understood that if, at any time, the OTS deems it appropriate in fulfilling the responsibilities placed upon it by the several laws of the United States of America to undertake any action affecting Doolin, nothing in this Order shall in any way inhibit, estop, bar or otherwise prevent the OTS from so doing.

28. Any time limitations imposed by this Order shall begin to run from the effective date of this Order. Such time limitations may be extended by the OTS for good cause upon written application by the Doolin Board to the Regional Director, Northeast Region, Jersey City, New Jersey.

29. For the purpose of this Order, all items required to be submitted by Doolin to the OTS shall be submitted to the Regional Director, Northeast Region, Jersey City, New Jersey, and to the Assistant Regional Director, Northeast Region (Pittsburgh Area Office).

30. The provisions of this Order are effective at the expiration of thirty (30) days after it is served upon Doolin, and shall remain effective and enforceable, except to the extent that,and until such time as, any provisions of this Order shall have been amended, suspended, waived, or terminated by the OTS.

IT IS FURTHER ORDERED THAT:

Respondent is hereby notified that it has the right to appeal this Final Decision and Order to the United States Court of Appeals within 30 days after the date of service of such Final Decision and Order.

Dated: 29 MAR '97

By: Nicolas P. Retsinas

Nicolas P. Retsinas

Director