



**SHADOW
FINANCIAL
REGULATORY
COMMITTEE**

COMMITTEE MEMBERS

- LAWRENCE CONNELL
Co-Chair
Prather, Seeger,
Doolittle & Farmer
- GEORGE G. KAUFMAN
Co-Chair
Loyola University
of Chicago
- RICHARD C. ASPINWALL
Chase Manhattan Bank
- GEORGE J. BENSTON
Emory University
- FRANKLIN R. EDWARDS
Columbia University
- ROBERT A. EISENBEIS
University of North
Carolina at Chapel Hill
- JOHN D. HAWKE, JR.
Arnold & Porter
- PAUL M. HORVITZ
University of Houston
- EDWARD J. KANE
Ohio State University
- ROGER W. MEHLE
Royer, Mehle & Babyak
- RICHARD J. HERRING
Univ. of Penna.
- KENNETH E. SCOTT
Stanford Law School

SUPPORTERS INCLUDE

- MID AMERICA
INSTITUTE FOR
PUBLIC POLICY
RESEARCH
- ARAH SCAIFE
FOUNDATION
UNIVERSITY OF
NORTH CAROLINA

Administrative Office
c/o Professor George Kaufman
Loyola University of Chicago
820 North Michigan Avenue
Chicago, Illinois 60611
(312) 915-7075
FAX (312) 915-7003

Statement No. 62

For information contact:
John D. Hawke, Jr.
202-872-6856

Statement of the Shadow Financial Regulatory Committee
on
Congressional Intercession with the
Financial Regulatory Agencies

December 10, 1990

Controversies in recent years concerning intercessions by individual members of Congress in the process of federal thrift supervision have raised serious questions about the propriety of such conduct. Particularly difficult is the question of when such intercession crosses the line between legitimate constituent service and impermissible attempts to affect the process of agency decisionmaking. This is the principal issue raised by the current "Keating Five" hearings before the Senate Ethics Committee. It also played an important role in the Wright proceedings before the House Ethics Committee.

In certain situations Congress itself has provided guidance that answers this question. Where Congress has by statute prescribed a procedure designed to ensure due process to parties dealing with a financial regulatory agency, there is a clear implication that members of Congress should allow that process to go forward without interference. In supervisory enforcement proceedings, where the governing law affords an aggrieved party an opportunity for a hearing before a disinterested trier-of-fact, subject to ultimate court review, intercession by individual members of Congress is inappropriate. Similarly, in application proceedings,

where judicial review based on the agency record is also possible, ex parte intercession should be viewed as inappropriate.

Where an agency is exercising rulemaking powers conferred upon it by Congress, it must follow procedures for the formulation of rules set forth in the Administrative Procedure Act. Efforts to influence the rulemaking process outside the scope of those procedures may also be viewed as inconsistent with the scheme Congress itself established.

Issues arising out of the process of bank examination may be viewed as especially inappropriate for congressional intercession. If bank examiners are to do their job properly, they cannot be subject to challenge by individual members of Congress acting on behalf of the institution being examined, while the examination process is going on. The procedure affords due-process protections to the institutions involved, and the responsible committees of Congress have ample oversight jurisdiction to assess the quality of supervision after the fact. To tolerate ex parte interference in the process by members of Congress and their staffs would ultimately weaken not only the process itself, but, more importantly, public confidence in the examination and oversight process.

There are, to be sure, occasions on which representations from members of Congress to the financial regulatory agencies may be perfectly appropriate. Routine "status" inquiries, when not intended to communicate a coercive intent, are certainly within the realm of acceptable conduct, as are formal comments on proposed rulemaking actions.

In all such cases, however, the agencies should make such communications a matter of public record -- indeed, Congress itself should insist on such a procedure. Such a disclosure rule would not only inhibit improper communication, but would bolster public confidence in the integrity of the regulatory process.