

{{8-31-94 p.A-2453}}

[¶5215] **In the Matter of Doolin Security Savings Bank, FSB, New Martinsville, West Virginia,
Docket No. FDIC-93-178a (6-29-94)**

FDIC adopts ALJ's recommendation and grants summary disposition ordering termination of deposit insurance of institution that failed to pay its semi-annual assessments to the Savings Association Insurance Fund. Respondent institution had objected to the risk classification assigned it on the basis of an examination by its primary regulator, the Office of Thrift Supervision, and paid only the amount it would have been assessed had it received a lower-risk classification.

[.1] Deposit Insurance—Assessment—Payment Required

FDIC may terminate deposit insurance of an institution that violates a law, regulation, or order; refusal to pay insurance fees in accordance with assessment notice is a violation of statute and regulation.

[.2] Deposit Insurance—Assessment—Disputed Amount

A depository institution that disputes its SAIF assessment must pay the assessment in full and then seek review and refund of any overpayment.

[.3] Deposit Insurance—Assessment—FDIC Authority to Collect

FDIC has a choice of remedies for compelling institutions to pay their SAIF assessments. Its statutory authority to commence action in district court is not exclusive; it may instead use its authority to terminate insurance.

In the Matter of

**DOOLIN SECURITY SAVINGS BANK,
FSB
NEW MARTINSVILLE, WEST
VIRGINIA
(Insured Federal Savings Association)
DECISION AND ORDER
TO TERMINATE INSURED
STATUS
FDIC-93-178a**

INTRODUCTION

The Federal Deposit Insurance Corporation ("FDIC") commenced this administrative proceeding on or about November 18, 1993, to terminate the status of Doolin Security Savings Bank, FSB, New Martinsville, West Virginia ("Respondent" or "Doolin") as an insured federal savings association {{8-31-94 p.A-2454}} pursuant to section 8(a) of the Federal Deposit Insurance Act ("Act"), 12 U.S.C. § 1818(a)(2) (B), for failure to pay its 1993 semi-annual assessments to the Savings Association Insurance Fund.¹ The matter is before the Board of Directors of the FDIC ("Board") following the submission of the Recommended Decision² of Administrative Law Judge Arthur L. Shipe ("ALJ"), which recommends that the Motion for Summary Disposition of FDIC Enforcement Counsel be granted.

The Board concurs in and adopts the Findings of Fact and Conclusions of Law set forth by the ALJ in his Recommended Decision and makes further findings and conclusions as set forth below.

BACKGROUND

A summary of the facts of this case, which are further detailed in the ALJ's Findings of Fact (R.D. at 3–6), is as follows. The FDIC established a risk-based insurance system and created regulations for implementing such system, pursuant to legislative mandate. 12 U.S.C. § 1817(a). In accordance with its regulations, the FDIC issued to Respondent a Risk-Related Deposit Insurance Assessment Rate Notification ("Notification") dated December 1, 1992, assigning Respondent risk classification "1B" for purposes of determining the annual deposit insurance assessment rate for the six-month period beginning January 1, 1993. The insurance assessment called for by the Notification was \$40,651.53. Respondent self-determined that its risk classification should have been "1A" rather than "1B," which would have reduced its insurance assessment to \$32,677.37. It made this determination because Respondent takes the position that the rating assigned by its primary regulator, the Office of Thrift

Supervision ("OTS"), in its 1992 Examination Report, was erroneous. Because the 1992 OTS Examination Report is one of the factors used by FDIC in assigning the risk classification,³ Respondent asserts that the FDIC's assignment of risk classification "1B" is also erroneous. Respondent paid to the FDIC \$32,677.37 and withheld the difference of \$7,974.16. Answer at ¶12. The process was repeated with the subsequent semi-annual payment. Respondent paid to the FDIC the amount of \$59,728.68 due on the basis of a "1A" classification, rather than \$67,519.24 which was the amount due on the basis of its "1B" classification. Answer at ¶14. Respondent withheld a total of \$15,764.80 of its deposit insurance assessment. *Id.*

Based on Respondent's failure to comply with the statute and regulations governing the deposit insurance system requiring payment of the full amount assessed, the FDIC issued its Notice of Intention to Terminate Insured Status, Findings, and Order Setting Hearing on November 18, 1993. Respondent filed a timely Answer asserting numerous affirmative defenses and a demand for a jury trial.

Prior to the commencement of this action, OTS brought an enforcement proceeding ("OTS Proceeding") against Respondent in which most of the issues raised by Respondent in this proceeding are raised.⁴ According to Respondent, its dispute with OTS arises out of an OTS investigation of Doolin and ***, a firm with which it conducted business. Resp. Br. at 4–7. Its dispute focuses on the OTS' treatment of loan and lease loss provisions and allegations of violation of the loans-to-one-borrower rule contained in the 1992 Examination Report of Doolin. None of these issues involves the FDIC.

The Board finds that section 8(a) of the Act, 12 U.S.C. § 1818(a), authorizes the FDIC to terminate the deposit insurance of an insured depository institution which violates applicable law, regulation or order. Respondent is required by statute and regula-

¹ The Savings Association Insurance Fund and the Bank Insurance Fund are collectively referred to herein as the Insurance Funds.

² Citations to the record shall be as follows:

Recommended Decision ____ "R.D. at ____."

Respondent's Exceptions ____ "Resp. Ex. at ____."

Respondent's Brief in Opposition to Motion for Summary Disposition .. "Resp. Br. at ____."

³ Section 327.3(d)(1)(ii) of the FDIC's assessment regulation provides that "...each institution will be assigned to one of the three subgroups on the basis of supervisory evaluations by the institution's primary federal supervisor and, if applicable, state supervisor; and such other information as the Corporation determines to be relevant to the institution's financial condition and the risk posed to the BIF or SAIF." 12 C.F.R. § 327.3(d)(1)(ii).

⁴ In the Matter of Doolin Security Savings Bank, FSB, New Martinsville, West Virginia, OTS No. AP 93-74. Doolin's Second Defense in the instant case is identical to a defense raised in the OTS Proceeding asserting OTS misconduct and violation of the Paperwork Reduction Act. Both allegations were successfully stricken by OTS in its proceeding.

{{8-31-94 p.A-2455}}tion to pay insurance fees in accordance with its assessment notice. 12 U.S.C. § 1817(c)(2); 12 C.F.R. § 327.3. Respondent admits that it has not done so, Answer ¶¶12, 14, and thus admits that it has violated both applicable law and regulation. Therefore, the FDIC's action to terminate Respondent's insurance is clearly authorized and appropriate.

Summary judgment may be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). With respect to FDIC Enforcement Counsel's Motion for Summary Disposition in this proceeding under section 8(a), the ALJ correctly found that there are no material issues of fact and that this matter may be decided as a matter of law.⁵ R.D. at 11. Summary Disposition in favor of the FDIC is appropriate.

DISCUSSION

Though not part of the determination that the FDIC has met its burden under section 8(a) and that termination of Respondent's deposit insurance is appropriate, the nature of Respondent's pleadings convinces the Board to address certain of the issues Respondent raises.

The proper issue in this proceeding under section 8(a) is whether Respondent has paid its insurance premium in accordance with law and regulation, and, if it has not, the FDIC's authority to terminate its deposit insurance.

Contrary to Respondent's repeated assertions and attempts to make it so, this is *not* "...a test not only of the FDIC's assessments of Doolin, but also of the FDIC's authority to create a subjective risk-based deposit insurance assessment scheme, of the non-APA procedures the FDIC established to implement its scheme, and of the FDIC's determination to enforce its assessments against Doolin in an administrative proceeding rather than an Article III court." Resp. Br. at 1; Resp. Ex. at 17.

Respondent is free, of course, to raise its constitutional challenge to the risk based assessment system in an appropriate proceeding.⁶ Administrative review of FDIC assessments may be had pursuant to 12 C.F.R. § 327.3(f). Judicial review of the final agency determination then is available in the United States District Court pursuant to chapter 7 of the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq.* The Board will not allow Respondent to sidestep these procedures and raise questions about determinations of its primary regulator or the underlying insurance assessment in a section 8(a) proceeding.

Instead of following established procedures, Respondent takes the position that the FDIC should sue in federal court to force payment of the full assessment. Respondent ignores the responsibility of the FDIC to the Insurance Funds. As a matter of sound policy aimed at protecting the Insurance Funds, in promulgating its regulations the FDIC determined that the solvency of the funds could not be placed at risk by depository institutions disputing their assessments.⁷ Unless depository institutions are required to pay their assessments in full and *then* dispute an assessment with which they disagree, the Insurance Funds would be jeopardized—

⁵ Respondent contests many factual issues primarily related to the 1992 examination conducted by OTS, as well as the risk classification assignment made by FDIC to the extent it is based on the OTS examination report. See, Resp. Br. at 4–17. None of these issues is relevant to this proceeding under section 8(a). Respondent has admitted all facts material to a determination under section 8(a). Review of the OTS classification of Respondent's loans may be had pursuant to OTS' established procedures.

⁶ It is abundantly clear from the record that Respondent's real grievance is against OTS. See Resp. Br. at 4–6, 8–10. However, if Respondent wishes to challenge determinations made by OTS, it must follow the appropriate OTS procedures for such challenge. Respondent has in fact availed itself of that opportunity. Respondent and OTS have been engaged in a protracted dispute which gave rise to an investigation of Doolin and eventually to litigation over the OTS' 1992 Examination Report of Respondent, which, in part, served as the basis for the FDIC's assessment classification. To date, Respondent has been unsuccessful in obtaining a modification of the Examination Report from OTS. Its challenges here are a blatant effort to "back door" its litigation with OTS. Neither the termination of insurance proceeding under section 8(a) nor the insurance assessment proceeding was intended to enable a financial institution to "end run" its primary regulator with which it disagrees. Significantly, throughout these proceedings Respondent has been on notice that if the full assessment is paid, and the OTS subsequently modifies its findings, the FDIC will reconsider its insurance risk classification and if the classification were changed to "1A," the difference in assessment would be paid to Respondent *with interest*. See, 12 C.F.R. § 327.7(a) (2); 57 Fed. Reg. 45,284 (Oct. 1, 1992).

⁷ The Notification received by all depository institutions recognizes that institutions may be dissatisfied with the [\(Continued\)](#)

[{{8-31-94 p.A-2456}}](#) directly contrary to the intent of Congress in creating risk-based insurance. The FDIC must anticipate with reasonable certainty the amount of the semiannual additions to the funds. Were institutions free to withhold payment and force the FDIC to sue each such institution to recover every semiannual assessment withheld, the FDIC could not operate the funds in a fiscally prudent manner. This is precisely the problem raised by the approach espoused by the Respondent.

Such a risk was not placed on the Insurance Funds by Congress and cannot be placed upon it by Respondent. In balancing the need to protect the Insurance Funds against the interest of an individual institution in challenging its assessment, the balance must be struck to protect the funds. See, *Commissioner v. Phillips*, 283 U.S. 589 (1931). Adequate protection has been provided to depository institutions which comply with the regulations and then challenge their assessment.

Respondent asserts that the FDIC is required by 12 U.S.C. § 1817(g) to bring an action in district court to seek unpaid insurance assessments.⁸ The ALJ correctly concludes that section 1817(g) contains no such requirement. R.D. at 10. That section provides the FDIC's authority to commence an action in district court against a financial institution which fails to pay all or part of its insurance premium. However, the FDIC is under no obligation to do so. The remedy of section 1817(g) is not exclusive and does not

limit in any way the FDIC's ability to select an alternative method of redress, such as the use of its authority to terminate the insurance of an insured depository institution which fails or refuses to pay its assessment. Indeed, the language of section 1817(h) is clear on its face that the remedies of section 1817(g) are *in addition to* any other remedy against an insured depository institution available to the FDIC (emphasis added). The choice of remedy lies with the FDIC and it has acted within the scope of its permissible discretion here in choosing to terminate Respondent's insurance.

Respondent asserts that the insurance assessment procedure established by the FDIC is in excess of the FDIC's statutory authority (Answer, Third Defense) and in excess of the "statutory jurisdiction, authority, or limitations of the FDIC, or short of statutory right" (Answer, Seventh Defense). These assertions are groundless with no basis in the statute or its legislative history. Section 302 of the Federal Deposit Insurance Corporation Improvement Act of 1991 ("FDICIA"), Pub. L. No. 102-242, 105 Stat. 2236, 2345, mandates the establishment of a risk-based insurance assessment system for insured depository institutions and section 302(a) of FDICIA requires the FDIC to adopt regulations establishing such a system. Section 302(f) of FDICIA authorized the FDIC to adopt regulations governing the transition between the then-existing assessment system and the risk-based assessment system mandated by section 302(a) of FDICIA. The statute provides great latitude to the FDIC. Respondent cites to a Treasury Department report, purportedly as evidence of legislative intent that a program different from the existing one be established. But the Treasury Report does not provide such evidence and, in any event, would not show Congressional intent unless it has been adopted or incorporated by the committees reporting on FDICIA, which it was not.

The FDIC was required to establish a risk-

⁷Continued: underlying examination report by their primary regulator, which might lead to dissatisfaction with the assessment category. The Notification at Enclosure II states:

The request for review procedure is generally available for instances in which the institution's supervisory subgroup assignment differs from what would be likely considering the composite rating most recently assigned and communicated to the institution in writing by its primary federal regulator. It is not intended as a means for an institution to dispute the composite rating assigned to the institution by its primary federal regulator under the Uniform Financial Institutions Rating System. Each primary federal regulator has established procedures for that purpose.

Accordingly, the regulations provide for the return or credit of overpayment with interest should the depository institution and primary regulator resolve their differences to the benefit of the institution. 12 C.F.R. § 327.7(a)(2). If Respondent is satisfied with the result of the administrative review by the FDIC, it may seek review of that result in district court under the APA.

⁸ In a related argument Respondent asserts that because the FDIC has stated that the intention behind bringing this action to terminate its insurance is to obtain payment of the full insurance assessment, this is actually an action to collect a debt which can be maintained only in an Article III court. Resp. Br. at 19. Respondent is incorrect, of course. The motivation for bringing an action—here, to encourage Respondent's compliance with statute and regulation—does not convert the nature of the action. The FDIC seeks no money in this proceeding under section 8(a) and is not seeking to collect a debt. An administrative proceeding is appropriate and permitted by statute under the facts presented by this proceeding. 12 U.S.C. § 1818(a)(3).

{{8-31-94 p.A-2457}}based insurance assessment program that is *reasonable*. That it has done.⁹ In determining to rely, in part, on the examination reports of primary regulators, the FDIC acted reasonably in light of the statutory time frame and the long-established bank regulatory system. That system would have been ill-served had the FDIC opted to create a second, duplicative, and perhaps conflicting examination solely for purposes of insurance assessment. Had it created such a system, the FDIC then would have been acting contrary to Congressional intent in this time of reduction of regulatory paperwork and intrusion. Moreover, in proposing and refining the current assessing scheme through notice and comment rulemaking, the FDIC carefully considered comments from all quarters, the vast majority of which favored the proposal of the FDIC which relied on a combination of objective and subjective factors — financial data provided by the institutions and supervisory examination reports provided by the primary regulators—in determining risk classification. See, 57 Fed. Reg. 45280 (Oct. 1, 1992). Such consideration is entitled to judicial deference. *FDIC v. European American Bank & Trust Co.*, 576 F. Supp. 950, 954 (S.D.N.Y. 1983).

Respondent next makes two somewhat confused complaints about not having received a formal APA hearing (Answer, Fourth and Fifth Defense). First, proceedings under section 8(a) of the Act are on the record adjudications under 5 U.S.C. § 554, and Respondent has been actively participating in such a

formal APA hearing. In fact, this decision is the culmination of that proceeding. The Board is at a loss to find a basis for Respondent's complaint.

Respondent also appears to object to the fact that no formal APA proceeding was provided in which it could contest its assessment category. This complaint is without merit. No such hearing is required by statute or regulation. However, the FDIC's regulations do provide for an opportunity for an insured institution to present its position in an informal administrative proceeding. The process was intended to be a "paper" hearing with oral presentations to be permitted only at the discretion of the FDIC.¹¹ Doolin availed itself of the procedure provided and first requested and was granted review of its classification. When no change in the classification was made, Doolin sought subsequent review by the Supervisory Review Committee, which again upheld the classification. In each instance Doolin was free to submit any material it believed to be helpful. The APA creates no greater rights where, as here, an on the record hearing is not required by statute or regulation.¹²

Respondent further argues that because the Insurance Funds benefit (i.e., collect more money) from maintaining Respondent's classification at "1B," the FDIC cannot make a fair determination of the issue. However, the statute authorizing the FDIC risk-based insurance system specifically recognized the interests of the Insurance Funds and identifies the needs of the funds as a factor in determining classification. 12 U.S.C. § 1817(b). Moreover, this statute is not unique. Previously this Board has stated:

"mere assertion of a conflict of interest clearly inherent in the statutory scheme established by Congress is insufficient to overcome the presumption of the propriety of agency action and Congressional recognition of the interest of the FDIC ..." *In the Matter of First City, Texas -Austin, National Association, Austin, Texas*, FDIC-92-316kk, 1 P-H FDIC Enf. Dec.

⁹ The standard for review of such agency action was established by the Supreme Court in *Federal Election Commission v. Democratic Senatorial Campaign Commission*, 454 U.S. 27, 39, 102 S.Ct. 38, 46 (1981). The Court found that the role of a reviewing court

"was not to interpret the statute as it thought best but rather the narrower inquiry into whether the Commission's construction was 'sufficiently reasonable' to be accepted by a reviewing Court...To satisfy this standard it is not necessary for a court to find that the agency's construction was the only reasonable one or even the reading the court would have reached if the question initially had arisen in a judicial proceeding."

¹⁰ Because section 8(a) provides for an administrative hearing, Respondent is not entitled to a judicial trial, and per force, the ALJ correctly found that Respondent is not entitled to a jury trial. R.D. at 10.

¹¹ At the time of the assessments at issue, the review procedure involved a first level of review by the appropriate Regional Director and a second level by the Director of the Division of Supervision. Subsequently, the regulations were amended to provide for the first level of review at headquarters, rather than in the region, and to clarify the informality of the hearing. 58 Fed. Reg. 34357 (June 25, 1993).

¹² Contrary to Respondent's argument, the APA does not provide a formal hearing for all grievances. In fact, such hearings are limited to only those "adjudications *required by statute* to be determined *on the record* after opportunity for hearing." (Emphasis added.) 5 U.S.C. § 554. [{{8-31-94 p.A-2458}}](#)

¶5209 (1993), citing *Landy v. Federal Deposit Insurance Corp.*, 486 F.2d 139 (3rd Cir. 1973); *FCC v. Schreiber*, 381 U.S. 279, 296 (1965); *Fahey v. Mallonee*, 332 U.S. 245, 256 (1947).

OTHER ISSUES

Respondent filed a fifty-five page document captioned "Exceptions to the Recommended Decision." In fact, this document is almost entirely a duplication of Respondent's Brief in Opposition to FDIC's Motion for Summary Disposition. At pages 15–17 Respondent "excepts" to the Recommended Decision insofar as it does not adopt Respondent's proposed findings of fact or conclusions of law. For the reasons set forth in this Decision and Order, the Board rejects all of Respondent's so-called exceptions.

By letter dated January 28, 1994, Respondent's president, Donald R. Stout, wrote to the Board indicating Respondent's willingness "to post bond with the United States District Court for the Northern District of West Virginia in a sum equal to the amount of dispute" in this proceeding. There was not at the time, and is not now, any proceeding before the U.S. District Court, so it could not accept such a bond.

Moreover, such a bond is no substitute for a timely and proper assessment payment.

CONCLUSION

In conclusion, while the FDIC is loathe to terminate the deposit insurance of an otherwise viable institution, the deposit insurance system cannot be held hostage to disagreement over an examination report between an institution and its primary regulator. Where the insurance assessment scheme established by statute and regulation assures depository institutions that overpayments will be refunded or credited to future payments, and interest paid should they be erroneously assessed, 12 U.S.C. § 1817(e), the outcome of this proceeding is the result of the Respondent's inappropriate resort to self-help. Such resort to self-help cannot be condoned or tolerated where a Respondent has other options which provide it with full due process and of which it failed to avail itself.

Thus, the Board denies Respondent's request for a stay pending judicial review. Under the Board's Order, Respondent's insured status will terminate sixty (60) days after receipt of the Order by Respondent. Notice of the impending termination, however, must be given to Doolin's depositors thirty (30) days after receipt of the Order. The Board will maintain jurisdiction over this matter during the sixty-day period. This will provide an opportunity for Respondent to avoid termination of its insurance and for the Board to reconsider its Order should Respondent meet the following conditions: (1) Respondent shall pay the full amount of all delinquent insurance assessment payments to date, plus interest, as required by 12 C.F.R. § 327.7,¹³ and (2) Respondent shall enter into a written affirmative agreement to pay the full amount of all future insurance assessments, subject to any review or reassignment of risk classification pursuant to the procedures set forth in Part 327 of the FDIC's Rules and Regulations after full payment is made. Violation of any such written agreement may subject Doolin's board of directors to the assessment of civil money penalties.

ORDER TO TERMINATE INSURED STATUS

For the reasons set forth above, IT IS ORDERED, FIRST, that the insured status of the Doolin Security Savings Bank, FSB, New Martinsville, West Virginia ("Insured Institution") be, and the same hereby is, terminated effective as of the close of business sixty (60) days from the date of receipt by Respondent of this ORDER.

IT IS FURTHER ORDERED, SECOND, that, on or before the close of business thirty (30) days from the date of receipt of this ORDER, the Insured Institution shall give notice to its depositors of the termination of its status as an insured institution ("Depositor Notification"). The Depositor Notification shall be mailed to each depositor and shall be published in two local newspapers in accordance with the requirements of section 308.123 of the FDIC's Rules of Practice and Procedure, 12 C.F.R. § 308.123. The Insured Institution shall furnish the FDIC with a copy of the Depositor Notification mailed and an affidavit executed by the person who mailed the same. Further, the Depositor Notification shall satisfy the requirements of section 308.123 of the FDIC's Rules of Practice and Procedure, 12 C.F.R. § 308.123, by stating as follows:

¹³ Respondent did not pay the full amount of its assessment which was due and payable no later than January 31, 1994.

[\[8-31-94 p.A-2459\]](#)

NOTICE

(Date) ____

1. The status of Doolin Security Savings Bank, FSB, New Martinsville, West Virginia as an insured depository institution, under the provisions of the Federal Deposit Insurance Act, will terminate as of the close of business on the ____ day of ____, 1994.

2. Any deposits made by you after that date, whether the same be new deposits or additions to existing deposits, will not be insured by the Federal Deposit Insurance Corporation.

3. Insured deposits in Doolin Security Savings Bank, FSB, New Martinsville, West Virginia, on the ____ day of ____, 1994, will continue to be insured, as provided by the Federal Deposit Insurance Act, for two (2) years after the close of business on the ____ day of ____, 1994. Provided, however, that any withdrawals after the close of business on the ____ day of ____, 1994, will reduce the insurance coverage by the amount of such withdrawals.

Doolin Security Savings Bank, FSB
250 Main Street
New Martinsville, West Virginia

With prior written approval of the FDIC, the Insured Institution may include in the Depositor Notification any additional information or advice it may desire to give its depositors, provided that such additional information is not inconsistent with this paragraph.

THIRD, that, if the Insured Institution refuses or fails to give such notice as specified in paragraph SECOND of this ORDER, the FDIC is authorized to notify the Insured Institution's depositors by:

(a) Sending notice of the termination of the insured status of the Insured Institution to each of the Insured Institution's depositors at his or her last address of record as shown on the books of the Insured Institution; and/or

(b) Publishing notice of the termination of the Insured Institution's insured status by use of a detailed statement of the facts of this matter in one or more local papers of general circulation in Wetzel County, West Virginia; and/or

(c) Posting a copy of such notice in the lobby of the Insured Institution, local post office, and/or any other appropriate place of equal prominence; and/or

(d) Seeking any judicial order as it may deem proper or necessary to require the Insured Institution to comply with the provisions herein.

FOURTH, that, if the Insured Institution is closed for liquidation prior to the effective termination date, as fixed in paragraph FIRST, the notices prescribed herein shall not be given to depositors.

FIFTH, that, after the date of termination of the Insured Institution's insured status, the Insured Institution shall not advertise or hold itself out as having insured deposits, unless, in the same connection, it shall also state, with equal prominence, that such additions to deposits and new deposits made after the date of termination of insured status are not insured. Further, the Insured Institution shall not use any of its checks, letterheads, promotional materials, signs, and the like which bear the words "Member of FDIC" or any like statements relating to membership in or supervision by the FDIC.

SIXTH, that the insured deposits of the Insured Institution on the date of termination shall continue to be insured by the FDIC according to the provision of section 8(a) of the Act, 12 U.S.C. § 1818(a). Furthermore, the Insured Institution shall continue to file statements and pay assessments thereon for the period the deposits are insured pursuant to the provision of section 7 of the Act, 12 U.S.C. § 1817, and shall, in all other respects, be subject to the duties and obligations of an insured depository institution pursuant to section 8(a)(7) of the Act, 12 U.S.C. § 1818(a)(7).

SEVENTH, that this ORDER is fully enforceable by the FDIC pursuant to the provisions of section 8(i) of the Act, 12 U.S.C. § 1818(i).

EIGHTH, that the Board of Directors of the FDIC retains full jurisdiction over these proceedings during the interim between the date hereof and the effective termination date, as fixed in paragraph FIRST, with full power and authority to amend, modify, alter or rescind this ORDER.

By direction of the Board of Directors.

Dated at Washington, D.C., this 29th day of June, 1994.

/s/ Robert E. Feldman

Acting Executive Secretary

[{{8-31-94 p.A-2460}}](#)

**RECOMMENDED ORDER ON
SUMMARY DISPOSITION**

**In the Matter of
DOOLIN SECURITY SAVINGS BANK,
F.S.B.
NEW MARTINSVILLE, WEST
VIRGINIA
(Insured Federal Savings Association)
FDIC-93-178a**

ARTHUR L. SHIPE, Administrative Law Judge:

This proceeding was instituted by a "Notice of Intention to Terminate Insured Status, Findings, and Order Setting Hearing", issued pursuant to 12 U.S.C. § 1818(a)(2)(B) on November 18, 1993. The Notice alleges that Respondent has violated 12 U.S.C. § 1817, and 12 C.F.R. § 327, and that because of these violations it is not entitled to continue operations as an insured depository institution within the meaning of 12 U.S.C. § 1818(a). Specifically, the Notice alleges that Respondent has failed to pay its federal deposit insurance fees as assessed, but instead remitted lower amounts for the six-month periods beginning

January 1, 1993 and July 1, 1993.

Respondent submitted an Answer variously denying and admitting the allegations of the Notice. Nine defenses and a demand for a jury trial were included in the Answer.

On January 21, 1994, FDIC Enforcement filed a motion for summary disposition pursuant to 12 C.F.R. § 308.29. That section provides that the Administrative Law Judge shall issue a final order granting such motions where there exists "no genuine issue as to any material fact," and, "the moving party is entitled to a decision in its favor as a matter of law."

FDIC Enforcement alleges that the following material facts are not in dispute in this proceeding.

1. Doolin Security Savings Bank, F.S.B., New Martinsville, West Virginia ("Doolin") is an "insured depository institution" as that term is defined in the Federal Deposit Insurance Act ("Act"), 12 U.S.C. § 1813(c)(2), is a federally chartered savings association doing business under the laws of the United States, and has its principal place of business in New Martinsville, West Virginia. It pays its deposit insurance assessments to the FDIC under Section 7 of the Act, 12 U.S.C. § 1817, which assessments are credited to the Savings Association Insurance Fund ("SAIF"). The FDIC has jurisdiction over Doolin. Admitted in Paragraph No. 2. of ANSWER OF RESPONDENT DOOLIN SECURITY SAVINGS BANK, F.S.B., dated the 24th day of November, 1993 (hereinafter "Answer").

2. Each insured depository institution is required by section 7(c)(1) of the Act, 12 U.S.C. § 1817(c)(1) to file a certified statement with the FDIC showing its average assessment base. Admitted in Paragraph No. 4 of Answer.

3. Section 302 of the Federal Deposit Insurance Corporation Improvement Act of 1991 ("FDICIA"), Pub. L. No. 102-242, 105 Stat. 2236, 2345, provides for the establishment of a risk-based insurance assessment system for insured depository institutions. Admitted in Paragraph No. 5 of Answer.

4. Section 302(a) of FDICIA, Pub. L. No. 102-242, 105 Stat. 2236, 2345, requires the FDIC to adopt regulations establishing a risk-based assessment system. Section 302(f) of FDICIA, Pub. L. No. 102-242, 105 Stat. 2236, 2349, authorizes the FDIC to adopt regulations governing the transition between the then-existing assessment system and the risk-based assessment system mandated by Section 302(a). A transitional system was adopted by the FDIC on September 15, 1992, 57 Fed. Reg. 45263 (Oct. 1, 1992), and subsequently amended, both codified in Part 327 of the Regulations, 12 C.F.R. Part 327. Admitted in Paragraph No. 6 of Answer.

5. Section 327.3 of the FDIC Regulations, 12 C.F.R. § 327.3, requires an insured depository institution to pay to the FDIC the amount of the assessment shown on the certified statement, as does Section 7(c)(1) of the Act, 12 U.S.C. § 1817(c)(1)(1989). Admitted in Paragraph No. 7 of Answer.

6. The FDIC notified Doolin, by letter dated December 1, 1992, that it was assigned for the purposes of determining its annual deposit insurance assessment rate a risk classification of 1B, which carried a rate of \$0.26 for each \$100 of domestic deposits. Admitted in Paragraph No. 9 of Answer.

7. The semiannual assessment for the six months beginning January 1, 1993, was due and payable on or before January 13, 1993. Admitted in Paragraph No. 10 of Answer.

8. In January, 1993, Doolin submitted to [{{8-31-94 p.A-2461}}](#) the FDIC the original certified statement, on which the FDIC had indicated an annual assessment of \$0.26 for each \$100 of domestic deposits, the rate for an institution assigned, as was Doolin, a 1B assessment risk classification; and an altered version of the certified statement on which Doolin had substituted an annual assessment rate of \$0.23 for each \$100 of domestic deposits, the rate corresponding to the 1A rating. Admitted in Paragraph No. 11 of Answer.

9. By substituting the rate of an insured depository institution with an assessment risk classification of 1A, Doolin caused the calculation its semiannual assessment to show an assessment amount of \$32,677.37, which it then paid, in lieu of the \$40,651.53 as called for in the original certified statement provided to Doolin by the FDIC, a difference of \$7,974.16. Admitted in Paragraph No. 12 of Answer.

10. On discovery of the underpayment, the FDIC notified Doolin on May 18, 1993, and again on July 14, 1993, that it had failed to pay its full semiannual assessment that was due and payable by January 31, 1993. Admitted in Paragraph No. 13 of Answer.

11. The next semiannual payment was due and payable by July 31, 1993. Doolin, in July of 1993, again submitted to the FDIC the original certified statement, on which the FDIC had indicated an annual rate of \$0.26 for each \$100 of domestic deposits, the rate for an institution assigned, as was Doolin, a 1B assessment risk classification, and an altered version of the certified statement, on which Doolin had substituted an annual assessment rate of \$0.23 per \$100 of domestic deposits, the rate corresponding to the 1A rating. Admitted in Paragraph 14 of Answer.

12. By substituting the rate for an insured depository institution with a assessment risk classification of 1A, Doolin caused the calculation of its semiannual assessment to show an assessment amount of \$59,728.68, which it then paid, in lieu of the \$67,519.24 as called for in the original certified statement provided to Doolin by the FDIC, a difference of \$7,790.68. Thus, Doolin, for 1993, has underpaid its

deposit insurance assessment by a total of \$15,764.80. Admitted in Paragraph 14 of Answer.

The Respondent filed an extensive reply to the FDIC motion, but it has not attempted to refute the factual claims upon which the motion is based. The alleged facts as set forth above are, accordingly, deemed established as true.

As those assertions of fact indicate, the instant dispute arises from Respondent's assessment by the FDIC of federal deposit insurance fees based on an assigned risk classification of "1B". It claims that the proper classification for it was "1A". The assigned classification results in an insurance assessment which is three cents per \$100 of deposits higher than the 1A classification. Respondent has paid a premium reflective of a 1A classification.

Respondent seeks to challenge here the lawfulness of the classification rating assigned to it, including the adequacy of the procedure by which that rating was determined.

Respondent was given notice by the FDIC of its risk classification category in December 1992. Respondent thereupon requested review of that classification pursuant to 12 C.F.R. § 327.3(f), then effective, which allowed review upon written request to the FDIC's Director of the Division of Supervision. Respondent also requested a hearing on the matter.

The request for a change in classification, as well as that for a hearing, was denied by letter of March 25, 1993. That letter also informed Respondent that it could request further review of the matter by the FDIC Supervision Review Committee. Such a review was requested and the relief sought was denied by letter of July 7, 1993.

A related petition by Respondent for the FDIC to establish procedures by rulemaking requiring an evidentiary hearing on the assignment of risk classifications has also been denied by the FDIC's Board of Directors.

The issue presented here is whether the determination by FDIC officials of Respondent's risk classification assignment, and the lawfulness of the procedures by which that classification was determined, are reviewable in this proceeding. It is my conclusion that no such review is permissible here.

The denial of Respondent's requests for a change in its classification, and for an evidentiary hearing, stated that the appropriate recourse for an institution to contest its risk classification assignment is through the procedures established for that purpose by the institution's primary regulator. Respondent's primary regulator, the Office of Thrift [{{8-31-94 p.A-2462}}](#) Supervision, has refused to alter the findings from which the contested classification is derived.

It is clear that the FDIC Board does not contemplate litigation of this issue in proceedings conducted pursuant to the Administrative Procedure Act. Therefore, the determination by the FDIC of the appropriate risk classification for Respondent, in accordance with procedures deemed by it to be adequate, is binding here. Any appeal of those previous determinations by the FDIC, or the OTS, lies with the courts, not with this forum.

As stated, the Notice instituting this proceeding alleges that the failure of Respondent to remit the assessed insurance premiums is a violation of law. The FDIC, under 12 U.S.C. § 1818(a), may terminate the deposit insurance of an insured depository institution for, *inter alia*, violations of applicable law, regulation, or order.

It is claimed here that Respondent's failure to remit insurance fees in accordance with its assessment violates 12 U.S.C. § 1817(c)(1) and 12 C.F.R. § 327.3.

Section 1817(c)(1) provides:

(1) On or before the last day of the first month following each semiannual period, each insured depository institution which became insured prior to the beginning of such period shall file with the Corporation a certified statement showing its average assessment base for such period, and the amount of the semiannual assessment due to the Corporation for the semiannual period which begins with such month. Each such depository institution shall pay to the Corporation the amount of the semiannual assessment it is required to certify.

Section 327.3 provides:

(a) Required - (1) In general. Except as provided in paragraph (a)(2) of this section, each insured depository institution shall pay the amount of the semiannual assessment due for the current semiannual period, as shown on its certified statement for such period.

(2) Newly insured institutions. A newly insured institution shall not be required to pay an assessment for the semiannual period during which it becomes an insured institution.

It is concluded that Respondent has not paid "to the Corporation the amount of the semiannual assessment it is required to certify" based upon its average assessment base and applicable rate, and that Respondent is therefore in violation of the cited statutory provision and regulation.

Respondent contends that 12 U.S.C. § 1817(g) precludes the instant action. That section allows the FDIC to bring a court suit to recover any unpaid assessment lawfully made. There is nothing, however, in that provision which abrogates the termination of insurance authority granted to of the FDIC by Section

1818(a). Moreover, section 1817(h) provides to the contrary. It states, "The remedies provided in this subsection and subsections (f) and (g) (emphasis supplied) of this section shall not be construed as limiting any other remedies against any insured depository institution, but shall be in addition thereto." Plainly, the authority of the FDIC to terminate insurance is not qualified by Section 1817(g).

As a related defense, Respondent argues that under the Seventh Amendment it is entitled to a jury trial in this matter because it concerns a "legal" dispute over the collection of money. However, it is well settled that there is no constitutional right to a jury trial in administrative proceedings. See e.g., *Atlas Roofing Co. v. Occupational Safety and Health Review Commission*, 430 U.S. 442 (1977).

Respondent makes the further constitutional argument that the FDIC cannot determine the issue in controversy consistent with due process because of its alleged interest in the outcome. However, the statutory scheme under which the FDIC functions requires that procedure. While it may be too broad a statement to assert that an administrative agency cannot determine constitutional issues, it is settled that an agency cannot find its statutory authority unconstitutional. See *Weinberger v. Salfi* 422 U.S. 749, 765 (1975); *Finnerty v. Cowen*, 508 F. 2d 979, 981 (2d. Cir. 1974).

For the reasons stated, it is my conclusion that there are no *material* facts in genuine issue, that the FDIC is entitled to a decision in its favor as a matter of law, and that the following order should be entered.¹

So Ordered, this 24th day of February, 1994.

/s/ Arthur L. Shipe

Administrative Law Judge

Date: February 24, 1994