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Regulating State Chartered Savings Associations: An Introduction to the Ohio Scheme

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FROM THIS NATION'S BEGINNING, savings associations have accepted a vital role in promoting the well-being of its citizens, by serving as the largest single source of home financing. Today, this important task is conducted in a regulation-intensive environment. The primary regulatory agency for federally chartered associations is the three-member Federal Home Loan Bank Board whose members also govern the Federal Savings and Loan Insurance Corporation. State chartered associations may also come within their regulatory jurisdiction by joining either the Federal Home Loan Bank system or the Federal Savings and Loan Insurance Corporation. Regardless of whether they are subject to federal regulation, Ohio chartered associations are regulated by the Ohio Division of Building and Loan Associations.

The policies and decisions of this state agency have a pronounced and immediate impact upon the operations of these associations. Any alteration of those operations in turn has an effect upon the home construction industry, the real estate brokerage community, and most importantly, upon the families who rely upon the savings association industry for the funds to acquire their homes. Disclosure of Division policies and how those policies are formulated are thus matters of intense importance to all those affected by Division decisions.

Ohio has one of the nation's largest state chartered industries, with over 250 associations possessing well over fifteen billion dollars in assets.\(^1\) Soon after this industry was founded in 1867,\(^2\) there followed the creation of the regulatory agency in 1891.\(^3\) Some of the most significant developments in the three-quarter century history of that agency have occurred in the last three years. Those developments resulted from a concentrated effort by the industry, public and the legislature to render the Division independent of political party pressures while at the same time opening the decision-making processes of the Division to public scrutiny and participation.

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3. The Agency was named the Bureau of Building and Loan Associations and was a unit within the Department of Insurance. 1891 Ohio Laws 469, 471. In 1913 this scheme was altered so that the Inspector would be appointed by the Governor, with the advice and consent of the Senate, for a term of three years. 1921 Ohio Laws 105. In 1921 the scheme was modified by amendment. The agency name was changed to Division of Building and Loan Associations, the Inspector was renamed Superintendent, the agency was placed within the Department of Commerce, and the Director of Commerce replaced the governor as the appointing authority. Id. The scheme remained unaltered until the recent reorganization in 1975. See text accompanying notes 4-6 infra.
This article is an initial effort to examine this regulator, certain of its most important policies, and the impact of those recent developments upon policy-making by the Division. Part one contains a brief overview of agency staffing, appointment and removal of the Superintendent, and the budget appropriation process. Part two examines the three most important areas of the Superintendent's regulatory authority: examinations, chartering and branching. Part three discusses the recently developed administrative procedures for rule-making by the agency.

I. THE REGULATORY AGENCY

A. The Superintendent

1. Appointment

In late 1975 the Ohio Legislature drafted legislation to grant independence to the agency regulating the Ohio savings association industry. While the provisions of that enactment did convey a new independence to the Superintendent, it did so only within the context of executive branch oversight. The act did not modify legislative oversight of this agency's functions by affecting the appropriation and budgeting control. Nor did the 1975 legislation attempt to limit industry or public oversight of the Division's activities. By expanding the applicability of the Ohio Administrative Procedure Act to encompass most rule-making by the Division, the legislature enhanced the opportunity for public and industry scrutiny. The General Assembly thus attempted to balance the increased administrative independence of the Superintendent within the executive branch by significantly increasing his responsibility to decision-make in a public forum.

The Superintendent is now appointed by the Governor, with the advice and consent of the Senate, for a term of four years. Each four-year term commences on February 1st of the year that the Governor assumes office and terminates four years later on January 31st. Vacancies in the office of Superintendent are filled by appointment for the unexpired term.

Prior to this enactment, the Commerce Director had concurrent jurisdiction with the Superintendent. The statutory basis for that concurrent jurisdiction was also altered in 1975 and now provides that:

All authority vested by law in the superintendent of building and loan associations with respect to the management of the division of building and loan associations, shall be construed as vested in the superintendent of building and loan associations. The director of commerce shall not impose upon the division of building and loan associations any

5 Id. § 121.08.
functions other than those specified . . ., nor transfer from such division any such functions.⁶

The present scheme clearly grants the Superintendent sole jurisdiction to select his administrative staff and permits him to go directly to the General Assembly in requesting his biennial budget appropriation. This combination of direct access for budgeting and appropriation requests and the ability to select his own staff personnel has produced an administrative agency with administrative independence not heretofore enjoyed by this state’s savings association regulator.

2. Removal

Removal of the Superintendent was a simple matter prior to the 1975 enactment. Since the Superintendent served at the pleasure of the Director of the Department of Commerce, the Director needed only to ask for his resignation. The Superintendent’s removal may now only occur with the “advice and consent of the Senate.”⁷ The consequences of this new removal requirement are twofold. That process imposes procedural requirements where none had existed in the past. Secondly, specific grounds for removal must exist before that action can be taken.⁸ The statute applicable to removal of any public official appointed with advice and consent of the Senate provides:

When not otherwise provided for by law, an officer who holds his office by appointment of the governor with the advice and consent of the senate may be removed from office by the governor with the advice and consent of the senate, if it is found that such officer is inefficient or derelict in the discharge of his duties, if the ethics commission created by section 102.05 of the Revised Code has found, based upon a preponderance of the evidence, that the facts alleged in a complaint under section 102.06 of the Revised Code constitutes a violation of Chapter 102. of the Revised Code, if the officer fails to file or falsely files a statement required by section 102.02 of the Revised Code, or if it is found that he has used his office corruptly.⁹

Certainly the Governor must make some initial investigation to determine whether one of these grounds for removal can be established before deciding to remove. Whether this first step is accomplished through a formal or informal adjudicatory process, removal may not occur until the Governor’s procedure is then coupled with a second step, the Senate’s ratification of his decision.

⁶ Id.
⁸ Id.
⁹ Id.
The removal statute is applicable only "when not otherwise provided for by law."\(^{10}\) Does this provision mean that the Senate's role in this two-step procedure may be abrogated by other statutory provisions; or does it mean that while both steps must be taken, a complementary statute may substitute additional grounds to support a removal decision? There are two separate statutes which pose these problems. The first such statute states a separate basis for removal when the Superintendent breaches certain confidentiality strictures.\(^{11}\)

Information obtained by the Superintendent, or his staff, either in an examination or otherwise as a result of his official position is made confidential by statute.\(^{12}\) That statute further provides that the Superintendent must be removed from office for public disclosure of such information. The exception to this confidentiality rule is that the Superintendent may disclose such information "when the public duty of [the Superintendent requires him] to report upon or take official action regarding the affairs of the building and loan association examined . . . ."\(^{13}\) Should the Governor determine that the Superintendent has violated confidentiality, then, upon that separate ground and without Senate ratification, the Governor may unilaterally remove the Superintendent.

To so construe these two statutes would defeat the legislature's intention to create an independent agency. The better approach would be to still require Senate ratification, while permitting breach of confidentiality to serve as an additional ground for removal of the Superintendent.

The second statutory provision which tests the impact of "when not otherwise provided by law" was enacted in the same 1975 act which provided for the Superintendent's removal only with the advice and consent of the Senate. This second statute confers immunity upon the Superintendent by providing that:

\[\text{[N]either the superintendent of building and loan associations nor any employee of the division of building and loan associations shall be liable in any civil, criminal or administrative proceeding for any mistake}\]

\(^{10}\) Id.

\(^{11}\) OHIO REV. CODE ANN. § 1155.16 (Page 1968).

\(^{12}\) Id. This section also provides that confidentiality is not breached when the Superintendent decides to exchange information with representatives of the Federal Home Loan Bank Board or savings association regulatory agencies of other states.

\(^{13}\) Id. It should be noted that while the Superintendent may also examine deposit guaranty associations and service corporations, this statute does not grant him the same exception to disclose information when it relates to or arises from an examination of those entities.
of judgment or discretion in any action taken, or any omission made by him in good faith.\textsuperscript{14}

There is obviously nothing unique about the office of Superintendent which would make less offensive any act by the Superintendent that would otherwise be cause for removal of any other public official. Indeed, the agency's very responsibilities to assure the financial integrity of these financial institutions make imperative that the public have every confidence in this regulatory body. Careful consideration of the application of this immunity statute in light of the policy objectives underlying the broader savings association regulatory scheme necessarily leads to the conclusion that the legislature did not intend special treatment for the Superintendent.

Although the General Assembly has not articulated expressly its intent in granting the Superintendent statutory immunity, the reasons which produced the enactment of that provision are fairly ascertainable. In recent years the specter of potential personal liability arising from their acts while in office has been perceived as less remote by many public officials. Law suits pending against a Director of the Department of Commerce of Ohio at one time in 1974 subjected him to potential personal liability in the hundreds of millions of dollars. Since the Director of the Department at that time still possessed all the powers of the Superintendent, the Director was the obvious defendant for any suits against the head of that Division.\textsuperscript{15}

As has been noted, the 1975 reorganization act replaced the Director and granted that power and any ancillary liability solely to the Superintendent. Any future attempts to impose personal liability upon the regulator of savings associations would thereafter be directed toward the Superintendent. It was with this backdrop that the then Superintendent requested the legislature to accord him immunity from personal liability. The legislature's response was to enact the present statutory immunity provision.\textsuperscript{16}

Considered in this context, the parameters of this statutory immunity ought to be limited to those actions or omissions which arise from the Superintendent's exercise of his official authority and responsibilities. Those are contained primarily within the enabling legislation for the office of Superintendent, the Division and state chartered savings associations.\textsuperscript{17} This

\textsuperscript{15} See \textit{Home Savings and Loan Ass'n v. Boesch}, 41 Ohio St. 2d 115, 332 N.E.2d 878 (1975).
standard could serve as a functional guide for determining when the Superintendent ought to be able to avail himself of this statutory immunity.

The appropriate, and probably the legislatively intended, approach to determine the applicability of the statutory immunity should thus begin with determining whether the basis for removal was one arising from an exercise of the Superintendent's statutory authority. If it was, then the immunity statute should be available to the Superintendent. If the action is outside his official authority, however, he ought not to be able to avail himself of this immunity and should be removed from office as any other public official who violates the public trust.

B. Division Personnel

The staff of the Division is comprised of the Superintendent, a Deputy Superintendent, a Chief Examiner, Financial Institution Examiners and a limited number of professional clerical employees. Over two-thirds of this staff are Financial Institution Examiners. This number of examiners is a product of the Superintendent's responsibility to conduct annual examinations of each association, a task that consumes the major portion of the Division's attention.

While the Superintendent is to be furnished office space in the State Capitol, only a minority of the Division's staff are located in that city. These include the Superintendent, the Deputy Superintendent, a limited number of supervising examiners (including the Chief Examiner) and all of the professional clerical staff. The remaining members of the staff are financial institution examiners, located in or near various metropolitan areas of the state, who work out of their homes. A loose, almost informal, network of supervising examiners overviews this field work.

A supervising examiner, designated the "examiner-in-charge," is appointed just prior to an examination in the event that more than one examiner is involved. In the past there has been negligible supervision by the Superintendent, his Deputy or the Chief Examiner of field staff or examinations in progress. Field examiners were only haphazardly recalled to the office for continuing education or "feedback" as to their performance. Indeed, the only review of his work that a field examiner generally receives occurs when his written examination report is forwarded to the office for review by the chief examiner's staff. Even in this instance feedback is generally lacking

since the final review letter goes not to the examiner who conducted the examination, but to the examined association.

In recent years the table of organization for the Division has listed only one Deputy Superintendent. In practice, however, the Chief Examiner has been delegated authority equivalent to that of a Deputy. The Chief Examiner has primary responsibility to oversee the examination functions of the Division. The bailiwick of the Deputy Superintendent does not include examinations, but is confined to jurisdiction over all “corporate” matters. His responsibility includes reviewing applications for corporate charters, branch applications, various corporate reorganization proposals and sundry other corporate matters. While the Chief Examiner has exercised supervision of all the financial institution examiners, the Deputy has generally had only one or, at most, two assistants to help him with his corporate tasks.

Although the Superintendent has delegated to the Chief Examiner and Deputy Superintendent broad responsibilities for overviewing staff and matters that come before the Division, there are only two provisions in the agency’s enabling legislation expressly permitting one other than the Superintendent to exercise authority. These provisions relate to requests by associations to sell or transfer certain substandard assets or to requests to initiate certain liquidation procedures and provide that either the Superintendent or his Deputy may approve such requests.

C. Division Budget

No administrative agency is truly independent of the executive branch until it controls its own purse strings. The agency must be free to both administer budgeted monies and to have direct access to the legislature to request its appropriation. It was this degree of independence which the legislature intended to grant the Superintendent in the 1975 reorganization bill. That reorganization bill was also needed to abrogate the budget problems caused by a 1973 enactment.

Prior to 1973 each Ohio savings association was assessed an annual fee of ten dollars plus an amount equal to one eightieth of one percent of that association’s assets. Since the total assets of all state chartered associations had steadily increased over the years immediately preceding 1973, the gross revenues collected by the Division had also increased. The problem, as defined by the savings association industry, was that the total receipts produced by this annual assessment far exceeded the total monies allocated


and expended in the operation of the Division,\textsuperscript{23} with the overage being used within the Department of Commerce to underwrite the operating deficit of the Division of Banks. The legislature responded sympathetically to this argument and enacted a new fee schedule in 1973 which based the assessment not upon a straight percentage of industry assets, but upon the legislative appropriation for each fiscal year's operation of the Division.\textsuperscript{24}

Fees annually assessed each association are now based upon the sum of two amounts. The first is $250 assessed from each state chartered association irrespective of asset size. The second is an amount equal to each association's pro rata share of the Division's fiscal year appropriation.

Under the pre-1973 fee assessment scheme, the Superintendent was given the authority to waive all fees for associations "[i]n any year when, in the opinion of the Superintendent, the amount of such fund on hand at the close of the business on the 30th day of June is sufficient to meet the expenses of his official functions for the ensuing year . . . ."\textsuperscript{25} This proviso presupposed that overages assessed the industry on an annual basis were somehow accounted for and maintained to the credit of the Superintendent in a fund separate from the general revenue fund of the state.

Indeed, that argument was made in 1973 by the savings association industry. The industry's representatives testified before the legislature that their records indicated a total historical overage in excess of $4,900,000, as of January 1, 1974. They suggested that this money be recovered and be used to underwrite the operation of the Division. Based upon the Division's 1973 expenditures of some $700,000, this total overage could have financed

\textsuperscript{23} The receipts and expenditures for the five years immediately preceding 1973 were as follows:

<table>
<thead>
<tr>
<th>Year</th>
<th>Receipts $</th>
<th>Operation Expense $</th>
<th>Overage $</th>
</tr>
</thead>
<tbody>
<tr>
<td>1968</td>
<td>832,687</td>
<td>494,370</td>
<td>338,317</td>
</tr>
<tr>
<td>1969</td>
<td>877,888</td>
<td>562,387</td>
<td>315,501</td>
</tr>
<tr>
<td>1970</td>
<td>904,980</td>
<td>631,416</td>
<td>273,564</td>
</tr>
<tr>
<td>1971</td>
<td>967,827</td>
<td>602,836</td>
<td>364,991</td>
</tr>
<tr>
<td>1972</td>
<td>1,099,093</td>
<td>629,522</td>
<td>469,571</td>
</tr>
</tbody>
</table>

For the year in which H.B. No. 366 was enacted, 1973, the overage was the highest ever: $529,696. Letter from the Ohio League of Savings Associations (on file with the Akron Law Review).


be applied in calculation of the fees to be paid based upon the assets of each association at the closing of its books on June 30, 1975. Fees to be paid based upon the assets of each association at the closing of its books on December 31, 1974, shall be calculated pursuant to section 1151.13 of the Revised Code as in effect prior to amendment by this act.

\textsuperscript{25} 1961 Ohio Laws 1115.
the Division's budget needs for at least five years hence, with no fees assessed the industry during that period. The legislature was not persuaded.

Without deciding whether a separate rotary fund ought to have been maintained by the state throughout the history of this fee statute, the legislature determined that no such fund was in existence by 1973 and thus that no accrued funds were available to underwrite the future operation of the Division. When the fee statute was revised in 1973, the legislature removed the statutory language which permitted the Superintendent to credit any overage to the Division's subsequent operating expenses. At the time it may have seemed that such a provision was no longer necessary since the fees assessed in the future would equal the appropriation for the fiscal year of assessment, thus producing no overages.

What was not anticipated, however, was that the removal of this rotary fund authorization might permit a Director of Commerce to frustrate efforts to free the Division from his administrative overview. Thus, when the legislature attempted in 1975 to grant the Superintendent independence from the Director, that Director was still able to exercise discretion in diverting the monies appropriated for the operation of the Division. Even though a Superintendent now had the ability to go directly to the legislature and request his future appropriation, coupled with freedom from executive branch overview of his administrative decisions, his independence could be frustrated by a Director's refusal to disburse appropriated monies.

The possibility of such an intrusion into the Superintendent's independence was at least mitigated, if not negated, with a third legislative enactment. In that appropriation measure, the legislature again expressly established a Division rotary fund. The purpose was to insure that the Director of Commerce could no longer withhold funds from the Superintendent nor redirect the Division's appropriation to supplement the budget of any other division within the Department of Commerce.

While this series of legislative enactments has yet to meet the test of time as to their effectiveness in granting the Superintendent independence within the executive branch, these various enactments evidence a clear legislative intent to free the Superintendent from any intrusion by the Director of the Department of Commerce into the Superintendent's appropriation or budgeting authority.

\[26\text{Am. Sub. S.B. No. 447, § 2, 111th G.A. (1975-76).}\]
II. SELECT PROVISIONS OF THE SUPERINTENDENT’S
REGULATORY AUTHORITY

The materials in this part present an overview of the three most
important grants of substantive authority exercised by the Superintendent:
his examination, chartering, and branching functions.

The historical development fleshing out the Superintendent’s authority
is best described as a series of random enactments. When one recollects that
this administrative agency was originally created at the request of the
industry, one has identified the reason for this lack of a cohesive and
integrated regulatory scheme. Enactments have generally resulted from either
an industry request or from a need evidenced by a crisis like that of the late
1920’s. Unfortunately, the task of delineating the Superintendent’s responsi-
bilities has never begun with articulating the policy objectives to be served
by this agency. The resulting statutes thus reflect the responses to specific
problems, but very little effort toward planning from a base of defined
public interests and objectives.

A. Examinations

The examination process is the most important function performed by
the Division of Building and Loan Associations.27 An examination of a
savings association should reveal, for example, whether that association is
exercising its lending authority within the parameters defined by statute for
such activities28 or whether the association is meeting its reserve require-
ments,29 in order that the state can determine if the association is being
managed so as to serve the needs of its community.30

Because these matters require constant monitoring by the regulatory
agency, the examination process really begins with the initial application
for a corporate charter. It is a process which involves at least annual
re-examination of every association. This annual re-examination, however, is
the only aspect of the process which associations perceive as the “examination”
process.31 A brief discussion of the examination made at the time of charter
application is here presented so that “examination” may be perceived as a
continuum with its reference point at the charter application examination.

27 This section does not discuss examinations of service corporations or holding companies.
The Superintendent has authority to examine only service corporations, however. OHIO REV.
29 Id. § 1151.52.
30 OHIO REV. CODE ANN. § 1151.03 (Page 1968). This contains the requirement that an associ-
ation serve the community for which it is chartered.
1. Savings Associations

a. Charter Application Examinations

Articles of incorporation for a savings association may not be recorded by the Secretary of State until he has transmitted those articles to the Superintendent and has received the Superintendent's authorization to record them. Before this authorization is sent to the Secretary of State, the Superintendent is required to "examine into all the facts connected with the formation of such proposed corporation." The purpose of this examination is to determine whether the proposed corporation is being formed to conduct the business of a building and loan association. Since the only definition of "building and loan association" is "a corporation organized for the purpose of raising money to be loaned to its members or to others," the Superintendent could conceivably expedite this initial inquiry by merely examining the proffered articles of incorporation to determine that this was the sole stated purpose for incorporating the entity.

Chapter 1151 of the Ohio Revised Code provides further delineation, however, of the legitimate business of a savings association. That definition is implicit within the lending and investment strictures contained within the statutory framework. Thus, to insure that the proposed articles of incorporation provide the basis to support a finding that the proposed entity will engage in the building and loan business, the articles should cross-reference the lending and investment statutory provisions. This would evidence that the proposed corporate activities will fall within the range of permissible activities contained within those various enabling provisions.

Three additional statutory requirements must be met before the Superintendent can certify the articles of incorporation to the Secretary of State. His examination must resolve whether the character and fitness of the incorporators "command the confidence of the community in which such corporation is proposed to be located." He must also determine whether the public convenience and advantage will be promoted by establishing this

31 OHIO REV. CODE ANN. § 1155.09 (Page 1968).
32 Id. § 1151.03.
33 Id.
34 Id.
35 Id. § 1151.01(A).
37 OHIO REV. CODE ANN. § 1151.03 (Page 1968). This is the only instance within the statutory framework governing state chartered associations which is concerned with the notion that such associations should serve the community. OHIO REV. CODE ANN. § 1151.05 (Page 1968) contains no such requirement concerning the requisites for approval of a branch application. Yet this very requirement of community service is incorporated into the Division's rule stating the criteria for branch approvals. See text accompanying note 87 infra.
new charter\textsuperscript{38} and that the proposed corporate name will not mislead the public as to the character or the purpose of the corporation.\textsuperscript{39}

It is appropriate at this point to note that the examination procedure for determining whether to certify proposed articles of incorporation is substantially different from the annual examination procedure discussed below. The informality associated with the annual examination is in sharp contrast with the formal adjudicatory process utilized to "exam" applications for new charters. Once the determination has been made to grant a new charter to a savings association, the \textit{annual} as well as the \textit{special} examination becomes the vehicle for continuing this process.

\textbf{b. Annual Examination}

"At least once each year the superintendent of building and loan associations, or examiners appointed for that purpose, shall make an examination into the affairs of each building and loan association in this state."\textsuperscript{40} This statutory provision constitutes the sole basis for the Superintendent's broad authority to conduct annual examinations. Having conferred such power, the statute is then silent with respect to defining the procedure or substance of that examination. Nor has the Division ever promulgated a rule disclosing either the procedural or substantive parameters for this important task. Since internal agency procedural and substantive criteria obviously exist for annual examinations, nondisclosure of these standards cannot be explained by an absence of standards. For many years the staff believed that the Division lacked authority to promulgate the necessary rules. That problem has, hopefully, been solved with the enactment of broad rule-making authority for the Division. That newly articulated rule-making authority has yet, however, to result in a rule.\textsuperscript{41}

The source presently available to define the annual examination is embodied in the practices, forms and written instructions used in this process by the Division's examiners. The Division divides associations into two classes for examination purposes. With respect to federally insured associations, the Division conducts a joint examination with the federal examiners, following the Federal Savings and Loan Insurance Corporation (FSLIC) forms and procedures.\textsuperscript{42} The obvious advantage of this process is that it permits the state agency to use fewer examiners than would be necessary if the examination were conducted solely by the Division. Since the FSLIC

\textsuperscript{38} \textit{Ohio Rev. Code Ann.} \textsection{} 1151.03 (Page 1968).
\textsuperscript{39} \textit{Id.} See also \textit{id.} \textsection{} 1151.07.
\textsuperscript{40} \textit{Ohio Rev. Code Ann.} \textsection{} 1155.09 (Page 1968).
\textsuperscript{41} See text accompanying notes 184-86 \textit{infra}.
\textsuperscript{42} Division of Building and Loan Associations, \textit{Examination Schedules} (on file with the \textit{Akron Law Review}).
examination is in part conducted to identify delinquent and other "slow" loans and to scrutinize management, directors and attorneys to determine whether they are serving the best interest of the association, these same state examination objectives are also thereby met. Joint examination of FSLIC associations also serves the state interest of insuring that state chartered associations are conducting their loan and investment activities in the manner mandated by Ohio statutes.

The second class of associations are those not insured by FSLIC, comprising approximately one-third of all Ohio chartered associations. These associations are either guaranteed by the Ohio Deposit Guarantee Fund (ODGF) or are uninsured. Examinations of these associations are conducted solely by the Division. The examination of ODGF and uninsured associations is the same, focusing upon three primary matters: financial condition of the association, corporate activities, and control persons.

A prime objective when reviewing the corporate activities of these associations is to determine whether loans and investments are being made in compliance with Ohio statutory provisions and to determine the rate of delinquencies of real estate loans and other investments. Delinquencies are listed in a statement of "scheduled items" and a schedule of "slow loans." The types of loans made, the process for procuring and closing loans (including compliance with the federal Truth-in-Lending and Real Estate Settlement Procedures Acts) and loans to control persons are checked by examination of randomly selected loan files to insure that statutory mandates have been met.

The examination serves a number of other purposes as well. Compliance with liquidity requirements of the ODGF is also ascertained. The association's attorney is asked to prepare information concerning pending litigation, loans foreclosed since the date of last examination, association documents held by the attorney, a statement of any funds controlled by the attorney for the institution and its borrowers, and a schedule of attorney's fees charged to the association or its borrowers. Board of directors' meetings minutes, including the form of board resolutions and proxies, are also perused. Even such matters as the institution's inventory of unissued travelers checks and

43 87TH ANNUAL REP. 14, 15. There were 280 state chartered associations on December 31, 1976. Of those, 176 were insured by FSLIC, 87 were guaranteed by the Ohio Deposit Guarantee Fund, and the remaining 17 were neither insured or guaranteed.
44 Examination Schedules, supra note 42.
45 Id.
46 This check of randomly selected loan files is to ascertain that the association is in compliance with the loan-to-value ratio contained in such sections as 1151.29 of the Ohio Revised Code, that the lending procedure specified in section 1151.291 is being followed, and that the limitations on loans to one borrower contained in such sections have been met. OHIO REV. CODE ANN, § 1151.292 (H) (Page Supp. 1976).
an analysis of savings bonds on hand is prepared. A review of internal accounting controls and bookkeeping procedures is also made at this time.

The annual examination, in addition, addresses the matter of control persons and management. A list is prepared naming all directors, principal officers and attorneys, giving full financial disclosure of salary and stock holdings. Every interest in any competing financial institution, whether owned or controlled by the officer, director, employee or attorney must be revealed by that questionnaire response. A check is also made to determine that all of the officers and directors of the corporation have the requisite surety bonds.\textsuperscript{47}

When the above outlined examinations are completed, two final steps remain. The examiner-in-charge first prepares a statement of hours involved in conducting the examination, with recommendations concerning the number of hours and number of examiners necessary to conduct the next annual examination of that particular association. He next completes an institution rating form. The factors rated are: "[s]cheduled items, [r]eserve position and policies, [c]ompetitive practices, [d]ividend or interest policies, [l]ending policies and practices, [c]redit policies and practices, [a]ppraisal policies and practices, [c]ollection policies and practices, [o]perating results, [r]ecords and system's controls, [l]aws and regulations and management."\textsuperscript{48}

The examination thus compiled and initially rated by the field examiner is forwarded to the Division office in Columbus for the final steps. The Chief Examiner's staff then reviews the information and makes initial recommendations to the Chief Examiner concerning the contents of the "comment letter" which will be forwarded to the examined association. The comment letter is the Superintendent's vehicle to communicate the Division's analysis of the examination data.

The letter is approved by the Superintendent and sent to the institution with the instructions that it be considered at the next meeting of the board of directors, and that the board respond to each problem identified by the examination. The board is asked to notify the Superintendent of what steps will be taken to ensure future compliance. This form of feedback from the Superintendent supplements an informal conference which is often held between the examiner-in-charge and the managing officer on the final day of the examination.

\textsuperscript{47} All officers and employees of an association are required to be covered by an indemnity bond. Since members of the board of directors are frequently officers, there is thus an implicit requirement that those members of the board will thus have an indemnity bond. \textit{Ohio Rev. Code Ann.} § 1151.49 (Page Supp. 1976). There is no statutory requirement that a non-officer director be covered by an indemnity bond.

\textsuperscript{48} \textit{Examination Schedules}, supra note 42.
c. Special Examinations

In addition to the annual examination which the Superintendent is required to conduct, he is also granted discretionary authority to conduct "special examinations." A special examination is defined as "[a]ny examination made by the Superintendent otherwise than in the ordinary routine of his duties and because, in his opinion, the condition of the association requires such examination." Once again there is no statutory definition of this examination. The only statutory difference between the special examination and the requisite annual examination is that expenses of the latter are borne by the state whereas the expenses of special examinations are paid by the association directly to the state treasury.

Special examinations are conducted infrequently by the Division. Because the statutory provision is drafted so broad as to include any investigation of an association by the Division, this special examination concept serves well to accomplish a number of objectives. If the Superintendent believes, for example, that an association is engaging in illegal loans to insiders, he may send examiners immediately to investigate that matter.

2. Foreign Associations

A "foreign association" is defined as any savings association whose home office is located outside of Ohio. Foreign associations that originate loans in this state are deemed to be doing business in this state and must thus receive prior approval of the Superintendent before engaging in such activity. If the foreign association is state chartered, the association must grant the Superintendent authority to conduct special examinations of that association before approval will be granted. Federally chartered "foreign" associations are excepted from this requirement to grant examination authority to the Superintendent.

The statutory authority to conduct special examinations of foreign associations is conferred by cross reference to the Superintendent's special examination authority for Ohio chartered associations, with the scope of such examinations as undefined as for those other "special" examinations.

50 Id.
51 The expenses for operating the division are borne not by the general taxpayers, but by the state chartered associations. The next annual budget of the division is the basis upon which associations are assessed an annual fee, which funds in turn support that year's operating budget for the division. No dollars are appropriated from the general revenue funds of the state for the purposes of operating the division. Ohio Rev. Code Ann. § 1155.13 (Page Supp. 1976). See text accompanying notes 20-26 supra.
52 Ohio Rev. Code Ann. § 1151.01 (C) (Page 1968).
53 The mere purchase of participating interest loans originated by a domestic association does not constitute doing business in this state. Id. § 1151.64(A).
3. Deposit Guaranty Associations

Ohio chartered associations and foreign state chartered associations are not the only entities subject to examination by the Superintendent. He also has express statutory authority to examine annually "deposit guaranty associations."54

Legislation authorizing the incorporation of deposit guaranty associations was first enacted in 1955.55 The purpose of that enactment was to provide state chartered associations with an alternative to FSLIC insurance. The vehicle selected was to be a "mutual deposit guaranty association without capital stock"56 comprised of no fewer than 25 member associations.57 Only one such guaranty association, the Ohio Deposit Guarantee Fund, has been organized since the date of that enactment.58

The focus of this examination is delineated by the tasks of a deposit guaranty association. Essentially, these include the functions of "assuring" the liquidity of members and "guaranteeing" monies on deposit.59 The enabling statute is silent, however, with respect to what portion of each deposit need be guaranteed.60 ODGF construed that silence as permitting it to guarantee the "full amount of [each depositor's] deposit as credited to his account on the books of the member."61

Liquidity and deposits of member associations are to be assured under the statutory scheme by permitting the guaranty association to loan money to troubled members62 and to buy their assets.63 The legislature apparently assumed that the funds which would be used by a deposit guaranty association to accord liquidity or guarantee deposits would be raised either by issuing capital notes or debentures,64 or by borrowing money.65 A caveat was contained within this legislative scheme, however, which additionally granted to guaranty associations the power to "[e]xercise any corporate power or powers not inconsistent with, and which may be necessary or convenient to,

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54 Id. § 1151.82.
55 1955 Ohio Laws 94-97.
57 Id.
59 Ohio Rev. Code Ann. § 1151.87 (A), (B) (Page 1968).
60 Id. § 1151.87.
63 Id. § 1151.87 (D).
64 Id. § 1151.87 (F).
65 Id. § 1151.87 (G).
the accomplishment of its purposes of assuring liquidity of member building and loan associations and guaranteeing deposits therein."

ODGF apparently elected to raise its necessary funds as an exercise of this latter grant of authority. Although the manner for raising the requisite funds was not specified in its original articles of incorporation, ODGF's constitution permits funds to be acquired by assessing each member an amount not to exceed two percent of the "deposit liability of such member." Since the fund provided that its deposit liability would equal the full amount of each deposit, the contribution of each member is thus based upon that requisite percentage of each member's total deposit liability. This contribution by member associations is evidenced by certificates of deposit issued by ODGF.

The Superintendent also has discretionary authority to conduct special examinations of deposit guaranty associations. The expense of a special examination is borne by the association, although the expense of annual examination is paid from the biennial state appropriation to the Division. This expense of the annual examination is in turn recovered by the fee assessed the deposit guaranty association. The fee is "five dollars plus a sum equal to one one-hundred-sixtieth of one percent of the assets of such association" as those assets are reported in its semiannual report. A deposit guaranty association is required to file that semiannual report on the 30th of June, as well as an annual report on the 31st of December each year (or within 40 days thereafter) showing the financial condition of the guaranty association as of the time of each report.

4. Dissemination of Examination Information

After the examiners have completed any examination, the working papers, forms and all other data are packaged together and forwarded to the Division offices. A cover letter, attached to each packet of examination data, carries the following admonition:

66 Id. § 1151.87 (H).
67 Constitution of Ohio Deposit Guaranty Fund, Article V (on file with the Akron Law Review). This article provides that in the event that the fund of contributions garnered through the two percent fee is inadequate, "[n]o additional deposit will be required except on an affirmative vote of members having deposit liabilities aggregating more than sixty percent (60%) of the total deposit liability of all members at a regular meeting or a special meeting called for the purpose." This document does not specify any ceiling for such additional contributions. The corporation's Regulations do provide that should a member vote against such an additional assessment, that member may "resign" from the fund within thirty days after the vote is taken (if additional deposits are approved by that vote). Ohio Deposit Guaranty Fund Rules and Regulations, Item III(A) (on file with Akron Law Review).
THIS REPORT OF EXAMINATION IS CONFIDENTIAL.

This report of examination is the property of the supervisory authorities and is furnished to the association for its confidential use. The association, or any of its directors, officers or employees, shall not disclose or make public in any manner the report or any portion thereof. If a subpoena or any other legal process is received by the association or by any of the foregoing persons calling for production of the report, the State Superintendent should be notified immediately. In addition, the attorney at whose instance the process was issued and, if appropriate, the Court which issued it, should be advised of these restrictions by the association and referred to Section 1155.16 of the Ohio Revised Code.

Each director, in keeping with his responsibilities, shall review the report thoroughly. This report should not be considered to be an audit report.\(^{71}\)

This warning suggests to the reader that all information compiled in the examination process becomes confidential by operation of law. Section 1151.16 is cited as the authority for that proposition. Yet even a cursory reading of that section quickly reveals that the only restrictions with respect to the disclosure of examination information relate to disclosure by the Superintendent, his deputy, assistants, clerks or examiners. Nowhere does that provision state that directors, officers, or any employees of an association are prohibited from revealing information contained within an examination report.

To impose such a restriction could have severe adverse consequences for the savings association. For example, such a restriction would absolutely preclude the public offering of a savings association’s securities. Fortunately, no such restriction appears in either the general corporate statutes of this state, or in the specific statutes regarding associations.

Since the prohibition contained in the standard cover letter is without a statutory basis, this statement has no legal consequence for the examined institution. Rather, it represents a misconstruction by the regulator of the language contained in section 1155.16. The purpose of that section is to impose a duty upon the members of the Division to maintain in the strictest confidence all information obtained through their positions. The statute protects savings associations from any injury which might result from the indiscriminate and capricious public disclosure of information obtained by the agency. This is in recognition of the fact that the discretion of the agency is limited to public disclosure of such information only when that disclosure would serve the public interest. Otherwise it is the function of the board of

\(^{71}\) A copy of the full letter is on file with the Akron Law Review.
directors of the association to determine what information ought to be made available to the general public.

This scheme should operate no differently than in similar settings such as confidentiality statutes pertaining to attorney-client and physician-patient relationships. Just as in those instances, the savings association has an absolute right to waive the confidentiality imposed upon the supervisory agency and disclose any information possessed by the agency, but which the agency might not have revealed.

B. Incorporating New Charters

A savings association may not be chartered in this state without the approval of the Superintendent. The standards to be met before that approval are now stated in both statute and Superintendent's rule. Yet it was only quite recently that the legislature required the Superintendent to adopt a rule fleshing out the chartering scheme described in various statutes.

When the Superintendent conducts the charter examination, he must determine that the applicant will meet and fulfill various requirements defined by statute. Initial requirements are that the incorporators instill public confidence, that public advantage and convenience will be promoted by the new association, and that the association's proposed name be appropriate. If these threshold requirements are met, the Superintendent can certify the articles of incorporation to the Secretary of State. The incorporated association must commence business within one year from that date or its articles will become void.

During that year, and before it may transact any business, the requisite percentage of subscribed capital stock must be paid into the corporation. Once that capital is raised, the Superintendent is again required to examine

72 Neither chapter 1151 of the Ohio Revised Code nor the chartering rule expressly defines the corporate form which a new charter may assume. Some standard forms of the division for the constitution and bylaws of associations suggest three separate types of corporate organization: permanent stock-deposit associations, mutual associations, and mutual deposit associations. (Form bylaws and constitutions are on file with the Akron Law Review). Discussion of the historical development which resulted in these three alternative modes of doing business and the present statutory basis for these alternatives is beyond the scope of this paper.
73 This is reflected in numerous sections: Ohio Rev. Code Ann. §§ 1151.02, 1151.03, 1151.04, 1151.07, 1151.08, and 1151.09 (Page 1968).
76 Id. §§ 1151.03, 1151.07.
77 Id. § 1151.03.
78 Id. § 1151.06.
79 Id. § 1151.08. Two copies of its constitution and bylaws must be filed with and approved by the Superintendent during this period.
the affairs of the association to insure that such corporation has complied with all the provisions of law required to entitle it to engage in business. Only then may the Superintendent render a second certification, this time entitling the corporation to commence business.

The statutory scheme for chartering had been troublesome for many years. This stemmed in part from the Superintendent's discretionary authority to require a reserve fund for new charters, while no statute required existing savings associations to maintain reserve funds. An existing association instead had absolute discretion to decide whether to create a reserve fund for the payment of losses, yet a new charter application could be denied for failure to establish such a fund in the amount designated by the Superintendent. Even more bothersome was the Division's failure to disclose its standards and application procedures for charter approvals, criteria and procedures that obviously existed within the agency. In order to remedy the latter problem, the legislature required the Superintendent to promulgate the present chartering rule. The reserve fund problem was also remedied in that enactment.

1. Chartering Rule

In 1973 the Superintendent promulgated a rule “governing his licensing functions relating to the consideration of applications to organize an association . . . .” That rule now states both the procedures and the substantive criteria relating to charter applications.

a. Substantive Criteria

The rule provides initially that charter applications may not be filed for Hamilton County. The stated reason for this prohibition is that “both

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81 No association may receive the Superintendent's permission to commence business "if commissions, contributions, or fees have been paid or contracted to be paid, directly or indirectly, by anyone, for selling or securing subscriptions for stock in . . . [an] association." Id. § 1151.08 (Page 1968).
82 "A building and loan association may accumulate from its earnings reserve funds for the payment of losses and an undivided profit fund, which funds may be loaned and invested like other funds of the association." 1963 Ohio Laws 307 (current version at Ohio Rev. Code Ann. § 1151.33 (Page Supp. 1976)).
83 Associations were required to maintain a reserve fund and a minimum net worth as prescribed by Ohio Rev. Code Ann. § 1151.33 (Page Supp. 1976) and by Division rule Ohio Ad. Code ch. 1301:2-1-05 (Baldwin 1977).
85 Id. ch. 1301:2-1-03 (A) (2). The validity of this prohibition upon otherwise statutorily permissible activities may well be deemed invalid by the courts for the same reason as was a Board of Liquor Control regulation which prohibited further issuance of certain liquor permits. Stouffer Corp. v. Board of Liquor Control, 165 Ohio St. 96, 133 N.E.2d 325 (1956). For a similar prohibition in the branching rule, see text accompanying note 122 infra. The entire RSU rule may constitute a similar ultra vires prohibition and thus be invalid for this same reason.
state and federal supervisory authorities have determined by mutual agreement that the market area is so over saturated with savings and loan facilities that it is impossible for an application to meet in the foreseeable future the requirements of the general criteria to be considered in evaluating an application . . . .” 86 There is no legislative support for this prohibition; existing statutes simply do not permit the Superintendent to prohibit charters within any geographic area of the state.

Indeed, the legislature probably contemplated that application denials would occur only after a case by case consideration. The rule’s absolute prohibition on application forecloses an opportunity for the Superintendent to monitor constantly economic conditions in Hamilton County to determine if public convenience would be promoted. The better approach would be to permit applications for any location within the state, and then to determine on that case by case basis what applications ought to be approved.

The rule next states the eight criteria which must be met before the Superintendent will approve a charter application. The first two provide that “[t]here is or will be at the time the association opens for business, a necessity for the proposed association in the community to be served by it and [t]here is a reasonable probability of usefulness and success of the proposed association.” 87 These requirements are grounded in the statutory provision that a charter application be approved only if the proposed association will promote the public convenience and advantage. The rule requires that a written economic report be supplied with the application and include such data as the ratio of population-per-savings association facility and indicate whether the applicant’s proposed services will complement or merely duplicate services already provided by existing associations.

The third criterion is that “[t]he proposed association can be established without undue injury to properly conducted existing local domestic building and loan associations.” 88 As in the instance of the Hamilton County prohibition, no statute prohibits injurious competition. Even the rule permits some injury to result from additional competition, but it does prohibit undue injury, without defining the difference between mere injury and undue injury. The consequence of the rule is a presumption (to be overcome by the applicant) that undue injury will result if the application is approved. Since the legislature could always repeal the present statutes and prohibit further charters, the present authorization to grant new charters evidences a legis-

86 OHIO AD. CODE ch. 1301:2-1-03 (A) (2) (Baldwin 1977).
87 Id. ch. 1301:2-1-03 (B) (1) (a), (b).
88 Id. ch. 1301:2-1-03 (B) (1) (c). Both state and federal associations are protected by this provision. See definition of “domestic association” in OHIO REV. CODE ANN. § 1151.01 (B) (Page 1968).
lative intent to permit (even encourage) incorporation of new associations. The rule conflicts with the legislative purpose by requiring the applicant to overcome this presumption. To cure this conflict that presumption should be removed from the rule.

The fourth criterion requires that the applicant "[e]stablish full-time operations in suitable quarters with qualified management satisfactory to the Superintendent." Although the term "suitable quarters" is not further delineated by the rule, an office on the ground floor independent of any other commercial enterprise has sufficed in the past. More difficult to measure is the notion that the management somehow be both qualified and satisfactory to the Superintendent. The only statutory criteria relating to qualifications of persons involved in the proposed corporation concerns the adequacy of the "character and general fitness of the persons proposed as incorporators." Past practice of the Division has indicated that management personnel with some experience within the savings association industry will be deemed satisfactory. Incorporating these past practices of the Division into the present rule could only result in better guidance to potential applicants.

A fifth requirement is that the proposed charter "[o]btain insurance or guarantee of withdrawable accounts by either the Federal Savings and Loan Insurance Corporation or the Ohio Deposit Guarantee Fund." Prior to the chartering rule, insurance or guarantee of accounts was not a requirement for either charter approval or continued operation of an association. Although the legislature may expressly require insurance or guarantee of accounts, or even delegate this decision to the Superintendent, there is no indication in the 1973 enactment mandating a chartering rule of any intent to delegate this decision. Today there is still no statute requiring account coverage, even though a significant number of associations have neither FSLIC nor ODGF account coverage.

Three criteria remain to be noted. The statutory grant of discretion permitting the Superintendent to require an expense fund is reiterated within the rule, which states that "[c]ost of incorporation and all expenses incurred up to the time of commencing business must be borne by the incorporators.

89 Ohio Ad. Code ch. 1301:2-1-03 (B) (2) (c) (Baldwin 1977).
91 Ohio Ad. Code ch. 1301:2-1-03 (B) (2) (a) (Baldwin 1977).
92 Existing savings associations still have discretion to secure FSLIC insurance of accounts or guarantee of accounts by ODGF. See generally, Ohio Rev. Code Ann. § 1151.41 (Page 1968).
unless with prior approval of the Superintendent, such cost may be included in sale price of permanent stock up to a maximum of twenty-five thousand dollars."^95

Other matters relegated by statute to the Superintendent's discretion are also codified in the rule, by tables which state the minimum paid-in capital requirements and the cash contributions to be made toward operating deficits.^96 The rule finally specifies the percentage of stockholders, organizers

^95 Ohio Ad. Code ch. 1301:2-1-03 (B) (2) (b) (Baldwin 1977).

^96 The authorized capital of a savings association may not be less than $2,000,000 or more than $10,000,000 as determined by the Superintendent. Nor may an association commence business until it has paid in five per cent of its authorized capital. Ohio Rev. Code Ann. § 1151.08 (Page 1968). These requirements are fleshed out separately for permanent stock companies and mutual companies, based upon population of the area or proposed incorporation as follows:

**MINIMUM PAID-IN CAPITAL REQUIREMENTS AND CASH CONTRIBUTION FOR OPERATING DEFICITS APPLICANT FOR INCORPORATION OF A BUILDING AND LOAN ASSOCIATION**

<table>
<thead>
<tr>
<th>Population of Area*</th>
<th>Permanent Stock Type Applicant</th>
<th>Cash Contribution for Operating Deficit</th>
<th>Mutual Applicant (Withdrawable Stock)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Total: Permanent Stock &amp; Statutory Reserves</td>
<td>Deposit Subscriptions</td>
<td><strong>(Permanent Stock or Mutual)</strong></td>
</tr>
<tr>
<td>Below 10,000</td>
<td>$ 150,000 ( 30)</td>
<td>$225,000 (225)</td>
<td>$ 75,000</td>
</tr>
<tr>
<td>10,001—25,000</td>
<td>200,000 ( 40)</td>
<td>300,000 (250)</td>
<td>75,000</td>
</tr>
<tr>
<td>25,001—50,000</td>
<td>300,000 ( 60)</td>
<td>375,000 (275)</td>
<td>100,000</td>
</tr>
<tr>
<td>50,001—100,000</td>
<td>400,000 ( 80)</td>
<td>400,000 (300)</td>
<td>100,000</td>
</tr>
<tr>
<td>Downtown Area</td>
<td>300,000 ( 60)</td>
<td>375,000 (275)</td>
<td>100,000</td>
</tr>
<tr>
<td>100,001—200,000</td>
<td>500,000 (100)</td>
<td>450,000 (325)</td>
<td>125,000</td>
</tr>
<tr>
<td>Downtown Area</td>
<td>400,000 ( 80)</td>
<td>400,000 (300)</td>
<td>125,000</td>
</tr>
<tr>
<td>Other Areas</td>
<td>400,000 ( 80)</td>
<td>400,000 (300)</td>
<td>125,000</td>
</tr>
<tr>
<td>200,001—350,000</td>
<td>600,000 (120)</td>
<td>525,000 (375)</td>
<td>125,000</td>
</tr>
<tr>
<td>Downtown Area</td>
<td>500,000 (100)</td>
<td>450,000 (325)</td>
<td>125,000</td>
</tr>
<tr>
<td>Other Areas</td>
<td>500,000 (100)</td>
<td>450,000 (325)</td>
<td>125,000</td>
</tr>
<tr>
<td>350,001—500,000</td>
<td>700,000 (140)</td>
<td>600,000 (450)</td>
<td>150,000</td>
</tr>
<tr>
<td>Downtown Area</td>
<td>600,000 (120)</td>
<td>525,000 (375)</td>
<td>150,000</td>
</tr>
<tr>
<td>Other Areas</td>
<td>600,000 (120)</td>
<td>525,000 (375)</td>
<td>150,000</td>
</tr>
<tr>
<td>500,001—750,000</td>
<td>800,000 (160)</td>
<td>675,000 (525)</td>
<td>150,000</td>
</tr>
<tr>
<td>Downtown Area</td>
<td>700,000 (140)</td>
<td>600,000 (450)</td>
<td>150,000</td>
</tr>
<tr>
<td>Other Areas</td>
<td>700,000 (140)</td>
<td>600,000 (450)</td>
<td>150,000</td>
</tr>
<tr>
<td>750,001—1,000,000</td>
<td>900,000 (180)</td>
<td>750,000 (600)</td>
<td>150,000</td>
</tr>
<tr>
<td>Downtown Area</td>
<td>800,000 (160)</td>
<td>675,000 (525)</td>
<td>150,000</td>
</tr>
<tr>
<td>Other Areas</td>
<td>800,000 (160)</td>
<td>675,000 (525)</td>
<td>150,000</td>
</tr>
<tr>
<td>Over 1,000,000</td>
<td>1,000,000 (200)</td>
<td>950,000 (725)</td>
<td>150,000</td>
</tr>
<tr>
<td>Downtown Area</td>
<td>900,000 (180)</td>
<td>750,000 (600)</td>
<td>150,000</td>
</tr>
<tr>
<td>Other Areas</td>
<td>900,000 (180)</td>
<td>750,000 (600)</td>
<td>150,000</td>
</tr>
</tbody>
</table>
and directors who must have a "substantial interest in the affairs of the community in which the applicant institution is to be located."\textsuperscript{97}

If all the criteria fixed by the rule are met by the association, the Superintendent issues a certificate of authority to commence business and certifies to the Secretary of State "that the corporation . . . [is] entitled to commence the business for which it is organized, [and] the articles of incorporation shall thereupon be recorded."\textsuperscript{98} The rule thus contemplates not the two-step statutory process, certification of articles of incorporation, followed within one year by a second certification to commence business, but a one-step process culminating in both certification of the articles and permission to commence business.

b. Application Procedure

The chartering rule states that the Division's procedures begin when the applicant files a formal application.\textsuperscript{99} When a person makes an inquiry to the Division for information about the chartering process, that inquiry is answered by a letter with this concluding statement that:

"[i]n the event you or your constituents are further interested in pursuing this matter, may I suggest that arrangements be made for a conference at this office, which we will gladly arrange at your suggestion."\textsuperscript{100}

Accompanying this letter are several attachments: an "Outline of Information to be included in Survey Report in connection with a Proposal Contemplating the organization of a new Building and Loan Association"; a copy of the chartering rule; the form for filing "Notice of Intention to Incorporate"; a sheet of instructions entitled "Information Relating to the Organization of Building and Loan Association"; and a "Certificate of Incorporators providing the cost of incorporation and all expenses incurred up until time of commencing business shall not be chargeable to the corporation."

The purpose of the recommended conference with the Division staff, prior to formal application, is not explained in the letter. If its purpose is to

\textsuperscript{97}In determining population, the basic criterion of measurement is the aggregate metropolitan area. In applying the concept to specific cases, consideration is given to community characteristics, trade patterns, and the nature and degree of real estate development. ( ) = Denotes minimum number of subscribers to permanent stock and deposits or withdrawable stock.

\textsuperscript{98}Ohio Ad. Code ch. 1301:2-1-03 (E).

\textsuperscript{99}Ohio Ad. Code ch. 1301:2-1-03 (B) (2) (d) (Baldwin 1977).

\textsuperscript{99}Id. ch. 1301:2-1-03 (A) (1).

\textsuperscript{100}Letter from Mr. James C. Blackledge, Deputy Superintendent of Building and Loan Associations, to Professor Ronald E. Alexander (Oct. 24, 1977) (on file with the Akron Law Review).
provide the Division with an opportunity to prejudge the merits of
the proposed application and discourage its submission, it would subvert
both the legislative intent, and the rule's procedural safeguards.

Once a formal application is filed with the Division, the first step is to
determine whether "the application is in compliance with statutory and
division requirements." The statutory requirements are those discussed
earlier in this section. The "Division requirements" have their source in
both the criteria and procedural strictures of the chartering rule itself, and
in material attached to the Division's letter acknowledging a request for
chartering information. The rule imposes no deadline by which the Division
must render this first step determination.

The rule also does not specify the scope of inquiry for this determination.
Although the branching rule defines the parameters of a similar inquiry to
merely determining whether the application is "substantially complete," the
chartering rule contains no such limitation. May the Superintendent at
this juncture make a determination upon the merits to deny the application?
If the rule were so construed by the Division, the adjudication provisions of
the Administrative Procedure Act would be triggered, requiring the Superin-
tendent to nonetheless provide the applicant with prior notice and formal
hearing before that decision on the merits could become final. However,
the past practice of the Division has been to simply review the materials
submitted in the application to determine that all the information and
requisite exhibits have been filed and are complete.

The Superintendent must then advise the applicant by letter to publish,
within ten days of that letter's date, a public notice of filing. The applicant
must then send to the Division a copy of the notice as published and a
copy of the publisher's affidavit of publication.

Immediately after the application is determined complete, the Superin-
tendent must also provide written notice of the filing to every domestic association within the county of the proposed association or within fifteen

101 OHIO AD. CODE ch. 1301:2-1-03 (D) (1) (Baldwin 1977).
102 The rule provides that applications must comply with sections 1151.01 to 1151.09 of the
Ohio Revised Code. OHIO AD. CODE ch. 1301:2-1-03 (A) (1) (Baldwin 1977).
103 This is in contrast with the express provision contained in the branching rule that the
Superintendent must determine within 30 days whether an application is substantially complete
as filed. See text accompanying note 154 infra.
104 See text accompanying note 157 infra.
105 See text accompanying notes 111-12 infra.
106 The form of this notice is also prescribed by rule. OHIO AD. CODE ch. 1301:2-1-03 (D)
(1) (Baldwin 1977).
miles from the boundaries of the county.\textsuperscript{107} Although state and federally chartered associations are the recipients of this notice, there is no provision in the chartering rule like that of the branching rule granting either priority of decision or protective start-up time as between newly approved state and federal charters within close proximity of one another.\textsuperscript{108} The absence of this provision in the chartering rule may simply reflect the drafters' conclusion that the negligible number of applications for either a state or federal charter negated the possibility of approvals for the same area, and thus the need for these cooperative safeguards.

It should be noted, however, that the present working understanding applies to branch and charter applications. Even though the working understanding is not incorporated by reference into the chartering rule, by its terms it provides a basis for granting protective start-up time to resolve any conflict between applicants for a state and a federal charter in the same area. Unfortunately, that working understanding was never promulgated as prescribed by the rule-making procedures of the Administrative Procedure Act, as required for a valid chartering rule.\textsuperscript{109} This defect is fatal to the validity of the understanding, with the consequence that its provisions are not applicable to the Division's chartering process.

The rule allows any person to file letters in protest or in favor of a charter application within twenty days after the public notice published by the applicant or within twenty days following the Division's notice to the domestic associations, whichever is later.\textsuperscript{110} The Division must hold a public hearing upon protest before deciding whether to approve the application.\textsuperscript{111} Almost as an afterthought, the rule then notes that this hearing will be in accordance with the adjudicatory procedures of the Administrative Procedure Act.

\textsuperscript{107} The rule provides that such notice shall be sent to every domestic association “located in adjacent counties in a 15 airline mile radius of the proposed site” (emphasis added). \textit{Id.} ch. 1301:2-1-03 (D) (2). While the rule could thus be construed to limiting notice to only associations within adjacent counties, in the event that 15 airline miles would go beyond to include nonadjacent counties, those associations should also be deemed to have the right to this same notice.

\textsuperscript{108} See text accompanying notes 156-59 infra.

\textsuperscript{109} H.B. No. 366, § 3, (1973 Ohio Laws 1611, 1630) \textit{supra} note 22, required the Division's chartering rule to “be adopted pursuant to Chapter 119 of the Ohio Revised Code.” This contains the Administrative Procedure Act. \textit{See also Working Understanding}, announced July 26, 1974 (eff. Sept. 25, 1974), signed by Ronald E. Alexander, Superintendent of Division of Building and Loan Associations. Approved Sept. 25, 1974, pursuant to Federal Home Loan Bank Board Resolution No. 74-1018 (on file with AKRON LAW REVIEW) [hereinafter cited as \textit{Working Understanding}].

\textsuperscript{110} Two copies of these communications are required to be filed with the division. \textit{Ohio Ad. Code} ch. 1301:2-1-04 (D) (3) (Baldwin 1977).

\textsuperscript{111} This requirement is unnecessarily repeated in two separate provisions of the rule. \textit{Id.} ch. 1301:2-1-03 (D) (1), (4).
Act. Yet several critical matters are left unresolved by either the rule or the Administrative Procedure Act. ¹¹²

Is the applicant entitled to advance disclosure of the protestor's reasons for protest? The rule does not require that the protest letter state any reasons for, or evidence supporting, its objections. ¹¹³ Without this minimal right to advance disclosure, the applicant's task in preparing for the hearing is unnecessarily burdensome. A second, even more critical omission in the rule is apparent where the only protestor is the Superintendent or his staff.

Now the matter of advance disclosure of a protestor's evidence and reasons is of paramount importance to the applicant. He can only prepare adequately for the hearing if forewarned of these matters so that he can marshal his best case in rebuttal. Ideally, the Superintendent will never prejudge an application solely upon his staff's objection, nor even make his charter decision until the applicant has had an opportunity to confront these objections. If the Superintendent has prejudged an application, however, obviously any hearing preparation by the applicant is mooted.

The closing provisions of the rule provide that when an application has been approved by the Superintendent, the association must commence operations within one year. This one year period, as measured both by statute ¹¹⁴ and by the rule, begins on the date that the Superintendent issues the association's articles of incorporation.¹¹⁵

C. Branching

During the formative years of this state's industry, savings associations generally had only one office. All business activities were conducted in that single location originally designated in the association's charter. Use of additional offices became popular with the migration of urban populations to the suburbs, and branching activities received the scrutiny of the legislature as early as 1923. In that year the General Assembly enacted the branching statute which has remained substantially intact to the present.

¹¹² The Administrative Procedure Act's requirement that an agency disclose in advance of hearing its "reasons for [its] action..." is probably not applicable at this stage in a charter application, since "it does not apply to situations in which [Ohio Revised Code § 119.07] ... provides for a hearing only when it is requested by a party." OHIO REV. CODE ANN. § 119.07 (Page 1978). That section provides that "[e]very agency shall afford a hearing upon the request of a person whose application for a license has been rejected and to whom the agency has refused to issue such license," Id. § 119.06. (emphasis added). A charter for a savings association is a license. See Home Savings and Loan Ass'n v. Boesch, 41 Ohio St. 2d 115, 332 N.E.2d 878 (1975). Since this license hearing need only be held after the Superintendent has denied the application and after requested by the applicant, the Division has no statutory obligation to disclose its denial reasons to the charter applicant.

¹¹³ This is in stark contrast to the treatment accorded protestors of a branch application. See text accompanying notes 160-66 infra.

¹¹⁴ OHIO REV. CODE ANN. § 1151.06 (Page 1968).

¹¹⁵ OHIO AD. CODE ch. 1301:2-1-03 (E) (Baldwin 1977).
That statute clearly stated that no branch office may be opened until the Superintendent has approved, in writing, that additional facility. The criteria to be applied by the Superintendent when determining whether to approve, the procedures for processing an application and, indeed, even the definition of "branch" are, by contrast, just as clearly not stated.

That these matters have been resolved over the years is evident from the over 600 branches authorized to state chartered associations. The responsibility for stating these branching standards has fallen primarily to the Superintendent, with some assistance from the legislature in 1969. It was only after significant prodding by the General Assembly, however, that the Division's standards were finally disclosed to the public when, in 1973, the General Assembly required the Superintendent to "promulgate and make effective not later than January 1, 1974, rules ... relating to the consideration of applications to ... create a branch office [of an association]. Such rules shall be adopted pursuant to [the rule-making procedures of the Administrative Procedure Act]."

Although the remainder of this section discusses the present branching scheme, no single comprehensive rule has been adopted to promote clearly defined public policy goals. The absence of policy formulation, coupled with the mirroring of federal provisions, has instead produced the sometimes conflicting patchwork of regulation. In effect today are a general branching statute, a special branching statute for pedestrian and drive-in facilities, a branching rule, a working understanding, and a Remote Service Unit (RSU) rule.

1. Present Branching Statutes

There is no definition of "branch" contained in the statute which grants the Superintendent jurisdiction over this activity. The only statutory definition is found in the second branching statute, that dealing with pedestrian and drive-in facilities. Even that definition fails to define what branches are within the jurisdiction of the Superintendent, but only provides that pedestrian and drive-in facilities are excluded from that jurisdiction. Since these two statutes provide no definition, the secondary source to consider is the Superintendent's branching rule and the RSU rule. The remainder of

117 On December 31, 1976 there were 481 branch and satellite offices and 134 remote service units. 87th Annual Rep. 14, 20.
119 Supra note 22.
120 Ohio Rev. Code Ann. § 1151.05 (Page 1968).
this section discusses the present branching scheme as embodied in those two rules.

2. The Branching Rule

The branching rule is applicable to three kinds of branch facilities: "regular branch offices," "low-cost type branch offices" and "satellite offices." Since the legislature's primary purpose in 1973 in mandating a branching rule was to disclose to potential applicants the criteria applicable to branch applications, this tripartite division of the branch concept suggests that the Division has developed definitions of each which are independently stated and mutually exclusive.

However, neither the term regular branch office nor low-cost type facility is objectively defined. The only term even partially defined is satellite office. Nor are there differences in the procedures for processing applications for any of the three. With regard to substantive criteria, there are both general criteria applicable to all three, and additional specific criteria applicable to each. It is fair to say that the only major distinctions between the three terms is that a satellite office must serve existing accounts, while a regular branch and low-cost type facility may be used to penetrate new market areas. As between these latter two, the difference lies in the necessity criteria, as discussed below. Without clearly stating the distinction, the rule provides that an application which fails to establish the necessity criteria for a regular branch may nonetheless be approved, at the discretion of the Superintendent, as a low-cost type branch office. The final distinction is that only satellite offices may be opened within Hamilton County. 122

a. General Criteria

Savings associations may not use the branch office as the vehicle for state-wide market penetration. 123 Rather, an association may only branch within one hundred miles of its home office 124 and not until after the close of its third year of operation. 125 An applicant must first secure either an option to lease or an option to purchase the proposed branch location 126 and must also establish that "there is a reasonable probability of usefulness

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122 *Ohio Ad. Code* ch. 1301:2-1-04 (B) (5) (Baldwin 1977). This prohibition upon regular branch and low-cost type facilities in Hamilton County may constitute an ultra vires provision and thus be invalid. See *Stouffer Corp. v. Board of Liquor Control*, 165 Ohio St. 96, 133 N.E.2d 325 (1956).

123 *Ohio Ad. Code* ch. 1301:2-1-04 (A) (2) (Baldwin 1977).

124 *Id.*

125 *Id.* at ch. 1301:2-1-04 (B) (1). There is a provision in the rule that the Superintendent may approve an earlier filing. Nowhere, however, does the rule state any criteria which the Superintendent will apply in determining whether to grant such approval.

126 *Ohio Ad. Code* ch. 1301:2-1-04 (C) (1) (d) (Baldwin 1977) (regular branch office); *id.* ch. 1301:2-1-04 (C) (2) (d) (low-cost type branch office); *id.* ch. 1301:2-1-04 (C) (3) (d) (satellite office).
and success of the proposed . . . office.”\textsuperscript{127} Although it is difficult to ascertain what evidence an applicant must produce to demonstrate this requisite usefulness, the application form for regular branch offices provides some guidance.\textsuperscript{128} One exhibit to that form, Exhibit G—Reasonable Probability of Usefulness, and Success of Proposed Branch Office, requires that extensive information be submitted by the applicant.\textsuperscript{129}

The next general criteria evidences the Division’s desire to mitigate competition within the industry. The rule requires the applicant to show that: “the proposed branch office can be established without undue injury to properly conducted existing local domestic associations, as the latter are defined in Section 1151.01(B) of the Revised Code.”\textsuperscript{130} The Division is concerned with protecting not only competing state chartered associations, but federally chartered associations as well.\textsuperscript{131} The FHLBB is required by the present working understanding to reciprocate and provide equal protec-

\textsuperscript{127} Id. ch. 1301:2-1-04 (C) (1) (b) (regular branch office); id. ch. 1301:2-1-04 (C) (2) (b) (low-cost type branch office); id. ch. 1301:2-1-04 (C) (3) (b) (satellite office).

\textsuperscript{128} Division Form, No. 29, Division of Building and Loan Associations (on file with the Akron Law Review).

\textsuperscript{129} Division Form, No. 29, Request for Approval to Establish and Maintain a Branch Office (on file with Akron Law Review). Among the eight exhibits accompanying this application is Exhibit G which requires the following data:

1. Statement of exact location as nearly as possible.
2. Description of office headquarters (including sketch showing that there are no lobby doorways connecting with any other business): plans as to leasing or constructing own building (available parking facilities).
3. Statement that proposed branch office would be located in independent, ground-floor quarters and operated on full-time basis.
4. Period of time, following approval, in which office would be opened.
5. Branch functions to be performed.
6. Office personnel, including those that would be full-time and those that would be part-time.
7. Estimated annual volume of business for proposed branch office, both savings and mortgages, as well as income and expenses. (Use Budget Form, Exhibit D, “Estimated Budget of Proposed Branch Office.”) Budget Forms, Exhibit D and Exhibit E, should show clearly the contribution of the proposed branch office to the overall profitability of the applicant association.
8. Statement of policies to govern applicant’s lending in proposed branch service area, including interest rates, service charges, loan terms and appraisal methods.
9. Statement of plans and methods to generate savings business in proposed branch service area, such as newspapers, radio, TV, giveaways, etc.
10. As to applicant’s existing branches: dates approved and dates opened; distances from now proposed branch sites; volume of business; extent of overlapping, if any, of service areas with now proposed branch service office.

\textsuperscript{130} Ohio Ad. Code ch. 1301:2-1-04 (C) (1) (c) (Baldwin 1977) (regular branch office; id. ch. 1301:2-1-04 (C) (2) (c) (low-cost type branch office); id. ch. 1301:2-1-04 (C) (3) (c) (satellite office).

\textsuperscript{131} Ohio Rev. Code Ann. § 1151.01 (B) (Page 1968) defines domestic associations to include both Ohio and federally chartered associations.
tion to Ohio chartered associations from federally chartered associations' branches.\textsuperscript{132}

What constitutes undue injury, not mere injury, is as difficult to define as the usefulness and success criteria. Once again the application forms for both satellite offices and regular branch offices provide some clue. Exhibit A of the respective forms\textsuperscript{133} solicits information from the applicant which the Division will consider in determining the question of undue injury. The only data required, however, are the pass book rates and certificate of deposit rates for both the applicant and all other financial institutions within a three-mile radius of the proposed branch location. Since information is elicited not only for "domestic savings associations," but for any financial institution within that area, these exhibits suggest that the Division is also concerned with the competitive impact upon credit unions, commercial banks, and similar institutions. Could the Superintendent then deny an application if he found that approval would cause undue injury to, for example, a commercial bank? Certainly such a decision finds no support in the branching rule's reference to "undue injury to . . . local domestic savings associations." This apparent conflict between the forms and the rule ought to be resolved by the rule, with the consequence that no application (including one for a low-cost type branch) may be denied for undue injury other than to a domestic association.\textsuperscript{134}

All the general criteria discussed to this point are applied by the Superintendent to formal applications. There are also four additional criteria which may be applied during the formal stage, or earlier, during the informal

\textsuperscript{132} Working Understanding ¶ II A.3., note 109 supra.

\textsuperscript{133} Division Forms, No. 29, Exhibit A (On file with the Akron Law Review).

\textsuperscript{134} Since the business activities which may be conducted at any of the three branch offices are not limited by the rule, it is quite probable that each such branch would constitute a competitive threat to commercial banks, credit unions and other financial institutions in the immediate area. The rule does not attempt a definition of branch in terms of the business that may be conducted at a branch. Since the rule neither limits the activities of a regular branch or low-cost type office, it is implicit that any business activity of the savings association may be conducted therein. The rule goes further with respect to satellites, however, and provides that any business of an association "as authorized by a Board of Directors may be transacted at a satellite office . . . ." Ohio Ad. Code ch. 1301:2-1-04 (C) (3) (g) (Baldwin 1977). This proviso is contained in the present rule because it constitutes a departure from the initial branching rule which provided that "functions which may be performed at such satellite office shall be limited primarily to teller operations and acceptance of loan applications." Superintendent Regulation COg-07-03 (b) (6) (eff. Jan. 1, 1974), Division of Building and Loan Associations (on file with Akron Law Review).

A second provision of the present branching rule is similarly explained. The 1974 Regulation COg-07 limited the period for operation of a satellite to five years, unless extended for a longer period by the Superintendent. Superintendent Regulation COg-07-03 (b) (7) (eff. Jan. 1, 1974), Division of Building and Loan Associations (on file with the Akron Law Review). The present rule imposes no five-year restriction, and also removes such restriction, from those prior satellites. Ohio Ad. Code ch. 1301:2-1-04 (C) (3) (h) (Baldwin 1977).
application stage. It should be noted, however, that if an applicant chooses not to initiate the informal process, but to begin its branch inquiry with a formal application, then these four criteria must nevertheless be met before approval will be granted:

(a) adequacy of net worth and compliance with statutory [reserve] requirements of Section 1151.33, Ohio Revised Code;
(b) in-depth management and sufficient trained personnel to staff the proposed branch;
(c) sound lending practices and compliance with statutory lending and investment provisions, Chapter 1151. of the Revised Code;
(d) satisfactory operating results reflecting the applicant’s ability to absorb expense of establishing and operating the branch office. 138

In addition to the general criteria, the following specific criteria are applicable to the individual branches.

b. Specific Criteria

i. Satellite Office

A satellite office is one located within five airline miles of the parent's home office or other branch office, 136 occupying no more than 1,000 square feet of floor space, and with not more than four teller stations. 137 Although regular branch and low-cost facilities must be independent of any other business, a satellite office is permitted to occupy a building with any other “retail sales establishment such as a department store or supermarket.” 138 There is a restriction, however, that “an association may not enter into an agreement of any kind for the exclusive right to operate satellite offices in a specified area at all or majority of all locations of a retail chain of any kind.” 139 Satellite offices are also described in the rule to include any office that is “a fully automated facility without tellers or other personnel to handle transactions with the public.” 140

The remaining criterion specifically applicable to satellite offices is a necessity requirement. While some need criterion is applicable to each of the three branch concepts, there is a variation on the theme with respect to each. That requirement pertaining to a satellite office is that “there is or

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135 Ohio Ad. Code ch. 1301:2-1-04 (A) (4) (a) - (d) (Baldwin 1977).
136 Id. ch. 1301:2-1-04 (C) (3) (e).
137 Id. ch. 1301:2-1-04 (C) (3) (f).
138 Id.
139 Id. ch. 1301:2-1-04 (C) (3) (i).
140 Id. ch. 1301:2-1-04 (C) (3) (f).
will be at the time the satellite office is opened a necessity primarily to serve existing customers of the applicant association."\(^{141}\)

It is this emphasis upon serving existing customers which precludes the use of satellite facilities to penetrate into new market areas. Although neither the rule nor the application form for satellite offices provides further direction to delineate this need requirement, an applicant association should at least provide some evidence of the number of its customers who reside within a close proximity of the proposed location.

The significant difference between the need requirement for a satellite office and that for the other two facilities concerns community need. The satellite applicant need simply demonstrate that it has a significant number of existing customers residing within that community. The absence of existing customers constitutes a sufficient basis for denial of a satellite application, regardless of the community's need for additional savings association offices.

\textit{ii. Low-Cost Type Branch Office}

There are only two criteria unique to this kind of branch. The first, and one shared with the regular branch, is that such facility be located in a permanent structure independent of any other business enterprise.\(^{142}\) The second relates to need, requiring that:

there is or will be at the time the low-cost type branch is opened a necessity for the proposed branch office in the community to be served by it. Such necessity may not fully satisfy the requirements [for a regular branch] \ldots but in the opinion of the Superintendent exists to a degree commensurate with the proposed capital investment in the branch, and proposed limitations as to its operations.\(^{143}\)

This need requirement contrasts with that of the satellite office in that the low-cost branch applicant must establish a community need. The first sentence suggests an identical requirement to that applicable to regular branch applications. The second phrase then undermines this conclusion by suggesting that a lesser degree of community need may permit approval of a low-cost branch, yet not permit approval of a regular branch. Whatever the Division intended as the difference between the low-cost and the regular branch office is not revealed by the rule as presently drafted. The rule should either be amended to state the difference in objective standards or to remove all reference to this separate class of branch.

\(^{141}\) Id. ch. 1301:2-1-04 (C) (3) (a) (emphasis added).

\(^{142}\) Id. ch. 1301:2-1-04 (C) (2) (e). This provision also requires that the facility have full-time management thus negating the possibility that low-cost facilities may be fully automated. A remote service unit presently defined by the Superintendent's rule could thus not be operated as a low-cost type branch office.

\(^{143}\) Id. ch. 1301:2-1-04 (C) (2) (a).
The initial 1974 branching rule contained only two subdivisions of the branch concept, regular branch office and satellite office. That dichotomy was clearly articulated. Applicants for a regular branch office had to establish that no undue injury would result, but satellite offices had no such requirement; satellite offices had to be located within five miles of the parent home office or another branch office, with no such limitation upon regular branch offices. A satellite could be fully automated and a regular branch could not; a satellite could be located within another retail establishment, yet a regular branch had to be located in independent quarters; and a regular branch could occupy any size building while satellite offices could not exceed 500 square feet of floor space. The functions to be performed at a satellite office were limited primarily to teller operations and acceptance of loan applications, but a regular branch office could conduct any business of the association. And finally, a satellite office could continue operations for only five years, with no such limitation upon the operation for a regular branch. Although some of those distinctions now remain when satellite offices are contrasted with regular or low-cost type facilities, there is no meaningful difference between the low-cost facility and the regular branch office as presently described in the branching rule.

iii. Regular Branch Office

The identical requirement applicable to low-cost facilities, that they be manned full-time and operated within independent structures, is applicable to the regular branch.\footnote{Id. ch. 1301:2-1-04 (C) (1) (e).} The need requirement is identical to the first sentence of that relating to low-cost facilities, \textit{i.e.}, a community need must be recognized.\footnote{Id. ch. 1301:2-1-04 (C) (1) (a).} Neither the rule nor the branch office application form provides any further indication of what constitutes community need. Comparative data presented by the applicant demonstrating either that it can provide additional services to those already proffered by financial institutions within the area, or that it can provide competitive services such as paying higher passbook or certificate of deposit rates, should help establish that the community has a need for the applicant’s proposed office.\footnote{Such information would also be relevant to establishing that the proposed branch would be successful, by evidencing an ability to attract existing customers of competing associations.}

Such data might also demonstrate a likelihood of \textit{injury} to the competing financial institutions. This presents a particularly troublesome dilemma for the applicant, since undue injury will result in denial of the application but it is nowhere defined by the rule. One consequence of this uncertainty is to encourage applicants to apply for satellite facilities rather than regular
branch or low-cost offices, since servicing existing customers is certainly less injurious than competing for the present customers of a competing financial institution. Another consequence may be to cause associations to pursue holding company affiliation as an alternative means to penetrate new markets.

c. Procedure for Processing Applications

The procedures for processing branch applications are the same for the regular, low-cost and satellite branch. The rule describes a two stage process, one that is discretionary with the applicant and a second which is mandatory for all applicants. The former is informal in the sense that only the Superintendent and the applicant are involved. The latter is formal in that public notice and an opportunity for public participation are part of the application process.

i. Informal Procedure

The Division's historical reluctance to submit branching decisions to public scrutiny was never entirely abandoned. The present branching rule evidences that continuing reluctance, by permitting an applicant to submit a "notice of intent to file [an] application"\(^\text{147}\) with the Superintendent. Although this notice is given prior to filing an application, the purpose of this procedure is to "request the Superintendent to make a preliminary recommendation with respect to such application."\(^\text{148}\)

The Superintendent has 30 days from receipt of the notice to render a decision concerning the potential application. His decision is based upon the four general criteria noted in the preceding section. These criteria run the spectrum from objectively quantifiable to very subjective. The most objective of these is the criterion that the association meet the statutory net worth requirements.\(^\text{149}\) Less definite is the requirement that an association have conducted its lending and investment practices as required by statute.\(^\text{150}\)

This second requirement and the third, that the association be able to absorb the expense of operating the proposed branch, are susceptible to a common criticism. The rule only permits the association to file a notice of intent, but does not provide for submission of additional data to establish

\(^{147}\) *Ohio Ad. Code* ch. 1301:2-1-04 (A) (3) (Baldwin 1977).

\(^{148}\) *Id.*


\(^{150}\) Since the lending and investment sections of *Ohio Rev. Code Ann.* ch. 1151 (Page 1968) are less than a model of clarity concerning both the substantive authority and the procedures whereby associations exercise that authority, an annual examination of any association invariably discloses some lending or investment violation.
that these criteria are met by the association. Apparently the Division's internal records are utilized during the informal proceeding to determine whether the association can overcome these threshold criteria. Why such a limited record is troublesome is most apparent when considered in light of the fourth of these criteria, that there be "in-depth management and sufficient trained personnel to staff the proposed branch." Division records consist primarily of annual examinations and may be a year or more old. Any efforts by the association, subsequent to its last annual examination, to upgrade its staff, to correct errors in lending and investment procedures or to increase profits, might not be reflected in such Division records, and yet the Superintendent may base his informal disapproval solely upon those records.

The critical defect in this informal procedure is not that the Division may lack an adequate record upon which to make a decision, but that this process encourages a preliminary ex parte dialogue between the Division and a potential applicant. This process affords the Division an opportunity to discourage, and even deny, an application for a branch without ever having subjected its decision to public scrutiny.

ii. Formal Procedure

An association may elect to avoid the informal process simply by filing an application with the Division. This filing triggers the rule's formal procedure. This process duplicates the scope of inquiry of the informal procedure in that the initial four general criteria must be met, as well as all other general and specific criteria.

When a formal application is filed, the Superintendent must first determine whether the "policies, condition or operations of the applicant association provide reason for supervisory objection to the application." An unfavorable determination of this issue can result in denial at this early juncture. This initial decision (to be made within 30 days of the receipt of the application) is based solely upon those same four criteria which underlie the informal preliminary recommendation. In contrast to the informal denial, the rule's formal procedure both permits the applicant to include in its application data concerning those four criteria, and requires that the Superintendent provide a reasoned decision in the event of denial.

During these initial 30 days following receipt of an application, the Superintendent must also make a second determination as to whether the

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151 OHIO AD. CODE ch. 1301:2-1-04 (A) (4) (b) (Baldwin 1977).
152 Id. ch. 1301:2-1-04 (A) (1).
153 Id. ch. 1301:2-1-04 (A) (5).
application is “substantially complete.” For an application to be determined complete it must contain some evidence relating to each of the general and specific criteria applicable to the branch sought.

A determination of completion triggers further steps by the Division. Although the rule does not provide when these steps must be taken, most occur concurrently or within a few days of each other, and very soon after the application is determined complete.

The Division’s first step is to notify the Cincinnati office of the Federal Home Loan Bank that a complete application has been filed. This notice identifies the location of the proposed facility and the application’s date of filing. It affords the applicant a priority of decision for 120 days over applications by federal associations for any branch within one airline mile of the applicant’s proposed location. The rule measures this 120 days from the “date of completeness,” without stating when that date occurs. The Division has in the past deemed that date to be the date on the letter from the Division notifying the applicant that its application is complete.

Priority of decision means that if the application with priority is approved within the 120 days, the applicant then receives a protective start-up time. During this period no other state or federally chartered association may commence operation of a new branch within one mile of the applicant’s branch location. The period of protective start-up time is six months from the date the applicant’s branch begins operation or twelve months from the date the applicant’s branch is approved, whichever is less.

A problem of agency discretion arises because the rule does not specify that decisions must be made during the 120 days that a complete application has priority of decision over other applications. Certainly that application should be processed and approved before any later applications for sites within the one mile radius.

What happens, however, if the Superintendent takes more than 120 days to render his approval? The rule does grant him a total of 180 days from the date of priority to render his decision, but is silent with respect to reordering priorities on the 121st day as between that applicant with

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154 Id. ch. 1301:2-1-04 (D) (1).
155 Id. ch. 1301:2-1-04 (D) (2).
156 Working Understanding, ¶ II C, note 109 supra.
157 OHIO AD. CODE ch. 1301:2-1-04 (D) (2) (Baldwin 1977). The Superintendent may extend that period an additional 60 days for “good cause.” Id. ch. 1301:2-1-04 (D) (6).
158 Working Understanding, ¶ II F, note 109 supra. Absent a working understanding between the state and the Cincinnati office of the Federal Home Loan Bank, such protective time would not be required to be accorded by federally chartered associations.
159 OHIO AD. CODE ch. 1301:2-1-04 (B) (4) (Baldwin 1977).
initial priority and all subsequent applicants. May the Superintendent deem the application to lose priority of decision on that 121st day? Since such a decision would deprive that initial applicant of the right to protective start-up time, it should only be made where the applicant has caused the Superintendent to delay his decision beyond the initial 120-day period. The rule should be amended to insure that in all other instances an applicant with priority of decision retains that priority until the Superintendent has rendered a final decision.

The Division’s second step after designating an application complete is to advise the applicant by letter to publish a public notice within ten days that the applicant has filed application for a branch in that community.\(^{160}\) The notice must state that any person wishing to protest or support the application must file his written comments with the Superintendent within 20 days from the date of publication. The applicant must then send the Division a copy of the notice and the publisher’s affidavit that the notice was published.

At this same time the Division must also give written notice to “each local domestic association within the county and each domestic association located in adjacent counties in a 10 airline mile radius of the proposed site”\(^{161}\) that the applicant has filed a complete application.

After the Superintendent has given these notices to the appropriate associations, the next phase of the formal procedure begins. Letters of protest or support may be filed by any person during the 20 days from the date of the applicant’s publication notice or 20 days from the date of the notice to competing institutions from the Division, whichever is later. Protestors must also furnish copies of their letters to the applicant. Such support and protest letters are probably timely filed if the postmark date is within the requisite 20 days, regardless of when the mail is received by the Division.

The rule not only permits any person to protest a branch application, including competing savings associations, commercial banks or any private citizens,\(^{162}\) but also contains the curious provision that the Superintendent may lodge a protest. This proviso was apparently drafted in anticipation of situations where the Division’s staff might oppose approval of the application. Although an oral hearing must be held if any protest is timely filed, the rule neither states when the hearing must be held nor whether the applicant must receive notice of it or be accorded an opportunity to appear. The

\(^{160}\) Ohio Ad. Code ch. 1301:2-1-04 (D) (3) (Baldwin 1977).
\(^{161}\) Id. ch. 1301:2-1-04 (D) (2).
\(^{162}\) Id. ch. 1301:2-1-04 (D) (4).
absence of such procedural rights deprives the applicant of a fair procedure. If the Superintendent were the only protestor, for example, that oral hearing would be the most appropriate vehicle to permit the applicant to rebut the staff's basis for objection. Indeed, even protestors receive fairer treatment, for they are accorded notice of the hearing and the opportunity to participate.

Before any protestor may participate at the hearing, he must file a written document containing the following: "(1) legal basis for the protest; (2) a list of specific matters in the application to which the protestor objects together with the reasons for such objections; (3) a statement of the facts supporting the protest, including relevant economic or financial data; (4) a statement of any adverse effects on the protestor which may result from approval of the application."

Although the rule does require protestors to provide the applicant with copies of their initial letters of protest, there is no requirement that this subsequent document be sent to the applicant. Yet this latter document may afford the applicant better advance notice of the protestor's basis of objection, and could permit the applicant to prepare more adequately for the hearing.

The rule also fails to require advance disclosure of the basis for the Superintendent's objection. The Superintendent may thus protest an application, convene an oral hearing, and never afford the applicant either a prior notice of the basis of his, or his staff's, objection to the application, nor even an opportunity to appear at that hearing.

Even though the rule does not expressly require the Superintendent to afford these procedural protections to applicants, one other provision of the rule does reflect a policy objective of procedural fairness. As noted earlier, the supervisory objection is a decision made by the Superintendent within 30 days of receipt of the application, and communicated in writing to the applicant. The notice of such objection must "set forth the reasons supporting the supervisory objections," although that particular provision does not state whether the Superintendent must have afforded the applicant a prior hearing. If this supervisory objection were construed to constitute a protest by the Superintendent, the oral hearing would have to be convened before the Superintendent could render a final decision disapproving the application. In at least this one instance the Superintendent would have to disclose the basis of his protest in advance of the hearing. But even in

\[\text{id.}^{163}\]

\[\text{id.}^{164}\] One serious consequence of disapproval is the significant waiting periods imposed before a previously refused applicant can reapply in substantially the same geographical area. \textit{Ohio Ad. Code} ch. 1301:2-1-04 (B) (3) (Baldwin 1977).

\[\text{id.}^{165}\] Id. 1301:2-1-04 (A) (5).

\[\text{id.}^{166}\] Id. \textit{See also} id. ch. 1301:2-1-04 (D) (4).
this situation, the rule still does not grant the applicant a right to participate at that hearing.

The rule’s silence concerning these important rights of the applicant has posed only a potential for unfairness, only partially realized in practice. The Division has always given the applicant notice of the hearing and permitted it to participate in that proceeding. The Division has just as consistently failed, however, to provide applicants with a written statement of its basis for objection prior to that hearing.

When an application is approved, the applicant must open its branch within twelve months from the date of approval. An exception is made in the case of branch facilities to be located in “a major shopping center or in a major office building to be constructed.”167 In those instances the association has 36 months from the date of approval to open its new facility. If the applicant does not open its branch within the prescribed period it may request an extension of time from the Superintendent, which is granted if the applicant can show good cause.168 Failure to secure an extension or otherwise open the branch office in the prescribed time results in the applicant’s forfeiture of its branch approval.

3. Remote Service Unit Rule

Remote service units (RSU’s) are deemed by Superintendent’s rule169 to constitute a separate class of branch. The original RSU rule announced that applications for such facilities would only be accepted until February 29, 1976. A subsequent amendment of that rule reopened the application period from August 1, 1976 through March 31, 1977.170 More recently, the rule was again amended to extend the period during which associations could begin operation of prior approved RSU’s.171

The distinguishing characteristic of an RSU is not that it may be a

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167 Id. ch. 1301:2-1-04 (B) (2).
168 Id. ch. 1301:2-1-04 (E).
169 Superintendent Regulation 75-5: Remote Service Units (Temporary Provision) (eff. July 31, 1975) issued by Roger W. Tracy, Jr., Superintendent, Division of Building and Loan Associations (on file with the AKRON LAW REVIEW).
170 Superintendent Regulation 76-3: Remote Service Units (Temporary Provision), Amended July 21, 1976 (eff. August 1, 1976) issued by Roger W. Tracy, Jr., Superintendent, Division of Building and Loan Associations (on file with the AKRON LAW REVIEW).
171 Apparently the Superintendent had construed the earlier regulation to limit not only the application period, but also the period during which an approved RSU could begin operations. As thus construed, any application approved thereunder must result in operations before July 31, or the facility could not be opened. When he consequently amended the rule to reopen the application time, the Superintendent also extended the rule's effective period through December 31, 1977. The final amendment extended this effective date through March 31, 1978, and thereby extended the period during which operations could begin on a prior approved RSU application. Ohio Ad. Code ch. 1301:2-5-14 (Baldwin 1977) (eff. Jan. 1, 1978).
fully automated facility, nor that it can be located within the situs of another business, but that this is the only facility that may be shared with other domestic savings associations.172

The business transactions permissible at an RSU are limited to accepting deposits and withdrawal demands on savings accounts, accepting loan payments, and transferring funds from one customer account to that of another.173 Although an RSU is clearly an office of an association transacting some of the association’s business, the rule nonetheless states that an RSU is neither a branch nor a facility as those terms are used or defined within either the two branching statutes or the Division’s branching rule.174

Having so defined an RSU, the Superintendent decided to adopt the rule and amendments without any notice or hearing, and failed to follow the Administrative Procedure Act’s provisions mandated by the legislature for promulgating rules relating to branches. While the rule and amendments are most probably invalid for this failure to afford the required prior notice and hearing procedures, they are nonetheless enforced by the Superintendent today. Since the rule prohibits further RSU applications, associations are now (illegally) prohibited from applying for any automated facility which would be shared with other domestic associations.

4. Closing a Branch

The Superintendent lacks express authority to require that an association submit a prior request before closing an existing branch. Past practice within the Division has been to inform any association inquiring about the proper closing procedure that it must give written notice to the Division of the closing, and identify the prior location and precise date of final operations. There is no explanation for this curious omission in a legislative scheme that otherwise confers broad discretion to the Superintendent to overview associations’ branching activities. This is particularly curious since the Superintendent does have the authority to overview the dissolution of savings associations.175

Before an association may be dissolved, pursuant to his consent, the Superintendent must determine that it is in a “safe and sound condition,” and that the necessary stockholder vote has been taken.176 Yet a branch

173 Id. ch. 1301:2-5-14 (B) (1).
174 Id. ch. 1301:2-5-14 (J) (1).
175 Ohio Rev. Code Ann. § 1151.45 (Page Supp. 1976). See also Ohio Att’y Gen. Op. 65-11 (1965). Although the Superintendent has the express authority to overview a dissolution, there is also some authority from the Ohio Attorney General that absent such express statutory authority, the Superintendent is without implied authority to at least revoke a branch approval. Ohio Att’y Gen. Op. 59-231, 124 (1959).
closing could just as well provide early evidence of the financial instability of an association. It might also reflect a significant change in an association's prior lending policies in that market area. In order to insure the continuing financial integrity and public service of associations, the Superintendent ought to have express authority to overview branch closings.

Such authority ought to be accomplished by legislative enactment, rather than by administrative fiat. The enabling statute should not only confer the authority to overview branch closing, but should also expressly state the procedural safeguards for exercise of this authority and the criteria upon which the Superintendent should base his decision. Such statute should permit customers presently serviced by that branch to voice their sentiments concerning the proposed closing, and should prohibit closings which would capriciously withdraw savings associations' services from that community or render the level of services inadequate for the community involved.

III. RULE-MAKING

The effectiveness and worth of this state's savings association regulatory agency must ultimately be measured against the backdrop of its policy formulation and implementation. The recent thrust toward independence was a crucial step for improving the process of policy formulation. Removing the Superintendent from the whims of political party leaders should greatly improve the policy-making environment, but this is only a first step. Although conducive to an open environment for decision-making, independence alone will not guarantee the continuation of that environment.

As illustrated by the branching and chartering areas, the legislature's grants of authority to the Superintendent have often been couched in very broad terms. Many business decisions by savings association management cannot be implemented until the Superintendent has "approved,"177 "certi-
fied” or accorded his prior “consent.” Some management decisions are approved only if “acceptable” to the Superintendent, while others are subject to his “discretion.” Such broad legislative grants pose a substantial potential for agency abuse. The Superintendent is delegated the task of defining regulatory objectives, with little (as in the instance of chartering) or no hint (as in the instance of branching) of the legislature’s purpose or objectives. The Superintendent also becomes the sole arbiter for determining the procedures for defining objectives and the procedures for exercising these powers.

The choice of procedures is limited primarily to two. The Superintendent may elect to reveal Division policies through the medium of individual adjudications, or by means of rules. A comprehensive statement of

(Page Supp. 1976) (no association may engage in dissolution without the prior approval of the Superintendent); OHIO REV. CODE ANN. §§ 1151.46, 1151.47 (Page 1968) (amendments to the Articles of Incorporation, Constitution and Bylaws of an association require the prior approval of the Superintendent before they become effective); OHIO REV. CODE ANN. § 1151.49 (Page Supp. 1976) (Superintendent’s approval necessary for certain sureties of officers’ and employees’ bonds); OHIO REV. CODE ANN. § 1151.61 (Page 1968) (certain reorganization decisions require the prior approval of the Superintendent); id. § 1151.62 (the sale or transfer of certain substandard or otherwise unacceptable assets of the association requires the prior approval in writing of the Superintendent).

178 OHIO REV. CODE ANN. § 1151.03 (Page 1968) (Superintendent must certify articles of incorporation to the Secretary of State before an association may commence business). See text accompanying notes 72-83 supra. See also OHIO REV. CODE ANN. § 1151.09 (Page 1968); id. § 1151.38 (federal association must receive the certification of the Superintendent before it may convert to a state charter); OHIO REV. CODE ANN. § 1151.45 (Page Supp. 1976) (Superintendent must certify that an association is in a safe condition before dissolution may occur); OHIO REV. CODE ANN. § 1151.64 (Page 1968) (Superintendent’s certificate required before a foreign building and loan association may commence business in Ohio); id. § 1151.82 (Superintendent must certify articles of incorporation of a deposit guarantee association to the Secretary of State before it may commence business).

179 OHIO REV. CODE ANN. § 1151.37 (Page 1968) (Superintendent’s prior written consent necessary before a state charter association may buy shares in a federal association); OHIO REV. CODE ANN. § 1151.45 (Page Supp. 1976) (Superintendent's written consent necessary before dissolution); OHIO REV. CODE ANN. § 1151.61 (Page 1968) (Superintendent’s written consent required before reorganization of an association); id. § 1151.62 (Superintendent’s written consent required for the sale or transfer of certain assets of an association).

180 OHIO REV. CODE ANN. §§ 1151.29 (F) (3), 1151.297 (A) (Page Supp. 1976), where the only standard for Superintendent’s decision is that the mortgage insurance company be “acceptable to the Superintendent.”

181 Id. § 1151.08 (Superintendent accorded the authority to fix the amount of reserve funds for newly chartered associations “in his discretion.”) See also id. § 1151.33 (Superintendent may “permit” association to cure a deficiency in its reserve account).

182 Although this term is defined by the APA (see OHIO REV. CODE ANN. § 119.01 (D) (Page 1978)), that act is only applicable to such actions by the Division as affect “licenses.” See Home Savings and Loan Ass’n v. Boesch, 41 Ohio St. 2d 115, 332 N.E.2d 878 (1975).


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Division policy, disclosed in advance to those affected by implementation of that policy, is clearly a more preferable vehicle for disclosing Division policies than the individual adjudicatory order. Certainly there are matters for decision by the Division that do not initially lend themselves to rule-making. In such instances some adjudications are necessary, for they provide the Division with an experiential base needed to fashion that eventual policy statement. The problem in the past has been the Division's failure to either utilize adjudications for the purpose of developing rules, or to disclose policies on those rare occasions when general policies had been so developed.

Only recently has the legislature sought to remedy this problem by placing some constraints upon the Superintendent's previously unfettered discretion. That remedy was the present requirement, formulated in 1975, that the Superintendent select rule-making, whenever possible, as the mode for policy formulation and disclosure.¹⁸⁴

Prior to 1973 the legislature had imposed rule-making constraints upon the Superintendent's discretionary authority in a very limited number of occasions.¹⁸⁵ In each of those instances the legislature had granted some new power to the Superintendent, but with the qualification that it could only be exercised through the medium of a rule. In 1973 the legislature for the first time superimposed rule-making upon an earlier grant of discretion by requiring the Superintendent to articulate his branching policy in a rule. As in the later 1975 rule-making mandate, the legislature in 1973 required the branching rule to be promulgated in accordance with the formal rule-making procedures of the Administrative Procedure Act.

The benefits of policy-making through the medium of rules can impact at both the formulation and the implementation stages. The process of formulation can benefit from the prior disclosure and input of public comment upon proposed rules. Dissemination of final rules to those affected also promotes compliance, a crucial element of implementation. This is not to say that rule-making brings perfection to policy formulation and implementation. However, by its very existence, the rule provides a starting point for further drafting, which can ultimately produce a clear statement of the agency's policies and procedures.

Not every legislative grant of authority can be immediately transformed into a rule. Often an agency needs to confront several occasions for application of its power before the skeleton of a rule begins to arise from those individual adjudications. As the agency moves toward that framework of

a rule, advanced disclosure of its adjudicatory procedures becomes increas-
ingly important to those affected by those adjudications.\footnote{Discussion of adjudicatory procedures applicable to the Division is beyond the scope of this paper. See generally, OHIO REV. CODE ANN. §§ 119.01 (A), 119.06, 119.061, 119.07, 119.08, 119.09, 119.10 and 119.13 (Page 1978). See also Home Savings and Loan Ass’n v. Boesch, 41 Ohio St. 2d 115, 332 N.E.2d 878 (1975); Comment, The Availability of Mandamus as a Vehicle for Administrative Review, 9 AKRON LAW REV. 713 (1975).} Too many times the Division’s enabling legislation has been silent regarding the procedures for decision-making. Administrative procedure, be it rule-making or adjudicating, in the past has seldom concerned the legislature when enacting the Division’s regulatory authority. This is not to say that the Division was singled out for special treatment. Rather, this silence evidenced the legislature’s past lack of concern over the general matter of state agencies’ procedures for rendering decisions.

In the last two years this lack of concern has vanished, replaced by an abundance of interest in the rule-making procedures of state agencies, which in turn produced a flurry of recent enactments. Those general administrative procedure enactments, coupled with a specific provision in the same act that granted independence to the Superintendent, have significantly altered the Division’s policy-making procedures. A clear preference for formal rule-making has replaced the historical legislative silence.

The enabling legislation of the Division outlines no specific rule-making procedures. The source of the applicable procedures is instead found in this state’s general administrative procedure statutes. Two complementary rule-making schemes exist in Ohio. The first, an informal rule-making procedure, is defined within a single statute.\footnote{OHIO REV. CODE ANN. § 111.15 (Page 1978).} The second, the formal rule-making procedure, is prescribed within the Administrative Procedure Act (APA).\footnote{Id. ch. 119.} Agencies which must comply with the formal rule-making procedure include any “division . . . specifically made subject to [the APA],”\footnote{Id. § 119.01 (A).} that is, any agency whose enacting legislation specifically refers to the APA. In the 1975 enactment granting independence to the Superintendent, the legislature designated the Division to be such an agency.\footnote{Id. § 1151.34 (E) (2); Am. Sub. H.B. No. 366, § 3, supra note 22.}

Prior to this enactment only three statutes specifically required the Superintendent to promulgate rules in compliance with the APA.\footnote{Ohio REV. CODE ANN. § 1155.20 (Page Supp. 1976).} The remaining statutes which expressly required the Superintendent to adopt

\footnote{186}
rules were silent concerning rule-making procedures.\textsuperscript{192} Since the APA was not specifically applicable to these rules, uncertainty surrounded the question of what rule-making procedures the Superintendent ought to follow. That uncertainty was thus removed in 1975. With only two exceptions, every Division rule must now be adopted in the procedural manner prescribed in the APA. The two excepted classes of rules must be adopted in the informal rule-making manner.

That 1975 enactment went much further than merely specifying the appropriate procedures to follow when rule-making. The legislature also \textit{required} the Superintendent to “issue rules and standards necessary to carry out . . .”\textsuperscript{103} each of his express grants of authority. In one broad stroke the legislature completed the task begun in 1973 when it first required the Superintendent to promulgate rules governing his chartering and branching authority. The legislature charged the Superintendent in 1975 to abandon, whenever possible, rule-making via adjudication and instead to fashion and announce policy through the medium of rules adopted in the APA procedures.

With his newly acquired independence, and this rule-making mandate, the Superintendent could now transcend both political pressures and staff intransigence and undertake a comprehensive reevaluation of Division policies. This task of reevaluation would serve to identify both policies already developed from adjudication, but which still had yet to be articulated in a rule, and those remaining areas where further deliberation would be necessary before rules could be finally drafted. The success of this reevaluation process can be measured in light of subsequent events.

In 1976 the legislature for the first time created a state administrative code.\textsuperscript{104} The objective was to provide public disclosure of all rules in effect among the various agencies of state government. Since many state agencies had displayed a reluctance in the past to disclose their rules, the legislature included a stimulus to promote disclosure for compilation of the administra-

\textsuperscript{192} \textit{Ohio Rev. Code Ann.} §§ 1151.201 (B), 1151.33 (A), 1151.33 (B), 1151.34 (B) and 1155.18 (Page 1968); Am. H.B. No. 485, § 3, 111th G.A. (1975-76). This statute was the Ohio corollary of the anti-redlining legislation promulgated by Congress and various other states. The statute required adoption of a rule that “shall require the filing by identified dates of quarterly reports with the...Superintendent stating the amount, interest rate, term, and location of the security for each [residential mortgage]...loan made during the preceding quarter. The reports shall contain such information concerning such loans, and similar loans made for a reasonable period not to exceed two years prior to this act, as shall be prescribed by the rule to assist the General Assembly in determining the effects of the addition of Division (B) (4) to section 1343.01 of the Revised Code.” This legislation resulted in Superintendent Regulation 76-1: Rules for Filing Reports on Residential Mortgage Loans, issued Feb. 4, 1976, by Roger W. Tracy, Jr., Superintendent, Division of Building and Loan Associations (on file with the \textit{Akron Law Review}). See \textit{Ohio Ad. Code} ch. 1301:2-3-01 (Baldwin 1977).


tive code. The act provided that no rule would remain in effect after January 1, 1977 unless filed prior to that date with the Director of the Legislative Reference Bureau for publication in the code. All new rules, whether the product of formal or informal rule-making, are also now filed with the Director for publication in the code.

Application of this act to the Division meant that all existing rules had to be filed by the prescribed date for inclusion in the first published edition of the administrative code. The branching rule, the chartering rule and all rules that had been specifically required by statute had to be filed to remain effective. Any additional rules that had resulted from the reevaluation mandated by the 1975 provision would also be disclosed with this filing. When that filing was made in 1976, it revealed for the first time that the reevaluation process had not produced any new rules. With only one exception, the only rules filed by the Division were those that had been specifically required by statutes enacted prior to 1975.

To date the Superintendent has yet to reveal an indication that the reevaluation is ongoing or was ever commenced. Not only have no rules been forthcoming, there have been no revealed efforts at specifying which broad grants of authority need further case by case application before a general theme can be developed to support a draft rule. Whatever the reasons for the Superintendent's apparent failure to abide by the 1975 mandate, certainly no legitimate public interest has been served by his omission.

What began some three years ago as a constructive endeavor to render the Division a more open forum for decision-making, more susceptible to public scrutiny and input, and more independent of petty political influences has not yet produced all those objectives. Indeed, not only may the Superintendent have failed to perform the reevaluation, but there is even some indication of an inclination to restrict further public and industry participation in agency rule-making. This is evidenced by the remote service unit rule. Under the

196 See text accompanying notes 169-74 supra.

present rule-making scheme there are only two kinds of Division rules which are exempted from the APA procedures, parity rules and rules "concerning internal management" of the Division. A parity rule is a rule which the Superintendent may adopt to grant state chartered associations any additional power, such as additional lending authority, which has been recently received by federal associations. Such rules are effective for only thirty months, during which time the legislature generally makes the new power permanent by enacting it in statute. Since the Superintendent possessed authority to incorporate any RSU provisions in the existing (and permanent) branching rule, all that he accomplished by designating the RSU provision to be a parity rule was to avoid the public notice and hearing safeguards of the APA.

Although the minimal procedures for parity regulation adoption sharply contrast with the abundant safeguards contained in the APA, the primary justification for adopting parity rules in the informal procedure has been that state chartered associations must receive this additional authority as soon as possible so they can continue to compete with federal associations. If the Superintendent’s rationale for electing the parity rule route was that the APA rule-making procedures are more time consuming, it ought not be persuasive, for the APA procedure also provides an alternative procedure for emergency situations. That procedure is just as expeditious as the informal rule-making procedure.198

A. Formal Rule-Making

With the exceptions of parity rules and rules of internal management, no rule-making activity of the Division can produce a valid rule unless the formal procedures outlined below are followed. Until very recently, formal rule-making consisted of only two steps prior to a final order by an agency to adopt, amend or repeal a rule: prior notice of the agency’s proposed action and a subsequent public hearing to consider that proposal. Once the agency’s action was incorporated into a final order, copies of the final rule were filed with the Secretary of State.

This prior rule-making scheme posed a perennial problem in this state. The public or even affected industries often times were unable to secure copies of an agency’s final rules. The first of this state’s recent enactments affecting rule-making procedures remedied that problem in 1976 by creating the Ohio Administrative Code. Because that initial act did not apply to several agencies, the legislature has more recently expanded the group of agencies which must make their rules available in the administrative code.199

198 See text accompanying note 221 infra.
Other recent acts have also broadened the class of persons who are entitled to receive prior notice of proposed agency rule-making and have inserted a significant third step into the rule-making process: legislative oversight of proposed rules. Since the present formal procedures are equally applicable to amendment or repeal of existing rules and proposals to adopt new rules, the remainder of this discussion will focus upon a new rule proposal to illustrate the requisite procedures.

Once the Division's staff has fashioned the proposed draft of a new rule, the first step toward final adoption of the proposal is public notice. The statute requires that the notice be given at least 30 days prior to the hearing date and at least 60 days prior to issuance of a final order adopting the proposed rule. The notice must be published in a Franklin County newspaper of general circulation and must also be provided to "any person who requests it and pays a reasonable fee, not to exceed the cost of copying and mailing." The contents of the notice must include either a synopsis of the proposed rule or a general statement of the subject matter, and a statement of the reason or purpose for the adoption. The notice must also state the date, time and place for the hearing. The hearing date can be no sooner than 30 days after the Division has filed copies of the proposed rule with the Senate clerk, the Secretary of State, and the Director of the Legislative Reference Bureau.

Since the rule cannot become effective until at least 60 days after these three filings, the Division will probably file these copies on the same day that it publishes the requisite public notice. Such a simultaneous notice

202 Ohio Rev. Code Ann. § 119.03 (B) (Page 1978) as amended by the 60 day provision, was added by Sub. H.B. No. 257, 112th G.A. (1977-78) (eff. Jan. 1, 1978). Extension of the minimum time running after notice was necessitated by the act's creation of legislative overview of rule-making. The 60 days is measured from the date when the proposed rule is filed with the Senate clerk, the Secretary of State and Director of the Legislative Reference Bureau. During that 60 days the joint legislative oversight committee may invalidate the proposed rule or any portion thereof. Ohio Rev. Code Ann. § 119.03 (1) (Page 1978).
205 Id. § 119.03 (A) (4).
and filing will permit the Division to adopt an effective rule in the shortest period permitted by statute.\textsuperscript{208} Assuming that notice and filing occur simultaneously, then two independent events are triggered to occur concurrently during the following 60 days. One is the hearing process performed by the Division and the other is the legislative oversight of the proposed rule.

The Division’s hearing, held no sooner than 30 days after the public notice and requisite filings, is a record hearing.\textsuperscript{207} Any “person affected”\textsuperscript{208} may participate in this hearing. Such person may participate directly or through his attorney\textsuperscript{209} (or both), and may present his “position, arguments, or contention . . . tending to show that the proposed rule . . . if adopted or effectuated will be unreasonable or unlawful.”\textsuperscript{210} The participant may present his arguments either orally or in writing, may offer and examine witnesses, and present evidence in any other fashion. Although the term “persons affected” is not defined,\textsuperscript{211} any state chartered savings association should certainly be permitted to participate at a Division rule-making hearing. Who may participate is a matter initially resolved by the Division at the hearing. Since the business activities of savings associations have a significant impact upon the public’s housing interest, the Division should also consider permitting representation of public views at a hearing. After all, the very reason for this hearing is to provide the agency with public feedback and response to the policies reflected in any proposed rule.

During this same period the joint legislative oversight committee has an opportunity to adopt a concurrent resolution partially or entirely invalidating the proposed rule.\textsuperscript{212} The grounds for invalidation are threefold: if the rule exceeds the agency’s scope of statutory authority,\textsuperscript{213} if the proposed rule conflicts with a rule of another agency or another rule of the Division,\textsuperscript{214} or if the proposed rule “conflicts with the legislative intent in enacting the

\textsuperscript{208}Id. See also id. § 119.03 (H) for a reiteration of this requirement for filing with the Senate clerk.

\textsuperscript{207} OHIO REV. CODE ANN. § 119.03 (C) (Page 1978).

\textsuperscript{208} “Person” is defined as any person, firm, corporation, association or partnership. OHIO REV. CODE ANN. § 119.01 (F) (Page 1978).

\textsuperscript{209} See note 207 supra; OHIO REV. CODE ANN. § 119.13 (Page 1978).

\textsuperscript{210} See note 207 supra.

\textsuperscript{211} The recent amendment permitting direct notice of rule-making to “any person who requests it and pays a reasonable fee” probably expands the class of persons entitled to participate to include those receiving actual notice, at least to the extent that differing views are thereby represented, but not unduly duplicated. OHIO REV. CODE ANN. § 119.03 (A) (3) (Page 1978), as amended by Am. S.B. No. 43, 112th G.A. (1977-78) (eff. Sept. 23, 1977).


\textsuperscript{213} OHIO REV. CODE ANN. § 119.03 (I) (1) (Page 1978).

\textsuperscript{214} Id. § 119.03 (I) (2).
statute under which the [Division] . . . proposed the rule." If the joint committee fails to recommend a resolution of invalidation within the 60 days of filing, or if the legislature fails to adopt such a resolution within that period of time, the Division may then issue its final order adopting the rule.**\textsuperscript{215}**

Although the purpose of the hearing is to assist the Division in discovering and incorporating any appropriate alterations of the rule, and may thus produce a final rule that differs from the proposed rule, the rule as finally adopted must be consistent with the synopsis or general statement included in the public notice.**\textsuperscript{216}** Once the Division has determined the final form of its rule, it must again file copies of that final rule with the Secretary of State and the Director of the Legislative Reference Bureau.**\textsuperscript{217}** At that time the Division must also designate an effective date of its final rule, a date that is no earlier than the tenth day after this filing with the Secretary of State and the Director of the Legislative Reference Bureau.**\textsuperscript{218}** During that ten-day period, the Division must make a reasonable effort to inform those persons affected by the rule of its final text.**\textsuperscript{219}** To comply with the requirement the Division should at least send letters directly to all those persons who participated in the hearing. Those letters should include a statement that a final rule has been adopted, and a copy of the final rule.

The procedural safeguards of formal rule-making afford ample opportunity for both affected members of the industry and interested members of the public to participate in Division policy-making. Legislative oversight permits the Division to benefit also from limited legislative feedback. At worst, only expediency in formulating finalized policy is sacrificed for this formal process. Even this consequence is minimal, for the Division can follow this process and still promulgate a final rule within 70 days after the first filing of the proposed rule. Nor must expediency always be sacrificed, for the APA also permits the adoption of emergency rules. Such rules are only effective for 90 days, but they become effective as soon as approved by the Governor and copies have been filed with the Secretary of State and the Director of the Legislative Reference Bureau.**\textsuperscript{220}** For an

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\textsuperscript{215} Id. § 119.03 (I) (3).

\textsuperscript{216} Id.

\textsuperscript{217} Id. § 119.03 (D).


\textsuperscript{219} Id.


emergency rule to remain in effect beyond the 90 days, the Division need only proceed to comply with the formal rule-making process during that period.

B. Informal Rule-Making

Exempted from the APA rule-making procedures are rules concerning the internal management of the Division and any rule promulgated by the Superintendent under section 1155.18 of the Ohio Revised Code, the “parity regulation statute.” In order for these two kinds of rules to become effective, they must be promulgated in accordance with the informal rule-making procedure.

\[222\] Ohio Rev. Code Ann. § 119.01 (C) (Page 1978).

\[223\] Ohio Rev. Code Ann. § 119.01 (A) (Page 1978). The Superintendent may adopt a rule granting to state chartered associations “a right, power, privilege, or benefit [enjoyed by federal associations] by virtue of statute, rule or regulation, or, judicial decisions...[if such] right, power, privilege, or benefit is not [presently] possessed by a building and loan association organized under the laws of this state.” Ohio Rev. Code Ann. § 1155.18 (Page 1968). Such rules are “parity regulations.”

\[224\] Ohio Rev. Code Ann. § 111.15 (Page 1978). There has long been disagreement within the Division over whether even this informal rule-making procedure was applicable to parity regulations. The recent amendments to this section contained in Sub. H.B. No. 25, 112th G.A. (1977-78) (eff. Nov. 4, 1977), make clear that the Division must now comply with these procedures of parity regulations. The informal procedures are now applicable to any rule adopted by a division of state government with only one exception: rules adopted pursuant to the formal procedures contained in the APA. The definition of rule contained in the APA exempts from that act’s coverage “regulations concerning internal management of the agency which do not affect the private rights.” Ohio Rev. Code Ann. § 119.01 (C) (Page 1978).

Those rules governing internal management of an agency must now be promulgated in accordance with the informal procedure, which means that those rules must now be filed for inclusion within the Ohio Administrative Code.

The Legislative Reference Board was granted the power to define what rules govern internal management and has adopted the following definition:

“Rule, regulation, by law, or standard governing the internal management of an agency” means a 111 rule which implements, interprets or prescribes agency policy or procedure with regard to the operation of a state agency and which has a general and uniform legal effect when applied to any identifiable class of persons. This definition does not include: staff manuals setting forth routine instructions of office procedures; academic course content descriptions; collectively bargained agreements; or those instructions or other statements issued by an agency which set forth criteria or guidelines to be used by its staff in auditing, making inspections or investigations, in settling commercial disputes or negotiating commercial arrangements, or in the selection or handling of case or criteria for the defense, prosecution, or settlement of cases, when the disclosure of such statement will enable a law violator to avoid detection, facilitate disregard of requirements imposed by law, or give a clear and proper advantage to persons who are in an adverse position to the state.


Sub. H.B. No. 257, 112th G.A. (1977-78) (eff. Jan. 1, 1978), also amended the informal procedure and in doing so reinforced the conclusion that the Division of Building and Loan Associations must comply with this procedure for the promulgation of parity regulations. The support for this conclusion is contained in Division (B) (2) of that amendment which expressly exempts “a rule...proposed under section...1155.18” from the joint legislative oversight committee’s jurisdiction. The conclusion to be drawn from that exemption from the oversight is that the filing requirements otherwise contained in the statute are applicable to the Division when promulgating parity regulations.

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That informal procedure merely requires that the Division file two copies of the final rule with both the Secretary of State and the Director of the Legislative Reference Bureau.\footnote{\textsc{Ohio Rev. Code Ann.} \textsection{} 111.15 (B) (Page 1978), \textit{as amended} by Sub. H.B. No. 25, 112th G.A. (1977-78) (eff. Nov. 4, 1977).} The rule then becomes effective on the tenth day after filing, or on a later date designated by the Superintendent.\footnote{\textit{Id.}}

He must also designate the effective period for a parity rule, not to exceed 30 months from its effective date.\footnote{\textit{Id.}} Before this period expires the legislature must decide whether to make the parity rule permanent by enacting a statute incorporating the rule's provisions. If the legislature fails to enact a statute, the parity rule is voided upon expiration of this designated period.\footnote{\textit{Id.}}

The informal rule-making statute permits rescission of the rule, but first requires the rescinding agency to file copies of the rescission order with the Secretary of State and the Director of the Legislative Reference Bureau. The rescission is effective ten days after that filing.\footnote{\textit{Id.}} The parity regulation statute also addresses the matter of rescission and provides that the Superintendent must give written notice of his proposed action 30 days before finally rescinding a rule.\footnote{\textit{Id.}} The two statutes together thus require the Superintendent to give written notice of the proposed rescission to all state chartered associations at least 20 days before filing the rescission order with the Secretary of State and the Director of the Legislative Reference Bureau. The ten days which must run from the date of these filings before the rescission can become effective, when added to that initial 20 day period, would total the 30 days required by the parity regulation statute.

As in the case of formal rule-making, a recent enactment submitted most informal rules to legislative oversight.\footnote{\textit{Ohio Rev. Code Ann.} \textsection{} 111.15 (B) (Page 1978), \textit{as amended} by Sub. H.B. No. 25, 112th G.A. (1977-78) (eff. Jan. 1, 1978).} That is, two copies of the rule must be filed with the Senate clerk at least 60 days before the agency may file copies of the rule with the Secretary of State and the Director of the Legislative Reference Bureau. During that 60 day period, the joint legislative oversight committee may recommend a concurrent resolution invalidating part or all of a proposed rule. Only after the 60 days have run may the agency adopt a final rule by filing copies with the Secretary of State and Director. The rule is then effective on the tenth day after filing.
Both parity regulations 232 and rules of internal management 233 were expressly exempted from legislative oversight. The legislature may well have felt no need to exercise additional oversight of parity regulations since the appropriate House and Senate standing committees must review all parity rules to determine whether to enact them in a statute.

The Superintendent is thus permitted to continue to adopt parity rules by merely filing and waiting the required ten days. Such procedure accords neither the industry nor the public any prior disclosure of the proposed rule. But no statute prohibits the Division from according such prior notice, or even some form of prior hearing. The informal rule-making procedure simply outlines minimal procedures; it does not thereby define the outer limits of the process which the Division may deem more appropriate.

The primary triggering events for adoption of parity rules occur when either Congress enacts legislation conferring new lending or investment authority upon federal associations or the Federal Home Loan Bank Board accomplishes the same end through a new rule. On most occasions the Division has knowledge of the FHLBB regulation or congressional enactment far in advance of such measure's effective date. In such instances the Superintendent should give some advance notice of his proposed parity rule. Such notice should be given at least in the same manner and to those persons entitled to advance notice of formal rule-making. The notice should also invite written comments to be submitted during a prescribed period, possibly 20 or 30 days following this notice. Written comments will provide the Division with industry and public feedback necessary for adopting the best final rule. This notice and comment procedure would require more time than the minimal informal procedure, but much less than formal rule-making.

CONCLUSION

Providing adequate housing for all citizens is as crucial a challenge today as ever before. How well that challenge is met will be determined in large part by savings associations. The adequacy of their response can be, and ought to be influenced by the felt needs of those very same citizens. Although the Superintendent's great store of discretionary authority can pose a great potential for abuse, if properly utilized, it can also serve as the medium for transforming those needs into policies that influence the industry's response.

Rule-making is the proper mode for utilizing and exercising this authority. The formal rule-making procedures specified by the legislature

232 Id. § 111.15 (B) (2).
233 Id. § 111.15 (B) (5).
not only provide an appropriate forum for public expression of their home financing needs, but also permit the industry an opportunity to participate in fashioning the policies that impact immediately upon its business operations. Regulatory policies that so affect the ultimate public welfare should not be hastily formulated. Avoiding the deliberative formal rule-making process merely for the stated purpose of expediency in policy formulation will seldom serve the ultimate best interests of the public, the industry or even the agency. Nor does the Division accomplish any public purpose by its failure to transcend adjudications and to engage instead in rule-making.

Although the final tally has yet to be taken, it appears that the legislature's initial solution to overcome agency intransigence by mandating policy formulation via formal rule-making will be unsuccessful. Should the Division's refusal continue, the legislature ought to reassume the authority delegated to the Division. When the quasi-legislative agency refuses to perform its delegated responsibility, the delegating legislature is the only body left to perform those tasks.