

{{11-30-94 p.I-97}}

[¶8028A] **In the Matter of The Citizens Bank of Clovis, Clovis, New Mexico, Docket No. FDIC-91-406b (2-15-94).**

FDIC Board denies bank's request for stay of cease and desist order pending judicial review.

[.1] Practice and Procedure—Stay Pending Appeal—Standards

Applicant for stay pending appeal to federal circuit court must show likelihood of success on the merits, irreparable injury if the stay is not granted, no substantial harm to other interested persons, and no harm to the public interest.

[.2] Practice and Procedure—Stay Pending Appeal—Cease and Desist Order

Allegation of improved financial condition is irrelevant to the appropriateness of a cease and desist order and cannot be a basis for stay of the order pending judicial review.

In the Matter of

THE CITIZENS BANK OF CLOVIS CLOVIS, NEW MEXICO (Insured State Nonmember Bank) DECISION AND ORDER DENYING MOTION FOR STAY PENDING APPEAL FDIC-91-406b

On January 28, 1994, The Citizens Bank of Clovis, Clovis, New Mexico ("Respondent," "Bank," or "Insured Institution"), filed a Motion for Stay of Cease-and-Desist Order ("Motion"). The Motion requests a stay pending appellate review by the United States Court of Appeals for the District of Columbia Circuit. The Motion argues, in essence, that the Bank's current financial condition does not merit issuance of the Cease and Desist Order, but otherwise fails to assert any basis for the relief sought.

On December 7, 1993, the Board of Directors ("Board") of the Federal Deposit Insurance Corporation ("FDIC") issued a Decision and Order on Cease and Desist Proceeding ("Order") to correct certain unsafe or unsound banking practices,¹ effective in thirty (30) days. The Order is to remain effective and enforceable except to the extent that, and until such time as, any of its provisions shall have been modified, terminated, suspended, or set aside by the FDIC.

[.1] Section 8(h)(3) of the Federal Deposit Insurance Act, 12 U.S.C. § 1818(h)(3), provides that the commencement of judicial review "shall not" operate as a stay of the order unless the reviewing court specifically orders a stay. The Board has interpreted this provision to mean that a stay is a remedy available only in extraordinary circumstances. It is the burden of the party seeking the stay to justify the need for it. In this regard, the Board has adopted the standards applied by the federal courts in determining whether to grant a stay. Thus, the Board has held that petitions for a stay pending judicial review must demonstrate that the following four factors are met before a stay will be entered: (1) a likelihood that the Respondent will prevail on the merits of the appeal; (2) irreparable injury to the Respondent unless the stay is granted; (3) no substantial harm to other interested persons; and (4) no harm to the public interest. *In the Matter of *** Bank, *** ***, ***,* Docket No. FDIC-87-203b, Board Volume I P-H FDIC Enf. Dec. ¶5123 (1988); *In the Matter of Harold A. Hoffman, Joseph L. Hayes and Alaska Continental Bank, Anchorage, Alaska,* Docket No. FDIC-88-156c&b, 2 P-H FDIC Enf. Dec. ¶5141 (1989); *Associated Securities Corp. v. S.E.C.*, 283 F.2d 773, 774-75 (10th Cir. 1960); *Virginia Petroleum Jobbers Assn. v. F.P.C.*, 259 F.2d 921, 925 (D.C. Cir. 1958). 7 (Pt.2) J. Moore, J. Lucas & K. Sinclair, Jr., *Moore's Federal Practice* ¶65.04[1] at 39-40 (2d 3ed. 1989) and the cases cited therein.

[.2] Respondent's Motion fails to assert or demonstrate the presence of any of these factors. Nor does Respondent assert that the unsafe or unsound practices have been corrected. Instead, the Motion seeks a stay

¹These unsafe or unsound banking practices included extending loan due dates without additional collateral, capitalizing interest, maintaining an excessive volume of classified assets, and failing to properly supervise the Bank's officers.

[{{11-30-94 p.I-98}}](#)merely upon allegations of improved financial condition, which is irrelevant to the appropriateness of a Cease and Desist Order. Even if the offending practices which gave rise to the Order have now ceased or been corrected, this would not be a basis for declining to issue a corrective order such as the one issued in this case, nor would it be a basis for staying a Cease and Desist Order. Rather, such facts go to the issue of compliance with the Order. *Bank of Dixie v. Federal Deposit Insurance Corporation*, 766 F.2d 175 (5th Cir. 1985); *First State Bank of Wayne County v. FDIC*, 770 F.2d 81 (6th Cir. 1985). A determination whether the offending practices have actually been abandoned or corrected by a bank is appropriately made in the course of subsequent bank examinations. *Id.* Therefore, there is no factual or legal basis upon which a stay pending appellate review should be granted.

Accordingly, it is hereby ORDERED that Respondent's Motion for Stay of the Order to Cease and Desist is DENIED. The provisions of this Order shall remain effective and enforceable except to the extent that, and until such other time as, any provision of the Order shall be modified, terminated, suspended, or set aside by the FDIC or a court of competent jurisdiction.

Pursuant to delegated authority, upon the advice and recommendation of the General Counsel.

Dated at Washington, D.C., this 15th day of February, 1994.