

{{2-28-93 p.A-2139}}

¶5189] **In the Matter of Steven J. Hirsch, James V. Hirsch, C.R. Hackworthy, Paul W. Hamblin, Bradley C. Lundeen, James W. O'Connell, William J. Radosevich, Richard R. Schmitz, and Richard O. Stout, Bank St. Croix, Roberts, Wisconsin, Docket No. FDIC-91-24k (12-15-92).**

Board, having earlier found respondents had violated law and regulations by opening a bank branch without prior FDIC and State authorization, finds that the ALJ improperly evaluated their level of culpability and assesses civil money penalties greater than those recommended by the ALJ. [See ¶5171A, page A-1845.]

**[.1] Civil Money Penalties—Amount of Penalty—Factors**

Blind reliance on the advice of counsel, after being informed by state and federal regulators that their actions violated the law, is not "good faith reliance" mitigating the amount of penalty assessed. Respondents are not entitled to leniency for their actions to remedy the violations.

**[.2] Civil Money Penalties—Indemnification**

Penalties and legal fees, where action was brought against respondents individually and not against the bank, are the obligation of the respondents. They may not be indemnified by the bank.

**In the Matter of  
STEVEN J. HIRSCH, JAMES V.  
HIRSCH,  
C.R. HACKWORTHY, PAUL W.  
HAMBLIN,  
BRADLEY C. LUNDEEN, JAMES W.  
O'CONNELL, WILLIAM J.  
RADOSEVICH,  
RICHARD R. SCHMITZ, and  
RICHARD O.  
STOUT, individually, and as  
institution-affiliated parties of  
{{2-28-93 p.A-2140}}  
BANK ST. CROIX  
ROBERTS, WISCONSIN  
(Insured State Nonmember Bank)  
DECISION AND ORDER ON CIVIL MONEY PENALTY PROCEEDING  
FDIC-91-24k**

**I. INTRODUCTION**

The Federal Deposit Insurance Corporation ("FDIC") issued a Notice of Assessment of Civil Money Penalties, Findings of Fact and Conclusions of Law, Order to Pay, and Notice of Hearing ("Notice") against Steven J. Hirsch, James V. Hirsch, C.R. Hackworthy, Paul W. Hamblin, Bradley C. Lundeen, James W. O'Connell, William J. Radosevich, Richard R. Schmitz, and Richard O. Stout ("Respondents") as individual directors and institution-affiliated parties of Bank St. Croix, Roberts, Wisconsin ("Bank"), on February 11, 1991. This Notice seeks to impose civil money penalties in the amount of \$5,500.00 on each Respondent for violations of section 18(d)(1) of the Federal Deposit Insurance Act ("Act"), 12 U.S.C. §1828(d)(1); section 221.04(1) (jm)(1) of the Wisconsin Statutes, Wis. Stat. §221.04(1)(jm)(1); and section 328.2 of the FDIC Rules and Regulations, 12 C.F.R. §328.2, by opening and operating a branch bank in Hudson, Wisconsin ("branch"), without approval of the FDIC or the Commissioner of Banking for the State of Wisconsin ("Commissioner"). Respondents were also charged with, and admitted to violating 12 C.F.R. §328.2, by failing "to display at the branch an `official bank sign.'" Answer at 3–4.<sup>1</sup>

Prior to the issuance of the Notice in this action, the Bank filed suit against the FDIC in the United States District Court for the District of Columbia seeking an injunction to suspend the effect of an earlier temporary cease-and-desist order issued by the FDIC, which ordered closure of the unauthorized branch.<sup>2</sup> On January 30, 1991, the District Court denied the Bank's request for an injunction. *Bank St. Croix v. FDIC*, 755 F. Supp. 455 (D.D.C. 1991).

The first hearing in this civil money penalty proceeding was held on July 2, 1991, before Administrative Law Judge Steven M. Charno ("ALJ"), who recommended granting a directed verdict for the Respondents. On December 19, 1991, the FDIC Board of Directors ("Board") reversed the ALJ's Decision, and found that Respondents had committed each of the violations alleged in the Notice. *In the Matter of Steven J. Hirsch, et. al.*, FDIC-91-24k, 2 P-H FDIC Enf. Dec. ¶5171A. The proceeding was remanded for a full hearing on the issue of the appropriate amount of civil money penalties. The Board stated that the violations at issue were shortlived, have been rectified, and the Bank is now operating under a consent agreement. Board Dec. at 18.

A second hearing on remand was held before the ALJ on July 8, 1992, in Minneapolis, Minnesota. The ALJ's Recommended Decision, issued on August 10, 1992, concludes that the following penalties should be ordered: (1) Respondents Steven J. Hirsch, C.R. Hackworthy, Paul W. Hamblin, James W. O'Connell, William J. Radosevich, Richard R. Schmitz and Richard O. Stout, \$500.00 each; (2) Respondent James V. Hirsch, \$250.00, and (3) Respondent Bradley C. Lundeen, \$5.00. The ALJ considered the evidence and the relevant statutory factors and reasoned that the Respondents had relied in good faith on the advice of counsel at the time they opened the unauthorized branch bank.

The FDIC filed exceptions to the ALJ's Recommended Decision challenging the ALJ's findings on good faith, the gravity of

---

<sup>1</sup>Citations to the record of this proceeding shall be as follows:

ALJ's Recommended Decision, "R.D. at \_\_\_\_."

Hearing Transcripts, "Tr. of (date) hearing at \_\_\_\_."

Joint Stipulations, "Joint Stip. No. \_\_\_\_."

Enforcement Counsel's Exceptions, "Except. at \_\_\_\_."

FDIC Board Decision of December 19, 1991, *In*

*the Matter of Steven J. Hirsch, et al.*,  
FDIC-91-24k, 2 P-H FDIC Enf. Dec. ¶5171A,  
"Board Dec. at \_\_\_\_."

---

<sup>2</sup>The earlier November 16, 1990, Temporary Order to Cease and Desist and Notice of Charges and of Hearing ("Notice of Charges") also concerned certain other matters such as the qualification of management, growth plans, loan policies, capital requirements, dividends, etc. These issues were resolved with the entry of a Consent Order in *In the Matter of Bank St. Croix*, FDIC-92-65b, 2 P-H FDIC Enf. Dec. ¶10,195 (March 15, 1991).

[{{2-28-93 p.A-2141}}](#)the violations, and the assessed penalties. FDIC Enforcement Counsel also requests the inclusion of language in the Order prohibiting the Respondents from seeking reimbursement from the Bank for any monetary penalties or legal expenses.

For the reasons stated below, the Board adopts the ALJ's Recommended Decision, but modifies the assessments, the discussion of good faith, and certain of the legal conclusions.

## II. BACKGROUND

During the period from June 1989 through September 1990, Respondent Steven J. Hirsch, president of the Bank, sought and received condition approval from the FDIC and the Commissioner to open a branch bank in Hudson, Wisconsin.<sup>3</sup> However, the Bank failed to fulfill one of the Commissioner's conditions for approval of the branch bank —the infusion of \$75,000 of capital from a source outside the Bank.<sup>4</sup>

The Bank notified the Commissioner, by letter dated October 29, 1990, that the branch would open on November 5, 1990. Joint Stip. No. 10, June 13, 1991. On November 1, 1990, the FDIC Regional Director hand-delivered to the Bank a letter withdrawing approval of the branch application.<sup>5</sup> The Commissioner suspended conditional approval of the branch by letter on the same day. Joint Stip. No. 12, June 13, 1991.<sup>6</sup>

On November 5, 1990, the Bank's board of directors, except for James V. Hirsch and Bradley C. Lundeen, who were not present, met and unanimously voted to open the branch after the Bank's counsel advised them to open the branch immediately and accept deposits to "establish the branch." Joint Stip. No. 13, June 13, 1991.<sup>7</sup>

At the Bank's request, a meeting was held on November 8, 1990, in Chicago between representatives of the State, FDIC, and the Bank's directors (except Respondent Lundeen). At this meeting the Bank was advised that the Commissioner's approval had expired on November 1, 1990, and that the branch must be closed immediately. FDIC representatives stated that civil money penalties would be assessed unless

the branch was closed immediately. Directly after the meeting, Respondents (except for Respondent Lundeen) consulted with their attorney and asked whether civil money penalties could be imposed upon them. Their attorney responded in the negative on the grounds that the Regional Director lacked authority to withdraw approval of the branch. R.D. at 4, fn. 8. The Bank continued to operate the branch until November 16, 1990, when the Bank was served with FDIC's Temporary Order to Cease and Desist, ordering closure of the branch bank.<sup>8</sup>Joint Stip. No. 19, June 13, 1991. In addition, during the period the branch was open, the Bank failed to display an official bank sign as required by 12 C.F.R. §328.2.

---

<sup>3</sup>The Regional Director (Supervision) of the FDIC's Chicago Regional Office ("Regional Director") approved the branch application on September 27, 1990, subject to the condition "until such time as the branch is established, the Corporation shall have the right to alter, suspend, or withdraw its approval. . .".Joint Stip. No. 8, June 13, 1991. 12 C.F.R. §303.0(a)(26)(iii).

The Commissioner's approval was subject to the Bank fulfilling three conditions: 1) execute a Memorandum of Understanding; 2) eliminate from its books certain assets classified loss; and 3) increase capital by \$75,000 from a source outside the Bank.

---

<sup>4</sup>The Bank transferred \$55,000.00 from the Bank's undivided profits account (a capital account) to its surplus account (a capital account) on October 22, 1990. Further, the Bank's holding company paid an additional \$20,000.00 into a capital account on October 31, 1990. Joint Stip. No. 9, June 13, 1991. The Division Administrator for the Commissioner testified at the first hearing that this transaction did not meet the Commissioner's requirement because the transaction had no impact on the Bank's financial condition; in essence, "the net effect would have been zero." Tr. at 39, July 2, 1991.

---

<sup>5</sup>The letter stated: "I am withdrawing approval of the branch application and have forwarded to our Washington office a formal recommendation for denial of the application based upon the condition of the Bank as we now know it." Joint Stip. No. 11, June 13, 1991.

---

<sup>6</sup>The letter was certified as received by Bank director James O'Connell's spouse on November 3, 1990; by Bank directors James Hirsch and Richard Schmitz on November 5, 1990; by Bank director William J. Radosevich on November 6, 1990; and by Bank President Steven Hirsch and Bank director Bradley C. Lundeen on November 14, 1990. The certified letter was not received by Bank director Paul W. Hamblin, and the date of receipt of the letter by Bank director C.R. Hackworthy is unknown. Joint Stip. No. 12, June 13, 1991.

---

<sup>7</sup>The Bank's counsel advised that the FDIC Regional Office lacked the authority to withdraw approval of the branch.

---

<sup>8</sup>The Bank also received, On November 16, 1990, the FDIC's November 8, 1990, denial of the branch application. Joint Stip. No. 15, June 13, 1991.  
{-2-28-93 p.A-2142}

### III. DISCUSSION

The Board has carefully reviewed the entire record in this proceeding, including the parties' submissions, transcripts of the proceedings, the ALJ's Recommended Decision, and Exceptions filed by FDIC Enforcement Counsel. The Board notes that the ALJ properly considered the statutory factors: the size of the financial resources and good faith of the persons charged, the gravity of the violations (losses to the bank and benefit received by violators), the history of previous violations and such other factors as justice may require. 12 U.S.C. §1828(j)(3)(B), 12 U.S.C. §1818(i)(g). The ALJ also properly analyzed the guidance set forth in the "Interagency Policy Regarding the Assessment of Civil Money Penalties by the Federal Financial Regulatory Agencies," 45 Fed. Reg. 59, 423 (September 9, 1980) ("Interagency Policy") in his determination of the appropriate civil money penalties.<sup>9</sup>The ALJ considered the stipulated evidence of certain of the Respondents' financial resources and the fact that Respondents did not receive any type of economic benefit from the violation. R.D. at 3 through 6.

On the issue of gravity, the ALJ found a lack of history of previous violations, that the violations were few, not recurring, of extremely limited duration, and did not cause the Bank to suffer a direct or indirect economic loss. R.D. at 6. The ALJ concluded, and the Board agrees, that the violations were not merely technical, but, on the other hand, cannot be described as "grave." R.D. at 6. Concerning other matters required by justice, the ALJ reasoned, and the Board agrees, that the deterrent emphasis of the legislative policy and the failure of Respondents to take action to close the branch, following the

November 8, 1990, meeting, amply justify imposition of the civil money penalties. The ALJ did not reach the issue of whether the Order should contain a provision prohibiting Respondents from seeking reimbursement from the Bank for any penalty or legal expenses.<sup>10</sup> Finally, the Board finds that the ALJ's discussion and findings on the issue of good faith and the recommended assessments require modification.

#### A. *Good Faith*

In the Recommended Decision the ALJ found:

(1) the evidence of record does not establish that Respondents attempted to conceal their opening of the branch or otherwise deceive either petitioner or the state, (2) the opening of the branch bank in violation of state law was not based upon respondents' good faith reliance upon the advice of counsel, (3) the opening of a branch bank in violation of federal law was based upon Respondents' reliance in good faith upon the advice of counsel, (4) the violations were remedied when Petitioner sought closure of the branch in a manner which Respondents' counsel advised was within the Petitioner's authority and (5) Respondents' cooperation with the bank's request for the November 8 meeting and by the fact that the bank has

---

<sup>9</sup>In addition to the statutory factors, the interagency policy requires that the economic benefit to the Respondent from the illegal activity be considered as well as the following factors, relevant to the gravity of the violation:

- (1) Evidence that the violation or pattern of violations was intentional or committed with a disregard of the law or the consequences to the institution;
- (2) The frequency or recurrence of violations and the length of time the violation has been outstanding;
- (3) Continuation of violation after the Respondent becomes aware of it, or its immediate cessation and correction;
- (4) Failure to cooperate with the agency in effecting early resolution of the problem;
- (5) Evidence of concealment of the violation, or its voluntary disclosure;
- (6) Any threat of or actual loss or other harm to the institution, including harm to public confidence in the institution, and the degree of any such harm;
- (7) Evidence that participants or their associates received financial or other gain or benefit or preferential treatment as a result of or from the violation;
- (8) Evidence of any restitution by the participants in the violation;
- (9) History of prior violations, particularly where similarities exist between those and the violation under consideration;
- (10) Previous criticism of the institution for similar violations;
- (11) Presence or absence of a compliance program and its effectiveness;
- (12) Tendency to create unsafe or unsound banking practices or breach of fiduciary duty; and
- (13) The existence of agreements, commitments or orders intended to prevent the subject violations.

---

<sup>10</sup>The ALJ stated that he lacked the authority to resolve this matter since the scope of the remand was limited to determining the appropriate civil money penalties. R.D. at 7, fn. 18.

{{2-28-93 p.A-2143}} entered into an agreement with Petitioner concerning the latter's operations.

R.D. at 5.

FDIC Enforcement Counsel takes exception to findings 3, 4 and 5, and asserts that the ALJ has cast the issue of good faith as one of black or white. In the Recommended Decision, the ALJ states: "[i]f Respondents were justified in relying upon November 5 legal advice that the FDIC did not have authority to take action, the FDIC's November 8 reassertion of such authority cannot logically convert Respondents' continued reliance on the same legal advice to evidence of bad faith." R.D. at 5, fn. 11. The Board disagrees with the ALJ's analysis. Further, FDIC Enforcement Counsel states, and the Board agrees, that "the ALJ apparently assessed the amount solely for the violation of section 221.04(1)(jm)(1) of the Wisconsin Statutes, Wis. Stat. §221.04(1)(jm)(1), and not for the violation of section 18(d)(1) of the Federal Deposit Insurance Act ('FDI Act'), 12 U.S.C. §1828(d)(1)." Except. at 2.

The Board finds that the ALJ's analysis of good faith is flawed. Specifically, the ALJ's finding that Respondents' "good faith" reliance on the advice of counsel excused or negated the violation of federal law and his failure to assess a penalty for the federal law violation is contrary to prevailing law and the Board's earlier Decision. Accordingly, the Board rejects this analysis and finding.

Good faith goes to the amount of the penalty and *not* the determination to assess the penalty, *Fitzpatrick v. FDIC*, 765 F.2d 569 (6th Cir. 1985) (emphasis added). The reliance upon advice of counsel does not, in and of itself, excuse the violation. Nor does it bar the imposition of civil money penalties against Respondents for the violations of federal law as to which they had been forewarned by the regulators.

In this case, Respondents relied upon the advice of counsel when opening the branch on November 5, 1990. However, Respondents were informed by officials of the FDIC and a representative of the Commissioner at the meeting on November 8, 1990, that their actions violated both federal and state law and that civil money penalties would be assessed if they persisted in the violations. Joint Stip. Nos. 53 and 54, May 29, 1991. The fact that Respondents elected to keep the branch open in the face of these warnings is a factor relevant to the issue of good faith and our evaluation of Respondents' level of culpability for keeping the branch open for an additional eight days.

[.1] Recognizing that good faith is not a black or white issue, the Board places less weight than the ALJ on Respondents' "good faith" reliance on counsel in keeping the branch open after the November 8, 1990 warnings. In the Board's view, when Respondents were told by both the state and federal regulators that the branch must be closed immediately, they could no longer blindly rely on the advice of counsel that had been called into question. Prudent bankers should have either closed the branch or at least made an immediate independent inquiry at this juncture.<sup>11</sup>

Accordingly, finding 3 should be revised to state that the opening of the branch in violation of federal law was not based upon Respondents' good faith reliance upon the advice of counsel. Furthermore, the ALJ erred in findings 4 and 5 in giving Respondents credit for their actions to remedy the violations.

#### B. Assessments Adjusted

The Board agrees with the ALJ's analysis and conclusions regarding the state law violation. However, because of our modifications to findings 3, 4, and 5, adjustments to the amounts of assessments are warranted. Accordingly, the assessments for Respondents Steven J. Hirsch, C.R. Hackworthy, Paul W. Hamblin, James W. O'Connell, William J. Radosevich, Richard R. Schmitz, and Richard O. Stout are increased from \$500 to \$1,000.

The Board finds adequate factual evidence to support a lower penalty for James

---

<sup>11</sup>The Board notes that the Business Judgment Rule requires directors, prior to making a business decision, to inform themselves of all material information reasonably available to them. This places an affirmative duty on directors to proceed with a critical eye. *Smith v. Van Gorkom*, 488 A.2d 858, 872 (Del. 1985) (en banc); *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. Supr. 1984); *Brodsky & Adamski, Corp. Officers & Dir.* §2:09 at 37 (1989); *Kaepper & Bailey, Liability of Corp. Officers and Dir.* §6.17.

This duty is not unlike the duty to investigate the propriety of an insider transaction. *In the Matter of J.J. Silagy*, FDIC-89-144k, 1 P-H FDIC Enf. Dec. §5170.1 (October 22, 1991) (board members could not reasonably rely, but had duty to investigate a statement regarding calculation of the bank's lending limit for insider transactions).

{{2-28-93 p.A-2144}}V. Hirsch. Although Respondent, James V. Hirsch was present at the November 8, 1990, meeting, the fact that he did not take part in initiating the violation makes a lower assessment appropriate. Thus, the assessment for state and federal violations for Respondent James V. Hirsch is \$500. Although Respondent Lundeen has been found liable and shares responsibility for the violation, because of the fact that he was not informed of the violation until two days before closure of the branch, the Board exercises its discretion not to assess a penalty against him.

#### C. Prohibition of Indemnification

FDIC Enforcement Counsel urges inclusion in the Order of a provision prohibiting Respondents from accepting payment or seeking reimbursement from the Bank for any monetary penalty or legal expense, pursuant to section 2523 of the Comprehensive Thrift and Bank Fraud Prosecution and Taxpayer Recovery Act of 1990, Pub. L. No. 101-647, 104 Stat. 4789 (codified at section 8(k)(1) of the Act, 12 U.S.C. §1828(k)). This statute states that the Corporation may prohibit or limit, by regulation or order, any golden parachute payment of indemnification. 12 U.S.C. §1828(k)(1). Indemnification payment is defined at section 18(k)(5) of the Act, 12 U.S.C. §1828(k)(5), to include the reimbursement by any insured depository institution or depository institution holding company of any liability or legal expense with regard to any administrative proceeding which results in a final order assessing a civil money penalty.

[.2] The Board observes that a prohibition of indemnification provision was present in the Notice, and

that, if the Bank were to reimburse Respondents for the assessments or legal fees, such action would fall within the above definition of an indemnification payment. The Board also notes that this action was brought against the Respondents individually for their personal actions in causing the opening and operating of an illegal branch office, and no penalty was assessed against the Bank. In the Board's view, the penalties and legal fees should be borne by the individual Respondents since it would be unfair to require the Bank to bear the costs associated with these individual actions.

#### IV. CONCLUSION

The Board finds that Respondents caused the opening and the operation of a branch bank in Hudson, Wisconsin, for an eleven (11) day period without proper authority from the State and the FDIC. Respondents also caused the branch to operate without displaying an 'official bank sign' in violation of 12 C.F.R. §328.2. Therefore, the Board finds that there is ample basis to assess the civil money penalties set forth in the following Order.

#### ORDER

The Board of Directors of the FDIC, having considered the entire record in this proceeding, taking into account the appropriateness of the penalty with respect to the size and financial resources and good faith of Respondents, the gravity of the violations, and such other matters as justice may require, it is: ORDERED, that by reason of violations set forth above, the following civil money penalties are hereby assessed: Respondents Steven J. Hirsch, C.R. Hackworthy, Paul W. Hamblin, James W. O'Connell, William J. Hackworthy, Paul W. Hamblin, James W. O'Connell, William J. Radosevich, Richard R. Schmitz and Richard O. Stout, \$1,000.00 each, and Respondent James V. Hirsch, \$500.00.

IT IS FURTHER ORDERED, that the Executive Secretary, or his designee, is instructed to execute and serve copies of this Decision and Order on Civil Money Penalty Proceeding on counsel for all parties, on the Administrative Law Judge, and on the Commissioner of Banking for the State of Wisconsin.

By direction of the Board of Directors.

Dated at Washington, D.C. this 15th day of December, 1992.

/s/ Robert E. Feldman  
Deputy Executive Secretary

---

#### RECOMMENDED DECISION

**In the Matter of**  
**STEVEN J. HIRSCH, et al.,**  
**BANK ST. CROIX ROBERTS, WISCONSIN**  
**(Insured State Nonmember Bank)**  
**Docket No. FDIC-91-24k**

#### DECISION ON REMAND

CHARNO, *Administrative Law Judge*:

On February 11, 1991, the Federal Deposit Insurance Corporation (Petitioner or [2-28-93 p.A-2145](#)) FDIC issued a Notice of Assessment of Civil Money Penalties (Notice) against Steven J. Hirsch, James V. Hirsch, C.R. Hackworthy, Paul W. Hamblin, Bradley C. Lundeen, James W. O'Connell, William J. Radosevich, Richard R. Schmitz and Richard O. Stout (Respondents) as individual directors and institution-affiliated parties of Bank St. Croix (Bank). The Notice sought to impose a \$5,500 penalty on each of the Respondents for alleged violations of Section 18(d)(1) of the Federal Deposit Insurance Act (Act), 12 U.S.C. §1828(d)(1), Section 221.04(1)(jm)(1) of the Wisconsin Statutes, Wis. Stat. §221.04(1)(jm)(1), and Section 328.2 of the FDIC's Rules and Regulations, 12 C.F.R. §328.2, by opening a branch bank in Hudson, Wisconsin after approval to do so had been withdrawn by Petitioner and by the Commissioner of Banking of the State of Wisconsin (State).

A hearing was held before me in Chicago, Illinois on July 2, 1991. At the conclusion of Petitioner's case-in-chief and prior to the presentation of Respondents' defense, I granted Respondents' motion for summary disposition. By Decision and Order Remanding the Proceeding for Further Determination (Decision and Order) issued December 19, 1991, the FDIC's Board of Directors reversed my Decision, found that Respondents had committed each of the violations alleged in the Notice and remanded the case to me for further hearing on "the sole issue of the amount of appropriate civil money penalties to be imposed on Respondents . . ." <sup>1</sup>

Pursuant to the Decision and Order, a supplemental hearing was held before me in Minneapolis, Minnesota on July 8, 1992.<sup>2</sup>At the conclusion of the hearing, the parties waived the submission of briefs and presented oral argument.

## DISCUSSION<sup>3</sup>

Civil money penalties may be assessed whenever there is a violation of the statutory or regulatory promulgations which govern the relationship between a bank and its insiders. See 12 U.S.C. §§1818(i)(2). Respondents are concededly insiders by virtue of their positions as members of the Bank's Board of Directors. Because Respondents were found to have committed violations which render them liable for the payment of civil money penalties, the size of those penalties must be determined. In setting the amount of a penalty, Congress has mandated that:

the Corporation shall take into account the appropriateness of the penalty with respect to the size of the financial resources and good faith of the member bank or person charged, the gravity of the violation, the history of previous violations, and such other matters as justice may require. 12 U.S.C. §18(j)(4)(B).

The relative weight to be given each of these statutory factors is within the FDIC's discretion, which cannot be exercised arbitrarily and must be based on reasoned analysis and substantial evidence. See *Butz v. Glover Livestock Co.*, 411 U.S. 182, 185 (1973).

The Board of Directors of the FDIC has adopted the Interagency Policy Regarding the Assessment of Civil Money Penalties by the Federal Deposit Insurance Regulatory Agencies ("Interagency Policy") which provides:

In determining the amount of a civil money penalty, the agencies believe that a significant consideration should be the financial or economic benefit the Respondent obtained from the violation. . . . The removal of economic benefit will, however, usually be insufficient by itself to promote compliance with the statutory provisions. The penalty may, therefore, in appropriate circumstances reflect some additional amount beyond the economic benefit derived to provide a deterrent to future conduct. 45 Fed. Reg. 59423 (1980).

This emphasis on deterrence accurately reflects the legislative history of the statutory scheme which authorizes the imposition of civil money penalties. See S. Rep. No. 95-323, 95th Cong., 1st Sess. 9 (1977); H. Rep. No. 95-1383, 95th Cong., 2d Sess. 17

---

<sup>1</sup>The Decision and Order made no mention of the fact that Respondents had not been allowed an opportunity to present evidence in their own defense, merely concluding at page 11 that "all issues of material fact as to the violations and regulations have been resolved by stipulation. . ."

---

<sup>2</sup>The hearing was postponed until July 8 at the parties' joint request in order to allow them to engage in settlement negotiations. Those negotiations appear to have been fruitless.

---

<sup>3</sup>In order to conform to the format adopted by the Board of Directors in the Decision and Order, I have abandoned the practice of setting forth numbered findings of fact and conclusions of law. [{{2-28-93 p.A-2146}}](#)(1978). The removal of any economic benefit received by Respondent may appropriately be considered in the context of the statutory factor concerning the gravity of Respondent's offenses, while the deterrent aspect of the penalty is clearly relevant as a matter which "justice may require."

The Interagency Policy also lists 13 elements which an agency should consider in determining whether to initiate a civil money penalty assessment proceeding. Since these elements explicitly relate only to the decision to initiate a proceeding, they cannot be concluded to control the amount of the penalty ultimately set. As relevant, these elements will be considered in the context of the five statutorily mandated factors set out above.

### A. Financial Resources

The record establishes that, as of October 1, 1990, the Respondents named below enjoyed the indicated net worths:

Hackworthy	\$500,000.
Hamblin	1,000,000.
O'Connell	300,000.
Radosevich	200,000.
Schmitz	200,000.
Stout	500,000.

The record is devoid of probative evidence concerning the financial ability of Respondents Lundeen and James Hirsch to pay a civil money penalty.<sup>4</sup> At the time of the hearing, Respondent Steven Hirsch had insufficient liquid assets to pay a \$5,500 penalty and his net worth of at least \$45,000 was subject to possible deterioration as a result of domestic difficulties.<sup>5</sup> Petitioner contends that the penalties sought in this action are nominal and that Respondents' ability to pay is therefore immaterial. I find that Respondents' financial resources are sufficient to allow them to pay the civil money penalties assessed herein.<sup>6</sup>

#### B. Good Faith

A brief recapitulation of the findings of fact contained in the Decision and Order is necessary in order to assess Respondents' claim of good faith. Prior to October 29, 1990, the Bank had approval from Petitioner and the State to open the Hudson branch. By letter dated October 29,<sup>7</sup> the Bank informed the State that the branch would be opened on November 5. By letter delivered to the Bank's President Steven Hirsch on November 1, Petitioner withdrew its approval to open the branch. By letter dated November 1, the State suspended its approval to open the branch. The State's letter was received as indicated below:

O'Connell's spouse	November 3
Schmitz and James Hirsch	November 5
Radosevich	November 6
Lundeen and Steven Hirsch	November 14
Hackworthy	Unknown
Hamblin	Not received

Based on advise of legal counsel that Petitioner did not have authority to withdraw approval of the branch, the Bank's Board of Directors, except for Respondents Lundeen and James Hirsch who were absent, unanimously voted on November 5 to immediately open the branch. The branch was in fact opened later that day. At the Bank's request, a meeting was held on November 8 in Chicago between representatives of Petitioner, the State and the Bank. The latter was represented by its legal counsel and all of the Respondents in this proceeding except Respondent Lundeen, who was absent. At this meeting, Petitioner and the State reasserted the positions set forth in their earlier letters and Petitioner's representative stated that civil money penalties would be assessed against Respondents unless the branch was closed immediately. Directly after the meeting, Respondents (except for Respondent Lundeen) consulted with their attorney and asked whether Petitioner could impose civil money penalties against them. Their attorney responded in the negative on the ground that Petitioner had not had authority to withdraw approval of the branch.<sup>8</sup> The Bank continued to operate the branch until November 16 when Petitioner's letter denying the branch application was received

---

<sup>4</sup>Petitioner's attempted demonstration that these Respondents were possessed of certain assets is meaningless in the absence of any evidence of their respective liabilities.

---

<sup>5</sup>Hirsch so testified without controversion.

---

<sup>6</sup>Notwithstanding the absence of evidence concerning the resources of Respondents Lundeen and James Hirsch. I believe that they are in a position to pay the nominal penalties which I have assessed.

---

<sup>7</sup>This letter was not received until November 6.

---

<sup>8</sup>Findings concerning Respondents' consultation with counsel are based on the uncontroverted testimony

of Steven Hirsch.

{{2-28-93 p.A-2147}}by the Bank.<sup>9</sup>During the period the branch was open, the Bank failed to display an official bank sign.

All of the Respondents except Lundeen and James Hirsch acted to open the branch on November 5 with full knowledge of the fact that Petitioner had withdrawn its approval. By November 8, all of the Respondents except Lundeen were aware that the branch was being operated without approval by either Petitioner or the State. There is no evidence that Respondent Lundeen was responsible for operation of the branch<sup>10</sup>or was even aware of the State's or Petitioner's position prior to November 14; I therefore find that there is no evidence that he acted in other than good faith.

Respondents argue that they opened and operated the branch in good faith reliance on their attorney's advice concerning the extent of Petitioner's authority. The record supports this argument in that the majority of Respondents sought and received legal advice justifying their position on November 5 and, again, on November 8.<sup>11</sup>I therefore find that the previously found violation of Section 18(d)(1) of the Act was committed in good faith reliance on the advice of counsel.<sup>12</sup>Petitioner contends that, while Respondents may have sought and received advice concerning the FDIC's position, they did not seek similar advice concerning the State's suspension of approval to open the branch. Respondents' argument that I should infer that their attorney's November 8 advice concerning civil money penalties must have been based upon a rejection of the State's position is not supported by the record.<sup>13</sup>Accordingly, I find that the previously found violation of Section 221.04(1) (jm)(1) of Wisconsin Statutes was not based upon a good faith reliance upon the advice of legal counsel. It is not contended that the failure to display an official sign in violation of 12 C.F.R. §328.2 was based on advice of counsel.

In summary, I find that (1) the evidence of record does not establish that Respondents attempted to conceal their opening of the branch or otherwise to deceive either Petitioner or the State, (2) the opening of a branch bank in violation of state law was not based upon Respondents' good faith reliance upon the advice of counsel, (3) the opening of a branch bank in violation of Federal law was based upon Respondents' reliance in good faith upon the advice of counsel, (4) the violations were remedied when Petitioner sought closure of the branch in a manner which Respondents' counsel advised was within Petitioner's authority and (5) Respondents' cooperation with the Bank's regulators is evidenced by the Bank's request for the November 8 meeting and by the fact that the Bank has entered an agreement with Petitioner concerning the latter's operations.<sup>14</sup>

### C. Gravity of the Violation

The FDIC has traditionally measured the gravity of a respondent's violations in two ways: (1) the extent to which the respondent benefitted from those violations and (2) the effect of the violations upon the bank. Turning to the first measure, it is agreed that none of the Respondents in this proceeding received any type of economic benefit as a result of the violations previously found herein. Accordingly, I find it inappropriate for the penalty in this proceeding to include any element intended to remove such benefits. With respect to the second measure, the effect of Respondents' violations on the Bank appears to be minimal. As the FDIC's Board of Directors observed on appeal from my earlier Decision, "the violations at issue were short-lived, have been rectified, and the Bank is now operating under a consent agree-

---

<sup>9</sup>The Bank and Respondents concede that Petitioner had authority to take this action.

---

<sup>10</sup>The scope of the remand set forth in the Decision and Order precluded the Respondents from demonstrating that they sought to have the branch closed prior to November 16.

---

<sup>11</sup>Petitioner contends that the reaffirmation of its position on November 8 precludes Respondents' subsequent reliance in good faith on advice of counsel. If Respondents were justified in relying upon November 5 legal advice that the FDIC did not have authority to take action, the FDIC's November 8 reassertion of such authority cannot logically convert Respondents' continued reliance on the same legal advice to evidence of bad faith.

---

<sup>12</sup>Petitioner's argument that the majority of the Respondents were attempting to exercise good business judgment when they decided to open the branch in no way negates Respondents' good faith reliance on the advice of counsel.

---

<sup>13</sup>This finding is based on the testimony of Steven Hirsch concerning Respondents' consultations with their attorney on November 8.

---

<sup>14</sup>Decision and Order at 18.

ment."<sup>15</sup>Based on the fact that the branch's assets did not decrease as a result of the November 16 closure,<sup>16</sup>it would appear that Respondents' violations did not weaken public confidence in the Bank.<sup>17</sup>In any event, there is no reason to believe that closure of a branch after eight days of operation would have a more serious impact on public confidence than would a failure to open a much-heralded branch for which dedicated premises had been constructed.

In summary, I find that Respondents' violations (1) were few, (2) were not of a recurring nature, (3) where of extremely limited duration, (4) did not economically benefit Respondents, (5) did not cause the Bank to suffer a direct or indirect economic loss and (6) were not shown to have adversely affected the Bank in any other way. Based on the foregoing findings, I must conclude that Respondents' violations cannot be described as "grave."

#### D. History of Previous Violations

It is agreed that Respondents do not have a history of previous violations.

#### E. Matters Required By Justice

Several additional elements identified in the Interagency Policy may be considered at this juncture. As discussed above, the violations have been rectified. In addition, Respondents' violations were not shown to have created an unsafe or unsound condition at the Bank.

The final factor requiring consideration is the deterrent emphasis of the legislative policy which underlies the statutory authorization of civil money penalties. The failure of Respondents to take action in response to the State's suspension of approval cannot be dismissed as a mere "technical violation." Indeed, the deterrence of such a failure to act in the future provides ample justification for the imposition of a civil money penalty.

#### F. Amount of the Penalties

On or before November 8, eight of the nine Respondents became aware of the State's suspension of approval. Notwithstanding this awareness, these eight men allowed the branch to operate in violation of state law until November 16. After consideration of the statutory factors set out above, I find that Respondents Steven Hirsch, Hackworthy, Hamblin, O'Connell, Radosevich, Schmitz and Stout should each pay a civil money penalty of \$500. Because Respondent James Hirsch took no affirmative action in violation of law or regulation, I believe that his penalty should be set at a lower level than that of the majority of the Respondents who voted to open the branch. I therefore find that Respondent James Hirsch should pay a penalty of \$250. Finally, because Respondent Lundeen was not shown to be aware of the State's suspension of approval until November 14, I can only conclude that any violations on his part were of minimal duration and his penalty should reflect that fact. Accordingly, I find that Respondent Lundeen should pay a penalty of five dollars.<sup>18</sup>

Based on the foregoing findings of fact and conclusions of law and upon the entire record in this proceeding, I hereby make the following recommended:

### ORDER

It is ORDERED that:

1. By reason of their violations of law and regulation, Steven J. Hirsch, C.R. Hackworthy, Paul W. Hamblin, James W. O'Connell, William J. Radosevich, Richard R. Schmitz and Richard O. Stout is each assessed a civil money penalty in the amount of \$500.00, James V. Hirsch is assessed a civil money penalty in the amount of \$250.00, and Bradley C. Lundeen is assessed a civil money penalty in the amount of \$5.00 pursuant to Section 8(i)(2) of the Federal Deposit Insurance Act, 12 U.S.C. §1818(i)(2).

2. This Order shall be effective and the ordered penalty shall be final and payable twenty (20) days from this Order's date of issuance by the Board of Directors of the Federal Deposit Insurance Corporation.

Done at Arlington, Virginia, this 10th day of August, 1992.

/s/ Steven M. Charno  
Administrative Law Judge

---

<sup>15</sup>Decision and Order at 18.

---

<sup>16</sup>Steven Hirsch so testified without controversion.

---

<sup>17</sup>I find this evidence to be of greater probity than Steven Hirsch's protestation in November of 1991

concerning a prospective loss of public confidence.

---

<sup>18</sup>At the hearing, the parties presented limited argument concerning the propriety of prohibiting the reimbursement of attorneys' fees incurred in defending this action. Given the scope of the remand set forth in the Decision and Order, I conclude that I have been denied authority to resolve the matter.

Last Updated 6/6/2003

[legal@fdic.gov](mailto:legal@fdic.gov)