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{{6-30-92 p.A-1530}}

[¶5153] In the Matter of R. Wayne Lowe and Jimmy A. Spivey, Docket No. FDIC-89-21k(4-16-90).

Civil Money Penalty assessed against principal shareholder and director and another director as a result of extensions of credit exceeding Bank's lending limitation and without full disclosure of Respondents' interests to Board of Directors. (*This decision has been affirmed by the United States Court of Appeals, 958 F. 2d 1526*.)

[.1] Practice and Procedure—Evidence—Hearsay

Failure to produce records required to be maintained will be treated as basis for inference adverse to party who has access to and would benefit from such evidence.

[.2] Civil Money Penalties—Amount of Penalty—Payment of Legal Fees

Limitation of Civil Money Penalty to legal fees paid can never be justified unless charged party has little culpability and limited resources.

[.3] Directors—Duties and Responsibilities—Conflict of Interest

Bank directors must affirmatively avoid a conflict of interest by making complete disclosure to other directors.

[.4] Civil Money Penalties—Amount of Penalty—Personal Gain

In assessing Civil Money Penalties, it is appropriate to consider whether director received a credit directly or indirectly, whether credit contained preferential terms, and whether director profited personally.

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[.5] Regulation O—Definitions—Unfavorable Features

The term "Unfavorable Features" used in Regulation O to describe aspects of extensions of credit to directors and principal shareholders is not unenforceably vague.

In the Matter of
R. WAYNE LOWE, individually and as a director and principal shareholder;
JIMMY A. SPIVEY, individually and as a director of
INTERNATIONAL CITY BANK
WARNER ROBINS, GEORGIA
(Insured State Nonmember Bank)
DECISION AND ORDER

This proceeding was initiated on March 13, 1989, pursuant to the FDIC's Notice of Assessment of Civil Money Penalties, Findings of Fact and Conclusions of Law, Order To Pay, and Notice of Hearing ("CMP Notice") directed to Respondents Lowe and Spivey as well as the other directors of the International City Bank, Warner Robins, Georgia ("ICB"). The CMP Notice sought to impose civil money penalties of $75,000 and $7500 on Lowe and Spivey, respectively for violations of the lending limit, creditworthiness, and prior approval requirements of 12 U.S.C. §375b, as incorporated by 12 U.S.C. §1828(j), and Regulation O, 12 C.F.R. §215. Prior to the hearing, the FDIC settled with all of the Respondents except Lowe and Spivey.

A hearing was held on September 5–7, 1989, before Administrative Law Judge Steven M. Charno ("the ALJ"). On December 20, 1989, the ALJ issued a Recommended Decision ("R.D.") assessing a civil penalty of $13,150 against Lowe and dismissing the CMP Notice as to Spivey on the ground that the legal fees he incurred in contesting the CMP Notice were adequate punishment.

Both sides filed Exceptions to the ALJ's Recommended Decision, although most of the ALJ's findings are not in dispute. The FDIC Enforcement Counsel ("Enforcement Counsel") has taken exception to six categories of Findings of Fact ("F.F.") and some of the Conclusions of Law ("C.L."). Lowe and Spivey have taken exception only to Conclusions of Law. The Board of Directors of the FDIC ("Board") has reviewed all of the challenged portions of the ALJ's Recommended Decision *de novo*.

With the exception of F.F. Nos. 118 and 119 and the factual findings discussed at R.D. 8–11 and 14, the Board adopts all of the ALJ's Findings of Fact. The Board also adopts the ALJ's Conclusions of Law

except for Nos. 26 and 27 and those discussed at R.D. 8–11. However, because the Board finds that the ALJ correctly concluded that assessment of a CMP was warranted but committed both factual and legal errors in his calculation of the CMP, the Board affirms his decision as modified herein.

I. *BACKGROUND*

Most of the facts in this case are not in dispute.[1] At all pertinent times, Lowe was a director and principal shareholder of ICB and Spivey was a director. Beginning in January 1985, ICB extended loans in greater and greater amounts to Lowe or to entities in which Lowe had an interest. By March 1987, the loans to Lowe and his interests totalled $980,986 and exceeded ICB's lending limits by $480,067. In February 1988, the amount of outstanding credit to Lowe and his interests was $516,987. Extensions of credit or renewals of credit to Lowe and his interests occurred on practically a monthly basis.

From early 1985 through early 1988, thirteen of these extensions or renewals of credit in excess of five percent of ICB's unimpaired capital and principal occurred without the prior approval of ICB's Board of Directors in contravention of 12 U.S.C. §375b(2) and 12 C.F.R. §215.4(b). During a total of 466 days, the extensions of credit to Lowe exceeded ICB's limit for unsecured loans to a principal shareholder: 15 percent of unimpaired capital and surplus. 12 C.F.R. §215.2(f). As of March 31, 1987, the total outstanding direct and indirect extensions of credit to Lowe equaled 42 percent of ICB's total equity capital and reserves and more than 5.5 percent of ICB's total extensions of credit to all borrowers.

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[1] This section of the Decision is based solely on those facts not in dispute.

{{4-1-90 p.A-1532}}

In addition, regarding two loans made to Quintax Equities and the extension of credit by purchase of the Dublin Bond issue, Lowe failed to disclose to the Board of Directors that the proceeds might be or would be transferred to the benefit of Colonial Associates and Prime Time Properties, entities in which he had an interest. The Quintax loans also contained three unfavorable features: (1) they were unsecured, (2) the endorsers did not reside in the same state as ICB, and (3) Quintax had a negative net worth. However, Lowe did not engage in fraud or concealment, and he did not participate in any vote approving an extension of credit to him or his interests.

In sum, even without considering those facts and legal conclusions of issue, the undisputed facts reveal significant violations of Regulation O attributable to Lowe and his related interests. Although none of the extensions of credit was made to Spivey, as a director of ICB with a fiduciary duty he clearly bears some responsibility for the violations.

II. *THE ALJ'S DECISION*

1. Regulatory Violations

The ALJ's decision carefully addressed the factual questions raised by the evidence of regulatory violations. He found that only one question arose on the issue of whether loans to Lowe and his interests violated regulatory limits for loans to a principal shareholder: whether the loans to Quintax Equities should be counted because Lowe claimed that the transfer of proceeds to an entity, Colonial Associates, of which Lowe was a general partner, did not constitute a transfer to a related interest (R.D. 3). The ALJ rejected this claim because he found the evidence demonstrated that Lowe not only identified Colonial as a related interest in ICB's records, but his authority and compensation also suggested that in fact he played a substantial role with significant discretionary authority in Colonial (R.D. 3).

Next, the ALJ determined that ICB's records demonstrated that on thirteen occasions extensions of credit in excess of the regulatory limit of five percent of unimpaired capital and surplus had been made to a principal shareholder without prior approval of ICB's board of directors (R.D. 4–6). He based his finding on the ICB board's minutes, which he found, with certain minor exceptions, had faithfully and accurately recorded all actions of the ICB Board (R.D. 5–6). He concluded that after-the-fact approval as to certain of the extensions of credit did not satisfy regulatory requirements (R.D. 5, n.5). No board minutes or incomplete minutes existed for the dates of four extensions of credit; in those cases, the ALJ found that prior approval had been granted by the ICB board based on undisputed testimony (R.D. 5–6).

Finally, the ALJ examined allegations that the Quintax loans contained "unfavorable features" violating the creditworthiness requirements of Regulation O (R.D. 6–7). The ALJ noted that the existence of three unfavorable features was uncontested: (1) the loans were unsecured, (2) they were endorsed by individuals residing out of state, and (3) at the time they were made, Quintax had a negative net worth (R.D. 7). The ALJ concluded that expert testimony of the FDIC examiners supported the finding that these features were "unfavorable" (R.D. 7 and n.12).[2]

The ALJ then turned to the calculation of the penalty. He noted the Congressional mandate in 12 U.S.C. 1828(j)(3)(B) that the penalty calculations take into account five factors: "the size of the financial resources and good faith of the. . .person charged, the gravity of the violation, the history of previous violations, and such other factors as justice may require" (R.D. 7). He also observed that the FDIC had adopted the "Interagency Policy Regarding the Assessment of Civil Money Penalties by the Federal Financial Regulatory Agencies" ("Interagency Policy"), 45 Fed. Reg. 59423 (Sept. 9, 1980), which emphasized the deterrent nature of the penalties and listed thirteen elements relevant to be considered in determining whether to initiate a civil penalty proceeding.

In considering the financial resources of Lowe and Spivey, the ALJ concluded that both of them had sufficient financial resources to pay the penalties proposed by the FDIC and that the FDIC had taken that factor into account in proposing the penalties (R.D. 8).[3] He also decided that one

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[2] The ALJ concluded that the allegation by the FDIC of a fourth unfavorable features was moot because he had already found three (R.D. 7, n.13).

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[3] The ALJ found Lowe to have a net worth in excess of $13 million and Spivey to have a net worth in excess of $840,000 (R.D. 27).

{{4-1-90 p.A-1533}}aspect of personal financial resources to be considered in calculating the penalty was the unfavorable cost of litigation, and he was unable to determine whether that fact had been considered by the FDIC (R.D. 8).

Next, the ALJ considered the good faith of Lowe and Spivey (R.D. 8–11). He noted that certain proposed findings on this issue were unopposed: that neither man exercised undue influence, acted to conceal information from regulatory authorities, failed to cooperate with regulatory authorities, or failed to take quick action to remedy violations brought to his attention (R.D. 9). The ALJ also found that it was undisputed that Spivey had not acted to deceive or conceal information from the ICB board, that he did not act with intentional or reckless disregard of the law, and that he did not fail to cooperate with the ICB board to resolve problems (R.D. 9).

The ALJ recognized that the crucial issues in dispute relating to good faith were: (1) whether Lowe had concealed from or failed to advise the ICB board that the proceeds of the Quintax and Colonial loans would be transferred to entities in which Lowe had an interest, and (2) whether the failure of Lowe and Spivey to recognize the violations occurring constituted a breach of fiduciary duty or an unsafe or unsound banking practice (R.D. 8–9, 9–10). With respect to the first issue, the ALJ found that Lowe had not concealed information from or failed to advise the ICB board, because at the time of the extensions of credit, (1) he was unaware, in the case of the Quintax loans, that proceeds would be transferred to entities in which he had an interest, and (2) he believed, in connection with the Dublin Bond issue, that the board had materials before it indicating his interest (R.D. 8–9). The ALJ also declined to find that Lowe and Spivey had acted improperly in failing to recognize the violations, because they had properly relied on the expertise of the bank's officers (R.D. 10). He notes that these violations were sophisticated and technical, and bank examiners had overlooked some of them (R.D. 10). Accordingly, he found that the violations were unintentional and not committed in bad faith, and that the FDIC had failed to consider these facts in proposing a penalty (R.D. 11).

The ALJ then considered the factor of the gravity of the violations. He noted that most of the basic facts concerning the violations themselves had already been addressed and that they were subject to little dispute (R.D. 12). He reiterated that he had already rejected the contention that Lowe acted in bad faith, and turned to the issue of whether Lowe had received a tangible economic benefit from the loans to Quintax and the Dublin Bond issue (R.D. 12). He opined that the only kind of economic benefit which the Interagency Policy deemed worthy of consideration in assessing a penalty was a benefit which the penalty could remove, i.e., some form of personal gain (R.D. 12 and n.25). He concluded that Lowe had not received any such benefit, and, that, in fact, Lowe's payment of interest on loans to him and his interests had significantly benefited ICB.

He then addressed the question of whether ICB had suffered a $50,000 loss on the second Quintax loan which would affect the gravity of the violations (R.D. 13). He noted that $50,000 of the proposed $75,000 penalty for Lowe was based on the asserted loss. He concluded, based on Lowe's testimony and hearsay testimony of one FDIC examiner, that no loss had occurred because the loan had been completely repaid (R.D. 13).

The ALJ next dealt with the history of prior violations (R.D. 14). He recognized that this factor is relevant to establishing to what extent the bank's management is on notice "concerning the kind of violations which are the basis for a civil money penalty action." (R.D. 14). Although noting that the historical violations need not be attributable to the persons charged in the action, he opined that they "should be of the same type as those which underlie the penalty action" (R.D. 14).

Based on these standards, the ALJ found that violations of Regulation O were noted in four or five previous examinations, that one previous violation involved lending limits, and that three involved a failure to obtain prior approval (R.D. 14). He concluded, however, that this record refuted the FDIC's view, in proposing penalties, that there had been a history of "continuous violations' documented in four out of five examinations" (R.D. 14).

Finally, the ALJ considered and adopted several uncontested findings regarding the magnitude of the lending limit violations at {{4-1-90 p.A-1534}}issue (set forth *supra*, p. 3) (R.D. 14). He also concluded, prior to analyzing the factors together and calculating the penalty, that the case involved unintentional rather than reckless violations which did not warrant "harsh punishment or strong deterrent measures" (R.D. 14–15).

2. Calculation of Penalty

The ALJ's calculation of Spivey's penalty was based on two factors. He observed that the record evidence almost completely supported a reduction in Spivey's penalty (R.D. 15). He also concluded that "Spivey's violations will be appropriately punished by requiring him to pay legal fees in connection with this proceeding" (R.D. 14). Accordingly, the ALJ declined to assess a penalty against Spivey.

The calculation of Lowe's penalty began with the premise that $50,000 of the proposed $75,000 penalty, based on the alleged $50,000 loss on the Quintax II loan, was unsupported by the record (R.D. 15). The ALJ then observed that an examination of the statutory factors revealed that the FDIC had relied, in assessing the penalty, on a number of findings the ALJ found to be unsupported by the evidence and had ignored or rejected mitigating evidence which he deemed to be relevant (R.D. 15). He acknowledged that Lowe's position differed from Spivey's in several relevant respects: Lowe and his interests were involved in the violations, he had more information concerning the transactions, and he was in a better position and had more reason to make "meaningful inquiries" concerning the transactions (R.D. 15). In sum, the ALJ concluded that "the violations . . . may be more fairly ascribed to him than any other member of the Board" (R.D. 15). Accordingly, he assessed against Lowe a $13,150 penalty, representing $25 per day for lending limit violations and $100 per violation for prior approval and creditworthiness violations (R.D. 15).

III. *DISCUSSION*

As stated above, the Board affirms the ALJ's Recommended Decision as modified herein. The Board largely agrees with the ALJ's factual findings; the disagreement is with his judgment as to the significance of those facts. The Board believes the violations at issue to be more serious than the ALJ found them to be, largely because the Board finds merit in Enforcement Counsel's exceptions relating to the calculation of the penalties for Lowe and Spivey.

[.1**]** Both parties have filed Exceptions to the Recommended Decision. Enforcement Counsel has taken exception to a number of findings of fact, most of which involve the ALJ's findings that the evidence did not disclose the occurrence of certain violations and a $50,000 loss on the Quintax II loan. Except as discussed below relating to the issue of whether Lowe's violations demonstrated a breach of fiduciary duty or reckless action, we affirm all of the ALJ's disputed factual findings for the reasons stated in the Recommended Decision.[4]

Both Enforcement Counsel and Respondents Lowe and Spivey take exception to a number of the ALJ's legal conclusions. Both parties raise concerns regarding the ALJ's discussion of the significance of the fact that a party will incur legal fees in determining an appropriate civil money penalty ("CMP"). Enforcement Counsel objects to the ALJ's treatment of the issue of whether Lowe engaged in concealment, recklessly violated the law, or breached his fiduciary duty in failing to disclose to the ICB board his interest in the Quintax loans and Dublin Bond issue. Enforcement Counsel also disputes the ALJ's conclusion that Lowe received no tangible personal benefit in connection with those extensions of credit. Finally, Enforcement Counsel asserts that the ALJ failed to attribute adequate significance to the history of prior violations.

Lowe and Spivey raise two issues. First, they argue that no penalty should be assessed for "technical" violations not involving at least negligence or breach of fiduciary duty. Second they take exception to the finding that the Quintax loans contained "unfavorable features" because those terms are alleged to be unenforceably vague.

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[4] The Board would make two observations in response to Enforcement Counsel's factual exceptions. First, on four occasions where board minutes were either nonexistent or inadequate, the ALJ found, based on testimony, that the board granted prior approval with respect to certain extensions of credit. In

such a case where the institution's records fail to disclose relevant information, the citation for violation is more appropriate under 12 C.F.R. §215.7, the recordkeeping regulation. Second, it seems clear that the question of whether the Quintax II loan was completely repaid is capable of conclusive resolution because documents which bear on this issue (cancelled check, bank records) must exist. In the future, the Board will treat the failure to produce such evidence as the basis for an adverse inference against the party which has access to and would benefit from that evidence.
{{4-1-90 p.A-1535}}

In evaluating these exceptions, we emphasize that in determining the amount of the penalty to be imposed, Congress has mandated a five-part test:

> 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 . . . person charged, the gravity of the violation, and such other matters as justice may require. 12 U.S.C. §1828(j)(3)(B).[5] The Board has carefully considered all of these exceptions, and the Board's conclusions are discussed below. Consideration of these issues has been organized on the basis of the five statutory factors: financial resources, good faith, gravity of the violations, history of prior violations, and other factors as justice may require.

A. Financial Resources—
The Consideration to be Given to the Legal
Fees Incurred by a Respondent

[.2**]** Both parties raise concerns with the ALJ's discussion of the significance of the fact that a party will incur legal fees in determining an appropriate CMP. The ALJ determined that the unavoidable costs of legal representation should be considered in fixing the CMP because legal fees bear on the statutory factor of the parties' financial resources available to pay the CMP (R.D. 8, 30). Because the ALJ found that Spivey's violations of Regulation O were not very significant, he determined that Spivey was adequately punished by having to pay legal fees and that he would not assess an additional CMP (R.D. 15). Enforcement Counsel objects that legal fees should not be considered at all. Respondent Spivey expresses concern that the ALJ's decision is unclear because he cannot determine whether or not he has been exonerated.

The Board does not agree with the ALJ's reading of the statute as requiring some consideration of legal fees as part of the overall inquiry concerning the party's ability to pay the CMP. Therefore, the Board concludes that the ALJ incorrectly applied the law. It is undisputed that Spivey had a net worth of almost $850,000 (R.D. 27). In the Board's view, limiting the CMP to legal fees paid can never be justified under the financial resources prong of the CMP test unless the charged party has little culpability and his very limited resources are essentially depleted by substantial legal fees. Thus, legal fees and expenses are only one minor factor to be considered in terms of ability to pay. As the court recognized in *Fitzpatrick v. FDIC*, 765 F.2d 569, 578 (6th Cir. 1985), in cases similar to Spivey's in which the violations do not merit a substantial CMP, the legal fees may often exceed the penalty. Yet, the deterrent purposes of the statute require imposition of a penalty, even though it may have only moral force in that particular case. *Id.* Therefore, given Spivey's financial resources, the Board concludes that the ALJ was incorrect in declining to assess a CMP because of the legal fees Spivey incurred.

B. Good Faith—The Significance of
Lowe's Failure to Disclose to the Board
His Interest in the Quintax Loans and
Dublin Bond Issue

Enforcement Counsel contends that the ALJ erred in declining to find that Lowe concealed from the ICB board of directors pertinent information concerning the Quintax I and II loans and the Dublin Bond issue or at least acted with reckless disregard of the law or in breach of fiduciary duty. Specifically, Lowe allegedly concealed from the ICB board the fact that some or all of the proceeds of the Quintax loans would be transferred to the Colonial Associates, an entity of which he was the general partner, and that the proceeds of the Dublin Bond issue would be transferred to Prime Time Properties, an entity of which he controlled 50% of the stock. The ALJ at least implicitly found, and the Board agrees, that Lowe did not advise the ICB board of these matters. The ALJ also found, and the Board agrees, that Lowe did not affirmatively conceal these matters from the ICB board (R.D. 8–9). In the case of the Quintax loans, the ALJ found that Lowe did not know at the time of the ICB board's approval that the proceeds would be transferred to Colonial. With respect to the Dublin Bond issue, the ALJ found that the ICB board had offering materials before it indicating that Prime Time Properties would receive proceeds of the bond purchase.

[9] The Board has adopted the Interagency Policy. That document specifies thirteen factors which the agency should consider in its decision to initiate an assessment of penalties. Although these factors do not control the penalty ultimately set, they serve to elucidate various aspects of the statutory criteria. {{4-1-90 p.A-1536}}

The Board concludes that the ALJ's findings are not completely correct as a factual matter. The ALJ credited Lowe's testimony (R.D. 9, notes 14 and 15) on these matters, and his testimony reveals several important undisputed facts. First, as just discussed, implicit in the ALJ's findings is the fact that Lowe made no disclosure to the board concerning the interest of his related entities, Colonial Associates and Prime Time Properties, in the Quintax loans and the Dublin Bond issue. Second, although Lowe testified that he was not aware prior to the approval of the Quintax loans that proceeds would be transferred to Colonial, he also testified that he was aware of the possibility that such an event could occur (Tr. 579-80). Third, Lowe testified that although he did not inform the Board that Prime Time Properties would receive proceeds of the Dublin Bond issue and that his interest in Prime Time Properties was fully explained in the offering memorandum, he also testified that he did not recall the offering documents being present in the board room at the time of the discussion and vote on the Dublin Bond issue (Tr. 583). Thus, although the Board finds that Lowe did not affirmatively conceal his interest in these matters, he was aware of his interest and failed to fully disclose it.

Enforcement Counsel also takes exception to the failure of the ALJ to conclude as a legal matter, that, in connection with the Quintax loans and Dublin Bond issue, Lowe did not intentionally violate the law or act with reckless disregard of it or in breach of his fiduciary duty. Although the Board agrees with the ALJ that Lowe's actions did not amount to affirmative concealment, Lowe's testimony, which the ALJ credited on this issue, plainly reveals that Lowe failed to disclose his interest. The legal significance of that failure depends on whether the law required Lowe to make a disclosure in those situations.

[.3**]** In the Board's view, the fiduciary duty of loyalty which bank directors owe their institution requires a bank director to investigate the possibility of a conflict of interest and be completely candid with his colleagues. When a bank director finds himself in a situation involving a conflict of interest, as here, it is incumbent on him to make complete disclosure in order to affirmatively avoid a conflict, even if such disclosure seems superfluous.

Therefore, Lowe's failure to ensure that potential conflicts inherent in the Quintax loans and the Dublin Bond issue were disclosed, is, in the Board's view, a breach of his fiduciary duty and a reckless disregard for the requirements of Regulation O. However, the Board does not view his conduct as reaching the level of active concealment and recognizes that he did not vote on any of the transactions at issue. These facts furnish some basis for adjusting the penalty assessed.

C. Gravity of the Violations

1. Assessing a Penalty for "technical violations" of Regulation O

Respondents object to the assessment of a CMP for "technical violations" of Regulation O which do not involve some form of negligence or breach of fiduciary duty. This issue primarily affects Spivey. The ALJ refused to accept this contention (R.D. 2), and the Board agrees with that refusal.

The statute, 12 U.S.C. §§375b, 504, 1828, and the regulations in 12 C.F.R. §215 clearly assign liability for any violation and do not require some further showing of culpability. Culpability is a factor which only affects the amount of the penalty as a part of the statutory criterion of "good faith of the . . . person charged." 12 U.S.C. §1828(j)(3)(B). *See Fitzpatrick v. FDIC*, 765 F.2d at 577, 578 (recognizing that a technical violation may give rise to only a nominal penalty). The legislation was designed to deal with the problem of insider abuse and fraud found to be at the root of the failure of many financial institutions. The legislation's structure is manifestly "prophylactic in nature," designed for preventing abuse before it occurs through strict prohibitions rather than dealing with the aftereffects of insider extensions of credit on a case-by-case basis. *See Whirlpool Corp. v. Marshall*, 445 U.S. 1, 12 (1980). Accordingly, the Board rejects Respondents' argument that a CMP cannot be assessed for "technical violations" of Regulation O.

2. Personal benefit from the Quintax loans and the Dublin Bond issue

Enforcement Counsel disputes the ALJ's conclusion that Lowe received no personal benefit from the Quintax and Dublin Bond extensions of credit. The ALJ found that because Lowe did not directly receive any form of gain from these loans, he received no personal benefit (R.D. 12–13). Enforce- {{4-1-90 p.A-1537}} ment Counsel did not challenge the underlying factual finding, and the Board agrees with the ALJ

that Lowe did not receive any direct personal gain.

The Board does conclude, however, that Lowe and his related entities did receive two forms of an indirect economic benefit. First, there is no question that both of Lowe's related interests received the extensions of credit that exceeded ICB's lending limits. As a legal matter, the receipt of credit that should not have been received is an economic benefit which must be directly attributed to Lowe. The ALJ properly recognized Lowe's receipt of this indirect benefit (R.D. 15). Second, the extensions of credit to Quintax, which contained unfavorable features, independently constituted an indirect economic benefit to Lowe and his interests, because the finding of unfavorable features suggests a strong likelihood that his related interests would not have received such loans from another bank on the same terms.

[.4**]** Thus, the Board concludes that in considering the gravity of the violations, it is appropriate to consider: (1) whether the extension of credit was received directly or indirectly by a particular director or his interests, (2) whether that credit contained preferential terms or unfavorable features, and (3) whether the recipient of the credit somehow profited personally from the credit or the bank sustained a loss as a result of the credit (bearing in mind that certain preferential terms in a loan, such as a below-market interest rate, may represent a profit to the recipient).[6]In this case, it is clear that Lowe or his interests received a direct or indirect economic benefit, that the loans contained preferential terms, and that those facts weigh on the gravity of his violations.

D. History of Prior Violations—The Significance of the Record of Prior Violations

Enforcement Counsel takes exception to the ALJ's finding that there was no history of continuous Regulation O violations at ICB. The ALJ found (R.D. 14; F.F. No. 122 at R.D. 27–28) that there had been previous violations. He concluded, however, that those violations were different from those at issue in this case (R.D. 14). Accordingly, he gave them little weight in calculating the penalty. However, the ALJ found and Respondents do not dispute that Regulation O violations had been cited in four out of five previous examinations. Thus, the Board finds that four out of the five previous examinations revealed Regulation O violations, including three prior approval and one lending limit violations. The Board concludes that these prior violations of Regulation O in four out of five prior examinations constitute a history of prior violations.

E. *Other Matters as Justice Requires—The Contention that the Terms "Unfavorable Features" are Unenforceably Vague*

[.5**]** The Respondents allege that the terms "unfavorable features", as used to describe aspects of extensions of credit to directors and principal shareholders which violate Regulation O, 12 C.F.R. §215.4(a)(2), are unenforceably vague and violate the Due Process Clause of the Fifth Amendment of the United States Constitution. As set forth above, the ALJ identified three features of the Quintax loans which he found to be unfavorable: (1) they were unsecured, (2) they had out of state endorsers, and (3) Quintax had a negative net worth at the time of the loans (R.D. 6–7). The Respondents do not object to these findings of fact but complain that it is impossible for bank directors to ascertain prior to approving the loans which features might be deemed unfavorable because the language is allegedly so vague.

The Board concludes that the language is not unenforceably vague. In a case, as here, involving neither criminal sanctions nor First Amendment rights, the test for constitutional vagueness is an external, objective one: "So long as the mandate affords reasonable warning of the proscribed conduct in light of common understanding and practices, it will pass constitutional muster." *Ryder Truck Lines v. Brennan*, 497 F.2d 230, 233 (5th Cir. 1974). In this case, the terms "look to whether an objective lender at the time the loan was made would have extended the credit based on the available information at the time." *Bullion v. FDIC*, 881 F.2d 1368, 1374 (5th Cir. 1989).

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[6] Two cases furnishing examples of the third category of benefit are FDIC-87-71k, 2 P-H FDIC Enf. Dec. ¶5114 at 7574 (1988), *aff'd sub nom. Bullion v. FDIC*, 881 F.2d 1368 (5th Cir. 1989), and FDIC-85-2k, 2 P-H FDIC Enf. Dec. ¶5063 at 6614 (1986).

{{4-1-90 p.A-1538}}The terms are clearly understandable from the surrounding language in the statute and regulations. The language in 12 U.S.C. §375b(3) and 12 C.F.R. §215.4(a)(2) requires that the loan at issue "not involve more than the normal risk of repayment or other unfavorable features." In context, this language plainly refers to features of the loan which either, as here, directly affect the risk of repayment or decrease the attractiveness of the loan for some other reason.[7]The expert testimony of the FDIC examiners established why the particular features of the Quintax loans at issue would be considered

unattractive by prudent lenders. It is easy to understand why these features, which adversely affect the risk of repayment on the loans and ICB's ability to collect on them if they go into default, increased the riskiness of the loans.[8] Accordingly, the Board concludes that these terms are not unenforceably vague.

IV. *CALCULATION OF THE PENALTY*

Pursuant to 12 U.S.C. §1823(j) and 12 C.F.R. §215.11, the maximum possible penalty which could be assessed is $481,000 based on a possible $1000 per day penalty for 466 days of lending limit violations, thirteen prior approval violations at $1000 per violation, and two creditworthiness violations at $1000 per violation. The FDIC proposed an actual penalty of $75,000 for Lowe and $7500 for Spivey. $50,000 of the $75,000 penalty for Lowe reflected the alleged $50,000 loss to ICB from the Quintax II loan. The ALJ reduced the penalty for Lowe to $13,150 and declined to assess any penalty on Spivey. As noted above, the Board finds that the record reflects more serious violations than the ALJ recognized. Accordingly, the Board has independently considered the entire record in this proceeding in light of the statutory factors to determine the appropriate penalties in this case.

Lowe. Lowe unquestionably has very substantial financial resources with which he could pay a penalty. While his cooperation with regulators and lack of active concealment of facts is undisputed, his failure to take affirmative steps to avoid any potential conflicts of interest by making full disclosure of the interest of his related entities in the Quintax loans and Dublin Bond issue is a breach of his fiduciary duty to the Bank. The Board recognizes that none of his violations involves fraud or concealment, that he did not vote on any of the loans, and that he has not failed to cooperate with ICB's board or banking regulatory authorities. However, the record shows repeated large lending limit violations resulting in extensions of credit to Lowe and his related interests aggregating almost twice the allowable lending limit and numerous prior approval violations. At the same time, the Board recognizes that ICB sustained no losses and that Lowe did not receive any direct personal profit as a result of the Regulation O violations.[9] However, it is also clear, as discussed above, that Lowe indirectly benefited through his related interest from the illegal extensions of credit. The Board also finds the history of previous similar violations to be very significant. Finally, the Board finds no other matters which the interests of justice require it to consider.

Based on this analysis of the statutory factors, the Board finds that an appropriate penalty giving weight to the statutory factors and providing a deterrent against future violations is $35,000.

Spivey. Spivey's ability to pay a substantial penalty is undisputed. In addition, the gravity of the violations for which he bears responsibility as a director is significant, in light of the history of previous violations. A major difference between Spivey and Lowe, which the Board considers under the rubric of gravity of the violations, is that Spivey did not receive any form of personal benefit from the extensions of credit. Spivey's culpability for the violations is of a lower order of magnitude. Nonetheless, he was on notice of his fiduciary responsibility as a di-

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[7] A previous decision of this Board recognized, for example, that the insolvency of a borrower, similar to Quintax's negative net worth, was an unfavorable feature involving more than the normal risk of repayment. FDIC-87-61e, 87-62k, 2 P-H FDIC Enf. Dec. ¶5113 at 7554 (1988).

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[8] Contrary to Respondents' exception, the purpose of the expert testimony is not to point out extremely arcane but unattractive features of these loans which ordinary bankers would not deem to be a problem. Rather, the expert testimony merely establishes why prudent lenders deem these features to be unfavorable. In this case, the fact that the particular features identified are unfavorable is practically a matter of common sense.

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[9] The ALJ placed some emphasis (R.D. 13) on the fact that the loans to Lowe benefited ICB economically. The Board does not regard this economic benefit as a distinct consideration; it is merely the flip side of the consideration of whether the bank sustained losses or the charged party gained a personal benefit. If there is no loss to the institution and the charged party does not gain a personal benefit (e.g., from the loan being made on preferential terms), then the bank will necessarily receive an economic benefit.

{{5-31-92 p.A-1539}}rector of ICB at the time of these violations; he was on notice as to the prior violations; and he failed to properly fulfill his fiduciary duty as a director. The Board concludes an appropriate penalty for Spivey considering the statutory factors and the record, giving appropriate weight to deterrence of future violations, is $5,000.

ORDER TO PAY CIVIL MONEY

PENALTIES

The Board of Directors of the FDIC, having considered the entire record in this proceeding, including the briefs filed on behalf of Respondents and the FDIC, the ALJ's Recommended Decision and Order dated December 20, 1989, and exceptions to the Recommended Decision and Order filed by each party, and after taking into consideration the appropriateness of the penalties with respect to the financial resources and good faith of the Respondents, the gravity of the violations, the history of previous violations, and such other matters as justice may require, makes the following findings. The Board finds on the record before it that Respondents violated section 22(h) of the Federal Reserve Act (12 U.S.C. §375b) and sections 215.4(a)-(c) of the Regulation O promulgated thereunder (12 C.F.R. §215.4(a)-(c)).

ACCORDINGLY, IT IS HEREBY ORDERED, that by reason of the violations set forth above, a penalty of $35,000 be, and hereby is, assessed against R. Wayne Lowe; and a penalty of $5,000 be, and hereby is, assessed against Jimmy A. Spivey, pursuant to section 18(j) of the Federal Deposit Insurance Act, 12 U.S.C. §1823(j)(3).

IT IS FURTHER ORDERED, that this Order shall be effective and the penalty ordered shall be final and payable twenty (20) days from the date of this Order. The provisions of this Order shall remain effective and enforceable except to the extent that, and until such time as, any provision of this Order shall have been modified, terminated, suspended, or set aside by the Board.

IT IS FURTHER ORDERED, that copies of this Decision and Order be served upon all parties of record in this proceeding, the Administrative Law Judge, and the Commissioner of Banking and Finance for the State of Georgia.

By direction of the Board of Directors.

Dated at Washington, D.C., this 16th day of April, 1990.

/s/ Hoyle L. Robinson
Executive Secretary

RECOMMENDED DECISION

In the Matter of
R. Wayne Lowe
and
Jimmy A. Spivey International City Bank
Warner Robins, Georgia
Steven M. Charno, Administrative Law Judge:

A Notice of Assessment of Civil Penalty was issued by the Federal Deposit Insurance Corporation ("FDIC" or "Petitioner") on March 13, 1989, alleging that R. Wayne Lowe and Jimmy A. Spivey ("Respondents")[1] violated certain prohibitions and requirements of Section 22(h) of the Federal Reserve Act ("Act"), 12 U.S.C. § 375b, and Regulation O of the Board of Governors of the Federal Reserve System ("Regulation O"), 12 C.F.R. §215. Respondents' Answers demurred as to the propriety of the penalties sought by Petitioner.

A hearing was held before me in Macon, Georgia on September 5–7, 1989.[2] Initial briefs were filed by Petitioner and Respondents under due date of November 6, 1989, and reply briefs were filed by the parties under due date of November 21, 1989.

DISCUSSION

I. Alleged Violations

Petitioner is empowered to assess civil money penalties for certain violations of the Act committed by insured banks which are not members of the Federal Reserve System. 12 U.S.C. § 1828(j). In this proceeding, Petitioner alleges that Respondents have violated three different provisions of Section 22(h) of the Act and Regulation O: (1) the aggregate lending limit prohibitions, (2) the prior approval requirements and (3) the creditworthiness requirements.

While the vast majority of factual issues in this proceeding have been resolved by stipulations among the parties, Respondents have made three essentially legal arguments which

[1] Additional individual respondents reached settlement agreements with Petitioner and were amended out of the action at the outset of the hearing.

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[2] The unopposed transcript corrections proposed by Petitioner and Respondents are hereby adopted. {{5-31-92 p.A-1540}}relate to all three types of violations. First, Respondents contend in essence that they are not liable for civil money penalties because all of their violations were inadvertent. While the question of Respondents' good faith is of substantial importance in determining the amount of any penalty in this proceeding, their intent is wholly immaterial to the question of their liability for having committed any of the precisely defined, highly technical statutory violations here at issue. *Fitzpatrick v. FDIC*, 765 F.2d 569, 578 (6th Cir. 1985). Second, Respondents contend that they had a right to rely upon the failure of the FDIC and the Department of Banking and Finance of Georgia ("State") to inform their bank that it was in violation of the relevant statute and regulations. To the contrary, the law is clear that Petitioner has no duty to warn banks of internal irregularities or violations. *See First State Bank of Hudson v. United States*, 599 F.2d 558, 563 (3d Cir. 1979), *cert. denied*, 444 U.S. 1013 (1980); *Harmsen v. Smith*, 586 F.2d 156, 157 (9th Cir. 1978). Accordingly, Respondents cannot rely on Petitioner's failure to supply such a warning.

Respondents' final contention of general applicability raises the question of whether they were shown to have committed any of the violations which may have taken place. In effect, they argue that a sufficient nexus has not been shown between their actions and the violations. The required nexus consists of "any action . . . for or toward causing, bringing about, participating in, counseling, or aiding or abetting a violation." 12 U.S.C. § 1828(j)(4)(A). Given this exceptionally broad definition and Respondents' admitted participation on the Bank's Board of Directors during the relevant period, I find that the uncontested failures of Lowe and Spivey to prevent the violations at issue constitute a sufficient demonstration of nexus to support findings of liability.

A. Lending Limits

Section 22(h) of the Act, as implemented by Regulation O, establishes a limit on the aggregate extensions of credit which a nonmember insured bank may make to a principal shareholder and to such a person's related interests. 12 C.F.R. § 215.4(c). It is uncontested that International City Bank ("Bank") is a nonmember insured bank, that Lowe is a principal shareholder of the Bank and that Peachbelt Properties, Inc. ("Peachbelt") and Prime Time Properties, Inc. ("PTP") are his related interests. An "extension of credit" takes place (1) when a loan is made or renewed to a principal shareholder or his related interests or (2) when a loan is made, the proceeds of which are "used for the tangible economic benefit of, or are transferred to," a principal shareholder or to one of his related interests. 12 C.F.R. § 215.3. If the proceeds of a loan are transferred to a principal shareholder or his related interest, it is immaterial to the existence of an "extension of credit" that a third party may benefit from the loan. *See Docket No. FDIC-85-2k*, [1986] F.D.I.C. Enf. Dec. (P-H) ¶5063.

Respondents dispute only those alleged lending limit violations which are based on loans by the Bank to Quintax Equities, Inc. ("Quintax") for $175,000 on March 29, 1985 ("Quintax I loan") and for $150,000 on November 23, 1986 ("Quintax II loan"). It is uncontested that $147,625 of the proceeds of the Quintax I loan and all of the proceeds of the Quintax II loan were transferred to Colonial Associates ("Colonial"), a limited partnership of which Lowe was the sole general partner. Respondents argue that these loans did not give rise to violations because Colonial was not one of Lowe's related interests. The record does not support this argument, and I find to the contrary.[3]Accordingly, I further find the disputed transactions to be lending limit violations.

B. Prior Approval

Section 22(h) and Regulation O also prohibit an extension of credit greater than five percent of a bank's unimpaired capital and surplus to a principal shareholder and his related interests, unless the extension is approved in advance by a vote of a majority of the bank's board of directors in which the principal shareholder did not participate. 12 U.S.C. § 375b(2); 12 C.F.R. § 215.4(b).

The minutes of the meeting of the Bank's Board of Directors for September 17, 1986 record that the Board explicitly gave Regu-

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[3] This finding is based on the fact that Lowe's submission to the Bank explicitly identified Colonial as one of his related interests, as do the Bank's internal records. In addition, the admissions elicited from Lowe on cross-examination concerning his duties and authority as Colonial's general partner establish that he enjoyed and exercised the power to control a significant segment of the partnership's affairs, even after

the contractual arrangements limiting his powers are taken into account. Certainly, the size of the fees he received from Colonial are more commensurate with a position requiring the exercise of discretionary authority than with a purely ministerial post.
{{8-31-91 p.A-1540.1}}lation O approval to two loans, notwithstanding the fact that both had previously been approved and referred by the Bank's Finance Committee; these minutes make no reference to approving the renewal of a $43,000 loan to Lowe on September 20. At a November 14, 1986 Board meeting, an $144,000 loan to Lowe, which had previously been approved and referred by the Finance Committee, was given Regulation O approval with Lowe abstaining, but these minutes make no mention of approving extensions of credit directly to Lowe for $118,500 on November 20 or indirectly to Colonial for $150,000 on November 23. While a loan to Spivey received Regulation O approval at the December 17, 1986 meeting of the Board of Directors, there is no reference in the minutes of that meeting to approval of the following loans which were subsequently made to Lowe and his related interests: (1) a $7,000 origination to Peachbelt on December 18, (2) a $72,500 origination to Lowe on December 31, (3) an $100,000 renewal to Lowe on January 16, Although the minutes of the Board meeting on February 18, 1987 evidence retroactive approval of a $72,500 loan "made in January by the bank" to Lowe,[4] they do not indicate approval of any of the following loan renewals: (1) $118,500 to Lowe on February 18, (2) $144,000 to Lowe on February 18, (3) $100,000 to Lowe on February 20 and (4) $50,000 to Peachbelt on February 20. The Board minutes for March 18, 1987 do not record any Regulation O approvals, but the Bank renewed a $72,500 loan to Lowe on March 31. On April 16, 1987, the renewal of four loans to Lowe, including one for $72,500,[5] was approved on the recommendation of the Bank's Loan Committee.[6] Again on May 20, 1987, the Board did not report any Regulation O approvals; an indirect extension of credit to Colonial was renewed three days later.

It was the Bank's policy and practice to record "all actions by the Board of Directors in the minutes,"[7] and the minutes for each meeting were approved at the next meeting[8] to insure accuracy. More specifically, it was the Board of Directors' policy and practice to note Regulation O approvals in their minutes whenever such approvals occurred,[9] and the Board's minutes record numerous instances where explicitly identified loans to Lowe and others received such approval.[10]

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[4] It is unclear from the record whether this entry was intended to refer to the December 31, 1986 loan noted above. Even if it were a reference to the December loan, that extension of credit was not a renewal, and the parties agreed that the requirements of Regulation O cannot be satisfied by an approval given after a loan has been funded.

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[5] I find that this after-the-fact approval did not meet the requirements of Regulation O. Respondents contend that any note requiring Regulation O approval which matured before Board approval of a renewal was considered by the Bank to be "past-due" until the renewal was approved and "back-dated" to coincide with the maturity date of the original note. Spivey's testimony that it was his "understanding" that the Bank's officers did not renew insider notes before securing Board approval appears to be limited by his admission that the Board was "frustrated" by Bank management's failure to have all renewals approved before the original notes matured. The testimony concerning Spivey's understanding was directly contradicted by that of the Bank's former President and Chief Executive Officer who admitted that, "in one or two instances, it might be that they were renewed a day or two prior to the Board meeting and then approved at the regular Board meeting. . . ." The record contains no testimony or documentary evidence that any renewal note was ever actually "back-dated." For the foregoing reasons, I find that at least some of the Bank's Regulation O loans were renewed before being approved by the Board of Directors. I therefore conclude that Respondents have not rebutted an inference that the March 31 loan did not receive prior approval.

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[6] In an unusual departure from the Board's normal practice, the minutes of this meeting fail to reflect the abstentions of either Lowe or the other insiders whose loans were approved. Based on Lowe's uncontroverted testimony that he consistently abstained from voting on the approval of any loans made to him by the Bank, I find that the minutes were in error and that Lowe did not vote in this instance.

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[7] This quotation is taken from the credited testimony of the individual who served as the Bank's President and Chief Executive Officer during the period when prior approval violations were alleged to have occurred: corroborative testimony was given by Spivey and Director Ivey.

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[8] This finding is based on the credited testimony of Director Ivey and those extracts of the minutes which are of record.

[9] This finding is based on Spivey's credited admission, which is supported by the numerous Regulation O approvals found in the minutes of the Board's meetings.

[10] Respondents argue that some loans subject to Regulation O were approved by the Bank's Finance or Loan Committees and that the action of those committees was then approved by the Board of Directors. The minutes of the Board meetings on September 17 and November 14, 1986 and April 14, 1987 establish that, even where a committee had previously approved an insider loan, the entire Board of Directors still voted on whether to grant Regulation O approval to the loan and the results of the Board's vote was recorded in the minutes of the meeting in which the vote took place. Neither the Bank's former President nor Director Ivey testified to the contrary, although both indicated that a loan might have been approved by a committee and that action recorded in the
(Continued)

{{8-31-91 p.A-1540.2}}For the foregoing reasons, I infer that no Regulation O approval took place which was not recorded in the Board's minutes.

This inference cannot be drawn where the record does not contain the minutes of the Board of Directors' meeting which preceded the origination or renewal of a loan allegedly violative of Regulation O. Thus, I find that the preponderance of the evidence does not establish that renewals of loans to Lowe for $100,000 on September 16, 1986 and July 6, 1987 and for $118,500 on September 10, 1987 and February 13, 1988 lacked prior approval by the Board of Directors.[11] I find the remaining 13 loans at issue to be violative of the prior approval requirements of Regulation O, as alleged in Petitioner's post-hearing request for findings of fact.

C. Creditworthiness

Finally, Section 22(h) and Regulation O prohibit an extension of credit to the related interest of a principal shareholder where that extension involves "unfavorable features." 12 U.S.C. § 375b(3); 12 C.F.R. § 215.4(a). Petitioner alleges that the two indirect extensions of credit to Colonial (i.e., the Quintax I and II loans) violate this prohibition. To support this allegation, Petitioner requests two findings of fact which identify four purportedly unfavorable features shared by the Quintax loans.

The existence of three of these features in uncontested: both loans were unsecured, both were endorsed by individuals residing outside the state and both were made at a time when Quintax had a deficit net worth. All three features were shown by expert testimony to be "unfavorable."[12] I therefore find that both loans violate the creditworthiness requirement of Regulation O.[13]

II. Amount of the Penalty

Because Respondents committed violations of the Federal Reserve Act which render them liable for the payment of civil money penalties, the size of those penalties must be determined. Petitioner contends that Lowe should pay a penalty of $75,000, while Spivey should be assessed a penalty of $7,500. The maximum penalty which may be imposed in this case is limited by statute to $1,000 for each day during which a violation continued. 12 U.S.C. § 18(j)(3)(A). In determining the actual penalty to be imposed, 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)(3)(B). (Emphasis supplied.)

The relative weight to be given each of these statutory factors is within the agency'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 Financial Institutions 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). (Emphasis supplied.)

This emphasis on deterrence accurately reflects the legislative history of the statutory scheme authorizing the imposition of civil money penalties. See S. Rep. No. 95-323,

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10 Continued: committee's minutes. The record contains no documentary evidence that any loan subject to Regulation O which was approved by a committee was not also approved by the Board of Directors in formal session. Accordingly, I reject Respondents' argument.

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11 While the record has minutes for the Board of Directors' meeting on September 17, 1986, comparable minutes for the August 20, 1986 meeting are not in evidence. Similarly, the record does not contain minutes for a Board meeting between July 15 and September 16, 1987. Finally, the minutes of the Board meetings on June 17, 1987 and January 20, 1988, which were offered and received in evidence, are fatally incomplete.

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12 Review Examiner King credibly testified that out-of-state endorsers and the absence of security were unfavorable features of both Quintax loans, while Examiner Pollack testified that Quintax's operation with "a negative capital position" constituted an unfavorable feature.

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13 Given the finding in text, Respondents' challenge of the fourth purportedly unfavorable feature is moot. {{8-31-91 p.A-1540.3}}95th Cong., 1st Sess. 9 (1977); H. Rep. No. 95-1383, 95th Cong., 2d Sess. 17 (1978). The removal of any economic benefit received by Respondents may appropriately be considered in the context of the statutory factor concerning the gravity of Respondents' 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 penalty ultimately set in such a proceeding. As relevant, these elements will be considered in the context of the five statutorily mandated factors set out above.

A. Size of Financial Resources

It is uncontested that each Respondent has a personal net worth sufficient to enable him to pay the penalty that Petitioner has proposed. It is further uncontested that Petitioner has taken the size of Respondents' financial resources into account in assessing the penalties here at issue.

Well-reasoned commentary on the imposition of civil money penalties suggests that the statutory factor pertaining to financial resources should be interpreted to include a charged party's level of subjective pain or penalty tolerance. Dee Diver, The Assessment and Mitigation of Civil Money Penalties by Federal Administrative Agencies, 79 Colum. L. Rev. 1435 (1979). Accordingly, I find that the unavoidably substantial cost of legal representation in this proceeding is an appropriate factor bearing on the questions of mitigation and of Respondents' subjective pain level. As such, it should be taken into account in setting the amount of the penalty herein. It is unknown whether this factor was considered by Petitioner.

B. Good Faith

Petitioner has proposed two findings of fact relating to the issue of Respondents' good faith, both of which embody facts considered by the FDIC in setting the penalty proposed in this case. The requested finding that Lowe failed to advise the Bank's Board of Directors that the proceeds of the Quintax loans would be transferred to Colonial is both immaterial and misleading since Lowe was unaware at the time the Board voted on these loans that such transfers would take place.[14]Similarly, the other requested finding that Lowe did not advise the Board that the proceeds of an $185,000 bond issue by the Residential Care Facilities of the Elderly Authority of Dublin, Georgia ("Dublin bond issue") would be transferred to PTP does not establish a bad faith attempt at concealment since the Bank was and remained in possession of formal printed offering materials which disclosed the intended transfer of proceeds.[15]There is no evidence which would suggest that these documents were not available to the Board at the time it voted to acquire the Dublin bond issue. For the foregoing reasons, I decline to make either of the findings sought by Petitioner on this issue and adopt Respondents' proposed finding that Lowe was not shown to have acted deceptively or to conceal material facts from the Bank's Board of Directors.

Respondents have requested four unopposed findings concerning the good faith of both Lowe and Spivey: (1) neither exercised undue influence, (2) neither acted to deceive or conceal any material information from the FDIC or State examiners, (3) neither failed to cooperate with the FDIC or State examiners and (4) neither failed to initiate immediate action designed to eliminate any violation brought to his attention. Three additional findings proposed by Respondents concerning Spivey's good faith are similarly unopposed by Petitioner: (1) Spivey did not act to deceive or conceal any material information from the Bank's Board of Directors, (2) he did not act with an international or reckless disregard of the law or the consequences of his actions upon the Bank and (3) he did not fail to cooperate with the Bank's Board of Directors to resolve any problems.[16]The consideration given by Pe-

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[14] I credit Lowe's uncontroverted testimony to this effect. The possibility that Lowe may have known of such a transfer at some point subsequent to the Board's consideration of the loans is clearly immaterial.

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[15] Lowe credibly so testified without exception.

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[16] Petitioner objects to the adoption of a comparable finding concerning Lowe because he demurred to the Bank President's request that Colonial repay a portion of the Quintax II loan, which the FDIC had classified as "loss." Neither Lowe nor Colonial was legally obligated to repay the loan, Lowe explained that he was advised not to do
(Continued)

{{8-31-91 p.A-1540.4}}titioner to these indicia of good faith in unknown.

The foregoing concessions notwithstanding, Petitioner objects to requested findings that Lowe did not act intentionally or recklessly and that Respondents neither breached their fiduciary duty to the Bank nor committed any unsafe or unsound banking practice. The validity of these objections turns in major part on the extent of Respondents' duty to the Bank. It is clear that each of the Respondents, by virtue of his office as a Director, was legally obliged to "exercise ordinary care and prudence in the administration of the affairs of his bank." *Docket No. FDIC-85-192k*, [1987] F.D.I.C. Enf. Dec. (P-H) ¶5091, at 7135. Petitioner correctly notes that a director cannot delegate every aspect of this duty to a bank's officers; a director must retain the derivative duties of "reasonable supervision" and "reasonable inquiry." *See Docket No. FDIC-85-192k, supra; Docket No. FDIC-85-25e*, [1987] F.D.I.C. Enf. Dec. (P-H) ¶5082, at 7020.

Respondents reply that it was proper under the facts of this case for them to rely on the expertise of the Bank's officers in order to insure compliance with statutory and regulatory guidelines. It is undisputed that neither Lowe nor Spivey had any training or experience as a banker prior to the time they became members of the Bank's Board of Directors.[17]The Bank had a compliance program in effect during the relevant period which was designed to prevent violations of Regulation O,[18]and members of the Board of Directors questioned the Bank's President at every meeting as to whether any matter before them might violate the strictures of Regulation O.[19]The record does not suggest that more extensive inquiry might have prevented a violation. I cannot conclude that inexperienced Directors were derelict in their duty when they fruitlessly queried the Bank's experienced officers concerning the existence of violations which were sophisticated, technical and overlooked by more than one bank examiner. There is no dispute that the Bank's then-President misinformed its Directors, that Petitioner's 1988 examination disclosed the extent of that misinformation, that the President's 19-month tenure with the Bank came to an abrupt end hard on the heels of that examination and that the Bank's condition thereafter improved.[20]

Based on these facts, I find that Lowe was not shown to have intentionally violated Regulation O or to have acted with reckless disregard for the law or the consequences of his actions. I further find that neither Respondent was shown to have breached his fiduciary duty to the Bank,[21]to have failed to make "reasonable inquiry" of the Bank's officers or to have failed in the duty of "reasonable supervision" of those officers.[22]For the foregoing reasons, I find that Respondents' violations were unintentional and were not shown to have been committed in bad faith.[23]I further find that Petitioner did not

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[16 Continued:] so by Colonial's attorney and the Bank never suffered an actual loss on the loan. Given these facts, I find that Lowe's refusal to comply falls far short of a failure to cooperate with the Board of Directors in order to solve a real problem. I shall therefore adopt the finding requested by Respondents.

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[17] This lack of experience distinguishes the instant case from the most of those cited by Petitioner.

[18] There is documentary evidence that, from at least July 1986 through January 1988, the members of the Board received periodic briefing statements which indicated outstanding loans to Directors and the Bank's capital position. These statements are of limited utility to one without some expertise in the regulation of banking, but they should—when accurately prepared—have allowed an experienced officer to counsel an inexperienced Board of Directors. In any event, I cannot credit Examiner Pollack's testimony that "you could almost say" that the Bank's violations were intentional because Respondents "never initiated a program to prevent it."

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[19] Lowe, Spivey and Director Ivey credibly so testified without exception. The nature and extent of this questioning was described in detail by Ivey, whose testimony is entitled to great weight by virtue of his demeanor and relative disinterest in the outcome of this proceeding.

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[20] Review Examiner King so testified concerning the Bank's condition.

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[21] Review Examiner King tended to find "some kind of breach of fiduciary duties," as well as a disregard for the statute, based on the duration of lending limit violations. Acceptance of King's inference presupposes that Respondents' failure to hold the Bank's officers to a higher standard of performance was either international or based on a reckless disregard for the consequences of their actions. As discussed above, neither of these alternatives is supported by a preponderance of the evidence.

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[22] Given the finding in text, I must reject the suggestion of one of Petitioner's experts that Respondents may have engaged in an unsafe or unsound banking practice by failing to adequately supervise the Bank's officers. Since neither the Notice in this case nor Petitioner's requested findings mention such an allegation, its emergence at this stage of the proceeding would be barred on both Constitutional and procedural grounds.

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[23] One of the 13 elements noted in the Interagency Policy is the existence of "evidence of a tendency to create unsafe or unsound banking practices." Petitioner's experts testified that Regulation O violations were, in effect, *per se* unsafe or unsound banking practices. Petitioner argues that the very Regulation O violations which are the subject of a civil money penalty proceedings constitute the evidence referred to in the Interagency Policy. If so, this
(Continued)

{{8-31-91 p.A-1540.5}}consider these facts in setting the penalties proposed in this case.

C. Gravity of the Violation

Subsumed under the rubric of this statutory factor are Petitioner's requests for findings of fact setting forth the duration of the lending limit violations found herein, reiterating the fact that all or a portion of the proceeds of certain loans to third parties were transferred to Lowe's related interests and stating that the Bank lost money due to the violations found herein. It is uncontested that Petitioner considered these matters in arriving at the amount of the penalties proposed herein.

Respondents do not question the mathematical accuracy of the first category of findings requested by Petitioner, and the grounds underlying Respondents' objections were discussed and rejected in the portion of this Decision relating to liability. Petitioner's findings concerning the duration of lending limit violations will therefore be adopted, although modified in form.

If the purpose of the requested findings concerning transfer of the proceeds of the Quintax loans and the Dublin bond issue to Lowe's related interests is merely to reiterate the argument that Lowe acted in bad faith,[24]then the findings are rejected for the reasons outlined in the previous section. If their purpose is to demonstrate that Lowe received tangible economic benefit which he should disgorge, they are not supported by the record. Any penalty in this case will be assessed against and paid by an individual, not a "related interest." Thus, the economic benefit to be removed by a civil money penalty should be one Lowe "obtained from the violation" in order to fulfill the explicit requirements of the Interagency Policy.[25]This point would hardly seem worth mention under most circumstances, but the facts in this case are somewhat unusual. Although Lowe had the power to control significant aspects of Colonial's affairs, he owned only one percent of the partnership, and there is substantial evidence that he never received any economic benefit as a result of his percentage interest.[26]Similarly, the record is bare of evidence that Lowe received any personal economic benefit from PTP. Since there is not evidence that Lowe could or did personally benefit from the Quintax loans or the Dublin bond issue in a way which would permit the required "removal" of that benefit, I must reject Petitioner's requested findings which appear intended to

suggest a contrary conclusion. In contrast, it is uncontested that Lowe economically benefitted the Bank by making interest payments in excess of $198,000.

The validity of Petitioner's final requested finding relating to the gravity of Respondents' offenses is dependent on the amount of loss suffered by the Bank. Petitioner asserts without qualification that "the record clearly shows that the Bank had sustained a $50,000 loss as a result of the Quintax II transaction." The Interagency Policy requires that a civil money penalty remove that portion of economic benefit which is based on loss to the affected bank, and the FDIC's memorandum authorizing the penalties in this case stated "[t]hese extensions of credit have resulted in a loss of $50,000 to the bank, with no restitution made."[27]The memorandum goes on to explicitly base $50,000 of Lowe's proposed penalty on the

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23 Continued: element of the Policy is meaningless because exactly the same "evidence" would exist in every case and that "evidence" could add nothing to a rational analysis of how the perpetrator of a violation should be penalized. I asked Petitioner to brief this issue but received only the argument that, in other contexts, the FDIC has found a Regulation O violation to be an unsafe or unsound banking practice: Petitioner also suggested that the Interagency Policy might actually refer to a "condition," rather than a "practice." Assuming *arguendo* that the violations found herein are evidence of an unsafe or unsound banking practice, I am forced to conclude that the existence of that practice in this case can contribute nothing to the reasoned analysis required of the FDIC. Accordingly, I reject as immaterial Respondents' requested findings concerning Petitioner's failure to prove the existence of any unsafe or unsound banking practices.

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24 The comparable finding which Petitioner requested in its pretrial brief referred to Lowe's purported knowledge that Colonial would receive economic benefit.

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25 On brief, Petitioner appeared to argue that Lowe enjoyed an economic benefit because he and his related interests had the use of the money loaned by the Bank. Such a benefit could not be removed by a civil money penalty after the loans were repaid. It therefore appears highly unlikely that this species of "benefit" ever occurred to the drafters of the Interagency Policy. In any event, this question is moot since Petitioner failed to request an appropriate finding concerning it.

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26 Burton's credited testimony concerning Colonial's precarious financial position is supported by Lowe's assessment of the partnership's value at the time it commenced operation.

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27 Petitioner's memorandum so states.

{{8-31-91 p.A-1540.6}}purported loss to the Bank.[28]In fact, the Quintax II loan was repaid in its entirety—the Bank never suffered a loss of any kind as a result of any extension of credit to Lowe or his related interests.[29]Because Petitioner's argument and requested finding are without record support, they must be rejected.

D. History of Prior Violations

Petitioner and Respondents have requested conflicting findings concerning this factor. In general, a history of violations establishes whether and to what extent a bank's management has been placed on notice concerning the kind of violations which are the basis for a civil money penalty action. Accordingly, earlier violations should be of the same type as those which underlie the penalty action. Moreover, historical violations need not have been personal to the individual charged, since that person may properly be charged with receipt of any notice given to the bank.

In March of 1985, Petitioner's examination of the Bank revealed no violations of Regulation O. A November 1985 State examination reported two cases of insufficient collateral,[30]which were described as violative of the preferential terms prohibition of Regulation O, 12 C.F.R. § 214.4(a)(1).[31]Petitioner's July 1986 examination of the Bank disclosed two prior approval violations of Regulation O, and a State examination in December of that year reported an additional prior approval violation. Finally, the State's examination eight months later documented one lending limit violation and incorrectly cited the Bank for a prior approval violation.[32]

It is uncontested that, when Petitioner set the penalties proposed in this case, it considered a history of what its expert witness termed "continuous violations" documented in four our of five examinations. Such a "history" is without record support.

E. Other Matters As Justice May Require

Petitioner has requested three findings which fall within this category. All deal with the magnitude of Respondents' lending limit violations, and all will be adopted.

Before concluding this discussion, the concept of deterrence must be taken into account. Not surprisingly in a case involving unintentional violations which were not the result of reckless activities, the record here contains no evidence dictating a need for harsh punishment or strong deterrent measures.[33]

F. Analysis

Review of the five statutory factors, together with the regulatory considerations embodied in the Interagency Policy, requires the finding that there is an overwhelming amount of evidence in support of a reduction in the size of Spivey's penalty and virtually nothing in the record which would support leaving it at the level proposed by the FDIC. Upon consideration of the record as a whole, I find that Spivey's violations will be appropriately punished by requiring him to pay his legal fees in connection with this proceeding. No further penalty can be justified by rational analysis or supported by substantial evidence.

Lowe's position is somewhat more complicated. Two-thirds of his assessed penalty was set in a wholly arbitrary manner and must be rejected. When the statutory factors are examined, it is clear that Petitioner considered and relied upon a number of pro-

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[28] Review Examiner King's testimony to this effect is supported by the document.

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[29] Lowe's credible, uncontroverted testimony to this effect is supported by Examiner Pollack's hearsay admission. Indeed, petitioner effectively abandoned its position that a loss had occurred when it failed to oppose Respondents' requested finding which explicitly denied the occurrence of any loss to the Bank. It approaches the disingenuous to argue that a classification of part of a loan as "loss" by one of Petitioner's examiners (1) results in an actual economic benefit which must be removed in conformity with the Interagency Policy and (2) requires that restitution be made by the person charged. Such an argument is devoid of reasoned analysis and is unsupported by substantial evidence.

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[30] Respondents' contention that Regulation O does not require loans to be secured "by any particular type of collateral" is in error. *See* 12 C.F.R. § 32.4.

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[31] In its post-trial requests for findings and conclusions, Petitioner abandoned its earlier allegation that Respondents had violated this provision of Regulation O.

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[32] The minutes of the December 17, 1986 meeting of the Bank's Board of Directors record the approval of an extension of credit which Petitioner's summary tabular exhibit shows to have been made to Lowe on December 22, 1986. Because I credit Lowe's uncontroverted testimony that he abstained from voting on this extension of credit, I find that the loan did not violate 12 C.F.R. § 215.4(b).

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[33] Review Examiner King indicated that, if it were shown that the bank had received nearly $200,000 in interest from Lowe and had not suffered a $50,000 loss, he might change his expert opinion as to the propriety of Lowe's proposed penalty.

{{8-31-91 p.A-1540.7}}posed findings about Lowe's conduct which were not established by a preponderance of the evidence. Simultaneously, Petitioner ignored or rejected a number of facts which would tend to have mitigated Lowe's punishment. Since Petitioner has not demonstarted compliance with the requirements of 12 U.S.C. § 18(j)(3)(B), the remaining $25,000 of Lowe's recommended penalty is without a rational basis and cannot be imposed.[34]Because Lowe or his related interests were involved in each of the violations found herein, his position differs substantially from that of Spivey. While there is not evidence that Lowe acted in bad faith, he had more information concerning the unlawful transactions at his disposal, he was in a better position to make meaningful inquiries of the Bank's officers and he had more reason to do so than any other member of the Bank's Board of Directors. Thus, the violations found in this proceeding may be more fairly ascribed to him than any other member of the Board. Accordingly, I find that Lowe shall pay a civil money penalty of $13,150. This figure represents a penalty of $25 for each day a lending limit violation was outstanding and $100 for each violation of the prior approval and creditworthiness requirements of Regulation O.

FINDINGS OF FACT[35]

1. At all times relevant to this proceeding, the Bank was a commercial bank organized and existing

under the laws of Georgia, having its principal place of business in Warner Robins, Georgia.

2. At all times relevant to this proceeding, the Bank was insured by the FDIC and was not a member of the Federal Reserve System.

3. From December 27, 1985 through December 22, 1986, Respondent Lowe owned and controlled 15.56 percent of the outstanding shares of capital stock of the Bank.

4. From December 22, 1986 through June 5, 1989, International City Bancorp, Inc. ("Bancorp"), Warner Robins, Georgia, a one-bank holding company, owned and controlled 100 percent of the outstanding capital stock of the Bank.

5. From December 22, 1986 through June 5, 1989, Lowe owned and controlled 21.3 percent of the outstanding shares of capital stock of Bancorp.

6. At all times relevant to this proceeding, Lowe was a director of the Bank.

7. At all times relevant to this proceeding, Respondent Spivey was a director of the Bank.

8. At all times relevant to this proceeding after December 27, 1987, Lowe directly or indirectly owned and controlled more than 10 percent of the outstanding shares of capital stock of the Bank.

9. At all times relevant to this proceeding, Warner Robins, Georgia had in excess of 30,000 residents.

10. At all times relevant to this proceeding, Lowe owned and controlled 100 percent of the outstanding shares of capital stock of Peachbelt, a Georgia corporation.

11. At all time relevant to this proceeding, Lowe was the sole general partner of Colonial, a North Carolina limited partnership authorized to do business in Georgia.

12. At all time relevant to this proceeding, Lowe owned and controlled 50 percent of the outstanding shares of capital stock of PTP, a Georgia corporation.

13. The FDIC conducted regular examinations of the Bank as of March 29, 1985, July 7, 1986 and March 31, 1988, and the State conducted regular examinations of the Bank as of November 30, 1985, December 31, 1986 and August 31, 1987, at the conclusion of which written reports of examination were prepared.

14. The FDIC and State examinations of the Bank were conducted for the purpose, *inter alia*, of determining the Bank's compliance with all applicable laws and regulations.

15. On January 22, 1985, the Bank extended credit to Lowe in the amount of $2,500.

16. On January 29, 1985, the Bank extended credit to Lowe in the amount of $25,000.

17. On February 20, 1985, the Bank extended credit to Lowe in the amount of $25,000.

18. On March 28, 1985, the Bank ex-

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[34] Interestingly, even Petitioner's own expert had no idea how this amount had been chosen.

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[35] Findings of fact and conclusions of law not previously discussed are based on the parties' stipulations at the outset of the hearing.

{{8-31-91 p.A-1540.8}}tended credit to Lowe in the amount of $10,000.

19. On March 29, 1985, the Bank extended credit indirectly to Colonial by making the Quintax I loan for $175,000, of which amount $147,624 was transferred by Quintax to Colonial on April 2, 1985.

20. On April 15, 1985, the Bank extended credit to Lowe in the amount of $80,000.

21. On April 29, 1985, the Bank extended credit to Lowe in the amount of $65,000.

22. On June 26, 1985, the Bank extended credit to Lowe in the amount of $30,013.

23. On November 22, 1985, the Bank extended credit to Peachbelt in the amount of $20,000.

24. On February 12, 1986, the Bank extended credit to Lowe in the amount of $100,000.

25. On April 30, 1986, the Bank extended credit to Lowe in the amount of $72,500.

26. The Bank's unimpaired capital and surplus as reflected in its June 30, 1986 Report of Condition was $2,271,000.

27. For the period July 1 through September 30, 1986, the Bank's Regulation O lending limit was measured by the unimpaired capital and surplus stated in the Bank's June 30, 1986 Report of Condition.

28. From July 1 through September 30, 1986, the Bank's Regulation O unsecured lending limit (15 percent of unimpaired capital and surplus) was $340,650.

29. On July 3, 1986, the Bank extended credit to Lowe in the amount of $100,067.

30. Between July 9, 1986 and January 15, 1987, Lowe pledged two certificates of deposit in the cumulative amount of $51,017 to secure his extensions of credit from the Bank.

31. On July 10, 1986, the total outstanding credit extended directly and indirectly by the Bank to Lowe, Peachbelt and Colonial was $388,192.

32. On July 11, 1986, the Bank extended credit to Lowe in the amount of $18,000, following which the cumulative amount of credit extended directly and indirectly by the Bank to Lowe, Peachbelt and Colonial was $406,192, and following which the cumulative amount of credit, less the $51,017 collateral value of the two certificates of deposit, exceeded 15 percent of the Bank's unimpaired capital and surplus by

$14,525.

33. On July 17, 1986, the Bank extended credit to Lowe in the amount of $79,000.

34. On August 12, 1986, the Bank extended credit to Lowe in the amount of $15,000.

35. On August 25, 1986, the Bank extended credit to Lowe in the amount of $5,000.

36. On September 11, 1986, the total outstanding credit extended directly and indirectly by the Bank to Lowe, Peachbelt and Colonial was $383,662.

37. On September 12, 1986, the Bank extended credit to Lowe in the amount of $19,500, following which the cumulative amount of credit extended directly and indirectly by the Bank to Lowe, Peachbelt and Colonial was $403,162, and following which the cumulative amount of credit, less the $51,017 collateral value of the two certificates of deposit, exceeded 15 percent of the Bank's unimpaired capital and surplus by $11,495.

38. On September 15, 1986, the total outstanding credit extended directly and indirectly by the Bank to Lowe, Peachbelt and Colonial was $403,162.

39. On September 16, 1986, the Bank extended credit to Lowe by renewing an extension of credit to him in the amount of $100,000, following which the cumulative amount of credit extended directly and indirectly by the Bank to Lowe, Peachbelt and Colonial was $403,162, and following which the cumulative amount of credit, less the $51,017 collateral value of the two certificates of deposit, exceeded 15 percent of the Bank's unimpaired capital and surplus by $11,495.

40. On September 19, 1986, the total outstanding credit extended directly and indirectly by the Bank to Lowe, Peachbelt and Colonial was $403,162.

41. On September 20, 1986, the Bank extended credit to Peachbelt by renewing an extension of credit in the amount $43,000, following which the cumulative amount of credit extended directly and indirectly by the Bank to Lowe, Peachbelt and Colonial was $403,162, and following which the cu- {{8-31-91 p.A-1540.9}}mulative amount of credit, less the $51,017 collateral value of the two certificates of deposit, exceeded 15 percent of the Bank's unimpaired capital and surplus by $11,495.

42. The Bank's unimpaired capital and surplus as reflected in its September 30, 1986 Report of Condition was $2,240,000.

43. For the period October 1 through December 31, 1986, the Bank's Regulation O lending limit was measured by the unimpaired capital and surplus stated in the Bank's September 30, 1986 Report of Condition.

44. From October 1 through December 31, 1986, the Bank's Regulation O unsecured lending limit was $336,000.

45. On November 9, 1986, the total outstanding credit extended directly and indirectly to Lowe, Peachbelt and Colonial was $399,958.

46. On November 10, 1986, the bank extended credit to Lowe in the amount of $144,000, following which the cumulative amount of credit extended directly and indirectly by the Bank to Lowe, Peachbelt and Colonial was $543,958, and following which the cumulative amount of credit, less the $51,017 collateral value of the two certifications of deposit, exceeded 15 percent of the Bank's unimpaired capital and surplus by $156,941.

47. On November 19, 1986, the total outstanding credit extended directly and indirectly by the Bank to Lowe, Peachbelt and Colonial was $543,958.

48. On November 20, 1986, the Bank extended credit to Lowe by renewing four extensions of credit to him in the amounts of $79,000, $15,000, $5,000 and $19,500, following which the cumulative amount of credit extended directly and indirectly by the Bank to Lowe, Peachbelt and Colonial was $543,958, and following which the cumulative amount of credit, less the $51,017 collateral value of the two certificates of deposit, exceeded 15 percent of the Bank's unimpaired capital and surplus by $156,941.

49. On November 20, 1986, the Bank extended credit to Lowe by renewing an extension of credit to him in the amount of $144,000, following which the cumulative amount of credit extended directly and indirectly by the Bank to Lowe, Peachbelt and Colonial was $543,958, and following which the cumulative amount of credit, less the $51,017 collateral value of the two certificates of deposit, exceeded 15 percent of the Bank's unimpaired capital and surplus by $156,941.

50. On November 22, 1986, the total outstanding credit extended directly and indirectly by the Bank to Lowe, Peachbelt and Colonial was $543,958.

51. On November 23, 1986, the Bank extended credit indirectly to Colonial by making the Quintax II loan for $150,000, which amount was transferred by Quintax to Colonial on November 28, 1986, following which the cumulative amount of credit extended directly and indirectly by the Bank to Lowe, Peachbelt and Colonial was $693,958, and following which the cumulative amount of credit, less the $51,017 collateral value of the two certificates of deposit, exceeded 15 percent of the Bank's unimpaired capital and surplus by $306,941.

52. On December 17, 1986, the total outstanding credit extended directly and indirectly by the Bank to

Lowe, Peachbelt and Colonial was $692,291.

53. On December 18, 1986, the Bank extended credit to Peachbelt in the amount of $7,000, following which the cumulative amount of credit extended directly and indirectly by the Bank to Lowe, Peachbelt and Colonial was $699,291, and following which the cumulative amount of credit, less the $51,017 collateral value of the two certificates of deposit, exceeded 15 percent of the Bank's unimpaired capital and surplus by $312,274.

54. On December 19, 1986, the total outstanding credit extended directly and indirectly by the Bank to Lowe, Peachbelt and Colonial was $699,291.

55. On December 22, 1986, the Bank extended credit indirectly to PTP by purchasing the Dublin bond issue, the proceeds of which in the amount of $185,000 were transferred to PTP on December 22, 1986, following which the cumulative amount of credit extended directly and indirectly by the Bank to Lowe, Peachbelt, Colonial and PTP was $884,291, and following which the cumulative amount of credit, less the $51,017 collateral value of the two certificates of deposit, exceeded 15 percent of the Bank's unimpaired capital and surplus by $497,274.

56. On December 31, 1986, the total outstanding credit extended directly and indi- {{8-31-91 p.A-1540.10}}rectly by the Bank to Lowe, Peachbelt, Colonial and PTP was $811,791.

57. On December 31, 1986, the Bank extended credit to Lowe in the amount of $72,500, following which the cumulative amount of credit extended directly and indirectly by the Bank to Lowe, Peachbelt, Colonial and PTP was $884,291, and following which the cumulative amount of credit, less the $51,017 collateral value of the two certificates of deposit, exceeded 15 percent of the Bank's unimpaired capital and surplus by $497,274.

58. The Bank's unimpaired capital and surplus as reflected in its December 31, 1986 Report of Condition was $2,292,000.

59. For the period January 1 through March 31, 1987, the Bank's Regulation O lending limit was measured by the unimpaired capital and surplus stated in the Bank's December 31, 1986 Report of Condition.

60. From January 1 through March 31, 1987, the Bank's Regulation O unsecured lending limit was $343,800.

61. On January 5, 1987, the total outstanding credit extended directly and indirectly to Lowe, Peachbelt, Colonial and PTP was $882,653.

62. On January 6, 1987, the Bank extended credit to Lowe by renewing an extension of credit to him in the amount of $100,000, following which the cumulative amount of credit extended directly and indirectly by the Bank to Lowe, Peachbelt, Colonial and PTP was $882.653, and following which the cumulative amount of credit, less the $51,017 collateral value of the two certificates of deposit, exceeded 15 percent of the Bank's unimpaired capital and surplus by $487,836.

63. On January 14, 1987, the total outstanding credit extended directly and indirectly to Lowe, Peachbelt, Colonial and PTP was $882,653.

64. Between January 15 and August 1, 1987, Lowe pledged three certificates of deposit in the cumulative amount of $157,119 to secure his extensions of credit from the Bank.

65. On January 15, 1987, the Bank extended credit to Lowe in the amount of $100,000, following which the cumulative amount of credit extended directly and indirectly by the Bank to Lowe, Peachbelt, Colonial and PTP was $982,653, and following which the cumulative amount of credit, less the $157.119 collateral value of the three certificates of deposit, exceeded 15 percent of the Bank's unimpaired capital and surplus by $481,734.

66. On February 17, 1987, the total outstanding credit extended directly and indirectly to Lowe, Peachbelt, Colonial and PTP was $980,986.

67. On February 18, 1987, the Bank extended credit to Lowe by renewing four extensions of credit to him in the amounts of $79,000, $15,000, $5,000 and $19,500, following which the cumulative amount of credit extended directly and indirectly by the Bank to Lowe, Peachbelt, Colonial and PTP was $980,986, and following which the cumulative amount of credit, less the $157,119 collateral value of the three certificates of deposit, exceeded 15 percent of the Bank's unimpaired capital and surplus by $480,067.

68. On February 18, 1987, the Bank extended credit to Lowe by renewing an extension of credit to him in the amount of $144,000, following which the cumulative amount of credit extended directly and indirectly by the Bank to Lowe, Peachbelt, Colonial and PTP was $980,986, and following which the cumulative amount of credit, less the $157,119 collateral value of the three certificates of deposit, exceeded 15 percent of the Bank's unimpaired capital and surplus by $480,067.

69. On February 19, 1987, the total outstanding credit extended directly and indirectly by the Bank to Lowe, Peachbelt, Colonial and PTP was $980,986.

70. On February 20, 1987, the Bank extended credit to Low by renewing an extension of credit to him in the amounts of $100,000, following which the cumulative amount of credit extended directly and indirectly

by the Bank to Lowe, Peachbelt, Colonial and PTP was $980,986, and following which the cumulative amount of credit, less the $157,119 collateral value of the three certificates of deposit, exceeded 15 percent of the Bank's unimpaired capital and surplus by $480,067.

71. On February 20, 1987, the Bank extended credit to Peachbelt by renewing two extensions of credit in the amounts of $43,000 and $7,000, following which the cumulative amount of credit extended directly and indirectly by the Bank to Lowe, Peachbelt, Colonial and PTP was $980,986, and following which the cumulative amount {{8-31-91 p.A-1540.11}}of credit, less the $157,119 collateral value of the three certificates of deposit, exceeded 15 percent of the Bank's unimpaired capital and surplus by $480,067.

72. On March 30, 1987, the total outstanding credit extended directly and indirectly by the Bank to Lowe, Peachbelt, Colonial and PTP was $979,160.

73. On March 31, 1987, the Bank extended credit to Lowe by renewing an extensions of credit to him in the amount of $72,500, following which the cumulative amount of credit extended directly and indirectly by the Bank to Lowe, Peachbelt, Colonial and PTP was $979,160, and following which the cumulative amount of credit, less the $157,119 collateral value of the three certificates of deposit, exceeded 15 percent of the Bank's unimpaired capital and surplus by $478,241.

74. The Bank's unimpaired capital and surplus as reflected in its March 31, 1987 Report of Condition was $2,327,000.

75. For the period April 1 through June 30, 1987, the Bank's Regulation O lending limit was measured by the unimpaired capital and surplus stated in the Bank's March 31, 1987 Report of Condition.

76. From April 1 through June 30, 1987, the Bank's Regulation O unsecured lending limit was $349,050.

77. On May 23, 1987, the total outstanding credit extended directly and indirectly to Lowe, Peachbelt, Colonial and PTP was $875,986.

78. On May 23, 1987, the Bank extended credit indirectly to Colonial by renewing the Quintax II loan in the amount of $50,000, following which the cumulative amount of credit extended directly and indirectly by the Bank to Lowe, Peachbelt, Colonial and PTP was $875,986, and following which the cumulative amount of credit, less the $157,119 collateral value of the three certificates of deposit, exceeded 15 percent of the Bank's unimpaired capital and surplus by $369,817.

79. On May 29, 1987, the total outstanding credit extended directly and indirectly by the Bank to Lowe, Peachbelt, Colonial and PTP was $875,986.

80. On May 30, 1987, the Bank extended credit to Lowe by renewing an extension of credit to him in the amount of $100,000, following which the cumulative amount of credit extended directly and indirectly by the Bank to Lowe, Peachbelt, Colonial and PTP was $875,986, and following which the cumulative amount of credit, less the $157,119 collateral value of the three certificates of deposit, exceeded 15 percent of the Bank's unimpaired capital and surplus by $369,817.

81. The Bank's unimpaired capital and surplus as reflected in its June 30, 1987 Report of Condition was $2,489,000.

82. For the period July 1 through September 30, 1987, the Bank's Regulation O lending limit was measured by the unimpaired capital and surplus stated in the Bank's June 31, 1987 Report of Condition.

83. From July 1 through September 30, 1987, the Bank's Regulation O unsecured lending limit was $373,350.

84. On July 5, 1987, the total outstanding credit extended directly and indirectly to Lowe, Peachbelt, Colonial and PTP was $801,819.

85. On July 6, 1987, the Bank extended credit to Lowe by renewing an extension of credit to him in the amount of $100,000, following which the cumulative amount of credit extended directly and indirectly by the Bank to Lowe, Peachbelt, Colonial and PTP was $801,819, and following which the cumulative amount of credit, less the $157,119 collateral value of the three certificates of deposit, exceeded 15 percent of the Bank's unimpaired capital and surplus by $271,350.

86. On August 18, 1987, the total outstanding credit extended directly and indirectly to Lowe, Peachbelt, Colonial and PTP was $554,486.

87. Between August 19, 1987 and march 31, 1988, Lowe pledged two certificates of deposit in the cumulative amount of $51,017 to secure his extensions of credit from the Bank.

88. On August 19, 1987, the Bank extended credit to Lowe in the amount of $120,035, following which the cumulative amount of credit extended directly and indirectly by the Bank to Lowe, Peachbelt, Colonial and PTP was $674,521, and following which the cumulative amount of credit, less the $51,017 collateral value of the two certificates of deposit, exceeded 15 percent of the Bank's unimpaired capital and surplus by $250,154.

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89. On September 9, 1987, the total outstanding credit extended directly and indirectly to Lowe, Peachbelt, Colonial and PTP was $672,854.

90. On September 10, 1987, the Bank extended credit to Lowe by renewing four extensions of credit to him in the amounts of $79,000, $15,000, $5,000 and $19,500, following which the cumulative amount of credit extended directly and indirectly by the Bank to Lowe, Peachbelt, Colonial and PTP was $672,854, and following which the cumulative amount of credit, less the $51,017 collateral value of the two certificates of deposit, exceeded 15 percent of the Bank's unimpaired capital and surplus by $248,487.

91. The Bank's unimpaired capital and surplus as reflected in its September 30, 1987 Report of Condition was $2,578,000.

92. For the period October 1 through December 31, 1987, the Bank's Regulation O lending limit was measured by the unimpaired capital and surplus stated in the Bank's September 30, 1987 Report of Condition.

93. From October 1 through December 31, 1987, the Bank's Regulation O unsecured lending limit was $386,700.

94. The Bank's unimpaired capital and surplus as reflected in its December 31, 1987 Report of Condition was $2,296,000.

95. For the period January 1 through March 31, 1988, the Bank's Regulation O lending limit was measured by the unimpaired capital and surplus stated in the Bank's December 31, 1987 Report of Condition.

96. From January 1 through March 31, 1987, the Bank's Regulation O unsecured lending limit was $344,400.

97. On January 19, 1988, the total outstanding credit extended directly and indirectly to Lowe, Peachbelt and Colonial was $362,686.

98. On January 20, 1988, the Bank extended credit to Lowe in the amount of $137,468, following which the cumulative amount of credit extended directly and indirectly by the Bank to Lowe, Peachbelt and Colonial was $500,154, and following which the cumulative amount of credit, less the $51,017 collateral value of the two certificates of deposit, exceeded 15 percent of the Bank's unimpaired capital and surplus by $104,737.

99. On February 12, 1988, the total outstanding credit extended directly and indirectly to Lowe, Peachbelt and Colonial was $398,487.

100. On February 13, 1988, the Bank extended credit to Lowe in the amount of $118,500, following which the cumulative amount of credit extended directly and indirectly by the Bank to Lowe, Peachbelt and Colonial was $516,987, and following which the cumulative amount of credit, less the $51,017 collateral value of the two certificates of deposit, exceeded 15 percent of the Bank's unimpaired capital and surplus by $1,211,570.

101. The renewal by the Bank on September 20, 1986 of a $43,000 extension of credit to Peachbelt, when aggregated with previous direct and indirect extensions of credit to Lowe, Peachbelt and Colonial, exceeded five percent of the Bank's unimpaired capital and surplus and was not approved in advance by the vote of a majority of the Bank's entire Board of Directors.

102. The renewal by the Bank on November 20, 1986 of an $118,500 extension of credit to Lowe, when aggregated with previous direct and indirect extensions of credit to Lowe, Peachbelt and Colonial, exceeded five percent of the Bank's unimpaired capital and surplus and was not approved in advance by the vote of a majority of the Bank's entire Board of Directors.

103. The indirect extension by the Bank on November 23, 1986 of an $150,000 credit to Colonial, when aggregated with previous direct and indirect extensions of credit to Lowe, Peachbelt and Colonial, exceeded five percent of the Bank's unimpaired capital and surplus and was not approved in advance by the vote of a majority of the Bank's entire Board of Directors.

104. The extension by the Bank on December 18, 1986 of a $7,000 credit to Peachbelt, when aggregated with previous direct and indirect extensions of credit to Lowe, Peachbelt and Colonial, exceeded five percent of the Bank's unimpaired capital and surplus and was not approved in advance by the vote of a majority of the Bank's entire Board of Directors.

105. The extension by the Bank on December 31, 1986 of a $72,500 credit to Lowe, when aggregated with previous direct and indirect extensions of credit to Lowe, Peachbelt, Colonial and PTP, exceeded five percent of the Bank's unimpaired capital and surplus and was not approved in advance by {{8-31-91 p.A-1540.13}}the vote of a majority of the Bank's entire Board of Directors.

106. The renewal by the Bank on January 5, 1987 of an $100,000 extension of credit to Lowe, when aggregated with previous direct and indirect extensions of credit to Lowe, Peachbelt, Colonial and PTP, exceeded five percent of the Bank's unimpaired capital and surplus and was not approved in advance by the vote of a majority of the Bank's entire Board of Directors.

107. The extension by the Bank on January 15, 1987 of an $100,000 credit to Lowe, when aggregated with previous direct and indirect extensions of credit to Lowe, Peachbelt, Colonial and PTP, exceeded five percent of the Bank's unimpaired capital and surplus and was not approved in advance by the vote of

a majority of the Bank's entire Board of Directors.

108. The renewal by the Bank on February 18, 1987 of an $118,500 extension of credit to Lowe, when aggregated with previous direct and indirect extensions of credit to Lowe, Peachbelt, Colonial and PTP, exceeded five percent of the Bank's unimpaired capital and surplus and was not approved in advance by the vote of a majority of the Bank's entire Board of Directors.

109. The renewal by the Bank on February 18, 1987 of an $144,000 extension of credit to Lowe, when aggregated with previous direct and indirect extensions of credit to Lowe, Peachbelt, Colonial and PTP, exceeded five percent of the Bank's unimpaired capital and surplus and was not approved in advance by the vote of a majority of the Bank's entire Board of Directors.

110. The renewal by the Bank on February 20, 1987 of an $100,000 extension of credit to Lowe, when aggregated with previous direct and indirect extensions of credit to Lowe, Peachbelt, Colonial and PTP, exceeded five percent of the Bank's unimpaired capital and surplus and was not approved in advance by the vote of a majority of the Bank's entire Board of Directors.

111. The renewal by the Bank on February 20, 1987 of a $50,000 extension of credit to Peachbelt, when aggregated with previous direct and indirect extensions of credit to Lowe, Peachbelt, Colonial and PTP, exceeded five percent of the Bank's unimpaired capital and surplus and was not approved in advance by the vote of a majority of the Bank's entire Board of Directors.

112. The renewal by the Bank on March 31, 1987 of a $72,500 extension of credit to Lowe, when aggregated with previous direct and indirect extensions of credit to Lowe, Peachbelt, Colonial and PTP, exceeded five percent of the Bank's unimpaired capital and surplus and was not approved in advance by the vote of a majority of the Bank's entire Board of Directors.

113. The renewal by the Bank on May 23, 1987 of a $50,000 indirect extension of credit to Colonial, when aggregated with previous direct and indirect extensions of credit to Lowe, Peachbelt, Colonial and PTP, exceeded five percent of the Bank's unimpaired capital and surplus and was not approved in advance by the vote of a majority of the Bank's entire Board of Directors.

114. The Quintax I loan possessed the following unfavorable features: (a) it was unsecured, (b) it was endorsed by individuals who resided outside Georgia and (c) it was made at a time when Quintax had a deficit net worth.

115. The Quintax II loan possessed the following unfavourable features: (a) it was unsecured, (b) it was endorsed by individuals who resided outside Georgia and (c) it was made at a time when Quintax had a deficit net worth.

116. Lowe has a net worth in excess of $13,017,320.

117. Spivey has a net worth in excess of $840,800.

118. With regard to all of the direct and indirect extensions of credit by the Bank to Lowe and his related interests which are the subject of this proceeding, neither Lowe nor Spivey was shown to have (a) used his position with the Bank to exert undue influence in order to secure favorable action regarding such extensions of credit, (b) acted to deceive or conceal material information concerning such loans or extensions of credit from the Bank's Board of Directors or from FDIC or State bank examiners, (c) failed to cooperate with the Bank's Board of Directors or with FDIC or State bank examiners, (d) intentionally violated Section 22(h) of the Act or Regulation O, (e) acted with reckless disregard of the law or of the consequences of his actions on the Bank or (f) breached any fiduciary duty to the Bank.

119. Respondents' violations of Regulation O were unintentional and were not {{8-31-91 p.A-1540.14}}shown to have been committed in bad faith; there is no evidence that Petitioner took into account the appropriateness of the proposed penalty with respect to the absence of bad faith on the part of Respondents.

120. The aggregate amount of outstanding credit extended directly and indirectly by the Bank to Lowe, Peachbelt, Colonial and PTP exceeded 15 percent of the Bank's unimpaired capital and surplus on three occasions: July 11 through July 15, 1986, comprising five days; September 12, 1986 through November 29, 1987, comprising 420 days; and January 20 through February 29, 1988, comprising 41 days.

121. The Bank never suffered a loss as a result of Respondents' violations of Regulation O, and the $50,000 portion of Lowe's penalty, which was purportedly based on such a loss, was assessed in an arbitrary manner.

122. (a) The report of Petitioner's March 1985 examination of the bank made no reference to violations of Regulation O, (b) the report of the November 1985 State examination of the Bank contains no reference to the type of Regulation O violations which are the subject of this proceeding, (c) the report of Petitioner's July 1986 examination of the Bank contained an accurate reference to two prior approval violations of Regulation O, (d) the report of the December 1986 State examination of the Bank contained an accurate reference to a single prior approval violation of Regulation O and (e) the report of the August 1987 State examination of the Bank contained an accurate reference to a single lending limit violation of Regulation O.

123. The total outstanding direct and indirect extensions of credit to Lowe and his related interests exceeded $975,000 from January 15 through May 22, 1987 and exceeded the Bank's Regulation O unsecured lending limit during this period by an amount which ranged between $469,817 and $481,734.

124. The total outstanding direct and indirect extensions of credit by the Bank to Lowe and his related interests equaled 42 percent of the Bank's total equity capital and reserves as of march 31, 1987.

125. The total outstanding direct and indirect extensions of credit by the Bank to Lowe and his related interests equaled more than 5.5 percent of the Bank's total extensions of credit to all borrowers as of March 31, 1987.

CONCLUSIONS OF LAW

1. The Bank is subject to the Federal Deposit Insurance Act, 12 U.S.C. §§ 1811-1831d, the FDIC Rules and Regulations, 12 C.F.R. Ch. III, and the laws of Georgia.

2. The FDIC has jurisdiction over Respondents under 12 U.S.C. § 1828(j) to impose a civil money for violations of Section 22(h) of the Act and Regulation O.

3. In an action for the assessment of a civil money penalty for violation of the prohibitions of Section 22(h) of the Act and Regulation O, liability for payment of a penalty is predicted solely upon Petitioner's establishment of such a violation by a preponderance of the evidence, without regard to the intent or good faith of the person charged.

4. The term "violates" as used in 12 U.S.C. § 1828(j) includes, without any limitation, any action taken by a person, either individually or with one or more other persons, for or toward causing, bringing about, participating in, counseling, aiding or abetting a violation.

5. Section 22(h)(1) of the Act and Section 215.4(c) of Regulation O prescribe maximum aggregate limitations on the amount of unsecured credit that may be extended directly or indirectly by a bank to a "principal shareholder" of that bank and to the "related interests" of such a person, as those terms are defined in Section 215.2 of Regulation O.

6. At all times relevant to this proceeding, Lowe was "principal shareholder" of the Bank within the meaning of Section 215.2(j) of Regulation O.

7. At all times relevant to this proceeding, Peachbelt, Colonial and PTP were "related interests" of Lowe within the meaning of Section 215.2(k) of Regulation O.

8. An "extension of credit" within the meaning of Section 215.3(f) of Regulation O is considered made to a principal shareholder of the Bank to the extent that the proceeds thereof are used for the tangible economic benefit, or transferred to, the principal shareholder or his related interests.

9. The purchase by the Bank of the Dublin bond issue, the proceeds of which were transferred to PTP, constitutes an "extension of credit" to PTP within the meaning of Section 215.3(a) of Regulation O.
{{8-31-91 p.A-1540.15}}

10. With the exception of those loans secured by Bank certificates of deposit, all direct and indirect extensions of credit made by the Bank to Lowe and his related interests, which were not secured by "readily marketable collateral" within the meaning of 12 C.F.R. § 32.4, were subject to the 15 percent unsecured lending limit of Regulation O.

11. The maximum aggregate amount of unsecured credit that may be directly and indirectly extended by the Bank under Section 214.4(c) of Regulation O to Lowe and his related interests is an amount equal to 15 percent of the unimpaired capital and surplus of the Bank.

12. From July 11 through July 15, 1986, the direct and indirect extensions of credit by the Bank to Lowe and his related interests exceeded the 15 percent lending limit of Regulation O in violation of Section 215.4(c) of Regulation O.

13. From September 12, 1986 through November 5, 1987, the direct and indirect extensions of credit by the Bank to Lowe and his related interests exceeded the 15 percent lending limit of Regulation O in violation of Section 215.4(c) of Regulation O.

14. From January 20 through February 29, 1988, the direct and indirect extensions of credit by the Bank to Lowe and his related interests exceeded the 15 percent lending limit of Regulation O in violation of Section 215.4(c) of Regulation O.

15. Respondents committed the violations of the Act and Regulation O identified in Conclusions of Law 12 through 14.

16. All of the direct and indirect extensions of credit made or renewed by the Bank to Lowe and his related interests, as more particularly described in Findings of Fact 101 through 113, were made and/or renewed without the prior approval of a majority of the Board of Directors of the Bank in violation of Section 22(h)(2) of the Act and Section 215.4(b) of Regulation O.

17. Respondents committed the violations of the Act and Regulation O identified in Conclusion of Law 16.

18. The indirect extensions of credit made or renewed by the Bank to Lowe's related interest, as more

particularly described in Findings of Fact 114 and 115, were made and/or renewed in violation of Section 22(h) of the Act and Section 215.4(a) of Regulation O.

19. Respondents committed the violations of the Act and Regulation O identified in Conclusion of Law 18.

20. In an action for the assessment of a civil money penalty under 12 U.S.C. § 1828(j) for violations of Section 22(h) of the Act and Regulation O, the determination of the appropriate amount of penalty to be imposed for such violations must take into account the five statutory factors provided in 12 U.S.C. § 1828(j)(3)(B) ("statutory factors") pertaining to (a) the good faith of the charged party, (b) the size of the charged party's financial resources, (c) the gravity of the violations which occurred, (d) any history of prior violations involving the charged party and (e) any other matters that may be required by justice.

21. The fees and costs paid by a charged party for legal representation in a civil money penalty proceeding are an element of the statutory factor pertaining to the size of the charged party's financial resources.

22. The statutory purpose and scheme of the enabling legislation authorizing the imposition of civil money penalties under 12 U.S.C. § 1828(j) for violations of Section 22(h) of the Act and Regulation O is designed and intended to serve a strong deterrent objective of preventing abusive and selfserving practices and violations of law that are harmful to banks and otherwise prejudicial to the best interests of their depositors.

23. The central injunction contained in the Interagency Policy pertaining to the removal of economic benefit is consistent with the legislative purpose and statutory scheme authorizing the imposition of civil money penalties under 12 U.S.C. § 1828(j) for violations of Section 22(h) of the Act and Regulation O.

24. In establishing the appropriate amount of a civil money penalty to be assessed under 12 U.S.C. § 1828(j) for violations of Section 22(h) of the Act and Regulation O. (a) it is appropriate to give significant consideration and weight to the removal of any economic benefit the charged party received as a result of such violations, (b) the FDIC has discretionary authority, on an ad hoe basis in each individual case, to determine the amount of weight and the degree of importance to be accorded each of the statutory factors, provided that such discretion is not {{8-31-91 p.A-1540.16}}exercised arbitrarily, is premised upon reasoned analysis and substantial evidence and is consistent with and promotes the statutory purpose and scheme of the enabling legislation and (c) no single statutory factor is controlling in determining the amount of a civil money penalty to be imposed.

25. Civil money penalties against Lowe in the amount of $75,000 and Spivey in the amount of $7,500 were not properly assessed in accordance with the statutory factors.

26. A civil money penalty may properly be assessed against Lowe in the amount of $13,150 for violations of Section 22(h) of the Act and Regulation O in accordance with the statutory factors in the Interagency Policy.

27. No civil money penalty may properly be assessed against Spivey for violations of Section 22(h) of the Act and Regulation O in accordance with the statutory factors and the Interagency Policy.

Upon the foregoing findings of fact and conclusions of law, and upon the entire record in this case, I hereby issue the following recommended:

ORDER TO PAY

After taking into account the appropriateness of the penalty with respect to the financial resources of each Respondent, the good faith of each Respondent, the gravity of each Respondent's violations, the history of previous violations in which each Respondent has been involved and such other matters as justice may require, it is:

ORDERED, that by reason of the violations of law and regulation evidenced in the record of this action and after taking into account the foregoing considerations required by law, a civil money penalty in the amount $13,150 is assessed against R. Wayne Lowe pursuant to 12 U.S.C. § 1828(j)(4).

IT IS FURTHER ORDERED that the Notice of Assessment of Civil Money Penalties is dismissed as to Jimmy A. Spivey.

IT IS FURTHER ORDERED that the Order shall be effective upon service and that the penalty ordered shall be final and payable 20 days after the date of service unless an appeal from this Order is filed within such period.

Done at Washington, D.C., this 20th day of December, 1989.

/s/ Steven M. Charno
Administrative Law Judge