

{{4-1-90 p.A-989}}

[¶5081] **FDIC Docket No. FDIC-86-104k (1-6-87)**

Civil money penalty was assessed against a bank director for making improper loans to officers and directors of the bank. Director's failure to file an answer to the charges constituted a waiver of the right to appear and contest the allegations.

**[.1] Civil Money Penalties—Time To Answer**

FDIC Rules provide that every party to a proceeding shall file an answer within 20 days after service of the notice of hearing.

**[.2] Civil Money Penalties—Failure To Answer**

Failure of a party to file an answer constitutes a waiver of the right to appear and contest the allegations, and authorizes the entry of a recommended decision.

**In the Matter of \* \* \* \* \* BANK  
(INSURED STATE NONMEMBER  
BANK)**

**DECISION AND ORDER TO PAY  
CIVIL MONEY PENALTY  
FDIC-86-104k**

*I. Procedural History*

This proceeding, brought by the Federal Deposit Insurance Corporation ("FDIC"), seeks civil money penalties against \* \* \*, individually and as a former director of \* \* \* Bank \* \* \*, for violation of section 22(h) of the Federal Reserve Act (12 U.S.C. § 375b) and Regulation O of the Board of Governors of the Federal Reserve System (12 C.F.R. Part 215) (improper loans and extensions of credit to officers, directors, etc). These provisions apply to state nonmember banks pursuant to section 18(j)(2) of the Federal Deposit Insurance Act (12 U.S.C. § 1828(j)(2)).

On May 7, 1986, the FDIC issued a Notice of Assessment of Civil Money Penalties, Findings of Fact and Conclusions of Law, Order to Pay and Notice of Hearing ("Notice"), pursuant to the provisions of section 18(j)(3) of the Act (12 U.S.C. § 1828(j)(3)) and the FDIC Rules of Practice and Procedures ("Rules") (12 C.F.R. Part 308). The Notice states that pursuant to section 308.69 of the FDIC Rules, a written request for a hearing may be filed within ten days of receipt of the Notice of Hearing. (12 C.F.R. § 308.69). The Notice also sets forth that anyone requesting a hearing shall file an Answer to the charges in the Notice within 20 days of receipt of the Notice in accordance with section 308.06 of the FDIC Rules (12 C.F.R. § 308.06). Respondent made a timely request for a hearing by an undated letter received May 27, 1986, but he failed to file an Answer to the charges in the Notice.

On June 25, 1986, the FDIC filed an Amended Order to Pay ("amended order") clarifying certain language in the original order regarding a penalty of \$3,000 against various individuals. The amended order specified that *each* original respondent, including Respondent \* \* \*, was to pay a \$3,000 penalty assessment. Respondent failed to respond to the FDIC's Amended Order to Pay.

On August 29, 1986, enforcement counsel for the FDIC filed a Motion for Recommended Default Judgment based upon the failure to file an Answer, as provided in section 308.06(a) of the FDIC Rules (12 C.F.R. § 308.06(a)). Respondent did not respond to the FDIC's motion. On October 16, 1986, the Administrative Law Judge ("ALJ") issued a Recommended Default Decision and Order recommending entry of an order to pay against Respondent. At no time has Respondent sought leave to file a late Answer or made any effort to excuse his failure to answer.

*II. Regulatory Provisions*

[.1] Section 308.06 of the FDIC Rules provides:

*Every party to a proceeding shall file an answer with the Executive Secretary within 20 days after service of the notice of hearing...(emphasis added).*

The directive of this rule could not be more clear. An Answer to the charges in the Notice must be filed by Respondent. Furthermore, consistent with this provision, the Notice of Hearing specifically put Respondent on notice of the obligation to file an Answer. The Notice of Hearing states:

Any Respondent who requests a hearing *shall file an answer* to the charges in the Notice of Assessment within 20 days of receipt of the Notice of Hearing in [{{4-1-90 p.A-990}}](#) accordance with section 308.06 of the FDIC Rules...(emphasis added).

In light of Respondent's failure to file an Answer, the Board of Directors ("Board") of the Federal Deposit Insurance Corporation adopts and incorporates by reference herein the Administrative Law Judge's Recommended Default Decision and Order, finding the facts to be as alleged in the Notice of Assessment of Civil Money Penalties.

#### **ORDER TO PAY CIVIL MONEY PENALTY**

The Board has reviewed the record in this proceeding, including the Administrative Law Judge's Recommended Default Decision and Order and finds \* \* \* to have violated section 22(h) of the Federal Reserve Act (12 U.S.C. § 375b) and Regulation O of the Board of Governors of the Federal Reserve System (12 C.F.R. Part 215).

IT IS HEREBY ORDERED, that \* \* \* shall pay a civil money penalty of \$3,000.

IT IS FURTHER ORDERED, that this penalty shall be paid within 60 days of the date of this Order.

By direction of the Board of Directors.

Dated at Washington, D.C., this 6th day of January 1987.

/s/ Hoyle L. Robinson  
Executive Secretary

#### **RECOMMENDED DEFAULT DECISION AND ORDER**

WILLIAM A. GERSHUNY, Administrative Law Judge: By Motion of August 29, 1986, counsel for the Federal Deposit Insurance Corporation ("FDIC") seeks entry of a Recommended order of Default against Respondent \* \* \* based on his failure to file an answer to notice of Assessment of Civil Money Penalties, as required by Sec. 308.06(a) of the FDIC Rules and Regulations.

By letter dated September 4, 1986, I advised Respondent that written responses to the motion would be permitted if postmarked not later than September 15. Respondent \* \* \* responded by undated letter (postmarked September 16), requesting that a previously canceled pretrial conference be rescheduled.

Respondent had filed a request for hearing, but not an answer.

[.2] The Motion of the FDIC will be granted. Sec. 308.06(d) of the Rules clearly provides that the failure of a party to file an answer constitutes a waiver of the right to appear and contest the allegations, and authorizes the immediate entry of a recommended decision. Respondent was put on notice of the requirement for the filing of *both* a request for hearing *and* an answer. The original Notice, issued on May 7, 1986, and amended on June 25, 1986, states:

Any Respondent who requests a hearing shall file an answer to the charges in the NOTICE OF ASSESSMENT within 20 days of receipt of the NOTICE OF HEARING in accordance with section 308.06 of the FDIC Rules of Practice and Procedure (12 C.F.R. 308.06).

Accordingly, as to Respondent \* \* \* , I adopt as my Findings of Fact and Conclusions of Law the allegations of the Notice of Assessment of Civil Penalties herein, and I recommend that the FDIC impose upon said Respondent \* \* \* the Amended Order to Pay of June 25, 1986.

Dated: October 16, 1986.

/s/ William A. Gershuny  
Administrative Law Judge

#### **AMENDED ORDER TO PAY**

#### **FDIC-86-104k**

The Federal Deposit Insurance Corporation ("FDIC") issued a NOTICE OF ASSESSMENT OF CIVIL MONEY PENALTIES, FINDINGS OF FACT AND CONCLUSIONS OF LAW, ORDER TO PAY, AND NOTICE OF HEARING ("NOTICE OF ASSESSMENT") on May 7, 1986 against, among others, \* \* \* , \* \* \* ,

\*\*\*, \*\*\*, \*\*\*, \*\*\*, \*\*\*, \*\*\*, \*\*\*, \*\*\*, and \*\*\* ("Respondents"), individually and as former or present directors of \*\*\* Bank \*\*\* ("Bank"), pursuant to section 18(j)(3) of the Federal Deposit Insurance Act ("Act") (12 U.S.C. § 1828(j)(3)). Following the issuance of the NOTICE OF ASSESSMENT, information came to light concerning confusion on the part of some of the Respondents as to whether the penalty assessed against them was \$300 each or \$3,000 each. In order to clarify the FDIC's intention that the penalty in question was for \$3,000, the FDIC has determined to amend the ORDER TO PAY accordingly.

IT IS HEREBY ORDERED, that a penalty of \$3,000 each be, and hereby is, assessed [{{4-1-90 p.A-991}}](#) against \*\*\*, \*\*\*, \*\*\*, \*\*\*, \*\*\*, \*\*\*, \*\*\*, \*\*\*, \*\*\*, \*\*\*, and \*\*\*.

IT IS FURTHER ORDERED, that the ORDER TO PAY be amended to add the word "each" to the phrase "a penalty of \$3,000 each be, and hereby is, assessed against \*\*\*, \*\*\*, \*\*\*, \*\*\*, \*\*\*, \*\*\*, \*\*\*, \*\*\*, \*\*\*, and \*\*\*."

IT IS FURTHER ORDERED, that the effective date of each assessment be stayed until ten days after the date of receipt by each Respondent of this AMENDED ORDER TO PAY, during which time each Respondent may request a hearing pursuant to section 308.69 of the FDIC Rules and Regulations (12 C.F.R. § 308.69).

By direction of the Board of Review, pursuant to delegated authority.

Dated at Washington, D.C., this 25th day of June, 1986.

/s/ Margaret M. Elsen

Deputy Executive Secretary

**STIPULATION AND CONSENT TO  
THE ISSUANCE OF AN AMENDED  
ORDER TO PAY  
FDIC-86-104k**

Subject to the acceptance of this STIPULATION AND CONSENT TO THE ISSUANCE OF AN AMENDED ORDER TO PAY ("CONSENT AGREEMENT") by the Federal Deposit Insurance Corporation ("FDIC"), it is hereby stipulated and agreed by and between a representative of the Legal Division of the FDIC and Respondent \*\*\* as follows:

1. Respondent \*\*\*, solely for the purpose of this proceeding, in order to avoid further costs and litigation, and without admitting or denying any of the allegations set forth in the NOTICE OF ASSESSMENT OF CIVIL MONEY PENALTIES, FINDINGS OF FACT AND CONCLUSIONS OF LAW, ORDER TO PAY, AND NOTICE OF HEARING issued by the FDIC against Respondent \*\*\* at \*\*\* Bank \*\*\* ("Bank"), hereby consents and agrees to the issuance by the FDIC of an AMENDED ORDER TO PAY, reducing the civil money penalty assessed against Respondent \*\*\* from \$3,000 to \$2,250, which AMENDED ORDER TO PAY shall be final and unappealable.

2. The parties to this CONSENT AGREEMENT waive:

- (a) The filing of PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW;
- (b) A recommended decision by an Administrative Law Judge; and
- (c) Exceptions and briefs with respect to such recommended decision.

3. Respondent \*\*\* agrees to pay the penalty assessed pursuant to the AMENDED ORDER TO PAY within thirty (30) days from the date of issuance of the AMENDED ORDER TO PAY, and that said penalty will not be paid directly or indirectly by the Bank.

Dated this \_\_\_\_ day of \_\_\_\_, 1986.

**FDIC 86-104k**

**AMENDED ORDER TO PAY**

The Federal Deposit Insurance Corporation ("FDIC") issued a NOTICE OF ASSESSMENT OF CIVIL MONEY PENALTIES. FINDINGS OF FACT AND CONCLUSIONS OF LAW, ORDER TO PAY, AND NOTICE OF HEARING on May 7, 1986 and an AMENDED ORDER TO PAY on June 25, 1986, against \*\*\*, among others, assessing a civil money penalty against Respondent \*\*\* for violation of section 22(h) of the Federal Reserve Act, 12 U.S.C. § 375b, and Regulation O of the Board of Governors of the Federal Reserve System promulgated thereunder, 12 C.F.R. Part 215, committed by Respondent \*\*\* at the \*\*\* Bank, \*\*\* ("Bank").

IT IS HEREBY ORDERED, that the Amended Order to Pay issued on June 25, 1986, based on the aforementioned violations be, and hereby is, amended to reduce from \$3,000 to \$2,250 the civil money penalty assessed against Respondent \*\*\*.

IT IS FURTHER ORDERED, that the penalty assessed pursuant to this AMENDED ORDER TO PAY shall be paid by Respondent \*\*\* within thirty (30) days from the date of issuance of this AMENDED

ORDER TO PAY.

FURTHER ORDERED, that the penalty assessed pursuant to this AMENDED ORDER TO PAY shall not be paid directly or indirectly by the Bank.

By direction of the Board of Review, pursuant to delegated authority.

{{4-1-90 p.A-992}}

Dated at Washington, D.C., this \_\_\_\_ day of \_\_\_\_, 1986.

/s/ Margaret M. Olsen

Deputy Executive Secretary

**NOTICE OF ASSESSMENT OF CIVIL  
MONEY PENALTIES, FINDINGS OF  
FACT AND CONCLUSIONS OF LAW,  
ORDER TO PAY, AND NOTICE OF  
HEARING**

**FDIC-86-104k**

*NOTICE OF ASSESSMENT OF CIVIL  
MONEY PENALTIES*

The Federal Deposit Insurance Corporation ("FDIC") is of the opinion that \* \* \* and \* \* \*, individually and as former executive officers and former directors of \* \* \* Bank \* \* \* ("Bank"), and \* \* \*, \* \* \*, \* \* \*, \* \* \*, \* \* \*, \* \* \*, \* \* \*, \* \* \*, and \* \* \* individually and as former directors of the Bank, and \* \* \*, \* \* \*, and \* \* \*, individually and as directors of the Bank (directors, former directors, and former executive officers collectively referred to as "Respondents") each has violated section 22(h) of the Federal Reserve 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. Part 215), promulgated thereunder and made to apply to insured State nonmember banks by section 18(j)(2) of the Federal Deposit Insurance Act ("Act") (12 U.S.C. § 1828(j)(2)). The FDIC hereby issues this NOTICE OF ASSESSMENT OF CIVIL MONEY PENALTIES, FINDINGS OF FACT AND CONCLUSIONS OF LAW, ORDER TO PAY, AND NOTICE OF HEARING ("NOTICE OF ASSESSMENT"), pursuant to the provisions of section 18(j)(3) of the Act (12 U.S.C. § 1828(j)(3)) and the FDIC Rules of Practice and Procedures (12 C.F.R. Part 308). In support thereof, the FDIC finds and concludes as follows:

*FINDINGS OF FACT AND  
CONCLUSIONS OF LAW*

1. The Bank is a corporation existing and doing business under the laws of the State of \* \* \*, having its principal place of business in \* \* \*. The Bank is and was, at all times pertinent to this proceeding, an insured State nonmember bank subject to the Act (12 U.S.C. §§ 1811-1831d). \* \* \* and \* \* \* were, at all times pertinent to the charges against which each of their assessments is based, "executive officers" and "directors" of the Bank, as those terms are defined in sections 215.2(d) and 215.2(c), respectively, of Regulation O (12 C.F.R. §§ 215.2(d) and 215.2(c)). \* \* \*, \* \* \*, \* \* \*, \* \* \*, \* \* \*, \* \* \*, \* \* \*, \* \* \*, and \* \* \* each was, at all times pertinent to the charges against which each of their assessments is based, a "director" of the Bank, as that term is defined in section 215.4(c) of Regulation O (12 C.F.R. § 215.4(c)). \* \* \*, \* \* \*, and \* \* \* each is and was, at all times pertinent to the charges against which each of their assessments is based, a "director" of the Bank, as that term is defined in section 213.4(c) of Regulation O (12 C.F.R. § 213.4(c)). The FDIC has jurisdiction over the Bank, each Respondent, and the subject matter of this proceeding.

2. (a) On April 22, 1983, a \$50,000 loan was made to \* \* \*, a \$40,000 loan was made to \* \* \*, and a \$50,000 loan was made to \* \* \*. On April 27, 1983, a \$250,000 loan was made to \* \* \*. On December 31, 1983, a \$60,000 loan was made to \* \* \*. These loans were made on terms that were not substantially the same as those prevailing at the time for comparable transactions, and were made for the purpose of purchasing interests in \* \* \* and \* \* \*.

(b) At the time of these transactions, \* \* \* was an interest of \* \* \*, \* \* \*, and \* \* \*, \* \* \*, and \* \* \* was a related interest of \* \* \*, and \* \* \*.

(c) The extensions of credit cited in this paragraph were made on preferential terms for the benefit of \* \* \*, \* \* \*, \* \* \*, and \* \* \*, and are in violation of section 215.4(a) of Regulation O (12 C.F.R. § 215.4(a)).

3. (a) On January 3, 1984, a real estate mortgage loan on the residence of \* \* \* of \$266,000 was assumed by \* \* \*, a corporation in which \* \* \* has a 71 percent ownership. The note was assumed at the contract rate of 11 percent, even though the terms of the mortgage instrument would have allowed the rate to have been increased to the Bank's then current rate, or 13 percent, at the time of the assumption.

The assumption of the note was done as part of a larger plan in which \* \* \*, was to purchase \* \* \* interest in the Bank. The note is therefore considered to be an extension of credit to \* \* \* and \* \* \* for purposes of section 215.3 of Regulation O (12 C.F.R. § 215.3). The failure to raise the interest rate on the note to the then current market rate is a violation of section 215.4(a) of Regulation O (12 C.F.R. § 215.4(a)) in that the extension of credit was not made on substantially the same terms as those prevailing at the time for comparable transactions.

(b) The amount of the real estate mortgage loan cited in this paragraph exceeds 5 percent of the Bank's capital and unimpaired surplus and was made without the prior approval of the Bank's board of directors as required by section 337.3(b) of the FDIC Rules and Regulations (12 C.F.R. § 337.3(b)), in violation of section 215.4(b) of Regulation O (12 C.F.R. § 215.4(b)).

(c) The amount of the real estate mortgage loan cited in this paragraph, when aggregated with other extensions of credit to \* \* \*, exceeds the Bank's aggregate lending limit in violation of section 215.4(c) of Regulation O (12 C.F.R. § 215.4(c)).

4. On June 15, 1984, a real estate loan of \$206,000 was made to \* \* \*, and \* \* \*. The amount of this loan exceeds 5 percent of the Bank's capital and unimpaired surplus and was made without the prior approval of the Bank's board of directors as required by section 337.3(b) of the FDIC Rules and Regulations (12 C.F.R. § 337.3(b)), in violation of section 215.4(b) of Regulation O (12 C.F.R. § 215.4(b)).

5. (a) On July 1, 1984, the Bank granted a commercial loan of \$383,000 to \* \* \* and \* \* \*. This loan involved more than the normal risk of repayment or presented other unfavorable features, in that the note was inadequately secured and the borrowers' financial statement did not support the loan. As such, the loan was made in violation of section 215.4(a) of Regulation O (12 C.F.R. § 215.4(a)). As of August 17, 1985, \$219,000 of this loan was classified "Loss."

(b) The amount of the commercial loan cited in this paragraph, when aggregated with other extensions of credit to \* \* \*, exceeds the Bank's aggregate lending limit in violation of 215.4(c) of Regulation O (12 C.F.R. § 215.4(c)).

6. (a) By virtue of the facts stated above, the FDIC concludes that each of the Respondents violated sections 215.4(a) of Regulation O (12 C.F.R. § 215.4(a)). Each of the Respondents except \* \* \* violated sections 215.4(b) and 215.4(c) of Regulation O (12 C.F.R. §§ 215.4(b) and 215.4(c)) and section 337.3(b) of the FDIC Rules and Regulations (12 C.F.R. § 337.3(b)). The FDIC concludes that a civil money penalty should be assessed against each Respondent under section 18(j)(3) of the Act (12 U.S.C. § 1828(j)(3)).

(b) As used herein, pursuant to section 18(j)(3)(A) of the Act (12 U.S.C. § 1828(j)(3)(A)), the terms "violate," "violated" or "violation" include, without limitation, and action for or toward causing, bringing about, participating in, counseling, or aiding or abetting the violation.

#### ORDER TO PAY

After taking into account the appropriateness of the penalty with respect to the financial resources and good faith of \* \* \*, \* \* \*, \* \* \*, \* \* \*, \* \* \*, \* \* \*, \* \* \*, \* \* \*, \* \* \*, \* \* \*, \* \* \*, \* \* \*, \* \* \*, \* \* \*, \* \* \*, and \* \* \*, the gravity of the violations of each Respondent, the history of previous violations of each Respondent, and any such other matters as justice may require, it is:

ORDERED, that by reason of the transactions and violations set forth in paragraph 2 through 5 above, a penalty of \$30,500 be, and hereby is, assessed against \* \* \*; a penalty of \$24,500 be, and hereby is, assessed against \* \* \*; a penalty of \$8,000 be, and hereby is, assessed against \* \* \*; and a penalty of \$3,000 be, and hereby is, assessed against \* \* \*, \* \* \*, \* \* \*, \* \* \*, \* \* \*, \* \* \*, \* \* \*, \* \* \*, \* \* \*, \* \* \*, and \* \* \*, pursuant to section 18(j)(3) of the Act (12 U.S.C. § 1828(j)(3)). By reasons of the transactions and violations set forth in paragraphs 2 and 3 above, a penalty of \$20,000 be, and hereby is, assessed against \* \* \*, pursuant to section 18(j)(3) of the Act (12 U.S.C. § 1828(j)(3)).

FURTHER ORDERED, that the effective date of the ORDER TO PAY be, and hereby is, stayed with respect to each Respondent until 10 days after the date of receipt of the NOTICE OF ASSESSMENT by each Respondent, during which time \* \* \*, \* \* \*, \* \* \*, \* \* \*, \* \* \*, \* \* \*, \* \* \*, \* \* \*, \* \* \*, \* \* \*, \* \* \*, \* \* \*, \* \* \*, and \* \* \*, or any of them, may request a hearing pursuant to {{4-1-90 p.A-994}}section 308.69 of the FDIC Rules of Practice and Procedures (12 C.F.R. § 308.69). Any such request for a hearing must be filed in writing with the Executive Secretary, Federal Deposit Insurance Corporation, 550 17th Street, N.W., Washington, D.C. 20429. If any Respondent fails to so file a request for a hearing, the penalty assessed against such Respondent pursuant to this ORDER TO PAY shall be paid within 60 days of the date of issuance of this NOTICE OF ASSESSMENT.

#### NOTICE OF HEARING

FURTHER ORDERED, that if any Respondent requests a hearing with respect to the charges in the NOTICE OF ASSESSMENT, the hearing shall commence 60 days from the date of receipt of such request at \* \* \*. The hearing will be conducted in accordance with the provisions of the Act (12 U.S.C. §§ 1811-1831d), the Administrative Procedures Act (5 U.S.C. §§ 551-559), and the FDIC Rules of Practice and Procedure (12 C.F.R. Part 308). The hearing will be held before an Administrative Law Judge to be appointed by the U.S. Office of Personnel Management pursuant to 5 U.S.C. § 3344. The exact time and location of the hearing will be determined by the Administrative Law Judge. The hearing will be private, unless the FDIC determines that a public hearing is necessary to protect the public interest.

Any Respondent who requests a hearing shall file an answer to the changes in the NOTICE OF ASSESSMENT within 20 days of receipt of the NOTICE OF HEARING in accordance with section 308.06 of the FDIC Rules of Practice and Procedures (12 C.F.R. § 308.06).

Originals of all papers filed in this proceeding shall be served upon the Office of the Executive Secretary, Washington, D.C. 20429. Copies of all papers filed in this proceeding shall be served upon the Legal Division, Compliance and Enforcement Section, Washington, D.C. 20429 and upon the Regional Counsel, Bank Supervision, for the Regional Office in which the home office of the Bank is located.

By direction of the Board of Review, pursuant to delegated authority.

Dated at Washington, D.C., this 7th day of May, 1986.

\s\ Margaret M. Olsen  
Deputy Executive Secretary