

[{{6-30-92 p.A-1202}}](#)

[¶5111] FDIC Docket No. 86-43k (1-19-88).

Civil money penalty was assessed against a person acquiring majority control of a nonmember bank for failure to give FDIC 60-days prior written notice of the acquisition in violation of the Change in Bank Control Act. Disgorgement of unlawful profit is significant aim of the penalty. *(This decision was affirmed in part and remanded, 906 F.2d 972 (4th Cir. 1990) and affirmed, 956 F.2d 58 (4th Cir. 1992)).*

[.1] Practice and Procedure—Delay of Hearing

The ALJ's delay in starting a hearing and issuing a recommended decision does not deprive FDIC of statutory authority to order payment of civil penalty for willful violation of the Change in Bank Control Act.

[.2] Change in Bank Control Act—Compliance

A person planning to acquire control of a nonmember bank must give 60-days prior notice to FDIC.

[.3] Change in Bank Control Act—Violations—FDIC Authority to Prosecute

FDIC has absolute discretion whether or not to prosecute or enforce CBCA violations. FDIC's failure to prosecute a violation in one case is irrelevant in another case.

[.4] Change in Bank Control Act—Civil Money Penalties for Violation— Statutory Standard

In determining the amount of the penalty for a violation, FDIC must consider the respondent's financial resources, good faith, the gravity of the violation, and any data, views and arguments submitted. It must also consider any financial or economic benefit gained from the violation.

[.5] Change in Bank Control Act—Civil Money Penalties for Violation— Economic Benefit Obtained

The financial and economic benefit obtained from the CBCA violation includes: the net profit from resale of minority shares; profit from resale of the remaining shares; and any indirect profit.

In the Matter of *, individually and
as acquiring person of *** BANK
(Insured State Nonmember bank)**

DECISION AND ORDER FDIC 86-43k

I. INTRODUCTION

This proceeding is a civil money penalty action brought by the Federal Deposit Insurance Corporation ("FDIC") against *** ("Respondent"), for his acquisition of the stock of *** Bank.

*** (***), in willful violation of the Change in Bank Control Act, 12 U.S.C. § 1817(j) ("CBCA").

Respondent acquired approximately 56 percent of *** stock in mid-1985 without providing sixty days' prior written notice to the FDIC.

Notice is required by the CBCA and the FDIC's regulations prior to acquisitions of "control", as defined by the CBCA. 12 U.S.C. § 1817(j); 12 C.F.R. § 303.4. After the acquiring party has submitted a complete, accurate and timely notice, the CBCA authorizes the FDIC to determine whether the [{{4-1-90 p.A-1203}}](#) proposed acquisition satisfies the statutory requirements for a change in control.¹

On February 26, 1986, the FDIC issued a Notice of Assessment of Civil Money Penalty, Findings of Fact and Conclusions of Law, Order to Pay, and Notice of Hearing ("Notice of Assessment") against the Respondent in the amount of \$300,000 with an additional \$500 penalty per day to accrue for each day Respondent remained in violation. The Respondent filed a timely request for hearing on March 10, 1986, and contested the FDIC's allegations and proposed relief at the hearing held September 22–26, 1986, before Administrative Law Judge John H. Powell (the "ALJ"). The ALJ issued his Recommended Decision on September 30, 1987. The ALJ found a willful violation of the CBCA and recommended that a \$250,000 penalty be imposed. Both the FDIC and the Respondent filed exceptions.

The Board of Directors of the FDIC ("Board") has reviewed the record, the parties' briefs and the Recommended Decision of the ALJ. The Board adopts the ALJ's Recommended Decision and Findings of Fact and Conclusions of Law except to the extent they are inconsistent with this Decision and Order.

The Board agrees with the ALJ's determination that Respondent willfully violated the CBCA by acquiring control of *** without the required statutory notice to the FDIC. However, the Board concludes that the ALJ's recommended order to pay civil money penalty fails to fully reflect the extent of Respondent's profit from his violation or provide an adequate deterrent to CBCA violations. The Board finds that, on the basis of the record in this proceeding, an order to pay a civil penalty in the amount of \$375,640 should be issued against the Respondent for his knowing and willful violation of the CBCA.

II. STATEMENT OF THE CASE²

A. Facts Related to Respondent's Violation of the CBCA.

Respondent was not in control of *** at any time prior to March, 1985. In March, 1985, the Respondent began solicitation of *** shareholders for purchase of their shares at \$50.00 per share. Most of ***'s small stockholders tendered their shares and he obtained ownership of 2,294 *** shares ("Minority shares"), approximately 18 percent of ***'s outstanding 12,500 shares of stock. F.F. Nos. 15–16.

Contemporaneous with his solicitation of *** shareholders, the Respondent began negotiations with the *** family to purchase approximately 4,700 shares of *** (38 percent of *** outstanding stock) under the control of Mrs. *** ("*** shares"). On April 23, 1985, the Respondent gave Mrs. *** a cashier's check for \$470,600 and obtained a stock certificate, in his name, for 4,706 shares of *** stock. On the same day, the Respondent purchased a \$94,120 repurchase agreement in the joint names of *** and *** ("joint repo"), giving Mrs. *** the right to one-half that amount, or \$47,060. F.F. Nos. 25, 27.

On April 17, 1985, approximately one week prior to his purchasing the *** shares, the Respondent reached an agreement with ***, Chairman of the Board of Directors of *** National Bank, *** for *** to purchase 7,000 shares of *** stock from the Respondent at some future time in an effort by *** to merge or otherwise acquire ***. At the time of this agreement, *** loaned the Respondent \$840,000, part of which was used to finance his acquisition of the *** shares the following week. F.F. Nos. 19, 25. The Respondent signed a note for the \$840,000, payable on demand at 12.75 percent annual interest. FDIC Ex. 6. This loan was subsequently secured by 7,000 shares of *** stock. F.F. No. 22. In addition, the Respondent received a \$300,000 cashier's check from *** when he made the agreement to sell the 7,000 *** shares to ***. F.F. No. 20.

The Respondent filed his first purported Notice of Change in Bank Control on April 10, 1985, indicating that he had purchased 2,294 shares of *** stock. On April 26,

¹ The CBCA authorizes the appropriate Federal banking agency to disapprove any proposed acquisition in the event of specified anticompetitive effects; or the financial condition of the acquiring person might jeopardize the financial stability of the bank; or the competence, experience or integrity of any acquiring person indicates such person should not be permitted to acquire control; or any acquiring person neglects, fails, or refuses to furnish required information to the agency. 12 U.S.C. §1817(j)(7)(A)-(E).

² Citation to the ALJ's Recommended Decision shall be noted "R.D. at ____". Citation to the ALJ's Findings of Fact and Conclusions of Law shall be noted "F.F. No. ____". FDIC Hearing exhibits are noted "FDIC Ex. ____". Respondent's hearing exhibits are noted "Resp. Ex. ____". [{{4-1-90 p.A-1204}}](#) 1985, he filed a second purported Notice of Change in Bank Control, revising the first Notice to reflect his acquisition of the *** shares on April 23. On May 3, 1985, the Respondent filed a third purported Notice of Change in Bank Control further detailing the facts surrounding the *** purchase. F.F. Nos. 7, 39.

In July, 1985, Respondent signed a Shareholder agreement which committed him to vote his 7,000 CBW shares in favor of a merger between *** and ***. The merger did not occur as rapidly as Respondent expected because the July 1985 proposal was rejected by the Office of the Comptroller of the Currency. F.F. Nos. 42, 49.

On March 20, 1986, the Respondent transferred all of his *** holdings, approximately 7,000 shares, to ***. In return, *** cancelled the Respondent's \$840,000 note and accrued interest, F.F. No. 49. Therefore, as described below, the Board concludes that from April 23, 1985 to March 20, 1986, the Respondent had control of ***. He owned 56 percent of the outstanding shares of *** by virtue of his acquisition of the Minority and *** shares, 2,294 shares (18 percent) and 4,706 shares (38 percent), respectively. F.F. No. 41.

B. Summary of the Board's Decision.

The ALJ found that the Respondent knowingly acquired control of *** in violation of the CBCA. He recommended a penalty of \$250,000, approximately 20 percent less than the \$311,000 sought by FDIC

enforcement counsel. The Board agrees that Respondent violated the CBCA. However, the Board finds that a \$375,640 penalty should be assessed to disgorge Respondent's profit from the transactions to the extent possible and to deter him from future violations. The Board finds the ALJ's estimate of Respondent's profit from the CBCA violation to be incomplete because the ALJ's calculation of the sale price does not reflect ***'s cancellation of the accrued interest on the \$840,000 note, a significant part of the consideration Respondent received for the 7,000 *** shares. Further, the ALJ's estimate is incomplete because it does not include in the overall estimate of Respondent's profit certain other financial benefits Respondent received from his willful violation of the CBCA.

III. DISCUSSION

A. *The ALJ's Delay In Scheduling a Hearing and Issuing His Recommended Decision Do Not Affect the Authority of the Board to Issue An Order To Pay Civil Penalties.*

In his exceptions, Respondent argues that the ALJ's failure to conduct a timely hearing and issue a timely recommended decision render the Recommended Decision "void and without force and effect since it was issued contrary to 12 C.F.R. §308.13(b)."³

Although the CBCA does not establish *any* requirement for agency action within specified time periods, Respondent argues the FDIC's procedural rules were violated by the ALJ's delays in commencing the hearing and issuing his Recommended Decision. FDIC rules governing assessment of civil penalties for willful violation of the CBCA require the Executive Secretary to order a hearing to commence within thirty days after receipt of a request for a hearing. 12 C.F.R. §308.81. In this case the Notice of Assessment was issued February 26, 1986. Although Respondent did not make his timely request for hearing until March 10, 1986, the FDIC's Office of the Executive Secretary had anticipated his request and already sought appointment of an ALJ from the United States Office of Personnel Management.⁴ However, none was appointed until April 18, 1986, and it was not possible to actually commence the hearing until more than 30 days elapsed following Mr. ***'s request. Although the Executive Secretary was unable to obtain an ALJ who could more promptly commence a hearing, we find no violation of the plain language of the rule. The Board finds that the Office of the Executive Secretary complied with the rule insofar as it timely sought the appointment of an ALJ who could commence the hearing.

Respondent also argues that the ALJ violated the requirement in 12 C.F.R. §308.13(b) that he file his recommended

³ Respondent also argues that the FDIC did not timely respond to his purported notices of change in control. This argument has no merit. The sixty day period which the CBCA permits the FDIC to disapprove proposed acquisitions of control applies only when proposed acquires give the statutory sixty days' advance notice. If sixty days' advance notice is given and the agency fails to act, the acquisition may be consummated without violating the CBCA. However, in this case no such advance notice was given.

⁴ The FDIC does not employ its own ALJs. It must borrow judges from other agencies or hire retired judges to hear particular cases. The ALJ to whom a case is assigned independently sets the hearing schedule.

{{4-1-90 p.A-1205}}decision 45 days after the record is completed. However, the rule relied upon by Respondent is one established by this Board for administrative efficiency. It is not a statutory requirement. Therefore, the Board has the authority to extend, alter or waive the requirement that the recommended decision must be forwarded to the Executive Secretary within 45 days.

In any event, even failure to meet *statutory* time requirements is not necessarily fatal to an administrative action. The well-recognized rule that has been uniformly applied by the courts⁵ was stated in *Fort Worth National Corp. v. Federal Savings and Loan Insurance Corp.*, 469 F.2d 47, 58 (5th Cir. 1972), as follows:

A statutory time period is not mandatory unless it both expressly requires an agency or public official to act within a particular time period and specifies a consequence for failure to comply with the provision.

[.1] In the case of civil penalty proceedings for violations of the CBCA, no time periods are set in the statute nor are consequences established for tardy agency actions. In addition, the regulations Respondent relies upon, albeit erroneously, do not specify a consequence for the ALJ's failure to perform his duties as expeditiously as the Board would direct. Accordingly, the Board finds no merit to the Respondent's argument that the ALJ's delay in commencing the hearing and issuing a recommended

decision invalidates or taints the record developed. The delays which occurred in the ALJ's handling of this proceeding, although unfortunate, do not deprive the Board of its statutory authority to issue an order to Respondent to pay civil penalties for his willful violation of the CBCA.

*B. Respondent Violated the CBCA By Failing To Provide Sixty Days' Prior Written Notice to the FDIC of His Acquisition of Control of ***.*

[.2] The CBCA requires sixty days' prior written notice to the FDIC by any person planning to acquire control of a state nonmember bank whose acquisition is not otherwise exempt from the Act. 12 U.S.C. §1817(j)(1). "Control" is defined in the CBCA as "the power, directly or indirectly, to direct the management or policies of an insured bank or to vote 25 per centum or more of any class of voting securities of an insured bank." 12 U.S.C. §1817(j)(8)(B).

Prior to his acquiring the *** shares, the Respondent owned 18 percent of ***, i.e., the Minority shares. F.F. No. 16. Since this level of stock ownership does not constitute "control" under the CBCA or FDIC regulations, advance notice to the FDIC of this purchase was not required.⁶ Therefore, Respondent's first filing with the FDIC on April 10, 1985, reflecting the Minority shares purchase consummated during March and April, did not fulfill any statutory obligation.⁷ Moreover, his April 10 filing did not constitute CBCA notice of his plan to acquire control, because, among other inaccurate or incomplete statements, that filing did not disclose his plan to purchase the *** shares.

On April 23, Respondent's ownership in *** increased to approximately 56 percent when he acquired the *** shares. Since this

⁵ See e.g., *Mayor's Office of Employ. v. U.S. Dept. of Labor*, 775 F.2d 196, 201 (7th Cir. 1985) (construing 29 U.S.C. §816(b)); *St. Regis Mohawk Tribe, New York v. Brock*, 769 F.2d 37, 41 (2d Cir. 1985) (construing 29 U.S.C. §817(a)); *Thomas v. Barry*, 729 F.2d 1469, 1470 n. 5 (D.C. Cir. 1984) (construing Home Rule Act, Pub. L. No. 93-198, 87 Stat. 774 (1973)); *Marshall v. Local Union No. 1374, Int. Ass'n of Mach.*, 558 F.2d 1354, 1357 (9th Cir. 1977) (construing 29 U.S.C. §482(b)); *Usery v. Whittin Mach. Works, Inc.*, 554 F.2d 498, 501 (1st Cir. 1977) (construing 19 U.S.C. §2273(a)); *Maryland Casualty Co. v. Cardillo*, 99 F.2d 432, 434 (D.C. Cir. 1938) (construing 33 U.S.C. §919); *Diamond Match Co. v. United States*, 181 F.Supp. 952, 958-59 (Cust. Ct. 1960) (construing 19 U.S.C. §1516(c)); *Alberta Gas Chems., Inc. v. United States*, 515 F.Supp. 780, 784-86 (1981) (construing 19 U.S.C. §160(c)(1)); *United States v. Log Mountain Mining Co.*, 550 F.Supp. 811, 815 (E.D. Tenn. 1982) (construing 30 U.S.C. §1268(c)). See also *Brock v. Pierce County*, 476 U.S. 253, 106 S.Ct. 1834 (1986) (construing 29 U.S.C. §816(b) and concluding the failure of the Secretary of Labor to take certain administrative action within 120 days as directed by statute and regulation did not preclude the Secretary from acting after the expiration of the 120 day period.)

⁶ The statutory threshold is 25 percent. 12 U.S.C. §1817(j)(8)(B). By regulation, the FDIC has adopted a presumption that the acquisition of 10 percent or more of the voting stock of an insured bank is the acquisition of the power to direct that bank's management if the bank has any class of voting securities registered under section 12 of the Securities Exchange Act of 1934 or if immediately after the transaction no other person will own a greater proportion of that class of voting securities. 12 C.F.R. §303.4(a). The regulatory presumption of control does not apply to Respondent's acquisition of 18 percent of the shares of CBW because the bank's stock was not registered under the securities laws and Mrs. *** owned a larger block of *** stock immediately after Respondent acquired the Minority shares.

⁷ Even if there had been notice required in connection with the Minority shares purchase, the April 10 filing would have been inadequate since it was not filed 60 days prior to Respondent's acquisition of those shares.

{{4-1-90 p.A-1206}} acquisition resulted in "control" within the meaning of the CBCA, Respondent was required to give the FDIC sixty days' prior written notice. Although the April 26 and May 3 notices report the *** purchase, neither was filed sixty days prior to the acquisition. Hence, none of the filings constituted a proper notice of a proposed change in control under the CBCA. Failure to give timely notice constitutes Respondent's violation of the CBCA.⁸

C. The FDIC's Decision Not to Prosecute Violations of the CBCA in Other Cases Is Within Its Discretion and Irrelevant to Respondent's Violation.

[.3] In his exceptions Respondent argues that the FDIC should not collect penalties from him for his CBCA violation since it has not always enforced the CBCA as to others. There is no provision in the CBCA for processing notices which are not filed sixty days prior to the proposed change in control.

However, the FDIC, in its discretion, may decide not to seek penalties from acquirers who have violated the CBCA. "[A]n agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion." *Heckler v. Chaney*, 470 U.S. 821, 831, 105 S.Ct. 1649, 1656 (1985). See also *Investment Co. Institute v. FDIC*, 728 F. 2d 518 (D.C. Cir. 1984).

The Court in *Heckler, supra*, recognized that,

. . . the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and indeed, whether the agency has enough resources to undertake the action at all. An agency generally cannot act against each technical violation of the statute it is charged with enforcing.

Accordingly, FDIC decisions not to assess penalties in other cases do not require the agency to abstain from enforcement action in this proceeding.

D. *The ALJ's Recommended Assessment of \$250,000 in Civil Money Penalties Against the Respondent Does Not Adequately Reflect Respondent's Total Profit From His Violation and Is Properly Increased to \$375,640.*

[.4] Section 7(j)(16) of the CBCA, 12 U.S.C. 1817(j)(16), directs the FDIC to give due consideration to the appropriateness of the penalty with respect to the size of financial resources and good faith of the person charged, the gravity of the violation, and any data, views, and arguments submitted.

An important consideration which the Board weighs in determining the amount of a civil money penalty is the financial or economic benefit the person obtained from the violation. See *Interagency Policy Regarding The Assessment Of Civil Money Penalties By The Federal Financial Institutions Regulatory Agencies*, 45 Fed. Reg. 59423 (1980).

Both parties recognize that disgorgement of unlawful profit is a significant aim of the penalty. Thus, the record contains substantial evidence and argument intended to address profit from Respondent's purchase and resale of the *** shares. Specifically, the parties differ as to whether profit on the sale of *all* *** shares Respondent sold should be disgorged, the characterization of certain monetary transfers to Respondent as profit, and the most accurate way to estimate the value of Respondent's profit.

1. *The Financial or Economic Benefit Respondent Obtained from the Violation*

[.5] The Board finds that the financial or economic benefit Respondent obtained from the CBCA violation is composed of the following elements: (1) the net profit from his resale of the Minority shares; (2) the profit from his resale of the *** shares; and (3) that portion of the \$300,000 payment to Respondent which constitutes indirect profit as compensation for his services in connection with the anticipated merger of *** and ***.

a. *Profit on the Minority Shares*

Respondent argues that he should not be penalized for profit generated in connection with his acquisition of the Minority shares. He contends that profit on the transfer of these shares "cannot be considered in assessing the Respondent's 'illegal profit' as these stocks were legally acquired and in turn legally transferred." Respondent's Ex-

⁸ Mere timeliness would not have resulted in a proper filing, however. We agree with the ALJ that "[e]ven a casual review of the three notices would show them to be totally and completely incomplete and inaccurate and clearly did not meet the mandates of the Change in Bank Control Act of 1978." R.D. at 22. [{{4-1-90 p.A-1207}}](#)ceptions, at 22-23. Contrary to the Respondent's assertion, the ALJ determined that the profit on these shares is properly reflected in the penalty. The ALJ noted that Respondent's negotiations to acquire the *** shares occurred contemporaneous with his solicitation of the minority shareholders. R.D. at 3. He concluded that Respondent's "purchase of the first 2,294 shares is considered to be part of the total transaction and cannot be separated from it." R.D. at 13. The Board agrees with the ALJ's conclusion.

There is no dispute that the Minority shares acquisition resulted in 18 percent ownership, less than that amount which triggers the notice requirement under the CBCA.⁹ Respondent's CBCA violation occurred later, on April 23, 1985, when he acquired the *** shares, increasing his holdings to 56 percent ownership

of ***, without providing sixty days' prior written notice to the FDIC of that acquisition of control. As the ALJ found, however, the Minority shares purchase was part of one overall transaction aimed at acquiring and selling a controlling interest in ***. In addition, Respondent's net profit on the *resale* of the Minority shares should be disgorged by the penalty because he would not have earned such profit without the later acquisition of control and resale of all his *** stock as a block to a single buyer.

Respondent purchased the 2,294 Minority shares at \$50 per share and resold them, after he acquired the 4,706 *** shares. Their sale price, valued at \$134 per share,¹⁰ reflects the fact that Respondent anticipated acquiring and selling#151;in a block#151;a controlling percentage of the outstanding *** shares. There is no evidence to suggest that, absent his unlawful acquisition of the *** shares in violation of the CBCA, Respondent could have earned *any* profit on the resale of the Minority shares of ***, which was a very troubled bank. F.F. No. 18. Since sale of the Minority shares at a profit was only possible because of Respondent's subsequent purchase of 4,706 shares in violation of the CBCA, it is appropriate that the Board consider the net profit on his resale of all shares he purchased in 1985 in determining Respondent's penalty.

The gross profit Respondent made from the sale of the Minority shares includes all consideration he received upon their sale less the cost of their purchase. In exchange for his 7,000 shares of *** stock on March 20, 1986, Respondent received from *** cancellation of the \$840,000 demand note Respondent owed to *** and all accrued interest thereon to date,¹¹ which amounted to \$98,175.¹² F.F. No. 49. Since the Respondent would have had to pay \$98,175 in interest as of March 20, 1986, ***'s cancellation of the interest as part of the stock transfer is an element of the sale price just as is the cancellation of the obligation to repay the principal.¹³ Accordingly, on March 20, 1986, Respondent received \$938,175, or approximately \$134 per share for his 7,000 *** shares. The difference between the purchase price of the Minority shares, \$50 per share or \$114,700, and the sale price, \$134 per share of \$307,396, is \$84 per share or \$192,696. This amount is Respondent's gross profit on the Minority shares which is properly included in the calculation of the total profit derived from Respondent's violation of the CBCA. The Respondent also incurred \$7,000 in expenses incident to the acquisition of the Minority shares. Therefore, his net profit on the sale of the Minority shares is \$192,696 minus \$7,000 or \$185,696.

b. *Profit on the *** shares*

There is no dispute regarding the inclusion of net profit from the resale of the *** shares in the overall profit determination. The sale price, properly calculated as discussed above, is \$134 per share. The purchase price contains two elements. First,

⁹ See *supra* note 6 at 9.

¹⁰ See *inpra* at 14–15.

¹¹ Evidence in the record that Respondent gave proxies for the shares on April 29, 1985 and January 22, 1986, and made representations of ownership of said shares in a shareholder agreement in July 1985, supports the ALJ's rejection of Respondent's argument that he divested himself of any interest he may have had in the shares on April 23, 1985. F.F. Nos. 42, 48. In addition, Respondent maintained he owned the shares as of January 9, 1986 in his deposition taken that day. "Q: [D]o you still own approximately seven thousand shares? A: I believe I own it, yes." Deposition of *** (January 9, 1986), FDIC Ex. 40 at 105–106.

¹² Interest accrued on the note from April 17, 1985 to March 20, 1986 (11 months) at an annual rate of 12.75 percent.

¹³ Although the ALJ recognized the \$98,175 benefit to Respondent from ***'s cancellation of the accrued interest, he did not include such benefit in the profit calculation and gave no explanation for the omission. F.F. No. 49.

{{4-1-90 p.A-1208}}there is Respondent's cash outlay of \$100 per share evidenced by the \$470,600 payment to Mrs. ***. Second, Respondent's purchase of the joint repo for \$94,120 represents additional cost to Respondent for these shares. The evidence supports the ALJ's conclusion that Mrs. *** owned a one-half interest in the proceeds of the joint repo.¹⁴ F.F. No. 63. Thus, in addition to \$100 per share, Mrs. *** received \$47,060, or \$10 per share in exchange for the stock. In sum, the total price paid by Respondent to Mrs. *** for the 4,706 shares is \$110 per share or \$517,660. The sale price, \$134 per share or \$630,604, less the purchase price, \$110 per share or \$517,660, is the net profit, \$24 per share

or \$112,944.

c. Indirect Profit from the \$300,000 Check

Respondent argues that the entire \$300,000 he received on April 17, 1985 from *** constituted prepayment of two \$100,000 ten-year notes owed to him by Messrs. *** and ***, due April 21, 1991.¹⁵ This argument is not tenable because the notes had an actual value of less than \$300,000 on the day they were paid. The difference between the value of the notes at the time of prepayment and \$300,000, constitutes consideration Respondent received for his services in connection with the anticipated merger of *** and ***.

The ALJ did not accept FDIC enforcement counsel's position that the present value of the notes on April 17 was \$223,000 and that consequently, Respondent's fee amounted to approximately \$77,000.¹⁶ The ALJ refused to assign a specific value to the notes on the day they were paid because he believed that the notes' unassignability could not be accounted for accurately in the present value analysis.¹⁷ R.D. at 16.

The ALJ's concern with respect to the notes' unassignability is not without merit. The present value of the notes on the day they were paid cannot be calculated with certainty because the record contains no evidence of the April 1985 interest rates on unassignable instruments in the *** market. However, the Board can use information available to it in this record to obtain a reasonable estimate of their value for purposes of establishing a penalty. It would be inconsistent with the purpose and intent of the enforcement provisions of the CBCA, as well as illogical, to omit any estimate of Respondent's profit from the \$300,000 payment on the grounds that such estimate cannot be established with certainty.¹⁸

FDIC enforcement counsel used a 12 percent discount rate in his analysis, indicating that interest rates in 1985 were approximately at that level. FDIC's Exceptions at 5. The only evidence in the record regarding relevant interest rates is that Respondent agreed to pay 12.75 percent on the \$840,000 demand loan the same day he accepted prepayment of the notes. This evidence supports the Board's decision to estimate the value of the prepayment to Respondent using a 12 percent discount rate and to accept the FDIC enforcement counsel's estimate of \$77,000 as Respondent's profit from the \$300,000 check.¹⁹

d. Summary of Respondent's Profit From His CBCA Violation

¹⁴Respondent's unsupported assertion that the designation of *** and *** as joint owners did not accurately reflect the true ownership of the money, i.e., that he considered all of the \$94,120 to be Mrs. ***'s money, is not persuasive. See Deposition of *** (January 9, 1986), FDIC Ex. 40 at 107-109.

¹⁵The *** brothers' notes were payable at a rate of 12 percent per year simple interest and required no payment of principal nor interest until April 1991. The notes were not assignable without the consent of the makers. FDIC Ex. 37 and 38.

¹⁶FDIC enforcement counsel calculated that the present value of \$440,000, the amount that would have been due on the two \$100,000 notes at 12 percent simple interest six years hence (1985 to 1991), using a 12 percent discount rate, is \$223,000. R.D. at 15.

¹⁷The ALJ also rejected the present value analysis suggested by FDIC enforcement counsel because the ALJ believed that various assumptions concerning future interest rates make the determination controversial. R.D. at 15-16. We believe the ALJ misunderstands present value analysis. The aim of such analysis is to determine what a purchaser would pay now, based on *current knowledge* of interest rates, to receive a specified amount of money at a particular time in the future.

¹⁸Administrative agencies often must make predictive judgments based on the best available evidence. *Sunshine State Bank v. FDIC*, 783 F.2d 1580, 1583 (11th Cir. 1986); *Missouri-Kansas-Texas Railroad Co. v. United States*, 632 F.2d 392, 406 (5th Cir. 1980).

¹⁹A more accurate discount rate for use in the present value determination, which accounts for the notes' unassignability, would be higher than the 12.75 percent rate charged on the demand loan. A higher rate would reduce the estimate of the present value of the notes. Therefore, the difference between the \$300,000 prepayment and a more accurate present value estimate, i.e., Respondent's indirect profit, would be greater than the current estimate of such profit. Since FDIC enforcement counsel's present

value analysis using a 12 percent rate results in a conservative estimate of Respondent's profit from the \$300,000 check, we adopt that analysis. In the Board's view, this results in no unfairness to Respondent, notwithstanding any uncertainty in the discount rate due to the notes' unassignability. [{{4-1-90 p.A-1209}}](#)

In sum, the Board's estimation of Respondent's total profit obtained as a result of his violation of the CBCA is as follows:

Net Profit on Minority shares	\$185,696
Net Profit on Rosenberg shares	\$112,944
Indirect Profit from \$300,000 payment	\$77,640
Total Profit	\$375,640

Ordinarily the Board establishes a civil penalty which fully disgorges all ill-gotten gains from the violation and, in addition, is sufficient to deter future unlawful conduct. In this case, a penalty of \$375,640 would disgorge Respondent's unlawful profit from the CBCA violation as well as provide a sufficient deterrent to future violations.²⁰

2. Other Factors FDIC Has Considered In Setting the Penalty

The Board has also considered Respondent's willfulness and lack of good faith, as well as the gravity and length of the violation, the impact of the unlawful acquisition on the bank, and Respondent's financial resources in its determination to assess a \$375,640 penalty. See *Interagency Policy Regarding The Assessment Of Civil Money Penalties By The Federal Financial Institutions Regulatory Agencies*, 45 Fed. Reg. 59423 (1980).

As the ALJ concluded, ***'s violation was knowing and willful. F.F. No. 88. He is a practicing attorney who had previously filed notices incident to the acquisition of control of three other banking institutions in compliance with the CBCA. F.F. Nos. 28-30. Although he did not advise the FDIC of his acquisition of control of ***, after the fact, the evidence supports the conclusion that he knew or should have known that the CBCA required sixty days' advance notice of a change in control. He offered no good faith justification for his failure to provide timely notice prior to his acquisition of control of ***. Thus, Respondent has established no grounds to mitigate the amount of the penalty on this basis of "good faith."

The length of the violation also supports a substantial penalty. The violation lasted from April 23, 1985, when Respondent illegally acquired control, until March 20, 1986, when he divested the stock. F.F. No. 89. Under the statute, the FDIC could have assessed a penalty of \$10,000 for each day of Respondent's unlawful ownership or a maximum penalty of more than \$3 million. 12 U.S.C. §1817(j)(16). Respondent argues that he might have divested sooner if the Office of the Comptroller of the Currency had approved his July 1985 merger plan. When he knowingly violated the CBCA, Respondent assumed the risk that he would be unable to divest control as quickly as he anticipated. The Comptroller's failure to approve Respondent's July 1985 plan, therefore, does not excuse or diminish the violation. Moreover, as the ALJ noted, the FDIC regularly objected to his continuing violation and never gave him any basis to believe his acquisition of control would be approved. F.F. No. 83.

The Board has also considered the harm to the acquired institution as a result of the unlawful acquisition. The ALJ found that *** was in poor financial condition when Respondent acquired control. F.F. No. 13. However, FDIC enforcement counsel did not assert, nor do we find any evidence in the record, that any actions taken by Mr. *** during the period of his control directly harmed ***. F.F. No. 92. Therefore, the amount of the penalty need not be increased to reflect any direct harm, or loss, to ***, as a result of Respondent's violation.

A substantial penalty is also reasonable and appropriate in light of Respondent's resources. The ALJ found that Respondent's assets are valued at approximately \$2,000,000 and this conclusion is supported by the evidence. F.F. No. 81. In 1985, Respondent's taxable income was approximately \$218,000, which does not include the profit from these transactions. FDIC Ex. 60. There is no evidence that Respondent will be unable to earn a substantial income in the future.

IV. CONCLUSION

The Board finds that a \$375,640 civil penalty is justified and appropriate based on the entire record in this matter, after considering Respondent's total profit from the transactions, the gravity and length of

²⁰ The calculation of the \$375,640 profit is not solely determinative of the amount of the penalty the Board could impose in this case. Consideration of the other factors, set forth *infra* at 19-20, could justify a penalty exceeding the illgotten profit. Accordingly, any dispute concerning the actual profit obtained by Respondent from the violation does not invalidate the amount of the penalty assessed in this case. {{4-1-90 p.A-1210}}the violation, the willfulness of the violation, and Respondent's financial resources.

ORDER TO PAY CIVIL PENALTY

The Board of Directors of the Federal Deposit Insurance Corporation has considered the entire record in this proceeding, including briefs filed on behalf of Respondent and FDIC enforcement counsel, the ALJ's Recommended Decision dated September 30, 1987, and exceptions to the Recommended Decision filed by the Respondent and FDIC enforcement counsel. The Board finds on the record before in that *** willfully violated Section 7(j) of the Federal Deposit Insurance Act, 12 U.S.C. §1817(j).

NOW, THEREFORE, IT IS ORDERED, that a civil penalty in the amount of \$375,640 be, and hereby is, assessed against ***.

IT IS FURTHER ORDERED that this penalty shall be paid within 30 days of the date of this Order.

By direction of the Board of Directors.

Dated at Washington, D.C., this 19th day of January, 1988.

/s/ Hoyle L. Robinson
Executive Secretary

RECOMMENDED DECISION

FDIC 86-43k

This case is before the Administrative Law Judge on a request for hearing filed by the Respondent, **, on March 10, 1986.

PROCEDURAL HISTORY

On February 26, 1986, the Federal Deposit Insurance Corporation ("FDIC") issued a Notice of Assessment of Civil Penalty against Respondent, **, in the amount of \$311,000.00 for alleged violations of Section 7(j) of the Change in Bank Control Act of 1978, 12 U.S.C. Section 1817(j). The Respondent filed a timely request for hearing on March 10, 1986. A hearing commenced on September 22, 1986 before the undersigned Administrative Law Judge in **. Following submission of post-trial briefs the matter is before the Administrative Law Judge for a recommended decision.

BACKGROUND

The ** Bank **, is a banking corporation existing and doing business under the Laws of the State of **. **s principle place of business is in **. At all times relevant hereto, ** was a "state nonmember insured bank" within the meaning of Section 3(q) of the Federal Deposit Insurance Act (12 U.S.C. Section 1813(q)), and an "insured state nonmember bank" within the meaning of Section 303.4 of the F.D.I.C. Rules and Regulations, 12 CFR Section 303.4. For the purposes of Section 7(j) of the Change in Bank Control Act (hereinafter the "ACT") (12 U.S.C. Section 1817(j)), the F.D.I.C. is the "appropriate Federal banking agency" with respect to **. Consequently, the F.D.I.C. has jurisdiction over any person who purchased control of, or applied to purchase control of, **. Respondent, **, is a practicing attorney and majority owner, director, and executive officer of the ** Bank at **, (whose principle place of business and residence are located in or near **).

** has been in existence since long prior to 1984. Prior to May 1985, the majority of the voting stock of ** (approximately 72 percent) was owned or controlled by the ** family. From at least 1984 and continuing until at least July 1985, ** experienced problems relating to poor management, financial instability, and poor capitalization. Many unsuccessful attempts were made to sell, merge, recapitalize, or otherwise provide answers to the various problems of **. The impetus for these efforts was the need to avoid **s loss of its insured status with the FDIC and the concomittant need of said institution to satisfy requirements imposed by the State of ** relating to banking corporations doing business in that state.

In March, 1985 the Respondent, ** (hereinafter **), began solicitation of ** shareholders for purchase of their shares at \$50.00 per share. Pursuant to these solicitations, ** was able to obtain control and ownership of 2,294 shares of ** by April 23, 1985. Contemporaneous with the solicitation of the shareholders, ** began negotiations with the **/** family (hereinafter "****") to purchase the stock under the control of Mrs. **. Mrs. **** had control over more than 4,700 shares of ** by virtue of a Power of

Attorney executed by her father, Mr. ***. As such she was able to sell controlling interest in *** to a bona fide purchaser.

On April 17, 1985, an agreement was reached between *** and one ***, Chairman of *** National Bank, that *** National Bank (hereinafter ***) would purchase 7,000 shares of *** stock from *** at some {{4-1-90 p.A-1211}} future time in an effort by *** to merge or otherwise acquire ***.

*** (hereinafter ***) had in the past unsuccessfully attempted to negotiate purchase of the *** stock. The exact reasons for failure of *** to reach an agreement with *** is unclear, but appears to be related to demands made by *** concerning hospitalization coverage for Mr. ***, a permanent position for Mrs. *** at ***, and an unwillingness of Ms. *** to negotiate directly with ***. In any case *** was able to arrange for purchase of 4,706 shares of *** stock from *** for a purported price of \$120.00 per share. This agreement was reached some time between April 17, 1985 and April 23, 1985. The agreement was consummated on April 23, 1985 when *** signed over the stock certificate for 4,706 shares to ***, the stock certificate being placed in his name. The stock was paid for using some of the proceeds from \$840,000.00 that *** obtained from *** on April 17, 1985. At the same time that *** obtained the \$840,000.00 from ***, he also obtained a \$300,000.00 cashier's check from ***. It is clear that *** was actively involved in making arrangements for the issuance of the check. At the time that *** obtained the \$840,000.00 he signed a "demand note" which on its face obligates *** to repay the money at 12.75 percent interest. When *** purchased the shares from *** on April 23, 1985, *** gave her a cashier's check for \$470,600.00. On the same day *** also purchased a \$94,120.00 repurchase agreement in the joint names of *** and ***. *** purportedly gave *** the certificates on the same day after he had signed them "in blank" on April 23, 1985. On April 24, 1985, *** informed an F.D.I.C. official *** of his purchase of an additional 4,706 *** shares on April 23, 1985.

On April 10, 1985 *** filed his first Notice of Change in Bank Control indicating that he had purchased 2,294 shares of *** stock. The Notice was filed ostensibly because the F.D.I.C. (per *** an F.D.I.C. official) had requested *** to do so, despite the fact that *** did not own more than 25 percent of the outstanding *** stock.

On April 26, 1985, *** filed a second Notice of Change in Bank Control which "revised" the first notice showing the change in control by purchase of the additional 4,706 *** shares. On May 1, 1985, the F.D.I.C. (per ***) mailed a letter to *** raising the spectre of a proposed violation of the Change in Bank Control Act. It is unknown when the letter was actually received by *** as the letter was sent to the wrong zip code address. However, it is clear that *** obtained the letter some time in May 1985. On May 3, 1985, a third Notice of Change in Bank Control was filed by ***. ***, on May 29, 1985, responded to the letter from the F.D.I.C. (per ***). This letter told the F.D.I.C. of the purchase of the shares of stock and indicated that the funds used for the purchase came from a loan from *** of \$840,000.00 which was secured by 7,000 shares of *** stock. Ultimately the shares of *** stock represented by two certificates in ***'s name which he had signed "in blank" were transferred to *** on March 20, 1986.

The F.D.I.C. has alleged that *** violated Section 7(j) of the Change in Bank Control Act of 1978, 12 U.S.C. Section 1817(j). In order to establish a violation of Section 7(j) of the Act, the F.D.I.C. must establish that *** did not have "control" of the *** Bank ***, that he subsequently obtained "control" of the bank, and that he failed to file a notice with the F.D.I.C. at least 60 days before obtaining control.¹ As is usually the case, resolution of the factual issues presented in the case for the most part will resolve the legal issues presented.

The undisputed facts in the case are that the ***/*** group had controlling interest of 7,000 shares of 12,500 outstanding shares of *** stock prior to April, 1985. ***, by his own admission, purchased 2,294 shares of *** stock from minor shareholders at a price of \$50.00 per share. These purchases were made from March 14, 1985 through April 23, 1985 with the exception that approximately 50 shares of the stock were still in transit as of April 23, 1985. *** contends, however, that when he negotiated and consummated the deal with *** he never became the legal or beneficial owner of the 4,706 shares of *** stock purchased from ***. He contends that *** or *** were the actual owners and that he was merely acting

¹ The term "control" as used in Section 1817(j) of the Change in Control Act of 1978 is defined as the power, directly or indirectly, to direct the management or policies of an insured bank or to vote 25 per centum or more of any class of voting securities of an insured bank. Section 1817(j)(8)(B) of the Act. {{4-1-90 p.A-1212}} as an agent or conduit for transfer of the stock. The objective evidence of record reveals that the stock was purchased with part of the \$840,000.00 which *** obtained from ***. At the time that *** obtained the \$840,000.00 he signed a demand note for the \$840,000.00 which demand note indicates on its face that *** agreed to repay the \$840,000.00 with interest at 12.75 percent. The loan agreement was subsequently secured by 7,000 shares of *** stock. These facts are prima facie evidence of ***'s ownership of the 4,706 shares of stock. *** also admits that the stock certificate was transferred to his

name by ***. He does contend, and there is no evidence to dispute his contention, that he signed the stock certificate in blank on the back. ***, however, argues that either *** or *** was the actual owner of the stock and he was merely acting as an agent or conduit for transfer of the stock. The prima facie evidence of record clearly shows that *** was in fact the owner of the stock when it was transferred from *** to him by the signing of the certificate in his name. All of the objective evidence clearly shows that *** purchased the stock using a loan which he obtained from ***. There is absolutely no objective proof, other than ***'s own statement, that he was not personally obligated on the demand note, that *** purchased the stock as an agent for *** or ***. Additionally, the record is replete with references by *** himself prior to the hearing that he actually owned the stock and that he had purchased it. After he had obtained the stock certificates from *** and allegedly gave them to ***, on at least three occasions he voted the stock by proxy. While he claims that this was done merely at the behest of ***, the Administrative Law Judge is unimpressed with this testimony. *** also had other business associates, i.e. ***, ***, and *** placed in various positions with the bank using his voting power in the stock and the leverage which it gave him. He also effectively killed a recapitalization plan proposed by an individual named *** who purchased additional stock which was to be issued by ***. There is absolutely no other proof of an agency relationship between ***, ***, and ***. *** is a practicing attorney, had past dealings with ***, and was an experienced banker. He certainly had knowledge of the various filing requirements of the Bank Control Act and in fact made filings for change of control prior to and subsequent to the purchase of the stock. The only conclusion which can be reached from the evidence of record was that *** purchased the 4,706 shares from *** for himself and was the legal/equitable owner thereof.

The F.D.I.C., therefore, has established that *** purchased controlling interest in the *** Bank *** on April 23, 1985 by the purchase of 4,706 shares from the ***/*** group thus giving him 7,000 shares of a total 12,500 voting shares. He thus had in excess of 50 percent of the voting shares of *** and the F.D.I.C. has established that a change in control of the bank was accomplished on April 23, 1985 by *** purchasing the additional 4,706 shares.

*** filed three Notice of Change in Bank Control. The first notice was filed on April 10, 1985 at a time when *** had only 2,294 shares either already purchased or in transit. These shares would amount to only 18 percent of the total voting stock of ***. Accordingly, as of this time any notice which would have been filed would not show any change in "control" as defined in Section 1817(j)². He filed a subsequent notice on April 26, 1985 which "revised" the first notice filed on April 10, 1985. The notice of April 26, 1985 did show that a change in bank "control" had been accomplished. He then filed a third notice of May 3, 1985 further detailing the facts surrounding the acquisition of the 4,706 shares. There is a dispute among the parties as to the accuracy of these various filings and whether the filing of April 10, 1985 has any legal significance. Whether accurate or not, it is clear that none of these notices were filed prior to 60 days before April 23, 1985. The first notice was filed on April 10, 1985, only two weeks prior to the purchase of April 23, 1985. Accordingly, *** did not file a notice showing an intended change in control of the *** Bank *** prior to 60 days before he actually purchased control. *** had full knowledge of the notice requirements for filing with the F.D.I.C. He is an attorney, an experienced businessman, and also has controlling interest in at least two other banks. On two prior occasions he filed notices showing changing control which notices were apparently accepted.

*** contends that he was not required to file the notices since he was only an agent or conduit for *** or *** National Bank. How-

² Id. {{4-1-90 p.A-1213}}ever, as has been shown, *** was the actual legal and beneficial owner of the stock purchased from the minority shareholders from March 1985 through April 10, 1985, and was also the legal and beneficial owner of the 4,706 shares of *** stock purchased from *** on April 23, 1985. No proof of agency has been shown or established. Therefore, under Section 7(j) of the Change in Bank Control Act, 12 U.S.C. 1817(j), *** was the appropriate person required to file Notices of Change in Bank Control at least 60 days prior to acquisition of the control.

The only conclusion which can be reached is that Respondent *** "acquired control" of the *** Bank *** by the purchase of a total of 7,000 shares, said control being acquired on April 23, 1985 with the purchase of 4,706 shares of *** stock raising his total stock ownership in *** from 18 percent to 56 percent of the outstanding voting stock. *** did not give 60 days prior written notice as required by 12 U.S.C. 1817(j)(1). Therefore, Respondent *** did knowingly and willingly violate Section 12 U.S.C. 1817(j)(1) of the Change in Bank Control Act of 1978.

Section 1817(j)(15) provides for penalty of not more than \$10,000.00 per day for each day during which a violation occurs. This Section of the Change in Bank Control Act of 1978 requires the F.D.I.C. to permit a respondent to submit data, views, and arguments in support of his position and to consider the size of the financial resources and good faith of the person charged, the gravity of the violation, and the data, views, and arguments submitted by the person so charged. In an effort to further clarify the policy to be

pursued by the federal agencies, policy statements of the F.D.I.C. dated September 30, 1980 provide guidance in the procedures and criteria used by agencies (including the F.D.I.C.) in the assessment of civil money penalties.³

The Act and F.D.I.C. statement of policies establish that the starting point in any consideration of a civil monetary penalty should be consideration of any economic or financial benefit obtained by the violators. A great deal of time and energy has been expended by all parties in attempting to establish the actual profit or financial gain obtained by *** in violation of the Change in Bank Control Act. *** contends that his actual profit was approximately \$22,000.00 while the F.D.I.C. contends that ***'s profit was at least \$284,000.00. In attempting to establish their respective views on ***'s actual profit, both parties have attempted to lessen or increase the actual profit from the sale of the stock by inclusion or exclusion of interest on various loans, and present or future benefits obtained from the payoff of various loans. ***'s actual profit on the sale of the stock came in two phases. First he purchased 2,294 shares at \$50.00 per share and subsequently sold them for \$120.00 per share. The difference between \$50.00 per share and \$120.00 per share is \$70.00 per share for 2,294 shares. This amounts to a gross profit of \$160,580.00. The evidence of record also reveals that in his purchase of the 4,706 shares from ***, ***, and *** only \$100.00 per share in actual cash. He also took \$20.00 per share and purchased a "repurchase agreement" in the joint names of himself and ***. As a matter of law *** would, as joint owner of the repurchase agreement with ***, be entitled to one-half of the value of the repurchase agreement. Thus *** would have made \$10.00 per share on the 4,706 shares which he purchased from ***. The \$10.00 per share profit is calculated by showing that *** sold the shares for \$120.00 per share. He gave *** a check for \$100.00 per share and also gave

³ The policy statement requires consideration of the individual's financial resources and good faith, the gravity of the violations, any previous history of violations, or any other matters as justice may require. This policy further states that significant consideration should be given to the financial or economic benefit obtained from the violation. The civil monetary penalty should seek to remove any economic benefit obtained from the violation and then assess an additional penalty as a deterrent to further conduct. In assessing the gravity of the violation critical factors include whether the violation was intentional or committed with a disregard of the law or consequences to the banking institution, the frequency of the violations and/or the length of time that the violation was outstanding, the continuation of the violation after the respondent becomes aware of it or its immediate cessation and correction, the failure to cooperate with the agency in effecting early resolution of the problem, any evidence of concealment of the violation or voluntary disclosure, the threat of or actual loss or harm to the banking institution, including loss of public confidence, and the degree of harm, any evidence that the violators received financial or other gain or benefits or preferential treatment as a result of the violation, evidence of restitution, any history of prior violations, any previous criticisms of the banking institution for similar violations, the presence or absence of a compliance program, the tendency to create unsafe or unsound banking practices, or the existence of agreements, commitments or orders intended to prevent the subject violation.

[{{4-1-90 p.A-1214}}](#)her half ownership in a repurchase agreement which was purchased using \$20.00 per share. Thus *** actually received \$110.00 per share for her 4,706 shares which *** sold for \$120.00 per share. Thus the profit of \$10.00 per share on 4,706 shares is \$47,060.00. The total gross profit obtained by *** is \$207,640.00 in the actual purchase and sale of the stock. *** argues that his profit from the purchase and resale of the first 2,294 shares was "legal" and should not be considered in determining his actual economic and financial gain from the transaction. However, the actual purchase and sale of the first 2,294 shares was part of the entire change in control. It is noted that without the 2,294 shares *** would only have purchased 4,706 shares which would not have been 50 percent of the total voting stock. While the Administrative Law Judge notes that under the Change in Bank Control Act of 1978 notice is required to be filed when there is a purchase in excess of 25 percent with no other individual owning more than 25 percent, *** without the additional 2,294 shares would not have owned 50 percent of the total outstanding stock. Thus while he would have been required to file the required notices with the F.D.I.C. without 50 percent of the outstanding voting stock, his leverage in the overall transaction would have been greatly diminished to the point where he might not have been able to force a merger with *** Bank. Lack of control of 50 percent of the stock would at least permit someone in theory to oppose his merger plans. Thus the purchase of the first 2,294 shares is considered to be part of the total transaction and cannot be separated from it. *** was paid for the 2,294 shares at the same time that he was paid for the 4,706 shares. Under ***'s theory, an individual could purchase all of the shares which he wished to purchase from minority shareholders up to a certain amount just below that required for control of the bank. He could then go out and purchase one additional share thus giving him control of the bank and would have his economic and financial benefit measured by the profit he made on the sale and purchase

of only one share. This clearly is absurd and ignores the realities of the situation. It is the actual control of in excess of 50 percent of the shares which would permit *** to force a merger and one cannot separate the purchase of the first 2,294 shares from the subsequent purchase of 4,706 shares when *** did not divest himself of the 2,294 shares prior to purchase of the subsequent 4,706 share block. Accordingly, ***'s arguments in this regard are specifically rejected.

Iso argues that the interest on the loan used to purchase the first 2,294 shares should be used to reduce his overall profit. This interest totaled \$1,372.70. However, *** ignores the fact that he had the use of \$207,640.00 in actual profit from the check of \$840,000.00 at all times after April 23, 1985. This profit could have been used to pay off the loan with no further accrued interest. ***, subsequently, did not end up paying any interest on the use of the \$840,000.00. Thus he cannot be heard to complain that he had to pay interest on the first loan which could easily have been paid off using the proceeds from the sale and additional interest could have been earned using the remaining funds. As such the interest on the loan used to purchase the initial 2,294 shares cannot be used to lower ***'s overall profit. *** also argues that a subsequent loan of \$77,000.00 plus the interest which would have to be paid (both past and future) should also be used to discount the actual profit. However, this \$77,000.00 loan was used to, in part, recapitalize *** Bank *** prior to the actual merger with ***. It is simply part of his investment in the bank and would have been reflected in the actual sale price of the stock to *** Bank. As such, it is part of his investment in the bank and was used to enhance the bank's financial picture prior to merger with ***. Therefore it is amply reflected in the sale price of the stock to *** and cannot be used to discount the profit.

F.D.I.C. contends that *** made at least an additional \$70,000.00 when he received a cashier's check for \$300,000.00 contemporaneous with the loan of \$840,000.00. *** admits that he cashed the \$300,000.00 check and kept all proceeds therefrom. However, he contends that the \$300,000.00 was repayment of two loans made to *** and his brother, each loan being for \$100,000.00. The loans were payable in 1991 and accrued interest at 12 percent simple interest per annum. The F.D.I.C. contends that the present value of the loans due in 1991 is approximately \$223,000.00 and that the difference between \$300,000.00 and \$223,000.00 was actual profit to *** as part of his leverage from the sale of the stock. While this argu- [{{4-1-90 p.A-1215}}](#) increase ***'s actual gross profit from the sale of the stock by \$77,000.00 representing the difference between the \$300,000.00 check which he received and the present value of the \$223,000.00. In obtaining the figure of \$223,000.00 various assumptions must be made concerning future interest rates and the terms of the notes. *** contends that the notes were payable in full in 1991, while *** has indicated that the notes were conditional on the occurrence of certain unspecified events. In any case both of the notes were unassignable. These facts would tend to indicate that the actual value of the notes was far less than the \$223,000.00 as proposed by the F.D.I.C. However, in a like manner, to speculate on the interest rates for six years from 1985 through 1991 is also subject to controversy. While the notes in 1985 might have been worth far less than \$223,000.00, since *** was unable to sell the notes or otherwise assign them, he is entitled to at least be given the benefit of any increase in value of the notes from 1985 to 1991. If interest rates decline in general from 1985 to 1991, the value of the notes, being at a fixed interest rate, would necessarily increase. Thus at some future time between 1985 and 1991 the value of the notes might be greater than what it would appear in 1985. The Administrative Law Judge notes that interest rates have gradually been declining and the value of the notes would have increased with the declining interest rates. The notes being unassignable, the Administrative Law Judge is unwilling to assign a specific figure to the value of the two \$100,000.00 notes. It is enough to say that *** did enjoy some preferential treatment in obtaining the \$300,000.00 cashier's check from the leverage which he had in ownership of the stock of ***. Thus the actual gross profit of *** from the sale of the 7,000 shares of stock is \$207,640.00. *** has established that he paid \$7,000.00 out in fees for the purchase of the initial 2,294 shares. This \$7,000.00 was paid to a business associate for his work in obtaining the stock. Although the F.D.I.C. does not wish this \$7,000.00 to be used to diminish ***'s gross profit, the Administrative Law Judge notes that this is not a criminal proceeding. The \$7,000.00 expense by *** paid to business associates for the purchase of the first 2,294 shares is a legitimate business expense related to the purchase of the shares and reduces his profit to \$200,640.00. Thus ***'s actual profit from the sale of the 7,000 shares of stock is \$200,640.00.

In addition to the actual removal of any financial or economic benefit from the purchase of control in violation of the Change in Bank Control Act of 1978, the policy of the F.D.I.C. as well as the clear intent of the Change in Bank Control Act of 1978 is to provide an additional monetary to deter future transgressions. Salient factors to be considered are the good faith of the violator, the gravity of the violation, and any other matters as justice requires. In the instant case it is clear that ***'s violation of the Bank Control Act of 1978 was intentional, willful, knowing, and in utter disregard of the law for the sole purpose of making a profit on the subsequent resale of stock or merger of *** with ***. *** had the education and experience to assess his situation and his actions and clearly know of the required notice

provisions of the Change in Bank Control Act of 1978, having filed at least two prior notices on the change of control of other banks. While he attempts to characterize his actions as also being related to public good will and in an attempt to keep the bank from closing despite all odds, the Administrative Law Judge is totally unimpressed with this characterization. The evidence of record clearly reveals that the action of *** and *** were solely for the purpose of making a profit. It is not the purpose of making a profit which constitutes the gravamen of the violation. Clearly there is no law against making a profit and certainly without the prospect of making a profit on business deals the economy of the world would slowly grind to a halt. It is the disregard for the law on the filing of the various notice provisions that constitutes the gravamen of ***'s violation. This he did knowingly and willfully and for which he has offered no viable excuse. However, there are other factors which mitigate in ***'s favor. Although the F.D.I.C. has attempted to show past questionable transactions of *** with the two banks which he has under his control, they have not established any prior violations by *** of the Change in Bank Control Act nor has *** ever been prosecuted for a civil monetary penalty in his other transactions with {{4-1-90 p.A-1216}}the bank and certainly he has never been prosecuted or found guilty of a criminal violation. Whether ***'s Notice of Change in Control would have been accepted by the F.D.I.C. had he been filed 60 days prior to his actual purchase of the 4,706 shares is absolutely irrelevant. It suffices to say that the F.D.I.C. has not established any prior violations of *** of the Change in Bank Control Act. After purchase of the 4,706 shares and notice by the F.D.I.C. of its disapproval of ***'s actions, he did make attempts to cure the violation but was unsuccessful in doing so. He clearly was unable to force change in ownership since the stock certificates, while in his name, were not within his possession. While normally an individual would wish the stock certificates which he has purchased to be transferred to his name immediately, in the instant case just the opposite was true for *** and ***. *** would have wanted the stock certificates transferred out of his name at the earliest possible moment due to his difficulties with the F.D.I.C. *** was apparently under some type of federal investigation on criminal charges and, for unknown reasons, also did not want the stock placed in his name or otherwise transferred to him. It was not until the F.D.I.C. stepped in that the actual stock transfer was accomplished. Clearly *** could not force a merger of *** with *** without ***'s approval as well as the approval of the various banking commissions. He also could not recapitalize *** by himself as he was financially unable to do so. Thus the Administrative Law Judge is willing to give *** the benefit of the doubt and conclude that he did make efforts to cure the violation. However, these efforts were unsuccessful. The Administrative Law Judge does note that *** did kill a plan by *** to recapitalize *** probably because he did not wish to actually lose control of *** and if the bank were recapitalized it would make it more difficult to merge with *** as *** would have significant leverage in determining whether a merger would occur. This does, to some extent, militate against the efforts made by *** to cure his violation.

The F.D.I.C. has not established any evidence of failure to cooperate by *** with the F.D.I.C. While *** may not have been the most cooperative individual, it is clear that the F.D.I.C. and *** were in adversarial roles as early as May 1985. This would have made any cooperation by *** difficult, to say the least. In any case the guidelines talk of a "failure" to cooperate rather than a willingness to cooperate. There being no evidence of a "failure" to cooperate, *** should be also given the benefit of doubt on this factor.

There is no doubt that *** voluntarily disclosed his purchase of control to the F.D.I.C. shortly after it was consummated.

The Administrative Law Judge can find no actual harm which occurred to *** due to ***'s purchase of control. While ***'s ability to manage a bank and some questionable insider loans have been questioned by the F.D.I.C., there is absolutely no evidence of such difficulties concerning ***. Additionally, since *** was on the verge of being closed anyway, it is difficult to perceive how a change in management could pose any further harm to ***. While *** may have been a "poor manager" it is clear that the other managers of *** prior to his obtaining control were at least as poor. In any case there is no actual harm done to *** and the F.D.I.C. has admitted as much in their briefs and statements at the trial.

*** did make a total profit of \$200,640.00 on the transaction here in question. He also received preferential treatment by receiving a \$300,000.00 cashier's check on the payoff of two loans which were not due to be paid off until 1991. This greatly eased ***'s cash flow difficulties which he was having at the time and was clearly of economic benefit to him, although the actual economic benefit cannot be reduced to a precise figure.

The remainder of the factors and criteria used in determining the gravity of the violation as set forth in the F.D.I.C. guidelines are clearly inapplicable or of no significant impact. Thus the totality of the evidence would indicate that *** made a profit \$200,640.00 from his sale of the stock and had additional economic benefits concerning the early payoff of two loans of a face value of \$200,000.00 in 1985 which loans were not due until 1991. This early payoff clearly eased ***'s cash flow problems and was of significant economic benefit to him.

The other factor which must be used in consideration of the civil monetary penalty is the financial

resources of the Respondent, ***. *** has total net worth of approximately \$2,000,000.00, most of which is tied up in ownership of shares of bank stock in two banks, and real estate. Thus while {{4-1-90 p.A-1217}}*** may have a net worth of \$2,000,000.00 this figure is subject to variation depending on the liquidity of the bank stocks and real estate.

Respondent *** was in violation of the Act at all times from April 23, 1985 to March 20, 1986. At \$10,000.00 a day, the maximum penalty which could have been imposed on the respondent exceeds \$3,000,000.00. This clearly would be an inappropriate penalty as it would be beyond the respondent's ability to pay and would be far too harsh for his actions in this matter.

The F.D.I.C. requests that Respondent *** be assessed a civil penalty of \$311,000.00. The Administrative Law Judge is not in agreement with the F.D.I.C. The evidence of record reveals that Respondent *** had a net actual profit of \$200,640.00 with other economic benefits relating to a \$300,000.00 cashier's check representing early payoff of two loans made to the *** brothers. While the precise value of the economic benefit derived from the \$300,000.00 check cannot be ascertained, it clearly was of great economic benefit to *** as it greatly eased his cash flow problems at a time when he was experiencing great difficulties meeting the payments on various loans and additionally probably represented a profit of unknown amount on the actual loan payoffs themselves. The value of this economic benefit cannot be precisely determined. Considering the gravity of the violation, ***'s lack of good faith in purchasing the controlling interest of the bank, his efforts to cease the violations thereafter, his voluntary disclosure of his violation, and the other factors as set forth herein, the Administrative Law Judge finds that a total civil money penalty of \$250,000.00 is appropriate. This would deprive the Respondent *** of his profit of \$200,640.00 and pose an additional penalty of almost \$50,000.00 for the economic benefit received from the \$300,000.00 cashier's check as well as a minimal amount to deter future violations.

During the course of the hearing and in post-trial motions the Respondent, ***, has also raised other arguments and motions. He renewed his motion to dismiss or motion for summary judgment on two grounds. The first ground is the failure of the F.D.I.C. to respond within 60 days of the filing of the Notice in Change in Bank Control as required by Section 7(j) of the Change in Bank Control Act of 1978, 12 U.S.C. Section 1817(j). However, as previously noted the failure of the F.D.I.C. to respond within 60 days of the notices is irrelevant as concerns the alleged violation herein. The violation of the Act occurred prior to expiration of the 60 day period even if one assumes that the April 10, 1985 notice was a proper filing. It is unnecessary to determine whether the F.D.I.C. was required to respond to this notice or to any of the other two notices. Even a casual review of the three notices would show them to be totally and completely incomplete and inaccurate and clearly did not meet the mandates of the Change in Bank Control Act of 1978. However, since the violation occurred prior to expiration of the 60 day time period, even assuming that the notice of April 10, 1985 required a response, there are no grounds for dismissal of the action due to this alleged failure. Certainly *** cannot claim to have relied on the failure of the F.D.I.C. to act when they were not required to do so prior to the time that the violation occurred. Simply stated the failure of the F.D.I.C. to respond within 60 days of any of the filing of the notices does not constitute grounds for dismissal.

*** also contends that the case should be dismissed for the failure to hold a hearing within 60 days of the filing of the request for hearing. As a hearing has been held and a decision on the merits is being issued the Administrative Law Judge can consider this motion at the present time. The Administrative Law Judge notes that *** has not shown any prejudice whatsoever by the failure to hold a hearing within 60 days of March 10, 1986. The scheduling of the hearing is not within the discretion of the F.D.I.C., but is vested exclusively in the Administrative Law Judge who is independent of the other governmental bodies. If the Administrative Law Judge were not independent of the other governmental bodies there would be no reason to hold a hearing in these matters. The independence of the Administrative Law Judge must be preserved at all costs in order to assure a fair and impartial hearing. Lastly, if more need be said Section 308.79(b) of the F.D.I.C. Regulations relied on by *** require only that the Executive Secretary or- {{4-1-90 p.A-1218}}der a hearing to commence within 30 days after receipt of a request for hearing. Section 308.79(b) does not require the Administrative Law Judge, who is independent of the Executive Secretary, to actually hold the hearing within 30 days nor does it require a decision within 30 days. Such an interpretation would effectively remove the Administrative Law Judge from control of the case. In any case as *** has not shown any prejudice of the failure of the Executive Secretary to order the hearing to commence within 30 days, it does not constitute grounds for dismissal.

During the course of discovery, Respondent *** moved for the production of various documents including, *inter alia*, certain documents of the Comptroller of the Currency within the possession of the F.D.I.C. The Administrative Law Judge specifically denied this motion. The F.D.I.C. had possession of these documents only as an agent for the Comptroller under a separate agreement between the two agencies. The documents were not used in the prosecution of the instant case and were specifically

denied admission by the Administrative Law Judge. The documents have not been considered in the determination of the case. Lastly, the documents were not related to the Respondent *** or his dealings with the F.D.I.C. in connection with his purchase of the *** stock and would not have materially aided him in his defense. As such, they were beyond the scope of discovery.

Based upon all of the credible evidence of record, the Administrative Law Judge finds that Respondent, ***, did intentionally, willingly, knowingly, and in utter disregard of the Law purchase 7,000 shares of stock in the *** Bank ***. The final purchase of 4,706 shares on April 23, 1985 gave Respondent, ***, control of the *** Bank *** by vesting in him control of approximately 56 percent of the voting stock of said bank. Respondent, *** did not file the appropriate Notices of Change in Control as required by Section 7(j) of the Change in Bank Control Act of 1978, 12 U.S.C. Section 1817(j). Accordingly, due to the violation of the Change in Bank Control Act of 1978 a civil monetary penalty of \$250,000.00 is assessed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon all of the credible evidence of record the Administrative Law Judge makes the following findings of fact and conclusions of law:

JURISDICTION

1. *** Bank ***, ***, is a banking corporation existing and doing business under the laws of the State of ***. ***'s principle place of business is in ***.
2. At all times relevant to this proceeding, *** was a "State nonmember insured bank" within the meaning of Section 3(q) of the Federal Deposit Insurance Act (12 U.S.C. Section 1813(q)), and an "insured state nonmember bank" within the meaning of Section 303.4 of the FDIC's Rules and Regulations, 12 C.F.R. Section 303.4.
3. For purposes of Section 7(j)(1) of the Act (12 U.S.C. Section 1817(j)(1)), the FDIC has been the "appropriate Federal banking agency" with respect to *** at all times relevant to this proceeding.
4. At all times relevant to this proceeding, the FDIC has had jurisdiction over any person who purchased control of, or applied to purchase control of, ***.
5. Respondent *** resides and has his principle place of business in or near ***.
6. *** is a practicing attorney, a majority owner, a director, and an executive officer of *** National Bank at ***, ***.
7. In April and May 1985, *** filed with the FDIC three documents labeled as Notices of Change in Bank Control. Those documents relate to ***'s purchases of *** stock, including his April 23, 1985 purchase of control of ***.
8. The FDIC has jurisdiction over *** and over the subject matter of this proceeding.
9. The FDIC issued a "Notice of Assessment of Civil Money Penalty" alleging a violation of Section 7(j) of the Change in Bank Control Act of 1978, 12 U.S.C. Section 1817(j) by Respondent *** and assessing a civil monetary penalty of \$311,000.00.
10. Respondent, ***, filed a Request for Hearing on March 10, 1986.
11. A hearing was held before the undersigned Administrative Law Judge commencing on September 22, 1986.
12. Prior to March 1985, *** and members of his family owned or controlled approximately 72 percent of ***'s voting stock. Mr. **** daughter, *** ("Ms. ****"), [{{4-1-90 p.A-1219}}](#) held a Power of Attorney under which she could, *inter alia*, sell Mr. **** stock in ***.
13. From at least 1984 forward, *** had serious problems including operating losses and inadequate capital. These problems were of such magnitude that *** was approaching an imminent failure by March 1985.
14. Prior to March 1985, there were unsuccessful efforts to sell, merge, liquidate, or recapitalize ***.
15. *** was not in control of *** at any time prior to March 1985.
16. On or about March 14, 1985, *** began to solicit, by mail, tenders of shares of *** stock at \$50.00 per share. The majority of ***'s small stockholders tendered their shares to *** at his \$50.00 per share offering price. Through that offer, *** acquired a total of 2,294 *** shares (18 percent of the outstanding stock) at that \$50.00 price.
17. By mid-March 1985, *** had spoken to Ms. *** concerning *** stock, including a possible sale of the *** stock under her control.
18. In March and April 1985, the book value of *** stock was less than \$50.00 per share. At that time *** had a serious capital deficiency, lacked adequate management, was losing money, and was in serious danger of being closed by the State of ***. There was no active market for *** stock. Absent a merger or acquisition, *** stock was worth substantially less than \$50.00 per share. Had *** closed, its stock would

probably have been worthless.

19. On April 17, 1985, Messrs. ***, ***, *** (** National's Chairman), and *** (** National's president) negotiated an agreement under which ** National Bank, ** ("** National ") contracted to purchase 7,000 ** shares from ** as part of a merger of ** into ** National. Major terms of that agreement included that: (a) ** National would immediately give ** a check for \$300,000.00, (b) ** National would immediately loan ** an additional \$840,000.00 to be secured by 7,000 ** shares, (c) ** would promptly use a portion of the loan proceeds to purchase 4,706 CBW shares controlled by Ms. **, and (d) when the merger was consummated, ** National would cancel the \$840,000.00 note, including all accrued interest, in exchange for **s 7,000 CBW shares.

20. On April 17, 1985 pursuant to that agreement, ** National delivered a \$300,000.00 cashier's check to **. That check would not have been issued but for the leverage ** had as a result of his actual, and anticipated, ownership of ** stock.

21. On April 17, 1985, pursuant to that same agreement, ** National loaned ** \$840,000.00 on a demand note to be secured by 7,000 shares of ** stock. The loan "value" of each share was \$120.00.

22. At the time the \$840,000.00 was delivered to **, he owned approximately 2,200 ** shares. ** delivered no collateral for the loan until at least April 23, 1985.

23. At the time ** National delivered the \$840,000.00 to **, it was impossible for ** to obtain a total of 7,000 ** shares without buying ** shares owned by Mr. ** or his family.

24. The \$840,000.00 and the \$300,000.00, was given to ** under an agreement that ** would promptly purchase 4,706 ** shares from Ms. **. While no precise time limit appears to have been set, it is clear that when he took the \$1.14 million, ** agreed and intended to purchase the control block of ** stock from Ms. ** long before the minimum 60 day waiting period under the Change in Bank Control Act would have expired.

25. April 23, 1985, Ms. ** sold her father's 4,706 ** shares to **. ** caused a \$470,600.00 cashier's check (\$100.00 per share) to be delivered to Ms. ** in payment for those ** shares. ** National's April 17, 1985, \$840,000.00 loan to ** provided the funds used to purchase that cashier's check.

26. The 4,706 CBW shares constitute 38 percent of **s 12,500 issued and outstanding shares. On or about April 23, 1985, **s board of directors learned that ** owned over 50 percent of **s stock.

27. Also on April 23, ** purchased a \$94,120.00 repurchase agreement (the "\$94,120.00 joint repo") in the joint names of ** and Ms. **. That \$94,120.00 is equal to \$20.00 for each of the 4,706 ** shares controlled by Ms. **.

28. Prior to March 1985, ** had purchased control of three other banks, **, {{4-1-90 p.A-1220}}Bank, **, ** National Bank, **, and ** Bank.

29. In each of those three prior instances, ** had filed a timely Notice of Change of Bank Control before purchasing control of those banks.

30. At all relevant times, **, a practicing attorney and banker, had actual knowledge that a purchase of control (over 25 percent) of **s stock without giving 60 days prior written notice to the FDIC would violate the Control Act.

31. **s April 17, 1985 agreement with ** National's ** and ** was entered into by ** despite his actual knowledge at that time that his purchase of the 4,706 ** shares from Ms. ** without 60 days prior written notice to the FDIC would violate the Control Act.

32. ** gave the FDIC no prior notice of the actual change in control#151;his purchase of the 4,706 ** shares from Ms. **.

33. ** consummated the April 23, 1985 purchase of the 4,706 ** shares from Ms. ** with actual knowledge that the purchase violated the Control Act.

34. **s purchase of control of ** constituted a knowing and willful violation of the Change in Bank Control Act.

35. On April 24, 1985, ** orally told **, an Assistant Regional Director in the FDIC's ** Regional Office, that he had purchased the 4,706 ** shares from Ms. ** on April 23, 1985.

36. ** stated to Mr. ** that he, **, knew at the time he purchased those 4,706 ** shares that the purchase was made in violation of the Control Act.

37. At that April 24, 1985 meeting, ** falsely stated that the purchase had been financed by two \$250,000.00 loans, one from ** Bank and the other from ** Bank & Trust Co., **. ** also falsely stated at that meeting that he decided to merge ** into ** National on April 23, 1985, and that the decision to merger was made after he had purchased the stock from Ms. **.

38. **s oral statements to Mr. **, even if true, would not have constituted notice under the Control Act, said Act expressly requiring 60 days prior written notice.

39. Respondent, **, filed three Notice of Change in Bank Control. These notices were filed on April 10, 1985, April 26, 1985, and May 3, 1985.

40. None of the notices filed by ** were filed more than 60 days prior to his acquisition of control of **

by the purchase of 4,706 shares from Ms. *** on April 23, 1985.

41. At all times from April 23, 1985 until March 20, 1986, *** was the legal and beneficial owner of approximately 56 percent (7,000 shares) of ***'s stock. This majority ownership gave *** the power to control ***. As a matter of law that stock ownership gave *** control of ***.

42. *** effectively exercised control over *** by agreeing to a purchase of *** stock by *** National. In furtherance of that agreement, on April 29, 1985, ***, as the owner of 7,000 *** shares, gave his proxy to vote his *** shares in favor of a merger of *** into *** National. Also in furtherance of that agreement, in or about July 1985, *** signed a Shareholders Agreement in which he agreed that he could, and would, cause the 7,000 *** shares owned by him to be voted in favor of the proposed merger of *** into *** National. In that Shareholders Agreement, *** represented that he had the capacity to vote, and had "good title to," 7,000 *** shares. The proposed merger failed to occur due to a rejection of the merger by the Comptroller of the Currency.

43. *** exercised additional influence over ***. In late July 1985, *** proposed to purchase from *** a large block of newly issued *** stock. *** advised Mr. *** that he, ***, would act against any such proposal. Shortly thereafter, Mr. *** terminated his proposal.

44. On or about August 1, 1985, *** and ***, president of ***'s *** Bank, were made unpaid consultants to ***.

45. In the fall of 1985, ***, or Mr. *** on ***'s behalf, recommended that *** be made president of ***. Shortly thereafter, Mr. *** was made president of ***.

46. After Mr. *** became the president of ***, *** spoke to him on a weekly basis concerning the condition, including the profitability, of ***.

47. Also in the fall of 1985, ***, or Mr. *** on ***'s behalf, recommended that Mr. *** be made a *** director. Mr. *** is associated with ***'s law firm. Shortly after this recommendation was made, Mr. *** was made a director of ***.

48. On January 22, 1986, *** gave his proxy to vote his 7,000 *** shares at a *** stockholders meeting. This proxy was given [{{4-1-90 p.A-1221}}](#) to ***'s management and not to *** National or its management.

49. The merger of *** into *** National was not consummated at the time *** had expected it to be consummated when he bought his *** stock. However, on March 20, 1986, *** surrendered his 7,000 *** shares to *** National in exchange for cancellation of the \$840,000.00 note and all accrued interest on that note. That accrued but unpaid interest totalled approximately \$99,000.00. That transaction yielded to *** the precise net purchase price he had agreed to on April 17, 1985.

50. At all times since at least April 1985, *** has had serious cash flow problems.

51. In March, 1985, and at all relevant times thereafter, the bulk of ***'s assets were invested in relatively illiquid assets, e.g., real estate and control blocks of stock in banks.

52. At all times subsequent to March 1985, *** lacked sufficient available cash flow to pay interest on, much less retire the principal of, the money he borrowed to finance his purchases of *** stock.

53. *** National foreclosed on that *** stock only after *** stated that he could not pay the \$840,000.00 plus interest secured by his *** stock.

54. Consistent with the policy underlying the Control Act, *** was required by law to give the FDIC an adequate opportunity to approve any change of control before he purchased control of ***. By his action of purchasing control of *** without first giving the FDIC the required 60 days prior written notice, *** prevented the FDIC from carrying out its statutory mandate.

55. *** anticipated, and realized, a substantial profit from his violation of the Control Act. That profit is composed of two principal elements: (a) a \$160,580.00 profit on resale of the 2,294 *** shares purchased at \$50.00 per share, and (b) a \$47,060.00 profit on resale of the 4,706 *** shares purchased from Ms. ***, less \$7,000.00 in expenses attendant with the purchase of the first 2,294 shares. *** realized a net profit of \$200,640.00.

56. *** paid \$50.00 per share for each of 2,294 *** shares. His anticipated and actual profit from his violation of the Control Act included his profit on resale of those *** shares. He resold those shares to *** National for \$120.00 per share. ***'s profit from resale of these shares was \$160,580.00 (2,294 shares times \$70.00 per share profit equals \$160,580.00).

57. Absent his purchase of 4,706 *** shares from Ms. ***, *** would not have been able to resell his 2,294 *** shares at a price even approaching \$120.00 per share.

58. *** paid an effective price of \$110.00 per share for the 4,706 shares controlled by Ms. ***. That \$110.00 per share figure contains two elements. First, *** caused a check for \$100.00 per share, \$470,600.00 to be delivered to Ms. *** in payment for the shares.

59. Second, *** used \$94,120.00 to purchase from *** Bank a repurchase agreement (the \$94,120.00 joint repo) in the joint names of himself and Ms. ***. That \$94,120.00 amounts to \$20.00 per share for the 4,706 *** shares.

60. The proceeds of the \$94,120.00 joint repurchase agreement were transferred to a savings account

at ***. That savings account was in the joint names of *** (or his business associate ***) and Ms. ***.

61. On the face of the account documents, *** had a one-half interest in the \$94,120.00 joint repo and he (or he and his associate Mr. ***) had a one-half interest in the savings account to which that money was transferred.

62. *** demonstrated his control over, and apparent beneficial interest in, the \$94,120.00 repo by, among other things, causing or allowing his *** Bank to use that \$94,120.00 joint repurchase agreement as security for a loan to himself. While *** denied that he authorized this use, his denial is not credible in light of his apparently authorized signature on the note, which note cross-references to the \$94,120.00 joint repo as security, and in light of his testimony that he received the proceeds of the loan documented in that note.

63. The preponderance of the credible evidence indicates that the price *** paid for the 4,706 *** shares consisted of the \$100.00 per share paid by check plus one-half of the \$20.00 per share put into the \$94,120.00 joint repo, *i.e.*, an additional \$10.00 per share, yielding an effective purchase price of \$110.00 per share.

64. ***'s resale of those 4,706 *** shares at \$120.00 per share yielded a profit to him [{{4-1-90 p.A-1222}}](#) of \$47,060.00 (4,706 shares times \$10.00 per share profit equals \$47,060.00).

65. The difference between the price *** paid for these 4,706 shares and the price he received for them was part of his profit from his violation of the Control Act.

66. *** had legitimate business expenses of \$7,000.00 related to his purchase of the first 2,294 shares.

67. Neither *** National nor *** and *** would, on April 17, 1985, have given *** all or any part of the additional \$300,000.00 that *** National paid to him on that date had *** not agreed to sell a control block, 7,000 shares, of *** in a merger with *** National. *** obtained the \$300,000.00 check by using the "leverage" he could exert by promising to sell a control block of *** in a merger with *** National.

68. The \$300,000.00 came from the funds of *** National Bank.

69. The preponderance of the credible evidence indicates that part of the consideration given by *** for the \$300,000 was his release of the two *** notes.

70. These two ten year notes contained several unusual terms. The notes were expressly non-assignable. Each note was in the principal amount of \$100,000.00, provided for 12 percent per year simple interest, and required no payment of principal or interest until April 1991.

71. Until at least April 17, 1985, it was the position of *** and *** that all of their liability on the notes was contingent on an event that had not yet occurred, and might never occur, *i.e.*, their profitable resale of the *** Bank stock.

72. Each note provided in substance that on April 21, 1991, \$220,000.00 would be due and owing (\$100,000.00 principal amount plus 12 percent simple interest for ten years equals \$220,000.00).

73. The ***' position that the notes were contingent tends to diminish their value.

74. Absent the purchase of 4,706 *** shares from Ms. ***, *** would have received none of the additional \$300,000.00 paid to him by *** National on April 17, 1985.

75. *** obtained substantial financial benefit by the receipt of \$300,000.00 in exchange for cancellation of the notes, the exact value of which cannot be calculated.

76. *** received preferential treatment in obtaining the \$300,000.00 payoff for the notes by virtue of his agreement to purchase control of *** and subsequently to merge *** with *** National Bank.

77. *** obtained substantial economic and financial benefits from the use of part of the funds from *** to ease his cash flow problems.

78. *** purchased charged off accounts from *** for \$77,000.00 in an effort to recapitalize ***.

79. The value of the charged off accounts is unknown.

80. Neither the \$77,000.00 given to *** for the charged off accounts or the interest on the loan used to obtain the \$77,000.00 can be used to diminish his profit on the purchase and resale of the 7,000 shares of stock for the following reasons:

- a) The value of the charged off accounts received for the \$77,000.00 is unknown;
- b) The addition of \$77,000.00 in cash to *** assets is reflected in the sale price of \$120.00 per share received by ***; and
- c) *** received interest free funds from *** National Bank in excess of the amount needed to pay off the \$77,000.00.

81. *** has assets valued at approximately \$2,000,000.00, the bulk of which are assets with little, if any, short term liquidity, *i.e.* real estate and stock in other banks which he controls.

82. *** did not, and could not, have relied on failure of the FDIC to timely respond to the three Notices of Change in Bank Control as he purchased control prior to expiration of 60 days from the filing of the notices.

83. The FDIC expressly and regularly objected to ***'s purchase of control. *** lacked any reasonable basis for believing that the FDIC agreed to excuse, or acquiesced in, his violation of the Control Act.

84. In setting the amount of a civil money penalty for violation of the Control Act, the FDIC is required to consider, *inter alia*, (a) Respondent's economic benefit from the violation and the prophylactic benefits of assessing civil money penalties that do more than simply remove the Respondent's actual profit from the violation, (b) the gravity of the violation, (c) Respondent's financial resources, and (d) Respondent's good faith.

85. For purposes of assessing civil money penalties here, it is appropriate to first de-
{{4-1-90 p.A-1223}}termine the order of magnitude or approximate range of ***'s profit from his violation and then to consider the gravity of the violation, ***'s net worth, and his good faith#151; or lack thereof.

86. ***'s profit from his violation of the Control Act is \$200,640.00.

87. *** also received other economic benefits by the use of funds which improved his cash flow at a time when he was experiencing cash flow difficulties and preferential treatment in the early payoff of two \$100,000.00 notes for \$300,000.00.

88. ***'s violation of the Control Act was knowing, willful, and "intentional."

89. *** remained in violation of the Control Act from the day he purchased control on April 23, 1985, until he divested his *** stock on March 20, 1986. His violation continued for those 11 months despite the FDIC's objections to the violation and the FDIC's statements, beginning by May 1, 1985, that it expected to impose civil money penalties based upon this continuing violation.

90. *** admitted in April 1985 that he purchased control of *** in violation of the Control Act.

91. There is no evidence that ***'s purchase of control on April 23, 1985 and subsequent dealings with *** in any way injured or harmed ***.

92. Given the state in which *** was in when *** acquired control, it is doubtful that he could have harmed *** any further by poor managerial skills, etc.

93. It is difficult to perceive how ***'s dealings with *** could cause any loss of public confidence in *** as *** was on the verge of closing its doors at about the time which he purchased control.

94. As regards Factor 7, ***'s anticipated and actual profit from his violation of the Control Act is \$200,640.00. He also received a substantial additional benefit in terms of improved cash flow and preferential treatment.

95. There is no proof of any other violations of Federal banking laws and regulations by ***.

96. The other "Factors" set forth in the Interagency Policy Statement have little apparent application to the instant case.

97. In order to achieve the purpose of deterring violations of the Control Act, civil money penalties generally should do more than simply return the violator to the financial position he would have enjoyed had he not been caught breaking the law.

98. ***'s lack of good faith and the gravity of his willful violation of the Control Act indicate that for a civil money penalty which is heavier than a baseline penalty equal to, or somewhat in excess of, ***'s expected or actual profit from the violation is appropriate.

99. Taking into account: (a) that *** willfully violated the Change in Bank Control Act; (b) that his violation was undertaken with the expectation that it would produce a large profit for ***; (c) that the violation did in fact produce a large profit for ***; (d) that unless his profit is removed in the form of civil money penalties, *** will profit from his decision to willfully break the law; and (e) considering all of the other factors and arguments discussed above and at the hearing, a civil money penalty of \$250,000.00 is clearly appropriate.

100. *** violated the Control Act with the expectation that he would make a large profit. ***'s knowing, intentional, and willful violation of the Control Act continued for 11 months. Moreover, during the course of more than a year *** repeatedly made false statements about the situation. These factors support the imposition of a penalty that does more than simply remove the profit ***'s made by breaking the law. They support imposition of a penalty of \$250,000.00.

RECOMMENDED DECISION

It is the Recommended Decision of the Administrative Law Judge that based upon a finding that Respondent *** purchased and held control of *** Bank ***, in willful violation of the Change in Bank Control Act of 1978, 12 U.S.C. Section 1817(j), and after taking into account Respondent's profit from that violation, the gravity of that violation, Respondent's financial resources, Respondent's lack of good faith, and the data, views, and arguments submitted by Respondent, it is hereby

ORDERED that a civil money penalty in the total amount of \$250,000.00 be, and hereby is, assessed against Respondent ***; and it is further

{{4-1-90 p.A-1224}}

ORDERED that said \$250,000.00 civil money penalty shall be paid within ninety days of the entry of this Order to pay.

Date this 30th day of September, 1987.

/s/ John H. Powell
Administrative Law Judge

FDIC 86-43k

RECOMMENDED ORDER TO PAY

Based upon a finding that Respondent *** purchased and held control of *** Bank ***, in willful violation of the Change in Bank Control Act of 1978, 12 U.S.C. Section 1817(j), and after taking into account Respondent's profit from that violation, the gravity of that violation, Respondent's financial resources, Respondent's lack of good faith, and the data, views, and arguments submitted by Respondent, it is hereby

ORDERED that a civil money penalty in the total amount of \$250,000.00 be, and hereby is, assessed against Respondent ***; and it is further

ORDERED that said \$250,000.00 civil money penalty shall be paid within ninety days of the entry of this Order to pay.

By direction of the Board of Directors.

Dated at Washington, D.C. this ____ day of ____, 1987.

Hoyle L. Robinson
Executive Secretary

APPENDIX A

Section 1817(j) of the Change in Bank Control Act provides, in pertinent part:

(j)(1) No person, acting directly or indirectly or through or in concert with one or more other persons, shall acquire control of any insured bank through a purchase, assignment, transfer, pledge, or other disposition of voting stock of such insured bank unless the appropriate Federal banking agency has been given sixty days prior written notice of such proposed acquisition and within that time period the agency has not issued a notice disapproving the proposed acquisition or extending for up to another thirty days the period during which such a disapproval may issue. The period for disapproval may be further extended only if the agency determines that any acquiring party has not furnished all the information required under paragraph (6) of this subsection or that in its judgment any material information submitted is substantially inaccurate. An acquisition may be made prior to expiration of the disapproval period if the agency issues written notice of its intent not to disapprove the action. For purposes of this subsection, the term "insured bank" shall include any "bank holding company", as that term is defined in Section 1841 of this title, which has control of any such insured bank, and the appropriate Federal banking agency in the case of bank holding companies shall be the Board of Governors of the Federal Reserve System.

* * *

(6) Except as otherwise provided by regulations of the appropriate Federal banking agency, a notice filed pursuant to this subsection shall contain the following information:

(A) The identity, personal history, business background and experience of each person by whom or on whose behalf the acquisition is to be made, including his material business activities and affiliations during the past five years, and a description of any material pending legal or administrative proceedings in which he is a party and any criminal indictment or conviction of such person by a State and Federal Court.

(B) A statement of the assets and liabilities of each person by whom or on whose behalf the acquisition is to be made, as of the end of the fiscal year for each of the five fiscal years immediately preceding the date of the notice, together with related statements of income and source and application of funds for each of the fiscal years then concluded, all prepared in accordance with generally accepted accounting principles consistently applied, and an interim statement of the assets and liabilities for each person, together with related statements of income and source and application of funds, as of a date not more than ninety days prior to the date of the filing of the notice.

(C) The terms and conditions of the proposed acquisition and the manner in which the acquisition is to be made.

(D) The identity, source and amount of the funds or other consideration used or to be used in making

the acquisition, and if any part of these funds or other consideration has been or is to be borrowed or otherwise obtained for the purpose of making the acquisition, a description of the [{{4-1-90 p.A-1225}}](#) transaction the names of the parties, and any arrangements, agreements, or understandings with such persons.

(E) Any plans or proposals which any acquiring party making the acquisition may have to liquidate the bank, to sell its assets or merge it with any company or to make any other major change in its business or corporate structure or management.

(F) The identification of any person employed, retained, or to be compensated by the acquiring party, or by any person on his behalf, to make solicitations or recommendations to stockholders for the purpose of assisting in the acquisition, and a brief description of the terms of such employment, retainer, or arrangement for compensation.

(G) Copies of all invitations or tenders or advertisements making a tender offer to stockholders for purchase of their stock to be used in connection with the proposed acquisition.

(H) Any additional relevant information in such form as the appropriate Federal banking agency may require by regulation or by specific request in connection with any particular notice.

* * *

(8) For the purposes of this subsection, the term#151;

(A) "person" means an individual or a corporation, partnership, trust, association, joint venture, pool, syndicate, sole proprietorship, unincorporated organization, or any other form of entity not specifically listed herein; and

(B) "control" means the power, directly or indirectly, to direct the management or policies of an insured bank or to vote 25 per centum or more of any class of voting securities of an insured bank.

* * *

(15) Any person who willfully violates any provision of this subsection, or any regulation or order issued by the appropriate Federal banking agency pursuant thereto, shall forfeit and pay a civil penalty of not more than \$10,000 per day for each day during which such violation continues. The appropriate Federal banking agency shall have authority to assess such a civil penalty, after giving notice and an opportunity to the person to submit data, views, and arguments, and after giving due consideration to the appropriateness of the penalty with respect to the size of financial resources and good faith of the person charged, the gravity of the violation, and any data, views, and arguments submitted. The agency may collect such civil penalty by agreement with the person or by bringing an action in the appropriate United States District Court, except that in any such action, the person against whom the penalty has been assessed shall have a right to trial de novo.

12 CFR 304.4(a) of the F.D.I.C. Regulations provides in pertinent part:

(a) Acquisitions of control. Under the Change in Bank Control Act of 1978, acquisitions by a person or persons acting in concert of the power to vote 25 percent or more of a class of voting securities of an insured nonmember bank, unless exempted, require prior notice to the Corporation. In addition, a purchase agreement, transfer, pledge, or other disposition of voting stock through which any person will acquire ownership, control, or the power to vote ten percent or more of a class of voting securities of an insured state nonmember bank will be presumed to be an acquisition by such person of the power to direct that institution's management or policies if:

(1) The institution has issued any class of securities subject to the registration requirements of Section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 781); or

(2) Immediately after the transaction no other person will own a greater proportion of that class of voting securities. Other transactions resulting in a person's control of less than 25 percent of a class of voting shares of an insured state nonmember bank would not result in control for purposes of the Act. An acquiring person may request an opportunity to contest any presumption established by this paragraph (a) of this subsection with respect to a proposed transaction. The Corporation will afford the person an opportunity to present views in writing, or, where appropriate, orally before its designated representatives either at informal conference discussions or at informal presentations of evidence.

FDIC Policy Statement entitled "Changes In Control In Insured Nonmember Banks", 44 Fed. Reg. 7226 (February 6, 1979) provides in pertinent part:

The Change in Bank Control Act of 1978, Title VI of the Financial Institutions Regu-
[{{4-1-90 p.A-1226}}](#)latory and Interest Rate Control Act of 1978, gives the Federal bank supervisory agencies the authority to disapprove changes in control of insured banks and bank holding companies.

* * *

The Act requires any person (broadly defined) seeking to acquire control of any insured bank or bank holding company to provide 60 days prior written notice to the appropriate Federal banking agency. This requirement applies to all covered transactions that will be consummated after March 9, 1979.

* * *

The Act describes the factors that the Corporation and the other Federal banking agencies are to consider in determining whether a transaction covered by the Act should be disapproved. These factors include the financial condition, competence, experience, and integrity of the acquiring person (or persons acting in concert) and the effect of the transaction on competition. The Corporation's objectives in its administration of the Act are to enhance and maintain public confidence in the banking system by preventing identifiable serious adverse effects resulting from anticompetitive combinations of interests, inadequate financial support, and unsuitable management in these institutions.

* * *

Under the Act, the Corporation will require a "person" proposing to acquire control of an insured State nonmember bank to file a notice with the Corporation containing personal and biographical information, detailed financial information, details of the proposed acquisition, information on any structural or managerial changes contemplated for the institution, and other relevant information required by the Corporation.

In order to be filed properly in accordance with the Act a notice must be substantially complete and responsive to every item specified in paragraph 6 of the Act.

* * *

The Act defines "control" as the power^{#151}; directly or indirectly ^{#151};to vote 25 percent or more of any class of voting securities or to direct the management or policies of a bank holding company or an insured bank. Therefore, any transaction, unless exempted by the Act, that results in the acquiring party having voting control of 25 percent or more of any class of voting securities or results in the power to direct the management or policies of such an institution would trigger the notice requirement.

With respect to persons who have the power to vote less than 25 percent of an institution's shares, the Corporation's regulations establish the following rebuttable presumptions for purposes of the notice requirements of the Act:

(1) Where the institution to be acquired has issued any class of securities subject to the registration requirements of Section 12 of the Securities Exchange Act of 1934 (15 U.S.C. Subsection 781), and a transaction would result in a person (or group of persons acting in concert) having voting control of ten percent or more of any class of voting securities of that institution, the transaction results in control.

(2) Where a transaction involving any class of voting securities of an insured State nonmember bank would result in a person (or group of persons acting in concert) having voting control of ten percent or more and after the transaction the acquiring person would be the largest shareholder of that institution, the transaction results in control.

Other transactions resulting in a person's control of less than 25 percent of a class of voting shares of an insured State nonmember bank would not result in control for purposes of the Act. In addition, customary one-time proxy solicitations and the receipt of pro rata stock dividends would not be subject to the Act's notice requirements.

* * *

Persons contemplating an acquisition that would result in a change in control of an insured State nonmember bank should request appropriate forms and instructions from the Regional Director of the Region in which the affected institution is located. If there is any doubt whether a proposed transaction requires a notice, the acquiring person should consult the Regional Director for guidance. The Act places the burden of providing notice on the prospective acquiring person and substantial civil penalties can be imposed for willful violations.

FDIC Policy Statement entitled "Interagency Policy Regarding the Assessment of Civil Money Penalties by the Federal Financial Institutions Regulatory Agencies" provides in pertinent part:

Under provisions of the Financial Institutions Regulatory and Interest Rate Control Act of 1978 ("FIRA"), 92 Stat. 3641, the Federal financial institutions regulatory agencies are authorized to assess civil money penalties for violations of various Federal statutes and regulations promulgated thereunder. The Board of Governors of the Federal Reserve System, the Office of the Comptroller of the Currency, and the Federal

Deposit Insurance Corporation are each authorized to assess civil money penalties for violation of:

* * *

(3) a willful violation of the Change in Bank Control Act of 1978 (12 U.S.C. 1817(j)).

* * *

The maximum civil penalty that may be assessed is generally \$1,000 per day for each day the violation continues. The maximum civil penalties are \$100 per day for a violation of Section 19 of the Federal Reserve Act and \$10,000 per day for a violation of the Change in Bank Control Act and the Change in Savings and Loan Control Act. In determining the amount of the penalty, the FIRA provisions require the appropriate agency to consider the financial resources and good faith of the company or person charged, the gravity of the violation, any history of previous violations, and such other matters as justice may require.

* * *

Under the FIRA civil penalty provisions, the person against whom a penalty is assessed has the opportunity to challenge the assessment in a formal administrative hearing and, following the hearing, to obtain judicial review of any assessment in an appropriate United States Court of Appeals. Under the Change in Control Act and the Change in Savings and Loan Control Act, the person is entitled to a trial on the assessment in an appropriate United States District Court.

To provide guidance in the procedures and criteria used by the agencies in the assessment of civil money penalties under the FIRA provisions and to promote coordination among the agencies in the assessment of penalties, the agencies have adopted this supervisory policy.

* * *

In assessing a civil money penalty under the various FIRA provisions, the agencies are required to consider the size of the financial resources and good faith of the respondent, the gravity of the violation, the history of previous violations, and such other matters as justice may require. 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. Accordingly, the agencies will consider, in addition to the other factors specified in the statute, the financial or economic benefit the respondent derived from the illegal activity. 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.

In determining whether the violation is of sufficient gravity (i.e., the importance, significance, and seriousness of the situation) to warrant initiating a civil money penalty assessment proceeding, the agencies have identified the following factors as relevant:

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

The delineation of these factors is intended to provide guidance regarding the circumstances under which the agencies may initiate a civil money penalty action and is not intended to preclude any Federal

financial institutions regulatory agency from considering any other matters relevant to the appropriateness of a civil money penalty assessment.

By Order of the federal Financial Institutions Examinations Council, September 3, 1980.

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