FEDERAL DEPOSIT INSURANCE CORPORATION
WASHINGTON, D.C.

In the Matter of	)	
MARINE BANK & TRUST COMPANY VERO BEACH, FLORIDA	)	**DECISION AND ORDER TO CEASE AND DESIST**
(Insured State Nonmember Bank)	)	**FDIC-10-825b**

I. INTRODUCTION

This matter is before the Board of Directors (Board) of the Federal Deposit Insurance Corporation (FDIC) following the issuance on November 2, 2012, of a Recommended Decision (Recommended Decision or R.D.) by Administrative Law Judge C. Richard Miserendino (ALJ). The ALJ recommended that Marine Bank & Trust Company, Vero Beach, Florida (Bank) be subject to an order to cease and desist and a corrective action plan pursuant to 8(b) of the Federal Deposit Insurance Act (FDI Act), 12 U.S.C. § 1818(b). The Board has reviewed the record, including the parties' submissions, the Recommended Decision, and the Bank's Exceptions to the Recommended Decision (Bank's Exceptions). The Board concludes that the Bank engaged in unsafe and unsound practices warranting a cease-and-desist order.

II. STATEMENT OF THE CASE

On May 20, 2011, the FDIC issued a Notice of Charges and of Hearing (Notice) alleging that the Bank, a federally insured state nonmember bank subject to the FDI Act, 12 U.S.C. §§ 1811-31aa and the Rules and Regulations of the FDIC, 12 C.F.R. Chapter III (FDIC Rules), had engaged in unsafe or unsound banking practices disclosed during the 2010 examination period (2010 Exam).[1] The Notice alleged that the Bank engaged in numerous unsafe or unsound banking practices by operating with: (1) an excessive volume of adversely classified assets (also referred to as ACA); (2) insufficient capital; (3) inadequate allowances for loan and lease losses (ALLL); (4) inadequate earnings; (5) inadequate liquidity; and (6) lax loan administration and underwriting practices. The Notice also alleged that Bank management, including senior officers, operated with unsafe or unsound banking practices and that the Bank board failed to adequately supervise officers. The Notice sought the imposition of a cease-and-desist order and corrective action plan.

On July 14, 2011, the Bank filed an Amended Answer and affirmative defenses denying the material allegations in the Notice. By Order dated November 1, 2011, the ALJ struck all of the Bank's affirmative defenses, except for the claim that the FDIC's determinations in the 2010 Report of Examination (2010 ROE) were arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law. Thereafter, the ALJ held a hearing on the merits in Fort Pierce, Florida, on January 9 through 12 and in Stuart, Florida, on January 17, 2012. At the hearing, the ALJ received sworn testimony from FDIC officials, including: former Assistant Regional Director Bruce Rollinson;[2] Case Managers Deona Payne (CM Payne) and Sharon Coleman (CM Coleman); and Supervisory Examiner Alejandro Pulido.[3] During the hearing, the ALJ also admitted into evidence the deposition testimony of Examiner-in-Charge Frederic W.

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[1] The 2010 Exam was conducted by the FDIC and the State of Florida Office of Financial Regulation (OFR).

[2] During the 2010 Exam, Bruce Rollinson was serving as the Assistant Regional Director of the Atlanta Regional Office. Tr. 388 (Rollinson). In that capacity, he approved the final version of the 2010 ROE. R.D. at 13.

[3] Alejandro Pulido was the Examiner-in-Charge of the Bank's 2009 Exam and was present at the management exit meeting for the 2010 ROE. Tr. 496 (Pulido).

Garfinkle (EIC Garfinkle).[4] The ALJ also heard testimony from the Bank's President and CEO, William J. Penny; Directors Charles Gould and David Croom; Chief Lending Officer Brian Fowler; and various stockholders.

On November 2, 2012, the ALJ issued his Recommended Decision finding that the Bank was operating in an unsafe and unsound manner as to its asset quality, capital, earnings, and management. On December 3, 2012, the Bank filed timely written exceptions to the Recommended Decision. The FDIC, however, did not file exceptions. On December 19, 2012, pursuant to 12 C.F.R. § 308.40(c)(2), the FDIC Assistant Executive Secretary transmitted the record in the case to the Board for final decision.

III. FACTUAL OVERVIEW

Because the ALJ provided a lengthy, detailed and well-reasoned opinion with extensive citations to the record in support of his conclusions, the Board finds it unnecessary to reiterate in full the contents of the Recommended Decision. The discussion below, however, provides an overview of the Bank's unsafe and unsound practices as alleged in the Amended Notice, corroborated by testimonial and documentary evidence, and recounted in the Recommended Decision.[5] Although the ALJ recognized errors and omissions in the 2010 ROE, he based his findings on the actual condition of the Bank during the 2010 Exam as evidenced by the testimony and documents submitted at the hearing.

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[4] EIC Garfinkle was unable to attend the hearing for medical reasons. Tr. 47 (CM Payne).

[5] The Findings of Fact in the Recommend Decision contain detailed citations to the voluminous record, which includes pleadings, briefs, trial transcripts, and exhibits. R.D. at 3-16. In most cases and, except where otherwise noted, the Board cites to the numbered pages in the Recommended Decision rather than to the underlying supporting evidentiary documents or transcripts. When necessary, citation to the hearing transcript will appear as "Tr.," citation to joint exhibits will appear as "Jt. Ex." and citation to the Bank's exhibits will appear as "R. Ex." In addition, due to some citation errors in the Recommended Decision in reference to EIC Garfinkle's deposition transcript, the Board cites to both the Recommended Decision and the exact page of EIC Garfinkle's deposition transcript (R. Ex. 342A).

A. Background

In August 2010, Frederick W. Garfinkle, a seasoned examiner with 40 years of bank examination experience in the South Florida area, began preparations for the 2010 Exam. R.D. at 3 (citing R. Ex. 342A at 4, 97, 74). In anticipation, he reviewed prior year examinations, the Bank's Uniform Bank Performance Report, and the June 30, 2010 Call Report (Original Call Report). R.D. at 3 (citing R. Ex. 342A at 74). The data revealed that the Bank had a high concentration of commercial real estate (CRE) loans and that its ratio of total CRE loans to total Bank capital was very high. Meanwhile, the volume of past due and nonaccrual loans was also high at 7.22 percent. R.D. at 3-4.

During the examination, EIC Garfinkle determined that the Bank had expanded its commercial real estate lending between 2007 and 2010. There was, however, a substantial decline in the South Florida real estate market, particularly in the Vero Beach area, as well as a substantial increase in the area's unemployment at this time. R.D. at 4 (citing R. Ex. 342A at 27-28, 59-60, and 106). As a result, the Bank's efforts to reduce its CRE concentration and credit administration were hampered by the rapidly deteriorating economy. R.D. at 4 (citing R. Ex. 342A at 27-28 and 34). EIC Garfinkle concluded that the high concentration of CRE loans and the high volume of past due loans, combined with other factors, adversely affected the Bank's asset quality and reflected poorly on the Bank's loan underwriting and management. R.D. at 4 (citing R. Ex. 342A at 27-28 and 34).

EIC Garfinkle also determined that the Bank's Tier 1 Capital Ratio and Total Risk-Based Capital Ratio, 7.41 percent and 11.18 percent respectively, were below the median capital ratios of 8 percent and 12 percent for banks in Florida. R.D. at 5 (citing R. Ex. 342A at 33). Despite the Bank's efforts to raise capital, it was unable to meet its own capital raising goals. R.D. at 5 (citing R. Ex. 342A at 36). Moreover, EIC Garfinkle determined that the Bank had overstated its capital by improperly including a deferred tax asset (DTA) in the Bank's regulatory capital. R.D. at 5-6 (citing R. Ex. 342A at 30-31). Finally, EIC Garfinkle determined that the Bank had significantly understated its risk-weighted assets in its Original Call Report and that if properly reported, the Bank's Total Risk-Based capital ratio would have been much lower. R.D. at 6.

EIC Garfinkle also questioned the Bank's methodology for determining allowance for loan and lease losses (ALLL) under Financial Accounting Standard No. 5 (FAS 5). R.D. at 6-7 (citing R. Ex. 342A at 48-49). By relying on an extended historical loss period of six and a half years, the Bank did not properly consider newer, more recent loans having higher losses when calculating ALLL. R.D. at 7 (citing R. Ex. 342A at 48-49). Similarly, EIC Garfinkle concluded that the Bank's FAS 114 impairment analysis was inadequate. R.D. at 7. Specifically, the Bank failed to recognize a $1 million impairment for a $2 million loan secured by real property, despite a Bank-ordered appraisal showing that the value of the collateral had decreased.[6] R.D. at 7 (citing R. Ex. 342A at 46). As a result of this and other, smaller loans, there was a $1,095,000 deficiency in the Bank's ALLL. R.D. at 8.

Although EIC Garfinkle acknowledged that the Bank had made positive changes in its deposit structure and that its liquidity was improving, there was still need for further improvement. R.D. at 8 (citing R. Ex. 342A at 77). As demonstrated through hearing testimony, FDIC examiners had additional concerns regarding liquidity. For instance, brokered deposits made up 12.60 percent of the Bank's total deposits, and part of those brokered deposits came from the Certificate of Deposit Account Registry Service, a program considered a "volatile" funding source in the 2010 Exam. R.D. at 8-9. Likewise, examiners determined that the $5

[6] Citing issues with the appraisal, the Bank conducted a cash flow analysis of the collateral and recognized an impairment of only $140,000. R.D. at 7, n.10.

million the Bank had borrowed from the Federal Home Loan Bank was too high, given the Bank's financial condition. Finally, FDIC examiners noted that the Bank's liquidity and contingency plans were deficient. R.D. at 9.

In light of the aforementioned discrepancies, the Bank eventually agreed to refile its Original Call Report. R.D. at 10. The Amended Call Report provided for the additional ALLL and accounted for the improperly excluded DTA and the improperly understated risk-weighted assets. As a result, the Bank's capital levels declined further. Specifically, the Bank's Tier 1 Capital in the Amended Call Report was $9,773,000 and the Total Risk-Based Capital was $11,345,000. The Bank's ALLL increased to $3,768,000. Meanwhile, the Tier 1 Leverage Capital ratio declined from 7.41 percent to 6.28 percent and the Bank's adjusted Total Risk-Based Capital declined from 11.18 percent to 9.24 percent as a result of the Amended Call Report. R.D. at 10.

EIC Garfinkle prepared the initial draft of the 2010 ROE (Initial Draft), based largely on the results of the examination as described above. R.D. at 10. He concluded that the condition of the Bank reflected poorly on its management. R.D. at 10. Nevertheless, he acknowledged the positive steps Bank management took in the months leading up to the 2010 Exam and the fact that Bank management agreed to correct the ALLL methodology shortcomings in the Amended Call Report. R.D. at 10-11. Also, EIC Garfinkle noted that the worsening South Florida real estate market had impacted the Bank's asset quality. R.D. at 11.[7]

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[7] EIC Garfinkle's Initial Draft contains some errors. Specifically, EIC Garfinkle improperly determined the CRE concentration level using the Bank's Tier 1 Leverage Capital instead of the Bank's Total Risk-Based Capital. Had he used the Bank's Total Risk-Based Capital, the Initial Draft would have stated that the Bank's CRE concentration level was 331 percent of the Bank's Tier 1 Capital, not 381.69 percent. The properly calculated ratio, nevertheless, reflected a high concentration of total commercial real estate loans. R.D. at 11.

EIC Garfinkle's Initial Draft also incorrectly stated that the Bank had violated State banking law by failing to obtain an appraisal or market value on an Other Real Estate (ORE) property within 90 days. R.D. 11. In reality, the Bank had established the market value based on estimates of the current market value from three local commercial

The Initial Draft of the 2010 ROE was reviewed by EIC Garfinkle's field supervisor and sent unchanged to the FDIC's Atlanta Regional Office for formal review. R.D. at 12. There, the Initial Draft was reviewed first by FDIC Case Manager Sharon Coleman (CM Coleman) and later by Case Manager Deona Payne (CM Payne).[8] CM Coleman deleted many of EIC Garfinkle's positive comments about Bank management and the impact of the South Florida real estate market on the Bank's overall financial condition. R.D. at 12. CM Coleman also replaced the inaccurate calculation for the Bank's CRE concentration level with another inaccurate calculation.[9] R.D. at 12. CM Payne then reviewed the draft report as revised by CM Coleman. R.D. at 12. CM Payne made an adjustment to the dependency ratio, but did not make a corresponding adjustment to the liquidity section. R.D. at 13. The Initial Draft (revised by CM Coleman and then CM Payne) was forwarded to FDIC Assistant Regional Director Bruce Rollinson (Rollinson). Rollinson approved the version transmitted to him without additional changes. R.D. at 13.

On September 15, 2010, the Bank signed a Memorandum of Understanding (MOU) related to the 2009 Report of Examination (2009 ROE). R.D. at 14, n.14.[10] In the MOU, the Bank agreed to maintain a Tier 1 Leverage Capital Ratio of not less than 8 percent and a Tier 1 Risk-Based Capital Ratio of not less than 12 percent. R.D. at 14, n.14. Two days later, the Bank

real estate professionals. R.D. at 11. This mistake remained in the final 2010 ROE that was ultimately approved by Assistant Regional Director Rollinson. R.D. at 13.

[8] CM Payne had been assigned to the Bank in February 2010 and was responsible for processing the report at the regional level and preparing a final report for the FDIC Deputy Regional Director's signature. R.D. at 12. CM Payne enlisted CM Coleman to help review EIC Garfinkle's Initial Draft. R.D. at 12; Tr. 568-69 (Coleman).

[9] CM Coleman replaced EIC Garfinkle's incorrect CRE concentration calculation (381.69 percent of the Bank's Tier 1 capital) with the phrase: "total CRE loans represented 595.09 percent of total capital." CM Coleman improperly included owner-occupied CRE loans in her calculation of the loan ratios. R.D. at 12.

[10] In February 2010, the FDIC submitted an MOU to the Bank related to the Bank's 2009 Report of Examination (2009 ROE). In April 2010, the Bank filed with the FDIC a formal request for review of the ratings in the 2009 ROE. R. Ex. 41 at p.1. Although the Bank's appeal was denied shortly thereafter (Tr. 334), the MOU remained unsigned until September 15, 2010. R.D. at 14, n.14.

met with the FDIC to review the results of the 2010 Exam. On the same day, the FDIC sent the Bank board a letter summarizing the results and imposing interim requirements on the board until the final ROE and corrective action plan were issued. R.D. at 14-15. On or about November 22, 2010, the final 2010 ROE was sent to each Bank board member. R.D. at 15. All of the Bank's component ratings in the 2010 ROE had fallen from those in the prior year and the Bank's composite rating had fallen from a "3" to a "4." R.D. at 13.

By letter dated January 6, 2011 (January 6 letter), Bank President and CEO William J. Penny (Penny) responded. R.D. at 15. Penny's letter acknowledged that: the Bank's capital levels needed immediate attention; the Bank's capital was less than satisfactory and did not support the existing risk profile of the Bank; the volume of past due and non-accrual loans was high; the methodology for determining ALLL was inappropriate and needed to be changed; the earnings were deficient; and the liquidity policy and contingency funding plan needed to be changed. R.D. at 15. The January 6 letter, however, disputed several points. It argued that the 2010 ROE failed to adequately acknowledge that the Bank's financial condition was primarily due to the decline in the South Florida real estate market and the overall economic decline, including high unemployment, in the area. R.D. at 15. Likewise, the January 6 letter insisted that the 2010 ROE failed to acknowledge that board oversight had improved in a number of areas and that the Bank had taken positive steps to strengthen underwriting and administration practices. R.D. at 15-16.[11]

The FDIC sought a formal consent order. The Bank, however, objected to a provision in the proposed consent order that could force the sale of the Bank if the Bank did not raise enough

[11] The January 6 letter also disputed that there was a heavy concentration of CRE lending as defined by the Joint Guidance and that the Bank had previously been criticized for its FAS 114 analysis. More specifically, Penny insisted that loans under $500,000 were not subject to an FAS 114 analysis under Bank policy and that the FDIC, aware of the policy, had not challenged it or its application in past examinations. R.D. at 15-16.

capital to reach the 8 percent and 12 percent ratio, as agreed upon in the MOU, within 60 days. This action followed. R.D. at 16.

IV. ANALYSIS

A. The ALJ's Factual Findings and Legal Determinations are Supported by the Record.

The Recommended Decision offers extensive evidentiary support for the conclusions that several aspects of the Bank's operations, policies, plans and management were unsafe or unsound. R.D. at 17-44. Although not specifically defined in the FDI Act, the term "unsafe or unsound practice" is often interpreted in accordance with a memorandum submitted by John Horne, then Chairman of the Federal Home Loan Bank Board, to Congress in connection with adoption of the Financial Institutions Supervisory Act of 1966. That memorandum states:

> Generally speaking, an "unsafe or unsound practice" embraces any action, or lack of action, which is contrary to generally accepted standards of prudent operation, the possible consequences of which, if continued, would be abnormal risk or loss or damage to an institution, its shareholders, or the agencies administering the insurance funds.

Financial Institutions Supervisory Act of 1966: Hearings on S. 3158 and S. 3695 before the House Committee on Banking and Currency, 89th Cong., 2d Sess. 49–50 (memorandum submitted by John Horne).

Under the Horne definition, an abnormal risk or loss to an institution is required for a practice to be unsafe or unsound. This definition has been followed by some courts of appeal, including the Eleventh and Eighth Circuits.[12] The required effect, however, has been made more stringent by some other federal courts of appeal, including the Third, Fifth, and D.C. Circuits.[13]

[12] *See, e.g., Doolittle v. National Credit Union Admin.*, 992 F.2d 1531, 1538 (11th Cir. 1993); *Greene County Bank v. FDIC*, 92 F.3d 633, 636 (8th Cir. 1996).
[13] *In re Seidman*, 37 F.3d 911 (3rd Cir. 1994); *Gulf Fed. Sav. & Loan Ass'n of Jefferson Parish v. Fed. Home Loan Bank Bd.*, 651 F.2d 259 (5th Cir. 1981); *Johnson v. OTS*, 81 F.3d 195 (D.C. Cir. 1996).

Under the more stringent formulation, known as the "Gulf Federal test,"[14] a practice must directly threaten an institution's financial stability to be an unsafe or unsound practice. In this case, the ALJ appeared to apply the more stringent formulation. R.D. at 18-19. While the Board does not adopt the ALJ's use of the "Gulf Federal test," the Board adopts the ALJ's findings of fact and conclude that the evidence establishes that the Bank was engaging in unsafe and unsound practices under even the "Gulf Federal test."

Although the threshold for imposing a cease-and-desist order may be based on a finding of just a single instance of unsafe or unsound conduct, the evidence in this case establishes that the Bank engaged in multiple unsafe and unsound practices. *See, e.g., Greene County Bank v. FDIC,* 92 F.3d 633, 636 (8th Cir. 1996) (FDIC may order an institution to cease and desist from an unsafe or unsound practice even where it is established that the bank has engaged in such a practice on only a single occasion.) Moreover, the Bank's less-than-satisfactory ratings—well supported by evidence in the record—for asset quality, earnings, and management form independent statutory bases for imposing a cease-and-desist order under section 8(b). *See, e.g., In the Matter of Frontier State Bank,* FDIC-07-288b, FDIC Enf. Dec. 2011 WL 2411399 at *4 (April 12, 2011), *aff'd Frontier State Bank v. FDIC,* 702 F.3d 588 (10th Cir. 2012).

As correctly pointed out by the Bank at the hearing and in its Exceptions, the 2010 ROE contained mistakes, including mathematical errors. The ALJ, however, identified and considered these mistakes and made his findings based on the Bank's actual condition at the time of the 2010 Exam and not on errors in the 2010 ROE. More specifically, the ALJ found, based on the evidence viewed as a whole, that the Bank had significant issues with its asset quality, capital, earnings, and management, among other things.

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[14] The test is known as the "Gulf Federal test" because it was first applied in *Gulf Fed. Sav.*, 651 F.2d 259.

First, the Bank's percentage of non-current loans was high, thereby reflecting negatively on its asset quality and negatively impacting the overall financial condition of the Bank. R.D. at 21. The Notice alleged, and the undisputed evidence showed, that 7.22 percent of the Bank's loans were past due. R.D. at 20. CM Payne opined that this percentage was high and CEO Penny conceded as much in his January 6 letter to the FDIC Regional Director. R.D. at 20-21.

Likewise, the record supports the ALJ's findings that the Bank engaged in an unsafe or unsound practice by operating with an excessive volume of adversely classified assets which negatively affected the Bank's overall risk profile and financial stability. R.D. at 24. Asset quality reflects the risk of potential loss to the Bank as expressed as a percentage ratio of either (1) poor quality assets to total assets *or* (2) poor quality assets to Tier 1 Capital plus the Bank's ALLL. R.D. at 22. In this case, the ALJ found ample evidence that the volume of Adversely Classified Assets was very high, given the Bank's capital levels, and increasing. R.D. at 22. The unrebutted evidence showed that the ratio of poor quality assets to total assets was 13.21 percent, and that the ratio of poor quality assets to Tier 1 Capital plus ALLL was 149.92 percent. R.D. at 22. CM Payne opined that the Bank's volume of ACA was excessive and inconsistent with the accepted standards of prudent banking practice. R.D. at 22.

The record also supports the ALJ's finding that the Bank had insufficient capital (R.D. at 31) which was compounded by poor earnings and the Bank's risk profile (as a result of its CRE). R.D. at 25, 30. CEO Penny acknowledged that the Bank's capital level "needed immediate attention" in his January 6 letter and conceded at the hearing that the Bank needed more capital. R.D. at 32. Further, the ALJ determined that the Bank's CRE related loans, while not necessarily "excessive" in light of the Joint CRE Guidance thresholds, were largely "substandard," "doubtful," or "loss" and, thereby, negatively reflected on the Bank's risk profile and heightened the need for additional capital. R.D. at 30. The Bank, however, was unable to raise sufficient capital despite a capital raising plan and capital campaign from 2008 to 2010. R.D. at 32 (citing Tr. 764, 920-21 (Penny); R. Ex. 342A at 112-13). Indeed, the Bank's adjusted Tier 1 Leverage Capital ratio dropped to 6.28 percent and the adjusted Total Risk-Based Capital dropped to 11.18 percent after the Bank amended the Original Call Report. The Bank did not dispute the accuracy of these numbers at the hearing. R.D. at 31.

Similarly, the record supports the ALJ's findings that the Bank's earnings, necessary to pay its expenses and augment its capital, were deficient. R.D. at 24. Indeed, even before the Original Call Report was amended to account for the ALLL provision, earnings were deficient. R.D. at 24-25. The Bank had a net loss of $1,286,000 or a return on average assets of negative 1.62 percent. R.D. at 25. Once the Original Call Report was amended to account for the ALLL provision, the Bank sustained an even greater net loss of $2,315,000 which reflected a return on assets of negative 2.92 percent. R.D. at 24.

Finally, the ALJ found that overall, the practices engaged in by Bank management, including the Bank's senior officers and the board, threatened the financial stability of the Bank, its depositors, and the FDIC's Deposit Insurance Fund. R.D. at 37-38. It is the function of the board and senior management to plan for and respond to risk that may arise from changing business and economic conditions. In this case, the evidence showed that the Bank's senior management, as the ALJ stated, "was overtaken by events and in some respects failed to react timely to recommendations by the FDIC." R.D. at 37. As noted, the Bank fully acknowledged through CEO Penny's testimony that the Bank was operating with insufficient capital. R.D. at 32. Moreover, the Bank's capital levels were not commensurate with asset growth as the commercial real estate market in South Florida and, in particular, the Vero Beach area, declined.

R.D. at 37. Also, the Bank overstated its capital because of its improper treatment of the DTA and risk weighted assets. R.D. at 37. The ALJ credited the Bank's steps to improve its financial condition in certain areas. Nevertheless, he correctly found that further improvements were necessary and that the Bank's failure to make proper adjustments, realistically assess risk, and acknowledge loss posed a risk to depositors and the FDIC Deposit Insurance Fund. R.D. at 37-38.

Significantly, in addition to each of the detailed findings described above, the Bank's less-than-satisfactory ratings for three critical components provide an independent basis for the ALJ to conclude that the Bank engaged in unsafe and unsound practices. Pursuant to the explicit language of section 8(b)(8) of the FDI Act, the FDIC may determine that a bank has engaged in unsafe or unsound practices when it has a less-than-satisfactory rating in asset quality, management, earnings or liquidity in its most recent ROE. 12 U.S.C. § 1818(b)(8). *In the Matter of Frontier State Bank*, FDIC-07-288b, FDIC Enf. Dec. 2011 WL 2411399 at *4 (April 12, 2011). In the 2010 ROE, the Bank was assigned less-than-satisfactory ratings of "4" for three identified components—asset quality, earnings, and management. Jt. Ex. 1 at p.1. Notably, the Bank had been assigned a "3" in all three components one year earlier. Jt. Ex. 1 at p.1.

Moreover, the fact that the Bank was assigned a "4" composite rating for 2010 dispels all doubt that it was, by either standard, engaging in unsafe and unsound practices. According to the Uniform Financial Institutions Rating System, adopted by the federal supervisory agencies comprising the Federal Financial Institutions Examination Council, characteristics of "4"-rated institutions include a general inability to withstand business fluctuations, a risk to the Deposit

Insurance Fund, and a distinct possibility of failure if the deficiencies are not satisfactorily addressed and resolved.[15]

Thus, in light of the ALJ's detailed findings as well as the statutory threshold, the Bank cannot credibly assert that the deficiencies cited do not constitute unsafe or unsound practices warranting a cease-and-desist order. The proof offered regarding the Bank's capital inadequacy—which the Bank concedes was deficient (R.D. at 32)—is enough to warrant a cease-and-desist order in this case. *In the Matter of Frontier State Bank*, FDIC-07-288b, FDIC Enf. Dec. 2011 WL 2411399 at *4 (April 12, 2011). When the capital deficiency is viewed in light of the Bank's other issues including asset quality, earnings, and management, this Order is clearly warranted.

B. The Requirements in the Proposed Cease-and-Desist Order are Reasonable.

Congress has empowered the FDIC with broad discretionary authority under section 8 of the FDI Act to initiate various types of enforcement actions and to fashion remedies appropriate to the nature of such actions. In the case of a cease and desist action, the authority of the FDIC includes the power to craft a remedy requiring that affirmative action be taken to correct the conditions resulting from cited unsafe or unsound practices. 12 U.S.C. § 1818(b)(6) (Section 8(b)(6) of the FDI Act). Further, it is clear that a reviewing court will extend substantial deference to the expertise of administrative agencies in designing an appropriate remedy, and that the only basis upon which the courts will overturn the agency's remedy is where the terms of the order are not reasonably related to the legislative purpose of the statute under which the action was initiated. *In the Matter of Mansfield Bank & Trust Company*, Mansfield, Louisiana,

[15] *See* Federal Deposit Insurance Corporation, Uniform Financial Institutions Rating System (UFIRS), Notice of Adoption of Policy Statement, 62 Fed. Reg. 752, 753 (January 6, 1997), adopting the Federal Financial Institutions Examination Council's updated UFIRS, 61 Fed. Reg. 67021, 67026 (December 19, 1996).

FDIC-90-44b, 2 P-H FDIC Enf. Dec. ¶ 5165, 1990 WL 711265 at *20 (November 16, 1990) (internal citations omitted). Thus, the appropriate inquiry here is whether the remedy proposed by the ALJ is reasonably related to and in accordance with the legislative purpose of section 8(b) of the FDI Act.

In this case, the ALJ found, based on testimony and supporting documents that the Bank engaged in eight unsafe and unsound practices. R.D. at 45-46. In light of these findings, the Recommended Decision included affirmative provisions requiring that the Bank implement policies and procedures designed to mitigate risk and promote safe and sound operations. Enforcement Counsel submitted evidence—including detailed financial information and opinions from the 2010 ROE and sworn testimony from experienced FDIC officials—establishing that the corrective action plan in the Recommended Decision was appropriate.[16] Notably, the ALJ pointedly excluded certain provisions of the proposed Cease-and-Desist Order based on his determination that Enforcement Counsel had not met its burden of proof.[17] In sum, the Board finds that the affirmative provisions in the ALJ's Recommended Decision are reasonably crafted to mitigate the unsafe and unsound practices identified in the Recommended Decision.

V. THE BANK'S EXCEPTIONS

The Board now turns to the Bank's Exceptions to the Recommended Decision (Bank's Exceptions).[18] The Bank's Exceptions consisted of 39 paragraphs that can be separated into four

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[16] *See, e.g.*, R.D. at 31 (citing R. Ex. 342A at 35); R. Ex. 342A at 83, 112 (EIC's Garfinkle's testimony that the Bank needed to increase capital); 32 (citing to EIC's Garfinkle's memorandum which provided a detailed explanation for the 8 percent and 12 percent capital ratios).

[17] *See, e.g.*, R.D. at 21 (evidence failed to show that insufficient loan practices caused high-percentage of non-current loans); 23 (evidence failed to show that excessive ACA was due to "lax loan administration, underwriting practices, and inadequate controls"); 36 (evidence failed to show that the bank operated with unsafe or unsound liquidity, liquidity policy and the contingency funds plan discussed in the 2010 ROE); 43 (evidence failed to show that the Bank failed to adequately supervise and direct Bank management).

[18] All citations to the Bank's Exceptions will be to the page(s) in the Bank's brief on which the Exception(s) appears.

general categories. First, the Bank's Exceptions suggested several corrections to the factual portion of the ALJ's Recommended Decision; in particular, the ALJ's statements regarding the 2009 MOU, the impact of the South Florida real estate market, and the Bank's CRE practices. Bank's Exceptions at 2-4. Second, the Bank discussed in depth its disagreement with several of the ALJ's evidentiary determinations. Specifically, the Bank asserted that the ALJ's findings with respect to its adversely classified asset levels and capital levels were flawed and unsupported by the record. Bank's Exceptions at 4-16. Third, the Bank challenged the CAMELS component ratings it received in the 2010 ROE for management and sensitivity to market risk. Bank's Exceptions at 16-19. Finally, the Bank argued that its condition was not caused by the Bank's actions and, therefore, did not satisfy the definition of unsafe or unsound conduct. Bank's Exceptions at 5, 6-7, 14, 16, 20.

The Board finds that the Bank's Exceptions to the factual portion of the ALJ's Recommended Decision are either immaterial or unsupported by the evidence and require no further attention.[19] Meanwhile, the Board finds that most of the Bank's remaining Exceptions are immaterial, unconvincing or, in some instances, merely rearguing issues that the Bank raised below that the ALJ adequately disposed of. As such, most do not justify further analysis.

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[19] *See, e.g.*, Bank's Exceptions at 2 (whether the Bank "refused to sign an MOU" while the 2009 ROE ratings were being appealed is immaterial); 2 (contrary to the Bank's assertion, the ALJ's statements regarding the South Florida real estate decline do comport with his findings); 3 (contrary to the Bank's assertion, the Bank did increase its CRE lending between 2007 and 2010. The increase peaked in 2009 and as a result, the total CRE was lower in June 2010 than March 2007.). Even if the Bank were correct in any of these assertions, none of these alleged factual inaccuracies are material to the ALJ's factual findings or legal conclusions. Therefore, they require no further consideration. *See In the Matter of Michael D. Landry and Alton B. Lewis*, FDIC-95-65e, FDIC Enf. Dec. ¶ 5265, 1999 WL 440608 (May 25, 1999), *petition for review denied, Landry v. FDIC*, 204 F.3d 1125 (D.C. Cir.). Further, we see no reason to address the Bank's fourth factual Exception, which objects to the analysis FDIC examiners applied to a particular loan and asks this Board to determine how best to evaluate all such similar loans. Bank's Exceptions at 4. The Board agrees with the ALJ's findings that FDIC examiners recommended an improved, albeit different method and the Bank provides no reason why such a decision is better made by the Board than seasoned examiners intimately involved in the Bank's examination. R.D. at 41.

Based on the Board's review of the record, the Board finds that only one factual correction is warranted. On page 3 at footnote 2 of the Recommended Decision, the ALJ states that the FDIC submitted an MOU to the Bank on February 24, 2009. The actual date, however, was February 24, 2010. R. Ex. 207 at 3; R. Ex. 72.

Although the Board finds none of the Bank's Exceptions compelling, we discuss below certain Exceptions. Any Exception not specifically discussed is denied.

Adversely Classified Asset Levels

Contrary to the ALJ's findings, the Bank insists there is inadequate support in the record to find that it engaged in an unsafe or unsound practice by operating with an excessive volume of adversely classified assets. Bank's Exceptions at 4-14. The Board disagrees. The Recommended Decision provides ample evidence that the Bank operated with an excessive volume of ACA. R.D. at 22. The ALJ explained that asset quality is expressed as a percentage ratio of (1) poor quality assets to total assets *or* (2) poor quality assets to Tier 1 Capital plus ALLL. R.D. at 22. In this case, the Bank's undisputed ratios were 13.21 percent and 149.92 percent, respectively. CM Payne, an FDIC case manager with more than 20 years of relevant experience, explained that there was a real possibility that full payment and interest would not be made on 13 percent of the Bank's total assets and that this percentage was "too high." R.D. at 22 (citing Tr. 83). She gave comparable testimony about the Bank's ratio of poor quality assets to Tier 1 Capital plus ALLL. (Tr. 83-84 (Payne)).

Although the ALJ acknowledged that CM Payne did not identify what these ratios might be under accepted standards of prudent banking, the Board notes that EIC Garfinkle did. EIC Garfinkle provided a correlation between a specific percentage of poor quality assets to Tier 1 Capital plus ALLL and bank ratings. EIC Garfinkle testified that a 50 percent ratio of poor quality assets to Tier 1 Capital plus ALLL was "automatically a 2," a 100 percent was "probably a 3," and above a 100 percent was "automatically a 4." He concluded that the Bank, with 149.92 percent ratio of poor quality assets to Tier 1 Capital plus ALLL, was "clearly a 4" in this case.

R. Ex. 342A at 102-103.[20] Likewise, CM Payne testified that both of the Bank's ACA ratios were too high for the Bank to operate in a safe or sound manner. R.D. at 22.

Under the standards described above, the findings, conclusions and predictive judgments of the FDIC's examiners are entitled to considerable deference in determining whether the practices at issue were unsafe and unsound. Courts have long recognized that bank examiners' unique experience leads to the conclusion that their determinations are entitled to great deference and cannot be overturned unless shown to be arbitrary and capricious or outside a "zone of reasonableness." *Sunshine State Bank v. FDIC*, 783 F.2d 1580, 1582-83 (11th Cir. 1986). The Board too has repeatedly recognized the great deference due to the opinions and conclusions of FDIC examiners. *See, e.g., In the Matter of First Bank of Jacksonville*, FDIC-96-155b, FDIC Enf. Dec. ¶ 5248, 1998 WL 363852 at *11 (May 26, 1998), *aff'd mem., First Bank of Jacksonville v. FDIC,* 180 F.3d 269 (11th Cir. 1999); *In the Matter of Bank 1st, Albuquerque, New Mexico*, FDIC-09-025b, FDIC Enf. Dec. 2010 WL 1936984 at *3 (March 16, 2010); *In the Matter of American Bank of the South*, Merritt Island, Florida, FDIC-92-17b, FDIC Enf. Dec. ¶ 5195, 1992 WL 813377 at *12-13 (November 24, 1992). Here, the ALJ accorded appropriate

[20] Also, the ALJ cited several cases that support CM Payne's conclusion that 149.92 percent ratio of poor quality assets to Tier 1 Capital plus ALLL is contrary to acceptable standards of prudent banking practices. R.D. at 22. The Bank erroneously insists that these cases do not apply because the formula for determining the ACA ratio (of adversely classified assets to Tier 1 Capital plus ALLL) was different when the cited cases were decided. The Bank further insists that when the ratios in each of the cited cases are calculated today, its 149.92 percent ratio is lower than the comparable ratios in each of the cited cases. Bank's Exceptions at 7-8, 10. The Board need not reach this argument as there is undisputed evidence in the record that the Bank's 149.92 percent ratio was commensurate with a "4" rating and therefore beyond the standards of prudent banking. R. Ex. 342A at 102-103. Nevertheless, the Board notes that the very same cases that the Bank challenges in its Exceptions *also* support the finding that the Bank's 13.21 percent ratio of poor quality assets to total assets was, as CM Payne testified, "too high." *See In the Matter of the American Bank of the South,* Merritt Island, Florida, FDIC-92-17b, FDIC Enf. Dec. ¶ 5195, 1992 WL 813377 at *8, 20 (November 24, 1992) (bank's total adversely classified assets equaled 12.09 percent of total assets); *In the Matter of Bay Bank & Trust Co.,* FDIC-92-313b, FDIC Enf. Dec. ¶ 5213 at A-2424, 1993 WL 661031, (December 10, 1993) (bank's total adversely classified assets equaled 12.51 percent of total assets).

deference to CM Payne's view that the Bank's ratios were too high for the Bank to operate in a safe or sound manner. R.D. at 22, 23. The Board agrees.[21]

Capital Requirements

The Board rejects the Bank's argument that the 8 percent and 12 percent capital ratios sought in the cease-and-desist order are "standard" and therefore arbitrary and capricious. Bank's Exceptions at 15-16. Preliminarily, the Board notes that the FDIC's authority to set capital levels is, pursuant to the International Lending Supervision Act of 1983 (ILSA), committed exclusively to the agency's discretion.[22] For this reason, federal courts have consistently declined to review challenges to agency capital requirements post-ILSA. *See Frontier,* 702 F.3d at 596-97 (Section 3907 of ILSA forecloses our review of the FDIC's imposition of capital requirements because it commits the setting of capital levels to the FDIC's discretion without giving us any standard to determine the correctness of the FDIC's decision.); *FDIC v. Bank of Coushatta,* 930 F.2d 1122, 1128-29 (5th Cir. 1991) (FDIC capital directive held unreviewable where the court had no meaningful standard by which to evaluate the agency's decision); *Transohio Sav. Bank v. Director, Office of Thrift Supervision,* 1991 WL 201178 at *5

[21] The Board is not persuaded by the Bank's remaining Exceptions with respect to adversely classified assets. The Bank insists that the ALJ's findings were improper because: (1) they rested on "a single quantitative calculation"—the 149.92 percent ratio, and (2) there was no evidence that the Bank would sustain a loss as a result of the high volume of ACA. Bank's Exceptions at 4-6. Contrary to the Bank's first argument, the ALJ did not rest his conclusions on one specific ratio. He concluded that the poor quality assets vastly exceeded the Bank's insufficient capital and this evidence, "viewed as a whole, support[ed] a reasonable inference that the [Bank's] condition presented an abnormal risk of loss to [its] financial stability," particularly where the assets at issue were "real estate related in a declining real estate market." R.D. at 23. Second, the ALJ reasonably inferred that the Bank's excessive volume of adversely classified assets, consisting of real estate loans in a declining real estate market, would result in losses in a situation where the Bank also had insufficient capital. R.D. at 23. Direct evidence that the Bank would sustain losses as a result of its ACA is not required. Circumstantial evidence is sufficient here. *In the Matter of Richard D. Donohoo and Craig R. Mathies, et al*, FDIC Nos. 92-249c&b, 92-250e, 92-251e, 92-252k, FDIC Enf. Dec. ¶ 5225, 1995 WL 618673 (July 5, 1995) (citing *Michalic v. Cleveland Tankers, Inc.*, 364 U.S. 325, 330 (1960)).

[22] *See* 12 U.S.C. § 3907(a)(2) ("Each appropriate Federal Banking agency shall have the authority to establish such minimum level of capital for a banking institution as the appropriate Federal Banking agency, in its discretion, deems to be necessary or appropriate in light of the particular circumstances of the banking institution.")

(D.D.C. Aug. 1, 1991) (The legislative history of ILSA confirms that Congress intended to preclude judicial review of the expertise and discretion of federal regulators in establishing and maintaining adequate levels of capital.). Federal bank regulators have clear discretion under ILSA to determine that a bank's failure to comply with capital requirements amounts to an unsafe and unsound practice under section 8 of the FDI Act.[23] Finally, the Board observes that regulators may establish capital levels through either a directive or a section 8(b) cease and desist proceeding such as this one. *See Frontier*, 702 F.3d at 597. For this reason, there can be no doubt that the capital levels recommended by EIC Garfinkle and approved by Rollinson in this matter are firmly within the FDIC's discretion.

Further, the Board finds ample evidence in the record supporting the capital level requirements established by the FDIC examiners in this case. As the ALJ correctly noted, EIC Garfinkle initially provided a detailed explanation for the 8 percent and 12 percent capital requirements recommendation. R.D. at 32. Once the exam was complete, the findings were, as Garfinkle testified, sent to the regional office, where adjustments were made based on a review of the exam results. R.D. at 33 (citing R. Ex. 342A at 32-34). Finally, Rollinson determined whether the 8 percent and 12 percent capital ratios in the 2010 ROE were appropriate for the Bank based on several factors, including the Bank's asset quality, concentration risk, and the ability or lack of ability for earnings to raise capital. R.D. at 34. Thus, contrary to the Bank's characterization of the capital ratios as arbitrary, the Board finds that EIC Garfinkle's

[23] 12 U.S.C. § 3907(b) provides that the "[f]ailure of a banking institution to maintain capital . . . as established pursuant to subsection (a) of this section may be deemed by the appropriate Federal banking agency, in its discretion, to constitute an unsafe and unsound practice within the meaning of section 1818 of this title."

recommendations for 8 and 12 percent capital ratios were finalized only after Rollinson conducted an independent review of significant factors.[24]

Finally, the Board is not persuaded by the Bank's suggestion that Rollinson's conclusions concerning capital requirements, and as a result the ALJ's conclusions, were based on critical errors and omissions in the 2010 ROE and are therefore flawed. Bank's Exceptions at 14-16. To the extent there were mathematical errors in the 2010 ROE, the ALJ addressed this point directly. He acknowledged that all errors in the 2010 ROE were "identified and vetted during the hearing and therefore do not detract from the actual numbers ... upon which this recommended decision is based." R.D. at 42.[25] Moreover, the record evidence clearly shows that the Bank had a high percentage of non-current or past due loans, deficient total earnings, and a high CRE concentration (even when correctly calculated). R.D. at 21, 25, 42. Accordingly, the Board agrees with the ALJ that the 8 percent and 12 percent capital ratios, determined by EIC Garfinkle and approved by Rollinson, were not arbitrary and capricious, but were reasonably related to and in accordance with the legislative purpose of section 8(b) of the FDI Act.

CAMELS Ratings

Further, the Board rejects the Bank's argument that the management rating should have been a "3" (instead of a "4") and that the sensitivity to market risk rating should have been a "2" (instead of a "3") in the 2010 ROE. R.D. at 16-19. Contrary to the Bank's arguments, there is adequate evidence to support both ratings. Importantly, even though information pertaining to

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[24] The Bank asserts that the 8 percent and 12 percent capital ratios sought by the FDIC were not "negotiated," as the ALJ finds in the Recommended Decision, because neither EIC Garfinkle nor anyone else used the word "negotiated." Bank's Exceptions at 14 (citing R.D. at 32-33). This argument is meritless. EIC Garfinkle clearly testified that all exam findings were tentative pending review by the regional office where adjustments were made. R.D. at 33 (citing R. Ex. 342A at 32-34). The Board finds that the ALJ's use of the word "negotiated" in the Recommended Decision is consistent with the substance and meaning of EIC Garfinkle's testimony.

[25] Also, the Board cannot overlook that on September 15, 2010, just two days before meeting with the FDIC to discuss the results of the 2010 Exam, Bank management signed an MOU related to the 2009 ROE agreeing to the very same capital ratios it now asserts are arbitrary and capricious. R.D. at 14, n.14.

South Florida's weakened economy and Vero Beach's deteriorating commercial real estate market was not included in the FDIC's final 2010 ROE, the ALJ considered these factors during the evidentiary hearing and weighed their impact in his Recommended Decision. R.D. at 38. The ALJ concluded that the evidence, viewed as a whole, did not establish that these two events were primarily responsible for the Bank's condition. R.D. at 38. Instead, he noted that the Bank made "human errors" (for example, with its DTA and risk-weighted assets) for which senior management was responsible. R.D. at 38. The ALJ added that the economy did not prevent the Bank from acting sooner to increase capital and decrease expenses in a deteriorating climate. R.D. at 38. In other words, the ALJ considered the omissions in the 2010 ROE, but still found evidence of management's shortcomings.

Also, the ALJ may have disagreed with the FDIC's component rating for bank management; however, he accorded appropriate deference to CM Payne's view on this topic. *Sunshine State Bank*, 783 F.2d at 1583 ([W]here certain expert inference and judgments are made, ... the ALJ is required to defer to the examiner's expertise in reviewing the examiner's classification conclusion. The ALJ may not substitute his own subjective judgment for that of the examiner, but may set aside the classification if it is without objective factual basis or is shown to be arbitrary and capricious.) CM Payne, a highly experienced FDIC case manager, correctly determined that the Bank's senior management and the board failed to promptly and properly address the Bank's financial weaknesses in a weakening economy and react timely to proper FDIC recommendations. R.D. at 43.[26]

[26] For the same reason discussed above, the Board rejects the Bank's argument that subsection (h) of the Order is not supported by the ALJ's findings. Bank's Exceptions at 19. As discussed above, the Recommended Decision details the ways in which Bank management's policies and practices were detrimental to the Bank and how management, including senior officers, jeopardized the safety of the Bank's deposits and the FDIC Deposit Insurance Fund. R.D. at 37-41, 43.

Similarly, the Board finds that there was ample evidence to support the "3" rating the Bank received for sensitivity to market risk. Banks rated "3" need to improve risk management practices given the size, sophistication, and level of market risk accepted by the institution. Jt. Ex. 11 at § 7.1. The 2010 ROE concluded that the management reports needed "enhancement" with respect to back testing information provided in the back model testing report. R.D. at 36. Although the ALJ found this deficiency did not rise to the level of an unsafe or unsound practice (R.D. at 37), it is sufficient evidence to support a "3" rating. Further, a "3" rating is appropriate for a bank which lacks adequate earnings and capital to support its degree of market risk. Jt. Ex. 11 at § 7.1. The record clearly showed that the Bank had inadequate earnings and capital. R.D. at 25, 32. Accordingly, both ratings are reasonable in light of the record evidence. *Sunshine State Bank*, 783 F.2d at 1580.

Causation

Finally, the Bank incorrectly argues throughout its Exceptions that there was no evidence the Bank's actions actually caused the unsafe or unsound financial conditions found by the ALJ. Bank's Exceptions at 5, 6-7, 14, 16, 20. For instance, the Bank insists that it was improper for the ALJ to find unsafe or unsound conduct where the Bank's ACA ratio and failure to raise capital were not the result of specific Bank practices. Bank's Exceptions at 5 and 16. These arguments are meritless.

The Bank correctly points out in its Exceptions, that the underpinning for an unsafe and unsound practice may be "either an 'action, *or lack of action*, contrary to generally accepted standards of prudent operation.'" Bank's Exceptions at 5 (emphasis added); *see, e.g., In the Matter of First Bank of Jacksonville*, FDIC-96-155b, FDIC Enf. Dec. ¶ 5248, 1998 WL 363852 at *11 (May 26, 1998) (finding unsafe or unsound conduct where the Bank's board of directors either consciously ignored regulatory criticism or negligently failed to take corrective action). The ALJ explained in his Recommended Decision that all banks must "plan for, and respond to, risks that may arise from changing business and economic conditions." R.D. at 37. Here, however, the Bank repeatedly failed to do so in a number of categories (*i.e.*, asset quality, earnings, capital and management). For example, the ALJ found that the Bank failed to keep its capital levels commensurate with asset growth as the South Florida and Vero Beach commercial real estate market declined. R.D. at 37. As a result, the Bank was "overtaken by events," (namely, the deteriorating economic conditions) and "failed to react timely to recommendations by the FDIC." R.D. at 37. The Board finds, therefore, that the Bank's *lack of action* posed a threat to the Bank's financial stability and a corresponding risk to the FDIC's Deposit Insurance Fund and, accordingly, constituted an unsafe and unsound practice.

VI. CONCLUSION

Based upon its review of the record, the Board finds a preponderance of evidence supporting findings and conclusions that the Bank engaged in multiple unsafe and unsound practices. Because the Board agrees that all of the elements of section 8(b) have been proven, the Board concludes that a formal cease-and-desist order with affirmative action is justified. Importantly, the FDIC has clear authority to issue a cease-and-desist order based on just a single finding of unsafe or unsound conduct, for example, operating with insufficient capital, which the Bank concedes it did. In this case, however, a clear pattern of risky practices emerges from the record. In addition, the Board finds it significant that the Bank resisted earlier regulatory efforts to correct these practices through the 2009 MOU (signed only days before the 2010 Exam results were disclosed) and, to date, insists that the Bank's condition is primarily the fault of the South Florida and Vero Beach economies.

The present circumstances illustrate a need for both an order prohibiting the identified risky conduct and a corresponding plan to correct the resulting conditions. The affirmative provisions in the Recommended Decision were clearly designed to address each of the cited unsafe or unsound practices. The Board endorses the plan proposed by the ALJ because it clearly targets the Bank's operational and managerial deficiencies and provides what appears to be a reasonable, workable plan for rehabilitation. The Board further observes that the order and corrective action plan are necessary because the record clearly demonstrates that Bank management, when confronted with the worsening economy and the declining local real estate market, failed to make appropriate and timely adjustments, realistically assess risk, and properly acknowledge losses.

Based on the foregoing, the Board concurs in the findings of fact and conclusions of law in the ALJ's Recommended Decision, and issues the following Order implementing its Decision.

ORDER TO CEASE AND DESIST

The Board of the FDIC, having considered the entire record of this proceeding and finding that Marine Bank & Trust Company, Vero Beach, Florida, by act or omission, engaged in unsafe or unsound banking practices, hereby ORDERS and DECREES that the Bank, institution-affiliated parties of the Bank, as that term is defined in section 3(u) of the FDI Act, 12 U.S.C. § 1813(u), and its successors and assigns, cease and desist from the following unsafe or unsound banking practices:

(a) Operating with a high percentage of non-current loans;

(b) Operating with and maintaining an excessive volume of poor quality loans and other assets in relation to its total assets, and in relation to its Tier 1 Capital and ALLL, resulting in an excessive volume of adversely classified assets;

(c) Operating with earnings that were inadequate to fund its operations and to augment its capital;

(d) Operating with an inadequate loan loss reserve;

(e) Operating with and maintaining a high volume of adversely classified CRE related loans;

(f) Operating with insufficient capital in relation to the kind and quality of the assets held by the Bank;

(g) Improperly maintaining a deferred tax asset as regulatory capital and improperly risk weighting certain assets, thereby resulting in an overstatement of capital; and

(h) Operating with Bank management, including the senior officers and the board of directors of the Bank (Bank's board), whose policies and practices were detrimental to the Bank and which jeopardized the safety of the Bank's deposits and the FDIC Deposit Insurance Fund.

1. **BOARD OF DIRECTORS**

As of the effective date of this ORDER, the Bank's board shall establish a subcommittee of the Bank's board (Directors' Committee) charged with the responsibility of ensuring that the Bank complies with the provisions of this ORDER. The Directors' Committee shall formulate and review monthly reports detailing the Bank's actions with respect to compliance with the ORDER. The Directors' Committee shall present a report detailing the Bank's adherence to the ORDER to the Bank's board at each regularly scheduled Bank's board meeting. Such report shall be recorded in the appropriate minutes of the Bank's board's meeting and shall be retained in the Bank's records. Establishment of this committee does not in any way diminish the responsibility of the entire Bank's board to ensure compliance with the provisions of this ORDER.

2. **CAPITAL**

(a) Within sixty (60) days from the effective date of this ORDER, the Bank shall have Tier 1 Capital in such amount as to equal or exceed eight percent (8%) of Total Assets, and shall have Total Risk-Based Capital in such an amount as to equal or exceed twelve percent (12%) of the Bank's total risk-weighted assets.

(b) During the life of this ORDER, the Bank shall maintain a Leverage Ratio of at least eight percent (8%) and a Total Risk-Based Capital Ratio of at least twelve percent (12%) as those capital ratios are defined in 12 C.F.R. Part 325.

(c) The level of Tier 1 Capital to be maintained during the life of this ORDER pursuant to this paragraph shall be in addition to a fully funded Allowance for Loan and Lease Losses (ALLL), the adequacy of which shall be satisfactory to the Regional Director as determined at subsequent examinations and/or visitations.

(d) Within thirty (30) days from the effective date of this ORDER, the Bank shall submit to the Regional Director a written capital plan. Such capital plan shall detail the steps that the Bank shall take to achieve and maintain the capital requirements set forth in this ORDER. In developing the capital plan, the Bank shall take into consideration:

(i) The volume of the Bank's adversely classified assets;

(ii) The nature and level of the Bank's asset concentrations;

(iii) The adequacy of the Bank's ALLL;

(iv) The anticipated level of retained earnings;

(v) Anticipated and contingent liquidity needs; and

(vi) The source and timing of additional funds to fulfill future capital needs.

(e) The capital plan must set forth, in detail, the Bank's strategy and procedures for addressing the following contingencies:

(i) Failure of the Bank to maintain the minimum capital ratios required under this ORDER;

(ii) Rejection of the capital plan, or any part thereof, by the Regional Director;

(iii) Failure of the Bank to implement or adhere to a capital plan to which the Regional Director has taken no written objection pursuant to this ORDER; and

(iv) The immediate sale or merger of the Bank in the event the Bank becomes Undercapitalized, as that term is defined in 12 C.F.R. Part 325, which the Bank shall implement upon written notice from the Regional Director.

(f) If any such capital ratios are less than the percentages required by this ORDER, as determined as of the date of any Consolidated Report of Condition and Income or at an examination by the FDIC, the Bank shall, within thirty (30) days from receipt of a written notice of the capital deficiency from the Regional Director, present to the Regional Director a plan to increase the Bank's Tier 1 Capital or to take other measures to bring all the capital ratios to the percentages required by this ORDER. After the Regional Director responds to the plan, the Bank's board shall implement the plan, including any modifications and/or amendments requested by the Regional Director.

(g) Any increase in Tier 1 Capital necessary to meet the requirements of this ORDER may be accomplished by the following:

(i) Sale of common stock;

(ii) Sale of noncumulative perpetual preferred stock;

(iii) Direct contribution of cash by the Bank's board, shareholders, and/or parent holding company;

(iv) Any combination of the above means; or

(v) Any other means acceptable to the Regional Director.

(h) No increase in Tier 1 Capital that is necessary to meet the requirements of this ORDER may be accomplished through a deduction from the Bank's ALLL.

(i) If all or part of any necessary increase in Tier 1 Capital required by this ORDER is accomplished by the sale of new securities, the Bank's board shall take all necessary steps to implement a plan for the sale of such additional securities, including the voting of any shares owned or proxies held or controlled by them in favor of the plan. Should the implementation of the plan involve a public distribution of the Bank's securities (including a distribution limited only to the Bank's existing shareholders), the Bank shall prepare offering materials fully describing the securities being offered, including an accurate description of the financial condition of the Bank and the circumstances giving rise to the offering, and any other material disclosures necessary to comply with applicable federal securities laws. Prior to the implementation of the plan and, in any event, not less than fifteen (15) days prior to the dissemination of such materials, the plan and any materials used in the sale of the securities shall be submitted to the FDIC, Division of Risk Management Supervision, Accounting and Securities Disclosure Section, 550 17th Street, N.W., Room MB-5073, Washington, D.C. 20429, for review. Any changes requested to be made in the plan or materials by the FDIC shall be made prior to the dissemination of the plan and materials. If the increase in Tier 1 Capital is provided by the sale of noncumulative perpetual preferred stock, then all terms and conditions of the issue, including, but not limited to, those terms and conditions relative to interest rate and convertibility factor, shall be presented to the Regional Director for prior approval.

(j) In complying with the provisions of the Capital paragraph of this ORDER, the Bank shall provide written notice of any planned or existing development, or other changes that are materially different from the information reflected in any offering materials used in connection with the sale of Bank securities, to any subscriber and/or purchaser of the

Bank's securities. The written notice required by this paragraph shall be furnished within ten (10) days from the date such material development or change was planned or occurred, whichever is earlier, and shall be furnished to every subscriber and/or purchaser of the Bank's securities who received or was tendered the information contained in the Bank's original offering materials.

3. **REDUCTION OF CLASSIFIED ASSETS**

(a) Within sixty (60) days from the effective date of this ORDER, the Bank shall submit a written plan to the Regional Director to reduce the remaining assets classified "Doubtful" and "Substandard" in the Report or any future regulatory examination report. The plan shall address each asset so classified with a balance of $500,000 or greater and provide the following:

(i) The name under which the asset is carried on the books of the Bank;

(ii) Type of asset;

(iii) Actions to be taken in order to reduce the classified asset; and

(iv) Timeframes for accomplishing the proposed actions.

(b) The plan shall also include, at a minimum:

(i) A review of the financial position of each such borrower, including the source of repayment, repayment ability, and alternate repayment sources; and

(ii) An evaluation of the available collateral for each such credit, including possible actions to improve the Bank's collateral position.

(c) In addition, the Bank's plan shall contain a schedule detailing the projected reduction of total classified assets on a quarterly basis. Further, the plan shall require the submission of monthly progress reports to the Bank's board and mandate a review by the Bank's board.

(d) The Bank shall present the plan to the Regional Director for review. Within thirty (30) days from the Regional Director's response, the plan, including any requested modifications or amendments, shall be adopted by the Bank's board and the approval shall be recorded in the Bank's board minutes. The Bank shall then immediately implement the plan.

(e) For purposes of the plan, the reduction of adversely classified assets as of the Report shall be detailed using quarterly targets expressed as a percentage of the Bank's Tier 1 Capital plus the Bank's ALLL and may be accomplished by:

(i) Charge-off;

(ii) Collection;

(iii) Sufficient improvement in the quality of adversely classified assets so as to warrant removing any adverse classification, as determined by the FDIC or the State; and/or

(iv) Increase in the Bank's Tier 1 Capital.

4. OTHER REAL ESTATE

Within sixty (60) days from the effective date of this ORDER, the Bank's board shall develop a written policy for managing the Other Real Estate ("ORE") of the Bank. Such policy shall be consistent with all applicable laws, regulations, and other regulatory guidelines regarding appraisals, including, but not limited to, the FDIC's appraisal regulation, 12 C.F.R. Part 323 and *Guidance on Other Real Estate,* FIL-62-2008 (July 1, 2008). The Bank shall submit the policy to the FDIC for review and comment. Within thirty (30) days from receipt of any comment from the FDIC, and after due consideration of any recommended changes, the Bank shall approve the policy, which approval shall be recorded in the minutes of the Bank's board meeting. Thereafter, the Bank shall implement and fully comply with the policy.

5. **RESTRICTIONS ON FUTURE ADVANCES**

(a) Beginning with the effective date of this ORDER, the Bank shall not extend, directly or indirectly, any additional credit to, or for the benefit of, any borrower who has a loan or other extension of credit from the Bank that has been charged off or classified, in whole or in part, "Loss" or "Doubtful" and is uncollected. The requirements of this paragraph shall not prohibit the Bank from renewing credit already extended to a borrower after full collection, in cash, of interest due from the borrower.

(b) Additionally, during the life of this ORDER, the Bank shall not extend, directly or indirectly, any additional credit to, or for the benefit of, any borrower who has a loan or other extension of credit from the Bank that has been classified, in whole or part, "Substandard."

(c) Subparagraphs (a) and (b) of this paragraph, above, shall not apply if the Bank's failure to extend further credit to a particular borrower would be detrimental to the best interests of the Bank. Prior to the extension of any additional credit pursuant to this paragraph, either in the form of a renewal, extension, or further advance of funds, such additional credit shall be approved by a majority of the Bank's board or a designated committee thereof, who shall certify in writing as follows:

(i) Why the failure of the Bank to extend such credit would be detrimental to the best interests of the Bank;

(ii) That the Bank's position would be improved thereby, including an explanatory statement of how the Bank's position would be improved; and

(iii) That an appropriate workout plan has been developed and will be implemented in conjunction with the additional credit to be extended.

(iv) The signed certification shall be made a part of the minutes of the Bank's board, or its designated committee and a copy of the signed certification shall be retained in the borrower's credit file

6. **ALLOWANCE FOR LOAN AND LEASE LOSSES AND CALL REPORTS**

Within sixty (60) days from the effective date of this ORDER, the Bank's board shall review the adequacy of the ALLL and establish a comprehensive policy for determining the adequacy of the ALLL. For the purpose of this determination, the adequacy of the ALLL shall be determined after the charge-off of all loans or other items classified "Loss." The policy shall provide for a review of the ALLL at least once each calendar quarter. Said review shall be completed in time to properly report the ALLL in the quarterly Reports of Condition and Income. The review shall focus on the results of the Bank's internal loan review, loan and lease loss experience, trends of delinquent and nonaccrual loans, an estimate of potential loss exposure, concentrations of credit, and present and prospective economic conditions. The review should include a review of compliance with FAS 114, currently codified as ASC 310-10-35, Receivable – Overall – Subsequent Measurement General, and FAS 5, currently codified as ASC 450, Contingencies. The policy shall adhere to the guidance set forth in *Interagency Policy Statement on the Allowance for Loan and Lease Losses,* FIL-105-2006. A deficiency in the ALLL shall be remedied in the calendar quarter it is discovered, prior to submitting the Report of Condition and Income, by a charge to current operating earnings. The minutes of the Bank's board meeting at which such review is undertaken shall indicate the results of the review. The Bank's policy for determining the adequacy of the ALLL and its implementation shall be satisfactory to the FDIC, as determined at the initial review and at subsequent examinations and/or visitations.

7. **WRITTEN STRATEGIC/BUSINESS PLAN**

Within sixty (60) days from the effective date of this ORDER, the Bank shall prepare and submit to the FDIC for review and comment a written strategic/business plan covering the overall operation of the Bank. At a minimum, the plan shall establish objectives for the Bank's earnings performance, growth, balance sheet mix, liability structure, capital adequacy, and reduction of nonperforming and underperforming assets, together with strategies for achieving those objectives. The plan shall also identify capital, funding, managerial and other resources needed to accomplish its objectives. Such plan shall specifically provide for the following:

(a) Goals for the composition of the loan portfolio by loan type including strategies to diversify the type and improve the quality of loans held;

(b) Goals for the composition of the deposit base including strategies to reduce reliance on volatile and costly deposits; and

(c) Plans for effective risk management and collection practices.

8. **PLAN TO IMPROVE EARNINGS/BUDGET**

(a) Within ninety (90) days from the effective date of this ORDER, the Bank shall formulate and fully implement a written plan and a comprehensive budget for all categories of income and expense for the current calendar year. The plan and budget shall include formal goals and strategies, consistent with sound banking practices and taking into account the Bank's other written policies, to improve the Bank's net interest margin, increase interest income, reduce discretionary expenses, and improve and sustain earnings of the Bank. The plan shall include a description of the operating assumptions that form the basis for and adequately support major projected income and expense components. Thereafter, the Bank shall formulate such a plan and budget by November 30 preceding each subsequent budget year.

(b) The plan and budget and any subsequent modification thereto shall be submitted to the FDIC for review and comment. Within thirty (30) days after the receipt of any comment from the FDIC, and after due consideration of any recommended changes, the Bank's board shall approve the plan and budget or subsequent modification thereto, which approval shall be recorded in the minutes of the meeting of the Bank's board.

(c) Following the end of each calendar quarter, the Bank's board shall evaluate the Bank's actual performance in relation to the plan and budget and shall record the results of the evaluation, and any actions taken by the Bank, in the minutes of the Bank's board meeting at which such evaluation is undertaken.

9. ASSET GROWTH

While this ORDER is in effect, the Bank shall notify the FDIC at least sixty (60) days prior to undertaking asset growth that exceeds ten percent (10%) or more per annum or initiating material changes in asset or liability composition. In no event shall asset growth result in noncompliance with the capital maintenance provisions of this ORDER unless the Bank receives prior written approval from the FDIC.

10. PROGRESS REPORTS

Within thirty (30) days of the end of the first quarter following the effective date of this ORDER, and within thirty (30) days of the end of each quarter thereafter, the Bank shall furnish written progress reports to the FDIC detailing the form and manner of any actions taken to secure compliance with this ORDER, and the results thereof. Such reports shall include a copy of the Bank's Reports of Condition and Income. Such reports may be discontinued when the corrections required by this ORDER have been accomplished and the FDIC has released the Bank in writing from making further reports. All progress reports and other written responses to this ORDER shall be reviewed by the Bank's board and made a part of the minutes of the appropriate Bank's board meeting.

11. DISCLOSURE

Within thirty (30) days from the effective date of this ORDER, the Bank shall provide to its shareholders or otherwise furnish a description of this ORDER, in conjunction with the Bank's next shareholder communication and in conjunction with its notice or proxy statement preceding the Bank's next shareholder meeting. The description shall fully describe the ORDER in all material respects. The description and any accompanying communication, statement, or notice shall be sent to the FDIC, Division of Risk Management Supervision, Accounting and Securities Disclosure Section, 550 17th Street, N.W., Room MB-5073, Washington, D.C. 20429, for non-objection or comment at least twenty (20) days prior to dissemination to shareholders. Any changes requested by the FDIC shall be made prior to dissemination of the description, communication, notice, or statement.

This ORDER shall not bar, estop, or otherwise prevent the FDIC, or any other Federal or state agency or department from taking any action against the Bank, the Bank's current or former institution-affiliated parties, and/or any of their respective directors, officers, employees, and agents, including, but not limited to, the imposition of civil money penalties.

This ORDER shall be effective on the date of issuance.

The provisions of this ORDER shall be binding upon the Bank, its institution-affiliated parties, and any successors and assigns thereof.

The provisions of this ORDER shall remain effective and enforceable except to the extent that, and until such time as, any provisions of this ORDER shall have been modified, terminated, suspended, or set aside in writing.

By direction of the Board of Directors..

Dated at Washington, D.C., this 19th day of March, 2013.

/s/
Robert E. Feldman
Executive Secretary

(SEAL)

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