

UNITED STATES OF AMERICA
BEFORE THE BOARD OF GOVERNORS OF THE
FEDERAL RESERVE SYSTEM
WASHINGTON, D.C.

ON CERTIFICATION OF THE DEPARTMENT)
OF THE TREASURY-- OFFICE OF THE)
COMPTROLLER OF THE CURRENCY)
))
In the Matter of a Notice to)
Prohibit Further Participation)
Against WALTER C. "CHARLIE" CLEVELAND,) DOCKET NO. OCC-AA-EC-04-47
))
Former Director and Senior Vice President,)
First National Bank, Lubbock, Texas)
))

ORDER OF PROHIBITION

WHEREAS, pursuant to section 8(e) of the Federal Deposit Insurance Act, as amended, (the "FDI Act") (12 U.S.C. § 1818(e)), the Board of Governors of the Federal Reserve System ("the Board") is of the opinion, for the reasons set forth in the accompanying Final Decision, that a final Order of Prohibition should issue against WALTER C. "CHARLIE" CLEVELAND ("CLEVELAND"), a former employee and institution-affiliated party, as defined in Section 3(u) of the FDI Act (12 U.S.C § 1813(u)), of First National Bank, Lubbock, Texas.

NOW, THEREFORE, IT IS HEREBY ORDERED, pursuant to section 8(e) of the FDI Act, 12 U.S.C. § 1818(e), that:

1. In the absence of prior written approval by the Board, and by any other Federal financial institution regulatory agency where necessary pursuant to section 8(e)(7)(B) of the Act (12 U.S.C. § 1818(e)(7)(B)), Cleveland is hereby prohibited:

(a) from participating in any manner in the conduct of the affairs of any institution or agency specified in section 8(e)(7)(A) of the FDI Act (12 U.S.C. § 1818(e)(7)(A)), including, but not limited to, any insured depository institution, any insured depository institution holding company or any U.S. branch or agency of a foreign banking organization;

(b) from soliciting, procuring, transferring, attempting to transfer, voting or attempting to vote any proxy, consent or authorization with respect to any voting rights in any institution described in subsection 8(e)(7)(A) of the FDI Act (12 U.S.C. § 1818(e)(7)(A));

(c) from violating any voting agreement previously approved by any Federal banking agency; or

(d) from voting for a director, or from serving or acting as an institution-affiliated party as defined in section 3(u) of the FDI Act (12 U.S.C. § 1813(u)), such as an officer, director, or employee in any institution described in section 8(e)(7)(A) of the FDI Act (12 U.S.C. § 1818(e)(7)(A)).

2. Any violation of this Order shall separately subject Cleveland to appropriate civil or criminal penalties or both under section 8 of the FDI Act (12 U.S.C. § 1818).

3. This Order, and each and every provision hereof, is and shall remain fully effective and enforceable until expressly stayed, modified, terminated or suspended in writing by the Board.

This Order shall become effective at the expiration of thirty days after service is made.

By Order of the Board of Governors, this 17th day of August 2005.

BOARD OF GOVERNORS OF THE
FEDERAL RESERVE SYSTEM

/s/

Jennifer J. Johnson
Secretary of the Board

I. STATEMENT OF THE CASE

A. Statutory and Regulatory Framework

Under the FDI Act and the Board's regulations, the ALJ is responsible for conducting proceedings on a notice of charges. 12 U.S.C. § 1818(e)(4). The ALJ issues a recommended decision that is referred to the deciding agency together with any exceptions to those recommendations filed by the parties. The Board makes the final findings of fact, conclusions of law, and determination whether to issue an order of prohibition in the case of prohibition orders sought by the OCC. *Id.*; 12 C.F.R. § 263.40.

The FDI Act sets forth the substantive basis upon which a federal banking agency may issue against a bank official or employee an order of prohibition from further participation in banking. To issue such an order, the Board must make each of three findings: 1) that the respondent engaged in identified misconduct, including a violation of law or regulation, an unsafe or unsound practice, or a breach of fiduciary duty; 2) that the conduct had a specified effect, including financial loss to the institution or gain to the respondent; and 3) that the respondent's conduct involved either personal dishonesty or a willful or continuing disregard for the safety or soundness of the institution. 12 U.S.C. § 1818(e)(1)(A)-(C).

An enforcement proceeding is initiated by filing and serving on the respondent a notice of intent to prohibit. Under the OCC's and the Board's regulations, the respondent must file an answer within 20 days of service of the notice. 12 C.F.R. §§ 19.19(a) and 263.19(a). Failure to file an answer constitutes a waiver of the respondent's right to contest the allegations in the notice, and a final order may be entered unless good cause is shown for failure to file a timely answer. 12 C.F.R. §§ 19.19(c)(1) and 263.19(c)(1).

B. Procedural History

On September 16, 2004, the OCC served upon Respondent¹ a Notice of Charges for Issuance of an Order to Cease and Desist and Notice of Assessment of a Civil Monetary Penalty (“Notice”) against Respondent based on his conduct while employed at the Bank. On October 15, 2004, Respondent through counsel filed an answer to the original Notice (“Answer”), along with a timely request for a hearing on the civil money penalty.

On February 28, 2005, the OCC served the First Amended Notice of Charges for Issuance of an Order for Prohibition and Notice of Assessment of a Civil Money Penalty (“Amended Notice”) upon Respondent. The Amended Notice repeated allegations made in the original Notice,² added new, substantive allegations relating to a loan made to Raintree Investment, Inc. (the “Raintree Loan”), and sought an order of prohibition. Amended Notice, Article III. The Amended Notice directed Respondent to file an answer within 20 days and warned that failure to do so would constitute a waiver of his right to appear and contest the allegations. The Amended Notice was served in accordance with the OCC rules by overnight

¹ Service of the initial Notice and every other document served on Respondent by the ALJ or OCC Enforcement Counsel was effected by service on Respondent’s counsel rather than on Respondent personally. Contrary to OCC rules, Respondent’s counsel did not file a notice of appearance pursuant to 12 C.F.R. § 19.6(a)(3). Accordingly, at least the initial Notice should have been served on Respondent himself, rather than his counsel. See 12 C.F.R. § 19.11(c)(2). In cases of default, it is particularly important to ensure that service of papers meets the minimum standards of due process. While the Board is concerned about the notice procedures followed in this case, it concludes that in light of Respondent’s counsel’s participation in the case on behalf of his client, the minimum requirements of the Rules and of due process have been met. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (notice must be reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections); 12 C.F.R. § 19.11(c)(2)(v) (permitting service “by any other method reasonably calculated to give actual notice”). The Board will, however, direct that OCC Enforcement Counsel serve a copy of the Order of Prohibition on the Respondent by various means, including by certified mail to his last known address, which does not appear in the current record.

² Because the motion for default is based solely on the allegations newly made in the Amended Notice, the Board does not consider any of the allegations in the original Notice in its determination.

delivery, signature requested, in care of Respondent's counsel. Respondent failed to file an answer within the 20-day period.

On March 31, 2005, Enforcement Counsel filed a Motion for Entry of an Order of Default against Respondent. On April 6, 2005, the ALJ issued an Order to Show Cause, noting that although Respondent was not in default as to the Original Notice, since he had filed an answer to it, the new allegations could be the basis for a default granting the relief sought. The Order provided Respondent until April 22, 2005, to file an answer to the Amended Notice and to show good cause for having failed to do so previously. To date, Respondent has not filed any reply to the Order to Show Cause or answered the Amended Notice.

C. The Raintree Loan

The Amended Notice alleges that Respondent, as a senior loan officer for Bank, caused the Bank to loan \$53,000 to Raintree Investment, Inc. ("Raintree"). The President of Raintree is Russell Baxter, Respondent's father-in-law; Respondent also served as trustee of the Deed of Trust for the property securing the loan. Respondent failed to disclose his interest in the Raintree Loan (an insider-related loan) to Bank's Board of Directors or to OCC examiners. Respondent also received two cashier's checks from the proceeds of the loan, totaling \$14,892, which he converted to his personal use, applying the bulk of the proceeds toward the closing costs on his personal residence. Respondent made cash payments on the loan until his departure from the Bank, thereby concealing the loan from the named borrower. Respondent additionally instructed Bank personnel not to send letters regarding the loan to Raintree, and on at least one occasion personally removed mail addressed to Raintree from the Bank's outgoing mail.

Over a month after Respondent left his position with the Bank in June 2004, Mr. Baxter responded to a Bank communication regarding the Raintree loan stating that he was unaware he had a loan at the Bank any longer. A survey ordered by the Bank determined that some of the property securing the loan had been sold, with no record of the sale in the Bank's loan file.³

II. DISCUSSION

The OCC's Rules of Practice and Procedure set forth the requirements of an answer and the consequences of a failure to file an answer to a Notice. Under the Rules, failure to file a timely answer "constitutes a waiver of [a respondent's] right to appear and contest the allegations in the notice." 12 C.F.R. § 19.19(c). If the ALJ finds that no good cause has been shown for the failure to file, the judge "shall file . . . a recommended decision containing the findings and the relief sought in the notice." *Id.* An order based on a failure to file a timely answer is deemed to be issued by consent. *Id.*

In this case, Respondent failed to file an answer to the Amended Notice despite notice to him of the consequences of such failure, and also failed to respond to the ALJ's Order to Show Cause. Respondent's failure to file an answer constitutes a default.

Respondent's default requires the Board to consider the new allegations in the Amended Notice as uncontested. The new allegations in the Amended Notice, described above, meet all the criteria for entry of an order of prohibition under 12 U.S.C. § 1818(e). It was a breach of fiduciary duty, conflict of interest, unsafe and unsound practice, and violation of law, for Respondent to: fail to remove himself from approving the Raintree loan made to a family member; administer the loan while acting as trustee for its collateral; and fail to disclose his

³ Mr. Baxter subsequently paid the balance of the loan.

interest in the insider loan to the Bank and to OCC examiners. He received financial benefit from the loan by using proceeds of the loan for closing costs on his own personal residence. He demonstrated both personal dishonesty and willful disregard for the safety and soundness of the Bank by purposefully withholding information about the Raintree loan from the named borrower's principal, with the effect of hiding from Mr. Baxter the fact that Baxter had an outstanding loan at the Bank; and willfully interfering with the Bank's communications with a borrower regarding the borrower's obligation to the Bank.

Accordingly, the requirements for an order of prohibition have been met and the Board hereby issues such an order. As noted above,⁴ the Board directs OCC Enforcement Counsel to serve the order of prohibition on Respondent personally, by delivering to his last known address, in addition to service on his counsel.

CONCLUSION

For these reasons, the Board orders the issuance of the attached Order of Prohibition.

By Order of the Board of Governors, this 17th day of August 2005.

BOARD OF GOVERNORS OF THE
FEDERAL RESERVE SYSTEM

/s/

Jennifer J. Johnson
Secretary of the Board

⁴ See fn.1.