

UNITED STATES OF AMERICA
Before The
OFFICE OF THRIFT SUPERVISION
DEPARTMENT OF THE TREASURY

In the Matter of:)	
)	Adjudicatory Proceeding
GREG L. DIAZ)	No.: AP 10-02
)	
Person Subject to Final Prohibition Order)	
Issued Pursuant to 12 U.S.C. § 1818(e))	Dated: March 10, 2010
And Former Institution-Affiliated Party of)	
Central Federal Savings & Loan Association))	
Cicero, Illinois)	
OTS Docket No. 01567)	

SECOND AMENDED NOTICE OF ASSESSMENT OF CIVIL MONEY PENALTIES

I. PRELIMINARY STATEMENT

1. The Director of the Office of Thrift Supervision (OTS), pursuant to Section 8(i)(2) of the Federal Deposit Insurance Act (FDIA), 12 U.S.C. § 1818(i)(2), issues this Second Amended Notice of Assessment of Civil Money Penalties (Second Amended Notice). By issuing this Second Amended Notice, the OTS commences administrative adjudicatory proceedings and assesses civil money penalties against Greg L. Diaz (Respondent), a person subject to a final and outstanding Order of Prohibition issued by the OTS pursuant to Section 8(e) of the FDIA, 12 U.S.C. § 1818(e), a former institution-affiliated party of Central Federal Savings & Loan Association, Cicero, Illinois, OTS Docket No. 01567 (Central).

2. The OTS charges that Respondent, by virtue of his consulting work as an employee of the financial institution consulting firm Thomas Compliance Associates (TCA), participated in the conduct of the affairs of insured savings associations and, therefore, engaged

or participated in violations of law and a final order after Respondent was subject to a final and outstanding Order of Prohibition, OTS Order No. ATL-2004-08, dated March 4, 2004, (Prohibition Order) issued by the OTS pursuant to Section 8(e) of the FDIA, 12 U.S.C. § 1818(e), and after Respondent entered a guilty plea on August 29, 2005, to one count of Embezzlement (18 U.S.C. § 656) all in violation of Section 8(e) of the FDIA, 12 U.S.C. § 1818(e), and Section 19 of the FDIA, 12 U.S.C. § 1829.

3. The OTS charges that grounds exist to assess civil money penalties against Respondent, pursuant to Section 8(i)(2)(A) of the FDIA, 12 U.S.C. § 1818(i)(2)(A) for his violations of the Prohibition Order, Section 8(e)(7)(C) of the FDIA, 12 U.S.C. § 1818(e)(7)(C), and Section 19 of the FDIA, 12 U.S.C. § 1829.

II. JURISDICTION

4. Pursuant to Section 3(q)(4) of the FDIA, 12 U.S.C. § 1813(q)(4), the Director of the OTS is the “appropriate Federal banking agency” to initiate and maintain a civil money penalty proceeding against Respondent pursuant to Section 8(i)(2) of the FDIA, 12 U.S.C. § 1818(i)(2), for violations of an Order it has issued pursuant to Section 8(e) of the FDIA, 12 U.S.C. § 1818(e).

5. Because Respondent at all relevant times to these charges was an institution-affiliated party, by virtue of his consulting work as an employee of the financial institution consulting firm TCA and as defined pursuant to Section 3(u)(3) of the FDIA, 12 U.S.C. § 1813(u)(3),¹ he is subject to the authority of the OTS to initiate and maintain this administrative proceeding against him pursuant to the provisions of Section 8 of the FDIA, 12 U.S.C. § 1818.

¹ Section 3(u)(3) of the FDIA, 12 U.S.C. § 1813(u)(3) defines institution-affiliated party as follows:

6. Until October 16, 2003, Respondent was an employee and institution-affiliated party of Central, a "savings association" within the meaning of 12 U.S.C. § 1462(4) and Section 3(b) of the FDIA, 12 U.S.C. § 1813(b).

7. On or about October 16, 2003, Central terminated Respondent for embezzling money from a customer account.

8. Based on his conduct while employed by Central, the OTS issued a final and effective Prohibition Order against Respondent on March 4, 2004, pursuant to Section 8(e) of the FDIA, 12 U.S.C. § 1818(e).

9. From approximately January 2, 2004 through approximately July 31, 2008, and subject to the Prohibition Order, Respondent was employed as a consultant by the financial institution consulting firm, TCA.

10. In considering whether Respondent, while employed by TCA as a consultant, participated in the conduct of the affairs of a depository institution the OTS evaluated: 1) the nature of the work performed; 2) the ability of the Respondent to cause harm to the institutions; and 3) the relationship between the role performed by the Respondent and the institutions.²

(3) any shareholder (other than a bank holding company), *consultant*, joint venture partner, and any other person as determined by the appropriate federal banking agency (by regulation or case-by-case) who participates in the conduct of the affairs of an insured depository institution. (emphasis added)

² *In the Matter of Frank E. Jameson*, 2 FDIC Enforcement Decisions and Order, ¶ 5154A (June 12, 1990), was decided prior to the Financial Institution's Reform, Recovery and Enforcement Act of 1989 (FIRREA) under the former Section 8(e)(2) of the FDIA. *Jameson*, however, discusses the meaning of "person participating in the conduct of the affairs of the Bank" and provides guidance on the similar language contained in the current provision, of Section 3(u)(3) of the FDIA, 12 U.S.C. § 1813(u)(3). In order to determine if a person is participating conduct of the affairs of an insured depository institution, post-FIRREA administrative bodies and tribunals have employed the *Jameson* analysis. The OTS continues to use the Jameson factors post-FIRREA in interpreting whether a party is participating in the conduct of the affairs of an insured depository institution. See, e.g., *In the Matter of Lawrence B. Seidman*, OTS Order No. AP 94-22, 1994 OTS DD Lexis 20 (May 9, 1994).

A. The Nature of Respondent's Work

11. While employed by TCA, Respondent conducted over 50 onsite lending and compliance audits or reviews in over 20 savings associations.

12. While employed by TCA, Respondent reviewed savings association documents and processes.

13. While employed by TCA, Respondent also conducted Bank Secrecy Act and Anti-Money Laundering (BSA/AML) independent testing and training for the savings associations' staff and assessed suspicious activity reporting by TCA's insured depository institution clients. Savings associations are statutorily required to have in-house personnel or hire a third party to conduct independent testing of BSA/AML program compliance.

14. As a result of saving associations outsourcing the statutorily required BSA/AML independent testing to third-party consultants, such consultants participate in the conduct of the affairs of the savings associations.

15. Moreover, while employed by TCA, Respondent proffered advice and direction to management and staff of savings associations concerning their banking transactions and risk management procedures and policies. The risk management procedures and policies included lending policies, electronic funds transaction, and check kiting procedures.

16. Due to the nature of Respondent's consulting work for the savings associations he reviewed and audited, Respondent participated in the conduct of the affairs of savings associations.

B. The Ability of the Respondent to Cause Harm

17. While employed by TCA, Respondent had access to confidential bank customer information, credit reports, loan files, and deposit and cash shipment records. Moreover,

Respondent was allowed to and did take audit papers, which included confidential customer information, to his residence.

18. While employed by TCA, Respondent also proffered advice and direction to management and staff on procedures concerning TCA clients' procedures for handling closed but not yet purged customer accounts, the same types of accounts from which Respondent embezzled funds at Central.

19. While employed by TCA, Respondent during his in-house reviews of savings associations had access to the institution's documents and processes.

20. By the nature of the work Respondent performed, Respondent had the ability to cause harm at the savings associations he served as a TCA consultant.

C. The Relationship Between the Role Performed By the Respondent and the Institutions

21. As a TCA consultant, Respondent conducted onsite reviews and audits and during such reviews and audits Respondent had access to confidential bank customer information and access to the institution's confidential documents and processes.

22. As a TCA consultant, Respondent was allowed to and did take audit papers, which included confidential customer information, to his residence.

23. As a TCA consultant, Respondent was also retained by savings associations to perform independent BSA/AML program compliance testing, a required bank function. Moreover, Respondent advised and directed bank management and staff on improving and strengthening their BSA/ALM programs.

24. While employed by TCA, Respondent also proffered forward looking advice and direction to management and staff of over 20 savings associations.³ Respondent proffered forward looking advice to savings associations, which included the conduct, scope, compliance, and risks associated with their loan documentation and lending procedures and, funds transfers, customer account opening and closing procedures and other internal controls.

25. Respondent, due to his role as a consultant who served savings associations, participated in the conduct of the affairs of savings associations.

26. By virtue of type of Respondent's consulting work while employed with TCA, Respondent engaged in or participated in the conduct of the affairs of insured depository institutions while subject to a final and outstanding Prohibition Order. Therefore, Respondent was an institution-affiliated party pursuant to Section 3(u)(3) of the FDIA, 12 U.S.C. § 1813(u)(3).

III. FACTUAL ALLEGATIONS AND CHARGES

27. On or about October 16, 2003, Central terminated Respondent for embezzling \$9,800 from a dormant Central customer account.

28. On March 4, 2004, the OTS issued a Prohibition Order against Respondent pursuant to Section 8(e) of the FDIA, 12 U.S.C. § 1818(e) and a cease and desist order which required Respondent to make restitution to Central pursuant to Section 8(b) of the FDIA, 12 U.S.C. § 1818(b).

³ *Contra, Grant Thornton, LLP v. Office of the Comptroller of the Currency*, 514 F.3d 1328 (D.C. Cir. 2008) (the D.C. Circuit, upon the OCC's initiated cease-and-desist and civil money penalty proceedings based on the independent contractor standard in Section 3(u)(4) of the FDIA, 12 U.S.C. § 1813(u)(4) against an independent accounting firm, considered the scope of "participating in the conduct of the affairs" of an insured depository institution. The D.C. Circuit found that Grant Thornton had not "participated in an unsafe or unsound practice" because the accounting audit was not a banking practice and noted that Grant Thornton did not proffer forward looking advice.)

29. The Prohibition Order and Section 8(e) of the FDIA, 12 U.S.C. § 1818(e), broadly prohibit Respondent from “participating in any manner in the conduct of the affairs of any insured depository institution without obtaining the prior written consent of the OTS or the appropriate Federal financial institution regulatory agency of the institution”.

30. On June 21, 2005, Respondent was indicted on federal criminal charges of embezzlement, theft, misapplication and bank fraud for embezzling funds from Central.

31. On August 29, 2005, Respondent entered a guilty plea to one count of Embezzlement, 18 U.S.C. § 656.

32. Respondent’s criminal conviction of Embezzlement described in Paragraph 31 subjects Respondent to prohibitions contained in Section 19 of the FDIA, 12 U.S.C. § 1829.

33. Section 19(a)(1)(A) of the FDIA, 12 U.S.C. § 1829(a)(1)(A), prohibits anyone who is convicted of a criminal offense involving personal dishonesty from “participating directly or indirectly in the conduct of the affairs of any insured depository institution” without prior written consent of the Federal Deposit Insurance Corporation (FDIC).

34. Section 19(a)(2)(B) of the FDIA, 12 U.S.C. § 1829(a)(2)(B), with regard to violations of 18 U.S.C. § 656, prohibits the FDIC from giving consent for at least ten (10) years, unless the court entering the conviction or plea grants an exception by order, and only on motion by FDIC.

35. At all times relevant, Respondent neither requested permission nor did the FDIC give Respondent written consent to allow Respondent to participate directly or indirectly in the affairs of an insured depository institution.

36. From approximately January 2, 2004 through approximately July 31, 2008, Respondent, as a consultant, was an employee of the financial institution consulting firm TCA and participated in the conduct of the affairs of insured depository institutions.⁴

37. While employed by TCA, Respondent conducted over 50 onsite lending and compliance audits or reviews in over 20 savings associations.

38. While employed by TCA, Respondent had access to confidential bank customer information, credit reports, loan files, and deposit and cash shipment records. Moreover, Respondent was allowed to and did take audit papers, which included confidential customer information, to his residence.

39. While employed by TCA, Respondent reviewed savings association documents and processes.

40. While employed by TCA, Respondent proffered advice and direction to management and staff of savings associations concerning their banking transactions and risk management procedures and policies. The procedures and policies included lending policies, electronic funds transaction, check kiting procedures, and procedures concerning TCA clients' procedures for handling closed but not yet purged customer accounts, the same types of accounts from which Respondent embezzled funds at Central.

41. While employed by TCA, Respondent also conducted BSA/AML independent testing and training for the savings associations' staff and assessed suspicious activity reporting by TCA's insured depository institution clients.

42. Pursuant to 12 C.F.R. § 563.177(c)(2), savings associations must conduct independent testing of compliance with its BSA/AML program. A savings association may

⁴ The Federal statute of limitations, as set forth under 28 U.S.C. § 2462, is interpreted to apply a 5-year period from the date of the misconduct for the OTS to commence an action or proceeding for the enforcement of any civil fine, penalty or forfeiture, pecuniary or otherwise.

choose whether to rely on in-house personnel or hire a third party, but regardless of the choice, it is the savings association's obligation to ensure that independent testing is performed and performed effectively.

43. Prior to his employment with TCA, Respondent never obtained the OTS's written consent to participate in the conduct of the affairs of insured depository institutions.

44. By virtue of Respondent's conduct as a consultant to TCA and described in Paragraphs 36 through 41, Respondent engaged in or participated in the conduct of the affairs of insured depository institutions. Therefore, Respondent was an institution-affiliated party pursuant to Section 3(u)(3) of the FDIA, 12 U.S.C. § 1813(u)(3).

45. Section 8(e) of the FDIA, 12 U.S.C. § 1818(e) and the Prohibition Order require Respondent to obtain prior written permission of the OTS, the agency that issued the Prohibition Order, before acting as an institution-affiliated party or participating "in any manner in the conduct of the affairs of insured depository institution" and other specified institutions and agencies.

46. Section 19 of the FDIA, 18 U.S.C. § 1829, requires anyone who is convicted of a criminal offense involving personal dishonesty, such as embezzlement (18 U.S.C. § 656), obtain the FDIC's prior written permission before participating "directly or indirectly in the conduct of the affairs of any insured depository institution".

47. By virtue of, proffering both advice and direction to TCA's savings association clients concerning their banking transactions, risk management and compliance procedures and policies, Respondent continued his participation in the affairs of savings associations despite the final and outstanding Prohibition Order.

IV. STATUTORY CHARGES UNDER 12 U.S.C. § 1818(i)(2)

Assessment of Civil Money Penalties

Civil Money Penalties Assessed Against Respondent Under Section 8(i)(2)(A) of the FDIA, 12 U.S.C. § 1818(i)(2)(A), based on the Violations of the Prohibition Order and Violations of Sections 8 and 19 of the FDIA

48. Each of the foregoing paragraphs, specifically Paragraphs 36 through 41, are incorporated herein by this reference.

49. Civil money penalties can be assessed against an institution-affiliated party pursuant to Section 8(i)(2)(A) of the FDIA, 12 U.S.C. § 1818(i)(2)(A), for any violation of law or any violation of a final order.

50. Therefore, civil money penalties are assessed against Respondent pursuant to Section 8(i)(2)(A) of the FDIA, 12 U.S.C. § 1818(i)(2)(A) for violations of Section 8(e)(7)(C) of the FDIA, 12 U.S.C. § 1818 (e)(7)(C), for violation of a final order, and for violation of Section 19 of the FDIA, 12 U.S.C. § 1829, as alleged in the above Paragraphs.

Amount of Assessed Civil Penalties

51. Based on the foregoing, the grounds exist, pursuant to Section 8(i)(2)(A) of the FDIA, 12 U.S.C. § 1818(i)(2)(A), to assess civil money penalties against Respondent. After taking into account the size of Respondent's financial resources, good faith considerations, the gravity of the violations, the history of previous violations, and such other matters as justice may require, the OTS hereby assesses a civil money penalty \$2,500 against Respondent.

V. CIVIL PENALTY PAYMENT DIRECTIONS AND PROCEDURAL MATTERS

52. It is hereby ordered that Respondent shall forfeit and pay the civil money penalties of \$2,500.

53. The civil money penalties set forth in this Second Amended Notice are assessed by the OTS pursuant to Section 8(i)(2) of the FDIA, 12 U.S.C. § 1818(i)(2). Except as the OTS may otherwise order in writing, remittance of the payment of the penalties set forth herein shall be made by delivering to OTS Financial Operations at 1700 G Street, N.W., Washington, D.C. 20552, a cashier's check or official bank check in the amount of \$2,500 payable to the order of the Treasurer of the United States.

54. Notice is given, pursuant to Section 8(i)(2)(H) of the FDIA, 12 U.S.C. § 1818(i)(2)(H), that Respondent is afforded an opportunity for a formal hearing, if requested, concerning the above assessment of civil money penalties. A hearing will be held with respect to the assessment against Respondent, provided that within ten (10) days after issuance and service of this Second Amended Notice, Respondent files a written request for a hearing concerning the assessment. Any request for such a hearing must be filed with the Office of Financial Institution Adjudication (OFIA), 3501 North Fairfax Drive, Suite VS-D8116, Arlington, VA 22226, and with OTS, c/o Sandra Evans, Secretary for Adjudicatory Proceedings (sandra.evans@ots.treas.gov), 1700 G Street, N.W., Washington, D.C. 20552, within 20 days after issuance and service of this Second Amended Notice on Respondent. **Respondent is encouraged to file any request for a hearing electronically with OFIA at ofia@fdic.gov.** Respondent shall also serve a copy of any such request upon Susan L. Chomicz, Deputy Chief Counsel - Enforcement (susan.chomicz@ots.treas.gov), Margaret E. McPartlin, Senior Attorney - Enforcement (meg.mcpartlin@ots.treas.gov), OTS, 1700 G Street, N.W., Washington, D.C. 20552 and Michael L. Del Medico, Regional Enforcement Counsel (michael.delmedico@ots.treas.gov), OTS, 1 South Wacker Drive, Suite 2000, Chicago, IL 60606.

55. If Respondent fails to file a request for a hearing within the aforementioned ten-day (10-day) period, the above assessment of civil money penalties in the amount of \$2,500 shall constitute a final and unappealable assessment order of the OTS against Respondent as provided by Section 8(i)(2)(E) of the FDIA, 12 U.S.C. § 1818(i)(2)(E). *See also* 12 C.F.R. § 509.19(c)(2). Any final and unappealable assessment order may be referred to the United States Department of Justice for collection against the subject of the assessment order.

VI. PROCEDURES GENERALLY

56. The OTS hereby appoints Administrative Law Judge C. Richard Miserendino (ALJ) of OFIA to preside over any hearing held regarding the subject of this Second Amended Notice. Unless otherwise set by the ALJ or by agreement of the parties, any hearing, if requested, should commence sixty (60) days following service of this Second Amended Notice. The exact time of day and any change in location would be announced at a later time by the ALJ. Any hearing, if requested, would be conducted before the ALJ in accordance with the provisions of the Administrative Procedure Act, 5 U.S.C. §§ 554-557, as made applicable by Section 8(h) of the FDIA, 12 U.S.C. § 1818(h) and 12 C.F.R. Part 509.

57. Respondent is directed to file an Answer to this Second Amended Notice within ten (10) days of service. *See* 12 C.F.R. § 509.19. Section 509.10 of the OTS Adjudicatory Rules, 12 C.F.R. § 509.10, governs the filing of papers in this proceeding. Except as otherwise provided by that rule, any papers required to be filed shall be filed with OFIA, Attn: Honorable C. Richard Miserendino, ALJ, 3501 North Fairfax Drive, Suite VS-D8116, Arlington, VA 22226. The requirements of the Answer and the consequences of failing to file an Answer are set forth at 12 C.F.R. § 509.19(c). **Respondent is encouraged to file any answer electronically with OFIA at ofia@fdic.gov.** Failure to answer within this time period shall constitute a waiver

of the right to appear and contest the allegations set forth in this Second Amended Notice and shall, upon the OTS's motion cause the ALJ or OTS to find the facts in this Second Amended Notice to be as alleged and to issue an Order of Assessment.

58. Respondent also shall serve a copy of each and every of its filings on the OTS, c/o Sandra Evans, Secretary for Adjudicatory Proceedings (sandra.evans@ots.treas.gov), 1700 G Street, N.W., Washington, D.C. 20552, and on Susan L. Chomicz, Deputy Chief Counsel – Enforcement (susan.chomicz@ots.treas.gov), and Margaret E. McPartlin, Senior Attorney-Enforcement (meg.mcpartlin@ots.treas.gov), OTS, 1700 G Street, N.W., Washington, D.C. 20552 and Michael L. Del Medico, Regional Enforcement Counsel (michael.delmedico@ots.treas.gov), OTS, 1 South Wacker Drive, Suite 2000, Chicago, IL 60606.

59. Within ten (10) days after service of this Second Amended Notice, Respondent may file a written request for a private hearing. Section 509.33 of the OTS Adjudicatory Rules, 12 C.F.R. § 509.33, sets out the requirements for any such request and any replies thereto. The evidentiary hearing of this matter before the presiding ALJ will be open to the public, unless the Director of OTS, in his or her sole discretion, determines that an open hearing will be contrary to the public interest. *See* Section 8(u)(2) of the FDIA, 12 U.S.C. § 1818(u)(2). The Director (or a duly authorized representative) will rule on any request filed under Section 509.33(a), and copies of any such request should be sent to the Director of OTS, c/o Sandra Evans, Secretary for Adjudicatory Proceedings (sandra.evans@ots.treas.gov), OTS, 1700 G Street, N.W., Washington, D.C. 20552.

The OTS, by its Director (or his duly authorized designee), issues this Notice on this 10th day of March, 2010.

OFFICE OF THRIFT SUPERVISION

By: _____/s/ _____

Name: Michael L. Simone

Title: Assistant Deputy Director, Examinations,
Supervision and Consumer Protection

(Pursuant to delegated authority)