UNITED STATES OF AMERICA
DEPARTMENT OF THE TREASURY
OFFICE OF THE COMPTROLLER OF THE CURRENCY

IN THE MATTER OF E. B. CHESTER, JR. FORMER DIRECTOR, PAUL W. POWERS, FORMER CHAIRMAN, JEROME M. HAUSE, FORMER PRESIDENT, BRANSON HOBBS, BYRON A. ROSE, DONALD P. HETTERMANN, R. EDGAR JOHNSON, AND PEYTON F. PERRY, FORMER DIRECTORS OF CHERRY CREEK NATIONAL BANK DENVER, COLORADO (FAILED)	AA-EC-92-107

DECISION AND ORDER

I. SUMMARY

These proceedings arise from an action for civil money penalties (CMPs) brought by the Office of the Comptroller of the Currency (OCC). The Respondents filed a request for interlocutory review of the order by Administrative Law Judge Walter J. Alprin (ALJ) which denied Respondents' Motion to Dismiss. With that filing, Respondents also requested that the Comptroller stay the proceedings until he completes his review of their request. The Comptroller grants the review and affirms the ALJ's denial of the Motion to Dismiss. Because the Comptroller issues his decision, a stay is not needed and the request for one is denied.

II. PROCEDURAL HISTORY

On June 2, 1992, the OCC served a Notice of Assessment of a Civil Money Penalty ("Notice") on Respondents. Pursuant to 12 U.S.C. § 1818(i)(2), the Notice charged Respondents with violations of 12 U.S.C. § 161 and noncompliance with a Formal Agreement entered

into between OCC and Cherry Creek National Bank, Denver, Colorado (Failed)("Bank").

On September 14, 1992, Respondents filed two motions, one seeking dismissal and one seeking a stay of the proceedings following the completion of discovery pending the Comptroller's decision on their Motion to Dismiss. The ALJ denied the Motion to Dismiss. Although the ALJ modified the procedural schedule, he denied the request for a stay and set a final prehearing conference for November 19, 1992. Respondents then sought interlocutory review by the Comptroller of the Currency to determine whether CMPs against banks under 12 U.S.C. § 164 are the exclusive penalty for call report violations. The OCC, represented by the Enforcement and Compliance Division ("E&C"), filed an opposition to the request for interlocutory review.

III. DISCUSSION

1. Interlocutory Review

The questions presented for interlocutory review are whether section 1818(i)(2) is a proper basis for assessing CMPs against directors of national banks for violations of section 161 and what degree, if any, of scienter is required to impose such CMPs.

The Comptroller may exercise interlocutory review if "(1) [t]he ruling involves a controlling question of law or policy as to which substantial grounds exist for a difference of opinion; (2)

[i]mmediate review of the ruling may materially advance the ultimate termination of the proceeding; (3) [s]ubsequent modification of the ruling . . . would be an inadequate remedy; or (4) [s]ubsequent modification . . . cause unusual delay or expense." 12 C.F.R. § 19.28(b)(1992).[1]

In its opposition to the request for interlocutory review, E&C contends that because "in effect, the ALJ found that there was no question as to the controlling law or policy as applied in this case," there should be no review. E&C argues that any review will not materially advance the proceedings, while a hearing on the merits will do so. In E&C's view, subsequent modification of the ALJ's decision is "highly unlikely" and continuing the administrative hearings would not constitute undue delay or expense.

Respondents argue that when Congress amended 12 U.S.C. § 164 in 1989, the section of the National Bank Act that authorizes the Comptroller to assess CMPs against national banks for filing inaccurate call reports, it intended to preclude the assessment of CMPs against bank officers and directors. Respondents contend that if the Comptroller were to agree with this interpretation of the amendment of this section, the result would be to effectively reverse the ALJ's denial of the Motion to Dismiss, terminate

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[1] This is the first request for interlocutory review to be decided under the revised regulation adopted in August 1991. See 56 Fed. Reg. 38,024 (1991).

these proceedings, and avoid additional expense that might exceed the amount of the penalty to be imposed.

The Comptroller accepts this case for interlocutory review because immediate review, if it led to a ruling in Respondents' favor, would be dispositive of the case. Specifically, if the Comptroller were to determine that section 164 is the exclusive remedy for violations of section 161, section 1818(i)(2) would not be a basis for holding directors liable for call report violations, and this determination would terminate the proceeding. The Comptroller does not decide what degree of scienter, if any, is needed to assess CMPs against directors for violations of section 161 and does not accept this issue for interlocutory review because it does not meet the standards of 12 C.F.R. § 19.28(b).

2. Director Liability for CMPs

Respondents in essence ask for a review[2] of whether directors can be held liable under section 1818(i)(2) for CMPs arising from violations of section 161.[3] Respondents argue that directors

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[2] Respondents argue that they attested to call reports that were true and correct to the best of their belief and knowledge. This is a fact issue to be determined at hearing. See Order Denying Motion to Dismiss and Modifying Procedural Schedule (October 6, 1992).

[3] Section 161 provides, in relevant part, that an officer must declare that the call report is "true and correct to the best of his knowledge and belief," and that

> The correctness of the report of condition shall be

cannot be held liable because section 164 is the exclusive provision under which CMPs can be imposed for violations of section 161. They base their argument on the following points: (1) the language of section 164 refers solely to banks, (2) Congress could not have intended to impose higher penalties on directors under section 1818(i)(2) than on banks under section 164,[4] and (3) Congress could have added "directors" to section 164 when it passed the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA). See Respondents' Motion to Dismiss and Respondents' Request for Interlocutory Review.

Section 1818(i)(2) applies to all federally-insured banks and "institution-affiliated parties." The Comptroller notes that section 1818(i)(2) plainly permits the assessment of CMPs against institutions and institution-affiliated parties for violations of any law or regulation. No specific exemption is listed for the assessment of CMPs relating to violations of section 161. Following the plain meaning rule of statutory construction, and

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> attested by the signatures of at least three of the directors of the bank other than the officer making such declaration, with the declaration that the report has been examined by them and to the best of their knowledge and belief is true and correct.

12 U.S.C. § 161.

[4] Section 164 penalties are generally lower than those under sections 93(b) and 1818(i)(2). For the first tier of penalties, CMPs are up to $2,000 per day under section 164 and up to $5,000 per day under sections 93(b) and 1818(i)(2). Compare 12 U.S.C. § 164 with 12 U.S.C. §§ 93(b), 1818(i)(2).

absent any evidence of Congressional intent to the contrary, section 1818(i)(2) must mean what it says. See United States v. Pub. Utility Comm'n., 345 U.S. 295, 315 (1953).

Thus, section 164 is not an exclusive remedy for violations of section 161. Because section 1818(i)(2) provides for penalties for any violations of law, that section would be meaningless if specific violations were carved out. Moreover, if Congress intended section 164 to be the exclusive remedy for section 161 violations, it could have amended FIRREA to reflect that intention.

Further, the OCC has interpreted a section similar to section 1818(i)(2), section 93(b), as permitting an officer to be held liable for CMPs for a violation of section 161. In the Matter of A Civil Money Penalty Assessment Against James R. Soukup, Former Chief Financial Officer, St. Charles Bankshares, OCC AA-EC-88-120, 1991 OCC Enf. Dec. LEXIS 294 (1991).

Although Soukup was decided after FIRREA, the violation arose pre-FIRREA and the court applied statutory provisions as they existed before FIRREA. At the time of the violation in Soukup, section 93(b)(1) provided that "[a]ny national banking association which violates, or any officer, director, employee, agent, . . . of such association who violates any provision of this chapter, or any provision of 92a of this title, or any

regulation issued persuant thereto, shall forfeit and pay a civil money penalty . . . ." 12 U.S.C. § 93(b)(1)(West 1988). Section 93(b)(1) now provides for CMPs against a national banking association or an institutional-affiliated party for the same violations as under the former version of section 93(b). 12 U.S.C. § 93(b)(1).

IV. CONCLUSION

It is the Comptroller's view that because CMPs can be assessed under section 1818(i)(2), section 164 is not the exclusive remedy under which CMPs may be imposed for violations of section 161. Directors violate section 161 when, although believing the reports to be true and accurate, that belief was not reasonable.

ORDER

It is hereby ORDERED that the ALJ's denial of Respondents' Motion to Dismiss is affirmed and Respondents' request for a stay is denied.

So ordered this 18th day of November, 1992.

STEPHEN R. STEINBRINK
Acting Comptroller of the Currency