

FEDERAL DEPOSIT INSURANCE CORPORATION

WASHINGTON, D.C.

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In the Matter of )	
Bank 1st )	DECISION AND ORDER
Albuquerque, New Mexico )	TO CEASE AND DESIST
(Insured State Nonmember Bank) )	(CORRECTED)
_____ )	FDIC-09-025b

**I. INTRODUCTION**

This matter is before the Board of Directors (“Board”) of the Federal Deposit Insurance Corporation (“FDIC”) following the issuance on November 2, 2009, of a Recommended Decision on Summary Disposition (“Recommended Decision” or “R.D.”) by Administrative Law Judge C. Richard Miserendino (“ALJ”). The ALJ recommended that Bank 1st, Albuquerque, New Mexico (“Bank”) be subject to an order to cease and desist and corrective action plan (“C&D Order”) pursuant to section 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, the Bank’s Written Exceptions to the Recommended Decision (“Bank’s Exceptions”) and FDIC Enforcement Counsel’s (“Enforcement Counsel’s”) Response to the Bank’s Exceptions. The Board agrees with the ALJ’s findings that the Bank engaged in unsafe and unsound banking practices warranting a C&D Order and that summary judgment in favor of the FDIC was appropriate. Therefore, the Board adopts in full and affirms the Recommended Decision.

## II. STATEMENT OF THE CASE

The FDIC initiated this action on May 15, 2009, when it issued against the Bank a Notice of Charges and of Hearing (“Notice”) to determine whether a C&D Order should be issued against 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. §§ 303-71. Notice ¶ 1. The Notice was based on information obtained in connection with a safety and soundness examination, commenced by the FDIC on November 17, 2008, of the Bank’s books and records as of September 30, 2008 (“2008 examination”). The resulting FDIC Report of Examination (“2008 Exam Report”) described many serious financial and managerial deficiencies.

Specifically, the 2008 examination revealed that the Bank was operating with inadequate capital ratios, earnings, liquidity, and supervision by its board of directors. The 2008 examination also showed that the Bank had an excessive level of adversely classified assets and concentrations of credit and that it failed to timely place loans in non-accrual status. Although Bank management did not disagree with the findings and conclusions in the 2008 Exam Report and acknowledged that the Bank’s financial condition warranted a C&D Order, negotiations to enter into a consent order were unsuccessful because Bank management rejected as unreasonable the capital requirements proposed by the FDIC. R.D. at 6-7.

Thereafter, the FDIC issued the Notice charging, as documented in the 2008 Exam Report, that the Bank engaged in multiple unsafe and unsound practices and seeking a C&D Order to stop such practices and to implement corrective action. Notice ¶¶ 3-15. On June 4, 2009, the Bank filed an Answer to the Notice (“Answer”) admitting

the factual allegations in the Notice but denying the FDIC's conclusion that it had engaged in unsafe and unsound practices.

Following discovery, on October 5, 2009, Enforcement Counsel moved for summary disposition asserting that because there were no issues of material fact, it was entitled to judgment in its favor as a matter of law ("Enforcement Counsel's Motion"). Enforcement Counsel's Motion was supported by, among other things, the 2008 Exam Report; the pertinent 2008 Consolidated Reports of Condition and Income ("Call Reports"); the Bank's September 30, 2008 Uniform Bank Performance Reports ("UBPR") and the Bank's Answer. Also in support of its Motion, Enforcement Counsel submitted sworn declarations from officials in the FDIC's Division of Supervision and Compliance ("DSC") directly involved in conducting or overseeing the 2008 examination: Examiner-in-Charge ("EIC") Lelan D. Hewett ("Hewett"), Case Manager Bruce E. Rollinson ("Rollinson"), and Assistant Regional Director Joseph A. Meade ("Meade").

On October 5, 2009, the Bank filed a cross motion for summary disposition ("Bank's Motion") and, on October 21, 2009, a response and opposition to the FDIC's Motion ("Bank's Response"). In support of both its Motion and Response, the Bank relied on an affidavit submitted by its CEO/President Steven O. Garrett ("Garrett"). The Bank did not dispute the financial and statistical information included in the Notice but argued that it had not engaged in unsafe and unsound practices. Focusing on the capital maintenance provision in the proposed C&D Order, the Bank claimed that it would be unable to comply with the FDIC's ratio requirements even if it used its best efforts.

The FDIC's proposed capital requirement provision also was at the heart of the Bank's Motion. There, the Bank -- relying solely on Garrett's affidavit -- asserted that the FDIC's proposal violated FDIC policy because it was unlikely that the Bank could raise enough capital to comply with the proposal. The Bank argued in its Motion that the FDIC's proposed capital requirement should be replaced by a "best efforts" or "good faith" standard and further argued that the proposed C&D Order was arbitrary, capricious and amounted to a denial of due process because failure to comply with its terms would result in the automatic imposition of a civil money penalty ("CMP"). R.D. at 2-3. In a response submitted on October 12, 2009, the FDIC disputed the assertions raised in the Bank's Motion. R.D. at 3.

Following the parties' submissions, the ALJ issued his Recommended Decision. On November 30, 2009, the Bank filed Written Exceptions to the Recommended Decision ("Bank's Exceptions"). On December 9, 2009, the FDIC filed a Response to the Bank's Exceptions.

### **III. DISCUSSION**

After a thorough review of the record in this proceeding, the Board finds that the ALJ's findings of Uncontested Material Facts and conclusions of law were correct as to the unsafe and unsound practices and resulting unsatisfactory financial condition of the Bank. Because the ALJ provided a detailed and well-reasoned opinion with citations to the record in support of his findings and conclusions, the Board finds it unnecessary to reiterate in full the contents of the Recommended Decision.<sup>1</sup> Instead, consistent with

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<sup>1</sup> The R.D. provides detailed citations to the record in this case which includes, among other things, pleadings, the 2008 Exam Report, the Call Reports, the UBPR, the DSC Risk Management Manual of Examination Policies ("DSC Manual"), and affidavits from DSC officials and the Bank President. The R.D. also includes "Conclusions of Law" ("CL") and in Appendix A, "Findings of Uncontested Material

FDIC Rule 308.40(c), 12 C.F.R. § 308.40(c), the discussion below focuses on the Bank's Exceptions which press the only real issue that has ever been disputed in this case – whether the capital requirements in the proposed C&D Order are reasonable. In that regard, we provide a brief overview of the underlying undisputed facts surrounding this issue along with an analysis under the applicable legal standards. For reasons explained below, the Board is not persuaded by any of the Bank's Exceptions.

**A. The Proposed C&D Order is Reasonable and Fully Supported by the Record.**

As noted, the Bank has not disputed that its weakened financial condition warranted a C&D Order. However, based on its position that it would likely be unable to comply with the capital requirements proposed, the Bank would not consent to the C&D Order as drafted. R.D. at 2. Raising the same challenge in its Exceptions, the Bank argues that it has demonstrated that the proposed capital provision was unreasonable and therefore, the ALJ's recommendation should be reversed. In support of this claim, the Bank relies on Bank President Garrett's opinion that the Bank would be unable to raise capital from existing shareholders or from investment firms. But Garrett offered no solicitation letters or responses, statistical information, or any other type of concrete examples to substantiate his view. R.D. at 13-14. In addition, and most significantly, the Bank's assertions regarding its inability to comply with the capital provision is not a relevant consideration as to whether a C&D Order is warranted because the FDIC is not required under section 8(b) to prove that a corrective capitalization plan is feasible.

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Facts" ("FF"), detailing the Bank's unsatisfactory condition as reflected in the 2008 Exam Report. The CL and FF are incorporated into the Recommended Decision which the Board adopts in full. In the interest of efficiency, the Board, when referring herein to the record, cites, for the most part, to specific paragraphs in the Notice, FF, CL or to pages in the R.D. rather than to the underlying supporting records. However, because the Bank's second exception relies on the DSC Manual, the Board, in discussing this exception, cites to specific sections in the Manual.

Thus, based upon its determination that the Bank was, among other things, operating with an unsatisfactory level of capital protection, the FDIC imposed minimum capital requirements to staunch further deterioration of the Bank's financial condition and protect the FDIC's deposit insurance fund from abnormal risk of loss.

Enforcement Counsel submitted abundant evidence, including the detailed financial information and opinions included in the 2008 Exam Report as well as sworn statements from experienced FDIC officials in support of the FDIC's conclusion as to the appropriateness of the proposed capital ratios. R.D. at 10. In this case, as reflected in the record, the 2008 Exam Report explains how and why the Bank's capital levels were critically deficient and why immediate capital injection, sale, assistance for shareholders or other sources of external financial support was required. *See* FF ¶¶ 3-4. Following the examination, EIC Hewitt, a commissioned bank examiner with more than 20 years of FDIC experience determined, after thoughtful analysis and upon thorough examination of the Bank books and records, that in order to bring the Bank to a safe and sound condition the Bank must raise its Tier 1 Capital Leverage Ratio to 9.5 percent and its Total Risk-Based Capital Ratio to 12 percent within 60 days from the date of the proposed C&D Order.

Hewitt's superiors, Rollinson and Meade, also commissioned examiners with decades of FDIC experience, reviewed the 2008 Exam Report and other pertinent financial records and concurred with Hewitt's determination. R.D. at 10, FF ¶¶ 14-15. Because the Board finds no basis for second-guessing the information included in the 2008 Exam Report, the informed judgment and analyses of the FDIC officials, or the ALJ's conclusion, the Bank's exception regarding its inability to comply with the capital

maintenance provision in the proposed C&D Order is denied. *See In the Matter of Marsha Yessick*, FDIC Enforcement Decisions and Orders ¶ 5270, A-3278 (2003); *In the Matter of Anderson County Bank, Clinton, Tennessee*, FDIC Enforcement Decisions and Orders ¶ 5165A, A-1734.4 (1991) (considerable deference and weight should be given to the opinions and conclusions of FDIC examiners.); *accord Sunshine State Bank v. FDIC*, 783 F.2d 1580, 1582-83 (11<sup>th</sup> Cir. 1986); *Independent Bankers Ass'n of America v. Heinmann*, 613 F. 2d 1164, 1169 (D.C. Cir. 1979).

**B. The Capital Requirement in the Proposed C&D Order Does Not Violate FDIC Policy.**

With misplaced reliance on a provision in the DSC Manual, the Bank asserts in its Exceptions that the FDIC's proposed capital requirement violates FDIC policy. The relevant portion of the DSC Manual, section 15.1, titled "Reports of Examination Containing a Basis for Section 8 Charges" offers "guidelines" to FDIC examiners for documenting for their supervisors practices cited in examination reports that may result in an enforcement action, such as this one, pursuant to section 8 of the FDI Act. Among other things, section 15.1 of the DSC Manual directs that examiners, in cases where they are recommending corrective measures, prepare separate memoranda to the FDIC Regional Director detailing the proposed measures to correct each identified "Undesirable and Objectionable Practices." Section 15.1 further provides that such measures "should be tailored to the situation and not be impossible to perform within the given time frame." *See* DSC Manual § 15.1-3. The Bank's attempt to elevate this latter phrase to a statement of FDIC supervisory policy governing the proposed capital requirement provision fails because the plain intent of section 15.1 is to provide internal guidance to examiners in preparing memoranda for their supervisors regarding proposed

corrective measures. Moreover, even if section 15.1 were construed as official FDIC policy, the Bank has not, as discussed above, offered any persuasive evidence demonstrating that it could not timely comply with the proposed capital maintenance provision. R.D. at 13-14.

Lastly, as the ALJ observed, the same DSC Manual on which the Bank relies to support its claim that the C&D Order as proposed violates FDIC policy, also states at section 15-4 that in formulating corrective measures, “[i]t is generally not desirable to include provisions which require the Regional Director to make *subjective judgments* regarding corrections.” (Emphasis added). Yet, that is exactly what the Regional Director would have to do under the Bank’s proposed capital maintenance standard. R.D. at 14-15. In his thorough and insightful analysis of the cases offered by the Bank to support its proposed “best efforts” or “good faith” language, the ALJ underscores the difficulty in interpreting and applying terms under such standards. As is clear from the ALJ’s analysis, subjective standards should be used sparingly in contracts and work best only in cases where mandated by statute or mutually agreed upon. Significantly, none of the cases cited by the Bank support the unilateral imposition of a subjective standard. R.D. at 15-18. For the foregoing reasons, the Board rejects the Bank’s exception asserting that the proposed C&D Order violates FDIC policy.

**C. The Bank has Raised No Meritorious Challenges to the Recommended Decision.**

Finally, the Board dismisses the Bank’s third exception in which it preserves generally the objections raised in its prior pleadings. Although this exception raises no specific issue requiring review, the Board makes the following observations. First, from the outset, the Bank has never disputed that the weaknesses identified in the 2008 Exam

Report warrant the imposition of a C&D Order. Pursuant to section 8(b)(1) of the FDI Act, a C&D Order may be imposed if any of the unsafe or unsound practices specified in the Notice has been established. Moreover, the explicit language of section 8(b)(8) of the FDI Act gives the FDIC authority to determine that a bank has engaged in an unsafe or unsound practices when it has a less than satisfactory rating in one or more of four specified components -- asset quality, management, earnings or liquidity. In this case, the Bank received a less than satisfactory rating in every one of the components specified (as well as in the two remaining CAMEL components - capital and sensitivity to market risk). R.D. at 9-10, CL ¶ 3. Therefore, because the Bank, as a matter of law, engaged in unsafe and unsound practices, it is hard-pressed to credibly assert that the deficiencies cited do not constitute unsafe and unsound practices. Furthermore, the Board has found, and federal appeals courts have affirmed, that each of the practices criticized in the 2008 Exam Report constitutes unsafe and unsound practices. *See, e.g., NW Nat'l Bank v. United States*, 917 F.2d 1111, 1113-15 (8<sup>th</sup> Cir. 1990) (inadequate allowance for loan and lease losses, inadequate loan documentation, inadequate capital, high level of classified loans); *Bank of Dixie v. FDIC*, 766 F.2d 175 (5<sup>th</sup> Cir. 1985) (inadequate liquidity); *In re Grubb*, 1992 WL 813163, at \*29 (Aug. 25, 1992), *aff'd*, 34 F.3d 956 (10<sup>th</sup> Cir. 1994) (improper lending practices).

#### **IV. CONCLUSION**

After a thorough review of the record in this proceeding, and for the reasons set forth above, the Board finds that a formal Order to Cease and Desist and accompanying corrective action plan are warranted against the Bank. Summary disposition was appropriate in this case because the Bank admitted all of the underlying financial and

statistical information, as reflected in the 2008 Exam Report, which served as a basis for the charges in the Notice. The C&D Order and corrective action plan proposed by the FDIC -- including the capital maintenance provision -- is reasonable and fully supported by the testimonial and documentary evidence submitted by Enforcement Counsel. Therefore, the Board hereby adopts in full and incorporates the ALJ's Recommended Decision and Order, as set forth and below.

### **ORDER TO CEASE AND DESIST**

IT IS HEREBY ORDERED that the Bank, its directors, officers, employees, agents, and other institution-affiliated parties (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:

1. Operating the Bank with an inadequate level of capital protection for the kind and quality of assets held by the Bank;
2. Operating the Bank with an excessive level of adversely classified loans or assets;
3. Failing to recognize non-accrual loans on a timely basis;
4. Creating concentrations of credit;
5. Operating the Bank with inadequate earnings to fund growth, support dividend payments and augment capital;
6. Operating the Bank without adequate liquidity or proper regard for funds management in light of the Bank's asset and liability mix;
7. Operating the Bank with a heavy reliance on short term potentially volatile liabilities as a source for funding longer term investments; and

8. Operating the Bank without adequate supervision and direction by the Bank's board of directors over the management of the Bank to prevent unsafe and unsound banking practices.

IT IS FURTHER ORDERED, that the Bank, its institution-affiliated parties and its successors and assigns take affirmative action as follows:

**CAPITAL MAINTENANCE**

1. (a) Within 60 days after the effective date of this ORDER and while this ORDER is in effect, the Bank, after establishing an Allowance for Loan and Lease Losses (“ALLL”), shall maintain its Tier 1 Leverage Capital ratio equal to or greater than 9.50 percent of the Bank's Average Total Assets and shall maintain its Total Risk-Based Capital ratio equal to or greater than 12 percent of the Bank's Total Risk Weighted Assets.

(b) If any such capital ratios are less than required by the ORDER, as determined at an examination by the FDIC or the New Mexico Financial Institutions Division (“State”), or in the Bank's Consolidated Report of Condition and Income, the Bank shall, within 30 days after receipt of a written notice of the capital deficiency from the Regional Director, FDIC, Dallas Regional Office (“Regional Director”) present to the Regional Director a plan to increase the Bank's Tier 1 Capital of the Bank (“Tier 1 Capital Plan”) or to take such other measures to bring all the capital ratios to the percentages required by this ORDER. After the Regional Director responds to the Tier 1 Capital Plan, the Bank's board of directors shall adopt the Tier 1 Capital Plan, including any modifications or amendments requested by the Regional Director.

(c) Thereafter, to the extent such measures have not previously been initiated,

the Bank shall immediately initiate measures detailed in the Tier 1 Capital Plan, to increase its Tier 1 Capital by an amount sufficient to bring all the Bank's capital ratios to the percentages required by this ORDER with 30 days after the Regional Director responds to the Tier 1 Capital Plan. Such increase in Tier 1 Capital and any increase in Tier 1 Capital necessary to meet the capital ratios required by this ORDER may be accomplished by:

- (1) The sale of securities in the form of common stock; or
- (2) The direct contribution of cash subsequent to November 17, 2008, by the directors and/or shareholders of the Bank or by the Bank's holding company; or
- (3) Receipt of an income tax refund or the capitalization subsequent to November 17, 2008, of a bona fide tax refund certified as being accurate by a certified public accounting firm; or
- (4) Any other method approved by the Regional Director.

(d) If all or part of the increase in Tier 1 Capital required by this ORDER is to be accomplished by the sale of new securities, the Bank's board of directors shall adopt and implement a plan for the sale of such additional securities, including soliciting proxies and the voting of any shares or proxies owned 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 Bank and the circumstances giving rise to the offering, and any other material disclosures necessary to comply with Federal

securities laws. Prior to the implementation of the plan, and in any event, not fewer than 20 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, Accounting and Securities Disclosure Section, Washington, D.C. 20429, for review. Any changes requested to be made in the plan or the materials by the FDIC shall be made prior to their dissemination. If the increase in Tier 1 Capital is to be provided by the sale of noncumulative perpetual preferred stock, then all terms and conditions of the issue shall be presented to the Regional Director for prior approval.

(e) In complying with the provisions of this ORDER and until such time as any such public offering is terminated, the Bank shall provide to any subscriber and/or purchaser of the Bank's securities written notice of any planned or existing development or other change which is materially different from the information reflected in any offering materials used in connection with the sale of the Bank's securities. The written notice required by this paragraph shall be furnished within 10 days after the date such material development or change was planned or occurred, whichever is earlier, and shall be furnished to every purchaser and/or subscriber who received or was tendered the information contained in the Bank's original offering materials.

(f) In addition, the Bank shall comply with the FDIC's Statement of Policy on Risk-Based Capital found in Appendix A to Part 325 of the FDIC's Rules and Regulations, 12 C.F.R. Part 325, App. A.

(g) For purposes of this ORDER, all terms relating to capital shall be calculated according to the methodology set forth in Part 325 of the FDIC's Rules and Regulations, 12 C.F.R. Part 325.

## **DIVIDEND RESTRICTION**

2. As of the effective date of this ORDER, the Bank shall not declare or pay any cash dividend without the prior written consent of the Regional Director.

## **CLASSIFIED ASSETS - CHARGE-OFF AND PLAN FOR REDUCTION**

3. (a) Within 30 days after the effective date of this ORDER, the Bank shall, to the extent that it has not previously done so, eliminate from its books, by charge-off or collection, all assets or portions of assets classified Loss by the FDIC or the State as a result of its examination of the Bank as of November 17, 2008. Elimination or reduction of these assets through proceeds of loans made by the Bank shall not be considered "collection" for the purpose of this paragraph.

(b) Within 45 days after 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 as of November 17, 2008 (Reduction of Doubtful and Substandard Assets Plan). The Reduction of Doubtful and Substandard Assets Plan shall address each asset so classified with a balance of \$500,000 or greater and provide the following:

- (1) The name under which the asset is carried on the books of the Bank;
- (2) Type of asset;
- (3) Actions to be taken in order to reduce the classified asset; and
- (4) Timeframes for accomplishing the proposed actions.

The plan shall also include, at a minimum:

- (1) Review the financial position of each such borrower, including the

source of repayment, repayment ability, and alternate repayment sources;  
and

(2) Evaluate the available collateral for each such credit, including possible actions to improve the Bank's collateral position.

In addition, the Bank's plan shall contain a schedule detailing the projected reduction of total classified assets on a quarterly basis. Further, the Reduction of Doubtful and Substandard Assets Plan shall contain a provision requiring the submission of monthly progress report to the Bank's board of directors and a provision mandating a review by the Bank's board of directors.

(c) The Bank shall present the Reduction of Doubtful and Substandard Assets Plan to the Regional Director for review. Within 30 days after the Regional Director's response, Doubtful and Substandard Assets Plan, including any requested modifications or amendments, shall be adopted by the Bank's board of directors which approval shall be recorded in the minutes of the meeting of the Bank's board of directors. The Bank shall then immediately initiate measures detailed in the Reduction of Doubtful and Substandard Assets Plan to the extent such measures have not been initiated.

(d) For purposes of the Reduction of Doubtful and Substandard Assets Plan, the reduction of adversely classified assets as of November 17, 2008, shall be detailed using quarterly targets expressed as a percentage of the Bank's Tier 1 Capital plus the Bank's Allowance for Loan and Lease Losses and may be accomplished by:

- (1) Charge-off;
- (2) Collection;
- (3) 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; or

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

(e) While this ORDER is in effect, the Bank shall eliminate from its books, by charge-off or collection, all assets or portions of assets classified Loss as determined at any future examination conducted by the FDIC or the State.

#### **CONCENTRATIONS - PLAN FOR REDUCTION**

4. (a) Within 90 days after the effective date of this ORDER, the Bank shall formulate and submit to the Regional Director for review and comment a written plan to reduce each of the borrower concentrations of credit identified in the Report of Examination as of November 17, 2008, to not more than 25 percent of the Bank's total Tier 1 Capital ("Borrower Concentrations Reduction Plan"). The Bank shall also formulate and submit to the Regional Director for review and comment a written plan to reduce industry and product concentrations of credit identified in the Report of Examination as of November 17, 2008, to not more than 100 percent and 300 percent of the Bank's total Tier 1 Capital, respectively ("Industry and Product Concentrations Reduction Plan"). Such Borrower Concentrations Reduction Plan and Industry and Product Concentrations Reduction Plan shall prohibit any additional advances that would increase the concentrations or create new concentrations and shall include, but not be limited to:

- (1) Dollar levels to which the Bank shall reduce each concentration; and
- (2) Provisions for the submission of monthly written progress reports to the Bank's board of directors for review and notation in minutes

of the meetings of the Bank's board of directors.

(b) For purposes of the Borrower Concentrations Reduction Plan and the Industry and Product Concentrations Reduction Plan, "reduce" means to:

- (1) Charge-off;
- (2) Collect; or
- (3) Increase Tier 1 Capital.

(c) After the Regional Director has responded to the Borrower Concentrations Reduction Plan and the Industry and Product Concentrations Reduction Plan, the Bank's board of directors shall adopt the Borrower Concentrations Reduction Plan and the Industry and Product Concentrations Reduction Plan as amended or modified by the Regional Director. The Borrower Concentrations Reduction Plan and the Industry and Product Concentrations Reduction Plan shall be implemented immediately to the extent that the provisions of the plan are not already in effect at the Bank.

#### **ALLOWANCE FOR LOAN AND LEASE LOSSES**

5. (a) Within 30 days after the effective date of this ORDER, the Bank shall make provisions to its ALLL in an amount equal to those loans required to be charged off by this Order in the amount of at least \$639,000. The allowance should be funded by charges to current operating income, and should be calculated in accordance with generally accepted accounting standards and ALLL supervisory guidance. After the initial provision is made, the Bank shall thereafter maintain a reasonable ALLL. Prior to the end of each calendar quarter, the Bank's board of directors shall review the adequacy the Bank's ALLL. Such reviews shall include, at a minimum, the Bank's loan loss experience, an estimate of potential loss exposure in the portfolio, trends of delinquent

and non-accrual loans and prevailing and prospective economic conditions. The minutes of the Bank's board of directors meetings at which such reviews are undertaken shall include complete details of the reviews and the resulting recommended increases in the ALLL.

(b) Within 30 days after the effective date of this ORDER, the Bank must use Financial Accounting Standards Board Statements Numbers 5 and 114 for determining the Bank's allowance for loan and lease losses reserve adequacy. Provisions for loan losses must be based on the inherent risk in the Bank's loan portfolio. The directorate must document with written reasons any decision not to require provisions for loan losses in the board minutes.

#### **PROFIT PLAN**

6. (a) Within 90 days after the effective date of this ORDER, and within the first 30 days of each calendar year thereafter, the board of directors shall develop a written profit plan consisting of goals and strategies for improving the earnings of the Bank for each calendar year ("Profit Plan"). The Profit Plan shall include, at a minimum:

- (1) Identification of the major areas in, and means by, which the board of directors will seek to improve the Bank's operating performance;
- (2) Realistic and comprehensive budgets;
- (3) A budget review process to monitor the income and expenses of the Bank to compare actual figures with budgetary projections on not less than a quarterly basis; and
- (4) A description of the operating assumptions that form the basis for and support major projected income and expense components.

(b) Such written Profit Plan and any subsequent modification thereto shall be submitted to the Regional Director for review and comment. Within 30 days after the receipt of any comments from the Regional Director, the Bank's board of directors shall approve the Profit Plan, and the approval shall be recorded in the minutes of the Bank's board of directors. Thereafter, the Bank, its directors, officers, and employees shall follow the profit plan and/or any subsequent modification.

### **LIQUIDITY/ASSET/LIABILITY MANAGEMENT**

7. (a) Within 30 days after the effective date of this ORDER, the Bank shall develop and submit to the Regional Director for review and comment a written plan addressing liquidity and the Bank's heavy reliance on short term potentially volatile liabilities as a source for funding longer term investments (“Liquidity/Asset/Liability Management Plan”). Annually thereafter, while this ORDER is in effect, the Bank shall review this Liquidity Asset/Liability Management Plan for adequacy and, based upon such review, shall make necessary revisions to strengthen funds management procedures. The initial Liquidity/Asset/Liability Management Plan shall include, at a minimum, provisions:

(1) Establishing limitations on the total loan to total deposits ratio which, within 90 days after the effective date of this ORDER, shall be reduced to not more than 100 percent and within 180 days after the effective date of this ORDER, be reduced to not more than 85 percent.

The requirements of this paragraph shall not be construed as standards for future

operations, and the Bank's total loan to total deposits ratio shall be monitored on a monthly basis and maintained at a level consistent with safe and sound banking practices;

(2) Establishing a reasonable range for its net non-core funding ratio as computed in the Uniform Bank Performance Report;

(3) Identifying the source and use of borrowed and/or volatile funds;

(4) Establishing lines of credit at correspondent banks, including the Federal Reserve Bank of Kansas City and/or the Federal Home Loan Bank, that would allow the Bank to borrow funds to meet depositor demands if the Bank's other provisions for liquidity proved to be inadequate;

(5) Requiring the retention of securities and/or other identified categories of investments that can be liquidated within one day in amounts sufficient (as a percentage of the Bank's total assets) to ensure the maintenance of the Bank's liquidity posture at a level consistent with short- and long-term liquidity objectives;

(6) Establishing a minimum liquidity ratio and defining how the ratio is to be calculated;

(7) Establishing contingency plans by identifying alternative courses of action designed to meet the Bank's liquidity needs;

(8) Addressing the use of borrowings (i.e., seasonal credit needs, match funding mortgage loan, etc.) and providing for reasonable maturities commensurate with the use of the borrowed funds; addressing concentration of funding sources; and addressing pricing and collateral requirements with specific allowable funding

channels (i.e., brokered deposits, internet deposits, Fed funds purchased and other correspondent borrowings); and

(9) Establishing procedures for managing the Bank's sensitivity to interest rate risk which comply with the Joint Agency Statement of Policy on Interest Rate Risk (June 26, 1996), and the Supervisory Policy Statement on Investment Securities and End-user Derivative Activities (April 23, 1998).

(b) Within 30 days after the receipt of all such comments from the Regional Director, and after revising the Liquidity/Asset/Liability Management Plan as necessary, the Bank shall adopt the Liquidity/Asset/Liability Management Plan, which adoption shall be recorded in the minutes of a board of directors' meeting. Thereafter, the Bank shall implement the Liquidity/Asset/Liability Management Plan.

#### **MANAGEMENT - BOARD SUPERVISION**

8. Within 30 days after the effective date of this ORDER, the Bank's board of directors shall increase its participation in the affairs of the Bank by assuming full responsibility for the approval of the Bank's policies and objectives and for the supervision of the Bank's management, including all the Bank's activities. The board's participation in the Bank's affairs shall include, at a minimum, monthly meetings in which the following areas shall be reviewed and approved by the board: reports of income and expenses; new, overdue, renewed, insider, charged-off, delinquent, non-accrual, and recovered loans; investment activities; operating policies; and individual committee actions. The Bank's board of directors' minutes shall document the board's reviews and approvals, including the names of any dissenting directors.

## **PROGRESS REPORTS**

9. Within 30 days after the end of each calendar quarter following the effective date of this ORDER, the Bank shall furnish to the Regional Director written progress reports signed by each member of the Bank's board of directors, detailing the actions taken to secure compliance with the ORDER and the results thereof. Such reports may be discontinued when the corrections required by this ORDER have been accomplished and the Regional Director has released, in writing, the Bank from making further reports.

## **SHAREHOLDER DISCLOSURE**

10. After the effective date of this ORDER, the Bank shall send a copy of this ORDER, or otherwise furnish a description of this ORDER, to its shareholders (1) in conjunction with the Bank's next shareholder communication, and also (2) 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 Accounting and Securities Disclosure Section, Washington, D.C. 20429, for review at least 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 be binding upon the Bank, its successors and assigns, and all institution-affiliated parties of the Bank. The provisions of this ORDER shall remain

effective and enforceable except to the extent that, and until such time as, any provision of this ORDER shall have been modified, terminated, superseded, or set aside by the FDIC.

IT IS FURTHER ORDERED, that copies of this Decision and Order shall be served on the Bank, counsel for all parties, the ALJ, and the Director, New Mexico Financial Institutions Division.

By Direction of the Board of Directors.

Dated at Washington, D.C. this 16th day of March, 2010.

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/s/  
Robert E. Feldman  
Executive Secretary

(SEAL)

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