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

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CHIEF COUNSEL  
JUN -5 10:58

IN THE MATTER OF )  
CAROLYN D. NELSON )  
FORMER ASSISTANT VICE PRESIDENT )  
LONE STAR NATIONAL BANK )  
PHARR, TEXAS )

AA-EC-99-23

ORDER

This matter is before the Comptroller of the Currency ("Comptroller") on the recommendation of the Administrative Law Judge ("ALJ") for entry of default against Respondent Carolyn D. Nelson ("Respondent"), a former Assistant Vice President of Lone Star National Bank, Pharr, Texas, in civil money penalty, cease and desist, and removal proceedings.<sup>1</sup> For the reasons below, the Comptroller concludes that the record should be clarified on whether Respondent has defaulted. If a default judgment is appropriate, the Comptroller also invites the parties to comment on whether the remedy sought in the Notice should be adopted without requiring Enforcement Counsel to furnish justification.

I. FACTUAL SUMMARY AND PROCEDURAL HISTORY

On November 19, 1999, the OCC commenced an enforcement action to impose a civil money penalty, an order of restitution, and an order of prohibition against Respondent. The single Notice initiating this action alleged that Respondent willfully and knowingly withdrew funds for her personal benefit from eight accounts of three bank customers without their prior

<sup>1</sup> The prohibition action has been certified to the Board of Governors of the Federal Reserve System pursuant to 12 U.S.C. § 1818(e)(4); this Order does not apply to that action.

knowledge or approval. The withdrawals continued for more than two years. Respondent's employment was terminated when bank management learned of the withdrawals.

When Respondent failed to file an answer or request a hearing, Enforcement Counsel filed a Motion for Default Judgment. Respondent received personal service of the ALJ's Show Cause Order but filed no response. On April 3, 2000, the ALJ issued his decision recommending that the Comptroller impose the relief sought by the Notice.

The Comptroller understands that Respondent has asked the ALJ to reconsider his recommended decision. In a letter to the ALJ, Respondent argued that she had requested a hearing and had appeared on the date set for hearing in the Notice, and that she is already making restitution to the Bank. The Comptroller understands that the ALJ referred Respondent to the Federal Reserve and the Comptroller, and that Respondent subsequently made similar arguments to the Federal Reserve. Respondent has made no communications to the Comptroller.

## II. DISCUSSION

### A. DEFAULT

Failure to file an answer or request a hearing ordinarily constitutes default. Under the civil money penalty statute and implementing regulations, the failure to request a hearing converts the notice of assessment into a "final and unappealable order."<sup>2</sup> Under the statute governing restitution orders, a party that fails to appear at a hearing is deemed to have consented to the issuance of an order.<sup>3</sup> Under the regulations governing OCC administrative hearings, the failure to file a timely answer constitutes a waiver of the right to contest a civil money penalty or

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<sup>2</sup> 12 U.S.C. § 1818(i)(2)(E)(ii) and 12 C.F.R. § 19.19(c)(2).

<sup>3</sup> 12 U.S.C. § 1818(b)(1). See also 12 C.F.R. § 19.21.

a restitution action, unless the respondent can show good cause for the failure.<sup>4</sup> The administrative record contains no answer, no request for a hearing, and no attempt to show good cause.

Notwithstanding Respondent's failure to participate in the proceedings, the Comptroller understands that Respondent has attempted, in communications to others, to deny any default. To ensure that the record is clear, the Comptroller orders Respondent to demonstrate why a default judgment is not appropriate. Enforcement Counsel must then submit a reply.

## B. REMEDY

If the Comptroller finds Respondent in default, it is necessary to impose an appropriate penalty. As noted earlier, the applicable statutes and regulations provide that a default constitutes consent to the remedy requested in the notice.<sup>5</sup>

In previous default decisions involving civil money penalties and restitution orders, the Comptroller has ordered Enforcement Counsel to submit information relating to the appropriate remedy.<sup>6</sup> Those decisions were based on the judicial requirement that victorious parties in default judgments in Article III courts must justify the remedy sought.<sup>7</sup> Moreover, the courts have not always upheld agency default decisions.<sup>8</sup>

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<sup>4</sup> 12 C.F.R. § 19.19(c)(1).

<sup>5</sup> See 12 U.S.C. §§ 1818(b)(1) and (i)(2)(E)(ii); 12 C.F.R. §§ 19.19(c) and 19.21.

<sup>6</sup> In re Massimiliano Locci, AA-EC-97-1 (Nov. 13, 1997) (amount of restitution); In re Paul Lowder, AA-EC-93-73 (Mar. 23, 1994) (amount of both restitution and CMP).

<sup>7</sup> Both decisions relied on *Pope v. United States*, 323 U.S. 1, 12 (1944), and other cases. The Federal Rules of Civil Procedure contain a similar requirement. Fed. R. Civ. P. 55(b)(1)-(2).

<sup>8</sup> *Amberg v. FDIC*, 934 F.2d 681 (5<sup>th</sup> Cir. 1991); *Oberstar v. FDIC*, 987 F.2d 494, 503-05 (8<sup>th</sup> Cir. 1993). *But see Kronholm v. FDIC*, 915 F.2d 1171 (8<sup>th</sup> Cir. 1990) (default judgment upheld).

The Comptroller has decided to review the need for information justifying the remedy sought in a default. Because this forum is not an Article III court, it is not clear that Enforcement Counsel should be required to submit such information when the applicable statutes and regulations appear to authorize the agency to adopt the remedy specified in the Notice. Accordingly, the Comptroller invites the parties to submit arguments, including information on the practices of the other federal financial institution regulatory agencies, on this question.

### III. ORDER

The Comptroller orders the parties to submit to the hearing clerk arguments on the issues discussed above as follows:

- (1) Respondent shall file its submission within 14 days of the date of issuance of this Order; and
- (2) Enforcement Counsel shall file its reply within 14 days of the date upon which Respondent's submission is served or, if Respondent fails to file, within 14 days of the date Respondent's submission was due.

IT IS SO ORDERED, this 2d day of June, 2000.

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**JOHN D. HAWKE, JR.**  
Comptroller of the Currency