FEDERAL RESERVE press release

For immediate release April 15, 1997

The Federal Reserve Board announced the issuance of Final Decision and Order of Prohibition against Charles R. Vickery, Jr., former Senior Chairman of First National Bank of Bellaire, Bellaire, Texas. The Order, the result of an action brought by the Office of the Comptroller of the Currency, prohibits Vickery from participating in the conduct of the affairs of any financial institution or holding company.

A copy of the Final Decision and Order is attached.

BOARD OF GOVERNORS
OF THE
FEDERAL RESERVE SYSTEM
WASHINGTON, D. C. 20551

ADDRESS OFFICIAL CORRESPONDENCE
TO THE BOARD

April 14, 1997

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(Return Receipt Requested)

The Honorable Walter J. Alprin
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In re: Charles R. Vickery, Jr., First National Bank of Bellaire, Bellaire, Texas, AA-OCC-EC-96-95.

To the counsel and interested persons of record:

Notice is hereby given that the Board of Governors of the Federal Reserve System has issued the enclosed Final Decision and Order in the above-captioned case.

Very truly yours,

William W. Wiles
Secretary of the Board

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 CHARLES R. VICKERY, JR., FORMER SENIOR CHAIRMAN OF THE BOARD, FIRST NATIONAL BANK OF BELLAIRE BELLAIRE, TEXAS	AA-OCC-EC-96-95

FINAL DECISION

This is an administrative proceeding pursuant to section 8(e) of the Federal Deposit Insurance Act ("FDI Act"), 12 U.S.C. § 1818(e), in which the Office of the Comptroller of the Currency of the United States of America ("OCC") seeks to prohibit Respondent Charles R. Vickery from further participation in the affairs of any federally-supervised financial institution as a result of his conduct during his former affiliation with First National Bank of Bellaire, Bellaire, Texas (the "Bank"). As required by statute, the OCC has referred the action to the Board of Governors of the Federal Reserve System (the "Board") for final decision.

The proceeding comes before the Board in the form of a 66-page Recommended Decision by Administrative Law Judge ("ALJ") Walter J. Alprin, issued following an administrative hearing held in June 1996. In the Recommended Decision, the ALJ found that Vickery had breached his fiduciary duty to the Bank by arranging to be paid, as "referral fees," a portion of the title insurance premium paid in connection with real estate loans that Vickery caused the Bank to make. Recommended Decision ("RD") 4. The ALJ concluded that this misconduct fulfilled the requirements for prohibition from banking in that it resulted in financial gain to Vickery and reflected his personal dishonesty and continuing disregard for the safety or soundness of the Bank. In Vickery's lengthy exceptions to these findings and conclusions, Vickery does not dispute his receipt of the payments, but denies that they reflected any impropriety.

Based on a review of the record and the arguments raised by Vickery, the Board rejects Vickery's exceptions for the reasons stated by the ALJ in the Recommended Decision, except as specifically noted in this Final Decision. The Board adopts OCC Enforcement Counsel's exceptions to the limited term of prohibition recommended by the ALJ and to the ALJ's recommended determination that Vickery's conduct did not reflect a willful disregard for safety or soundness.

I. STATEMENT OF THE CASE

A. STATUTORY AND REGULATORY FRAMEWORK

1. Standards for Prohibition Order

Under the FDI Act, the ALJ is responsible for conducting an administrative hearing on a notice of intent to prohibit. 12 U.S.C. § 1818(e)(4). Following the hearing, the ALJ issues a recommended decision that is referred to the Board, and the parties may file exceptions to the ALJ's recommendations. The Board makes the final findings of fact, conclusions of law, and determination whether to issue an order of prohibition. Id.; 12 C.F.R. § 263.40.

To issue a prohibition order under the FDI Act, the Board must make each of three findings: 1) there must be a specified type of **misconduct** -- violation of law, unsafe or unsound practice, or breach of fiduciary duty; 2) the misconduct must have a prescribed **effect** -- financial gain to the respondent or financial loss or other damage to the institution; and 3) the misconduct must involve **culpability** of a certain degree -- personal dishonesty or willful or continuing disregard for the safety or soundness of the institution.

2. Title Insurance Premium Splitting.

Applicable Texas Department of Insurance Rules provide that a title insurance company is permitted to make payments only to persons who have actually rendered services commensurate with the payment. Rule P-22, OCC Exhibit ("Ex.") 8 at 9. The payee must submit an invoice stating in detail the services performed, and the payor must verify that the services were actually performed. Rule P-22(F), OCC Ex. 8 at 9. The rule also requires that the title insurance company verify in writing that "No portion of the charge for the services actually rendered shall be attributable to, and no payment shall be made for the solicitation of, or as an inducement for the referral or placement of the title insurance business with the company." Id.

B. PROCEDURAL HISTORY

The OCC issued a Notice of Intention to Prohibit Further Participation against Vickery on January 26, 1996. RD 1. Simultaneously, the OCC brought an action against Vickery seeking a civil money penalty of $250,000. Both actions were addressed in a common hearing before the ALJ and by the ALJ's Recommended Decision. Unlike this prohibition decision, the final decision as to the civil money penalty action is statutorily assigned to the Comptroller. 12 U.S.C. § 1818(h), (i). The Board takes official notice that, on March 31, 1997, the Comptroller issued a final Decision and Order assessing the full $250,000 amount against Vickery.

II. FINDINGS OF FACT

1. Relevant Persons and Institutions

First National Bank of Bellaire was at all times relevant to this proceeding a national bank subject to supervision by the OCC. RD 5. Vickery was the Senior Chairman of the board of directors of the Bank from 1967 until he was terminated by the board of directors in 1994. RD 5. As Senior Chairman, Vickery was responsible for approving and supervising all banking activities, including loans, investments, operations, and asset/liability management. RD 6. Vickery was also the principal shareholder of the Bank, owning or controlling about 40 percent of the Bank's outstanding shares in 1991. RD 5. He was also a principal shareholder of other banks, including Texas National Bank of Baytown and Mayde Creek Bank, N.A. RD 6.

During the time central to this action, mid-1991 to early 1992, Vickery was also chairman of the Bank's executive committee and a member of the loan committee. RD 5. The other members of the loan committee were G. Warren Coles, Chairman and president of the Bank, and Craig Wooten, the Bank's executive vice-president and chief operating officer. RD 7. Vickery was also an active member of the Texas State Bar from 1948 to September 1988, when he requested inactive status. RD 6.

During his banking career, Vickery's affiliated banks engaged in repeated litigation with banking regulators. In one case, the OCC was upheld by both a district court and the Fifth Circuit Court of Appeals in its direction that the banks cease the practice of distributing credit life insurance income to Vickery and other bank insiders in connection with loans that they had arranged for the Bank to make. First Nat'l Bank of LaMarque v. Smith, 436 F. Supp. 824 (S.D. Tex. 1977), aff'd 610 F.2d 1258 (5th Cir. 1980).[1/]

Vickery maintained a longstanding practice of collecting commissions from title insurance companies in return for referring borrowers to them. OCC Ex. 45 at 5. Among these

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[1/] In another case, the OCC was upheld in part and reversed in part when it imposed a cease and desist order against the Bank. First Nat'l Bank of Bellaire v. Comptroller of the Currency, 697 F.2d 674 (5th Cir. 1983). An aspect of the order that was upheld required that the Bank take action to prevent further violations of the restrictions on loans to bank insiders. 697 F.2d at 683-84. In a third case, the Fifth Circuit upheld the OCC's cease and desist order against the Bank and its affiliates for violations of lending limits in connection with the loans involved in the present action. Texas National Bank v. Department of the Treasury, 50 F.3d 1033 (5th Cir. 1995) (table).

companies was Sovereign, which would pay Vickery a commission of 20 percent of the insurance premiums for issuing a title policy arising from real estate transactions financed by loans from Vickery-affiliated banks. RD 6; Coles Tr. 1110; OCC Ex. 45 at 5. Sovereign's representative in these transactions was P.B. Dover, a registered title insurance agent and attorney, who began paying Vickery the "referral fees" in 1982. Dover Tr. 428, 429. Dover testified that he entered into the arrangement because Vickery had earlier maintained a similar arrangement with another title insurance company and Dover understood that this was the price of doing business. Dover Tr. 430. By 1991, the Texas Department of Insurance had issued rules, intended to prevent rebates and kickbacks that were driving up the cost of insurance, that prohibited title insurance companies from making payments to induce referrals for placement of title insurance business and required that any payments be justified by the performance of actual services. Rule P-22(H), (E); OCC Ex. 8 at 9; Hopson Tr. 687. Dover stopped paying the referral fees after the insurance regulations changed, but resumed them after Vickery demanded to know where his referral fee was and advised Dover that the regulations did not apply to referral fees among lawyers. Dover Tr. 431.[2/] Dover continued to pay Vickery referral fees until 1994. Dover Tr. 437.

[2/] Vickery told Dover that if he were not willing to pay the fees he would find someone else to do it. Dover Tr. 431-32.

2. **The Moore Loans**

Between June 1991 and February 1992, the Bank originated a series of 23 loans to real estate developer Jerry J. Moore and his wife, and to corporations owned by them. The loans were secured by shopping center properties owned by the Moores. RD 7. The total dollar volume of the Moore loans originated by the Bank was about $46 million; the Bank retained about $24 million of that amount, selling participations in the remainder to its affiliates. RD 7.

Vickery was the Bank's representative in negotiating the terms of each of the Moore loans, RD 7, and was viewed by the Bank's board of directors as the loan officer on the Moore loans. RD 22; Olsen Tr. 784. The other members of the loan committee had little influence on the decision to make the loans: The ALJ found that Coles "acceded" to each loan and that Wooten had little involvement with the Moore loans. RD 7-8. Vickery assumed responsibility for credit and final approval of each loan. Coles Tr. 1089. Each of the loans was approved, booked, and funded before being presented to the Bank's board of directors for ratification. RD 22; Coles Tr. 1134; Olsen Tr. 783; Wooten Tr. 598. One of the directors resigned because of his concern about the Moore loans. Levy Tr. 1073. The minutes of the Bank's board of directors meetings contain no evidence of any formal disclosure by Vickery of his arrangement with Sovereign or his receipt of payments in connection with the Moore loans. RD 22.

In choosing a title insurance company in connection with the loans, Vickery's preference for Sovereign was overridden by Moore's insistence on the use of Commonwealth Land Title, a title insurance company with which Moore had been doing business for 30 years. RD 8. In response, Coles advised Moore that any change in title companies would have to be approved by Vickery. RD 8; Coles Tr. 1110; OCC Ex. 40. As part of the loan negotiation process, Moore told Vickery that Commonwealth would be closing the Moore loans, and that Vickery would have to accept that or work it out with Commonwealth. RD 8-9; Moore Tr. 78; Coles Tr. 1095. Vickery told Coles that Commonwealth could be used as the title insurer, but that "Commonwealth would have to honor the same kind of agreement [Vickery had] with Sovereign on the title policies". RD 9; Coles Tr. 1111-1112, 1113, 1125. This requirement was honored by Commonwealth, which in every case paid 20 percent of the gross insurance premium to Vickery or his proxy, Sovereign.

In connection with the first Moore loan, Commonwealth paid the 20 percent cut directly to Vickery's defunct law firm, despite the fact that the Bank was represented by separate outside counsel who was paid directly from the loan proceeds. For the remaining loans, the payments to Vickery were made more circuitously.

Sometime before August 8, 1991, Vickery telephoned Dover and told him that he would be receiving some checks that he had "to run through Sovereign Title Company," and that in return for handling the paperwork involved, Dover could keep the greater of five percent or $500 of the check proceeds and should send the remainder to Vickery. RD 13; Dover Tr. 437-38, 460. Following this conversation, Dover received a package of premium-splitting certification forms from Commonwealth that called for Dover to certify that he had performed specified services on each of 12 Moore loans in return for Commonwealth's payment to Sovereign of 20 percent of the title insurance premium. Dover called Commonwealth for further instructions, signed the certification forms, and returned them to Commonwealth. RD 14. Despite his certification that he had performed services in return for the payments, Dover admitted that he did no work on the Moore loans, and was unaware of any work performed by Vickery. RD 21; Dover Tr. 453-54.

On or around August 16, 1991, Commonwealth sent Dover two checks totalling $31,483 payable to Sovereign, representing 20 percent of the title insurance premiums Commonwealth earned on the 12 Moore loans between July 19 and August 6, 1991. RD 14. Dover deposited the proceeds of both checks into his personal account, and then used the funds to buy two cashier's checks, one for Vickery in the amount of $29,908, and the other which he kept himself in the amount of $1,574, or five percent of the total amount received from Commonwealth. RD 15. Dover used the same procedure for amounts received from Commonwealth in connection with loans made on August 9, 1991 ($4,208 before splitting), September 11 ($7,725), October 11 ($8,097), and January 3, 1992

($2,113). RD 15-21. In each case, Commonwealth sent Dover 20 percent of its insurance premium, and Dover retained $500 or five percent of that amount and forwarded the remainder to Vickery.

Vickery thus received personal payments in connection with each of the Bank's 23 loans to the Moores, totalling about $52,880. RD 10; OCC Ex. 33-38.

III. CONCLUSIONS OF LAW

A. MISCONDUCT

1. Breach of Fiduciary Duty

The Board adopts the ALJ's recommended conclusion that, on the above facts, Vickery violated the duty of loyalty that he owed the Bank to refrain from engaging in self-dealing or conflicts of interest. RD 30. "The threshold inquiry in assessing whether a director violated his duty of loyalty is whether the director has a conflicting interest in the transaction. Directors are considered to be 'interested' if they either 'appear on both sides of a transaction [ ] or expect to derive any personal financial benefit from it in the sense of self-dealing, as opposed to a benefit which devolves upon the corporation or all stockholders generally." In re Seidman, 37 F.3d 911, 934 (3d Cir. 1994); quoting In re Bush, OTS AP 91-16 at 11, 15-16.

Indeed, these principles have been applied to an analogous situation involving Vickery, Coles, and the Bank. In 1976, the OCC issued policy directives requiring that Vickery and the officers in his affiliated banks cease the practice of selling credit life insurance in conjunction with loans made by their banks in return for commissions paid by the insurance company to them personally, rather than the bank. First National Bank Of LaMarque v. Smith, 436 F. Supp. 824, 826-27. (S.D. Tex. 1977), aff'd in part, 610 F.2d 1258 (5th Cir. 1980). Upon a challenge by the banks to the policy directive, both the district court and the court of appeals upheld the OCC's actions and condemned the conflict of interest represented by insiders pocketing profits from the credit life sales. The Fifth Circuit emphasized that:

> The payment to and retention by loan officers of commissions derived from the sale of credit life insurance involves an inherent conflict of interest: the loan officer's judgment may be influenced by his direct financial reward from making the loan. As a result, the officer may be induced to make a loan he would not otherwise have considered sound. When loan officers are allowed to retain commissions, the prospect of financial gain is interjected into the lending decision.

610 F.2d 1265.

Under this authority, it is clear that Vickery breached his fiduciary duty of loyalty to the Bank.[3] Receipt of the kickbacks of title insurance premiums, like the pocketed profits from the sale of credit life insurance premiums, caused Vickery to have a personal financial stake in the loans made by the Bank

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[3] Vickery excepts to the ALJ's determination that he was required to avoid even the appearance of a conflict of interest. RD 4. Because the evidence ,clearly establishes that Vickery engaged in an actual conflict of interest, it is not necessary to reach this issue, and the Board, like the Comptroller, does not adopt the ALJ's conclusion on the appearance issue. See OCC Decision and Order at 12 n.5. For the same reason, the Board need not reach the issue, raised in OCC Enforcement Counsel's exceptions, of whether Vickery's actions also breached his duty of care. See OCC Decision and Order at 7.

that could have influenced his lending decisions and his recommendation of title insurers. As Bank lending officer, Vickery's duties to the Bank included denying loan applications that were not in the Bank's interests. His personal interests, on the other hand, were directly served by ensuring that loans were made in any case, the bigger the better, so that he would receive his referral fees from the title insurance company.[4] Furthermore, Vickery's choice of title insurance companies was not made solely in the interests of the Bank, but was influenced by which company would be willing to pay his referral fees. Thus, Vickery's responsibilities as loan officer of the Bank were compromised by the incentive to make loans and utilize title insurance companies for reasons other than the best interests of the Bank.

The Board adopts the ALJ's determination that the payments to Vickery constituted "referral fees" -- or, in the term used by a Texas title insurance regulator, "kickbacks" -- and rejects Vickery's alternative and mutually contradictory explanations for the payments. These explanations are either incredible on their face, would present similar conflicts even if true, or are unsupported by the record. First, contrary to his other characterizations and without business explanation, he states that he did not know what the payments were for, but that he

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[4] In addition, the availability of kickbacks created an incentive for Vickery to prefer real estate-secured lending over other kinds of loans in order to assure the participation of a title insurer that would provide him fees. In certain market conditions, such a preference might well be harmful to a bank.

thought they were paid "out of the goodness of [Commonwealth's] heart" (Vickery Tr. 119, 127). Next, he suggests that the payments were fees for services performed for Commonwealth (Excep. 14). *If that were so, that would only underscore, not* alleviate, the conflict of interest. Vickery was the Bank's fiduciary, and therefore had a duty not to provide services to another party in a transaction in which the Bank was involved. Third, he claims that the payments were for services performed for the Bank. The record does not support a finding that Vickery performed any such services.[5]

In short, Vickery is correct only when he characterizes the payments as similar to the kind of commissions or referral fees he had been paid by Sovereign for 20 years. Excep. 19, 21; OCC Ex. 45. That characterization, however, is no defense: these previous payments also represented breaches of Vickery's fiduciary duty of loyalty.

Nor is Vickery's precise role in the loan transactions crucial to the determination that he had a conflict of interest. In his exceptions, Vickery denies that he had ultimate decisionmaking authority for the Moore loans (Excep. 5-6, 18). But even if Vickery had merely recommended, rather than approved,

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[5] In transactions in which the Bank was represented by counsel its counsel was not Vickery. According to Dover, *Sovereign performed no services for the Bank in connection with* the loans. Moreover, Vickery was in the hospital during several of the closings. Even if Vickery had provided services to the Bank, he offers no explanation as to why his Bank salary -- in excess of $149,000 -- did not sufficiently compensate him for such services, or why Commonwealth would pay him out of its insurance premium for services rendered to the Bank.

the loans, his receipt of fees would have been a conflict of interest and a breach of fiduciary duty.[6]

Similarly, Vickery's argument that he did not give detailed instructions to Dover as to the handling of the payments (Excep. 7, 13) is immaterial. Whatever his instructions, they were sufficient to cause Dover to forward to him payments from Commonwealth. Moreover, the ALJ had ample basis for resolving credibility issues against Vickery and in favor of Dover's detailed recollection of Vickery's instructions.

There is also no basis for Vickery's argument that his conflict of interest is benign because the interests of the Bank and the title insurer are coincident. Even though the title insurer and the Bank have a common interest in assuring that the borrower has good title to its security, their interests diverge in that the title insurer's interest is in maximizing the volume

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[6] In any event, the record flatly contradicts Vickery's assertion. Vickery does not contest that he negotiated the loans with Moore or that Moore viewed him as the ultimate decisionmaker. Coles testified that Vickery had the ultimate say as to making the loans, that the third member of the loan committee was not consulted after the loans began to be made, and that Vickery made a decision to keep making the loans over Coles' objections. Coles Tr. 1089, 1099-1100, 1124. The Board of directors only approved the loans after they had been made. See Levy Tr. 715 (by the time the Board approved the loans, "these loans were done deals"); Edwards Tr. 897 (board discussion of the Moore-related loans consisted of: "The loans have been made. You all need to approve them"); Vickery Tr. 304 (the board "never had arguments or discussions of loans. They just have a list of loans, and the board approves them, and that is that"). Vickery's dominance of the board was such that if a director "crossed" Vickery, he would not be renominated for the board the next year; when Vickery's brother was not renominated, Vickery had two policemen escort him out of the building. Edwards Tr. 902.

of business, while a bank's interest includes rejecting dubious loans -- and in complying with regulatory limits on concentration of lending. The Bank's interests also include, in approving the use of a title insurance company, consideration of that company's record of performance when a claim is made under a policy -- a point at which the interests of the bank and those of the insurer certainly diverge. Furthermore, an overlap of institutional interests does not as a general matter negate the conflict. In LaMarque, the Fifth Circuit found self-dealing and an unsafe and unsound practice where individual bank insiders profited from the sale of credit life insurance, even though the court found that that insurance benefitted banks, borrowers and insurers. The same is true here. Even assuming that title insurance benefits the lender, the lending officer's personal stake in placing such insurance constitutes a conflict of interest. See generally Pepper v. Litton, 308 U.S. 295, 311 (1939) (fiduciary may not utilize his strategic position for personal gain).

The Board therefore rejects Vickery's arguments that these facts do not establish a proscribed conflict of interest or breach of fiduciary duty.[7] Excep. at 44-75. Vickery's attempts

[7] The breach of fiduciary duty caused by Vickery's self-dealing is not affected by the fact that it was not **also** a usurpation of corporate opportunity -- i.e., that Vickery's kickbacks did not properly belong to the Bank. Excep. 49-51. In LaMarque, the Fifth Circuit affirmed the district court's decision that the personal profit from the sale of credit life insurance constituted self-dealing even though it vacated the portion of the district court's decision that addressed usurpation of corporate opportunity. 610 F.2d at 1263. Accordingly, LaMarque makes clear that such self-dealing is a (continued...)

to distinguish other conflict of interest cases as more heinous do not in any way redeem his conduct. Excep. 46-49. While Vickery may not have explicitly conditioned the making of the loans on the receipt of the fees, he took active steps to ensure that he would receive funds directly in connection with those loans. In any event, as discussed above, a bank officer has a duty to make a lending decision free from <u>any</u> personal financial stake in the transaction.

The Board also adopts the ALJ's recommendation that Vickery violated his duty of candor by failing to inform the officers and directors of his potential financial interest in the Moore loans. The general knowledge or inference of Coles and Wooten that Vickery was receiving commissions in connection with title insurance carries no weight in light of Vickery's dominance of the bank and the absence of any record, such as a board of directors vote, that would have brought the payments to the attention of regulators. <u>See</u> <u>Greenberg v. Board of Governors</u>, 968 F.2d 164, 171 (2d Cir. 1992) (minutes of board of directors meetings silent as to conflict relationship). The Board finds, however, that the absence of disclosure bears more directly upon Vickery's culpability than upon the existence of a conflict, in that it is not clear that a conflict arising out of a bank officer's personal financial interest in a transaction could be

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[7](...continued)
breach of fiduciary duty and an unsafe and unsound practice even if it is not also a usurpation of corporate opportunity.

cured by board of directors approval.[8] Furthermore, the suggestion that Vickery should have removed himself from the loan approval process because of the conflict, an action that is appropriate in many conflict situations, is circular in this case. Had Vickery not been involved as the lending officer, the title insurer would have had no reason to make payments to him and the conflict would not have existed. Accordingly, while recusal or board of directors approval may cure some conflicts, this is not such a case.[9]

[8] See LaMarque, 436 F. Supp. at 830 ("The illegality of self-dealing exists regardless of the financial strength of the plaintiff banks. 'Full disclosure' of the practice of all shareholders cannot legitimize this type of self-dealing.")

[9] In his exceptions, Vickery objects to the ALJ's official notice of a prior OCC decision, affirmed by the Fifth Circuit, which held that the Bank and other Vickery-controlled banks had violated legal lending limits with respect to the Moore loans. The ALJ limited his consideration of this proceeding with respect to the prohibition action to its potential bearing on Vickery's culpability. RD 2 n.2.

The only issue determined in that proceeding -- that the Moore loans violated the Bank's lending limits -- is irrelevant to the existence of the breach of fiduciary duty found here. Vickery's conflict would have existed had the Moore loans complied with the lending limits. Accordingly, because the two cases involve different claims, there is no *res judicata* bar to considering the prior proceeding. Moreover, to the extent that the fact that the Moore loans violated lending limits bears on Vickery's culpability, the facts established in the prior proceeding may be used collaterally against Vickery in this proceeding, as his ability to control the prior litigation establishes that he was in privity with the Bank. See Restatement (Second) of Judgments § 39.

B. **EFFECTS**

There is no dispute that Vickery's breach of fiduciary duty did not cause financial loss to the Bank, but there is also no dispute that Vickery received financial gain from the referral commissions. RD 46. His percentage, 20 percent of the title insurance premiums less the five percent of that amount or $500 for Dover, amounted to $52,881. RD 48. That financial gain is sufficient to establish the second category of prohibition requirements.

C. **CULPABILITY**

The ALJ determined that Vickery's conduct reflected both personal dishonesty and a **continuing** disregard for safety or soundness, but did not find that it established a **willful** disregard for safety or soundness. Vickery excepts to the first two findings and OCC Enforcement Counsel excepts to the third.

The Board finds that ample evidence supports the conclusion that Vickery's conduct reflected personal dishonesty and both willful and continuing disregard for the safety and soundness of the Bank. The standard for personal dishonesty is clearly met by the evidence supporting the ALJ's findings that Vickery lacked integrity, fairness, straightforwardness, and trustworthiness, and displayed a disposition to lie and misrepresent the facts. RD 49. The arrangement that Vickery worked out with Dover to "run checks through" Sovereign displays an intent to shield the transactions from regulatory scrutiny, and Vickery's indication to Dover that it would involve some paperwork indicates a consciousness that Dover would be required to file false certifications that he had performed services in connection with the closing. RD 50-51. Further, the Board adopts the ALJ's credibility determination that Vickery intentionally misled the Texas Finance Commission when he testified under oath on October 16, 1992, that he had no knowledge of the $2,432 fee paid to "Vickery Law Corporation" by Commonwealth on the first Moore loan. RD 44; OCC Ex. 51. As the ALJ found, it "simply is not credible" that Vickery would have forgotten about the payment, in light of the controversy surrounding the Moore loans. RD 44-45. That false answer under oath displays a disposition to falsehood that reflects personal dishonesty. RD 51; OCC Ex. 51 at 38.

The Board also finds that Vickery's conduct reflected a willful disregard for safety or soundness. The Board has previously found that a "willful disregard for safety or soundness" is established by **intentional conduct** that constitutes an unsafe or unsound banking practice. In re Magee, 78 Federal Reserve Bulletin 969, 974 (1992). There is no question that Vickery's arrangement of the referral fees was conduct intentionally engaged in -- indeed that it had been consistently engaged in for decades, despite knowledge that similar payments had been found to constitute an unsafe or unsound practice and breach of fiduciary duty in LaMarque. Such deliberate conduct is unquestionably willful.

Vickery's "disregard for safety or soundness" is established because his self-dealing constituted an unsafe or unsound practice. As the Board has previously observed:

> The safety or soundness element addresses the **nature**, rather than the degree, of the departure from ordinary standards of prudent banking. Conduct departing from such standards represents an unsafe or unsound banking practice when it is of a kind that, if continued, would present an abnormal risk -- i.e., risks other than those inherent in doing business -- of harm or loss to the bank.

In re Van Dyke, No. AA-EC-87-88 (June 13, 1988), slip op. at 26, aff'd, Van Dyke v. Board of Governors, 876 F.2d 1377, 1380 (8th Cir. 1989); see Greene County Bank v. FDIC, 92 F.3d 633, 636 (8th Cir. 1996)(unsafe or unsound practice is conduct deemed contrary to accepted standards of banking operation which might result in abnormal risk or loss to a banking institution or shareholder).

Here, the self-dealing practice is contrary to ordinary standards of prudent banking because it creates incentives to make loans and deal with title insurers for reasons other than the bank's best interests. A lending officer whose judgment is skewed by personal interest has the potential to commit a bank to loans that would expose the Bank to abnormal risk of harm or loss. Under the Board's standards, therefore, Vickery's conduct reflected a willful disregard for the Bank's safety and soundness.

The ALJ's conclusion to the contrary used an overly-narrow standard that would require a finding that an individual deliberately exposed the Bank to abnormal risk of loss or harm (RD 54), a standard that incorrectly appears to require that an individual intend or be conscious of potential harm to the Bank. Because the statute plainly contemplates prohibition of individuals who benefit from their practices even if the bank is as yet unharmed, the culpability standard must be sufficiently broad to embrace schemes designed solely to enrich the individual, if the practice is of a type that could cause harm to the bank. The practice of making lending decisions with a personal financial interest acting as a thumb on the decisional scales is clearly a practice that exposed the Bank to abnormal risk of loss or harm.[10]

The Board also adopts the ALJ recommended conclusion that Vickery engaged in "continuing disregard for the safety and soundness of the institution," a standard that captures conduct reflecting recklessness or indifference with respect to an institution's safety. See Brickner, 747 F.2d at 1203 n.6.; Grubb v. FDIC, 34 F.3d 956, 962 (10th Cir. 1994). This series of loans was made over a period of some months, and Vickery's arrangement for personal fees was made against a backdrop of previous cases in which the Comptroller and the courts had made clear that the collection of such fees was not only improper but potentially hazardous to the institution. Both the district court and the

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[10] This distinguishes situations where individuals have acted passively or not acted at all. See, e.g., Brickner v. FDIC, 747 F.2d 1198 (8th Cir. 1984) (bank officers failed to take action to rein in lending officer despite explicit FDIC warnings). Even where such conduct does not rise to the level of willful disregard for safety or soundness,it may still satisfy the standard for continuing disregard. See, e.g., Brickner, 747 F.2d at 1203.

Fifth Circuit in the LaMarque case informed Vickery in no uncertain terms that the receipt of personal gain by a lending officer in connection with bank business constitutes self-dealing and an unsafe and unsound practice. LaMarque, 610 F.2d at 1265. Vickery was quite aware of those rulings. E.D. Vickery Tr. 853; Vickery Tr. 265. Vickery was also aware that fee-splitting among title insurance companies for referrals had been prohibited by Texas regulation. Dover Tr. 431. Notwithstanding these bases for caution, Vickery nevertheless arranged the Dover scheme, creating a conflict of interest with his responsibilities as a lending officer. It is not a defense that the relatively small amount that Vickery received in referral fees may not have been the primary reason why Vickery decided to make the loans, since a lending officer should not place himself in a position where his personal financial interest plays any role in a lending decision. Accordingly, Vickery's repeated self-dealing in arranging referral fees for the Moore loans satisfies the standard for continuing disregard for the safety or soundness of the Bank.

Finally, the ALJ recommended that the Board order that Vickery be prohibited for only a fixed term of three years, rather than indefinitely. The ALJ based this recommendation on Vickery's age, ill health, and the fact that his conduct did not harm the Bank directly. RD 56. The Board declines to adopt this recommendation. To the extent that the Board has authority to issue a limited-term prohibition, it does not choose to exercise that authority in the circumstances of this case. The assumed absence of harm to the bank carries little weight as a mitigating factor in that, as noted above, the FDI Act plainly contemplates that a prohibition order can be based solely on financial gain, even if the bank is not harmed. Vickery's decades of self-dealing reflect an inveterate obliviousness to fundamental concepts of fiduciary responsibility and safe and sound banking. This long history of recalcitrance does not suggest any reason for the Board to have confidence that Vickery would be suited to return to banking in three years' time. While age and ill health are factors that may warrant compassion, they do not bear upon the ultimate issue in the matter of prohibition, whether an individual's character is consistent with his continued participation in banking. While Vickery of course retains the statutory right to seek agency consent to return to banking, the Board declines, to the extent it has such authority, to issue such consent prospectively.[11/]

[11/] The Board denies Vickery's exceptions to the ALJ's evidentiary rulings, which were within the scope of the wide discretion allocated to the ALJ in the conduct of a hearing. The Board also denies the request for oral argument, to the extent that it is addressed to the Board, since the Board finds that the issues have been adequately addressed in the administrative record.

CONCLUSION

For the foregoing reasons, the Board orders that the attached Order of Prohibition issue. By Order of the Board of Governors, this 14th day of April, 1997.

BOARD OF GOVERNORS OF THE
FEDERAL RESERVE SYSTEM

William W. Wiles
William W. Wiles
Secretary of the Board

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 CHARLES R. VICKERY, JR., FORMER SENIOR CHAIRMAN OF THE BOARD, FIRST NATIONAL BANK OF BELLAIRE BELLAIRE, TEXAS	AA-OCC-EC-96-95

ORDER OF PROHIBITION

WHEREAS, pursuant to section 8(e) of the Federal Deposit Insurance Act, as amended, (the "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 CHARLES R. VICKERY, JR.;

NOW, THEREFORE, IT IS HEREBY ORDERED, pursuant to sections 8(b)(3), 8(e), and 8(j) of the Federal Deposit Insurance Act, as amended, (12 U.S.C. §§ 1818(b)(3), 1818(e) and 1818(j)), 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)), CHARLES R. VICKERY, JR. is hereby prohibited:

(a) from participating in the conduct of the affairs of any bank holding company, any insured depository institution or any other institution specified in subsection 8(e)(7)(A) of the Act (12 U.S.C. § 1818(e)(7)(A));

(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 Act (12 U.S.C. § 1818(e)(7)(A));

(c) from violating any voting agreement previously approved by the appropriate 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 Act, (12 U.S.C. § 1813(u)), such as an officer, director, or employee.

2. This Order, and each 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 upon the expiration of thirty days after service is made.

By Order of the Board of Governors, this 14th day of April, 1997.

BOARD OF GOVERNORS OF THE
FEDERAL RESERVE SYSTEM

William W. Wiles

William W. Wiles
Secretary of the Board