UNITED STATES OF AMERICA
Before the
OFFICE OF THRIFT SUPERVISION
DEPARTMENT OF TREASURY

IN THE MATTER OF LAWRENCE B. SEIDMAN AND JOHN BAILEY, individually, as Persons Participating in the Conduct of the Affairs of Crestmont Federal Savings and Loan Association, Edison, New Jersey	)	Re: Case No. OTS AP 91-78 (October 30, 1991) OTS Order No. AP 92-149 Dated: December 4, 1992 OTS Order No. AP 95-35 Dated: November 8, 1995

DECISION AND ORDER ON REMAND

TABLE OF CONTENTS

I. INTRODUCTION AND SUMMARY OF CONCLUSIONS

This proceeding is before the Acting Director on remand from the United States Court of Appeals for the Third Circuit in In re Seidman, 37 F.3d 911 (3d Cir. 1994). The Third Circuit remanded the case to permit the Acting Director to consider whether a cease and desist order and civil money penalties ("CMPs") may be issued against Lawrence B. Seidman ("Seidman" or "Respondent"), former Chairman of the Board and Director of Crestmont Federal Savings and Loan Association, a Federal savings association, of Edison, New Jersey (Crestmont).[1]

The Acting Director finds that Seidman attempted to obstruct an OTS investigation of allegations that Seidman used his position with Crestmont to benefit his dealings with another institution. This misconduct warrants the issuance of a cease and desist order, including limitations and affirmative actions requiring supervision by others if Respondent participates in the affairs of depository institutions subject to OTS jurisdiction in the future. In addition, the Acting Director finds that Seidman's misconduct warrants the imposition of second-tier CMPs of $20,812.50.

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[1] The Third Circuit reversed that portion of the OTS Final Decision In re Seidman, Decision and Order, OTS Order No. AP 92-149 (Dec. 4, 1992) removing Seidman from his positions with Crestmont and prohibiting him from participating in the conduct of the affairs of institutions and entities listed in 12 U.S.C. § 1818(e)(7). The Third Circuit also directed the OTS to terminate further proceedings against a second respondent, John Bailey. Today's decision includes appropriate orders addressing these matters.

II. BACKGROUND

A. Proceedings through 1992 Final Decision

On October 30, 1991, the OTS Office of Enforcement ("Enforcement") issued a "Notice of Charges and Hearing; Notice of Intention to Remove and Prohibit Lawrence Seidman; and Notice of Assessment of Civil Money Penalties" ("Notice"). The Notice alleged that Seidman had engaged in several kinds of wrongdoing. Specifically, the Notice alleged that Seidman had used his position at Crestmont and the prospect that Crestmont might provide end-loan financing to purchasers of industrial condominiums to obtain a release of a personal guarantee of a loan made to fund construction of the condominiums by an unaffiliated bank (Count I). The Notice also stated that Seidman had made false and misleading statements and had failed to disclose material facts during a sworn deposition before the OTS (Count II). The Notice further alleged that Seidman had destroyed material evidence and solicited another witness to give false testimony (Count III). The Notice sought a removal and prohibition order for all charges, third-tier CMPs of $1.5 million for Count I, second-tier CMPs of $130,000 for Count II, and second-tier CMPs of $150,000 for Count III, a total of $1.78 million in CMPs against Respondent.

Following a hearing, Administrative Law Judge Walter J. Alprin (the "ALJ") issued a Recommended Decision on August 13, 1992 (1992 Recommended Decision or RD-1992). The ALJ generally found that the evidence supported all charges against Respondent and recommended that Seidman be permanently removed and prohibited from further participation in the affairs of Crestmont and other institutions and entities listed at 12 U.S.C. § 1818(e)(7). The ALJ also recommended CMPs totalling $930,000.

The OTS issued a Final Decision and Order on December 4, 1992 generally upholding the findings and conclusions of the ALJ, including the removal and industry-wide prohibition order (Final Decision or FD). With respect to CMPs, the Director ruled that the ALJ improperly assigned to Respondent the entire burden of proof on statutory mitigating factors,[2] and that Enforcement had the initial burden of going forward and presenting evidence on these mitigating factors, including financial resources. The Director remanded the matter to the ALJ to consider whether CMPs should be assessed and, if so, the amount of the CMPs. The Final Decision directed the ALJ to conduct the proceedings and issue a recommended decision in accordance with the CMP analysis set forth in In re Rapp.[3]

Respondent timely filed a petition for review of the Final Decision in the United States Court of Appeals for the Third Circuit.[4]

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[2] 12 U.S.C. § 1818(i)(2)(G).

[3] In re Rapp, OTS Order No. AP 92-148 (Dec. 4, 1992) aff'd, 52 F.3d 1510 (10th. Cir. 1995). In re Rapp was issued on the same day as the Seidman Final Decision and announced the OTS's new approach for analyzing CMP cases ("Rapp methodology"). All OTS CMP cases decided after In re Rapp have utilized this approach.

[4] On January 15, 1993, Respondent filed a motion to stay the remanded CMP proceedings pending judicial review of the Final Decision. The Acting Director denied Respondent's motion. OTS Order No. AP 93-23 (Mar. 26, 1993). Simultaneously, Respondent filed an application for stay of the agency order and the remanded proceedings with the United States Court of Appeals for the Third Circuit. The court denied this application on February 4, 1993, and denied Respondent's renewed application on May 27, 1993.

B. Remand to the ALJ on CMPs

The proceedings on remand to the ALJ addressed the statutory mitigating factors applicable to the assessment of CMPs, including Respondent's ability to pay the CMP and the impact of any assessment penalty on Respondent.[5] Following a hearing, the ALJ issued a Recommended Decision on February 2, 1994, including recommended findings of fact and conclusions of law, and a proposed order (1994 Recommended Decision or RD-1994).[6] The ALJ incorporated factual findings on Respondent's conduct from the Final Decision and analyzed Respondent's conduct under the statutory standard for imposing CMPs. The ALJ concluded that the statutory prerequisites for imposing CMPs against Respondent had been satisfied.

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[5] In the remanded proceeding, Respondent contested Enforcement's efforts to obtain discovery of documents relating to his financial condition. See ALJ's Order dated February 20, 1993, and the Acting Director's order on interlocutory review of the ALJ's discovery order (OTS Order No. AP 93-29 (Apr. 14, 1993)). On May 7, 1993, pursuant to an order of the United States District Court for the District of New Jersey issued May 3, 1993, Seidman produced subpoenaed documents.

[6] Respondent's Exceptions to the 1994 Recommended Decision assert that the Director lacked the authority to order a final remedy on the removal and prohibition while simultaneously remanding the CMP portion to the ALJ for further proceedings. Respondent also argues that the remanded CMP procedure treated him differently than the respondent in In re Simpson, OTS Order No. AP 92-123 (Nov. 18, 1992) aff'd, Simpson v. OTS, 29 F.3d 1418 (9th Cir. 1994), cert. denied, 115 S.Ct 1096 (1995). The Acting Director addressed his authority to order the remand proceedings, including the differences between this case and In re Simpson, in his denial of Respondent's motion to stay and his interlocutory review of the ALJ's discovery order. See OTS Order No. AP 93-23 (Mar. 26, 1993) and OTS Order No. 93-29 (Apr. 14, 1993). Moreover, the Third Circuit determined that the CMP remand was authorized. 37 F.3d at 939, n.41. This exception is denied.

The ALJ applied the Rapp methodology to determine the amount of CMPs to be imposed and concluded that the evidence of Respondent's conduct supported CMPs of $1.5 million, $130,000, and $150,000 for Counts I, II and III, respectively, before considering statutory mitigating factors. After considering the size of Respondent's financial resources and other factors as justice required, the ALJ reduced the penalties to $20,000, $45,000 and $45,000 for Counts I, II and III, respectively, for a total recommended penalty assessment of $110,000. The ALJ did not disclose precisely how he applied these two mitigating factors to reduce the penalty amounts, although he determined that the evidence on Seidman's financial condition showed that Seidman could pay a total penalty approximating $423,000 (rather than the $1.78 million originally sought).

On May 3, 1994, Respondent filed exceptions to the 1994 Recommended Decision. Enforcement filed exceptions on May 4, 1994, and replied to Respondent's exceptions on May 19, 1994.[7] On June 27, 1994, the parties were notified that the proceeding was submitted to the Acting Director for review and final determination.

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[7] On May 19, 1994, Enforcement moved to strike exhibits attached to Respondent's exceptions. Enforcement claimed that the exhibits were an improper attempt to supplement the record to contest factual findings by the ALJ. Seidman responded on May 26, 1994. The Acting Director finds that there is no prejudice to Enforcement if these materials are included in the record.

On June 1, 1994, Enforcement requested leave to file a letter brief addressing the Final Decision In re Lopez, OTS Order No. AP 94-23 (May 17, 1994), aff'd per curiam, ___ F.3d ___ (D.C. Cir. 1995). Respondent objected on June 10, 1994. The Acting Director is already fully aware of the decision in In re Lopez. The request is denied.

C. Appeal to the United States Court of Appeals for the Third Circuit

While the Final Decision on CMPs was pending before the Acting Director, the Third Circuit issued its decision on Seidman's appeal of the 1992 Final Decision. The decision, issued September 14, 1994, rejected many of the findings in the Final Decision. Specifically, the Court concluded that Seidman's alleged self-dealing (Count I) did not constitute a violation of law or regulation, an unsafe or unsound practice or a breach of fiduciary duty,[8] and rejected the finding that Seidman intentionally made false or misleading statements and failed to disclose material facts at his deposition (Count II).[9] Accordingly, the court declined to uphold the removal and prohibition order on the basis of Count I or II.

With regard to Count III, the court concluded that Seidman's attempt to induce a witness to offer false testimony constituted an unsafe and unsound practice,[10] violated a law or regulation,[11] and

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[8] 37 F.3d at 930-936.

[9] 37 F.3d at 937, n.38.

[10] 37 F.3d at 937. The court stated that Seidman's attempt to destroy material evidence (i.e., a copy of the Risko letter) could also be viewed as hindering an OTS investigation. However, the court noted that the Director's finding on this point "may not be adequately supported" because the Director gave no explanation for his reversal of the ALJ's credibility finding that Seidman acted without intent to hinder the investigation. 37 F.3d at 937, n.38 & n.39.

[11] 37 F.3d at 936, n.37. The court specifically noted that the Director concluded that Seidman violated 12 C.F.R. 512.6 (prohibiting obstructionist conduct) and stated that it did "not question that conclusion."

involved personal dishonesty.[12] The court, however, could not find that this misconduct had the requisite effect required under 12 U.S.C. § 1818(e)(1) and determined that a removal and prohibition based on Seidman's obstructionist conduct was also not appropriate.

Nonetheless, the court noted that Seidman's obstructionist conduct could support a cease and desist order and CMPs. Accordingly, the court remanded the proceeding to the OTS "to consider whether Seidman should on this record be subjected to the lesser sanction of a cease and desist order along with any monetary penalties that may be properly imposed."[13]

D. Remand to the Acting Director

By Order issued November 23, 1994, the Acting Director directed the parties to address the following issues: (1) Whether the OTS should issue a cease and desist order against Seidman for the conduct alleged in Count III of the Notice; and (2) How the Third Circuit Decision should be applied in the Acting Director's

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[12] 37 F.3d at 937.

[13] 37 F.3d at 939. See also 37 F.3d at 916. The Third Circuit acknowledged that the Notice did not seek a cease and desist order, but did request "[a]ny other relief deemed appropriate by the Director of OTS." 37 F.3d at 938. The Third Circuit concluded that the notice requirements of 12 U.S.C. § 1818(b)(1) were satisfied because "Seidman was put on notice of the facts alleged to constitute an unsafe or unsound practice by the notice of charges issued pursuant to [the removal and prohibition statute]. Compare 12 U.S.C. 1818(b)(1) and 12 U.S.C. § 1818(e)(4)." 37 F.3d at 939, n.40.

review of the ALJ's 1994 Recommended Decision assessing CMPs against Seidman.[14]

Seidman has responded that the record does not support the issuance of a cease and desist order or CMPs. Seidman asserts that, with one exception, the Third Circuit specifically found that the factual allegations in the Notice were unproven. With regard to the remaining allegation -- instructing a witness to withhold material evidence -- Seidman contends that Enforcement's witnesses were not credible. Seidman also argues that this allegation, even if proven, does not constitute an unsafe or unsound practice.

For its part, Enforcement argues that a cease and desist order (with specific affirmative relief) is appropriate under Count III since the Third Circuit found that Seidman's attempts to hinder the OTS investigation constituted an unsafe and unsound practice. Enforcement also argues that the Count III conduct supports second-tier CMPs of $150,000. Additionally, Enforcement contends that second-tier CMPs of $130,000 should be assessed for the Count II conduct.[15]

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[14] The time for issuing a final decision in the CMP remand proceeding was extended to permit the review and consideration of the Third Circuit's decision. OTS Order No. AP-94-42 (Sept. 26, 1994).

[15] Enforcement concedes that a cease and desist order and CMPs based on the self dealing and conflict of interest charges (Count I) are foreclosed by the Third Circuit decision. Accordingly, today's order will dismiss charges related to these allegations.

E. Issues before the Acting Director

Based on the pleadings of the parties, the following issues are now before the Acting Director:

1. Should the Acting Director issue a cease and desist order against Seidman based on the Count III allegation that Respondent attempted to obstruct an OTS investigation? If so, what affirmative actions should the cease and desist order prohibit or require?

2. Should the Acting Director also assess CMPs based on Count III charges? If so, in what amount?

3. Should the Acting Director assess CMPs based on the Count II allegation that Seidman made false and misleading statements in his deposition? If so, in what amount?[16]

The facts relevant to the disposition of these questions are set forth below.

III. SUMMARY OF THE FACTS

During August and September 1991, Respondent engaged in various efforts to hinder an OTS investigation into allegations that he misused his position with Crestmont to obtain a benefit in his dealings with another institution. Respondent's efforts included encouraging others to destroy evidence relevant to the OTS investigation, encouraging another witness to give false testimony at an OTS investigation deposition, and destruction of evidence relevant to the OTS investigation.

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[16] Exceptions to the 1994 Recommended Decision and arguments raised in the parties' submissions on remand from the Third Circuit that are not explicitly addressed in this Decision are rejected.

A. Release of the Guarantee

In October 1988, Fulton Street Associates ("FSA"), a real estate partnership in which Seidman participated, obtained a $3.7 million land loan from United Jersey Bank ("UJB"). This loan was secured by a first mortgage on real estate in Boonton, New Jersey and by the personal joint and several guarantees by each partner, including Seidman. About March 28, 1989, FSA obtained a construction loan for $3.76 million from UJB. This loan was secured by a second mortgage on the same property and by similar joint and several guarantees by FSA partners.

From January through May 1991, James R. Poole and Co. ("Poole & Co."), a commercial mortgage broker, represented by James A. Risko ("Risko"), assisted FSA in renegotiating its outstanding debt to UJB. On May 20, 1991, the FSA partners, including Seidman, executed a joint and several replacement guarantee on the construction loan in the amount of $4,450,000.[17]

In late May 1991, Seidman initiated discussions with Risko to secure a release of Seidman's guarantee on the UJB construction loan.[18] Seidman claims that he took these steps in order to avoid

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[17] It appears that there was also a $3.2 million guarantee on the land loan.

[18] The Director previously determined that there was inconsistent evidence in the record to determine if Seidman was released from the personal guarantee on the land loan to FSA from UJB. Because the parties were unable to reconcile the evidence and the Director was unable to do so, the discussion relates solely to the $4.45 million personal guarantee on the construction loan. FD at 2, n.1.

a conflict of interest[19] if Crestmont were to provide "end-loan" financing for the sale of completed industrial condominiums at FSA's Boonton site.[20] Seidman and Risko agreed that Seidman would send UJB a brief letter requesting a release of Seidman's guarantee and Risko would send UJB a more detailed supporting letter.

Seidman dictated his brief letter to his secretary and sent that letter to UJB on May 30, 1991. On May 30, 1991, Seidman also dictated a proposed draft of a letter for Risko to send to UJB on Seidman's behalf, and telefaxed this draft to Risko for approval. Risko received the draft, added a single sentence, and telefaxed the revised draft to Seidman's secretary on May 31, 1991, with a cover memorandum asking Seidman to review the draft and to let Risko know if it was acceptable. On May 31, 1991, hearing nothing further from Seidman, Risko assumed the change had been accepted, and forwarded the letter to UJB on Poole & Co. stationery. UJB released Seidman from his guarantee on June 7.

B. Seidman's Testimony

On June 19, 1991, the OTS initiated a formal investigation into Seidman's suspected conflict of interest. In early August, 1991, after receiving a subpoena in connection with the formal investigation, Seidman telephoned Risko and asked about the Poole & Co. file on FSA. During the conversation Risko advised Seidman

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[19] In mid-1990, Seidman recognized that his outside business ventures would prevent Crestmont from making otherwise desirable loans and began to dispose of various business interests to his former partners. The transfer of Seidman's interest in FSA became the subject of a formal agreement on June 1, 1991.

[20] Crestmont ultimately did not provide any end-loan financing.

that the file contained Seidman's May 30, 1991 telefaxed draft of the Risko letter with the cover sheet from Crestmont to Risko. Seidman told Risko to "make sure that [the documents] get thrown away." Risko, I: 147-49 (1992).[21] Following this conversation, Risko made copies of the documents and kept these copies in a separate file. Risko I: 151, 158 (1992). Seidman did not know that Risko had made these copies. Risko I: 157, 161-62 (1992).

On Friday, September 13, 1991, the OTS deposed Seidman, focusing on the contents and the author of the draft letter that Risko ultimately sent to UJB. During the deposition, Seidman gave the following testimony:[22]

> Q. Did you discuss with Mr. Risko what he would write?
>
> A. I won't say that we discussed it. I saw the letter, but [redacted] -
>
> Q. Did you see the letter before he sent it to Mr. Eberhardt?
>
> A. He thinks that he sent it to me the day he sent it, and my secretary called him and told him I said it was okay, but I don't recall seeing it, but I may have.
>
> Q. Okay.
>
> A. I wasn't really - - I'm sorry.
>
> Q. Did you discuss with him what position you would take with UJB to seek release from your personal guarantee?
>
> A. No.

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[21] References to hearing transcripts will be cited as: witness name, volume number: page (year of hearing).

[22] Seidman, III: 509-10 (1992). These are excerpts from Seidman's investigation deposition , page 222, line 19, et seq., "Q." by OTS attorney Shapiro, "A" by Seidman. The quoted excerpts were included in the record of the proceeding. The entire investigation deposition, however, was not admitted.

Q. How did he know? Was it typical for him to write letters of this nature without discussing it with you?

A. He knew the deals backwards, forward and upside down. He knew the deal much better than I did. He was intimately involved in this transaction. I was the outside guy. I mean I was just the financial guy in this deal. I knew almost nothing about this transaction. He knew the tenants better than I did. He stayed on it much better than I did.

* * *

Q.[23] Did you ask Mr. Risko - - I am sorry. Let me show you OTS No. 7, which is a letter from James Risko to Robert Eberhardt, dated May 31, 1991 and ask you if you recall seeing that letter?

A. Yes. This is the letter that I referred to before that Mr. Risko thinks he sent me the day he sent it to Mr. Eberhardt.

Q. Okay. And that is the letter where you thought your secretary said you had read it and that you didn't have any problems with it?

A. Right.

Q. Do you recall reviewing that letter?

A. No.

Q. Okay. Now, how did Mr. Risko come up with those reasons? Did you ever discuss with him, first of all, the fact that, and why don't you give me the letter for a second.

Did you discuss with him the fact that your position as Chairman of Crestmont Federal Savings & Loan may make the financing of certain condo purchasers impossible if you were also a partner in Fulton Street?

A. No.

Q. Okay. Did you discuss with Mr. Risko the fact that the inability to finance the end users, does not serve the United New Jersey Bank's position or that of the developer?

A. Mr. Risko and I had a discussion two or three times. We had that discussion, like I said before. Even Bob Eberhardt,

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[23] Seidman, III: 511-14 (1992). Excerpts from Seidman's investigation deposition, p. 225, et seq.

who stated either Bob or George Rinneman or Stackhouse, that if there were any end users that they felt to be qualified, that they should send them to UJB and most likely UJB would make a considerable effort to do those end loan financing.

So, I mean that was discussed at one of the meetings. I don't know if Mr. Risko was in that part of the conversation or not.

* * *

Q. Do you construe this letter as linking the release of your personal guarantee to what Crestmont might or might not be willing to do with respect to end loan users?

A. No. I just think this is a letter of a broker representing what he deems to be his client, trying to sell somebody on something without committing to anything.

C. Solicitation of False Testimony and Destruction of the Telefaxed Letter

Following his deposition, Seidman learned that Risko had also been subpoenaed by OTS to give testimony later in September. On Monday, September 16, 1991, the first business day after Seidman's deposition, Respondent met with Risko in a conference room at the Poole & Co. offices to review the contents of the FSA file. Seidman advised Risko that at Risko's deposition he was "not to lie, to tell the truth, but in essence to forget about [the telefax of the May 30th Risko draft letter and cover sheet] ever existing in the file." Risko, I: 160 (1992). Seidman also told Risko that the draft of the Risko letter and transmittal sheet could cause Seidman problems and to "get rid of them." Risko, I: 153 (1992).

Risko left the room to confer with James Poole, his supervisor. Poole and Risko returned to where Seidman was reviewing documents. Noting that Seidman "was very intent upon this ['loss of the documents']" and that Risko "was absolutely at

wit's end," Poole crumpled up the original telefax of the draft Risko letter and took it to his own office.[24] Poole, II: 326 (1992). There, Poole smoothed out the document and placed it on a credenza behind his desk. Seidman followed Poole into his office and told him that the document had to "go out of the file." Poole, II: 329-31 (1992). Seidman then took the document, ripped it up, and put it in his pocket. Poole, II: 330-32 (1992); Seidman, III: 533 (1992).

The ALJ found that "while Seidman destroyed the [telefax] intentionally, it was done in a fit of anger and not for the purpose of destroying material and relevant evidence." RD-1992 at 20. In the 1992 Final Decision, the Director, without comment, overturned the ALJ's finding that Seidman was not motivated by a desire to destroy evidence when he tore up the telefax. The Third Circuit noted that the Director's finding that Seidman was motivated by a desire to destroy evidence may not have been adequately supported. While the court recognized that the Director owes no deference to the findings of the ALJ, the court indicated that better practice is to state the reasons for disregarding an ALJ's findings of fact.[25]

After careful review of the evidence, the Acting Director believes that the Director in 1992 correctly rejected the ALJ's finding that Seidman's destruction of documents was impulsive, and not for the purpose of destroying evidence. We do not lightly

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[24] Poole crumpled the original telefax. He was not certain whether he crumpled other documents. Poole II: 328 (1992). Accordingly, here we refer only to the original telefax.

[25] 37 F.3d at 937-38, n.39, citing Citizens State Bank v. FDIC, 718 F.2d 1440, 1444 (9th Cir. 1983).

overturn the factual findings of the ALJ, particularly where these findings are based on the oral testimony of witnesses.[26] In this case, however, the ALJ credited the testimony of Risko and Poole as to what words were spoken and what actions transpired at the meeting of Risko, Poole and Seidman on September 16, 1991 and prior thereto.[27] These words and actions do not support the ALJ's finding that Seidman was not motivated by a desire to destroy evidence. Moreover, the circumstantial evidence supports Risko's and Poole's versions of events, rather than Seidman's. Thus, it was unreasonable to find that Seidman acted impulsively.

Even before going to Risko's office on September 16, 1991, Seidman had in early August asked Risko to make sure that Seidman's telefaxed draft of May 30, 1991 got "thrown away." Risko, I: 149 (1992).[28] When Seidman went to Risko's office, his purpose could not have been to refresh his own recollection since Seidman's deposition had already been taken. Rather, his purpose, as

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[26] The Acting Director will defer to ALJ credibility determinations unless the findings are unreasonable, self-contradictory, or based on inadequate reasoning. In re Lopez, at 8, n.9, citing Stanley v. Board of Gov. of the Federal Reserve System, 940 F.2d 267 (7th Cir. 1991).

[27] On remand from the Third Circuit, Seidman argues that there was "hopeless inconsistency and confusion" in Risko's testimony, and reasserts his assertions that Risko's testimony was incredible. The excerpts of Risko's testimony reveal no material inconsistencies. Further, to the extent that there was conflicting testimony at the hearing, the ALJ found that Seidman's testimony was not credible and that the testimony of Risko and Poole was consistent on material facts. RD-1992 at 20, 37-38, 47. The Director adopted these findings. FD at 7, n.6. The Third Circuit affirmed the Director's findings related to Seidman's attempts to hinder the OTS investigation by soliciting Risko to testify falsely. 37 F.3d at 937, n.38. Seidman's arguments are rejected.

[28] Poole recalled that Risko had discussed this conversation with him. Poole II: 321-24 (1992).

manifested by his prior and subsequent actions, was to influence Risko's testimony and specifically to suppress the evidence of Seidman's May 30 telefax to Risko. At this meeting, Seidman's conduct was steadily directed to the elimination of the telefax. When Seidman and Risko reviewed Risko's file on the UJB loan, Seidman again told Risko to "get rid of" the May 30 document. Risko, I: 153 (1992). Risko then left the room and told Poole of Seidman's statement. Risko, I: 154 (1992); Poole, II: 326 (1992). Poole returned to the room with Risko, and Seidman asked that Poole "remove the document from the file." Poole, I: 327 (1992).

Poole then crumpled up the document and took it to his own office, where he was careful to attempt to restore it by smoothing it out. Poole, II: 327-29. Seidman followed Poole and then had a brief conversation about the draft. Poole, II: 329-30 (1992); Seidman, III: 532 (1992). Poole then took a telephone call, and, while he was on the telephone, Seidman took the document, tore it into little pieces and put the pieces in his pocket. Poole, II: 330-32 (1992); Seidman, III: 533 (1992). Nothing in either Poole's or Seidman's testimony of the discussion in Poole's office suggests the destruction of this document was a new and sudden impulse on Seidman's part. Rather, Seidman arrived at Risko's and Poole's offices intent on seeing the document "removed" or destroyed and, when Risko and Poole failed to do so, Seidman accomplished the deed himself.[29]

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[29] The ALJ explained his finding that Seidman was not motivated by a desire to destroy evidence as follows:

> [T]hat Risko left Seidman alone with the offending documents and that Seidman did not destroy them at that time the undersigned ascribes to Seidman's recognition that oral testimony of such act would be adverse to his interest, which is why my [finding] is that the actual

Seidman claimed that his destruction of the document was an angry reaction to a "set up" by Risko and Poole. That is, Seidman contended that he was worried that Risko and Poole planned to testify falsely that Seidman was the source of the Risko letter to

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> destruction was, as Seidman testified, not to destroy material evidence but done in a fit of anger.

RD-1992 at 47.

The Acting Director declines to accept this rationale for several reasons. There is no basis in the record for concluding that, when left alone in the room with the document, Respondent considered destroying the document and rejected that option. In fact, Respondent testified that he does not remember being left alone with the document. Seidman III: 530 (1992). Therefore, there is no basis for assuming that Respondent believed that destruction of the document would be counter to his self-interest. To the contrary, the evidence of Respondent's repeated urgings of Risko and Poole to give false testimony or to destroy the document suggest a persistent intent to destroy the telefax.

Even if we accept the ALJ's finding that Seidman was initially restrained by the fear of adverse testimony, this finding does not mandate the conclusion that his subsequent destruction of evidence was not purposeful. Moreover, circumstances and motivations changed significantly after Siedman's first opportunity to destroy the document. That is, it became clear that neither Risko nor Poole would assist in the destruction of the document in compliance with Seidman's wishes. This, in the Acting Director's view, strengthened Seidman's resolve to destroy the telefax.

Further, implicit in the ALJ's finding is the conclusion that the Respondent's destruction of the document must have been an irrational act because it could result only in adverse consequences to him. This does not accurately reflect the Respondent's state of mind. When Seidman destroyed the telefax, he did not know that Risko had made copies. Thus, from Seidman's point of view, the destruction of the document could have had beneficial results by eliminating physical evidence corroborating Risko's testimony regarding the authorship of the letter. The lack of physical corroboration could have made it more likely that a factfinder would credit Seidman's version of events over Risko's. Thus, based on what Seidman knew at the time, his destruction of evidence may have been entirely rational.

UJB.[30] This statement of intent is baseless. The ALJ found (and the evidence convincingly shows) Seidman was the source of the ideas in the letter. RD-1992 at 13, 37-40. Accordingly, there could not possibly have been any reason for Seidman to believe that Risko and Poole were trying to "set [him] up." Moreover, Seidman's repeated requests to "get rid of" the document reflect a longstanding intent on Seidman's part to see the document destroyed. Further, the timing of Seidman's visit to Risko and Poole -- the first business day after Seidman's deposition -- indicates that Seidman's intent was to make sure that the evidence still to be presented to the OTS was consistent with Seidman's deposition testimony. Destruction of the document was simply the logical outcome of that intent; since Risko and Poole would not destroy the document, Seidman did.

IV. DISCUSSION

A. Cease and Desist Order

Under 12 U.S.C. § 1818(b), the OTS may issue a cease and desist order against an institution-affiliated party[31] who has engaged in an unsafe or unsound practice in conducting the business of an institution, or has violated a law, rule or regulation, or any conditions imposed in writing by the agency in connection with

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[30] See Seidman III: 497 (1992)("I told Mr. Risko that if he went in and lied, that I was the one who did the first draft, that he was going to make me out to be a liar and that he knew it was wrong.") and Seidman III: 543 (1992)("I have a very volatile temper. That's why I went into Mr. Poole's office, I was livid. I know when I am being set up. That's what was happening. I did not appreciate it, I lost my temper, and I did what I did.")

[31] Respondent, the former Chairman of the Board and a director of Crestmont, is an institution-affiliated party under 12 U.S.C. § 1813(u). FD at 21.

the granting of any application or other request by the institution or any written agreement entered into with the agency. The authority to issue a cease and desist order includes the authority to place limitations on the activities or functions of an insured depository institution or any institution-affiliated party.[32]

The present record clearly establishes the legal basis for the issuance of a cease and desist order. The Third Circuit concluded "that an attempt to hinder an OTS investigation constitutes an 'unsafe or unsound practice,'"[33] and that "Seidman's attempts to obstruct the OTS investigation into his dealings with FSA and UJB, particularly his act of counseling Risko to withhold potentially material facts . . . could support a cease and desist order . . . under 12 U.S.C. § 1818(b)(1)."[34] The Third Circuit also did not

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[32] 12 U.S.C. 1818(b)(7). Additionally, if statutory predicates are satisfied, the agency may require a party to take affirmative actions to correct or remedy any conditions resulting from the any violation or practice with respect to which such order is issued. 12 U.S.C. § 1818(b)(1) and (6).

[33] 37 F.3d at 937.

[34] 37 F.3d at 938. Respondent argues that Enforcement must demonstrate two elements to prove an unsafe and unsound practice -- an imprudent act and an abnormal risk of financial loss or damage to a depository institution as a result of the imprudent act. Because Crestmont's financial security was not endangered by the obstruction of the OTS investigation, Respondent argues that there is no basis for finding unsafe and unsound practices.

The Third Circuit already has rejected this contention:

> We believe an attempt to obstruct an OTS investigation is such an [unsafe and unsound] act. OTS is statutorily charged with preserving the financial integrity of the thrift system. . . . Where a party attempts to induce another to withhold material information from the agency, the agency becomes unable to fulfill its regulatory function. . . . Seidman's attempt to obstruct the investigation, if continued, would pose an abnormal risk

question the Director's conclusion that Seidman's conduct violated the OTS regulation that prohibits efforts to obstruct OTS investigative proceedings and formal examinations.[35]

Accordingly, the Acting Director finds that Seidman engaged in unsafe or unsound practices in conducting the business of the institution,[36] and violated applicable OTS regulations at 12 C.F.R. § 512.6. The issuance of a cease and desist order is warranted under 12 U.S.C. § 1818(b)(1).

The Third Circuit did not mandate or suggest terms for the cease and desist order. Rather, this issue was left to the discretion of the Acting Director under 12 U.S.C. § 1818(b). Enforcement seeks an order directing Respondent to cease and desist from any attempts: (1) to hinder OTS in the discharge of its regulatory responsibilities, including the conduct of OTS

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of damage to OTS. Accordingly, we hold that an attempt to hinder an OTS investigation constitutes an "unsafe and unsound practice. . . ." 37 F.3d at 937.

[35] 37 F.3d at 936, n.37. The Final Decision determined that Respondent's conduct violated 12 C.F.R. 512.6 (prohibiting obstructionist conduct). FD at 28.

[36] Respondent argues that a cease and desist order is not appropriate because Enforcement failed to demonstrate that he engaged in unsafe and unsound practices "in conducting the business of [Crestmont]." See 12 U.S.C. § 1818(b)(1). Seidman's suggestion that his misconduct was independent of his actions and activities as Chairman of Crestmont is not supported. The record clearly demonstrates that his obstructionist conduct was designed to cover up evidence relating to allegations of self-dealing at Crestmont.

Respondent also appears to argue that the cited regulatory violation cannot support a cease and desist order because "it was not imposed in connection with any application . . . or any written agreement entered into with the Agency." Seidman has simply misinterpreted 12 U.S.C. § 1818(b)(1) on this point.

examinations and investigations; or (2) to induce any officer, director, employee or agent of a savings association to withhold material information from the OTS.

In this proceeding, Respondent attempted to deprive the OTS of correct and reliable information necessary for its supervision of a regulated institution by soliciting others to give false testimony and to destroy evidence and by himself destroying material evidence. The OTS regulatory function encompasses the examination and supervision of institutions including formal investigations and other regulatory measures designed to ensure the safe and sound operation of savings associations and the financial integrity of the thrift system. Correct and reliable information is vital to each of these activities. Indeed, the Third Circuit stated that Respondent's attempt to obstruct the OTS investigation, "if continued, strikes at the heart of the regulatory function."[37] Accordingly, today's order directs Respondent to cease and desist from any attempts to hinder OTS in the discharge of its regulatory responsibilities, including the conduct of OTS examinations and investigations, and to cease and desist from any attempts to induce any person to withhold material information from the OTS related to the performance of these functions.[38]

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[37] 37 F.3d at 937.

[38] Enforcement would direct Respondent to cease and desist from attempts to induce officers, directors, employees or agents of a savings association to withhold information. Respondent's misconduct involved individuals that do not fall within this limited class. Accordingly, the cease and desist order will prohibit any future attempts to induce any person to withhold information from the OTS.

Enforcement also requests affirmative limitations on Respondent's activities if he is employed at a depository institution in the future. Enforcement's proposed limitation would require the institution's board of directors or a committee of the board to review Seidman's preparation or review of any reports, documents or other information to be submitted or reviewed by the OTS in the discharge of its regulatory functions.[39]

The OTS has imposed affirmative limitations requiring supervision of a respondent where the respondent has demonstrated an inability or unwillingness to comply with his duties as an institution-affiliated party.[40] Here, Respondent, a lawyer presumably aware of the obligations of witnesses and the impropriety of destroying information relevant to a regulatory

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[39] Specifically, Enforcement suggests the following provision:

> In the event that Seidman becomes an institution-affiliated party . . . to the extent that his responsibilities include the preparation or review of any reports, documents or other information that would be submitted or reviewed by the OTS in the discharge of its regulatory functions, all such reports, documents and other information shall, prior to submission to, or review by the OTS, be independently reviewed by the Board of Directors or a duly appointed committee of the Board, to ensure that all material information and facts have been fully and adequately disclosed.

[40] See In re Bush, Decision and Order, OTS Order No. AP 91-16 (Apr. 18, 1991) (Respondent required to obtain the advice of counsel before accepting a position with an insured depository institution or holding company, and when issues arise that cause him to be uncertain about his fiduciary responsibilities); see also In re Fishbein, Order to Cease and Desist, OTS Order No. AP 92-24 (Mar. 11, 1992) (settlement order requiring special supervision of former outside counsel for Lincoln Savings and Loan Association); In re KPMG Peat Marwick, Opinion and Order, OTS Order No. AP 94-37 (Aug. 9, 1994) (settlement order requiring special supervision of accountants for various failed savings associations).

agency's investigation, engaged in personally dishonest conduct in an effort to obstruct the OTS investigation.[41] Under these circumstances, a cease and desist order with the proposed affirmative conditions will ensure that the Respondent provides the OTS with complete and accurate information necessary to the agency's regulatory responsibilities.

To ensure that the condition is not unduly onerous, it will be limited in duration. Three years after assuming any of the described duties, Seidman will be permitted to request the removal of the condition. Upon a review of the request, the Director will determine whether to eliminate the condition based on his evaluation of such factors as: the extent to which the Respondent has abided by the condition; the record of his conduct at insured depository institutions; and the likelihood of future violations or unsafe and unsound practices in the absence of the condition. In the meantime, the restrictions as now tailored will enable Seidman to participate as an institution-affiliated party, while preserving the OTS's ability to ensure Respondent's compliance.[42]

B. Civil Money Penalties

The Federal Deposit Insurance Act ("FDIA"), as amended by the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, employs a three-tiered penalty structure under which the

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[41] 37 F.3d at 937 ("[Seidman's] personal dishonesty is shown by the undisputed evidence that Seidman asked Risko to forget about the draft of the letter to UJB.")

[42] Enforcement proposed that the condition automatically expire five years after the date of the issuance of today's order. The Acting Director believes the restriction should not be removed in the absence of the review procedure described above.

maximum penalty increases with the seriousness of the conduct upon which the assessment is based.[43] Enforcement seeks second-tier CMPs totalling $280,000 based on Respondent's false and misleading testimony at his deposition (Count II) and his attempts to obstruct an OTS investigation by destroying evidence and by soliciting a witness to destroy evidence and to give false testimony (Count III).[44]

1. Misleading Testimony

Enforcement seeks second-tier CMPs of $130,000 based on the charge that Seidman gave false and misleading testimony during his September 13, 1991 deposition. Enforcement acknowledges that the Third Circuit rejected the Director's finding that Seidman's testimony was intentionally misleading as to material facts and constituted an unsafe and unsound practice.[45] Enforcement further

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[43] 12 U.S.C. § 1818(i)(2)(A)-(D).

[44] As noted above, Enforcement has terminated its request for CMPs of $1.5 million based on Seidman's efforts to obtain a release of his personal guarantees on the UJB loans.

[45] The Third Circuit stated:

> [W]e note our disagreement with the Director's conclusion that Seidman gave deposition testimony that was "intentionally misleading as to material facts concerning Seidman's knowledge of the [Risko] letter's contents and omitted material facts concerning the drafting of the letter." . . . The transcript of Seidman's deposition reveals that the OTS investigator never directly questioned Seidman about the draft of the letter OTS charged him with concealing. Instead the investigator asked only whether Risko and he had discussed OTS's investigation of the circumstances surrounding Seidman's release from the UJB guarantee. Seidman truthfully admitted that he had discussed the topic with Risko "two or three times." . . . The investigator failed to ask Seidman about the initial draft of Risko's letter in

concedes that the agency is obligated to "proceed in accordance with the mandate and the law of the case as established on appeal."[46] Nonetheless, Enforcement argues that the Acting Director may reconsider issues decided by an appeals court where the appellate decision was clearly erroneous and enforcement of its command would work a manifest injustice.

Enforcement argues that Third Circuit's conclusion that Seidman's testimony was not misleading was based on the incorrect belief that there were only two versions of the Risko letter. Enforcement notes that there were at least three versions of the Risko letter: a May 30, 1991 draft, written by Seidman and sent to Risko (OTS Ex. 2 & 15, 1992); a draft incorporating additions by Risko and sent to Seidman on May 31, 1991 (LS Ex. 3, 1992); and the final letter signed by Risko, also dated May 31, 1991 (OTS Ex. 1 and 20, 1992).[47] Enforcement claims that the Third Circuit decision is "clearly erroneous" because the court assessed Seidman's testimony in the context of this factual inaccuracy.

An issue decided by an appellate court constitutes the law of the case and must be followed in all subsequent proceedings. There is support for the proposition that the Acting Director may depart

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> support of the release, who had prepared the letter or what it meant, even though OTS not only knew about the early draft but had secretly obtained a copy of it. (citations omitted).

37 F.3d at 937, n.38.

[46] See e.g., Bankers Trust Co. v. Bethlehem Steel Corp. 761 F.2d 943, 949 (3d Cir. 1985).

[47] References to hearing exhibits will be cited as: OTS Ex. or LS Ex., number of exhibit, year of hearing.

from the law of the case in extraordinary circumstances, such as where the appellate decision is clearly erroneous and, if implemented, would work a manifest injustice.[48] However, even under these authorities, mere doubt or disagreement as to the wisdom of a prior decision will not suffice. "To be 'clearly erroneous,' a decision 'must strike us as more than just maybe wrong or probably wrong; it must . . . be dead wrong.'"[49]

While the Third Circuit may, to a certain extent, have confused the May 30, 1991 and May 31, 1991 drafts,[50] it was cognizant of the fact that there were multiple drafts of the Risko letter.[51] More importantly, the court was fully aware of the primary issue raised by the misleading testimony charge -- did Seidman make materially misleading statements regarding his authorship or his knowledge of the contents of the Risko letter, including drafts of that letter? The court's conclusions regarding Seidman's testimony were based on its findings that the OTS

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[48] Pelletier v. Zweifel, 987 F.2d 716, 718 (11th Cir. 1993), cert. denied 114 S.Ct. 311 (1993); Miles v. Kohli and Kaliher Associates, Ltd., 917 F.2d 235, 241 (6th Cir. 1990); Wheeler v. City of Pleasant Grove, 896 F.2d 1347, 1350 (11th Cir. 1990).

[49] City Public Service Board v. General Electric Co., 935 F.2d 78, 82 (5th Cir. 1991) citing Parts & Electric Motors Inc. v. Sterling Electric, Inc., 866 F.2d 228, 233 (7th Cir. 1988), cert. denied 110 S.Ct 141 (1989).

[50] For example, the court concluded that on September 16, 1991, Seidman destroyed a document that the OTS already possessed. 37 F.3d at 938. This is not correct. When Seidman visited the offices of Poole and Co., the OTS had copies of the May 31, 1991 draft. It did not have copies of the May 30, 1991 draft destroyed by Seidman until Risko provided a copy of the draft on September 25, 1991.

[51] 37 F.3d at 919 ("While drafts were being faxed back and forth between Risko and Seidman, [the OTS examiner] was at Crestmont on other business.")

investigator never directly asked Seidman who had prepared the Risko letter or what the letter meant, and that Seidman truthfully answered all other direct questions. These findings are unaffected by Enforcement's allegation of error.[52]

For these reasons, the Acting Director cannot conclude that the Third Circuit's decision was clearly erroneous and will not depart from the law of the case on the misleading testimony charge.[53] CMPs will not be assessed on this basis.

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[52] The Third Circuit noted that these questions were not asked "even though OTS not only knew about the early draft but had secretly obtained a copy of it." 37 F.3d at 937, n.38. Contrary to Enforcement's allegations of error, it is not entirely clear whether "the early draft" referred to the May 30, 1991 draft or the May 31, 1991 draft. Even if we assume that the Third Circuit incorrectly referred to the May 30, 1991 draft, this is not an error of great significance. Enforcement concedes that it had a copy of the May 31, 1991 draft at the deposition. This draft states across the top margin "Changes are Underlined." Thus, the May 31, 1991 draft clearly refers to a previous drafting attempt and to the contents of that previous attempt. LS Ex. 3, 1992.

[53] Enforcement argues that Respondent's misleading testimony served as one of the factual bases for the Director's legal conclusion that Seidman violated 12 C.F.R. § 512.6 (prohibiting obstructionist conduct). FD at 28. Because the Third Circuit left this conclusion undisturbed (37 F.3d at 936, n.37), Enforcement argues that Respondent's misleading testimony violated OTS regulations and that CMPs may be assessed on this basis.

While the Third Circuit did not question the Director's legal conclusion that Seidman violated 12 C.F.R. § 512.6, it clearly rejected the factual finding that Respondent's testimony was intentionally misleading. 37 F.3d at 937, n.38. In light of this finding, the Acting Director rejects Enforcement's argument. The remaining factual bases supporting this regulatory violation are considered below.

2. Obstruction of OTS Investigation

Enforcement seeks second-tier CMPs of $150,000 based on the allegation that Respondent attempted to obstruct the OTS investigation (Count III). As noted above, the Final Decision remanded CMP issues to the ALJ and instructed him to perform his CMP analysis in accordance with the Rapp methodology. The Acting Director largely agrees with the ALJ's careful and thorough application of the Rapp methodology on this count. Except where specifically noted below, the Acting Director adopts those portions of the 1994 Recommended Decision as if fully restated herein.[54]

Rapp prescribes a five-step analysis to determine the appropriate amount of the CMP. The steps are: first, determination of the appropriate tier of the violation, practice or breach; second, selection of the starting daily dollar amount for computation of the penalty; third, determination of whether the violation, practice or breach is "continuing;" fourth, application of the Federal Financial Institutions Examination Counsel ("FFIEC") factors;[55] and fifth, application of the statutory mitigating factors.

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[54] The evidence on remand addressed only Respondent's financial resources. Seidman, however, argues that the 1992 Final Decision required the resubmission of evidence supporting each element of the CMP assessment, including the underlying misconduct supporting the assessment. We disagree with this reading of the 1992 Final Decision. It was entirely appropriate for the ALJ to rely upon the facts contained in his 1992 Recommended Decision, and revised by the Director's 1992 Final Decision, to resolve issues in this proceeding, other than issues involving Respondent's financial resources.

[55] Interagency Policy Regarding the Assessment of Civil Money Penalties by the Federal Financial institution's Regulatory Agencies, 45 Fed. Reg. 59,423 (1980).

a. Tier Determination

Second-tier penalties of up to $25,000 per day may be imposed against a respondent for violating laws, regulations, agency orders, conditions imposed in writing by an agency, or written agreements between the depository institution and the agency; for recklessly[56] engaging in any unsafe or unsound practice in conducting the affairs of an institution; or for breaching any fiduciary duty.[57] Such conduct must either be part of a pattern of misconduct; cause or be likely to cause more than minimal loss to the institution; or result in pecuniary gain or other benefit to the institution-affiliated party.[58]

As noted above, Respondent's destruction of the telefax original of the May 30, 1991 draft of the Risko letter and solicitation of Risko to destroy evidence and testify falsely during an investigation deposition violated 12 C.F.R. § 512.6. Accordingly, Seidman's conduct satisfied the criteria for second-tier CMPs under 12 U.S.C. § 1818(i)(2)(B)(i)(I). Seidman's obstructionist conduct also constituted an unsafe and unsound practice for the reasons stated in the Discussion at IV.A. His repeated efforts to persuade Risko to destroy documents and to

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[56] Reckless conduct is highly unreasonable conduct, involving not merely simple, or even excusable negligence, but "an extreme departure from the standards of ordinary care, and which presents a danger . . . that is either known to the defendant or that is so obvious that the actor must have been aware of it." In re Simpson at 17.

[57] 12 U.S.C. § 1818(i)(2)(B)(i).

[58] 12 U.S.C. § 1818(i)(2)(B)(ii).

testify in a misleading fashion demonstrated personal dishonesty,[59] as did his intentional destruction of material evidence. These actions were in flagrant disregard of his duty as Chairman of Crestmont to provide accurate and reliable information to the OTS in the course of an examination and investigation. Respondent obviously knew of the risk of harm or other damage that his conduct would cause to the OTS, yet he was plainly indifferent to those consequences. His actions thereby demonstrate recklessness and satisfy the criteria for second-tier CMPs under 12 U.S.C. § 1818(i)(2)(B)(i)(II).

The Acting Director agrees with the ALJ's finding that Respondent's obstructionist conduct was "part of a pattern of misconduct" satisfying the elements required for a second-tier CMP under 12 U.S.C. § 1818(i)(2)(B)(ii)(I).[60] The record clearly indicates that Respondent engaged in repeated attempts over a two-month period to persuade Risko to testify in a misleading fashion before the OTS, to convince Risko and Poole to destroy material documents and, when these efforts failed, to destroy relevant documents himself.

Based on these findings, the Acting Director agrees that second-tier CMPs may be assessed against Respondent.

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[59] See 37 F.3d at 937.

[60] RD-1994 at 46. The Third Circuit decision, however, precludes the ALJ's alternate conclusion that second-tier CMPs are appropriate under 12 U.S.C. § 1818(i)(2)(B)(ii)(III). Respondent's violation or practice did not result in a pecuniary gain or other benefit to him. See 37 F.3d at 938 and discussion below.

b. The Starting Dollar Amount

The Acting Director adopts the ALJ's conclusion that $12,500 (one-half of the maximum daily penalty amount) is the appropriate starting dollar amount for CMPs based on Respondent's attempts to obstruct an OTS investigation.[61]

c. Continuing Violation

The OTS uses an objective approach to determine whether a violation is continuing. The test is whether: (a) the detrimental effect of the violation continued; and (b) the effect could have been undone or cured by the respondent taking or refraining from a particular action.[62]

The Acting Director does not adopt the ALJ's finding that Respondent's obstructionist conduct constituted a continuing violation from September 16 through 25, 1992.[63] As the Third Circuit concluded, Risko and Poole rebuffed Respondent's attempts to persuade Risko to testify falsely and to convince Risko and Poole to destroy documents.[64] Further, the record contains no evidence that Respondent's September 16th actions carried with them any continuing meaning -- e.g., that Respondent had threatened Risko or Poole if they failed to carry out his wishes or that

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[61] RD-1994 at 46. See RD-1994 at 26, citing In re Rapp at 40-42.

[62] In re Rapp at 42-43; In re Paul, OTS Order No AP 93-104, at 40 (Dec. 15, 1993).

[63] RD-1994 at 46-47.

[64] 37 F.3d at 938.

Respondent otherwise possessed some leverage over them. Nor is there any evidence that Risko and Poole felt themselves to be under some kind of continuing obligation after September 16 to carry out Respondent's requests.

Additionally, Respondent's destruction of the May 30th draft did not impede the OTS investigation, nor did this act benefit Respondent during the course of the investigation. Risko had retained copies of the document Seidman destroyed and provided these copies to investigators at the same time that he otherwise would have provided the original draft. Under these circumstances, the Acting Director cannot conclude that Respondent's actions resulted in any continuing detrimental effect.

Accordingly, CMPs will be assessed for violations that occurred on a single day at the starting amount of $12,500.[65]

d. Application of the FFIEC Factors

The FFIEC statement presents thirteen aggravating and mitigating factors to apply to the starting amount to determine the appropriate penalty. The Acting Director agrees, for the reasons stated in the ALJ's 1994 Recommended Decision, that the starting amount should be increased for the following factors in the listed

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[65] Enforcement's Notice assessed CMPs for misconduct occurring from September 15 through 26, 1991. While Respondent engaged in prior misconduct that supports a finding that he engaged in a pattern of violations, Seidman's destruction of evidence and improper solicitation of witnesses occurred only on one day within the assessment period, September 16, 1991. CMPs may be imposed only for this date.

amounts: willfulness of the violation (25%); failure to cooperate (15%); concealment of the violation (25%); and tendency to create an unsafe and unsound practice or breach of fiduciary duty (15%).[66] The Acting Director also agrees that the penalty amount should be reduced by 10% because there is no history of previous violations, and that four FFIEC factors -- restitution, previous criticism, compliance program and preventative measures -- are inapplicable. The Acting Director does not adopt the ALJ's recommendations on the following four FFIEC factors:

Frequency. The ALJ increased CMPs by 10%, the maximum permitted under this factor, because Respondent's efforts to impede and obstruct the OTS investigation occurred over a two-month period. Seidman's efforts to impede occurred on two dates during this period - an undisclosed date in August 1991 and September 16, 1991. Recognizing that violations should not be repeated and should be terminated as early as possible, the Acting Director believes that it is appropriate to increase the CMPs under this factor, but not by the maximum amount, because the efforts to impede were limited to two occasions. Accordingly, the Acting Director will increase the penalty by only 5%.

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[66] The ALJ's discussion of this last FFIEC factor warrants a slight revision in light of the Third Circuit's decision. The ALJ, quoting the 1992 Final Decision at 28, found that Respondent's misconduct was an unsafe and sound practice because it "'pose[d] as a natural consequence [an] abnormal risk of loss or damage to the institution, the very essence of an unsafe or unsound practice.'" RD-1994 at 49. The Third Circuit, however, found that Respondent's imprudent acts were an unsafe or unsound practice because they posed an abnormal risk of damage to the OTS by making it unable to fulfill its regulatory function. 37 F.3d 937 ("Such behavior, if continued, strikes at the heart of the regulatory function.") The ALJ's discussion is adopted with this one revision.

Continuation. The ALJ increased CMPs by 15% based on "continuation of the violation."[67] We have said in the past that this factor was intended to deter continuing violations, but we also have said that the focus of this factor is more subjective than the objective tests imposed in the third step of the Rapp analysis. This factor requires examination of the Respondent's conduct once he became aware of a violation. If a Respondent makes no effort to correct a violation after he has become aware of it, this constitutes a serious indicium of culpability and warrants an increase. On the other hand, immediate correction of a violation indicates good faith and would merit a small reduction.[68]

In a case such as this, the absence of a continuing violation under the third step of the Rapp analysis, as discussed above, does not necessarily preclude the application of this factor. In an exercise of discretion in this case, however, the Acting Director will not increase the CMPs on the basis of this factor.

Harm to the institution. This factor addresses any threat of or actual loss or other harm to the institution, including harm to public confidence in the institution, and the degree of such harm. The ALJ found that Respondent's cover-up of his self dealing harmed the institution and recommended that CMPs be increased by 25%, the maximum amount for this factor.[69]

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[67] RD-1994 at 47 ("Respondent was clearly aware that he was attempting to deprive the OTS of relevant evidence, and yet he continued his illicit obstructionist activities.")

[68] In re Paul at 44.

[69] RD-1994 at 48.

Because the Third Circuit found that the underlying self-dealing allegation was unsupported, the Acting Director may not adopt the ALJ's finding that Seidman's actions caused tangible harm to Crestmont. However, the sanctions for conduct that clearly is both personally dishonest and unsafe and unsound should not be diminished because the conduct did not cause direct harm to an insured institution. Seidman's attempts to prevent the agency from fully exploring allegations of potential misconduct posed the risk that unsafe and unsound practices, regulatory violations and fiduciary breaches would remain uninvestigated and would continue unremedied. Accordingly, although the Acting Director will not increase the penalty based on harm to the institution, neither does he think it appropriate to decrease the penalty based on these facts.

Gain to the Respondent. The ALJ recommended an increase of 10% based on the benefits received by Respondent as a result of his misconduct. The ALJ found that Seidman benefitted by depriving the OTS of reliable and material evidence, thwarting the OTS enforcement action and hampering the prompt resolution of the self-dealing charges.[70] The record does not show that Respondent, in fact, received any benefit from his efforts. CMPs will not be adjusted for this factor.

e. Statutory Mitigating Factors

The FDIA requires consideration of five mitigating factors: size of a respondent's financial resources, respondent's good faith, the gravity of the violation, the history of previous

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[70] RD-1994 at 48, citing FD at 28.

violations, and such other factors that justice may require.[71] In remanding the CMP portion of the proceeding, the Director set forth the allocations of the burden of proof on the statutory mitigating factors, including the size of Respondent's financial resources. FD at 32-35.

(i) Gravity, History and Good Faith

The Acting Director adopts the ALJ's findings and conclusions that Respondent's attempts to obstruct the OTS investigation reveal an utter lack of good faith and, therefore, no reduction in the penalty amount for this factor is appropriate.[72]

(ii) Size of Respondent's Financial Resources

On the issue of a respondent's financial condition, Enforcement must produce some evidence on the size of the respondent's financial resources.[73] Once this minimal burden has been met, the respondent has the burden of persuasion to show that he lacks the financial resources to pay the assessed penalty. If a respondent fails to satisfy his burden of persuasion on this

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[71] 12 U.S.C. § 1818(i)(2)(G).

[72] RD-1994 at 49-50. The ALJ correctly noted that no additional consideration of "gravity of the violation" or "history of prior violations" is required under the Rapp methodology. These factors are incorporated in the FFIEC factors.

[73] FD at 33. Alternatively, the minimal burden may be met by showing that: (1) Enforcement requested a respondent to provide information on current financial condition; (2) the respondent failed to produce any information on financial resources or produced inaccurate or misleading information; and (3) as a result, the record does not present a proper basis to assess the respondent's financial condition. FD at 34-35.

critical issue, the decisionmaker may draw an adverse inference that the respondent can pay the penalty. FD at 34.

The Acting Director adopts the ALJ's full and detailed discussion on the evidence each party adduced at the hearing to satisfy their respective burdens of production and persuasion. RD-1994 at 50-67. The Acting Director also agrees with the ALJ's conclusion that Enforcement satisfied its burden of production, and that Respondent failed to sustain his burden of persuasion on the issue of the size of his financial resources. The ALJ's findings and conclusions are summarized briefly below.

Enforcement's Burden of Production. Enforcement entered into evidence Respondent's most recent unaudited "Statements of Assets and Liabilities at Current Value," as of June 30, 1990 (OTS Ex. 19, 1993) and as of December 31, 1990 (OTS Ex. 3, 1993). Seidman testified that his December 31, 1990 financial statement had not been updated. Seidman, I: 47-48 (1993). The statements were prepared for Respondent by his accountant, as "compilations," reports of figures provided by Respondent with no documentation, or independent substantiation or verification by the preparer (OTS Exs. 3 & 19, 1993; Axelrod, III: 103-106 (1993)). The December 31, 1990 financial statement reflects Respondent's opinion that as of that date, Respondent had a net worth of $1.4 million (OTS Ex. 3, 1993).

The ALJ determined upon examination of the financial statements and testimony during the hearing "that neither of the documents displayed the veracity to be taken seriously as a true financial statement." RD-1994 at 52. The ALJ therefore concluded that these statements were of limited utility in even establishing

a starting point to determine Respondent's current financial condition.

Enforcement also entered into evidence a draft of Respondent's 1992 joint federal income tax return (OTS Ex. 1, 1993), the most recent tax return submitted by Respondent in response to Enforcement's discovery request. The ALJ concluded that this document was inaccurate because Respondent subsequently advised his accountant of other income that was not included on the draft return; and because Respondent and his wife subsequently made a decision to file separate tax returns. RD-1994 at 58. The ALJ concluded, based on the testimony adduced at trial, that the tax returns, by themselves, were inadequate for determining the fair market value of an asset. RD-1994 at 59. Enforcement also attempted to provide evidence on Respondent's financial condition by eliciting testimony from Respondent. Seidman, I & II: 25-250. The ALJ concluded that Seidman's testimony was vague, incomplete, self-serving, without corroboration and of dubious reliability. RD-1994 at 52-53, 56-68.

Therefore, the Acting Director concurs with the ALJ in concluding that Enforcement satisfied its burden of producing some evidence on the size of Respondent's financial resources.[74]

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[74] The Acting Director also agrees with the ALJ's conclusion that Enforcement satisfied the alternative minimum burden of going forward with evidence on the size of Respondent's financial resources. RD-1994 at 51 & 56. Enforcement sought to have Respondent produce detailed current financial information in the remand proceedings. Respondent produced this information only a few days before the hearing began, pursuant to court order. Respondent and his accountant failed to produce certain documents responsive to Enforcement's document request, such as the December 31, 1992 financial statement for El-Jay Venture Associates. RD-1994 at 59. The materials submitted by Respondent were not useful

Respondent's Burden of Persuasion. The ALJ concluded, and the Acting Director agrees, that Respondent failed to sustain his burden of persuasion on the size of his financial resources.

At the remand hearing, Respondent attempted to show that he has a limited net worth and is unable to pay any CMPs. The ALJ was unimpressed by the evidence Respondent presented at the hearing to support his burden of persuasion. The ALJ stated:

> Respondent testified at the remand hearing regarding his assets and liabilities to demonstrate his modest net worth, although his testimony was not clear as to the precise size of his net worth. Respondent also presented the testimony of Axelrod, his accountant since 1978, to corroborate his testimony about his purported assets and liabilities. Finally, Brosterman, Respondent's former counsel, testified as to the nature and volume of documents produced prior to the first administrative hearing. Respondent also relied on his production of documents both at that time and shortly before the hearing on remand to sustain his burden. According to Respondent, these documents, not one of which was offered into evidence by Respondent, corroborated his testimony and that [Enforcement] had the affirmative responsibility to introduce any evidence from these documents to refute Respondent's testimony on the size of his financial resources.

Id. at 56-57 (citations omitted).

It is not enough for Respondent merely to present evidence about his financial condition. Respondent has the burden of persuading the trier of fact that he does not have the resources to

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in determining the value of assets and Respondent's testimony about his financial condition was self-serving and of questionable reliability. Therefore, the record is inadequate to properly assess Respondent's financial condition.

pay the assessed penalty, information uniquely in his control.[75] See FD at 34; Stanley v. Board of Governors, 940 F.2d 267, 274 (7th Cir. 1991). As the ALJ correctly noted, "the mere fact that Respondent's testimony is uncontradicted does not require the trier of fact to accept it, particularly where there is a failure to produce corroborative evidence." RD-1994 at 53.[76]

The ALJ was critical of Respondent's testimony. He found:

> Respondent's credibility in these proceedings has already been seriously impeached. . . . His testimony in the remand proceeding contained numerous contradictions and evasions, and little corroboration. . . . Respondent provided no corroboration, either documentary or testimonial, for his subjective estimates of asset values . . . Respondent also testified at length about his obligation to repay certain obligations to First Fidelity in 1992, but provided no documents or other corroborating information to support his testimony that the First Fidelity obligation had to be paid at that time and in the manner described by Respondent.[77]

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[75] In his Exceptions to the 1994 Recommended Decision, Respondent claims that he is being treated unfairly by the OTS vis a vis respondents in other OTS CMP cases. Respondent contends that Enforcement failed to produce a witness to testify about the application of the Rapp methodology, as was done in In re Paul. Respondent claims that this deprived him of the opportunity to cross examine Enforcement's case against him. However, in In re Paul, the Acting Director criticized the use of an expert witness on the determination of penalty amounts and found such testimony to be of marginal value since the application of the Rapp analysis involves legal conclusions, not factual issues. In re Paul, at 32-33. This exception is denied.

[76] See Geiger v. Commissioner Internal Revenue, 440 F.2d 688, 689 (9th Cir.), cert. denied, 404 U.S. 851 (1971); Glimco v. Commissioner Internal Revenue, 397 F.2d 537, 540-41 (7th Cir.), cert. denied, 393 U.S. 981 (1968); Tatum v. Tatum, 241 F.2d 401, 408 (9th Cir. 1957).

[77] Id. at 57-60. The ALJ also found that Respondent substantially overstated his liabilities by including contingent as well as direct liabilities in determining his net worth. RD-1994 at 60. Seidman testified as to the size of his various contingent liabilities. Seidman I: 155-56 and III: 243-248 (1994). However,

Contrary to Respondent's assertions, Axelrod, Respondent's accountant, does not provide any reliable corroboration of Seidman's testimony on the value of Respondent's assets and liabilities. Axelrod testified that his information on Seidman's assets and liabilities was "to a large extent" obtained from Seidman, and not by any independent analysis, audit or review. (Axelrod, III: 102-06 (1993)). In addition, Brosterman's testimony concerning the August-September 1991, production of documents does not corroborate Seidman's testimony on the value of his assets and liabilities at the time of the remand hearing. Finally, Seidman makes much of the volume of documents produced to Enforcement, yet he did not offer any documents into evidence to corroborate his testimony.

Therefore, the Acting Director concurs with the ALJ's conclusion that Respondent failed to satisfy his burden of demonstrating that he lacked the resources to pay the assessed penalty. Enforcement is, thus, entitled to an adverse inference that Seidman can pay any penalty assessed against him. Dazzio v. FDIC, 970 F.2d 71, 78 (5th Cir. 1992).[78]

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his testimony was not clear as to the size of his net worth (RD-1994 at 57), so his testimony is of little value.

[78] Respondent excepts to numerous findings of fact made by the ALJ in the 1994 Recommended Decision. The vast majority of these exceptions reflect a disagreement with the ALJ's determination that Seidman's testimony on his financial resources was not credible, or a misunderstanding of Enforcement's initial burden of introducing evidence on financial resources (i.e., Respondent argues that OTS possessed, but failed to introduce, additional documentary evidence supporting matters relating to specified assets). These exceptions are baseless and are rejected.

Respondent's other exceptions assert that the ALJ made incorrect findings regarding the nature of Seidman's ownership

Additionally, the ALJ estimated Respondent's financial status based on the evidence, albeit incomplete and of questionable reliability. The ALJ found that there was substantial evidence in the record that Respondent cashed in IRA accounts[79] in 1992 containing Crestmont stock worth approximately $500,000; exercised stock options to buy Crestmont stock with a market value of $330,720, at a cost of $48,250;[80] sold Crestmont stock to his children's educational trust for $40,500 used to meet legal expenses; and "swapped" cash-producing assets with a ready cash equivalent for a "mess of porridge" consisting of partnership

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interest in, and the proper valuation of, specific selected assets and liabilities. Even if these remaining exceptions were accepted as well-founded, the resulting modifications to the ALJ's findings of fact would not alter the Acting Director's conclusions that Respondent failed to meet his burden of persuasion regarding the extent of his financial assets.

[79] Respondent claims in his Exceptions to the 1994 Recommended Decision that the IRA was not subject to attachment under New Jersey Code § 25:2-1. The Acting Director rejects Respondent's exception for two reasons. First, the subject assets have already been removed from the IRA account and are no longer subject to any trust. Second, Respondent is simply wrong in his assertion that the cited statutory provision would protect assets held in an IRA from creditors. The provision states that funds held in trust for the use of the person who created the trust are void as to creditors, i.e., that creditors may pierce the trust to get at its assets. See Aronsohn & Springstead v. Weissman, 230 N.J. Super. 63, 552 A.2d 649 (N.J. Super A.D.), cert. denied, 117 N.J. 36, 563 A.2d 808 (1989) (Keogh retirement plan maintained by self-employed professional for his own exclusive account could be levied upon by judgment creditors).

[80] Seidman, I at 52-58 (1993). The value stated is for unencumbered stock, which presumably would be more than for encumbered stock. Apparently, as a condition for permitting the transfer of the shares from Respondent to his wife, the stock was restricted (i.e., further transfer of the stock was limited for two or three years). It is not clear whether the same restriction would have been imposed if Seidman had exercised the option and retained the shares. Seidman claims the value of the restricted shares was only $96,775. Respondent's Exceptions at 7.

interests and real estate with what Respondent considers minimal, if any, value.[81]

From this balance of roughly $823,000, the ALJ reasonably assumed that Respondent (or his wife) paid a flat fee of $100,000 to counsel for appellate work, and roughly a similar amount to trial counsel for trial work, and still a similar amount for other additional or other legal expenses; and $100,000 to First Fidelity. (RD-1994 at 68). This left a balance of roughly $423,000[82] unaccounted for, in addition to the value of Respondent's retained real estate and partnership interests. Based on these estimates, the ALJ concluded that Respondent's financial condition should permit him to pay an assessment at least approaching that amount.[83]

In addition to the considerations addressed by the ALJ, the Acting Director notes that Seidman is capable of earning a

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[81] RD-1994 at 68, See also RD-1994 at 14, 17-21, 62-65.

[82] In reducing the estimated value of Seidman's assets by the amount Seidman claims were paid or were owing for legal fees relating to this proceeding, the ALJ distinguished the FDIC decisions in In re Lowe, FDIC No. 82-21k, 1 FDIC Enforcement Decisions and Orders (P-H) para. 5153 (Apr. 16, 1990), aff'd, Lowe v. FDIC, 958 F.2d 1526 (11th Cir. 1992), and Fitzpatrick v. FDIC, 765 F.2d 569, 578 (6th Cir. 1985). These cases indicate that it is inappropriate to limit CMP assessments to legal fees paid. The ALJ found that here legal fees were being used indirectly to measure Respondent's financial capacity and not as a direct measure of the amount of CMPs to be assessed. The Acting Director neither endorses nor contradicts the ALJ's analysis of this issue since it does not affect the outcome of this case. The Acting Director will reserve discussion of the role of legal fees in assessing CMPs for another proceeding.

[83] RD-1994 at 68. See also RD-1994 at 22, 59-60, 61-62.

substantial minimum annual salary of $70,000 - $100,000.[84] Based on these expected earnings and Respondent's financial condition, as estimated by the ALJ,[85] the Acting Director believes that Seidman is able to pay the CMPs assessed in today's decision. Even if this were not the case, Enforcement is entitled to an adverse inference that Seidman can pay the penalty assessed against him based on his failure to satisfy his burden of demonstrating a lack of financial resources.

For the reasons set forth above, the Acting Director has determined that no mitigation based on the size of Respondent's financial resources is appropriate.

(iii) Other Factors That Justice May Require

As to "other factors that justice may require," the ALJ considered the effect of the removal and prohibition order and attempted to estimate the size of Respondent's financial resources on the basis of the incomplete data presented at the hearing. The removal and prohibition order is no longer at issue[86] and the

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[84] Seidman, I: 25, 207 (1994); and Seidman, III: 205-04 (1994).

[85] The ALJ's estimate of $423,000 may overstate some amounts. In addition to the valuation for unencumbered stock noted above, the ALJ did not consider federal tax penalties of $49,706 payable for premature withdrawal of Seidman's IRA (OTS Ex. 3 (1993), and may have overstated or double-counted amounts received in return for Seidman's transfer of Crestmont stock to his children's educational trust. Even with these adjustments, however, the revised estimate substantially exceeds the total penalty assessed today.

[86] Moreover, the imposition of a removal and prohibition sanction, in and of itself, is not a mitigating factor to be considered is assessing CMPs. While removal and prohibition may

financial resources are discussed above. The Acting Director finds that no other factors warrant mitigation.

f. Calculation

Based on the above discussion, the starting amount of $12,500 will be increased by eighty-five percent (85%) to $23,125 to reflect the FFIEC aggravating factors. The Acting Director will reduce this amount by ten percent (10%) to $20,812.50 to reflect the FFIEC mitigating factors. No statutory mitigating factors are present. Accordingly, the Acting Director will impose a second-tier penalty of $20,812.50.

V. CONCLUSION

For the reasons set forth above, the Acting Director will issue: (1) An order directing Respondent to cease and desist from engaging in unsafe and unsound banking practices or regulatory violations and imposing specified limitations and affirmative actions requiring supervision by others if Respondent participates in the affairs of depository institutions subject to OTS jurisdiction in the future; and (2) An order directing Seidman to pay a CMP of $20,812.50.

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affect the future earnings of a respondent and may be relevant to the calculation of CMPs, this matter is properly considered under the mitigating factor -- size of a respondent's financial resources. See e.g., In re Brannan, FDIC 91-37k, 1 FDIC Enforcement Decisions and Orders (P-H) para. 5176, at A-1967 (Apr. 14, 1992); In re ***, [Bound Volume 1] FDIC Enforcement Decisions and Orders (P-H) para. 5082, at A-1009 and n.21 (Feb. 2, 1987).

O R D E R

Upon consideration of the entire record in this matter, including the Recommended Decision of the Administrative Law Judge dated February 2, 1994, the exceptions to this Recommended Decision filed by Enforcement Counsel and by Respondent Seidman, and Enforcement Counsel's reply to Respondent's exceptions, the decision of the United States Court of Appeals for the Third Circuit dated September 14, 1994 remanding the proceeding to the Acting Director, and the parties' submissions on remand to the Acting Director, and for the reasons set forth in the accompanying Decision:

The Acting Director, pursuant to his authority under 12 U.S.C. § 1818, finds that: Lawrence B. Seidman, in his former capacity as Chairman of the Board and Director of Crestmont, was an institution-affiliated party of Crestmont who violated OTS regulations at 12 C.F.R. § 512.6 (1991) and engaged in unsafe and unsound practices in conducting the business of this insured depository institution. Accordingly, grounds exist under 12 U.S.C. 1818(b) to require Seidman to cease and desist from these actions, to place limitations on Seidman's activities and functions, and to require Seidman to take affirmative action to correct or remedy the conditions resulting from these violations and practices.

The Acting Director further finds, pursuant to his authority under 12 U.S.C. § 1818(i), that Respondent violated a regulation and recklessly engaged in unsafe and unsound practices in conducting the affairs of Crestmont, and that the regulatory violation and unsafe and unsound practices were part of a pattern of misconduct. Accordingly, the Acting Director is authorized to impose second tier civil money penalties under 12 U.S.C. §

1818(i)(2)(B) for the violation and practices. After consideration of factors in aggravation and in mitigation of Respondent's conduct, as fully set forth in the accompanying Decision, a civil money penalty is imposed in the amount of $20,812.50.

IT IS, THEREFORE, HEREBY ORDERED that:

1. Enforcement's motion to strike exhibits attached to Respondent's exceptions is denied.

2. Enforcement's motion for leave to file a brief addressing the Final Decision in In re Lopez, OTS Order No. AP 94-23 (May 17, 1994) is denied.

3. All charges against John Bailey specified in the "Notice of Charges and Hearing; Notice of Intention to Remove and Prohibit Lawrence Seidman; Notice of Assessment of Civil Money Penalties" issued October 30, 1991 are dismissed.

4. Paragraphs 1 through 3 of this Order are effective immediately.

IT IS FURTHER ORDERED that:

5. Respondent Seidman shall cease and desist from any attempts to hinder the OTS in the discharge of its regulatory responsibilities, including the conduct of any OTS examination or investigation.

6. Respondent Seidman shall cease and desist from any attempts to induce any person to withhold material information from

the OTS related to the performance of its regulatory responsibilities.

7. If Respondent Seidman becomes an institution-affiliated party of any insured depository institution subject to the jurisdiction of the OTS, to the extent that his responsibilities include the preparation or review of any reports, documents or other information that would be submitted or reviewed by the OTS in the discharge of its regulatory functions, all such reports, documents and other information shall, prior to submission to, or review by the OTS, be independently reviewed by the Board of Directors or a duly appointed committee of the Board to ensure that all material information and facts have been fully and adequately disclosed.

8. Three years after assuming any of the duties described in paragraph 7 above, Respondent Seidman may file a written request with the Director for the removal of the condition imposed by that paragraph. The conditions for granting any such request are described in the attached Decision.

9. Paragraphs 5 through 8 of this Order are effective upon the expiration of thirty (30) days after the date of service of this Order upon Respondent Seidman and shall remain effective and enforceable, except to the extent that, and until such time as, any provisions of this Order shall have been stayed, modified, terminated or set aside by action of the Director or a reviewing court.

IT IS FURTHER ORDERED that:

10. After consideration of factors in aggravation and in mitigation of Respondent's conduct, as fully set forth in the accompanying Decision, Respondent Seidman shall pay a civil money penalty of $20,812.50.

11. Respondent Seidman shall make full payment of the civil money penalty assessed herein within sixty days after the date of service of this Order upon him. Remittance of the penalty shall be payable to the Treasurer of the United States and delivered to:

Controllers' Division
Office of Thrift Supervision
U.S. Treasury Department
1700 G Street, N.W.
Washington, D.C. 20552

12. The provisions of paragraphs 10 and 11 of this Order are effective immediately upon service upon Respondent Seidman and shall remain effective and enforceable, except to the extent that, and until such time as, any provisions of this Order shall have been stayed, modified, terminated or set aside by action of the Director or a reviewing court, or in accordance with any applicable statute or regulation.

IT IS FURTHER ORDERED that:

13. Respondent Seidman is hereby notified that he has the right to appeal this Final Decision and Order to the United States Court of Appeals within 30 days after the date of service of such Final Decision and Order. 12 U.S.C. § 1818(h).

THE OFFICE OF THRIFT SUPERVISION

Dated: November 8, 1995

By: Jonathan L. Fiechter
Jonathan L. Fiechter
Acting Director

bcc: John F. Downey
Angelo A. Vigna

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of November, 1995, a copy of the foregoing OTS Order No. AP 95-35 was served by Federal Express mail on the following:

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Helene Brecher

Helene Brecher, Secretary to the
Office of Thrift Supervision
for Adjudicatory Proceedings