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

In the Matter of:	)	
	)	
David Julian	)	
Former Chief Auditor	)	AA-EC-2019-71
	)	
Paul McLinko	)	
Former Executive Audit Director	)	AA-EC-2019-72
	)	
Wells Fargo Bank, N.A.	)	
Sioux Falls, South Dakota	)	

FINAL DECISION OF THE COMPTROLLER OF THE CURRENCY

I. INTRODUCTION

This is a Final Decision in an enforcement action brought by Enforcement Counsel ("EC") of the Office of the Comptroller of the Currency ("OCC") against David Julian, former Chief Auditor at Wells Fargo Bank, N.A. ("Bank"), and Paul McLinko, former Executive Audit Director at the Bank (collectively, "Respondents"). This decision accompanies and incorporates parts of the Final Decision against Claudia Russ Anderson, former Group Risk Officer at the Community Bank. ("CRA Dec.").

This case stems from one of the largest scandals in banking history. *See infra* Parts VI.A.3-4; CRA Dec. at I, VI.A. Under pressure to meet unreasonable sales goals, thousands of employees at Wells Fargo engaged in a collection of practices subsequently referred to as "sales practices misconduct" ("SPM"). These practices included opening millions of unauthorized customer accounts, transferring funds without customer consent, lying to customers that certain products were available only as a package with other products, enrolling customers in online banking and bill-pay without their consent, delaying the opening of requested accounts and products until the next sales reporting period, and falsifying customers' personal information. *See* CRA Dec. at VI.A.1. SPM harmed customers' credit scores and damaged customers' trust in the banking system, while the Bank pocketed millions in customer fees to which it was not entitled. *Id.* In short, it was exactly the kind of wrongdoing that threatens the OCC's mission of maintaining a safe, sound, and fair banking system.

Enforcement Counsel filed a Notice of Charges ("Notice") on January 23, 2020, against several senior bankers at Wells Fargo, including Julian and McLinko. The Notice alleged that Julian and McLinko recklessly engaged in unsafe or unsound practices and breached their fiduciary duties to the Bank. Notice at 82, 92. Pursuant to 12 U.S.C. § 1818(i) and (b), the Notice

sought a $2 million civil money penalty ("CMP") against Julian, a $500,000 CMP against McLinko, and a cease-and-desist order against both. *Id.* at 1-2.

Following discovery practice and motions for summary disposition, the case went to a 38-day hearing. On December 5, 2022, Administrative Law Judge ("ALJ") Christopher McNeil issued two Recommended Decisions ("RDs") against Julian and McLinko, which recommended that the Comptroller of the Currency ("Comptroller") issue a prohibition order—or, alternatively, a cease-and-desist order—and a $7 million CMP against Julian, Julian RD at 8, and a cease-and-desist order and $1.5 million CMP against McLinko, McLinko RD at 7. Following submission of exceptions briefing from Respondents and Enforcement Counsel, the case was submitted to the Comptroller for a final decision.

Upon careful review of the entire administrative record and the arguments raised by Respondents and Enforcement Counsel in their exceptions, and for the reasons set forth in this decision, the Comptroller adopts in part the ALJ's recommendations. As detailed below, the Comptroller finds that from 2013 to 2016 (the "relevant period"), Julian failed to plan and mange audit activity that would detect and document SPM, failed to adequately escalate the SPM problem, and failed to incorporate risk events in incentive compensation recommendations. *See infra* Part VI. The Comptroller finds that each of those instances of misconduct constituted unsafe or unsound banking practices pursuant to 12 U.S.C. §§ 1818(i)(2)(B) and 1818(b)(1). *See infra* Parts VI-VII. The Comptroller finds that those unsafe or unsound practice were reckless under § 1818(i)(2)(B). *See infra* Part VI. The Comptroller also finds that Julian's misconduct had the requisite effect under § 1818(i)(2)(B)(ii). *See infra* Part VI. Accordingly, the Comptroller hereby enters a cease-and-desist order and assesses a $7 million CMP against Julian.

In addition, the Comptroller finds that during the relevant period, McLinko failed to plan and manage audit activity that would detect and document SPM, failed to adequately escalate the SPM problem, and failed to maintain independence from the Community Bank. *See infra* Part VI. The Comptroller finds that each of those instances of misconduct constituted unsafe or unsound banking practices pursuant to 12 U.S.C. §§ 1818(i)(2)(B) and 1818(b)(1). *See infra* Parts VI-VII. The Comptroller finds that those unsafe or unsound practices were reckless under § 1818(i)(2)(B). *See infra* Part VI. The Comptroller also finds that McLinko's misconduct had the requisite effect under § 1818(i)(2)(B)(ii). *See infra* Part VI. Accordingly, the Comptroller hereby enters a cease-and-desist order and assesses a $1.5 million CMP against McLinko.

II. STATEMENT OF JURISDICTION

At all times relevant to the facts alleged in the Notice of Charges, the Bank was a national banking association within the meaning of 12 U.S.C. § 1813(q)(1)(A) and an "insured depository institution" as defined in § 1813(c)(2), and Julian and McLinko were "institution-affiliated parties" ("IAPs") as defined in § 1813(u).[1] Pursuant to § 1813(q), the OCC is the "appropriate Federal banking agency" with jurisdiction over the Bank and its IAPs, and the OCC is authorized to initiate and maintain this enforcement action against Respondent.

[1] Julian argues that he was not the Bank's Chief Auditor after June 2015 and thus cannot be held liable by the OCC for any conduct after June 2015. *See* Julian's Brief in Support of Exceptions to Recommended Decision ("Julian Br."), Apr. 14, 2023, at 391-96. However, Julian admits that he was the Bank's Chief Auditor from June 2013 to June 2015. *See id.* at 393. The Comptroller finds that that admission alone is sufficient to establish the OCC's jurisdiction over Julian. *See* 12 U.S.C. § 1818(i)(3). Further, Julian merely needs to be a "director, officer, employee, or controlling stockholder" of the Bank to be an IAP. 12 U.S.C. § 1813(u)(1). Julian was paid by the Bank from 2010 through the relevant period, establishing that he was, at least, an employee of the Bank and thus an IAP, regardless of his formal title. *See* OCC Exh. 1941. Moreover, the Comptroller finds that Julian was participating in the conduct of the affairs of the Bank and is therefore an IAP. *See* 12 U.S.C. § 1813(u)(3); *see also infra* Part XI.C.

III. PROCEDURAL HISTORY

A. Notice of Charges and Affirmative Defenses

As noted above, Enforcement Counsel filed a Notice of Charges against Julian and McLinko on January 23, 2020, alleging that they recklessly engaged in unsafe or unsound practices and breached their fiduciary duties to the Bank. The Notice alleged that Julian failed to identify and escalate the SPM problem and that McLinko failed to identify and escalate the SPM problem in audit reports. Notice at 87, 95.

Julian and McLinko filed their Answers on February 12, 2020, along with requests for a hearing pursuant to 12 C.F.R. § 19.19(a).[2] Their Answers included several affirmative defenses that argued, *inter alia*, that the OCC's action was barred by the statute of limitations, estoppel, waiver, Article III, and the due process clause of the U.S. Constitution. Julian Ans. at 62-63; McLinko Ans. at 54-56. Enforcement Counsel moved to strike Respondents' affirmative defenses, and the ALJ issued an order striking several of Julian and McLinko's defenses. Order Regarding EC's Motion to Strike Respondents' Affirmative Defenses at 9, Apr. 1, 2020; *see also infra* Part IX.D. On July 16, 2020, the ALJ ordered Respondents to file amended answers "so as to comply with OCC Uniform Rules 12 C.F.R. 19.19(b)." Order Regarding EC's Motion Concerning the Answers of Respondents Strother, Julian and McLinko at 17, July 16, 2020. Julian and McLinko filed their Amended Answers on August 7, 2020.

B. Summary Disposition Proceedings

On May 12, 2020, Respondents filed three joint motions for summary disposition based on their remaining affirmative defenses. After receiving Enforcement Counsel's opposition to the

[2] The Comptroller notes that 12 C.F.R. Part 19 was revised after the RDs were issued. *See* 88 Fed. Reg. 89843 (Dec. 28, 2023). The current version of 12 C.F.R. Part 19, Appendix A, contains Part 19 as it applies to this action. All citations to Part 19 in this decision are to 12 C.F.R. Part 19, Appendix A.

motions on June 2, 2020, ALJ McNeil denied all three motions. Order Regarding Respondents' Initial Joint Motions for Summary Disposition at 31, June 24, 2020.

Following further motions practice and discovery, on March 26, 2021, Enforcement Counsel moved for summary disposition against Julian and McLinko, arguing that there was "no genuine issue as to any material fact regarding the charges alleged and relief sought." Brief in Support of EC's Motion for Summary Disposition Against Respondents Julian and McLinko ("EC MSD Br."), Mar. 26, 2021, at 1. Enforcement Counsel submitted 564 statements of material fact in support of the motion against Julian and McLinko. *See generally* EC's Statement of Material Facts as to Julian and McLinko ("SOMF"), Mar. 26, 2021. Enforcement Counsel also requested an increased CMP amount of $7 million for Julian and $1.5 million for McLinko. EC MSD Br. at 194. Julian and McLinko opposed the motion and responded to each of Enforcement Counsel's statements of material fact. *See* Julian's Brief in Opposition to Motion for Summary Disposition, May 21, 2021 (refiled); Julian's Response to EC's Statement of Material Facts ("Julian's SMF"), May 21, 2021 (refiled); McLinko's Brief in Opposition to EC's Motion for Summary Disposition, May 21, 2021 (refiled); McLinko's Response to EC's Statement of Material Facts ("McLinko's SMF"), May 21, 2021 (refiled). In addition, both Julian and McLinko submitted their own additional statements of material fact. *See* Julian's SMF at 481-785; McLinko's SMF at 426-566.

On July 20, 2021, ALJ McNeil issued a 753-page order granting in part and denying in part Enforcement Counsel's motion for summary disposition against the three remaining Respondents. The ALJ found that many of Enforcement Counsel's statements of material fact against Julian and McLinko were undisputed and could be resolved against them at the summary disposition stage. The ALJ also found that Julian and McLinko's additional facts were

procedurally improper under the OCC's Uniform Rules because they did not respond to Enforcement Counsel's facts. *See* Order Regarding EC's Motion for Summary Disposition ("SD Order"), July 20, 2021, at 748-49. The ALJ preserved these additional facts in the record as "proffers" but did not take them into account when determining the merits of Enforcement Counsel's summary disposition motion. *Id.* The remaining factual issues were set to be resolved at the hearing, along with the other unresolved claims from the Notice of Charges. *See* Excerpts Identifying Controverted Facts to be Presented and Supplemental Prehearing Order, July 28, 2021; EC's Supplemental Statement of Disputed Issues at 2-3, Aug. 6, 2021; McLinko's Supplemental Prehearing Statement at 9-25, Aug. 6, 2021; Julian's Supplemental Prehearing Statement at 9-23, Aug. 6, 2021.

C. Hearing and Post-Hearing Proceedings

ALJ McNeil presided over a 38-day hearing that began on September 13, 2021, and concluded on January 6, 2022. The parties' presentation of evidence and sworn testimony covered more than 3,000 exhibits and generated more than 10,000 pages of hearing transcript. The parties filed post-hearing briefs on May 23, 2022, and they filed their respective reply briefs a month later. Acknowledging the size and complexity of this case, ALJ McNeil issued an order pursuant to 12 C.F.R. § 19.38(a) extending the typical 45-day deadline to issue a recommended decision. Status Report, Aug. 4, 2022. On December 5, 2022, the ALJ issued three RDs—one for each Respondent—plus an Executive Summary that applied to all three Respondents. Executive Summary, Dec. 5, 2022. The ALJ recommended that the Comptroller issue a prohibition order, or, in the alternative, a cease-and-desist order, and a $7 million CMP against Julian. Julian RD at 464, 468. In making this recommendation, the ALJ found that Julian engaged in multiple unsafe or unsound practices and breaches of his fiduciary duty. *Id.* at 461-65. As to McLinko, the ALJ recommended that the Comptroller issue a cease-and-desist order and a $1.5 million CMP.

McLinko RD at 442, 446. In making this recommendation, the ALJ found that McLinko engaged in multiple unsafe or unsound practices and breaches of his fiduciary duty. *Id.* at 442-43.

D. Proceedings Before the Comptroller

After the Comptroller granted two extensions, the parties filed their exceptions to the RDs on April 14, 2023. *See* 12 C.F.R. § 19.39. On April 18, 2023, Respondents filed a joint motion requesting that the Comptroller direct the Office of Financial Institution Adjudication ("OFIA") to file a corrected record and index with 61 additional documents. The Comptroller issued an order on May 15, 2023, taking official notice of those 61 documents and providing the parties ten additional days to review the record and to request any further additions. *See* Order Regarding Respondents' Motion for an Order Directing OFIA to File a Corrected Certified Record and Index, May 15, 2023. Both parties filed responses on May 31, 2023. Enforcement Counsel filed a response containing a chart listing 135 documents or categories of documents to be added to the record; Respondents did not request that any additional documents be added. On July 5, 2023, the Comptroller issued a final order certifying that the record was complete and giving notice that the matter was deemed submitted for a final decision. *See* Order Regarding EC's Report and Request that Additional Documents be Added to the Certified Record, July 5, 2023.

On July 21, 2023, Respondents filed a motion to stay the proceedings pending the outcome of the Supreme Court's decisions in *SEC v. Jarkesy*, 144 S. Ct. 2117 (2024), and *CFPB v. Cmty. Fin. Serv. Ass'n of Am., Ltd.*, 601 U.S. 416 (2024). The Comptroller denied the motion on August 8, 2023, reasoning that neither case would be binding on this tribunal. *See* Order Denying Respondents' Motion to Stay Proceeding, Aug. 8, 2023.

Due to the unprecedented size of this case—including over 6,000 pages of exceptions briefing from Respondents alone—the Comptroller issued two additional orders extending the

deadline to issue a final decision. Order Extending Time to Issue Final Decision, Dec. 6, 2023; Order Extending Time to Issue Final Decision, June 7, 2024.

IV. SCOPE OF COMPTROLLER REVIEW

The Comptroller is the final agency decisionmaker in this enforcement action. 12 C.F.R. § 19.40(c)(1). The final decision is based on review of the entire record, *see id.*, and "[t]he Comptroller is free to accept or reject the ALJ's recommendations." *In the Matter of Adams*, No. OCC AA-EC-11-50, 2014 WL 8735096, at *7 (OCC Sept. 30, 2014). In this case, review of the entire record includes all prehearing filings—including summary disposition filings, exhibits, and findings[3]—as well as hearing transcripts, exhibits, post-hearing filings, and briefing before the Comptroller. When reviewing an ALJ's procedural determinations, the Comptroller should overturn such a ruling only where it amounts to "an abuse of discretion" or constitutes "manifest unfairness." *In the Matter of Brooks*, No. AA-EC-91-154, 1993 WL 13966512, at *14 (OCC June 17, 1993).

A party's failure to file written exceptions to the ALJ's recommended decision, findings, conclusions, admission or exclusion of evidence, or the ALJ's failure to make a ruling proposed by a party is deemed a waiver of objection thereto. *See* 12 C.F.R. § 19.39(a), (b)(1). Furthermore, "[n]o exception need be considered by the Comptroller if the party taking exception had an opportunity to raise the same objection, issue, or argument before the [ALJ] and failed to do so." *Id.* § 19.39(b)(2). All exceptions must, *inter alia*, set forth "page or paragraph references to the

[3] The Comptroller's review of the record included a review of the statements of material fact and responses thereto, supporting evidence, and arguments from all parties at the summary disposition stage. This decision cites evidence and findings from both the hearing and the ALJ's summary disposition order. The undersigned notes that Julian and McLinko have challenged the validity of the summary disposition process and its attendant findings; while these exceptions are addressed more fully below in Part IX.C, it is worth noting that any summary disposition finding cited in this decision has been fully reviewed by the Comptroller and has been determined to have been properly determined at the summary disposition stage.

specific parts of the [ALJ's] recommendations to which exception is taken" and "the legal authority relied upon to support each exception." *Id.* § 19.39(c)(2).

In reaching a final decision, "the Comptroller may limit the issues to be reviewed to those findings and conclusions to which opposing arguments or exceptions have been filed by the parties." *Id.* § 19.40(c)(1). That does not mean, however, that the Comptroller's final decision must explicitly address and rule upon every single exception raised by the parties in their over 6,000 pages of briefing. Julian's exceptions briefing alone totals more than 2,300 pages.[4] The Comptroller has carefully reviewed all of the parties' exceptions during the review of the entire record of this proceeding. This decision addresses the most significant exceptions individually, and it otherwise addresses categories of exceptions rather than exhaustively addressing each one. *See Pharaon v. Bd. of Govs. of Fed. Rsrv. Sys.*, 135 F.3d 148, 155 (D.C. Cir. 1998) (explaining that "agencies need only indicate that they have considered and rejected a party's exceptions" rather than "respond with specificity to each of [the party's] many exceptions"). If an exception is not specifically mentioned in this decision, it will be covered categorically, and unless otherwise noted, the party who raised it can consider it rejected.

The following decision applies only to Respondents Julian and McLinko. The Comptroller has set forth his findings against Respondent Anderson in a separate decision.

[4] Julian and McLinko each submitted two exceptions briefs: one that raises line-by-line exceptions to the RD and another that raises broader legal arguments in support of those exceptions. *See* Julian Br.; McLinko's Brief in Support of Exceptions to the Recommended Decision ("McLinko Br."), Apr. 14, 2023; Julian's Exceptions to the Recommended Decision ("Julian Exceptions"), Apr. 14, 2023; McLinko's Exceptions to the Recommended Decision ("McLinko Exceptions"), Apr. 14, 2023. The Comptroller considers these exceptions holistically.

V. APPLICABLE LEGAL STANDARDS

When reviewing the record, the Comptroller "determine[s] whether, in his judgment, Enforcement Counsel has met its burden of supporting its allegations by a preponderance of the evidence in the record." *Adams*, 2014 WL 8735096, at *7 (citing 5 U.S.C. § 556(d)); *see also Steadman v. SEC*, 450 U.S. 91, 104 (1981)); *In the Matter of Ellsworth*, Nos. OCC AA-EC-11-41, OCC AA-EC-11-42, 2016 WL 11597958, at *8 n.10 (OCC Mar. 23, 2016). Under this standard, Enforcement Counsel must adduce evidence that the existence of a fact is more probable than its nonexistence. *See Concrete Pipe & Prods. of Calif. v. Constr. Laborers Pension Tr.*, 508 U.S. 602, 622 (1993).

A. Section 1818(i) CMPs

Pursuant to § 1818(i)(2), the Comptroller may assess CMPs, categorized by escalating "tiers," including first-tier penalties of up to $5,000 per day of continued misconduct and second-tier penalties of up to $25,000 per day of continued misconduct.[5] Here, Enforcement Counsel sought and the ALJ recommended second-tier CMPs of $7 million against Julian and $1.5 million against McLinko. *See* Julian RD at 8; McLinko RD at 7.

For the Comptroller to assess a second-tier CMP against an IAP, Enforcement Counsel must establish two elements: *misconduct* and *effect*. As relevant here, *misconduct* can take the form of a violation of law, breach of fiduciary duty, or the "reckless" engagement in an unsafe or unsound practice in conducting the affairs of the institution. *See* 12 U.S.C. § 1818(i)(2)(B)(i).[6]

[5] The daily maximum CMP set at $25,000 in 12 U.S.C. § 1818(i)(2) must be adjusted periodically by agencies in rulemaking to account for inflation. 28 U.S.C § 2461 note. For the relevant period through November 1, 2015, the daily maximum was $37,500. 73 Fed. Reg. 66493, 66496 (Nov. 10, 2008). From November 2, 2015 onward, the daily maximum was $61,238. 89 Fed. Reg. 872, 874 (Jan. 8, 2024).

[6] An unsafe or unsound practice includes "any action, or lack of action, [that] is contrary to generally accepted standards of prudent operation, the possible consequences of which, if

Conduct is "reckless" if it is "done in disregard of, and evidencing a conscious indifference to, a known or obvious risk of a substantial harm." *Cavallari v. OCC*, 57 F.3d 137, 142 (2d Cir. 1995). "[R]ecklessness does not require that the Bank suffer an actual loss; it requires only a 'risk of a substantial harm.'" *See In the Matter of Blanton*, No. OCC AA-EC-2015-24, 2017 WL 4510840, at *14 (OCC July 10, 2017) (quoting *Cavallari*, 57 F.3d at 142), *aff'd in relevant part sub nom., Blanton v. OCC*, 909 F.3d 1162 (D.C. Cir. 2018). If an IAP was aware of a risk of substantial harm but did not act appropriately to address or mitigate that risk, that conduct is reckless. *Id.*[7]

To satisfy the *effect* prong, Enforcement Counsel must also establish that the misconduct "is part of a pattern of misconduct"; that it "causes or is likely to cause more than a minimal loss to such depository institution"; or that it "results in pecuniary gain or other benefit to such party." 12 U.S.C. § 1818(i)(2)(B)(ii); *see also In the Matter of Blanton*, 2017 WL 4510840, at *15 (referring to § 1818(i)(2)(B)(ii) as the statute's "effect" prong).

B. Section 1818(b) Cease-and-Desist Orders

The Comptroller may impose a cease-and-desist order against any IAP who is engaging, has engaged, or the OCC has reasonable cause to believe is about to engage, in an unsafe or unsound practice, a violation of law or regulation, or any condition imposed in writing by a federal banking agency. 12 U.S.C. § 1818(b).

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continued, would be abnormal risk or loss or damage to an institution, its shareholders, or the agencies administering the insurance funds." *Adams*, 2014 WL 8735096, at *11. Despite McLinko and Julian's arguments to the contrary, *see* McLinko Br. at 297-301, Julian Br. at 673-85, the Comptroller re-affirms that the standard set forth in *Adams* is the proper standard. *See Adams*, 2014 WL 8735096, at *2-5.

[7] The Comptroller partially upholds Enforcement Counsel's exceptions that Julian and McLinko recklessly engaged in unsafe or unsound practices to the extent noted in Part VI.B below. *See* EC's Julian Br. at 37-39; EC's McLinko Br. at 33-35.

C. Generally Accepted Standards of Prudent Operations for Internal Auditors of Banks

In order to prove that IAPs engaged in unsafe or unsound practices, Enforcement Counsel must show that their conduct was contrary to generally accepted standards of prudent operation. *See Adams*, 2014 WL 8735096, at *6. To meet that burden, Enforcement Counsel must "make some showing as to the relevant standards and the departure from those standards." *Id.*

In the present case, this means Enforcement Counsel must show what standards were applicable to Julian and McLinko in their positions at the Bank and how Julian and McLinko departed from those standards. The Comptroller finds that the applicable standards are the standards found in the Comptroller's Handbook on Internal Audit and the OCC's heightened standards. *See* OCC Exhs. 1909U, 931 (codified at 12 C.F.R. Part 30, Appendix D).

Julian and McLinko both filed exceptions to their respective RDs arguing that their RDs failed to rely on the applicable professional standards. *See* Julian Br. at 420-32; McLinko Br. at 310-16. Citing to the Comptroller's 2006 decision in *In the Matter of Grant Thornton*, Nos. AA-EC-04-02, AA-EC-04-03, 2006 WL 5432171 (OCC Dec. 29, 2006) (Comptroller's Decision), which applied generally accepted accounting standards to the conduct of an external auditor, they argue that only the Institute for Internal Auditor's ("IIA") standards apply to their conduct as internal auditors. *See* Julian Br. at 420-32; McLinko Br. at 310-16. They argue that Enforcement Counsel failed to provide competent evidence on what the IIA standards required under the circumstances and that the RDs failed to analyze their conduct against the IIA standards. *See* Julian Br. at 434-36; McLinko Br. at 316-22. They assert that their experts' unrebutted opinions show that they both met the generally accepted standards of prudent operation. *See* Julian Br. at

434-36; McLinko Br. at 309-10.[8] For these reasons, Julian and McLinko argue that the RD's unsafe-or-unsound-practice determinations are flawed, and therefore, the cases against them should be dismissed. *See generally* Julian Br. at 418-40; McLinko Br. at 321-22.

The Comptroller rejects Respondents' arguments that the IIA standards are the correct or sole standards by which to assess Julian and McLinko's conduct. The IIA standards are baseline standards that apply generally to internal auditors and are not specific to internal auditors at highly regulated insured depository institutions supervised by the OCC. Here, the applicable standards are the standards found in the Comptroller's Handbook on Internal Audit and the OCC's heightened standards. *See* OCC Exhs. 1909U, 931. This is consistent with the National Bank Examiners' ("NBEs") testimony. *See, e.g.*, Hr'g Tr. at 1028:12-19 (Candy) ("I will be applying the extensive OCC standards that we have for evaluating internal audit within [a bank]. That's outlined in items such as the internal and external audit handbook, 12 CFR [P]art 30, and other handbooks and guidance[] from the OCC."). The IIA standards are incorporated into the Comptroller's Handbook and thus, while relevant, they are not dispositive. Finally, *Grant Thornton's* holdings are inapposite, as *Grant Thornton* was a case against an external auditor, not an internal auditor. *See generally Grant Thornton*, 2006 WL 5432171.[9] For these reasons, the

[8] McLinko also argues that the ALJ's failure to apply the IIA standards violated his due process rights. *See generally* McLinko Br. at 322-29. The Comptroller rejects this argument. Enforcement Counsel gave Respondents notice that the IIA standards were not the standards that their conduct was being judged against. *See, e.g.*, EC MSD Br. at 88-89. Additionally, the cases McLinko relies upon are inapposite because the standards McLinko was expected to follow are publicly set forth in OCC regulations, OCC Comptroller Handbooks, and OCC Bulletins. *See, e.g.*, OCC Exhs. 1909U, 931; *see also General Elec. Co. v. EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995) (holding that an agency fairly notifies a regulated party of the standards by which one is expected to conform when the standards are set forth in regulations and other public statements).

[9] The Comptroller also notes that internal auditors are not required by statute to follow a particular standard, but 12 U.S.C. § 1831m(f)(1) requires external auditors to meet or exceed generally accepted accounting standards.

Comptroller rejects Julian and McLinko's exceptions. Below, the Comptroller has outlined the standards applicable to Julian and McLinko, drawing from OCC guidance, expert opinions and testimony, and the IIA standards as appropriate.

VI. COMPTROLLER'S FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING THE CIVIL MONEY PENALTIES

A. Background

1. The role of internal audit in a bank

Banks are generally organized with three lines of defense. *See* OCC Exh. 1908U at 39, 42. The first line of defense, which is the frontline or business units, creates risk and is accountable for assessing and managing that risk. *See id.* The second line of defense, which is independent risk management, oversees and assesses risk. *See id.* The third line of defense, which is internal audit, provides independent assurance to the Board on the effectiveness of governance, risk management, and internal controls. *See id.*; *see also* OCC Exh. 1909U at 8.

Internal audit is "a bank's primary mechanism for assessing controls and operations and performing whatever work is necessary to allow the board and management to accurately attest to the adequacy of a bank's internal control system." OCC Exh. 1909U at 8. Further, "[c]lear communication between the board, the internal auditors, and management is critical to timely identification and correction of weaknesses in internal controls and operations." *Id.* at 23; *see also* Hr'g Tr. at 156:9-157:15 (Coleman). On this point, NBE Gregory Coleman testified:

> [I]nternal audit is critical in providing the Board that independent assessment that the effective internal controls are in place, that the bank is complying with laws and regulations [and] their own internal policies and where there are deficiencies, those issues are properly escalated to the Board in a timely manner and that . . . management is taking action to remediate those issues. And I say that it's critical because it is the third and really last line of defense that the OCC would look to in ensuring that risk management functions are working appropriately within the institution in order to ensure the bank is being operated in a safe and sound manner.

Hr'g Tr. at 156:14-157:2; *see also* R. Exh. 18844 at 34 ("An independent internal audit function, along with an effective system of internal control, forms the foundation for safe and sound operations, regardless of a bank's size"). Internal audit is therefore critical to the safe and sound operation of a bank.

2. Wells Fargo's corporate structure, Wells Fargo Audit Services, and Julian and McLinko's roles

During the relevant period, Wells Fargo & Company ("WFC") was a financial holding company, and the Bank was its largest subsidiary, comprising over 90% of its assets. *See* OCC Exhs. 102 at 4, 2327 at *20; Hr'g Tr. at 3825:17-23 (Smith). There was little distinction in practice between WFC and the Bank. *See, e.g.*, Hr'g Tr. at 4935:25-4936:8 (Callahan); OCC Exh. 1969R at 1 (WFC Board committee meeting minutes noting that the OCC had determined it would release WFC from an OCC-imposed consent order).[10] WFC's Board of Directors had various subcommittees that oversaw risk management at WFC and the Bank. For example, the Audit and Examination Committee ("A&E Committee") oversaw policies and management activities concerning audit, and the Risk Committee oversaw the risk management framework. *See, e.g.*, OCC Exh. 102 at 40-41. Additionally, the Enterprise Risk Management Committee ("ERMC") was a WFC management-level committee that reported to the Risk Committee and oversaw the management of all types of risk across WFC. *See id.* at 16.

Further, during the relevant period, WFC and the Bank were organized with the three lines of defense model described above. *See* R. Exh. 1780 at *41; *see also* SD Order SOMF 235. The first line of defense owned risk and was responsible for taking, identifying, assessing,

[10] Generally, this decision focuses on the Bank itself. Where appropriate, the decision refers to WFC to distinguish between it and the Bank. Although Julian argues that during the relevant period, he was at times only WFC's Chief Auditor, *see* Julian Br. at 391-96, and that the RD does not distinguish between WFC and the Bank, *see* Julian Br. at 396-400, the Comptroller rejects those arguments, as detailed in this Part.

managing, and controlling the risks it generated. *See* R. Exh. 1780 at *41.[11] The second line of defense oversaw risk and was responsible for establishing and enforcing WFC's and the Bank's risk management framework. *See id.* The third line of defense, Wells Fargo Audit Services ("WFAS"), was responsible for providing an independent assessment of the risk framework and internal control systems to the Board. *See id.*

The audit charter defined WFAS' scope of work to "determine if the [Bank's] risk management, systems of control, and governance process are adequate and functioning as intended." OCC Exh. 2088 at 1. The audit charter states that WFAS must ensure that "[f]raud risk management is effectively managed." *Id.* at 2. The audit charter further specified that WFAS must ensure that "compensation programs incent appropriate and desired behavior" and "employees' actions are in compliance with the policies, standards, procedures, and applicable laws and regulations." *Id.* Under the WFAS policy manual, WFAS leaders were responsible for evaluating audit work to ensure that all issues and their root causes were identified. R. Exh. 18885 at 99. The policy manual defines issues as "weaknesses and deficiencies in risk management, control, and governance." *Id*. The fraud risk management policy also stated that WFAS must provide "independent evaluation of the fraud controls that management has designed and implemented, including direct business controls." R. Exh. 6313 at 8.

[11] The Community Bank was a line of business within the Bank's first line of defense. It was the Bank's largest line of business. *See* OCC Exh. 2327 at *20. The Community Bank provided financial products and services to individuals and small businesses, including checking and savings accounts, debit cards, credit cards, bill pay, and remittance products. *See id*. It included the Bank's retail branch network, with over 6,000 physical branches. *See* R. Exh. 5940 at *1.

Julian and McLinko were both executives within WFAS. Julian was WFC's and the Bank's Chief Auditor,[12] and he reported to the chair of the A&E Committee. *See, e.g.*, R. Exh. 18305 at *2; Hr'g Tr. at 5929:10-14 (Julian). As Chief Auditor, Julian was responsible for ensuring that WFAS adequately executed its duties, and he was responsible for the accuracy and completeness of audits. *See infra* Part VI.B.1.a; Julian Am. Ans. at ¶¶ 391-92. One of Julian's primary responsibilities was to develop and employ WFAS's audit plan. *See, e.g.*, OCC Exhs. 2088 at 2, 1938R at 2. Julian was also a member of a variety of management committees, such as the ERMC and the incentive compensation steering committee. *See* Hr'g Tr. at 4789:2-4 (Loughlin); 1124:22-1125:16 (Candy); OCC Exh. 102 at 53.

As Chief Auditor, Julian had a direct line of reporting to the WFC Board. In this role, he regularly participated in and presented at WFC Board and committee meetings. He was also responsible for providing the A&E Committee with quarterly summary reports and annual Enterprise Risk Management Assessments ("ERMAs"). He was supposed to report significant issues, including their root cause, to the A&E Committee and provide the directors with a complete and accurate overview of the Bank's condition, activities, and issues. OCC Exhs. 931 at 118-19, 1906 at 6.

McLinko was the Executive Audit Director ("EAD") for the Community Bank & Operations Group ("CBO Group"). *See* McLinko Am. Ans. at ¶ 444; SD Order SOMF 257.

[12] Julian argues he was not the Bank's Chief Auditor prior to June 2013 or after June 2015. *See* Julian Br. at 391-96. The Comptroller has reviewed the record evidence and finds that a preponderance of evidence establishes that he was the Bank's Chief Auditor from 2012 on. *See* Hr'g Tr. at 5927:10-13 (Julian); Hr'g Tr. at 3827:9-19 (Smith); *see also* OCC Exh. 1714 at *15; OCC Exh. 1715 at *15; OCC Exh. 2321 at *6, *19; Hr'g Tr. at 2334:2-21 (Crosthwaite) (testifying that Julian never told her he was not the Bank's the Chief Auditor); Hr'g Tr. at 3905:16-19 (Smith) (same). Julian argues that his appointment as the Bank's Chief Auditor was legally deficient under the Bank's bylaws. *See* Julian Br. at 391-96. The Comptroller has reviewed the bylaws, *see* R. Exh. 838 (proffered), and rejects this argument.

McLinko reported to Julian. *See* McLinko Am. Ans. at ¶ 440. McLinko had oversight responsibilities for audits performed by the CBO Group, including "setting the audit strategy, reviewing and approving draft audit reports, complying with Audit's charter, and providing credible challenge to Community Bank management, as necessary." *See* SD Order SOMF 257; *see also* McLinko Am. Ans. at ¶¶ 439, 446. McLinko's audit group had responsibility for auditing the retail branch network of the Community Bank. Hr'g Tr. at 8504:8-16 (McLinko). McLinko's responsibilities included oversight of the audit team's execution of its duties and the accuracy and completeness of the audits. McLinko Am. Answer at ¶¶ 445-46; SD Order SOMF 258. McLinko was also a member of several management committees, including the Audit Management Committee, the Community Bank Risk Management Committee, the Community Bank Internal Fraud Committee, and the Pre-Issuance Review Committee. Hr'g Tr. at 7788:3-19; 7841:25-7842:23 (McLinko).

3. SPM was one of the Bank's highest risks throughout the relevant period

The Comptroller finds that the record evidence and hearing testimony demonstrates that SPM was one of the Bank's highest risks during the entire relevant period. In 2013, the head of Corporate Investigations told WFAS that sales integrity[13] was his number one concern. *See* OCC Exh. 1985 at *1. Corporate Investigations reported that SPM was on the rise before and during 2013. *See, e.g.*, R. Exh. 323 at 1; OCC Exh. 274 at *1. Additionally, in 2013, the *L.A. Times* published two articles about SPM and how it was pervasive in the Bank. *See* R. Exh. 18961; OCC Exh. 1104. The head of Corporate Investigations told Julian and McLinko that the first article was a "big deal." OCC Exh. 644 at *1. These articles led to Julian raising SPM as a risk to the Bank at an October 2013 ERMC meeting. *See* Hr'g Tr. at 6283:15-22 (Julian); OCC Exh.

[13] Sales integrity was the Bank's term for SPM, and it included manipulation and/or misrepresentations of sales or referrals in order to meet sales goals. *See* R. Exh. 4009 at *1.

1194. ERMC reporting subsequently identified SPM as a high risk to the Bank. *See* Hr'g Tr. at 6283:23-6284:15 (Julian); *see also* R. Exh. 19357. The Bank's Chief Risk Officer testified that the ERMC knew that the Bank had sales practices issues after the publication of the *L.A. Times* articles. *See* Hr'g Tr. at 2962:25-9263:5 (Loughlin). Thus, in 2013, SPM was a high risk to the Bank.

From 2014 to 2016, the Bank itself identified SPM as one of its highest risks. Specifically, the ERMC's quarterly reports identified sales conduct, practices, and the consumer business model as one of the Bank's highest risks from January 2014 through 2016. *See* R. Exhs. 538, 19357, OCC Exhs. 687, 739, 1098, 1103, 1738, 2140, 2162, 2179, 2180; Hr'g Tr. at 4732:4-16 (Loughlin); *see also* SD Order SOMF 445. During this time, sales conduct, practices, and the consumer business model was consistently rated as a high risk and at least the fifth-highest risk to the Bank, except for February 2015 when it was rated as medium risk and the eighth-highest risk to the Bank. *See id.*

Therefore, based on the record evidence and hearing testimony, the Comptroller finds that SPM was a high risk to the Bank from 2013 through 2016.

4. Julian and McLinko were aware of the SPM problem and the risk of harm from SPM

The Comptroller finds that the evidence in the record supports the ALJ's findings that Julian and McLinko were aware of the SPM problem at the Bank and the risk of harm from SPM.[14] In making this determination, the Comptroller incorporates the following relevant facts that the ALJ properly found undisputed at the summary disposition stage: SD Order SOMFs 31-

[14] The Comptroller has found that SPM at the Bank was widespread and systemic in the Anderson Decision. *See* CRA Dec. at VI.A.1. The Comptroller hereby incorporates that section of the Anderson Decision.

33, 35, 39-43, 101, 114, 174, 259, 265-66, 268, 272, 274, 303-05, 330, 335-36, 338-39, 362-63, 394, 396-98, 400-01, 403-04.

a. Julian was aware of SPM and the risk of harm from SPM

As discussed in Part VI.A.3 above, SPM was one of the Bank's highest risks throughout the relevant period. Julian was aware of SPM at the Bank at least as far back as 2013. He admitted that he read the October and December 2013 *L.A. Times* articles regarding pervasive SPM at the Bank. Julian Am. Ans. ¶ 404-05; OCC Exhs. 2772 at 41:21-42:7 (Julian), 1938R at 1, 13; Hr'g Tr. at 6283:15-22 (Julian). Julian testified that his "understanding of the larger, systemic nature of sales practices problems at [the Bank] began to form" after reading the October 2013 article. OCC Exh. 1938R at 13. In fact, Julian's awareness of the SPM problem led him to raise SPM as a risk to the Bank at an October 2013 ERMC meeting. *See* Hr'g Tr. at 6283:15-22 (Julian); OCC Exh. 1994R.

There is also record evidence that Julian actually became aware of the SPM problem prior to his review of the *L.A. Times* articles. From at least early 2013, Julian routinely received information regarding SPM through his membership on various committees, such as the Team Member Misconduct Executive Committee ("TMMEC"), Audit Management Committee ("AMC"), and the Ethics Committee. Julian Am. Ans. at ¶ 398. Julian admitted in his amended answer that, as a member of these committees, he received multiple presentation decks from Corporate Investigations identifying risk issues. *Id*. For example, a March 4, 2013 presentation to the TMMEC identified sales integrity violations as the second most common corporate investigations type. R. Exh. 800 at *8; Hr'g Tr. at 6160:6-6163:7 (Julian). A March 11, 2013 presentation to the AMC showed the total number of sales integrity violations cases increasing, and also showed an increasing number of EthicsLine reports relating to sales practices. R. Exhs. 323, 3924; Hr'g Tr. at 6186:21-6188:25 (Julian). An August 22, 2013 presentation to the Ethics

Committee showed that "misconduct and ethics violations are up"; the Community Bank had the "highest number of [EthicsLine] reports per 1,000 team members and most associated with Sales Integrity issues"; and "Sales Integrity issues are most prevalent – there needs to be continued focus in this area." OCC Exh. 738; R. Exh. 4479; Hr'g Tr. at 6229:23-6230:2 (Julian). As a last example, on August 23, 2013 Corporate Investigations' presentation to the TMMEC included a 2013 mid-year regional banking and sales integrity case and EthicsLine update, which showed that there were sales integrity cases in every region of the Community Bank, with customer consent cases being the most common, and sales integrity being the most common Corporate Investigations case type arising from EthicsLine complaints. R. Exh. 4495.

In addition to his awareness of the SPM problem, Julian also knew about the risk of harm from SPM to the Bank. Julian was a member of the ERMC and, as discussed in Part VI.A.3, the ERMC identified SPM as one of the Bank's highest risks from 2014 through 2016.

b. McLinko was aware of SPM and the risk of harm from SPM

McLinko was also aware of the SPM problem at the Bank as far back as 2013, and his arguments to the contrary are not supported by the evidence. McLinko admits that on October 4, 2013, he received the October 2013 *L.A. Times* article from Michael Bacon, Head of Corporate Investigations. McLinko Am. Ans. ¶ 457; OCC Exh. 644. In that email, Bacon told McLinko that the article was a "big deal and very interesting." *Id.* at *1. Additionally, McLinko was directly informed of SPM problems at the Community Bank from his direct report, Bart Deese, on various occasions. For example, on January 3, 2013, McLinko received an email from Deese detailing a meeting Deese had with Michael Bacon. R. Exh. 3635. In this email, Deese told McLinko that Bacon pointed to sales integrity as "still his #1 concern" and that "he felt a lot of it was related to sales goals and pressure." *Id.* On November 1, 2013, McLinko received another email from Deese regarding a Significant Investigation Notification from Corporate

Investigations describing allegations identifying 177 bankers for possible simulated funding, resulting in 30 terminations. R. Exhs. 4818, 4819.

McLinko also received numerous reports and presentations regarding SPM directly from Corporate Investigations. On February 20, 2013, McLinko received a report from Corporate Investigations in connection with a Community Bank Internal Fraud Committee meeting he attended showing the number of sales integrity violations cases and demonstrating that the number of terminations and resignations associated with them were increasing. R. Exhs. 3817, 3819 at 3, 5, 7.

On March 4, 2013, Julian emailed McLinko a copy of Corporate Investigations' presentation to the TMMEC identifying sales integrity violations as the second most common corporate investigations type and asking McLinko what work WFAS was doing "related to team member fraud," explaining that "Community Banking has a lot of issues each year." R. Exhs. 766, 3881; Hr'g Tr. at 7899:6-7900:18 (McLinko). On March 11, 2013, McLinko received an additional report from Corporate Investigations, again showing that the number of sales integrity violations cases was increasing. R. Exhs. 3923, 3924. On August 9, 2013, McLinko received yet another report from Corporate Investigations showing that Corporate Investigations had 822 Community Bank sales integrity violations in the quarter ending June 2013, with customer consent being the largest category of sales integrity violations cases. R. Exh. 4434. Corporate Investigations also provided McLinko with a sales integrity update, which demonstrated that sales integrity violations cases were increasing, that customer consent was the largest category of sales integrity violations cases, and that there were violations cases in every part of the Community Bank's regional network. OCC Exhs. 273, 274, 275.

Further, McLinko admits that he was a member of the Community Bank's Internal Fraud Committee throughout the relevant period and that, as part of that committee, he received reporting from Corporate Investigations regarding sales integrity cases and investigations related to lack of customer consent for products and services. McLinko Am. Ans. ¶ 449; Hr'g Tr. at 7918:19-7919:4 (McLinko).

Despite McLinko's denial, a review of the record clearly evidences that he was aware of SPM at the Bank and of the risk of harm from SPM to the Bank. As discussed in Part VI.A.3, the risk to the Bank was an obvious one, and McLinko cannot feign ignorance of the risk posed by SPM after receipt of numerous communications detailing that risk for him.

Based on this evidence, the Comptroller finds that both Julian and McLinko knew about the SPM problem and the risk of harm from SPM.

B. Misconduct

1. Julian's failure to plan and manage activity that would detect and document SPM within the Community Bank and the related internal control deficiencies was a recklessly unsafe or unsound practice

The Comptroller finds that the record evidence and hearing testimony supports the ALJ's findings that Julian recklessly engaged in unsafe or unsound practices by failing to plan and manage activity that would detect and document SPM and the related internal control deficiencies from 2014 to 2016. *See generally* Julian RD at 90-95, 141-45, 151, 198-99, 385, 428, 474. Specifically, the record shows that Julian, as Chief Auditor of the Bank, was responsible for ensuring that the audit plans adequately covered the Bank's top risks. The record also shows that he failed to do so because the audit plans did not adequately cover the internal control deficiencies that led to SPM in the Bank's physical branches from 2014 to 2016. In making this determination, the Comptroller incorporates the following relevant facts that the ALJ

properly found undisputed at the summary disposition stage: SD Order SOMFs 420, 445, 452-53, 457-58, 460, 470, 484, 503, 505, and 516.

a. Standards applicable to Julian as Chief Auditor

The Comptroller finds that generally accepted standards of prudent operation require Chief Auditors to establish a risk-based plan that adequately audits the highest risks in the Bank. Bank policies, including WFAS' audit charters and policy manuals, stated that the Chief Auditor was responsible for developing and employing the Bank's audit plans. *See, e.g.*, OCC Exhs. 2088 at 2, 2090 at 75, 2091 at 98, 2092 at 120, 2093 at 111; R. Exh. 17746 at 2. Julian's expert testified that internal audit's results need to achieve the purpose of, and the responsibilities outlined in, the audit charter. *See* Hr'g Tr. at 7694:16-21 (Ploetz). The IIA standards also state that Chief Auditors "must establish a risk-based plan to determine the priorities of the internal audit activity, consistent with the organization's goals." R. Exh. 533 at 9.

It is undisputed that a bank's audit plan must adequately cover the highest risks in the Bank. All parties agree with this. NBE Tanya Smith testified that that audit plans must audit all significant risks. *See, e.g.*, Hr'g Tr. at 3931:9-20, 3952:10-22. The Comptroller's Handbook on Internal Audits states that auditing must be risk-based and that audit cycles should not be open-ended. *See* OCC Exh. 1909U at 14, 16 (noting that "some banks set audit cycles at 12 months or less for high-risk areas"). The OCC's heightened standards require the audit plan to take into account "the bank's risk profile, emerging risks, and issues." OCC Exh. 931 at 118. Julian himself agreed that internal audit "must ensure that risks are assessed appropriately and evaluated at proper intervals." OCC Exh. 1938R at 21; *see also* Hr'g Tr. at 5991:8-12 (Julian). Julian's expert also agreed that the audit plan should focus on the Bank's highest risks. OCC Exh. 2634 ¶ 34 (Ploetz expert report). Bank policies state that the audit plan must cover the Bank's high-risk business units or processes at least every two years. *See, e.g.*, OCC Exh. 2090

at 23. Finally, according to the IIA standards, in developing the audit plan, the Chief Auditor must develop a risk-based plan. R. Exh. 533 at 9. Thus, as Chief Auditor, Julian was required to ensure that audit plans covered the Bank's highest risks.

As explained in Part VI.A, SPM was one of the Bank's highest risks from 2013 to 2016, and Julian knew this through his participation as a nonvoting member of the ERMC. *See, e.g.*, Hr'g Tr. at 3530:8-21 (Loughlin), 6265:24-6269:2 (Julian), 6280:21-6281:6 (Julian).

Based on the standards outlined above and Julian's knowledge of the risks posed by SPM, Julian was required to establish a risk-based audit plan and ensure the audit plan covered SPM. As detailed below, Julian did neither and, therefore, he acted contrary to the generally accepted standards of prudent operation for a Chief Auditor.

b. Julian did not ensure the audit plan adequately covered SPM from 2014 through 2016

Following a review of the record evidence and hearing testimony, the Comptroller adopts the ALJ's findings that Julian did not ensure that the audit plan adequately covered SPM and the related internal control deficiencies from 2014 to 2016.[15] *See, e.g.*, Julian RD at 474. Julian admitted in his response to the OCC's 15-day letter that the scopes of various audits from 2014 to 2016 did not include SPM. *See* OCC Exh. 1938R at 2 ("The audit scopes were not designed to audit the sales practices issues themselves."). Additionally, when the Bank announced the settlements in September 2016, Julian's immediate reaction was that audit did not identify SPM. *See* OCC Exh. 700 at *1 (Sept. 12, 2016, email from Julian stating, "[W]hile I'd like to be able to say we tested for activity like this, specifically in the Community Bank, I don't think we did.").

[15] Although Enforcement Counsel alleged that this was an unsafe or unsound practice during the entire relevant period, the Comptroller finds that the 2013 audit of the Sales Service Conduct Oversight Team ("SSCOT") was sufficient audit coverage. *See* OCC Exh. 1328. However, WFAS failed to audit SSCOT after 2013. *See* Hr'g Tr. at 8714:8-24 (McLinko).

Julian agreed in his 2018 sworn statement that a competent auditor with his knowledge of SPM would have scoped controls that could prevent SPM into an audit. *See* OCC Exh. 2772 at 170:4:19 (testifying that a competent auditor would look at controls preventing employees from issuing debit and credit cards without customers' signatures). The Comptroller finds that this failure to ensure that the audit plan covered SPM in the Community Bank's branches and the internal control deficiencies that led to SPM was an unsafe or unsound practice.

Turning to the actual audit plans from 2014 to 2016, the record evidence shows that in 2014, Julian did not plan any audit that would cover SPM in the Bank's physical branches. The 2014 audit plan did not include a reference to sales practices or SPM. *See* OCC Exh. 2107.[16] While Julian's 2014 reporting to the A&E Committee pointed to the audits of Wells Fargo Customer Connection and Wells Fargo Digital Channel for coverage of sales conduct risks, these audits did not scope in SPM in branches. *See, e.g.*, OCC Exh. 2227 at 60-61. The Customer Connection audit scoped in telephone sales, and the Digital Channels audit scoped in online sales. *See* R. Exh. 515 at 2 (Customer Connection audit report); Hr'g Tr. at 8715:21-25 (McLinko) (testifying that the scope of this audit did not include account opening in branches); OCC Exh. 2065 at 2 (Digital Channels audit report); Hr'g Tr. at 8716:22-8717:4 (McLinko) (testifying that this audit did not involve the Bank's branch network); *see also* SD Order SOMFs 452-53. Julian planned an audit of enterprise-wide incentive compensation in 2014; however,

[16] The audit plan did mention that WFAS was enhancing audit coverage through horizontal review of common processes and specified that cross-selling was one common process. *See* OCC Exh. 2107 at 11. However, WFAS did not audit cross-selling in the Community Bank branches as a part of this. *See* OCC Exh. 2227 at 60-61 (noting a cross-sell audit only for Wealth, Brokerage, and Retirement and stating, "an assessment of cross-sell audit coverage was also completed as part of the [audit] plan with no significant additional coverage warranted."); Hr'g Tr. at 3974:8-12 (Smith) (testifying that she did not "see cross-sell work being done in the Community Bank").

this audit failed to assess whether sales goals were reasonable. *See* Hr'g Tr. at 7129:5-7 (Julian); OCC Exh. 2068 at 14-15.[17] Given Julian's knowledge that SPM was occurring in the physical Bank branches, planning no audits that covered account opening in physical Bank branches was unsafe or unsound.

Similar to 2014, the 2015 audit plan did not mention sales conduct or SPM specifically, only stating, "a heightened focus will continue on a handful of processes including . . . consumer-related activities." R. Exh. 604 at 1. Julian's other reporting to the A&E Committee in 2015 pointed to a regional banking account opening and a business banking sales audit for coverage of sales conduct risks. *See, e.g.*, OCC Exh. 1857 at 7.[18] The business banking audit did not cover account opening in the Bank's physical branches. *See* Hr'g Tr. at 3966:10-14, 3981:8-12 (Smith).

The regional banking account opening audit was originally planned to cover sales practices. *See* OCC Exh. 2157 at 59. This audit was the *only* audit that would have directly covered SPM in physical Bank branches in all of 2014 to 2016. In October 2015, however, WFAS scoped out sales practices from this audit. *See* OCC Exhs. 1019 at 1, 1380 at 1. Despite knowing this was a possibility in May 2015, Julian testified that he was not aware of this

[17] Additionally, the Comptroller notes that the OCC's 2016 audit examination stated that incentive compensation audits "have not included extensive testing in Community Banking." R. Exh. 15393 at 2.

[18] WFAS' 2015 audits originally included other audits that might have covered some processes that led to SPM. Specifically, WFAS originally planned an audit for Unfair, Deceptive, or Abusive Acts or Practices ("UDAAP"). *See* R. Exh. 8421 at *15 (WFAS first quarter 2015 Community Bank summary) (showing a UDAAP audit planned for the fourth quarter of 2015). This audit was changed to an audit of the responsible business policy. *See* Hr'g Tr. at 8645:19-8646:3 (McLinko). However, this audit was converted to a business monitoring engagement and therefore was not a control audit of processes that led to SPM. *See* R. Exh. 15853 at 15 (WFAS fourth quarter 2016 Community Bank summary); Hr'g Tr. at 8645:4-8646:11 (McLinko) (testifying that the UDAAP audit was renamed to a responsible business policy audit and converted to a business monitoring engagement).

decision until March 2016. *See* OCC Exh. 1302 (May 2015 email among lawyers in the Bank's law department, [redacted]); Hr'g Tr. at 6870:7-13 (Julian).[19] Given that he knew SPM posed risk to the Bank and knew that both the A&E Committee and the OCC wanted audit to cover SPM,[20] Julian, as Chief Auditor, needed to ensure this audit covered SPM or he needed to plan a subsequent audit that covered SPM in physical branches. Julian did neither.

Although in 2016 WFAS' audit coverage of processes related to SPM started to become more robust, these audits still failed to cover SPM in the Bank's physical branches. *See, e.g.*, R. Exhs. 1095 at 8-16, 11816 at 7-15. For example, WFAS' sales practices coverage strategy document does not mention a control testing audit of sales practices within branches. *See* R. Exh. 1095 at 8-16. The document points to "control testing audits planned throughout 2016 related to product sales and account opening activities in the areas of centralized Business Banking, Business Direct and Virtual Channels (call center and online)." *Id.* at 4. Additionally, the document states, "Regional Bank (stores) account opening process is being covered in 2015." *Id.*[21] Julian testified extensively about SPM coverage in 2016. *See generally* Hr'g Tr. at 6838:5-6858:1 (Julian). He testified that the strategy included customer complaints, *see id.* at 6849:1-3 (Julian), the EthicsLine, *id.* at 6849:7-10, internal investigations, *id.* at 6849:21-24, and enterprise risk management, *id.* at 6850:9-13. The strategy, however, did not include account openings in the Bank's physical branches. Despite Julian's assertion that this strategy included

[19] Julian also represented to the A&E Committee multiple times that the focus of this audit would be "account opening and sales practices." OCC Exhs. 2157 at 59 (July 2015 reporting), 2228 at *62 (November 2015 reporting), 1900 at 64 (February 2016 reporting).
[20] *See* OCC Exh. 1302 (stating that Julian "is under significant pressure from the audit committee and the regulators" to not take a back seat to the first or second line of business on SPM).
[21] Although not explicit in this document, this presumably refers to the 2015 account opening audit, which, as explained above, did not cover sales practices in the Bank's branches.

100,000 audit hours and was a "significant" commitment of WFAS, *see id.* at 6857:8-20 (Julian), Julian still failed to ensure that audit reviewed the core process that led to SPM—account opening in the Bank's physical branches.

Additionally, the 2016 audit plan focused on business monitoring and enhancing audit coverage but did not mention control audits of processes that could lead to SPM. *See* R. Exh. 12031 at 14. Thus, even as late as 2016, Julian failed to plan audits to cover the high risk of SPM in the Bank's physical branches.

The Comptroller notes that Julian, in his sworn statement, agreed that a competent auditor should have done much more to ensure that audit covered processes that led to SPM. *See, e.g.,* OCC Exh. 2772 at 167:8-168:5 (testifying that it's "clear [WFAS] didn't do enough based on what I know now to investigate"); 170:25-171:4 (testifying that he did not know if anyone in WFAS reviewed controls to prevent unauthorized accounts). Additionally, as described in Part VI.B.2.b, McLinko and other auditors described many other processes that WFAS could have audited that were high risk for SPM. This testimony establishes that WFAS could have planned audits to cover many processes with SPM risk. However, the only audit Julian planned that covered SPM in the Community Bank's physical branches was the 2015 regional bank account opening. Moreover, as detailed above, Julian then failed to ensure that the audit had actually reviewed SPM, despite repeatedly reporting to the A&E Committee that the audit would review sales practices. In spite of this evidence, Julian argues that he acted consistent with the general standards applicable to internal auditors. The Comptroller disagrees.

Based on the above evidence, the Comptroller finds that Julian engaged in an unsafe or unsound practice from 2014 to 2016 by not ensuring that an audit directly covered process that led to SPM in branches.

c. Business monitoring is not an effective substitute for control testing

One of Julian's exceptions to the RD's findings on the failure to plan audits is that the ALJ failed to consider that he appropriately used business monitoring for SPM. *See* Julian's Br. at 617-24. Specifically, Julian argues that business monitoring is standard practice in internal auditing, pointing to his expert's testimony in support. *See id.* at 618-20 (quoting Hr'g Tr. at 7626:1-18 (Ploetz)). Julian also argues that business monitoring is appropriate when internal controls are changing. *See id.*

The Comptroller has reviewed these arguments and the supporting evidence and rejects them. Although business monitoring has a place in a safe and sound internal audit environment, given the risks of SPM to the Bank and the lack of control testing coverage, the business monitoring Julian points to was insufficient. McLinko testified that WFAS' business monitoring did not test the controls and therefore "couldn't determine the effectiveness" of the controls. Hr'g Tr. at 8648:15-22. Instead, business monitoring was meant for "monitoring the risk profile of the relevant business area." *Id*. at 8648:8-14 (McLinko). As Julian already knew that SPM posed a high risk, business monitoring was unnecessary.

Additionally, the business monitoring did not cover controls that would detect or prevent SPM. *See* Hr'g Tr. at 7995:2-7996:8 (McLinko) (testifying that the business monitoring consisted of reviewing the Quality of Sales Report Card and the regional bank's Risk Council). Had Julian ensured that WFAS' business monitoring would cover the SPM allegation process in SSCOT, for example, business monitoring might have identified control issues around SPM. He did not.

Finally, the Comptroller finds that Julian's argument that business monitoring was appropriate given the changes to the control environment is misplaced. As a general principal of internal audit, business monitoring when controls are changing can be appropriate. However, it

cannot be a substitute for failing to audit high-risk areas of the Bank for years. As NBE Smith testified, when internal controls are changing, "audit doesn't stop doing work," particularly "when you have evidence of fraud." Hr'g Tr. at 3890:25-3892:6). In a highly regulated bank, internal audit "is expected to continue to look at the control environment and opine on it" even when controls are changing. *Id.* at 3892:20-22 (Smith). Internal audit cannot justify failing to audit high-risk processes for years because controls continue to change. This could have the irrational result of internal auditors never testing processes that harm customers because the processes are constantly changing. The Comptroller rejects this argument and finds that Julian's failure as Chief Auditor to ensure adequate audit coverage of processes that led to SPM was unsafe or unsound.

d. Julian's conduct was reckless, as he disregarded the known risk of SPM by not ensuring the audit plan adequately covered SPM

The Comptroller finds that the record evidence and hearing testimony support a finding that Julian's conduct was reckless, meeting the standard for misconduct for a second-tier CMP under 12 U.S.C. § 1818(i)(2)(B). Julian disregarded a risk of substantial harm by not planning audits that could identify SPM and the related internal control deficiencies. As detailed above, Julian received extensive reporting and saw multiple presentations on SPM. Julian was a member of the ERMC, which rated sales conduct as a high risk starting in 2014. Julian knew that SPM happened in in the Community Bank branches because of pressure to meet sales goals. Despite this knowledge, Julian did not ensure that the audit plan adequately covered pressure to meet sales goals. This failure was recklessly unsafe or unsound. *See In the Matter of Blanton,* 2017 WL 4510840, at *13 ("Conduct is reckless under the [Federal Deposit Insurance Act] for purposes of assessing a CMP when it is done in disregard of, and evidencing conscious

indifference to, a known or obvious risk of a substantial harm.") (internal quotation marks omitted).

2. McLinko's failure to plan and manage activity that would detect and document SPM within the Community Bank and the related internal control deficiencies was a recklessly unsafe or unsound practice

The Comptroller finds that the record evidence supports the ALJ's finding that McLinko recklessly engaged in unsafe or unsound practices by failing to plan and manage audit activity that would have detected and documented SPM within the Community Bank from 2014 to 2016. *See generally*, McLinko RD at 292, 324, 450-51. Specifically, the record shows that McLinko, as EAD, was responsible for ensuring that the audit plans for the CBO Group covered the Community Bank's top risks. However, the record also shows that he failed do to so and that the audit plans did not adequately cover the internal control deficiencies that led to SPM in the Bank's physical branches. In making this determination, the Comptroller incorporates the following relevant facts that the ALJ properly found undisputed at the summary disposition stage: SD Order SOMFs 419, 421, 430, 445, 452-53, 456-58, 460, 474-76, 506, 520.

a. Standards applicable to McLinko as Executive Audit Director

The Comptroller finds that generally accepted standards of prudent operations require internal audit executives to ensure that audit plans adequately audit the highest risks. According to Bank policies, including the WFAS audit charters and policy manuals, the staff of the internal audit department was responsible for developing and completing the audit plan. *See, e.g.*, OCC Exhs. 2088 at 2, 2090 at 75, 2091 at 98, 2092 at 120; 2093 at 111; R. Exh. 17746 at 2. Additionally, as a member of WFAS leadership[22] under WFAS policies, McLinko was responsible for developing the audit plan. *See, e.g.*, OCC Exh. 2093 at 53. McLinko's expert

[22] WFAS' policies defined WFAS leadership to include EADs, Audit Directors, and Senior Audit Managers. *See, e.g.*, OCC Exh. 2093 at 99.

agreed and opined that McLinko was responsible for developing the Community Bank audit plan. *See* OCC Exh. 2375 at ¶ 32. Finally, the IIA standards state that an audit plan must be "risk-based" and take into account a "documented risk assessment." R. Exh. 533 at 9.

As detailed above in Part VI.B.1.a, the audit plan must cover a bank's highest risks. Additionally, as explained in Parts VI.A.3 and VI.A.4, SPM was one of the Bank's highest risks from 2013 to 2016, and McLinko knew this. Because SPM was one of the highest, if not *the* highest, risk specific to the Community Bank throughout the relevant period, McLinko, as EAD for the CBO Group, needed to ensure that the audit plan adequately covered SPM and the internal control deficiencies that led to SPM. *See, e.g.*, Hr'g Tr. at 3931:2-3932:2 (Smith) ("Risk in the branch banking system, the largest part of Wells Fargo . . . should have garnered immediate attention by the chief auditor and certainly by the executive audit director responsible for the Community Bank.").

Based on the standards outlined above and McLinko's knowledge of the high risk of SPM to the Community Bank, McLinko was required to ensure that the audit plan covered SPM. As detailed below, McLinko did not, and he therefore acted contrary to the generally accepted standards of prudent operation for an EAD.

b. McLinko did not ensure the Community Bank audit plan adequately covered SPM from 2014 through 2016

The record evidence and hearing testimony support the allegation that McLinko failed to plan or manage *any* Community Bank audit activity that would adequately cover SPM and the related internal control deficiencies from 2014 to 2016. As detailed in Part VI.B.1.b, the Comptroller has already established that the audit plan did not adequately cover SPM. The Comptroller finds that, given McLinko's responsibilities for the Community Bank audit plan,

McLinko engaged in an unsafe or unsound practice by failing to ensure that the Community Bank audit plan adequately covered SPM in the Community Bank's physical branches.

It is not disputed that the Community Bank audit group needed to audit SPM and the related internal control deficiencies. McLinko even testified that it was "important" to have audit programs in place to test for sales practices. Hr'g Tr. at 8601:11-8602:17 (McLinko) (testifying that he needed "to assure that we had audit programs and practices in place to test for sales practices throughout the Community Bank"). NBE Coleman testified that "as the audit director for the Community Bank, [McLinko] had the responsibility to understand the business activities of the Community Bank and any significant strategy of the bank, which sales practices was the cornerstone of" and that McLinko should "conduct audits to ensure that the Community Bank had implemented effective controls in regards to sales practices." *Id.* at 245:6-15. But despite these responsibilities, NBE Coleman testified, "I found no evidence that [McLinko] implemented audits or conducted audits that identified that risk and escalated that risk to the Board, even after 2013." *Id*. at 245:16-18. NBE Smith similarly testified that "[t]he audit scopes were not designed to audit sales practices issues themselves," *id.* at 3884:8-20, and she explained that the expectation for an internal audit function would be to conduct an audit of a known risk such as SPM. *Id.* at 3884:20-3886:9.

The record reveals that there were several audits that McLinko failed to plan that would have covered SPM in the Community Bank's physical branches and the related internal control deficiencies. For example, McLinko testified that WFAS did not conduct a control testing of SSCOT's proactive monitoring process or its customer polling process from 2014 to October 2016. Hr'g Tr. at 8714:8-24. WFAS did not audit the Community Bank's Evolving Model

initiative.[23] *See id*. at 8653:2-7. McLinko admitted that WFAS could have audited control processes around incentive compensation, the process for adjusting sales goals for staffing fluctuations, and controls for obtaining customer consent for moving money. *See* Hr'g Tr. at 8836:1-3; 8836:22-8837:3-9. Any one of these audits would likely have identified SPM in the Bank's physical branches or the internal control deficiencies that led to SPM, and yet, WFAS did none of these. McLinko also admitted that he never directed his team to test whether sales goals in the Community Bank were reasonable. *Id*. at 8604:18-8605:3. McLinko was responsible for ensuring that the Community Bank audit plan adequately covered SPM, and his failure to plan even a single audit that could have detected the deficiencies constituted an unsafe or unsound banking practice.

Other evidence in the record further illustrates McLinko's total failure to adequately plan and manage audits that would detect SPM. First, in May 2015, McLinko and WFAS began scoping a planned account opening and closing audit for the Regional Bank. *See* OCC Exh. 802. The audit was planned to include sales practices and sales quality, but in October 2016, McLinko approved scoping out those issues. *See* Hr'g Tr. at 8828:22-88:30:5 (McLinko); *see also* OCC Exhs. 1019, 1302, 1380; Hr'g Tr. at 8396:12-8397:22 (McLinko). Given McLinko's knowledge of SPM, failing to ensure that WFAS audited account opening in the Bank's physical branches was inconsistent with his responsibilities as EAD of the CBO Group, despite his assertions to the contrary.

Moreover, the OCC issued a supervisory letter on June 26, 2015, noting that WFAS had limited oversight and monitoring of sales practices. *See* OCC Exh. 1754. The Bank, in its

[23] The Evolving Model initiative was partially intended to reduce SPM by adding controls to capture customer signatures or other evidence of consent when opening accounts. *See* Hr'g Tr. at 5577:7-5578:6 (MacDuff) (explaining the Evolving Model).

response, committed to "evaluate the current sales practices audit coverage and commit to develop a comprehensive audit approach." OCC Exh. 705 at 11. The response named McLinko as one of the accountable executives for that action. *Id*. Despite this commitment, McLinko did the opposite: He approved *narrowing* the scope of the account opening audit.

It was a total abdication of his responsibilities for McLinko to permit the CBO group to go years without conducting an audit of sales practices, particularly when there was so much known evidence of SPM. *See, e.g.*, Hr'g Tr. at 2253:6-2254:9 (Crosthwaite) ("This is after the OCC supervisory letter, the five [Matters Requiring Attention ("MRAs")]. . . . And [McLinko] essentially doesn't even look at account opening. . . . The bank has a significant sales practices misconduct problem, and to this point in time they haven't even looked at account opening."). As discussed in Part VI.B.1.b, this was the *only* control audit planned between 2014 and 2016 that would have covered account opening. Given his knowledge of the substantial risks of SPM, McLinko's failure to either follow through on this planned audit or initiate a new audit that scoped in account opening was not consistent with generally accepted standards of prudent operation.

Also, as noted in section VI.B.1.b, WFAS originally planned for a control testing audit of UDAAP in 2015. WFAS placed this audit on hold and eventually changed it from a control testing audit to a business monitoring engagement that took place only after 2016. *See* R. Exh. 8421 at *15 (WFAS first quarter of 2015 summary) (showing a UDAAP audit planned for the fourth quarter in 2015); OCC Exh. 1857 at 14 (WFAS third quarter of 2015 summary) (showing the UDAAP audit as on hold); R. Exh. 15853 at 15 (WFAS fourth quarter of 2016 summary) (showing UDAAP audit, now a responsible business policy audit, as converted to a business monitoring engagement). This is another example of McLinko's failure to ensure that the CBO

Group adequately covered SPM in the Community Bank. Instead of ensuring a control audit that might have identified SPM or the related internal control deficiencies occurred, McLinko allowed the audit to be delayed and then downgraded. Given his knowledge of SPM within the Bank's physical branches, this was inconsistent with generally accepted standards of prudent operations.

McLinko's expert witness, Jarrett, attempts to rebut the argument that McLinko failed in his responsibilities as EAD. Jarrett testified that he found that McLinko's actions in the audit planning process conformed with professional standards and Wells Fargo policy. *See, e.g.*, Hr'g Tr. at 8922:5-8923:10 (Jarrett). The Comptroller disagrees. Many of Jarrett's conclusions are inconsistent with safe and sound banking practices. His testimony, if taken at face value, implies that McLinko would have little responsibility for anything at all, as Jarrett testified that McLinko's various responsibilities either flowed upward to Julian as Chief Auditor or downward to the senior audit managers ("SAMs") who reported to McLinko. *See, e.g.*, Hr'g Tr. at 8921:22-8922:4 (testifying that it was "appropriate for Mr. McLinko to rely on Mr. Julian to exercise Mr. Julian's professional judgment as to what he feels should be reported to the board"); 8922:5-8923:4 (testifying that it is appropriate for McLinko to delegate audit planning to his "experienced senior managers" and then to manage the process); 8946:17-8947:1 (testifying that "McLinko's responsibility wasn't for the actual testing of the controls"); 8949:2-18 (testifying that it's "the responsibilities of the SAMs to develop the risk assessment."); 8949-24-8950:4 (testifying that ensuring WFAS had a risk-based coverage strategy "fell to the responsibility of the SAMs"). Attempting to downplay his obligations as EAD, McLinko gave similar testimony. *See, e.g., id.* at 8442:22-8443:4 ("I don't perform audits of the areas. It's my senior audit management team that plans the audit, executes the audit, and issues the audit reports."). This

abdication of responsibility is unconvincing, not supported by the record, and is inconsistent with safe and sound banking practices.

Based on the record evidence and hearing testimony described above, the Comptroller finds that given McLinko's knowledge of SPM and its inherent risks, his failure to plan and manage audit activity to detect and document the Community Bank's SPM problem was contrary to generally accepted standards of prudent operation. McLinko, as EAD for the CBO Group, was responsible for ensuring that the Community Bank audit plan adequately covered SPM. It did not. Therefore, the Comptroller finds that McLinko engaged in unsafe or unsound banking practices.

c. McLinko's conduct was reckless, as he disregarded the known risk of SPM by not ensuring the audit plan adequately covered SPM

The Comptroller concludes that the record evidence and hearing testimony support a finding that McLinko's conduct was reckless, meeting the standard for misconduct for a second-tier CMP under 12 U.S.C. § 1818(i)(2)(B). McLinko disregarded a risk of substantial harm by not planning audits that could identify SPM and the related internal control deficiencies. As detailed above, McLinko had extensive information about the extent and risk of SPM. Despite this knowledge, McLinko did not ensure that the audit plan would adequately cover SPM and the related internal control deficiencies. This failure was recklessly unsafe or unsound. *See In the Matter of Blanton*, 2017 WL 4510840, at *13.

3. Julian's failure to escalate the SPM problem was a recklessly unsafe or unsound practice

The Comptroller finds that the record evidence supports the ALJ's finding that Julian failed to escalate and report on risk issues related to SPM. *See generally* Julian RD at 8, 10-11, 46, 261-62, 292-93. Specifically, the record reflects that Julian repeatedly failed to escalate known or obvious SPM risks to the Board of Directors, and he continuously misled the Board by

downplaying the extent of SPM in the Community Bank. This misconduct constituted a recklessly unsafe or unsound practice. In making this determination, the Comptroller incorporates the following relevant facts that the ALJ properly found undisputed at the summary disposition stage: SD Order SOMFs 237, 248, 420, 430-443, 448-50, 452-53, 455-61, 470, 472, 484, 488-89.

a. Standards for escalation applicable to Julian as Chief Auditor

Julian's responsibility to escalate risk issues arises out of internal Bank documents and OCC guidance. These materials, as expanded upon by NBE testimony, articulate a standard for escalation for the Chief Auditor, albeit one that Julian does not agree with. As previously discussed in Part V.C, there are heightened standards applicable to Julian as Chief Auditor. *See* OCC Exh. 931. The WFAS Audit Charters also state that audit, in its role as the Bank's third line of defense, "[f]unctions as a change agent to *ensure risk issues are escalated and resolved.*" OCC Exhs. 2087, 2088; R. Exh. 17746 (emphasis added). Moreover, pursuant to the 2003 Interagency Policy Statement on the Internal Audit Function and its Outsourcing, audit directors and senior management are required to promptly report significant matters "directly to the board of directors (or its audit committee) and senior management." OCC Exh. 1906 at 6. As explained by NBE Smith, in order to comply with his responsibility to escalate, Julian was required to undertake greater reporting, to include "greater focus on the scope of the issue, the types of controls that are broken down, the accountability, who broke it, but also who is going to fix it. What needs to be done, the types of corrective action." Hr'g Tr. at 3925:18-25. "Audit's reporting to the board is critically important," states Smith. She further explained:

> It's why it's a part of [the OCC's] heightened standards. Audit provides that third line of defense perspective. But that third line of defense perspective is that independent perspective. They're looking at issues outside the first and second line of defense. They are looking at issues across the entire enterprise, and they are coming up with their views on risks within the lines of business as well as the

> broader risk management framework. Their input provides the board with really important information about the control environment . . . .

Id. at 3911:2-18.

Emphasizing the importance of escalation and the standard for reporting, NBE Coleman explained that:

> Escalation begins with the identification of issues, and where there are significant issues that may result in noncompliance with laws, regulations, OCC expectations or bank policies, it's the expectation that those issues would be escalated, either to senior management or the Board. And so escalation is also a key component in ensuring that prompt action is taken by either the Board or senior management in remediating those issues. So, therefore, it's also important that issues are escalated in a timely fashion . . . . Escalation would include details in regards to the significant risk issue, the root cause of that issue, how it could impact the bank, and what recommended actions management needs to take in order to effectively remediate those issues.

Id. at 235:20-236:16. Further, as Chief Auditor, Julian had the added responsibility of accountability in reporting to the Management Committee and the A&E Committee. OCC Exh. 2087 at *2. The WFAS Charters provide that the chief audit executive has the responsibility to "[e]nsure effective corrective actions are taken to strengthen reported control weaknesses or uncontrolled risks" and to "[a]ssist in the investigation of significant suspected fraudulent activities within the organization and notify management and the [A&E] committee of the results." OCC Exhs. 2087, 2088; R. Exh. 17746.

b. Julian failed to escalate information he had on SPM

As discussed in Part VI.A.4, Julian had knowledge of SPM in the Community Bank. He testified that he was aware of the risks posed by the Community Bank's sales practices after the October and December 2013 *L.A. Times* articles, OCC Exh. 2772 at 41-42, and that his understanding of the "larger, systemic nature of sales practices problems" began to form after reading the October 2013 article, OCC Exh. 1938R at 13. As such, it was his responsibility as

Chief Auditor to escalate these risk issues to both management and the A&E Committee of the Board. He failed in that responsibility.

Julian argues in his exceptions that he repeatedly escalated the information he had regarding SPM, and that he was not required to escalate information regarding SPM that was already known to the WFC Board or was already being escalated by someone else within WFC. Julian Br. at 462-67. The Comptroller will address each argument in turn.

Julian first argues that, insofar as he was obligated as Chief Auditor to escalate information to the WFC Board, he did so. Julian Br. at 466-67. The Comptroller disagrees. The record shows that Julian continuously failed to report and escalate to the A&E Committee the existence of SPM risk issues, the root cause, or any deficiencies related to sales practices risk management or internal controls prior to October 2016. Michael Loughlin, the Bank's Chief Risk Officer and a member of the Bank's Board, testified that prior to October 2016, he could not recall a single time that Julian raised serious concerns regarding SPM to the Board from audit's perspective. Hr'g Tr. at 2992:20-2993:4, 4864:3-9.

Moreover, what Julian did report to the Board and at Board committee meetings was misleading and unjustifiably positive. Despite having testified that he knew about SPM risk issues in the Community Bank from at least 2013, Julian continuously reported to the A&E Committee that WFAS believed that overall risk management, systems of controls, and governance processes were generally effective. OCC Exh. 1969R; R. Exhs. 11908, 20573, 20591. He reported that the results of audit continued to be good and improving, with large percentages rated as effective. R. Exhs. 12389, 13540, 20486, 20604. And he reported that overall controls were functioning as intended and that the controls were well managed. OCC Exh. 2072R; R. Exhs. 1373, 20573, 20701. What he did not report, however, is that WFAS was

not performing any audits designed to detect and document SPM in the Community Bank and the related control deficiencies. *See* Part VI.B.1; *see also* OCC Exh. 799 at 24, 58. Julian cannot claim this to be adequate escalation of SPM risk issues.

Julian also misled the Board by failing to escalate SPM risk issues in his presentations of the annual companywide ERMAs to the A&E Committee. OCC Exhs. 1334, 2220, 2252; R. Exh. 17746; Hr'g Tr. at 1202:20-1203:4 (Candy), 3912:6-3913:10, 3929:3-3930:12, (Smith), 6488:14-6491:25 (Julian). The 2013, 2014, and 2015 companywide ERMAs and Julian's presentations failed to identify a problem with SPM in the Community Bank and failed to identify for the Board any significant risk of management or internal controls deficiencies related to sales practices. OCC Exhs. 1334, 2220, 2252. Instead, the ERMAs praised the Community Bank each year for its risk management, internal controls, and culture. *Id.* For example, the 2013 companywide ERMA gave a satisfactory rating for the enterprise risk management of the Community Bank. OCC Exh. 1334 at 9; Hr'g Tr. at 6498:5-8 (Julian). Julian presented this ERMA to the A&E Committee of the Board on April 28, 2014, mere months after the *L.A. Times* articles were published. Hr'g Tr. at 6487:17-6488:1 (Julian). Despite admitting that he read the articles and became aware of SPM problems, he did not escalate those concerns in his presentation. *Id.* at 6498:9-6499:25 (Julian). Instead, he conveyed only the satisfactory rating in the ERMA as written, thus falsely assuring the Board that there was no issue with enterprise risk management.

As another example, Julian failed to report and escalate WFAS' October 2015 opinion that risk management of sales practices needed improvement. *See* OCC Exh. 1994R; Hr'g Tr. at 2388:8-2389:6 (Crosthwaite) (testifying that WFAS' assessment of risk management of sales practices needs improvement was "never escalated outside of audit."). As NBE Crosthwaite

testified, this was particularly problematic because "the bank has a serious problem with sales practices misconduct. . . . The OCC has just issued five MRAs . . . ." Hr'g Tr. at 2389:14-19 (Crosthwaite). It was not until May 2017 that Julian *finally* reported to the Board that WFAS rated sales practices risk management as weak in the 2016 ERMA. *Id.* at 4000:24-4003:11 (Smith). But, as NBE Smith explained, it was too late for the information to be useful to the Board to effectively remediate the SPM risk issues. *Id*.

> [A]t that point the sales goals had been taken out of the Community Bank. So the underlying problem in the Community Bank has actually been removed . . . . It was not useful [to the Board] at that point at all . . . . [T]his is the first time that audit is issuing a Weak rating for sales practices misconduct. And this is actually after the bank has had to completely dismantle its entire approach to how it sold products in the Community Bank because of the rampant fraud and misconduct.

Id. at 4002:4-4003:11.

In addition to Julian's misleading reporting to the A&E Committee, Julian presented misleading information at the May 19, 2015 Risk Committee meeting. The meeting was held shortly after a lawsuit was brought against the Bank by the Los Angeles City Attorney relating to improper sales practices in its retail banking stores. R. Exh. 156R. Karl ("Keb") Byers, the former head of Corporate Enterprise Risk, testified in his sworn statement that Julian's presentation at the meeting included "one comment at the time that his folks had done audit work around sales practice and hadn't found anything systemic . . . ." OCC N/A 1 at 19-20 (admitted excerpts of Sworn Statement of Karl Byers). Further, handwritten meeting minutes taken by Anthony Augliera, WFC Secretary, reveal that Julian falsely told the Risk Committee that a number of different audits had been done in the prior 18 months, with more targets around cross-sell, but that audit had not found anything systemic across the organization. OCC Exhs. 2158R-U, 2365; Hr'g Tr. at 3669:18-3673:10 (Augliera). NBE Smith testified that Julian's presentation provided a false "sense of comfort to the board that the third line of defense understands the

issue, is doing work around it and is not finding any problems." Hr'g Tr. at 3974:17-20. She testified that the misleading presentation gave "the false impression that the board doesn't have to do anything further, doesn't really have to engage further. This is not escalating a material risk. This is not escalating anything. If anything, it is the exact opposite." Hr'g Tr. at 3974:25-3975:6 (Smith).

Given the obvious risks posed by SPM at the Bank, *see* Part VI.A.3, the Comptroller finds that Julian's repeated reporting of false and misleading assurances to the Board and his failure to escalate risk issues related to SPM constituted an unsafe or unsound practice. The Comptroller, therefore, rejects Julian's exceptions arguing that he adequately escalated SPM risk issues to the Board.

Second, Julian argues that whatever information he purportedly did not escalate was meaningless or substantially similar to information already escalated by either himself or others. Julian Br. at 462-44, 466-67. Julian asserts that there is "no benefit to be gained from escalation *ad nauseum"* because it would inundate the WFC Board with repetitive information, "obscuring meaningful escalation." Julian Br. at 462-64. However, the fact that the SPM continued for nearly four years, from at least January 1, 2013, to September 30, 2016, clearly shows that SPM was a major longstanding risk that remained unaddressed and, as such, "inundating" the Board was necessary to resolve the issue and lessen harm to the Bank. What others in the Bank may have already known about the SPM problem does not absolve Julian of his responsibility to escalate the risk issues to the WFC Board. Julian's responsibility remained unchanged: "to ensure risk issues are escalated and resolved." OCC Exhs. 2087, 2088; R. Exh. 17746. To say otherwise would produce an absurd result—an unenforceable duty that one could simply sidestep by pointing the finger at some other person or entity who may have already known of the risk.

Because SPM was clearly a continuing and unaddressed risk that Julian had a responsibility to escalate to the WFC Board regardless of whether he believed others knew about it, the record evidence supports a finding that he failed in that responsibility. The Comptroller, therefore, rejects Julian's exceptions arguing that he was not required to escalate SPM risk information that the Board may have already known, or already escalated by someone else.

c. Julian's failure to escalate SPM was reckless

The Comptroller finds that the record evidence and hearing testimony support a finding that Julian's conduct was reckless, meeting the standard for misconduct for a second-tier CMP under 12 U.S.C. § 1818(i)(2)(B). Julian disregarded known or obvious risks of substantial harm by not escalating to the Board of Directors serious and continuing SPM risks, and which he was aware of from as early as October 2013. Despite having this knowledge, Julian failed in his duty to escalate. This failure was recklessly unsafe or unsound. *See In the Matter of Blanton*, 2017 WL 4510840, at *13.

4. McLinko's failure to escalate the SPM problem was a recklessly unsafe or unsound practice

The Comptroller finds that the record evidence supports the ALJ's finding that McLinko failed to escalate risk issues related to SPM. *See generally* McLinko RD at 8, 10, 95-97, 261. Specifically, the record reflects that McLinko repeatedly failed to escalate known or obvious SPM risks to David Julian and the WFC Board, and that this constituted a recklessly unsafe or unsound practice. In making this determination, the Comptroller incorporates the following relevant facts that the ALJ properly found undisputed at the summary disposition stage: SD Order SOMFs 237, 421, 430-43, 448-49, 452-53, 455-61, 464-66, 470, 488-89.

a. Standards for escalation applicable to McLinko as EAD

As EAD in WFAS, there is no question that McLinko had the responsibility to escalate SPM risks to Julian and, by extension, to the WFC Board. In his exceptions, McLinko admits that, in his role as EAD, he "reported to Mr. Julian who in turn reported to the WFC Board." McLinko Br. at 608. McLinko also testified that his "reporting relationship [to the Board] was through David Julian." Hr'g Tr. at 7997:13-21.

McLinko's responsibility to escalate risk issues arose out of internal Bank documents and OCC guidance. Contrary to McLinko's claim that either no professional standard or the incorrect professional standard had been articulated, *see* McLinko Br. at 309-22, these materials, as expanded upon by NBE testimony, do articulate a standard for escalation for the EAD. As discussed in Part VI.B.3, the standard identified is a heightened one. As such, McLinko's argument in his exceptions that either no professional standard or the wrong professional standard had been articulated is without merit.

b. McLinko failed to escalate information on SPM

As discussed in Part VI.A.4, McLinko had knowledge of SPM in the Community Bank. He admitted that on October 4, 2013, he received the October 2013 *L.A. Times* article from Michael Bacon. McLinko Am. Ans. ¶ 457; OCC Exh. 644. He was also informed of the SPM risk issues on multiple occasions from his direct report, Bart Deese, and received numerous reports and presentations regarding SPM from Corporate Investigations. *See* OCC Exhs. 273, 274, 275; R. Exhs. 766, 3635, 3817, 3819, 3881, 3923, 3924, 4434, 4818, 4819. As such, it was his responsibility as EAD to escalate these risk issues to Julian and the WFC Board. He failed in that responsibility.

McLinko argues in his exceptions that he escalated appropriately to the WFC Board. McLinko Br. at 615-19. Based on a review of the record and the standards discussed above, this

argument fails. Despite frequent meetings and communications between McLinko and Julian throughout the relevant period, McLinko admits that he did not escalate several significant risk issues to Julian. For example, on January 3, 2013, McLinko received an email from Bart Deese regarding a meeting Deese had with Michael Bacon, the head of Corporate Investigations. R. Exh. 3635. In this email, Deese conveyed that Bacon pointed to sales integrity as "still his #1 concern" and that "he felt a lot of it was related to sales goals and pressure." *Id*. Despite McLinko's testimony that "[s]ales integrity itself, as an auditor, you – it's not something you want to see happening if there are sales integrity issues," Hr'g Tr. at 7885:11-14, he did not recall escalating that information to Julian. *Id*. at 8556:5-10.

On November 1, 2013, in another email from Bart Deese, McLinko received a Significant Investigation Notification ("SIN") from Corporate Investigations describing allegations identifying 177 bankers for possible simulated funding, resulting in 30 terminations as of the date of the SIN. R. Exhs. 4818, 4819. Regarding the SIN, McLinko testified that there was never a time that he viewed simulated funding as an acceptable practice. Hr'g Tr. at 8588:9-11. He also testified that part of audit's job was to ensure that employees' actions complied with the "bank policies, the internal controls as part of those bank policies." *Id*. at 8590:1-6. Nevertheless, McLinko admitted not only that he did not read the entire SIN, but that he also did not share the SIN or any information he learned from what he did review with Julian. *Id*. at 8590:14-22. Lastly, McLinko testified that he did not recall telling Julian at the time that team members were engaging in simulated funding to meet sales goals. *Id*. at 8590:23-8591:8.

Additionally, McLinko and his team were involved in drafting portions of the WFAS quarterly summary reports to the A&E Committee pertaining to the Community Bank. Hr'g Tr. at 3914:5-11 (Smith), 6202:10-6203:12 (Julian), 8716:1-15 (McLinko). Throughout this process,

McLinko failed to escalate significant matters to Julian and the A&E Committee. Specifically, McLinko failed to escalate that he narrowed the scope of the 2015 account opening audit to Julian and the A&E Committee. McLinko prepared language for Julian's A&E Committee reporting on this audit, which stated that the focus of the audit "will be account-opening and sales practices." OCC Exh. 1208. This exact language went to the A&E Committee in July 2015, November 2015, and February 2016. *See* OCC Exhs. 2157 at 59, 2228 at 62, 1900 at 64. However, in October 2015, McLinko approved narrowing the scope of this audit to exclude sales practices. *See* Hr'g Tr. at 8396:9-25; 8829:5-8830:5 (McLinko). He did not tell Julian that he had approved narrowing the scope of the audit until March 2016. *See id*. 6875:22-6876:1, 7371:15-7372:8 (Julian). Moreover, the A&E Committee reports of November 2015 and February 2016 did not reflect the scope change. *See* OCC Exh. 2228 at 62, 1900 at 64. The reporting after March 2016 also did not escalate that the scope had changed, only obliquely noting that the "focus of the review was account opening," without mentioning sales practices. OCC Exh. 799 at 58. McLinko was responsible for escalating significant matters. OCC Exh. 931 at 118-19. Given that this audit was the only audit that scoped in sales practices in the Bank's physical branches, *see* Part VI.B.1, above, the change in scope was a significant matter that McLinko needed to report to Julian and in the A&E Committee reporting. McLinko's belated escalation to Julian was insufficient. Hr'g Tr. at 249:11-250:18 (Coleman). His failure to escalate the scope change is yet another specific example supporting McLinko's overall failure to escalate significant issues.

McLinko was also responsible for reviewing the conclusions in the Community Bank ERMAs, which were incorporated into the company-wide ERMAs that Julian and WFAS provided to the Board annually. *Id*. at 8156:6-16 (McLinko). The 2013, 2014, and 2015 ERMAs

failed to identify SPM in the Community Bank and also failed to identify any significant risk management or internal controls deficiencies related to sales practices. OCC Exhs. 1334, 2220, 2252. Instead, the ERMAs praised the Community Bank each year for its risk management, internal controls, and culture. *Id.* For example, the 2013 ERMA was presented to the Board after the *L.A. Times* articles identifying a culture of SPM at the Community Bank were published, yet the ERMA stated that:

> WFC's desired culture is well articulated in the company's Vision and Values and Employee Handbook. Culture is communicated in team member meetings and publications. Additionally, WFC has processes in place to identify, measure, and address ethical violations. The [lines of business] and risk areas all rate culture Strong or Satisfactory.

OCC Exh. 1334 at 12; *see also id*. at 4, 9, 13. The 2013 ERMA awarded an overall satisfactory rating for enterprise risk management to the Community Bank, despite the known existence of SPM as reported in the *L.A. Times* articles. *Id.* at 9. McLinko reviewed and approved the 2013 ERMA, knowing that it would give the Board false assurances regarding enterprise risk management at the Community Bank. The Comptroller finds that this was unsafe or unsound.

McLinko's alternative argument that he was not required to escalate risk issues related to SPM because "the WFC Board, a WFC Board committee, individual directors, senior Bank management, or some other person or entity was already aware of the information" is without merit. McLinko Br. at 607. McLinko asserts that there was "no benefit to be gained from escalation *ad nauseum*" because it would have inundated the WFC Board with repetitive information and "obscure meaningful escalation." *Id*. at 608. However, as discussed above in Part VI.B.3, the fact that others in the Bank may have already known about SPM did not absolve McLinko of his responsibility to escalate the risk issues to Julian and the WFC Board. SPM was clearly a continuing and unaddressed risk that McLinko had a responsibility to escalate

regardless of whether he believed others knew about it, and the record evidence supports a finding that he failed in that responsibility.

Given the obvious risks posed by SPM at the Bank, *see* Part VI.A.3, the Comptroller finds that McLinko's repeated failure to escalate risk issues related to SPM constituted an unsafe or unsound practice.

c. McLinko's failure to escalate SPM was reckless

Finally, the Comptroller finds that the record evidence and hearing testimony support a finding that McLinko's conduct was reckless, meeting the standard for misconduct for a second-tier CMP under 12 U.S.C. § 1818(i)(2)(B). McLinko disregarded risks of substantial harm by not escalating to Julian and the Board of Directors known or obvious and serious and continuing SPM risks, which he was aware of from as early as October 2013. Despite having this knowledge, McLinko failed in his duty to escalate. This failure was recklessly unsafe or unsound. *See In the Matter of Blanton*, 2017 WL 4510840, at *13.

5. Julian's failure to incorporate risk events in the 2016 incentive compensation recommendation was a recklessly unsafe or unsound practice

The Comptroller finds that the record evidence and hearing testimony support a finding that Julian engaged in a recklessly unsafe or unsound practice by failing to incorporate risk events in the 2016 incentive compensation process. *See generally* Julian RD at 48, 419-21, 426-28, 430, 435.[24] Specifically, the record shows that Julian, as Chief Auditor of the Bank, was a

[24] The Comptroller notes that the ALJ did not explicitly find that this was an unsafe or unsound practice. *See generally* Julian RD at 48, 419-21, 426-28, 430, 435. Enforcement Counsel properly excepted to the RD, arguing that the RD should have explicitly found that Julian engaged in an unsafe or unsound practice by failing to assess and incorporate risk events in incentive compensation recommendations. *See* EC's Exceptions to the ALJ's Recommended Decision as to Julian, Apr. 14, 2023 ("EC Julian Exceptions") at 2; Brief in Support of EC's Exceptions to the ALJ's Recommended Decision as to Julian, Apr. 14, 2023 ("EC Julian Exceptions Br") at 39-41. As detailed in this section, the Comptroller partially upholds these exceptions.

non-voting member of the incentive compensation steering committee and participated in the discussions and meetings in 2014, 2015, and 2016. *See, e.g.*, Hr'g Tr. at 1124:22-1125:16 (Candy). This committee provided a compensation memo to the Bank's CEO and the Human Resources Committee of the Board. *See* OCC Exh. 689 at *1. The memo assessed how effectively the Bank's senior executives managed risk based on risk events such as regulatory and audit findings. *See generally id.* The memo recommended lowering the incentive compensation of senior executives who had negative findings on their risk management. *See id.* at *12-*13. As detailed below, the record shows that in 2016, Julian was aware of multiple negative regulatory and audit findings relating to Tolstedt and Anderson, but he did not raise these findings during the meeting. In making this determination, the Comptroller incorporates the following relevant facts that the ALJ properly found undisputed at the summary disposition stage: SD Order SOMFs 462, 486.

a. Standards for incentive compensation

The OCC, along with other federal banking agencies, has established standards for incentive compensation recommendations through guidance on incentive compensation. *See* OCC Exh. 2042 (promulgated at 75 Fed. Reg. 36395 (June 25, 2010)). This guidance states that banks "should monitor incentive compensation awards and payments, risk taken, and actual risk outcomes to determine whether incentive compensation payments to employees are reduced to reflect adverse risk outcomes or high levels of risk taken." *Id.* at *17-18. In addition, the OCC's Heightened Standards require that compensation and performance management programs "appropriately consider the level and severity of issues and concerns identified by independent risk management and internal audit." OCC Exh. 931 at 125. Additionally, according to the compensation memos, unsatisfactory and high-risk needs improvement "audit issues" are supposed to be factored into the final recommendations on incentive compensation. OCC Exh.

689 at *2. Regulatory findings, such as key MRAs, consent orders, and other regulatory concerns are also supposed to be factored into the final recommendation. *See id.* Thus, Bank employees who make recommendations on incentive compensation must ensure that adverse risk outcomes, including audit and regulatory findings, are taken into account. Failure to do so would be contrary to the generally accepted standards of prudent operation with respect to incentive compensation. *See Adams*, 2014 WL 8735096 at *11.

b. Julian failed to incorporate three risk events in the 2016 incentive compensation recommendation process

From 2014 to 2016, Julian was part of the Bank's annual risk assessment process that evaluated risk areas and determined whether any senior executive's incentive compensation should be lowered based on how they managed risk. *See* Hr'g Tr. at 1125:1-16 (Candy); SD Order SOMF 462, 486; OCC Exhs. 640, 689, 2819. Julian, along with other Bank executives, met as the incentive compensation steering committee and reviewed the risk management performance of senior executives. *See* Hr'g Tr. at 1124:22-1125:16 (Candy), 3192:4-16 (Loughlin). Although Julian was a non-voting member of this committee, he testified that his role was to ensure that he gave his view with respect to risk matters. *See id.* at 6383:12-6384:11 ("My role was to assure that the folks who were responsible for making those decisions, in my opinion, had my view with respect to risk matters that ought to be taken into consideration."). NBE Candy testified that Julian's role was to "provide his input in terms of the audits and any adverse ratings, you know, any control issues, and really had a valued opinion when it came to the risk events and the subsequent accountability." *Id.* at 2096:3-7. This process culminated in a memo that was submitted to the Bank's CEO and the Human Resources Committee of the Board. *See id.* at 1125:8-16 (Candy).

In 2016, the memo reflected satisfactory risk performance on sales practices for all executives within Community Bank. *See* OCC Exh. 689 at *12. For example, the memo recommended adjusting Anderson's, the Community Bank's Group Risk Officer, compensation down by only 4%, or by $9,100. *See id.* This was an insufficient adjustment, given the unsafe or unsound practices that Anderson was responsible for.[25] At the time the memo was issued, Julian had knowledge of multiple risk events that should have been incorporated into the recommended adjustment. Specifically, Julian knew that the OCC had issued five MRAs related to SPM. *See* OCC Exh. 1754 at 5 (showing Julian as a recipient of the supervisory letter), *6-9 (detailing the five MRAs the OCC issued). Julian also received a report from an outside consultant, which contained many negative findings about risk management related to SPM. *See* OCC Exh. 1310 (email to Julian to attaching the report), 1311 at *4 (report's executive summary) (finding that the first line of defense "does not have a uniform way of evidencing sufficient control over sales practices issues"); *see also* OCC Exh. 1312 (full report). Additionally, in October 2015, WFAS internally rated the Community Bank's risk management of sales practice as "needs improvement." *See* OCC Exh. 1994R at *1. Despite Julian's knowledge of these happenings, the recommendation memo gave Anderson and other Community Bank executives the highest assessment for risk management. *See* Hr'g Tr. at 4815:14-4816:8 (Loughlin); OCC Exh. 689 at *12. The recommendation memo failed to sufficiently incorporate these three risk events in its recommended compensation decisions. *See generally* OCC Exh. 689; Hr'g Tr. at 1123:24-

[25] For more details on these unsafe or unsound practices, refer to the Comptroller's Anderson Decision, Parts VI.B and VII.A.

1124:10 (Candy).[26] Julian's failure to ensure that the recommendation memo adequately reflected these three risk events was an unsafe or unsound practice.[27]

Julian advanced four arguments that his actions were not unsafe or unsound. *See* Julian's Post-Hearing Reply Br. at 71-73. First, he argues that Enforcement Counsel did not prove that any senior executive received inappropriate compensation. *See id.* at 71-72. Next, he argues that he was merely a non-voting member and did not have the same responsibilities as others on the committee. *See id.* at 72. He then argues that he was not responsible for the final recommendation and never saw the final recommendation memos. *See id.* at 72. Finally, he argues other committee members had the same knowledge of SPM and bore more responsibility for the incentive compensation recommendations. *See id.* at 72-73.[28]

The Comptroller rejects these arguments. First, the unsafe or unsound practice is not the absolute amount of compensation paid, but the failure to raise the three risk events detailed above. Second, Julian testified that he was there to share his views with respect to risk matters.

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[26] The Comptroller notes that the OCC conducted an incentive compensation exam later in 2016 and identified these exact issues as unsafe or unsound practices. *See* OCC Exh. 1742 at 2 (concluding that the Bank's incentive compensation program weaknesses were unsafe or unsound banking practices), 8 (stating that the process "to identify adverse risk events that should potentially impact individual incentive compensation" exists but "needs to improve in order to be comprehensive and well-supported"); Hr'g Tr. at 1119:8-1121:15 (Candy) (testifying about this examination). This bolsters the conclusion that Julian's actions were unsafe or unsound.

[27] Although Enforcement Counsel has argued that Julian engaged in unsafe or unsound practices by not incorporating risk events into incentive compensation recommendations in 2014, 2015, and 2016, the Comptroller is only finding that Julian engaged in this unsafe or unsound practice in 2016. The record does not reflect that Julian knew of similar risk events for the 2014 and 2015 compensation recommendations.

[28] Julian has advanced several arguments in his exceptions, including objecting to the ALJ's finding that he engaged in an unsafe or unsound practice by not being involved in the ultimate, actual compensation in this process. *See* Julian Br. at 581-83. The Comptroller is not upholding this finding, and Julian's argument is therefore moot. Julian's remaining arguments do touch on the arguments he previously raised, and the Comptroller rejects them as described in this section.

See Hr'g Tr. at 6383:12-6384:11. Both Loughlin, the head of the committee, and NBE Candy testified regarding Julian's involvement in these meetings. *See id.* at 3284:9-18 (Loughlin), 2095:5-2096:7 (Candy). Julian cannot abdicate his admitted responsibilities by falling back on his status as a non-voting member. He was responsible for bringing up risk events, *see id.* 6383:12-6384:11 (Julian), and there is no evidence in the record that Julian brought up any of the three risk events discussed above, *see id.* at 3308:22-3309:3, 3310:2-5 (Loughlin).[29] It was Julian's responsibility to bring up these three risk events, regardless of other committee members' knowledge and regardless of whether he saw the final recommendation. In sum, Julian's counterarguments are unavailing. The Comptroller finds that his failure to communicate the negative findings was an unsafe or unsound practice.

c. Julian's failure to incorporate the three risk events was reckless

Additionally, the Comptroller finds that Julian's conduct was reckless, meeting the standard for misconduct for a second-tier CMP under 12 U.S.C. § 1818(i)(2)(B). Julian disregarded a known risk of substantial harm by not communicating these three negative reports. These reports identified significant issues with risk management of SPM. *See, e.g.*, OCC Exh. 1311 (Accenture report executive summary). By not communicating these negative findings, the Bank was unable to properly hold executives accountable for unsafe or unsound risk management. This allowed the unsafe or unsound risk management practices to continue without consequences. Therefore, Julian's failure to communicate these risk events was recklessly unsafe or unsound. *See In the Matter of Blanton*, 2017 WL 4510840, at *13.

[29] Julian testified that he would credibly challenge conclusions at these meetings, but there is no evidence in the record beyond this testimony that supports this assertion. *See* Hr'g Tr. at 6383:1-11 (Julian).

6. McLinko's failure to maintain independence from the Community Bank was a recklessly unsafe or unsound practice

The Comptroller finds that the record evidence and hearing testimony supports the ALJ's findings that McLinko engaged in a recklessly unsafe or unsound practice by failing to maintain his independence as an internal auditor for the Bank. *See generally* McLinko RD at 8, 332-33, 447-48. In making this determination, the Comptroller incorporates the following relevant facts that the ALJ properly found undisputed at the summary disposition stage. *See* SD Order SOMFs 255, 257-58, 436, 461, 471 490, 494.

a. Standards for internal auditor independence

As previously noted, as EAD, McLinko had oversight responsibilities for audits performed by the WFAS Community Bank & Operations Group, including "setting the audit strategy, reviewing and approving draft audit reports, complying with Audit's charter, and providing credible challenge to Community Bank management, as necessary." McLinko Am. Ans. ¶ 444; SD Order SOMF 257; *see also* McLinko Am. Ans. ¶ 439 (admitting that he had responsibilities for overseeing the auditing of the Community Bank). This included oversight of the audit team's execution of its duties and the accuracy and completeness of the audits. McLinko Am. Ans. ¶¶ 445-46; SD Order SOMF 258.

McLinko does not dispute that WFAS, as the Bank's third line of defense, was required to establish and adhere to processes for *independently* assessing the design and ongoing effectiveness of the risk government framework, and that internal audit's "principal function is to provide objective and independent assessments of [the B]ank's processes and controls." *See* McLinko Am. Ans. ¶ 16; Hr'g Tr. at 7789:6-7 (McLinko) ("[A]s an auditor, we need to maintain our independence."); 12 C.F.R. Part 30, Appendix D; OCC Exh. 1909U at 12, 23; R. Exh. 533 at

3-4 (internal audit activity must be independent, and internal auditors must be objective in performing their work).

b. McLinko failed to maintain independence from the Community Bank

Despite his acknowledgement of an auditor's need for independence, the evidence shows that McLinko exhibited a clear lack of independence and objectivity while in his role as EAD from 2013 to 2016. In particular, McLinko allowed the Community Bank to influence audit's activities, even though audit was supposed to independently act as a check on risks arising from the Community Bank.

For example, in his correspondence with Anderson, the Group Risk Officer in charge of the first line of defense, McLinko specifically referred to her as being a "partner with WFAS." OCC Exh. 1266; *see also* OCC Exhs. 749, 2071 (McLinko telling his audit team to prepare a deck for his meeting with Carrie Tolstedt and Anderson on how they can work better together explaining he wanted them to "consider us more of a partner verses an auditor"); Hr'g Tr. at 9792:10-20 (Anderson) (testifying that McLinko was a good partner and excellent audit director).

Other record evidence and hearing testimony further demonstrate McLinko's "partnership" and lack of independence. For example, McLinko alerted Tolstedt and Anderson of an issue with a particular audit and promised them that the issue would not go to the Board. *See* OCC Exh. 2010 (email stating "as promised [Tolstedt] and Claudia will not see any surprises" in the committee reports). Moreover, McLinko and Anderson would regularly share drafts of documents that were going to regulators and provide suggestions and edits on how to respond. *See e.g.*, OCC Exh. 104 (Anderson sharing draft MRAs with McLinko and asking for his feedback), 1029, 1030, 1328 (documents showing that Anderson made changes to a draft audit report that ultimately made it into the final report). The record evidence also shows that McLinko

would regularly update Anderson on what was discussed in his meetings with the OCC, *see, e.g.*, OCC Exh. 627; R. Exh. 7917, and that he even asked Anderson *not to mention* certain topics when she had her own meetings with the OCC. *See* OCC Exh. 627 (email from McLinko to Anderson asking, "I'd appreciate it if you don't mention audit and the risk culture topic together when and if you approach the subject with the regulators.").

NBE Crosthwaite explained that McLinko's actions of giving Anderson a "heads up on his conversations with the regulators," *see* Hr'g Tr. at 2371:20-22, and "allowing the first line of defense to provide edits to his audit findings and conclusions" demonstrate a "clear lack of independence," *see id.* at 2360:19-2361:4. In addition, she testified that "auditors are not supposed to be partners with the first line. Auditors are supposed to be independent, provide credible challenge, identify root cause and escalate issues." *Id.* at 2360:2-5. Similarly, NBE Smith testified that while WFAS needs to be a partner with the company, "that is not the same as being a partner with the line of business that you are actually auditing." *Id.* at 3997:13-24. Moreover, she testified that "the notion that Mr. McLinko wants to partner with the line of business rather than acting as an agent of change . . . raises real risks for the institution and, obviously, for the board itself." *Id*. at 3999:8-12. Even McLinko's own expert agrees that an internal auditor would not "be able to operate in an unbiased manner if he's not independent." *Id.* at 8934:1-7.

The Comptroller finds that the record evidence cited above demonstrates a lack of independence and constitutes an unsafe or unsound practice. *See* OCC Exh. 931 ; OCC Exh. 1909U at 12, 23-24; R. Exh. 533 at 3-5.

c. McLinko's failure to maintain independence was reckless

Additionally, the Comptroller finds that the record evidence supports a finding that McLinko's failure to maintain his independence was reckless, meeting the standard for

misconduct for a second-tier CMP under 12 U.S.C. § 1818(i)(2)(B). McLinko disregarded a risk of substantial harm by not remaining independent from the first line of defense. These failures were recklessly unsafe or unsound. *See In the Matter of Blanton*, 2017 WL 4510840, at *13

C. Effect

The *effect* element of a Tier 2 CMP under 12 U.S.C. § 1818(i)(2)(B) can be satisfied by showing that Respondents' misconduct:

1. Is part of a pattern of misconduct;
2. Causes or is likely to cause more than a minimal loss to the Bank; or
3. Results in pecuniary gain or other benefit.

In the RDs, the ALJ found that all three prongs of the effect element were satisfied. *See* Julian RD at 465; McLinko RD at 443. For the following reasons, the Comptroller finds that the record evidence supports the ALJ's findings that Respondents' misconduct satisfied the first two prongs of the effect element of § 1818(i)(2)(B): pattern of misconduct and loss to the Bank. As to the final prong (pecuniary gain), the Comptroller finds that Enforcement Counsel did not meet its burden of proof and rejects the ALJ's finding.

1. Julian and McLinko's misconduct constituted a pattern of misconduct

Under 12 U.S.C. § 1818(i)(2)(B), a *pattern of misconduct* involves a "series of unlawful efforts." *In re Seidman*, No. OTS AP-91-78, 1994 WL 16012535 (OTS Feb. 2, 1994) (recommended decision), *aff'd*, 1995 WL 18252476 (OTS Nov. 8, 1995) (final decision). In addition, ongoing misconduct over a period of months or years can constitute a pattern, particularly when such misconduct demonstrates "utter disregard for the Bank's interests over a significant period of time." *Ellsworth*, 2016 WL 11597958, at *21; s*ee also In the Matter of Blanton*, 2017 WL 4510840, at *10.

The record evidence establishes that Respondents' misconduct constituted a pattern of misconduct for the purposes of § 1818(i)(2)(B). As discussed in Parts VI.A.3 and 4, both

Respondents were aware of the SPM problem and the risk of harm from SPM. As discussed in Parts VI.B.1 and B.2, both Respondents failed to plan and manage activity that would detect and document SPM and the related internal control deficiencies from 2014 to 2016. And, as discussed in Parts VI.B.3 and B.4, both Respondents failed to escalate the SPM problem and its risks up their respective chains during the relevant period. As discussed in Part VI.A.5, Julian also failed to incorporate risk events in the 2016 incentive compensation process. Finally, as discussed in Part VI.A.6, McLinko failed to maintain his independence as an internal auditor for the Bank. Each of these repeated instances of misconduct constituted a pattern under the statute.

In their exceptions, Julian and McLinko raise several legal arguments as to why the RD's findings did not establish a pattern of misconduct, including that a pattern "must be based on repetitive, affirmative misconduct rather than an overall failure to act," *see* Julian Br. at 696-97, 700; McLinko Br. at 305, 690; that instances of misconduct must by "tied together by a common illicit purpose," *see* Julian Br, at 697,700; McLinko Br. at 305, 690-91; and that a continuing violation cannot form a pattern of misconduct, *see* Julian Br, at 696-97, 700; McLinko Br. at 688, 756-57. These arguments were also advanced by Anderson, and the Comptroller addressed and rejected them in the Anderson Decision. *See* CRA Dec. at VII.B.1. The Comptroller hereby incorporates that section of the Anderson decision. *See id*. Specifically, the Comptroller finds that a pattern of misconduct can be supported by repeated failures to act or omissions, and there is no requirement that the misconduct needs to be tied together by a common illicit purpose. *See id*. Moreover, because the Comptroller has not applied the continuing violations doctrine in this case, that exception is moot.

2. Julian and McLinko's misconduct caused more than a minimal loss to the Bank

The record evidence also establishes that Respondents' misconduct caused more than a minimal loss to the Bank for the purposes of § 1818(i)(2)(B). This effect prong is similar to the

financial loss element of §1818(e). *See In re Dodge*, No. OTS AP 10-03, 2011 WL 5545546 (OTS Nov. 1, 2011) (recommended decision) ("These elements largely mirror those the OTS is required to prove to justify a prohibition[.]"), *aff'd*, 2012 WL 6764475 (Sept. 17, 2012) (final decision), *aff'd sub nom., Dodge v. OCC*, 744 F.3d 148 (D.C. Cir. 2014).

Accordingly, the Comptroller incorporates his findings from Part VI.C.1 of the Anderson decision that demonstrates that the Bank suffered a loss of more than $3 billion because of SPM. *See* CRA Dec. at VI.C.1. The only issue left is to what extent Julian and McLinko are responsible for a portion of those losses. As explained in the Anderson decision, the exact amount of the harm need not be proven, nor does it matter if other individuals' actions also contributed to the losses. *See id*. The Comptroller finds that the evidence supports the conclusion that Julian and McLinko's misconduct caused "more than a minimal loss to the Bank," s*ee* Part VI.B.1-6, *supra,* thus satisfying § 1818(i)(2)(B)(ii). Their failures to plan audit activity that would identify the internal control deficiencies that led to SPM and to escalate SPM-related risk issues certainly delayed an effective response to the SPM problem and resulted in a greater loss to the Bank than what it would have suffered had they executed their responsibilities as Chief Auditor and EAD. *See, e.g.*, Hr'g Tr. at 2383:17-2386:16 (Crosthwaite) (testifying that WFAS delayed reporting to the Board until 2017 that sales practices oversight and governance was weak and that prior assurances that risk management in the Community Bank were effective were false), 4000:24-4003:11 (Smith) (testifying that audit's reporting a weak rating for sales practices for the first time in 2017 "was not useful at that point at all" because it occurred after the "rampant fraud and misconduct"); *see also id*. at 4003:13-22 (testifying that audit could have identified sales practice risk as weak "far earlier").

In their exceptions, Julian and McLinko both assert that the effect element requires a showing of both but-for and proximate cause. Julian Br. at 703-07; McLinko Br. at 305-07, 692-96. This argument is substantively identical to an argument advanced by Anderson. *See* CRA Dec. at VI.C.1, VII.B.2. The Comptroller hereby incorporates those sections of the Anderson decision. *See id.* Specifically, the Comptroller finds that he does not need to determine whether proximate cause is required because the record supports a finding that Julian and McLinko's misconduct satisfied the effect element under the heightened proximate-cause standard.

D. Appropriateness of CMP Amount

1. The CMP increases for both Respondents were appropriate

The Notice of Charges sought a $2 million CMP against Julian and a $500,000 CMP against McLinko. Notice at 2. Enforcement Counsel later sought an increase in the CMP amounts to $7 million for Julian and $1.5 million for McLinko. EC MSD Br. at 194-99. The RD adopted the increased CMP amounts. Julian RD at 8; McLinko RD at 7. Both Respondents assert in their exceptions that the OCC may not increase CMP amounts after filing a notice of charges. Julian Br. at 742-44; McLinko Br. at 720-22. Respondents' exceptions also assert that the CMP increases constituted unlawful retaliation against them for exercising their right to litigate their cases. Julian Br. at 738-42; McLinko Br. at 722-27.

These arguments are substantively identical to arguments raised by Anderson. *See* CRA Dec. at VII.C. The Comptroller hereby incorporates that section of the Anderson decision. *See id.* Specifically, the Comptroller holds that the OCC has the legal authority to increase the amount of a CMP after a notice of charges has been filed. *Id.* In addition, the Comptroller holds that regardless of the ALJ's motivations for increasing the CMP, the Comptroller has a valid factual basis for the increased penalties—notably, new evidence demonstrated how widespread and systemic the SPM problem was at the Bank. *Id.* Moreover, the Comptroller's Final Decision

is based on his review of the entire record in this proceeding, and he has found that the evidence supports the imposition of the higher CMPs.

2. The statutory factors support the increased CMP amounts

The Comptroller must consider four statutory factors that weigh toward mitigation when assessing the appropriateness of a CMP amount: (1) the size of financial resources and good faith of the person charged; (2) the gravity of the violation; (3) the history of previous violations; and (4) such other matters as justice may require. 12 U.S.C. § 1818(i)(2)(G). Although Julian and McLinko do not have a history of previous violations, the gravity of their violations is significant,[30] Respondents have not demonstrated sufficient good faith,[31] Respondents have not demonstrated that they lack the financial resources to pay the CMPs, and no such other matters as justice may require apply in this instance.

Respondents argue in their exceptions that they do not possess the financial resources to pay the CMP amounts. Julian Br. at 752-55; McLinko Br. at 731 n.821. Enforcement Counsel and Julian agree that between 2012 and 2016, Julian's total compensation from the Bank was over $12 million. OCC Exh. 2403 ¶ 24, Fig. 1. Enforcement Counsel and McLinko agree that between 2012 and 2016, McLinko's total compensation from the Bank was nearly $3 million. OCC Exh. 2367 ¶ 24, Fig. 1. The OCC need not affirmatively prove Respondents' financial condition before imposing a CMP. *Stanley v. Bd. of Governors of Fed. Rsrv. Sys.*, 940 F.2d 267, 274 (7th Cir. 1991). Given that the Respondents earned substantial sums in their jobs during the time period from 2012 to 2016, the Comptroller finds that this fact does not weigh in favor of reducing the CMP amount.

[30] *See* Part VI.A.3 (finding that SPM was one of the Bank's highest risks).
[31] *See* Part VI.A.4 (finding that the Respondents had knowledge of SPM, yet did not take sufficient action).

Having considered the record evidence, the Comptroller finds that the balance of the statutory mitigating factors does not weigh in favor of reducing the CMP amounts assessed from $7 million for Julian or $1.5 million for McLinko.

3. The thirteen interagency factors support the increased CMP amounts

Respondents assert in their exceptions that the RDs erred in their analysis of the thirteen interagency factors, arguing that the ALJ did not sufficiently explain his reasoning regarding the increased CMP amounts. Julian Br. at 737-38; McLinko Br. at 729-41. The Comptroller finds that the ALJ reviewed and considered the interagency factors based on the evidence established during the hearing in recommending the CMPs for both Respondents. Julian RD at 465-68; McLinko RD at 443-46. The Comptroller thus rejects these exceptions.

VII. COMPTROLLER'S FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING THE CEASE-AND-DESIST ORDERS

Under 12 U.S.C. § 1818(b), the Comptroller may impose a cease-and-desist order against any IAP who has engaged in an unsafe or unsound practice. Here, the Comptroller has previously found that Julian engaged in several unsafe or unsound banking practices: (1) failure to plan and manage audit activity that would have detected and documented SPM in the Community Bank; (2) failure to escalate the SPM problem; and (3) failure to incorporate risk events in the 2016 incentive compensation recommendation. *See supra* Parts VI.B.1, 3, 5. Additionally, the Comptroller has found that McLinko engaged in several unsafe or unsound banking practices: (1) failure to plan and manage audit activity that would have detected and documented SPM in the Community Bank; (2) failure to escalate the SPM problem; and (3) failure to maintain independence from the Community Bank. *See supra* Parts VI.B.2, 4, 6. Any one of these misconduct findings is sufficient to support a cease-and-desist order for the

Respondents under 12 U.S.C. § 1818(b). Accordingly, the Comptroller imposes cease-and-desist orders against both Julian and McLinko.

VIII. JULIAN AND MCLINKO'S STRUCTURAL EXCEPTIONS

A. The Proceeding Did Not Violate Article III or Respondents' Right to a Trial by Jury

Julian and McLinko argue that the proceedings violated Article III of the Constitution as well as their right to a jury trial. Julian Br. at 39-45; McLinko Br. at 772-78. These arguments are substantively identical to arguments advanced by Anderson. *See* CRA Dec. at VIII.A. The Comptroller hereby incorporates that section of the Anderson Decision. *See id.* Specifically, the Comptroller holds that Congress may validly assign the adjudication of OCC enforcement actions outside of Article III because they implicate "public rights." *See id.*

B. ALJ McNeil and Deputy Comptroller for Large Bank Supervision Gregory Coleman Were Properly Appointed

1. ALJ McNeil was properly appointed and was not unconstitutionally protected from removal

Julian and McLinko argue that the ALJ was unconstitutionally appointed and that he was unconstitutionally insulated from Presidential removal. Julian Br. at 46, 53; McLinko Br. at 778, 784. These arguments are substantively identical to arguments advanced by Anderson. *See* CRA Dec. at VIII.B.1. The Comptroller hereby incorporates that section of the Anderson Decision. *See id.* Specifically, the Comptroller holds that the ALJ was properly appointed in the wake of the Supreme Court's decision in *Lucia v. SEC*, 585 U.S. 237 (2018), and that the ALJ is not unconstitutionally insulated from removal by the President, *see id.*

2. The individual who signed the Notice of Charges was properly appointed.

Julian and McLinko argue that the Notice of Charges was signed by an inferior officer without statutory or constitutional authority to do so. Julian Br. at 50; McLinko Br. at 781. Part of their argument—that 12 U.S.C. § 4 limits the number of individuals with "Deputy

Comptroller" in their title—is substantively identical to an argument advanced by Anderson. *See* CRA Dec. at VIII.B.2. The Comptroller hereby incorporates that section of the Anderson Decision. *See id.* Specifically, the Comptroller holds that Coleman's position is not limited by § 4 and that he was validly appointed by the Comptroller pursuant to 12 U.S.C. § 482. *See id.*

Julian and McLinko also argue that Coleman was required to be appointed pursuant to the Appointments Clause. Julian Br. at 53; McLinko Br. at 783. For the reasons explained below, the Comptroller rejects this exception.

First, the Comptroller notes that Julian and McLinko failed to raise this argument before the ALJ. Under the Uniform Rules, the Comptroller is not required to consider an exception where a party "had an opportunity to raise the same objection, issue, or argument before the ALJ and failed to do so." 12 C.F.R. 19.39(b)(2). Julian and McLinko certainly had the opportunity to raise this issue before the ALJ, because they raised the issue of Coleman's statutory appointment in their joint motion for summary disposition. *See* Respondents' Joint Motion for Summary Disposition on the Basis of Their Appointments, Removal, and Improper Signatory Defenses, May 12, 2020, at 18-20. Because they failed to challenge the validity of Coleman's appointment under the Appointments Clause of the Constitution, they forfeited this particular exception. *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952) ("[C]ourts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice.").

Setting aside their failure to timely raise the objection, this exception fails on the merits. Coleman is not, as Julian and McLinko argue, an "officer" subject to the Appointments Clause. "Employees" of the United States are "lesser functionaries" who are subordinate to officers and need not be appointed pursuant to the requirements of the Appointments Clause. *Buckley v.*

Valeo, 424 U.S. 1, 126 n.162 (1976). To qualify as an "officer," an individual must occupy a continuing position established by law and exercise significant authority pursuant to the laws of the United States. *Lucia*, 585 U.S. at 245. The Comptroller delegated limited and specifically defined enforcement authority to certain Deputy Comptrollers to sign notices of charges subject to various restrictions.[32] Coleman's duties signing certain notices of charges were "occasional" and "intermittent," *United States v. Germaine*, 99 U.S. 508, 511-12 (1878), and "subject to the control or direction" of the Comptroller, *Buckley*, 424 U.S. at 126 n.162, thus, he was not subject to the Appointments Clause.

C. The OCC's Funding Structure is Constitutionally Sound

Julian and McLinko argue that the OCC's funding structure violates the Appropriations Clause. Julian Br. at 57; McLinko Br. at 786. This argument is substantively identical to an argument advanced by Anderson. *See* CRA Dec. at VIII.C. The Comptroller hereby incorporates that section of the Anderson decision and holds that the OCC's funding structure is constitutionally sound. *See id.*

D. The Administrative Proceeding Afforded Julian and McLinko All Their Due Process Rights

Julian and McLinko both argue that the proceedings violated their due process rights. Most of these arguments have been addressed in other sections of this decision. *See, e.g.*, Part

[32] A series of delegation memoranda, which the Comptroller hereby incorporates into the administrative record, reveals that Coleman did not exercise significant authority in signing notices of charges and that all significant authority was ultimately vested in the Comptroller. The fact that McLinko did not raise this argument until now—after the Comptroller had certified the record as complete—only confirms that it is too late for him to raise this argument. In any case, the Comptroller includes these materials in the record to respond to the argument that McLinko belatedly raised. *See* Memorandum from Thomas J. Curry, "Delegation of Authority," May 10, 2012; Memorandum from Thomas J. Curry, "Delegation of Authority—Enforcement Authority for Major Matters," July 16, 2014; Memorandum from Thomas J. Curry, "Delegation of Authority—Supervisory and Enforcement Authority," Mar. 23, 2016.

VI.D.1 (rejecting McLinko's argument that increasing the CMP amount violated due process); Part XI.A (accepting Julian's argument regarding the ALJ's recommended issuance of a prohibition order). In addition to those other arguments, Julian argues that the structure of the proceedings violated due process. Julian Br. at 45. And McLinko argues that Enforcement Counsel's reliance on secret law violated his due process rights. McLinko Br. at 791-94.

Julian's argument is substantively identical to an argument advanced by Anderson. *See* CRA Dec. at VIII.D. The Comptroller therefore incorporates that section of the Anderson decision and holds that the structure of the administrative proceedings did not violate Respondents' due process rights. *See id.*

McLinko's argument about the ALJ's reliance on unpublished agency precedent is substantively identical to Anderson's argument. *See* CRA Br. at 119-21. The Comptroller hereby incorporates the relevant section of the Anderson decision. *See* CRA Dec. at IX.B n.69. Specifically, the Comptroller holds that any alleged ALJ reliance on unpublished precedent is cured by this Final Decision, because the Comptroller does not rely on such precedent in this decision. *See id.*

IX. EXCEPTIONS REGARDING PREHEARING ERRORS

A. The ALJ Did Not Unconstitutionally Restrict Communications with a Critical Witness

Julian and McLinko argue that the ALJ unconstitutionally restricted their ability to communicate with former Respondent Carrie Tolstedt, who was a critical witness for their defense. Julian Br. at 58-59; McLinko Br. at 29. These arguments are substantively identical to arguments advanced by Anderson. *See* CRA Dec. at IX.D. The Comptroller hereby incorporates that section of the Anderson decision. *See id.* Specifically, the Comptroller holds that the ALJ's order restricting communications with Tolstedt was valid and issued pursuant to a compelling

reason—the parallel Department of Justice criminal proceedings—and the record shows that Respondents were not prejudiced by the restriction. *See id.*

B. The ALJ's Discovery Orders Were Not Arbitrary and Capricious

Julian and McLinko argue that the ALJ made several erroneous and prejudicial rulings during discovery. Julian Br. at 69-83; McLinko Br. at 42-59. In particular, Julian argues that the ALJ erred by: (1) quashing subpoenas to NBEs who worked on the OCC Ombudsman's *Lessons Learned* report; (2) blocking discovery into personnel information for NBEs who supervised the Bank; (3) blocking discovery of pre-2010 materials; and (4) blocking discovery of *Brady* material. Julian Br. at 69-83. McLinko advances those same arguments, and he also argues that the ALJ erred by (1) blocking discovery into the GAO report; (2) blocking discovery into peer banks; and (3) blocking discovery into documents relied on by exam team witnesses. McLinko Br. at 42-59.

Most of these arguments are substantively identical to arguments advanced by Anderson. *See* CRA Dec. at IX.E. The Comptroller incorporates that section of the Anderson Decision. *See id.* Specifically, the Comptroller holds that the ALJ did not abuse his discretion in blocking discovery into pre-2010 materials, personnel information, or exculpatory material. *See id.*

Moreover, for the same reasons explained in the Anderson Decision, *see id.*, the ALJ did not abuse his discretion in his remaining discovery orders, including by quashing subpoenas to NBEs who worked on the Ombudsman report, blocking discovery into the GAO report, blocking discovery into peer banks, and blocking discovery into documents relied on by exam team witnesses. The Uniform Rules, 12 C.F.R. §19.5(b), confer broad powers on the ALJ, including "all powers necessary to conduct the proceeding," which includes the power to consider and rule upon all procedural and other motions, including discovery motions. *See also id.* §19.25. The Comptroller has reviewed the relevant filings and concluded that the ALJ's rulings on these

matters did not constitute an "abuse of discretion," and, accordingly, the Comptroller does not overturn them. *Brooks,* 1993 WL 13966512, at *14.

C. Partial Summary Disposition Was Proper

Julian and McLinko advance several legal and factual arguments about the summary disposition process. *See* Julian Br. at 90-134; McLinko Br. at 64-105. McLinko argues (1) the Administrative Procedure Act ("APA") does not allow for summary disposition; (2) the ALJ improperly entered partial summary disposition; (3) the ALJ erred in applying the standards governing summary disposition; (4) the ALJ improperly made additional findings EC did not ask for; and (5) the ALJ improperly struck additional material facts he offered. McLinko Br. at 64-105. Julian advances similar arguments, namely (1) the APA does not allow for summary disposition; (2) the ALJ improperly entered partial summary disposition; (3) the ALJ erred in applying the standards governing summary disposition; (4) the ALJ improperly made additional findings EC did not ask for; and (5) the ALJ improperly struck additional facts he and McLinko offered. Julian Br. at 90-134.

Julian and McLinko's first four arguments are substantively identical to arguments advanced by Anderson. *See* CRA Dec. at IX.B. The Comptroller hereby incorporates that section of the Anderson Decision. *See id*. Specifically, the Comptroller concludes that summary disposition is allowed in OCC administrative actions. *See id.* at IX.B.1. Similarly, 12 C.F.R. Part 19 allows for partial summary disposition. *See id.* at IX.B.2. As to any factual errors the ALJ made during summary disposition, the Comptroller has conducted a *de novo* factual review of the SD Order's factual findings, Enforcement Counsel's SOMFs, and the evidence cited by both parties. Where this Final Decision relies on a finding or SOMF from the SD Order, the Comptroller's review has determined that the findings or SOMF is properly supported by the evidence adduced at the summary disposition stage. *See id.* at IX.B.3. For the reasons explained

in this Final Decision, the SD Order SOMFs where there was not a genuine dispute of material fact, combined with the evidence and testimony from the hearing, support the issuance of CMPs and cease-and-desist orders against Julian and McLinko. Finally, the Comptroller did not consider the introductory pages of the SD Order in this decision. *See id.* at IX.B.3.

With respect to Julian and McLinko's final argument, the Comptroller disagrees that the ALJ erred by not considering the additional facts they offered. Twelve C.F.R. § 19.29 does not contain a provision allowing parties opposing summary disposition to file their own material facts; it allows filing "a statement setting forth those material facts as to which the opposing party contends a genuine dispute exists" and supporting that statement with evidence. 12 C.F.R. § 19.29(b)(2). Additionally, Julian submitted 480 pages of factual response and McLinko submitted 425 pages of factual response that the ALJ considered. *See* Julian's Response to EC's SOMFs at 1-480; McLinko Response to EC's SOMF at 1-425. Therefore, the ALJ's ruling was not an abuse of discretion and did not constitute manifest unfairness.[33] *See Brooks*, 1993 WL 13966512, at *14; *see also supra* Part IV. The Comptroller rejects this exception.

D. The ALJ Properly Rejected Julian and McLinko's Affirmative Defenses

Julian and McLinko argue that the ALJ erroneously rejected their affirmative defenses. Specifically, Julian and McLinko both argue that the ALJ erred in rejecting their affirmative defenses related to the statute of limitations and estoppel, and McLinko argues that the ALJ erred in rejecting his affirmative defenses based on constitutional violations. Julian Br. at 769-87; McLinko Br. at 749-91.

[33] Additionally, given the amount of evidence the ALJ did consider at summary disposition, any error was harmless.

1. The ALJ properly rejected Julian and McLinko's estoppel defense

Julian and McLinko's arguments concerning their affirmative defense of estoppel are substantively identical to arguments advanced by Anderson. *See* CRA Dec. at IX.C. The Comptroller hereby incorporates that section of the Anderson decision and holds that the ALJ properly rejected Respondents' affirmative defense of estoppel. *Id.*

2. The ALJ properly rejected Julian and McLinko's constitutional defenses

McLinko argues that the ALJ improperly rejected his constitutional defenses, and he also argues the merits of each constitutional issue. McLinko Br. at 771-91. The Comptroller has addressed each of these issues in other sections of this decision. *See supra* Part VIII. For the reasons articulated in those sections, the Comptroller rejects those defenses and determines that the ALJ did not err in rejecting them as well.

3. The statute of limitations does not bar any claims against Respondents

Respondents and Enforcement Counsel all filed exceptions related to the statute of limitations. In addition, Julian and McLinko argue that the ALJ improperly rejected their affirmative defenses regarding the statute of limitations. Julian Br. at 769; McLinko Br. at 750. For the reasons detailed below, the Comptroller partially accepts Respondents' exceptions to the ALJ's analysis of continuing violations. The Comptroller rejects all other exceptions.

In the RDs, the ALJ found that the five-year statute of limitations in 28 U.S.C. § 2462 applies to the CMP actions against Julian and McLinko. Julian RD at 478-79; McLinko RD at 453-54. The ALJ found that the effect of Julian and McLinko's misconduct occurred within the statute of limitations period and that the CMP charges were timely brought. *Id.* The ALJ further found that the continuing violations doctrine applied. Julian RD at 480; McLinko RD at 454-55.

Julian and McLinko raised two arguments that are substantively identical to arguments raised by Anderson: (1) the ALJ misconstrued what a claim first accruing means under the

statute of limitations, and (2) the continuing violations doctrine does not apply to actions under 12 U.S.C. § 1818. *See* Julian Br. at 769-82; McLinko Br. at 750-61. Similarly, Enforcement Counsel's sole argument on the continuing violations doctrine is substantively identical to the argument they raised against Anderson. *See* EC Julian Exceptions Br. at 53; Brief in Support of Enforcement Counsel's Exceptions as to the ALJ's Recommended Decision as to McLinko ("EC McLinko Exceptions Br."), Apr. 14, 2023, at 47. The Comptroller hereby incorporates that section of the Anderson Decision. *See* CRA Dec. at IX.A. Specifically, the Comptroller holds that a claim accrues when any occurrence of any element first occurred and that the continuing violations doctrine is not necessary as the claims against Julian and McLinko accrued inside the statute of limitations period. *See id.*

Julian and McLinko raised three additional arguments: (1) the D.C. Circuit's 2000 decision in *Proffitt vs. FDIC*, 200 F.3d 855 (D.C. Cir. 2000), is no longer good law because of the Supreme Court's 2013 decision in *Gabelli v. SEC*, 568 U.S. 442 (2013); (2) even if *Proffitt* is good law, it only applies to cases where the actual loss occurs inside of the statute of limitations period; and (3) 28 U.S.C. § 2462 applies to cease-and-desist orders, and therefore, that claim is time-barred. *See* Julian Br. at 770-71, 775-77; McLinko Br. at 750-53, 755-56. The Comptroller will address these arguments in turn.

The ALJ relied on the D.C. Circuit cases *Proffitt* and *Blanton* to interpret 28 U.S.C. § 2462 as it applies to 12 U.S.C. § 1818. *See* Julian RD at 478-80; McLinko RD at 553-55. Julian and McLinko argue that the Supreme Court's decision in *Gabelli* overturned *Proffitt*. *See* Julian Br. at 775-76; McLinko Br. at 755-56. The Comptroller rejects this argument. The Supreme Court's holding in *Gabelli* was limited: the Court held that the fraud-discovery rule does not apply to government actions for civil penalties. *See* 568 U.S. at 448. Decisions after *Gabelli* have

not extended its reasoning beyond this narrow holding. *See, e.g.*, *FERC v. Powhatan Energy Fund, LLC*, 949 F.3d 891, 899 (4th Cir. 2020); *United States v. Spectrum Brands, Inc.*, 924 F.3d 337, 350 (7th Cir. 2019). The Comptroller reaffirms his 2020 decision in *Ortega,* which held, "*Proffitt* remains good law and . . . the Comptroller concludes that it was not abrogated by *Gabelli*." *In the Matter of Ortega*, Nos. AA-EC-2017-44, AA-EC-2017-45, 2020 WL 8919757 (OCC Dec. 18, 2020) (Comptroller's Decision). Therefore, the Comptroller rejects Julian and McLinko's arguments that the Comptroller should not follow *Proffitt*. *See* Julian Br. at 775-77; McLinko Br. at 755-56. Accordingly, as detailed in the Anderson decision, if *any* occurrence of *any* element *first* occurred on or after January 23, 2015, the CMP claims against Julian and McLinko are timely under 28 U.S.C. § 2462. *See* CRA Dec. at IX.A.

Applying this legal standard, the Comptroller finds that the statute of limitations does not bar any claims against Julian and McLinko. The record shows that the first occurrence of loss to the Bank was on September 8, 2016, when the Bank agreed to a $186 million fine by the OCC, Consumer Financial Protection Bureau, and the Office of the Los Angeles City Attorney. This loss satisfies the "effect" element of a CMP, as it was the first time Julian and McLinko's misconduct "cause[d] more than a minimal loss" to the Bank. 12 U.S.C. § 1818(i)(2)(B)(ii)(II).[34] Additionally, as detailed in Parts VI and VII, Julian and McLinko engaged in misconduct numerous times since January 23, 2015. They cannot evade liability because their misconduct continued for more than five years. *See In the Matter of Blanton*, 2017 WL 4510840, at *16.[35]

[34] *See* Part VI.C.

[35] Because the entire CMP claims against Julian and McLinko are timely pursuant to 28 U.S.C. § 2462, the Comptroller need not determine whether the continuing violations doctrine applies. The Comptroller does not adopt or rely on the ALJ's continuing violations analysis.

As to Julian and McLinko's final arguments, the Comptroller finds that 28 U.S.C. § 2462 does not apply to cease-and-desist orders under 12 U.S.C. § 1818(b). The statute of limitations applies to the enforcement of "civil fine, penalty, or forfeiture, pecuniary or otherwise." 28 U.S.C. § 2462. Applying the reasoning in the Supreme Court case, *Kokesh v. SEC*, 581 U.S. 455 (2017), the Comptroller holds that a cease-and-desist order is not a penalty because it is equitable relief. A cease-and-desist order under 12 U.S.C. § 1818(b) is similar to an injunction, and courts have found that the statute of limitations does not apply to injunctions issued by regulatory agencies. *See, e.g.*, *SEC v. Gentile*, 939 F.3d 549, 562 (3d Cir. 2019); *SEC v. Collyard*, 861 F.3d 760, 765 (8th Cir. 2017); *SEC v. Graham*, 823 F.3d 1357, 1362 (11th Cir. 2016). The Comptroller therefore rejects Julian and McLinko's exceptions on this point. *See* Julian Br. at 770-71; McLinko Br. at 751.

In the alternative, even if 28 U.S.C. § 2462 applied to cease-and-desist orders, Julian and McLinko's misconduct that occurred on or after January 23, 2015, would make the action timely. Acceptance of Julian and McLinko's arguments—that any cease-and-desist action against them is not timely because their misconduct began prior to January 23, 2015—would have the absurd effect of allowing them to evade liability for unsafe or unsound practices that occurred well inside the five-year year statute of limitations. Taken to the extreme, under their argument, a malefactor would completely escape liability if they were able to conduct a scheme that continued for more than five years. This is clearly not the law. *See In the Matter of Blanton*, 2017 WL 4510840, at *17. Therefore, the Comptroller finds that the statute of limitations does not bar the cease-and-desist actions against Julian and McLinko.

E. Julian and McLinko Were Not Prejudiced by the ALJ's Other Prehearing Rulings

Julian and McLinko argue that the ALJ prejudiced them by imposing burdens that had no basis in the Uniform Rules. Julian Br. at 83, 134; McLinko Br. at 36, 59-64. These arguments are

substantively identical to arguments advanced by Anderson. *See* CRA Dec. at IX.F. The Comptroller hereby incorporates that section of the Anderson decision. *See id.* For the reasons articulated in that section, and after reviewing the relevant filings and arguments, the Comptroller holds that the ALJ did not abuse his discretion in ruling on these procedural prehearing matters. *See id.*

X. EXCEPTIONS REGARDING HEARING ERRORS

A. The ALJ Did Not Err in Overseeing the Hearing

Julian and McLinko argue that the ALJ made several errors in overseeing the hearing, including: (1) improperly limiting the scope of cross examination, Julian Br. at 221-25, McLinko Br. at 247-51; (2) improperly requiring Respondents to bring their case-in-chief before Enforcement Counsel rested, Julian Br. at 277-83, McLinko Br. at 251-56; and (3) improperly ruling that Julian had "rested" to block him from admitting evidence, Julian Br. at 272-77, McLinko Br. at 256-60.

The first two arguments are substantively identical to arguments advanced by Anderson. The Comptroller hereby incorporates that section of the Anderson decision and holds that the ALJ did not err by limiting the scope of cross examination or requiring Respondents to begin their case-in-chief before Enforcement Counsel rested. *See* CRA Dec. at X.A-B.

As to Julian and McLinko's argument that the ALJ improperly blocked evidence after ruling that Julian had "rested," the Comptroller has reviewed the relevant portions of the record and concludes that the ALJ did not abuse his discretion in declining to admit the proffered materials. The record reflects that Julian sought to admit this evidence two weeks after informing the tribunal he had no further witnesses to present. *See* Order Regarding Julian's Motion for Reconsideration, January 18, 2022, at 2; Hr'g Tr. at 7720:1-3 ("Mr. Julian's case has literally just finished its last witness."). Julian's counsel presented no compelling reason why they could not

move to admit the exhibits earlier, particularly given that they moved to admit a subset of those exhibits on December 8. *See* EC's Omnibus Opposition to Julian's Motions, January 14, 2022, at 4. Moreover, it is well within the ALJ's powers to refuse to admit evidence that is presented without a sponsoring witness. *See supra* Part IV; CRA Dec. at IX.F, X.B. The ALJ did not abuse his discretion in setting reasonable limits on the admission of evidence.

In addition to the above arguments, Julian and McLinko make several other arguments related to the ALJ's purported errors in conducting the hearing, most of which are addressed in other sections of this Final Decision. *See, e.g.*, Part X.B. Otherwise, the Comptroller has reviewed the record and Respondents' arguments concerning the ALJ's management of the hearing, and the Comptroller accordingly rejects all other exceptions related to the ALJ's management of the hearing. Respondents did not demonstrate that the ALJ abused his discretion in conducting the hearing. *Brooks*, 1993 WL 13966512, at *14. Moreover, preponderant record evidence supports the imposition of CMPs and cease-and-desist orders against both Julian and McLinko. *See supra* Parts VI-VII. Respondents' remaining exceptions concerning the ALJ's hearing management are hereby denied.

B. Julian and McLinko's Exceptions Regarding Evidence

Both Julian and McLinko posit numerous evidentiary errors in their exceptions. *See* Julian Br. at 140-286; McLinko Br. at 173-247. Almost all of these evidentiary exceptions are substantively identical to arguments raised by Anderson. The Comptroller hereby incorporates that section of the Anderson decision and rejects these evidentiary exceptions. *See* CRA Dec. at X.B. Specifically, the Comptroller finds that the ALJ's significant discretion under the Uniform Rules to determine the scope of the proceedings, *see* 12 C.F.R. § 19.5, extends to evidentiary

rulings.[36] The Comptroller further finds that, given the ALJ's substantial discretion to rule on evidentiary matters, the ALJ's previous orders denying Respondents' omnibus motion *in limine* (which alleged many of the same errors being raised here) did not constitute an abuse of discretion. *See* Respondents' Omnibus Motion in Limine, Sept. 3, 2021; Order Regarding the Parties' Motions Seeking Orders in Limine, Sept. 9, 2021; Order Nunc Pro Tunc Regarding the Parties' Motions Seeking Orders in Limine, Oct. 1, 2021. To the extent the Comptroller has relied on evidence in making findings in this decision, the Comptroller has reviewed the cited evidence and determined that the evidence is relevant, material, reliable, and not unduly repetitive and is therefore admissible under the Uniform Rules.

One evidentiary exception not previously addressed is Respondents' assertion that the ALJ improperly excluded evidence concerning the IIA professional standards. *See* McLinko Br. at 176-78; Julian Br. at 214-15. As discussed above in Part V.C, the Comptroller has already found that the IIA standards are not the correct or sole standards by which to assess Julian and McLinko's conduct. The Comptroller also already found that the IIA standards are incorporated into the Comptroller's Handbook, and thus while relevant, they are not dispositive. *See supra* Part V.C. In making his findings that the Respondents' conduct was contrary to generally accepted standards of prudent operation, the Comptroller did consider the IIA standards that are part of the record. *See* R. Exh. 533. For these reasons, the Comptroller rejects this exception.

[36] The Uniform Rules provide that evidence that would be admissible under the Federal Rules of Evidence ("FRE") is admissible in adjudicatory proceedings, 12 U.S.C. § 19.36(a)(2), and that, except as otherwise provided, "relevant, material, and reliable evidence that is not unduly repetitive is admissible to the fullest extent authorized by the Administrative Procedure Act and other applicable law." *Id.* § 19.36(a)(1). If evidence meets this latter standard but would be inadmissible under the FRE, the ALJ may not deem the evidence inadmissible. *Id.* § 19.36(a)(3).

In sum, the Comptroller has considered each of the Respondents' evidentiary objections and rejects them because they either lack merit, or are harmless, or because the Comptroller does not rely upon the challenged evidence in this decision.

C. Enforcement Counsel's Exceptions Regarding Evidence

Enforcement Counsel also excepts to the ALJ's decisions about evidence—namely, that the ALJ wrongfully excluded certain evidence. *See* EC McLinko Exceptions Br. at 66-100; EC Julian Exceptions Br. at 72-108.[37] Enforcement Counsel's exceptions are substantively identical to arguments Enforcement Counsel raised in the Anderson decision. *See* CRA Dec. at X.B. The Comptroller hereby incorporates that section of the Anderson decision and rejects these evidentiary exceptions. *See id.* Specifically, the ALJ's decisions were not an abuse of discretion and did not constitute manifest unfairness toward Enforcement Counsel. *See Brooks*, 1993 WL 13966512, at *14.

D. The ALJ Was Not Required to Recuse Himself

Respondents' exceptions assert three broad arguments for disqualification of the ALJ: (1) the ALJ prejudged the case; (2) the ALJ engaged in *ex parte* communications with Enforcement Counsel; and (3) the ALJ was biased and incapable of managing the case. *See* Julian Br. at 286-306; McLinko Br. at 262-73. Arguments (1) and (3) are substantively identical to arguments advanced by Anderson.[38] The Comptroller hereby incorporates those sections of

[37] Enforcement Counsel assert that the ALJ should have allowed Arvin Grover to testify at the hearing and should have admitted Michael DeClue's deposition transcript into evidence. *See* EC McLinko Exceptions Br. at 97-100; EC Julian Exceptions Br. at 105-08. The Comptroller rejects these exceptions because the exclusion of this evidence did not prejudice Enforcement Counsel and the evidence was unnecessary to find that Respondents engaged in unsafe or unsound practices.

[38] Respondents also argue that the ALJ was biased because he was hostile towards Respondents and made gratuitous, disparaging remarks about their evidence and legal arguments before those issues had fully been presented. Julian Br. at 293; McLinko Br. at 269. However, a review of the

the Anderson decision and holds that the ALJ was not required to recuse himself. *See* CRA Dec. at X.D.

Respondents' assertion that the ALJ should have been disqualified because he improperly engaged in *ex parte* communications is rejected. The OCC's Uniform Rules provide that "the administrative law judge may not consult a person or party on any matter *relevant to the merits* of the adjudication, unless on notice and opportunity for all parties to participate." 12 C.F.R. § 19.9(e) (emphasis added). Respondents assert that the ALJ engaged in improper *ex parte* communications with Enforcement Counsel,[39] which reflected an appearance of partiality and provided grounds for disqualification. *See* Julian Br. at 300-03; McLinko Br. 270-71. Specifically, Respondents point to various electronic communications between Enforcement Counsel, the ALJ, and a liaison for the ALJ regarding hearing logistics, electronic submissions, technical difficulties, troubleshooting, and data security standards. *See id*. While the ALJ and Enforcement Counsel did communicate as stated, a review of the record reveals that the communications at issue were not improper *ex parte* communications, as they were purely

record does not reveal any conduct, comment, or statement made by the ALJ that was so plainly inconsistent with his responsibility as an impartial decisionmaker as to establish bias. *See Jenkins v. Sterlacci*, 849 F.2d 627, 634 (D.C. Cir. 1988) ("A party alleging actual bias on the part of a judge must prove that claim by evidence of the judge's extra-judicial conduct or statements that are plainly inconsistent with his responsibilities as an impartial decisionmaker."); *see also Liteky v. United States*, 510 U.S. 540, 555-556 (1994). Even if the ALJ were to express dissatisfaction or impatience with Respondents, that would not be sufficient to establish bias. *See Liteky*, 510 U.S. at 555-56 ("expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women . . . sometimes display" are insufficient to establish bias). Therefore, the Comptroller finds that Respondents fail to meet the "high burden of persuasion" required to make a showing of actual bias or the appearance of bias. *Hasie v. OCC*, 633 F.3d 361, 367-68 (5th Cir. 2011).

[39] Under 12 C.F.R. § 19.9, an *ex parte* communication is defined as any "material oral or written communication *relevant to the merits* of an adjudicatory proceeding that was neither on the record nor on reasonable notice to all parties that takes place between: (i) An interested person outside the OCC (including such person's counsel); and (ii) The ALJ handling that proceeding, the Comptroller, or a decisional employee." 12 C.F.R. § 19.9(a)(1) (emphasis added).

administrative or logistical in nature. As such, they were not material or relevant to the merits of the adjudication within the scope of 12 C.F.R. § 19.9(a)(1).

XI. EXCEPTIONS REGARDING THE RECOMMENDED DECISION

A. The ALJ Incorrectly Recommended a Prohibition against Julian

Julian argues that the ALJ's *sua sponte* recommendation of a prohibition order was erroneous. *See* Julian Br. at 759-69. The Comptroller upholds this exception and will not issue a prohibition order against Julian. Enforcement Counsel did not seek a prohibition order against Julian in the Notice. *See* Notice at 1 and 92. Moreover, Enforcement Counsel did not argue for a prohibition order at summary disposition, in pre-hearing submissions, or in post-hearing briefing. *See generally* EC MSD Brief; EC Pre-Hearing Statement; EC Julian Post-Hearing Br.; EC Julian Post-Hearing Reply Br.[40] Julian therefore did not have the opportunity to present exculpatory evidence or testimony at the hearing relevant to the elements of a prohibition, which due process requires. *See, e.g.*, *Regency Air, LLC, v. Dickson*, 3 F.4th 1157, 1162 (9th Cir. 2021). The Comptroller therefore rejects the ALJ's recommendation of a prohibition order for Julian.

B. The RDs Generally Comply with the APA and Any Alleged Deficiencies Are Cured by This Final Decision

Julian and McLinko make a variety of arguments challenging the sufficiency of their respective RDs under the APA. They argue that the RDs do not provide a clear and satisfactory explanation, Julian Br. at 315-26, McLinko Br. at 276-79, 550-53, that they ignore or mischaracterize large swaths of testimony and evidence, Julian Br. at 326-39, 368-90, McLinko

[40] Enforcement Counsel inexplicably argued in its exceptions brief that the ALJ correctly recommended a prohibition. *See, e.g.*, EC Julian Exceptions Br. at 9. Enforcement Counsel did not explain what changed between its post-hearing brief and its exceptions. *See generally id.* If Enforcement Counsel wanted to pursue a prohibition after issuing the Notice, the proper course of action was to amend the Notice under 12 C.F.R. § 19.20(a) or file a motion giving Julian prior notice that it was now seeking a prohibition.

Br. at 279-85, and that they rely on excluded or improperly admitted evidence, Julian Br. at 340-43, McLinko Br. at 288-91.[41]

These arguments are similar to arguments advanced by Anderson. The Comptroller hereby incorporates the relevant section of the Anderson decision. *See* CRA Dec. at XI.A. The Comptroller recognizes that many of Respondents' arguments concerning deficiencies in the RD have merit. However, the Comptroller—not the ALJ—is the final agency decisionmaker under the APA. By reviewing the record *de novo* and making the above findings of fact and conclusions of law supported by substantial evidence in the record, any alleged deficiencies with the RD are cured by this Final Decision. *See id.*

C. Julian and McLinko Engaged in Banking Practices and Conducted the Affairs of the Bank

Julian and McLinko contend in their exceptions that their RDs are deficient for a failure to address whether they were "conducting the affairs of" the Bank in their roles as internal auditors. *See* McLinko Br. at 297-98, 546-50; Julian Br. at 444-48. Respondents rely on *Grant Thornton, LLP v. OCC*, 514 F.3d 1328 (D.C. Cir. 2008), wherein the D.C. Circuit held that external auditors had not engaged in a banking practice or conducted the affairs of the bank by merely "examining the company's books from the outside and verifying the accuracy of its records and the adequacy of its internal controls." *Id.* at 1332-34. Therefore, the external auditors had not violated 12 U.S.C. §§ 1818(b)(1) and 1818(i)(2)(B). *Id.* Under *Grant Thornton,* an IAP

[41] Julian also makes several arguments concerning the RD's substantive errors, including that the RD makes erroneous findings concerning Julian's tenure as Chief Auditor, that it fails to differentiate WFC from the Bank, and that it makes erroneous findings concerning the extent of SPM. Julian Br. at 391-417. These substantive concerns are addressed in other parts of this Final Decision. *See* Part VI.A.2 (concerning Julian's tenure as Chief Auditor); Part VI.A.2 (differentiating WFC from the Bank); and Part VI.A.3 and VI.A.4 (the extent of SPM). In addition, as discussed above, these alleged deficiencies in the RD are cured by the Comptroller's *de novo* review as the final agency decisionmaker.

has conducted the affairs of a bank when the IAP had "some part in directing [the enterprise's] affairs," including advising the Bank on how to conduct its business. *Id.* at 1333 (alteration in original) (quoting *Reves v. Ernst & Young*, 507 U.S. 170, 179 (1993)).

The Comptroller rejects Respondents' arguments, as the record evidence supports a finding that both Julian and McLinko served in directive roles at the Bank. Internal audit is the "third and . . . last line of defense . . . in ensuring that risk management functions are working appropriately within the institution in order to ensure that the bank is being operated in a safe and sound manner." Hr'g Tr. at 156:22-157:2 (Coleman); *see also supra* Parts VI.A.1-2. A failure to carry out the internal audit function adequately would deprive the Bank's Board of the opportunity to remediate risk management issues. *See id.* at 157:21-158:7 (Coleman) ("[I]t really would leave the Board blind to the risks and would prevent them from doing their jobs in an effective way.").

Under the WFAS policy manual, WFAS leaders were charged with ensuring that all "weaknesses and deficiencies in risk management, control, and governance" are identified, and making a "recommendation for required corrective actions" to Bank management. R. Exh. 18885 at 99, 101. When Bank management declines to take the recommended corrective action and WFAS leadership concludes that this creates an unacceptable level of risk, WFAS must report the risk to the A&E Committee. *Id.* at 102-03. As Chief Auditor and EAD, respectively, Julian and McLinko were WFAS leaders, and assumed the requisite advisory responsibilities of their roles. *See* R. Exh. 18305 at *2,8885 at 99 (including EADs in the definition of WFAS leadership). In addition, as Chief Auditor, Julian was tasked with "[d]evelop[ing] and employ[ing] a dynamic audit plan," and was authorized to "[a]llocate resources, set frequencies,

select subjects, determine scopes of work, and apply the techniques required to" carry out the plan. OCC Exh. 2088 at *2, *4.

Both Julian and McLinko assumed advisory responsibilities and enjoyed a degree of decisional power that went beyond "verify[ing] a bank's books[.]" *Grant Thornton, LLP*, 514 F.3d at 1333. As detailed in Part VI.B, the Respondents' failure to plan and manage activity that would detect and document SPM within the Community Bank and failure to escalate the SPM problem left the Bank's Board underinformed as to the risks posed by SPM. Therefore, the Comptroller finds that Respondents committed misconduct "in conducting the affairs" of the Bank.[42]

D. The ALJ's Reliance on NBE Testimony and Expert Reports Did Not Prejudice Julian or McLinko

Julian and McLinko make several arguments concerning the ALJ's deference to NBE witnesses. Julian Br. at 343-68; McLinko Br. at 105-72, 285-88. These arguments fall into the following broad categories: (1) The ALJ erred in admitting the NBEs' testimony; (2) The NBEs were not "experts" and the ALJ erred in designating them as such; (3) the NBEs lacked audit expertise; (4) the ALJ erred by giving too much deference to NBE opinions; and (5) the NBEs were biased. Many of these arguments are substantively identical to those advanced by

[42] Julian also argues that, because WFC is not itself a national bank, he cannot be held liable by the Comptroller for "conducting the affairs of" the Bank when acting in his capacity as WFC Chief Auditor. Julian Br. at 396-400. However, as explained in *Grant Thornton*, an IAP can be liable for "conducting the affairs of" a bank whenever they "have some part in directing [the enterprise's] affairs," irrespective of the IAP's formal title. 514 F.3d at 1333. The OCC has established liability against a wide range of IAPs, including a bank's outside counsel (*Cavallari v. OCC*, 57 F.3d 137, 143 (2d Cir. 1995)) and the CEO of a bank's holding company (*Dodge v. OCC*, 744 F.3d 148, 161-62 (D.C. Cir. 2014)). Therefore, the Comptroller can hold Julian liable under 12 U.S.C. §§ 1818(b)(1) and 1818(i)(2)(B) for the misconduct discussed in Part VI.B, regardless of whether that misconduct is attributable to his role as the WFC Chief Auditor or as the Bank's Chief Auditor.

Anderson. Accordingly, the Comptroller incorporates the relevant sections of the Anderson decision. *See* CRA Dec. at XI.E-F.

First, the Comptroller rejects the assertion that the ALJ erred in admitting the NBEs' testimony. Under the OCC's Uniform Rules, ALJs have broad powers to consider and admit evidence, and the ALJ did not abuse his discretion by admitting their testimony or expert reports. *See supra* Part X.B; CRA Dec. at XI.F. Respondents' challenges to the substance of the NBEs' testimony and reports may affect the *weight* a decisionmaker should place on the testimony and reports, but they fail to demonstrate that the ALJ abused his discretion in *admitting* the testimony and reports in the first place. *See* CRA Dec. at XI.E.

As for Julian and McLinko's arguments regarding the NBEs' lack of audit expertise and their improper designation as "experts," *see* Julian Br. at 345-48, 359-63, McLinko Br. at 105-15, 122-33, these arguments largely miss the point. Just as with their arguments regarding the proper professional standards, it is not solely audit expertise—or the IIA standards—that matters here. *See supra* Part V.C. Crucially, the ALJ correctly determined that the NBEs had relevant experience "analyzing and evaluating the performance of internal auditors." Hr'g Tr. at 80:18-20 (Coleman); *see also id.* at 80:16-86:13; 1024:19-1045:25 (Candy). The ALJ did not abuse his discretion in designating the NBE witnesses as hybrid fact-expert witnesses pursuant to the Uniform Rules. *See* Order Regarding the Parties' Motions Seeking Orders In Limine, September 9, 2021, at 12-13.

McLinko and Julian's arguments regarding the ALJ's deference to NBEs' opinions are substantively similar to Anderson's arguments, and the Comptroller incorporates his reasoning from that section of the Anderson decision. *See* CRA Dec. at XI.E-F. Specifically, the Comptroller upholds some of Respondents' challenges to the NBEs' reports, noting that much of

the reports were drafted by Enforcement Counsel and largely contain conclusory language. *See id.* For this reason, the Comptroller places little weight on the NBEs' expert reports. *Id.*

In addition, the Comptroller need not decide what level of deference should be accorded to the NBEs' testimony, because the Comptroller does not give any witnesses any special deference in this case. *See* CRA Dec. at XI.F. Even if the ALJ improperly allocated too much deference to their testimony or reports, those errors are cured by this Final Decision, because the Comptroller's final findings of fact and conclusions of law are based on his *de novo* review of the record without any special deference in this case. *See id.*

Lastly, Julian and McLinko both argue that the NBEs' testimony was tainted by bias. Julian Br. at 363-64; McLinko Br. at 138-41. These arguments are substantively identical to arguments raised by Anderson, and the Comptroller incorporates the relevant portion of the Anderson decision. *See* CRA Dec. at XI.E.. Any harm from this alleged error is cured by the Comptroller's final review, which has included all evidence preserved in the record as proffers. *See id.*

E. The Comptroller Does Not Decide Whether Julian or McLinko Breached Their Fiduciary Duties

Julian and McLinko challenge the ALJ's findings that they breached their fiduciary duties to the Bank. *See* Julian Br. at 685-93; McLinko Br. at 301-05. They both argue that the ALJ misapplied the governing law for breach of fiduciary duty, and that state law, rather than federal common law, should apply. *Id.* Julian further argues that the ALJ conflated his analysis of unsafe or unsound practices with that of breach of fiduciary duty and that the RD errs by containing no separate analysis for breach of fiduciary duty. Julian Br. at 686.

As detailed above, the Comptroller finds that Julian and McLinko committed several unsafe or unsound practices, each of which support the imposition of CMPs and cease-and-desist

orders under 12 U.S.C. §§ 1818(b) and (i). The Comptroller declines to decide whether their conduct also resulted in breaches of their fiduciary duties to the Bank, rendering these exceptions moot.

XII. CONCLUSION

For the foregoing reasons, the Comptroller hereby issues a cease-and-desist order and assesses a $7 million CMP against Julian and issues a cease-and-desist order and assesses a $1.5 million CMP against McLinko.

IT IS SO ORDERED.

Michael J. Hsu

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Date: 2025.01.14 07:24:16 -05'00'

MICHAEL J. HSU
ACTING COMPTROLLER OF THE CURRENCY

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

In the Matter of:	)	
	)	
David Julian	)	
Former Chief Auditor	)	AA-EC-2019-71
	)	
Wells Fargo Bank, N.A.	)	
Sioux Falls, South Dakota	)	

ORDER TO CEASE AND DESIST AND
ORDER FOR THE ASSESSMENT OF A CIVIL MONEY PENALTY

WHEREAS, the Office of the Comptroller of the Currency ("OCC") initiated cease-and-desist and civil money penalty proceedings against David Julian ("Respondent"), former Chief Auditor of Wells Fargo Bank, N.A. ("Bank"), pursuant to 12 U.S.C. §§ 1818(b) and (i), through the issuance of a Notice of Charges for Orders of Prohibition and Orders to Cease and Desist and Notice of Assessments of a Civil Money Penalty dated January 23, 2020, in *In the Matter of Carrie Tolstedt, et al.* ("Notice") based on Respondent's conduct related to the Bank's sales practices misconduct problem;

WHEREAS, Respondent timely filed an Answer to the Notice, requested a hearing on February 12, 2020, and filed an Amended Answer on August 7, 2020;

WHEREAS, pursuant to 12 U.S.C. §§ 1818(b) and (i) and 12 C.F.R. Part 19, a hearing was conducted before an Administrative Law Judge in Sioux Falls, South Dakota, and remotely via videoconference between September 13, 2021, and January 6, 2022, and Respondent was given full opportunity to appear, present evidence, examine and cross-examine witnesses, file proposed findings of fact and conclusions of law, and file post-hearing and reply briefs;

NOW, THEREFORE, having considered the evidence presented at said hearing and the record as a whole, the arguments of both parties, and the Recommended Decision issued by the

presiding Administrative Law Judge, and pursuant to the authority vested in him by the Federal Deposit Insurance Act, as amended, 12 U.S.C. § 1818, the Acting Comptroller of the Currency ("Comptroller") hereby issues the following cease-and-desist and civil money penalty orders ("Order"):

ARTICLE I

JURISDICTION

(1) The Bank is an "insured depository institution" as that term is defined in 12 U.S.C. § 1813(c)(2).

(2) Respondent was an officer and employee of the Bank and was an "institution-affiliated party" of the Bank as that term is defined in 12 U.S.C. § 1813(u), having served in such capacity within six (6) years from the date of the Notice. *See* 12 U.S.C. § 1818(i)(3).

(3) The Bank is a national banking association within the meaning of 12 U.S.C. § 1813(q)(1)(A) and is chartered and examined by the OCC. *See* 12 U.S.C. § 1 *et seq.*

(4) The OCC is the "appropriate Federal banking agency" as that term is defined in 12 U.S.C. § 1813(q) and is therefore authorized to initiate and maintain these cease-and-desist and civil money penalty actions against Respondent pursuant to 12 U.S.C. §§ 1818(b) and (i).

ARTICLE II

ORDER TO CEASE AND DESIST

(1) Whenever Respondent is employed by or is otherwise affiliated with any depository institution as defined in 12 U.S.C. § 1813(c)(1) or otherwise becomes an institution-affiliated party as defined in 12 U.S.C. § 1813(u), Respondent shall:

(a) Comply fully with all laws and regulations applicable to the depository institution;

(b) Not engage or participate in any unsafe or unsound practice, as that term is used in Title 12 of the United States Code;

(c) Fulfill his fiduciary duty of care and act in the best interests of the depository institution at all times;

(d) Adhere to the depository institution's written charters, policies, procedures, and any other governing documents, or receive written permission from appropriate authorized individuals to do otherwise;

(e) With respect to any Board or management committee of which he is a member, act diligently, prudently, honestly, and carefully in carrying out his responsibilities;

(f) Document, at least annually, his title, role, and responsibilities with respect to the depository institution, and produce such documentation to the appropriate Federal banking agency upon request;

(g) Participate, at least annually, in accredited training regarding audits of sales practices, culture, retail banking, and incentive compensation programs;

(h) Ensure that any audit he manages, oversees, or supervises is adequately scoped and competently executed, and that reports of such audits identify the root cause of any identified control breakdowns; and

(i) Ensure that any audit department or team he manages, oversees, or supervises is independent and objective, adequately audits the most significant risks, and completely and accurately reports on the effectiveness of risk management and controls in audit reports and to the

Board.

(2) If Respondent is currently an institution-affiliated party, he shall provide the Chief Executive Officer and Chairman of the Board of the institution with a copy of this Order within ten (10) days of issuance of this Order.

(3) Prior to accepting any offer of a position that causes Respondent to become an institution-affiliated party, he shall provide the Chief Executive Officer and Chairman of the Board of the institution with a copy of this Order.

(4) Within ten (10) days of satisfying the requirements of paragraphs (2) and/or (3) of this Article, Respondent shall provide written certification of his compliance to the OCC by mail to Director, Enforcement, Office of the Comptroller of the Currency, 400 7th Street, SW, Washington, D.C. 20219, or by email to the address provided by the OCC.

(5) If, at any time, Respondent is uncertain whether a situation implicates paragraph (1) of this Article, or if Respondent is uncertain about his duties arising from such paragraph, he shall obtain, at his own expense, and abide by the written advice of counsel regarding his duties and responsibilities with respect to the matter. To comply with this paragraph, Respondent shall engage counsel who is in no way affiliated with the institution; and who has never been subject to any formal sanctions by any Federal banking agency, either by agency order or consent, as disclosed on the banking agencies' websites.

ARTICLE III

ORDER FOR CIVIL MONEY PENALTY

(1) Respondent shall pay a civil money penalty in the amount of seven million dollars ($7,000,000.00), which shall be paid in full upon the effective date of this Order.

(2) Respondent shall make payment in full via wire transfer, in accordance with

instructions provided by the OCC. The docket number of this case (AA-EC-2019-71) shall be referenced in connection with the submitted payment.

ARTICLE IV

CLOSING

(1) Respondent is prohibited from seeking or accepting indemnification from any insured depository institution for the civil money penalty assessed and paid in this matter.

(2) If, at any time, the Comptroller deems it appropriate in fulfilling the responsibilities placed upon him by the several laws of the United States of America to undertake any action affecting the Respondent, nothing in this Order shall in any way inhibit, estop, bar, or otherwise prevent the Comptroller from so doing.

(3) The provisions of this Order are effective at the expiration of thirty (30) days after the service of this Order by the Comptroller, 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 in writing by the Comptroller, his designated representative, or a reviewing court.

IT IS SO ORDERED.

Michael J. Hsu

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Date: 2025.01.14 07:24:51 -05'00'

MICHAEL J. HSU
ACTING COMPTROLLER OF THE CURRENCY

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

In the Matter of:	)	
	)	
Paul McLinko	)	
Former Executive Audit Director	)	AA-EC-2019-72
	)	
Wells Fargo Bank, N.A.	)	
Sioux Falls, South Dakota	)	

ORDER TO CEASE AND DESIST AND
ORDER FOR THE ASSESSMENT OF A CIVIL MONEY PENALTY

WHEREAS, the Office of the Comptroller of the Currency ("OCC") initiated cease-and-desist and civil money penalty proceedings against Paul McLinko ("Respondent"), former Executive Audit Director of Wells Fargo Bank, N.A. ("Bank"), pursuant to 12 U.S.C. §§ 1818(b) and (i), through the issuance of a Notice of Charges for Orders of Prohibition and Orders to Cease and Desist and Notice of Assessments of a Civil Money Penalty dated January 23, 2020, in *In the Matter of Carrie Tolstedt, et al.* ("Notice") based on Respondent's conduct related to the Bank's sales practices misconduct problem;

WHEREAS, Respondent timely filed an Answer to the Notice, requested a hearing on February 12, 2020, and filed an Amended Answer on August 7, 2020;

WHEREAS, pursuant to 12 U.S.C. §§ 1818(b) and (i) and 12 C.F.R. Part 19, a hearing was conducted before an Administrative Law Judge in Sioux Falls, South Dakota, and remotely via videoconference between September 13, 2021, and January 6, 2022, and Respondent was given full opportunity to appear, present evidence, examine and cross-examine witnesses, file proposed findings of fact and conclusions of law, and file post-hearing and reply briefs;

NOW, THEREFORE, having considered the evidence presented at said hearing and the record as a whole, the arguments of both parties, and the Recommended Decision issued by the presiding Administrative Law Judge, and pursuant to the authority vested in him by the Federal Deposit Insurance Act, as amended, 12 U.S.C. § 1818, the Acting Comptroller of the Currency ("Comptroller") hereby issues the following cease-and-desist and civil money penalty orders ("Order"):

ARTICLE I

JURISDICTION

(1) The Bank is an "insured depository institution" as that term is defined in 12 U.S.C. § 1813(c)(2).

(2) Respondent was an officer and employee of the Bank and was an "institution-affiliated party" of the Bank as that term is defined in 12 U.S.C. § 1813(u), having served in such capacity within six (6) years from the date of the Notice. *See* 12 U.S.C. § 1818(i)(3).

(3) The Bank is a national banking association within the meaning of 12 U.S.C. § 1813(q)(1)(A) and is chartered and examined by the OCC. *See* 12 U.S.C. § 1 *et seq.*

(4) The OCC is the "appropriate Federal banking agency" as that term is defined in 12 U.S.C. § 1813(q) and is therefore authorized to initiate and maintain cease-and-desist and civil money penalty actions against Respondent pursuant to 12 U.S.C. §§ 1818(b) and (i).

ARTICLE II

ORDER TO CEASE AND DESIST

(1) Whenever Respondent is employed by or is otherwise affiliated with any depository institution as defined in 12 U.S.C. § 1813(c)(1) or otherwise becomes an institution-affiliated party as defined in 12 U.S.C. § 1813(u), Respondent shall:

(a) Comply fully with all laws and regulations applicable to the depository institution;

(b) Not engage or participate in any unsafe or unsound practice, as that term is used in Title 12 of the United States Code;

(c) Fulfill his fiduciary duty of care and act in the best interests of the depository institution at all times;

(d) Adhere to the depository institution's written charters, policies, procedures, and any other governing documents, or receive written permission from appropriate authorized individuals to do otherwise;

(e) With respect to any management committee of which he is a member, act diligently, prudently, honestly, and carefully in carrying out his responsibilities;

(f) Document, at least annually, his title, role, and responsibilities with respect to the depository institution, and produce such documentation to the appropriate Federal banking agency upon request;

(g) Participate, at least annually, in accredited training regarding audits of sales practices, culture, retail banking, and incentive compensation programs;

(h) Ensure that any audit he manages, oversees, or supervises is adequately scoped and competently executed, and that reports of such audits identify the root cause of any identified control breakdowns;

(i) Ensure that he maintains independence and objectivity at all times with respect to any audit activity in which he is involved; and

(j) Ensure that any audit department or team he manages, oversees, or supervises is independent and objective, adequately audits the most significant risks, and completely and accurately reports on the effectiveness of risk management and controls in audit reports and to the Board.

(2) If Respondent is currently an institution-affiliated party, he shall provide the Chief Executive Officer and Chairman of the Board of the institution with a copy of this Order within ten (10) days of issuance of this Order.

(3) Prior to accepting any offer of a position that causes Respondent to become an institution-affiliated party, he shall provide the Chief Executive Officer and Chairman of the Board of the institution with a copy of this Order.

(4) Within ten (10) days of satisfying the requirements of paragraphs (2) and/or (3) of this Article, Respondent shall provide written certification of compliance to the OCC by mail to Director, Enforcement, Office of the Comptroller of the Currency, 400 7th Street, SW, Washington, D.C. 20219, or by email to the address provided by the OCC.

(5) If, at any time, Respondent is uncertain whether a situation implicates paragraph (1) of this Article, or if Respondent is uncertain about his duties arising from such paragraph, he shall obtain, at his own expense, and abide by the written advice of counsel regarding his duties and responsibilities with respect to the matter. To comply with this paragraph, Respondent shall engage counsel who is in no way affiliated with the institution; and who has never been subject to any formal sanctions by any Federal banking agency, either by agency order or consent, as disclosed on the Federal banking agencies' websites.

ARTICLE III

ORDER FOR CIVIL MONEY PENALTY

(1) Respondent shall pay a civil money penalty in the amount of one million five hundred thousand dollars ($1,500,000.00), which shall be paid in full upon the effective date of this Order.

(2) Respondent shall make payment in full via wire transfer, in accordance with instructions provided by the OCC. The docket number of this case (AA-EC-2019-72) shall be referenced in connection with the submitted payment.

ARTICLE V

CLOSING

(1) Respondent is prohibited from seeking or accepting indemnification from any insured depository institution for the civil money penalty assessed and paid in this matter.

(2) If, at any time, the Comptroller deems it appropriate in fulfilling the responsibilities placed upon him by the several laws of the United States of America to undertake any action affecting the Respondent, nothing in this Order shall in any way inhibit, estop, bar, or otherwise prevent the Comptroller from so doing.

(3) The provisions of this Order are effective at the expiration of thirty (30) days after the service of this Order by the Comptroller, 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 in writing by the Comptroller, his designated representative, or a reviewing court.

IT IS SO ORDERED.

Michael J. Hsu

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Date: 2025.01.14 07:26:06 -05'00'

MICHAEL J. HSU
ACTING COMPTROLLER OF THE CURRENCY