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

In the Matter of:	)	
	)	
Claudia Russ Anderson	)	
Former Community Bank Group Risk Officer	)	AA-EC-2019-81
	)	
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 Claudia Russ Anderson ("Respondent" or "CRA"), former Group Risk Officer for the Community Bank at Wells Fargo Bank, N.A. ("Bank"). This case stems from one of the largest scandals in banking history. *See infra* Part VI.A; *see generally* Emily Flitter, *The Price of Wells Fargo's Fake Account Scandal Grows by $3 Billion*, N.Y. TIMES (Feb. 21, 2020), https://www.nytimes.com/2020/02/21/business/wells-fargo-settlement.html; Emily Glazer, *Wells Fargo's Sales-Scandal Tally Grows to Around 3.5 Million Accounts*, WALL ST. J. (Aug. 31, 2017, 6:59 PM), https://www.wsj.com/articles/wells-fargos-sales-scandal-tally-grows-to-around-3-5-million-accounts-1504184598. 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 infra* Part 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 Anderson and other senior bankers at Wells Fargo, including David Julian, Chief Auditor, and Paul McLinko, Executive Audit Director for the Community Banking Group (collectively,

"Respondents").[1] The Notice alleged that Anderson violated laws and regulations, recklessly engaged in unsafe or unsound practices, and breached her fiduciary duties to the Bank. Notice at 52, 60. Pursuant to 12 U.S.C. § 1818(i) and (e), the Notice sought a $5 million civil money penalty ("CMP") against Anderson and an order prohibiting her from work in the banking sector. *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 a Recommended Decision ("RD") against Anderson (as well as separate decisions against Respondents Julian and McLinko), which recommended that the Comptroller of the Currency ("Comptroller") issue a prohibition order and a $10 million CMP. 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 Anderson and Enforcement Counsel in their exceptions, and for the reasons set forth in this decision, the Comptroller adopts in part and rejects in part the ALJ's recommendations. As detailed below, the Comptroller finds that, from 2013 to 2016 (the "relevant period"), Anderson failed to provide or provided false, incomplete, and/or misleading information to the OCC; failed to credibly challenge the Bank's incentive compensation program; failed to institute effective controls to manage the risks posed by SPM; and failed to escalate known or obvious risks related to SPM. *See infra* Part VI. The Comptroller finds that each of those instances of misconduct constituted unsafe or unsound practices pursuant to § 1818(e)(1)(A) and that those unsafe or unsound practices were "reckless" under § 1818(i)(2)(B). *See infra* Parts VI and VII. The

[1] The remaining Respondents—Carrie Tolstedt and James Strother—settled.

Comptroller further finds that Anderson committed violations of 18 U.S.C. §§ 1517 and 1001. *See infra* Part VI.B.5. The Comptroller also finds that Anderson acted with the requisite culpability under § 1818(e)(1)(C) and that her misconduct had the requisite effect under both § 1818(e)(1)(B) and § 1818(i)(2)(B)(ii). *See infra* Parts VI.C-D, VII.B. Accordingly, the Comptroller hereby enters an order of prohibition and assesses a $10 million CMP against Anderson.

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 Anderson was an "institution-affiliated party" ("IAP") as defined in § 1813(u). CRA Amended Answer ("Am. Ans.") at ¶¶ 1, 245. 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.

III. PROCEDURAL HISTORY

A. Notice of Charges and Affirmative Defenses

As noted above, Enforcement Counsel filed a Notice of Charges against Anderson and other senior bankers on January 23, 2020, alleging that Anderson violated laws and regulations, recklessly engaged in unsafe or unsound practices, and breached her fiduciary duty to the Bank. Specifically, the Notice identified four categories of alleged misconduct: (1) Anderson failed in her responsibilities as Group Risk Officer; (2) Anderson failed to ensure that the Community Bank's controls were reasonably designed to prevent and detect sales practices misconduct; (3) Anderson failed to escalate and accurately report the sales practices misconduct problem and its root cause to the Enterprise Risk Management Committee ("ERMC") and the Board;

(4) Anderson made false and misleading statements to the OCC. Notice at 53-58. The Notice sought a $5 million CMP and a prohibition order. *Id.* at 100.

Anderson filed her Answer ("Ans.") on February 11, 2020, along with a request for a hearing pursuant to 12 C.F.R. § 19.19(a).[2] Her Answer 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. Ans. at 18. Enforcement Counsel moved to strike Respondents' affirmative defenses, and the ALJ issued an order striking Anderson's estoppel and waiver defenses. Order Regarding EC's Motion to Strike Respondents' Affirmative Defenses at 8, Apr. 1, 2020.[3] 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. Anderson filed her Amended Answer 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 RD. *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.

[3] Anderson withdrew three of the affirmative defenses included in her initial answer—that the Notice of Charges "fails to state any claim," that the Notice of Charges is barred because "it relies on unpromulgated rule-making," and that the Notice of Charges is barred by laches—but she preserved the rest. Respondents' Joint Response to EC's Motion to Strike Certain Affirmative Defenses at 4 n.2, Mar. 30, 2020 (withdrawing laches defense); Respondents' Joint Notice of Withdrawal of Certain Affirmative Defenses, Apr. 3, 2020 (withdrawing failure to state a claim defense); CRA's Notice of Withdrawal of Affirmative Defense No. 3, May 12, 2020 (withdrawing unpromulgated rulemaking defense).

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 Anderson, 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 as to CRA ("EC MSD Br.") at 1. Enforcement Counsel submitted 500 statements of material fact in support of the motion against Anderson. *See generally* EC's Statement of Material Facts as to CRA ("EC SOMF"). Enforcement Counsel also requested an increased CMP amount of $10 million for Anderson. EC MSD Br. at 204. Anderson opposed the motion and responded to each of Enforcement Counsel's statements of material fact. *See* CRA's Memorandum of Law in Opposition to Motion for Summary Disposition, May 21, 2021 (refiled); CRA's Response to EC's Statement of Material Facts as to CRA, Apr. 30, 2021.

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 most of Enforcement Counsel's statements of material fact against Anderson were undisputed and could be resolved against her at the summary disposition stage. The remaining factual issues were set to be resolved at the hearing, along with the other unresolved claims from the Notice of Charges. *See* Order Regarding EC's Motion for Summary Disposition, July 20, 2021 ("SD Order"); 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; CRA's Supplemental Prehearing Statement at 8-19, 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. As to Anderson, the ALJ recommended that the Comptroller issue a prohibition order and a $10 million CMP. RD at 442. In recommending the prohibition order, the ALJ found that Anderson engaged in multiple unsafe or unsound practices, breaches of her fiduciary duties, and violations of law. *Id.* at 416.

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[4]—as well as hearing transcripts, exhibits, post-hearing filings, and briefing before

[4] 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. The foregoing decision cites evidence and findings from both the hearing and the ALJ's summary disposition order. The undersigned notes that Anderson has challenged the validity of the summary disposition process and its attendant findings; while these exceptions are

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-91-153, 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 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. Anderson's exceptions briefing alone totals more than 1,400 pages.[5] The Comptroller has carefully reviewed all of the parties' exceptions during the review of the entire

addressed more fully below in Part IX.B, 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.

[5] Anderson 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* Anderson's Legal Brief in Support of Exceptions to Recommended Decision, Apr. 14, 2023 ("CRA Br."); Anderson's Exceptions to the Administrative Law Judge's Recommended Decision, Apr. 14, 2023 ("CRA Exceptions"). The Comptroller considers these exceptions holistically and cites to both as needed.

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

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 Cal. v. Constr. Laborers Pension Tr.*, 508 U.S. 602, 622 (1993).

A. Section 1818(e) Prohibitions

For the Comptroller to enter an order of prohibition against an IAP pursuant to 12 U.S.C. § 1818(e), Enforcement Counsel must establish three separate elements: misconduct, effect, and culpability. *See* 12 U.S.C. § 1818(e)(1)(A)-(C); *Kim v. OTS*, 40 F.3d 1050, 1054 (9th Cir. 1994) (labeling the three elements).

The *misconduct* element may be satisfied by showing that the IAP has "directly or indirectly" violated any law or regulation; "engaged or participated in any unsafe or unsound practice in connection with any insured depository institution . . ."; or "committed or engaged in any act, omission, or practice which constitutes a breach of such party's fiduciary duty." *See* 12 U.S.C. § 1818(e)(1)(A). Only one form of misconduct is required to uphold the charge. *See Dodge v. Comptroller of Currency*, 744 F.3d 148, 156 (D.C. Cir. 2014).[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 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.[7]

The *effect* element may be satisfied by showing that, "by reason of" the misconduct, the institution at issue "has suffered or will probably suffer financial loss or other damage," that the institution's depositors' interests "have been or could be prejudiced," or that the charged party "has received financial gain or other benefit." 12 U.S.C. § 1818(e)(1)(B). Finally, the *culpability* element may be satisfied by showing that the alleged misconduct "involves personal dishonesty" or "demonstrates willful or continuing disregard by [an IAP] for the safety or soundness of such insured depository institution." 12 U.S.C. § 1818(e)(1)(C).

B. 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-

[6] Here, the ALJ found that Anderson had engaged in all three types of misconduct. RD at 321, 414-16; Executive Summary at 56-61; *see also infra* Parts VI-VII.

[7] Anderson's exceptions assert that the ALJ applied an incorrect and incomplete legal standard for unsafe or unsound practices. *See e.g.*, CRA Br. at 426-39, 590; CRA Exceptions at 626. The Comptroller re-affirms that the standard set forth in *Adams* is the proper standard. *See Adams*, 2014 WL 8735096, at *2-5.

tier penalties of up to $25,000 per day of continued misconduct.[8] Here, Enforcement Counsel sought and the ALJ recommended a second-tier CMP of $10 million against Anderson. *See* RD at 422.[9]

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). 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.'" *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 to appropriately address or mitigate that risk, that conduct is reckless. *Id.*[10]

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

[8] 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).

[9] Enforcement Counsel also asserted that the elements to impose a Tier 1 CMP against Anderson were met because she violated multiple laws. *See* EC Exceptions Br. at 42-44.

[10] The Comptroller partially upholds Enforcement Counsel's exceptions arguing that Anderson recklessly engaged in unsafe or unsound practices to the extent noted in Part VII below. *See* Brief in Support of Enforcement Counsel's Exceptions to the ALJ's Recommended Decision as to Anderson, Apr. 14, 2023 ("EC Exceptions Br.") at 51-53.

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).

VI. COMPTROLLER'S FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING THE PROHIBITION ORDER

A. Background

1. SPM was widespread and systemic in the Bank throughout the relevant period

The Comptroller finds that the evidence in the record supports the ALJ's findings that SPM at the Bank was widespread and systemic. *See generally* RD at 8-10, 18-19, 22-23, 89-90, 140-41, 259, 306-07, 352, 356-59, 397, 406-07, and 422-23. 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 48-53, 55-56, 58-60, and 264.

These SD Order SOMFs demonstrate that SPM included: (1) opening and issuing unauthorized checking and savings accounts, debit cards, and credit cards; (2) simulated funding, which involved transferring customer funds between accounts without customer consent; (3) bundling, which involved misrepresenting to customers that certain products were available only as a package with other products; (4) pinning, which involved enrolling customers in online banking and online bill-pay without consent; (5) sandbagging, which involved delaying the opening of requested accounts and products until the next sales reporting period; and (6) accessing and falsifying customers' personal information, such as phone numbers, home addresses, and email addresses, without authorization. SD Order SOMF 48. They also demonstrate that several Bank executives stated that the Bank had a systemic SPM problem. *See, e.g.*, SD Order SOMFs 49 (Chief Executive Officer), 50 (Chief Risk Officer), 51 (Chief Administrative Officer), 52 (same), 53 (Head of Corporate Enterprise Risk), 55 (Chief Security

Officer), 56 (Head of Financial Crimes Risk Management), 58 (General Counsel), 59 (Regional President), 60 (Regional Bank Executives), 264 (Sales and Service Conduct Risk Leader).

In addition, the evidence and testimony adduced at the hearing supports the findings that SPM was widespread and systemic. Reports by third parties and the Bank strongly support the conclusion that SPM was widespread and systemic.

Anderson excepts to the RD's determination that SPM was widespread and systemic. Anderson's exceptions fall into two categories. First, she faults the RD and Enforcement Counsel for not quantifying the amount of SPM. *See, e.g.*, CRA Br. at 405-08; CRA Exceptions at 33-35. Second, she argues that the reports upon which the RD relies to conclude that SPM was widespread and systemic are unreliable, should not have been admitted, and do not support the conclusion that SPM was widespread and systemic. *See, e.g.*, CRA Br. at 409-20; CRA Exceptions at 33-40.

The Comptroller disagrees with Respondent's contention that the amount of SPM needs to be specifically quantified. The record contains testimony and evidence that establishes that SPM was systemic and widespread. Precise numbers of the amount of SPM are not necessary to come to that conclusion.[11]

Anderson's exceptions to the various reports are without merit. As discussed in Part X.B, the OCC's Uniform Rules afford the ALJ wide discretion to admit evidence. *See* 12 C.F.R. § 19.36(a). Additionally, Anderson argues extensively that the reports, individually, do not show that SPM was systemic or widespread. If Enforcement Counsel had offered up only one report,

[11] Nor is it necessary for aggrieved customers to testify that the Bank opened unauthorized accounts in their name, as Anderson suggests. *See* CRA Br. at 408. The fact that SPM occurred is well-established in the record evidence, and Anderson even agreed that SPM occurred in her own testimony. *See, e.g.*, Hr'g Tr. at 9561:20-22 ("[A]s I previously testified, sales practices misconduct occurred. I'm not saying it didn't.").

Anderson might have a point. The record, however, contains multiple reports, each supporting the conclusion that SPM was systemic and widespread. The weight of the evidence points to this conclusion, even if an individual report might not prove it alone.

Based on a review of the record evidence, as detailed in the following subsections, the Comptroller finds that SPM was both widespread and systemic and accordingly rejects Anderson's exceptions. SPM was systemic, as it resulted from the Bank's business model that incentivized bankers to engage in SPM to meet sales goals.[12] The record contains several reports that demonstrate that SPM was widespread and systemic. A cavalcade of Bank employees testified that SPM was widespread and systemic. Based on this record evidence, the Comptroller finds that Enforcement Counsel proved by a preponderance of the evidence that SPM was widespread and systemic.

a. Reports show that SPM was widespread

The record evidence contains multiple reports indicating that the Bank had a widespread SPM problem during Anderson's tenure at the Bank. Taken together, these reports provide a preponderance of evidence showing that SPM was widespread in the Bank.[13] These reports are addressed below in turn.

[12] Anderson faults the RD for not defining widespread, for using a variety of different words to describe the extent of SPM, and for using a definition of "systemic" that is unintelligible. *See, e.g.*, CRA Br. at 405-07; CRA Exceptions at 31-32. These exceptions are misplaced. These words are not terms of art, and the RD uses their common-sense meanings. Regardless, whatever words were used to describe SPM, the underlying question for Anderson was whether SPM presented a risk to the Bank that Anderson, as Group Risk Officer for the Community Bank, was required to manage. As detailed in this section, the Comptroller finds that SPM presented a serious risk to the Bank that Anderson was required to manage. Her failure to manage the risks that led to and resulted from SPM is what is at issue in this action.

[13] In addition to the discussion in this section, Part VI.B.3 also reviews and discusses some of these reports and other data showing the extent of SPM at the Bank.

The first report was an October 2015 report from Accenture ("Accenture Report"). OCC Exh. 1312. The goal of this report was, in part, to "identify examples of sales practices risk." *Id.* at 2. The Accenture Report was based on approximately 470 interviews with randomly selected Bank employees, including Community Bank employees and Bank executives. *Id.* The Accenture Report concluded that communication, execution of sales quality monitoring controls, setting sales goals, and customer complaint tracking were weaknesses that needed to be addressed. *Id.* at 4. The Accenture Report stated, "[m]any team members interviewed made statements regarding activities that, if true, would indicate sales practices issues." *Id.* at 6. Additionally, it stated that customer complaints and employee ethics escalation data had "limited use." *Id.* While the Accenture Report did not specifically opine on whether SPM was systemic or widespread, it shows that SPM posed multiple medium and high risks to the Bank. *Id.* at 46 (showing three "medium" risks and ten "high" risks). Anderson herself testified that she read the Accenture Report and believed it was "very important work." Hr'g Tr. at 10109:23-10111:3.

Another report was the Bank's Regulatory Compliance Risk Management report dated March 8, 2016 ("RCRM Report"). OCC Exh. 1896U. This report was meant to identify customer complaints and inquiries from January 1, 2014, to September 30, 2015, that may have involved SPM. *Id.* at 3. The RCRM Report found approximately 45,000 complaints with potential SPM. *Id.* at 38. It also included a slide with a graphic showing that SPM occurred across the country. *Id.* at 39. On that same page, the RCRM Report noted, "The largest volume of sales practices complaints [was] reported in California, Texas, Florida, and Arizona. The higher volume of potential sales practice complaints can be partially attributed to the number of Stores per state." *Id.* The RCRM Report is an early quantification of the amount of potential SPM in the Bank, showing that it was widespread throughout the Bank's geographic footprint.

The best estimate of the amount of SPM admitted as evidence comes from a series of reports produced by outside consultant PwC in September 2017. *See* OCC Exhs. 1811RU, 1812RU, 1813RU, 1636R. These PwC reports attempted to quantify the amount of SPM. PwC looked at potential SPM in online bill pay, credit cards, line of credit accounts, and accounts with potential simulated funding. *See id.* From January 1, 2013, through September 30, 2016, PwC identified 182,829 unauthorized bill pay accounts, 643,948 unauthorized credit card accounts, 72,980 unauthorized line of credit accounts, and 1,018,866 million unauthorized accounts with simulated funding. *See id.* Combining the numbers from the PwC reports, PwC identified approximately 1.9 million unauthorized accounts that Bank employees opened between 2013 and 2016. Notably, these reports did not include all types of SPM. *See* Hr'g Tr. at 1197:5-14 (Candy). These figures did not include other types of SPM like bundling, pinning, or sandbagging. *See id*. 1199:1-19 (Candy). They also did not include all the types of accounts that could have been used to engage in SPM, such as debit cards. *See id*. at 1199:16-19 (Candy), 10298:21-10300:6 (Abshier).

The final report was the report issued by the independent directors of the Bank's holding company on April 10, 2017 ("Board Report"). R. Exh. 16147. The Board Report was the result of an investigation of SPM at the Bank by a Board committee with four independent directors, assisted by a law firm. *Id.* at *2. The Board Report found that systemic sales practice failures were rooted in "the distortion of the Community bank's sales culture and performance management system, which, when combined with aggressive sales management, created pressure on employees to sell unwanted or unneeded products to customers and, in some cases, to open unauthorized accounts." *Id.* The Board Report concluded that "the Community Bank's senior leaders distorted the sales model and performance management system, fostering an atmosphere

that prompted low quality sales and improper and unethical behavior." *Id.* at 4. The Board Report reviewed data that showed SPM allegations and termination increasing as sales goals increased. *Id.* at 6. While the Board Report does not specifically conclude that SPM was widespread or systemic, the findings paint a picture of a systemic and widespread problem. *See generally id.*

In sum, the findings from these reports demonstrate that SPM was indeed widespread.

b. Testimony from Bank employees shows SPM was widespread and systemic

In addition to the documented evidence in the above-described reports, numerous Bank executives, including high-level executives, testified that that SPM was widespread and systemic. Michael Loughlin, the Bank's former Chief Risk Officer, testified at hearing and in a sworn statement that he realized that SPM was systemic in the first half of 2015. *See* Hr'g Tr. at 3038:5-13; OCC Exh. 2890 at 49:20-52:5. Similarly, the Bank's former Chief Executive Officer, John Stumpf, testified in a sworn statement that he agreed the Bank had a systemic SPM problem. *See* MSD-8C at 551:1-11.

Karl ("Keb") Byers, the former Head of Corporate Enterprise Risk, testified that based on the number of terminations related to SPM, he concluded in September 2016 that the Bank had a systemic SPM problem. *See* MSD-382 at 132:17-134:24. He further testified that "there was just way too much pressure . . . in the system . . . starting with the incentive comp[ensation] plan. There was pressure from management, and not everybody did this, but a large number, you know, did this . . . the root cause, to me, is just the pressure." OCC Exh. 2736 at 231:24-232:6.

Hope Hardison, the Bank's former Chief Administrative Officer, testified that she believed, as early as 2013, that the Bank had a systemic SPM problem. *See* MSD-293A at 33:9-25; *see also* Hr'g Tr. at 5431:1-10 (testifying that she came to the conclusion that the Bank had a systemic problem with SPM sometime between 2013 and 2016). Patricia Callahan, another former Chief Administrative Officer, believed SPM was systemic in 2013. *See* MSD-291 at

110:14-111:13; *see also* Hr'g Tr. at 4956:5-13 (testifying that she suspected in late 2013 that the root cause of SPM may be incentive plans that were too aggressive). Paul McLinko, the Community Bank's former Executive Audit Director, testified in his sworn statement that the Bank had a systemic SPM problem in all regions of the country. *See* OCC Exh. 2785 at 54:8-18, 95:19-24. David Julian, the Bank's former Chief Auditor, testified that that the Bank had a systemic SPM problem. *See* OCC Exh. 2772 at 25:2-26:11.

In addition to this testimony, other Bank executives, Community Bank employees, and Community Bank executives concluded that SPM was systemic and widespread. *See, e.g.*, MSD-298 at 40:14-20 (head of Bank's Financial Crimes Risk Management division); MSD-295 at 25:12-20 (Chief Security Officer and Head of Corporate Investigations); MSD-199 ¶ 6 (Regional President of Retail Banking in Los Angeles); MSD-546 at 207:5-9 (regional bank executive); MSD-579 at 99:1-7 (regional bank executive); MSD-585 at 25:20-26:14 (leader of Community Bank's sales quality group). In sum, authoritative sources within the Bank testified that SPM was widespread and systemic from 2013 to 2016.

2. Anderson knew or should have known that SPM was widespread and systemic.

The Comptroller finds that the evidence in the record supports the ALJ's findings that Anderson knew SPM was widespread and systemic. *See generally* RD at 7-11, 19-21, 352, 423. 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 85, 99-101, 142-43, 196, 199-200, 280, 292-95, 299, 306, 310, 312-13, 317-18, 320, 410. Based on review of

the entire record, the Comptroller finds that Anderson knew that SPM was widespread and systemic.[14]

The SD Order SOMFs demonstrate that Anderson knew there was pressure in the Community Bank to perform and that this pressure was the reason for SPM. *See* SD Order SOMFs 99-100. Corporate Investigations regularly informed Anderson about continuing SPM. S*ee* SD Order SOMFs 280, 299. Anderson also received employee complaints, including employee surveys, about unethical sales practices and read the *LA Times* articles on SPM at the Bank. S*ee* SD Order SOMFs 196, 199-200, 292-95, 306, 312-13, 317. In 2016, Anderson received a report that SPM represented the largest category of EthicsLine cases. S*ee* SD Order SOMF 318. Anderson was also aware of SPM through meetings and conferences where concerns about sales pressure, sales quality, and team member misconduct and terminations were discussed. *See e.g.*, SD Order SOMFs 85, 101, 142-43, 280, 313, 317, 320, 410.

Despite all of the above evidence of SPM, Anderson testified at hearing that she did "not agree [SPM] was a significant problem" for the Bank. Hr'g Tr. at 9527:5-13. She testified that "sales practices misconduct occurred," *id.* at 9561:20-23, but asserted that it was only a problem in "hotspots where people had unreasonable performance expectations." *Id.* at 9620:13-9621:7. Upon reviewing Anderson's testimony and the contrary record evidence, the Comptroller rejects this assertion for the reasons explained below.

Anderson testified that she did not believe SPM was systemic because she had "no evidence then or during [her] whole tenure that it was a systemic issue." *Id.* at 9388:14-19; s*ee also id.* at 9527:8-9 ("I would not agree [SPM] was a significant problem, no."). Her other

[14] To the extent Anderson argues she did not actually know that SPM was widespread and systemic, the hearing testimony and record evidence also shows that Anderson *should have known* that SPM widespread and systemic.

testimony, however, undercuts this assertion. Anderson was part of the core team that met weekly and reviewed SPM cases from Corporate Investigations. *Id.* at 9719:10-18. She testified that throughout 2015, "[s]ales pressure was a topic in the core team." *Id.* at 9988:23-24. She testified that, in 2016, the Bank had SPM "hotspots where people had unreasonable performance expectations," including in Los Angeles, New Jersey, Arizona, and Texas. *Id.* at 9620:20-9621:4. Anderson knew that SPM was the result of, among other things, "pressure to meet sales goals," *id.* at 9573:8-9574:3, and that this pressure persisted in 2016. *Id.* at 9620:20-9621:7. This knowledge, combined with the many concerns, complaints, and reports of SPM that she received in her role as GRO all contradict her assertion that there was "no evidence" that SPM was systemic.

Similarly, Anderson continued to assert that SPM was not systemic even when presented with evidence that refuted her assertion. When presented with a March 2016 report showing SPM complaints throughout the country, *see* OCC Exh. 1896U at 39, Anderson still maintained that SPM was not "significant" or "widespread." Hr'g Tr. at 10041:13-42:7. Additionally, Anderson testified that 3,477 terminations for SPM from January 2013 to January 2016 "didn't concern" her. *Id.* at 10072:7-23. Anderson's assertions in the face of this contradictory evidence strain credulity, especially given that in another part of her testimony Anderson admitted that SPM was a "material issue" for the Bank from 2013 to 2016. *Id.* at 9526:8-10. Anderson's testimony shows, despite her protestations, that she knew or should have known that SPM was widespread and systemic.

In addition to this testimony, the record evidence shows that Anderson knew or should have known that SPM was widespread and systemic based on reporting she received. Anderson received many reports of employees committing SPM between 2013 and 2016. These reports

included reports of individual employees committing SPM. *See, e.g.*, OCC Exhs. 191,251 881, 1363, 1485; R. Exhs. 5037, 8343, 10942. She also received reports containing aggregated data showing widespread and systemic SPM. *See, e.g.*, OCC Exhs. 273,274, 288, 602, 777, 1231; R. Exhs. 388, 3819, 10730. She confirmed at the hearing that she received regular information about SPM. Hr'g Tr. at 9656:5-10.[15]

Additionally, there is evidence that Anderson understood that SPM was a bigger problem than she admitted in her hearing testimony. For example, in 2016, she sent an email to David Otsuka:

[redacted]

OCC Exh. 251 at *1. This email indicates that Anderson understood that SPM was more than an issue in a few "hotspots." Anderson also received emails where others opined that SPM was widespread and systemic. In November 2013, she received an email from Michael Bacon, the former head of Corporate Investigations, asking "do we really need a monthly report to tell us we have a systemic issue" with SPM? OCC Exh. 1031 at *2. In December 2013, she received an email from Susan Nelson, a Human Resources ("HR") Manager, stating, "I'm not sure how many more hours we can all continue to invest in Core Group meetings to hammer through [the] same issues- different names again and again." OCC Exh. 1367 at *5. Finally, she read the October 2015 Accenture Report, *see* Hr'g Tr. at 10109:23-25 (Anderson), which found that

[15] The Comptroller also notes that Anderson states in her exceptions brief that she "was aware of the scope and nature of SPM and knew of control failures in the [first line of defense]." CRA Exceptions at 415-16.

Community Bank employees were challenged to meet sales goals and noted heightened turnover. *See* OCC Exh. 1312 at 4-6.

Based on this evidence, the Comptroller finds that Anderson knew or should have known that SPM was widespread and systemic and that her assertions to the contrary are not credible.

3. Anderson was responsible for effectively managing the risks in the Community Bank

Anderson was the Community Bank's[16] Group Risk Officer ("GRO") between 2004 and August 2016. Am. Ans. ¶ 242. Between 2006 and 2015, she reported to the Head of the Community Bank, Carrie Tolstedt. *Id*; SD Order SOMF 19; OCC Exh. 2279 ¶ 6 (Anderson Decl.). She also reported to the Bank's Chief Risk Officer, Loughlin, starting in the fall of 2013. SD Order SOMF 20; OCC Exh. 2279 ¶ 7. As GRO, Anderson led the first line of defense with responsibility for risk management and controls, including with respect to sales practices. Am. Ans. ¶ 247; Hr'g Tr. at 9251:1-7 (Anderson). Anderson was responsible for understanding the sales processes and incentive structures in the Community Bank and the risks they presented. SD Order SOMF 27. In January 2012, Anderson gained direct management oversight of the Sales and Service Conduct Oversight Team ("SSCOT") within the Community Bank, which was responsible for detecting sales practices misconduct and conducting proactive monitoring. Am. Ans. ¶ 260. Anderson also served on important management committees with responsibilities for identifying, managing, and escalating sales practices misconduct. SD Order SOMF 28; Am. Ans. ¶ 151.

[16] The Community Bank 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.

Per her annual performance objectives, Anderson was required to "ensure effective and efficient operational risk management in the Community Bank lines of business and to support effective and efficient risk management in aggregate at the enterprise level." R. Exh. 5214 at 1 (2013 performance objectives); R. Exh. 7256 at 1 (2014 performance objectives);[17] *see also* Hr'g Tr. at 9518:13-9519:2 (Anderson) (discussing performance objectives). Anderson understood that a critical aspect of her responsibilities was risk management relating to sales practices misconduct. Hr'g Tr. at 9519:3-10 (Anderson). She also understood that operational risk was defined as "all risks excluding credit and market, inclusive of risks we have traditionally viewed as basic business risks such as new product and technology development, staffing, incentives, execution risk, loss prevention, and team member behavior (sales quality/sales integrity, internal fraud, ethics violations, etc.)." *Id.* at 9519:21-9520:4 (agreeing with definition in R. Exh. 7256 at 1). Anderson understood that she was accountable for effective management of operational and compliance risks and that SPM posed these operational, compliance, and operational risks. Hr'g Tr. at 9520:5-9521:13 (Anderson). Anderson further acknowledged that it was her responsibility to build controls to prevent SPM from occurring (even if impossible to completely prevent it), *id.* at 9531:8-17, and that she was responsible for building a culture of accountability with strong controls to detect SPM. *Id*. at 9532:3-7; R. Exh. 7256 at 2.

Additionally, her performance objectives required her to "[p]rovide credible challenge to the Community Banking lines of businesses, as well as cross-enterprise and corporate Enterprise Risk Programs," and to "[c]ollaborate with, be timely and ensure transparency to key stakeholders including corporate risk and other impacted GROs." R. Exh. 7256 at 1; Hr'g Tr. at

[17] The record also contains her performance objectives for 2015 and 2016, which contain similar requirements. *See* OCC Exh. 626 at 1; R. Exh. 13780 at 1.

9523:9-21 (Anderson) (acknowledging that she had these duties). She also a responsibility to escalate risk issues to risk management, *see, e.g*., R. Exhs. 5214 at 5, 7256 at 1; *see also,* Hr'g Tr. at 9477:18-25 (Anderson), and to build a culture of accountability with strong controls to ensure no material operational losses. *See, e.g*., R. Exhs. 5214 at 3, 7256 at 2; *see also,* Hr'g Tr. at 9532:3-9533:2 (Anderson) (discussing responsibility for controls).

4. SPM posed significant risks to the Bank

Given the severe consequences of SPM at the Bank, including massive losses to the Bank as detailed in Part VI.C, the Comptroller finds that SPM posed significant risks to the Bank.

B. Misconduct

The *misconduct* element of § 1818(e) may be satisfied by showing that the IAP has "directly or indirectly" violated any law or regulation, "engaged or participated in any unsafe or unsound practice in connection with any insured depository institution," or "committed or engaged in any act, omission, or practice which constitutes a breach of such party's fiduciary duty." 12 U.S.C. § 1818(e)(1)(A). As detailed below, the Comptroller hereby finds that Anderson committed several unsafe or unsound practices and violated federal laws, each of which is sufficient to meet the misconduct element of § 1818(e).

1. Anderson engaged in unsafe or unsound practices by failing to provide information or providing false, incomplete, and/or misleading information to the OCC during the 2015 OCC examinations.

Following a review of the record evidence and hearing testimony, the Comptroller finds that the evidence in the record supports the ALJ's findings that Anderson engaged in unsafe or unsound practices during the February and May 2015 OCC examinations by failing to provide information or providing false, incomplete, and/or misleading information to OCC examiners. *See generally* RD at 64, 177-85, 215-16, 220-22, and 230. Specifically, the Comptroller finds that, during the 2015 OCC examinations, Anderson (1) did not provide accurate information

about the volume of terminations relating to SPM, (2) made false statements regarding her knowledge of sales pressure, (3) falsely stated that no one loses their job because sales goals are not met, and (4) failed to disclose the thresholds used in proactive monitoring.[18] 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 18-19, 22, 25-27, 85, 101, 142-43, 196, 199-200, 280, 313, 317, 320, 335, 345, 390-92, 394-95, 397-99, 401-04, 406-07, 410-13, 415-17, 419-23, and 425.

Candor and transparency are crucial to the OCC's supervisory process. Examiners rely on information that bank personnel provide them during examinations to fully understand a bank's activities to evaluate risk, assess controls, and ensure that the bank is operating in a safe and sound manner. *See* Hr'g Tr. at 144:17-145:16 (Coleman) (testifying that communication between the Bank and the OCC is a significant component of our supervision model), 688:9-19 (Hudson) (testifying that "[c]ommunications with bank personnel play a vital role in the examination process"), 689:20-22 (Hudson) ("the hallmark of examining is to be able to rely upon the information that's communicated throughout the process."). Moreover, Anderson affirmed that she understood her obligations to be transparent and honest with the OCC, *id.* at 9773:23-9774:9, and that her failure to do so would not only hinder the OCC's exam, *id*. at 9774:23-9777:25, but could result in increased reputational, compliance, and operational risk. *Id*. at 10030:6-10031:8; *see also* SD Order SOMF 394 (establishing that Anderson was aware of her obligations to the

[18] In addition to these four findings, the ALJ made additional findings that Anderson had not been candid or forthcoming during the 2015 OCC examinations. *See, e.g.*, RD at 160-64; 180-81; and 197. The Comptroller finds that it is unnecessary to address the remaining findings, because there is more than enough evidence to affirm the ALJ's overall conclusion that Anderson engaged in misconduct when she failed to provide or provided false, incomplete, and/or misleading information to the OCC during the 2015 OCC examinations.

OCC). Anderson also agreed that she had an obligation to correct information or fill in gaps if her colleagues or subordinates provided incorrect information to the OCC. *Id*. at 9802:8-21.

Despite her obligation to be transparent with examiners, the record evidence firmly establishes that Anderson's candor to examiners was lacking and that she failed to provide complete and accurate information during the 2015 examinations. As discussed below, these instances of misconduct constituted unsafe or unsound practices. *See e.g.*, *De la Fuente v. FDIC*, 332 F.3d. 1208, 1224 (9th Cir. 2003) (finding that failing to disclose relevant information to bank regulators, particularly related to potential problems, was an unsafe or unsound practice); *In re Seidman*, 37 F.3d 911, 936-37 (3d Cir. 1994) (finding that withholding information from the regulator to hinder an investigation constitutes an unsafe or unsound practice); *In re Cirino*, No. 99-011e, 2000 WL 33983843 (FDIC Jan. 14, 2000) (finding that an officer concealing information or providing false information to the regulator constitutes an unsafe or unsound practice), *aff'd*, FDIC-99-011e, 2000 WL 1131919 (May 10, 2000).

a. Anderson did not provide the OCC accurate information about the volume of terminations relating to SPM during the 2015 examinations

Following a review of the record evidence and hearing testimony, the Comptroller affirms the ALJ's finding that Anderson was not transparent or candid in providing the OCC accurate information regarding the number of terminations relating to SPM. *See* RD at 64, 230. The record evidence shows that, by 2013, Anderson was aware that 1,000 or more employees were terminated every year for SPM. *See* Hr'g Tr. at 9913:9-19 (Anderson); *see also* OCC Exh. 1264 (Anderson response to April 2015 email agreeing that the number of terminations in 2013 was around 1,000 to 1,200 and that nothing had really changed); Hr'g Tr. at 9909:3-9910:1 (Anderson) (discussing OCC Exh. 1264 and testifying that her response in the April 2015 email was correct). The record evidence also shows that, in April 2014, Anderson informed the ERMC

that between approximately 1,000 and 2,000 team members were terminated in the Community Bank. *See* OCC Exh. 1438 at 1 (ERMC Meeting Minutes); Anderson Am. Ans. ¶ 164(e) (admitting that in an April 9, 2014, ERMC meeting, "Community Bank leadership informed the committee that one to two percent of Community Bank employees (1,000 to 2,000) were terminated each year for sales practices-related wrongdoing."); *see also* Hr'g Tr. at 9721:5-21 (discussing response in Amended Answer).[19] During the 2015 OCC examinations, when asked for information on termination volumes, Anderson initially referenced that 30 employees were terminated and later that an additional 160 terminations were reported, for a total of 190 terminations for SPM. *See* OCC Exh. 1734 at 1-2 (May 14, 2015, meeting notes). However, as evidenced above, Anderson clearly knew that the volume of terminations significantly exceeded 190 employees prior to and during the 2015 OCC examinations. National Bank Examiner ("NBE") Hudson testified that, during the examination, she asked several times for data regarding terminations and expressed concern that Anderson was "piecemealing" information. Hr'g Tr. at 736:5-25.

At the hearing, Anderson testified that she had a duty to be honest and transparent with the OCC on a number of topics, *see id*. at 9867-71, yet when specifically asked about this duty regarding termination volumes, she inexplicably denied that she had a duty to be transparent on this topic. *Id.* at 9870:14-19.[20] She further testified that she did not believe that her failure to provide complete information about the volume of terminations would hinder the OCC's

[19] At her deposition, Anderson admitted that she did not think the termination numbers represented true risk. OCC Exh. 2509A at 180-81. While this view may explain why she did not feel a need to fully inform the OCC of the larger termination numbers, it does not change the fact that she knowingly provided incorrect information to the OCC during the examinations.

[20] "Q: Did you believe at the time that you had a duty as the group risk officer to ensure that the May 19, 2015, memo was transparent about the volume of terminations for sales integrity violations? A. No."

examinations. Hr'g Tr. at 9778:14-20. ("I believe the OCC knew that information, so I don't know – I don't know that I could have hindered it since they knew the information.").[21] NBE Hudson testified that because Anderson was specifically asked to provide termination information, her failure to do so was not justified simply because the OCC could have reviewed information that had been previously provided to the OCC. *Id*. at 737:18-738:6. In later testimony, Anderson was again asked if the OCC examiners had a right to information regarding the number of terminations based on lack of customer consent and she responded "yes, if it was part of our conversations." Hr'g Tr. at 9938:18-19.[22] Failing to provide accurate information about this material issue during the OCC examinations constituted an unsafe or unsound practice.

b. Anderson made false statements to the OCC regarding team members being under sales pressure

Following a review of the record evidence and hearing testimony, the Comptroller affirms the ALJ's finding that Anderson's responses to the OCC's questions regarding sales pressure during at the May 14, 2015, examination lacked candor and transparency. RD at 220-22. During the May 2015 examination, the OCC asked Anderson questions concerning sales pressure. In response to a question about whether she had any dialogue with Personal Bankers indicating that they were under pressure, she responded that she did not hear that at all, explaining that "[s]he's been at leadership summits and that people are positive with what they hear and feel." OCC Exh. 1734 at 4; *see also id.* at 3 (noting that interviews did not lead to a

[21] Anderson asserts that the ALJ erred in his findings related to the OCC examinations because he excluded evidence relating to OCC's supervision and knowledge of SPM and other associated issues. *See e.g*., CRA Exceptions at 424-25; CRA Br. at 159-61. Even if the OCC had some prior knowledge of SPM, that does not refute the evidence that Anderson provided the OCC false, incomplete, and/or misleading information during the 2015 examinations, nor does it alter her obligations to be candid and provide accurate and complete information during a bank examination. The Comptroller therefore rejects this exception.

[22] *See* Respondents' Amended Revised Errata Transcripts of Hearing Days Day 9-38 at 78, Mar. 7, 2022 (changing "conversation" to "conversations").

conclusion about sales pressure); *see also* Hr'g Tr. at 9985:23-9986:9 (Anderson) (confirming that she told OCC examiners that she did not hear that bankers were under pressure at all).

However, both the record evidence and her hearing testimony confirm that Anderson had knowledge that sales pressure relating to SPM was a problem before the 2015 examinations. *See, e.g.,* SD Order SOMFs 196, 199-200, 280, 313, 410 (supporting that Anderson had knowledge since at least 2013 that sales pressure was an issue related to SPM). The record evidence also establishes that the information Anderson provided during the May 2015 OCC examination that sales pressure was not an issue was false. *See, e.g.*, OCC Exh. 1549 at 2 (email dated May 22, 2014) (noting agenda item for core team meeting involved "online sales pressure petitions floating around"); R. Exh. 9028 at 4,6 (March 2015 investigation debrief) (noting the reasons team members gave for engaging in behavior involved sales pressure); OCC Exh. 3004 (email dated April 13, 2015) (adding item to core team agenda regarding "protest activity in St. Paul, which focused in large part of sales pressure related issues.").

Anderson testified that she knew that between 2013 and 2016, "we had hotspots where people had unreasonable performance expectations." Hr'g Tr. at 9620:13-9621:7, 9791:17-21 (affirming that she understood that between 2013 and 2016 that there were hotspots where employees faced significant pressure to meet unreasonable goals), 9831:1-8 (same). Anderson also testified that she understood that pressure to meet sales goals was a reason why employees engaged in SPM between 2013 and 2016. *Id.* at 9573:8-9574:3,9996:10-23 (admitting she had concerns about sales pressure petitions in 2014).[23] And during questioning about an employee

[23] NBE Crosthwaite testified that there were only two reasons why a lower-level employee would open up a fake account, Hr'g Tr. at 2297:9-2298:11, and that one of them was "extreme pressure and fear of losing your job because you're not going to make your goals." *Id.* at 2298:9-11.

protest that took place in St. Paul, Anderson admitted that the protest—which occurred just one month before the May 2015 examination—led her to "believe that there was still some pressure, but not excessive pressure." Hr'g Tr. at 9991:17-22. Yet, she testified that it did not occur to her to provide this information to the OCC because she didn't know who the protesters were and if the protesters were team members. *See id*. at 9989:23-9990:20.[24]

NBE Hudson explained that it was important to the OCC to understand whether employees faced sales pressure in order to assess risk, not only to the institution but to the customers that the bank serves. Hr'g Tr. at 734:23-735:5. The hearing and record evidence discussed above confirms that Anderson knowingly misled the OCC about a material issue when she told examiners that she was not hearing about sales pressure at all. This failure to provide the OCC complete and truthful information constituted an unsafe or unsound practice.

c. Anderson falsely told the OCC during the 2015 examinations that no one loses their job because sales goals were not met

Following a review of the record evidence and hearing testimony, the Comptroller affirms the ALJ's finding that Anderson falsely told OCC examiners that "no one loses their job because they did not meet sales goals." RD at 184-85. The record evidence shows that Anderson made this unqualified statement to OCC examiners in 2015. *See* OCC Exhs. 1735 at 3 (February 19, 2015, conclusion memo) (noting that the statement was made and expressing concern with Anderson's candor), 1943 at 2 (Anderson's response to OCC's 15-day letter) (stating that "[a]n employee could not be fired for failing to meet sales goals. There simply is no Human Resources

[24] Anderson had received an email providing information about the protest that specifically referenced team members by name. OCC Exh. 3004 (email dated April 13, 2015). Furthermore, Anderson admitted that she never took any steps to find out who was protesting. Hr'g Tr. at 9989:23-9990:20.

code for such a discharge."),[25] Anderson's Response to EC's SOMF 405 ("Undisputed Ms. Russ Anderson testified [at her deposition] that she stated to the OCC during the 2015 examinations that employees could not be terminated for failing to meet sales goals, because that is what she believed and knew at the time, having been told this information by others at the Bank upon making inquiries about this issue."), OCC Exh. 1771 at 2 (February 10, 2015, meeting notes) (Anderson failed to correct a statement made during the meeting with the OCC that "[t]he incentive plan. . . . is not a requirement for keeping your job.").

At the hearing, Anderson was directly asked if her statement that "no one loses their job because they did not meet sales goals" in the OCC's memo was accurate. Her response was "yes," and she explained that her statement was based on conversations with Debra Paterson, a senior HR professional, who told her that such terminations did not occur and there was no code in the system for such a termination.[26] Hr'g Tr. at 9437:6-9438:7. The OCC examiners also confirmed this is what Anderson told them during the 2015 examinations. *See* Hr'g Tr. at 706:2-8 (Hudson) (testifying that Anderson told her during the exam that "no one loses their job for failure to meet sales goals."), 2270:14-16 (Crosthwaite) ("I asked her specifically if they were terminating team members for not meeting sales goals, and the answer was no.").

However, during her cross-examination, Anderson changed her testimony and qualified her statement, testifying that employees were not terminated "s*olely* for not meeting sales goals." Hr'g Tr. at 9567:15-25 (emphasis added). And importantly, she confirmed that between 2013

[25] Anderson admits that she was heavily involved in preparing the 15-day letter response and testified that the contents were accurate. *See* OCC Exh. 2509A (Anderson Dep.) at 37:24-39:21.
[26] Anderson also testified that this was an important topic for her based on her personal experience with her son who has Aspergers, as she "could not in good conscience work for a company that would terminate people for not meeting sales goals. It is – it's an abomination to me." Hr'g Tr. at 9439:11-14.

and 2016 she knew and understood that employees *could* be terminated for not meeting sales goals, but it could not be the only "or the preponderate [*sic*] reason." *Id*. at 9568:1-20. She also admitted that, during her earlier direct testimony, she "didn't nuance it that clearly." *Id*. at 9570:20-9571:9. In her post-hearing briefing, Anderson affirmatively asserted that she told the OCC examiners back in February 2015 that the bank did not terminate employees "*solely*" for not meeting sales goals. *See* Anderson's Proposed Findings of Fact and Conclusions of Law, Finding of Fact ¶ 172 (emphasis added). Yet the record evidence and hearing testimony does not support this assertion, nor is there any evidence that she ever informed the OCC examiners of this qualification.

The record contains contemporaneous evidence showing that examiners had concerns with Anderson's candor and transparency during the 2015 examinations. For example, in an email chain discussing the February 10, 2015, sales practices call, NBE Crosthwaite wrote "we all agreed after call…Claudia [Anderson] and Co not Transparent…very difficult...it's like pulling teeth…." NBE Moses agreed, stating, "As you said Claudia [Anderson] was downplaying or dodging." R. Exh. 7713 (email chain dated February 10-11, 2015); OCC Exh. 1754 at 2 (June 26, 2015, Supervisory Letter) (concluding "[t]here has been and continues to remain an overall lack of transparency at the first line of defense regarding past investigations, and ongoing control and monitoring processes."); *see also infra* Part VI.B.4 (discussing Anderson's tendency to downplay SPM risks).

Anderson's own hearing testimony confirms that she was selective in the information she provided to the OCC. For example, in response to a question about whether, during the relevant period, she had "ample opportunity to inform OCC examiners about information known to [her] related to sales practices misconduct," she stated, "*[i]f it was material*, yes." Hr'g Tr. at 9773:14-

19 (emphasis added). Likewise, in her deposition, she qualified her answer regarding her obligation to provide complete information to the OCC during her tenure as the GRO, testifying, "I was responsible for providing the OCC with complete and accurate information *for which they asked for*, yes." OCC Exh. 2509A at 93:11-18 (emphasis added). Anderson's admissions that she limited the information she provided to the examiners is inconsistent with the examination process. *See, e.g.*, Hr'g Tr. at 144:17-145:16 (Coleman) (explaining that examiners rely on information provided to assess banks), 688:3-690:2 (Hudson) (same).

The ALJ similarly found that Anderson's hearing testimony regarding representations she made to the OCC were not credible. *See, e.g.,* RD at 183-85. Specifically, the ALJ found that "[p]reponderant evidence adduced during the hearing compels the conclusion that Ms. Russ Anderson's testimony – that she told the examiners no employee was terminated *solely* for failing to meet sales goals – was false; that instead when she met with the examiners, she represented to them that no employees were terminated for failing to meet sales goals – without qualifying the claim as she did during her testimony." *Id.* at 184 (emphasis added). The Comptroller has reviewed the evidence relating to this credibility determination and finds that Anderson's hearing testimony was inconsistent and contradictory with the record evidence.[27] Accordingly, the Comptroller affirms the ALJ's credibility determination.

In her exceptions, Anderson asserts that the ALJ erred because he incorrectly found that the first time Anderson qualified her statement with the word "solely" was at the hearing rather

[27] The ALJ expressed similar concerns about other parts of her hearing testimony, finding that it was false and/or unreliable. *See e.g.,* RD at 123-24 (finding Anderson's testimony about the quality of sales report card during her cross examination was contradicted by the evidence), 226 (finding Anderson gave false testimony at hearing), 420 (finding Anderson presented false and unreliable testimony throughout the proceeding). The Comptroller agrees with the ALJ's assessment that her testimony was inconsistent.

than a year earlier at her pre-hearing deposition.[28] CRA Br. at 248-52; CRA Exceptions at 546-54. The Comptroller rejects this exception. Whether she first qualified her statement at her deposition or at the hearing does not alter the record evidence demonstrating that Anderson knew at the time of the 2015 examinations that employees could be terminated for failing to meet sales goals as long as it was not the only reason, and she never informed the OCC of this qualification.[29] The hearing testimony and record evidence establish that (1) during the 2015 examinations, Anderson told the OCC that no one loses their job for not meeting sales goals; (2) she repeated this unqualified assertion numerous times, including in her responses to the OCC's 15-day letter and to EC's SOMFs; (3) at the time she made the unqualified statement to the OCC, Anderson knew that, in fact, an employee *could* be terminated for not meeting sales goals, as long as it was not the sole or preponderant reason; and (4) she never informed the OCC of the qualified answer. Based on this evidence, the Comptroller finds that Anderson informing the OCC during the examination that employees were not terminated for not meeting sales goals was a knowing and material misrepresentation, which constituted an unsafe or unsound practice.

[28] Anderson also claims that the ALJ mischaracterized her response to the OCC's 15-day letter. *See* CRA Exceptions at 549-550; CRA Br. at 250. The Comptroller rejects this exception. The letter clearly states that "[e]mployees could not be terminated for failure to meet sales goals." OCC Exh. 1943 at 6.

[29] Anderson excepts to the RD's findings about her transparency during the February 10, 2015, examination, claiming that the ALJ ignored contrary evidence. CRA Br. at 479-80. The Comptroller rejects this exception. The hearing testimony suggests that the ALJ did, in fact, review Anderson's evidence regarding her transparency. *See, e.g.*, Hr'g Tr. at 3236:7-10. In any case, the Comptroller has reviewed all such evidence in his *de novo* review of the record. *See supra* Part IV. The record contains both testimony and documentary evidence that demonstrates that Anderson was not transparent and did provide false, incomplete, and/or misleading information to the OCC.

d. Anderson failed to disclose the thresholds used in proactive monitoring during the 2015 examinations

Following a review of the record evidence and hearing testimony, the Comptroller affirms the ALJ's finding that Anderson failed to disclose the thresholds used in proactive monitoring during the 2015 OCC examinations.[30] *See generally* RD at 178-79, 215-16. Anderson does not dispute that she failed to disclose the thresholds during the 2015 examinations, but she justifies her omission by claiming that the OCC did not specifically ask for the information. *See* OCC Exh. 2279 ¶ 28 (Anderson Decl.) ("I was never asked by the OCC Wells Fargo supervisory team about specific methodology for gathering data, including whether thresholds were being used. I would have gladly shared this information if they had thought it was important enough to ask about."), ¶ 29 (during the February 2015 examination, the OCC examination staff did not ask "any questions about the thresholds used in SSCOT's proactive monitoring" and she "had no reason to believe that thresholds were relevant" to the discussions); *see also* OCC Exh. 2509A at 96:18-97:9 (testifying she had no recollection of telling OCC about thresholds), 96:18-22 ("if they had asked me the question, and we [would have] given them the whole, complete answer . . . I can't sit here today and tell you if I would have told them about the 99.9."); SD Order SOMF 420 ("At the May 14, 2015, Meeting, Respondent Russ Anderson did not disclose the 99.99% and 99.95% thresholds used by SSCOT to detect simulated funding.").

However, the record evidence contradicts Anderson's assertion that she was not asked for this information. Prior to the February 10, 2015, meeting, Anderson was provided with a list of topics to be covered, which included "controls and monitoring processes for identifying

[30] Anderson excepts to this finding. *See* CRA Exceptions at 569-70; CRA Br. at 513-14. For the reasons detailed below, the finding is support by the record and the Comptroller adopts the ALJ's finding.

inappropriate behavior." OCC Exh. 2955 at *2. The OCC's meeting notes from the February 2015 examination indicate that there was a discussion of SSCOT, but the notes do not show that either proactive monitoring or thresholds were discussed. OCC. Exh. 1771 at 3. Additionally, the notes indicate that the examiners inquired about testing for the first line of defense for sales quality and were told about scorecards, but there is no mention of monitoring or thresholds. *Id*.

The OCC's meeting notes for the May 2015 examination indicate that, during a discussion regarding SPM, Anderson was specifically asked "how is it detected?" OCC Exh. 1734 at 1-2. Again, the notes contain no indication that she mentioned proactive monitoring or thresholds in her response. *Id*. NBE Hudson testified that Anderson was asked the question "how simulated funding [was] detected" in order "to understand the controls that were in place in order to detect inappropriate behavior." Hr'g Tr. at 731:24-732:5. NBE Hudson further explained that she would have expected Anderson to disclose controls such as the thresholds if they were being used to isolate the type of activity because it was important for examiners to understand the controls in assessing operational risks. *Id*. at 732:6-733:1. Hudson rejected the idea that the OCC had to use the specific word "thresholds" in order to get this information, explaining that the OCC had been asking the same questions since February 2015. *Id*. at 733:2-25. Hudson further testified that if there was a threshold (regardless of terminology being used), it was important for Anderson to communicate that information, as it was not the examiner's job to interrogate bank management, and examiners rely on officers to answer questions "accurately and transparently and candidly." *Id*. at 733:11-25. NBE Candy also confirmed that thresholds were not disclosed during the May 2015 examination. *Id*. at 1079:17-19.

Anderson testified that she had previously advised the OCC about thresholds in 2013 during discussions on proactive monitoring. *Id*. at 9982:20-25. But the mere fact that she had

discussed thresholds back in 2013 does not excuse her failure to provide information on thresholds during the 2015 examinations. The evidence discussed above demonstrates that the OCC asked specific questions regarding how simulated funding was detected and that Anderson did not discuss thresholds then or any time during the 2015 examinations. Moreover, Anderson admitted there were changes made to the thresholds in the summer of 2014 and again in April 2015. *Id*. at 9316:17-21. At a minimum, Anderson should have disclosed these changes during the 2015 examinations. *See id.* at 9317:1-6 (Anderson) (testifying that in April 2014 the threshold was 99.99 and in 2015 it was lowered to 99.95). The Comptroller finds that because the 2015 OCC examinations were focused on SPM and controls, information such as changes to the controls were clearly material to the examination and her failure to disclose this information constituted an unsafe or unsound practice.

2. Anderson's failure to credibly challenge the incentive compensation program's unreasonable sales goals constituted an unsafe or unsound practice

The Comptroller finds that the record evidence supports the RD's findings that Anderson committed unsafe or unsound banking practices by failing to *credibly challenge* the Bank's incentive compensation program. *See generally* RD at 17, 39, 54, 60, 170, 210-11. In making this determination, the Comptroller incorporates the following relevant facts the ALJ properly found undisputed at the summary disposition stage. *See* SD OrderSOMFs 18-20, 22-24, 69, 86, 88-95, 97-98, 104, 110, and 117.

The Comptroller finds that the record evidence, including hearing testimony and exhibits, further establishes by preponderant evidence that: (1) Anderson had a responsibility to credibly challenge the incentive compensation program; (2) Anderson knew that unreasonable sales goals in the incentive compensation program were incentivizing employees to commit SPM; and

(3) Anderson failed to discharge her obligation to credibly challenge the incentive compensation program.

a. Anderson was required to credibly challenge the incentive compensation program

The record evidence demonstrates that Anderson had an obligation under Bank policies to ensure effective risk management of the incentive compensation program, including by exercising credible challenge to the incentive compensation program.

Under the Bank's Fraud Risk Management Policy, the GRO was responsible for "providing credible challenge to the businesses they oversee." OCC Exh. 1272 at 7; *see also* OCC Exh. 1733 at 5 (Wells Fargo Product and Service Risk Management Policy). The Bank's Sales Practices Risk Governance Document defined *credible challenge* as "the communication of an alternative view, opinion, or strategy developed through expertise and professional judgment to challenge business or enterprise strategies, policies, products, practices, and controls." R. Exh. 11373 at 9. The policy further stated that "Group Risk Officers . . . exercise credible challenge through various means, including by raising concerns to Group management . . . ." *Id.*

The Bank's Incentive Compensation Risk Management Policy specifically required incentive compensation programs to appropriately balance risk and reward. OCC Exh. 1855 at 3-4 (Incentive Compensation Risk Management Policy). As described above, Anderson, as GRO, was responsible for providing an independent assessment of and credibly challenging the Bank's incentive compensation program, including use of sales goals, to her superiors. *See* OCC Exhs. 1272 at 7 (Wells Fargo Fraud Risk Management Policy), 1733 at 5 (Wells Fargo Product and Service Risk Management Policy); *see also* SD Order SOMF 94.

As GRO, Anderson was also responsible for understanding the risks posed by incentive compensation, ensuring that proper controls were in place for that risk and continuously

monitoring those controls. Hr'g Tr. at 1132:13-22, 1138:1-5 (Candy). Indeed, Anderson admitted in her post-hearing briefing that "it was an important part of her job to credibly challenge the incentive compensation plans in the Community Bank to ensure they appropriately balanced risk and reward." CRA Post-Hearing Reply Br. at 3-4. Additionally, Anderson testified during the hearing that "[her] responsibilities . . . were to provide credible challenge to the [incentive compensation] process . . . ." Hr'g Tr. at 9278:14-16. She also recognizes this responsibility in her exceptions. *See* CRA Exceptions at 104. Therefore, the Comptroller finds that Anderson was obligated (and knew she was obligated) to credibly challenge her superiors on the incentive compensation program wherever it failed to properly balance risk and reward.

Anderson raises in her exceptions that the legal standard for "credible challenge" is left undefined by the ALJ and Enforcement Counsel. CRA Br. at 333-34, 501-02. However, as established above, the Bank's policies clearly defined credible challenge and charged the GRO with the responsibility to credibly challenge the businesses they oversaw. *See* OCC Exhs. 1272 at 7, 1733 at 5; R. Exh. 11373 at 9. Moreover, Anderson has already admitted in her hearing testimony, post-hearing briefing, and in her own exceptions that she had a responsibility to provide credible challenge on the incentive compensation program. *See* Hr'g Tr. at 9278:14-16;CRA Post-Hearing Reply Br. at 3-4; CRA Exceptions at 104. Additionally, Anderson's own expert witnesses testified that she had to provide credible challenge as GRO. Hr'g Tr. at 10368:14-18 (Farrell) (testifying that Anderson as GRO had to credibly challenge incentives and sales goals). Chief Risk Officer Michael Loughlin also testified that one of Anderson's "primary responsibilities would have been to provide credible challenge to the Community Bank and its leadership" and that a credible challenge meant "a challenge to either the performance or the strategy of . . . the Community Bank . . . with thoughtfulness, collegiality, [and] information . . .

." Hr'g Tr. at 2949:1-13. The Comptroller rejects this exception because the NBE's testimony, the Bank's corporate policies governing the incentive compensation program and risk management, and the hearing testimony demonstrate that Anderson had a clear obligation to exercise credible challenge and that she was aware of this requirement.

Failing to discharge this obligation of credible challenge constitutes an unsafe or unsound banking practice, as it represents a "lack of action which is contrary to generally accepted standards of prudent operation" that could result in "abnormal risk or loss or damage" to the Bank. *Adams*, 2014 WL 8735096, at *11. Failing to comply with the responsibilities under the Bank's policies represents a departure from generally accepted standards of prudent operation, and the substantial risks to the Bank posed by SPM have already been established above. Therefore, Anderson's failure to provide credible challenge represented an unsafe or unsound practice.

b. Anderson knew that the Community Bank imposed unreasonable sales goals on employees

Upon review of the record evidence, the Comptroller finds that Anderson knew that the Community Bank imposed unreasonable sales goals on employees. From 2013 to 2016, the Community Bank's incentive compensation program included unreasonable sales goals. SD Order SOMFs 69and 88; *see also, e.g.*, Hr'g Tr. at 1131:7-20 (Candy),4282:20-4283:3 (Smith). Through the incentive compensation program, managers and employees were pressured to meet unreasonable sales goals. SD Order SOMF 302; *see also* Hr'g Tr. at 1119:18-24 (Candy),2295:18-2296:3 (Crosthwaite); OCC Exh. 1754 at 3. Managers and employees in the Community Bank sought to meet unreasonable sales goals to achieve financial compensation and to avoid adverse employment actions, up to and including termination. Hr'g Tr. at 1130:2-21

(Candy). And throughout 2013-2016, Anderson had knowledge that the sales goals were unreasonable and incentivizing employees to commit SPM. *See supra* Part VI.A.2.

There is extensive evidence that sales goals were unattainable during 2013-2016. *See, e.g.*, OCC Exhs. 835, 1163, 1215U, 1312 at 27-28, 1985; R. Exh. 17720 at 2-3; *see also*, OCC Exhs. 38, 1020, 1549, 1742; R. Exh. 16147 at 47; Hr'g Tr. at 10241:2-10242:7 (Abshier). For example, in a January 2013 email, Bart Deese relayed concerns that Michael Bacon had relating to sales integrity and compliance, including unfunded accounts, duplicate addresses, suspicious IDs, and ineligible customers. OCC Exh. 1985 at *1. As part of the discussion about the root cause of some of those issues, Bacon "said he felt a lot of it was related to the sales goals and pressure." *Id*. Bacon further recounted a story in which Chief Risk Officer Michael Loughlin's wife entered a Wells Fargo branch to conduct a transaction and "came out with 5 products," implying an environment where employees pushed products onto customers. *Id*. at *2. Further,Loughlin testified at hearing that he believed "sales goals were increasing turnover, which is not a good thing from a risk management perspective." Hr'g Tr. at 3286:18-3287:2. Indeed, even Anderson herself wrote in an October 2013 email: "I don't get the savings to [demand deposit account] goal," expressing confusion as to why sales goals encouraged employees to sell customers more than one savings account per checking account. OCC Exh. 1163 at *2. She went on to write that her own family only had one savings account, two checking accounts, and one brokerage account because that was "[a]ll we need," implying that the goals set for employees did not make sense for many customers' needs. *Id*. at *1.

Anderson admitted that she believed that sales goals were unreasonable in 2012, but attributes that fact to regulatory changes relating to the 2010 Dodd-Frank Act. Hr'g Tr. at 9282:3-15 (Anderson). She further asserted that the sales goals were no longer unreasonable after

the targets were lowered beginning around 2012-2013. *See id.* at 9405:25-9406:5, 9629:3-7;CRA Post-Hearing Reply Br. at 5. However, she fails to present any evidence that supports her assertion that sales goals became reasonable after being lowered other than her own testimony. Hr'g Tr. at 9628:19-23 (Anderson); R. Exh. 278 at 68 (Anderson Dep.). In contrast, Kenneth Zimmerman, head of the deposit products group at Wells Fargo during 2013-2016, testified that the Bank went through multiple quarters of lowering sales goals beginning around 2012 because "the sales force was missing those goals by a wide margin" and that he "would have been advocating for lower goals than we ultimately settled on," further supporting the conclusion that the sales goals were too high and remained so. Hr'g Tr. at 4516:13-4518:25, 4519:19-25.

The record contains extensive evidence that Anderson had knowledge that sales goals were unattainable and driving employees to commit SPM, as she received contemporaneous information through various channels about employees committing SPM due to pressure to meet the same sales goals she alleges were reasonable. *See, e.g.*, OCC Exhs. 111, 242, 261, 289, 295, 306, 815, 877, 1035, 1163, 1363, 1366, 1375, 1489; Hr'g Tr. at 2295:18-2296:3 (Crosthwaite). For example, Anderson responded to an email chain from November 2013 regarding an investigation into employees changing customer phone numbers during account openings, questioning whether "there was pressure to do this?" and stating that "there must be some underlying issues for changing the numbers." OCC Exh. 1363. Indeed, Anderson admitted in her hearing testimony that she was aware and concerned that sales pressure was a reason why employees engaged in SPM from 2013-2016. Hr'g Tr. at 9573:8-9574:3.

Anderson also contends that sales pressure was not the cause of SPM. *See, e.g.*, CRA Exceptions at 34, 36; CRA Br. at 464. Anderson again does not present any evidence other than her own testimony to support the assertion that sales goal pressure did not lead to substantial

risks, including SPM. In his SD Order, the ALJ properly found the evidence shows that employees faced significant pressure to meet unreasonable sales goals and feared losing their jobs if they did not meet sales goals, which incentivized them to commit SPM. SD Order SOMFs 98and 302.

Supporting this finding, ample record evidence demonstrates Bank employees committed SPM due to pressure to meet unreasonable sales goals. *See, e.g.*, OCC Exhs. 26, 111, 306, 644, 835, 877, 1363, 1366, 1861, 2915 at 21-25, 2988. For example, in a December 2013 email chain regarding investigations into employee misconduct from around the country, HR manager Susan Nelson expressed concern about team members "taking actions that are in many, many cases either encouraged or studiously ignored by their store management, in order to meet goals and keep their jobs." OCC Exh. 1366 at *1. [redacted]

Moreover, NBE Candy testified that "[t]he fact that people could risk termination if they did not meet the unreasonable goals did drive some of the misconduct." Hr'g Tr. at 1068:12-18. She further testified that the incentive compensation program "enforced or encouraged people to meet the unreasonable sales goals" and "gave managers an incentive to either encourage inappropriate illegal behavior to meet the sales goals or . . . turn a blind eye." *Id*. at 1130:2-21. Jason MacDuff, a Wells Fargo employee in strategic planning during 2013-2016, also testified that subject-matter experts at the Bank conveyed to him that pressure to meet sales goals was driving misconduct. *Id*. at 5679:19-5680:20. In addition to the record evidence and testimony, Anderson essentially concedes that unreasonable sales goals were a primary driver of SPM in her

exceptions briefing. While arguing that "escalation occurred" in the Bank to address SPM risks, she asserts that "[c]hanges to sales goals and incentive compensation plans . . . resulted in significant decreases in the rates of sales practices misconduct." CRA Br. at 448. The premise of this statement is self-evident: Sales goals were a primary driver of SPM.

This evidence together demonstrates that sales pressure did indeed drive employees to commit SPM, and that Anderson did know about it. Given the extent and severity of the misconduct being reported directly to Anderson, there is little doubt that Anderson knew that the incentive compensation program was not appropriately balancing risk and reward. Hr'g Tr. at 1119:18-1120:1 (Candy); OCC Exh. 1742 at 8.

Anderson testified that while there were geographic "hotspots" where employees faced significant pressure to meet unreasonable sales goals, she did not believe that it ever rose to the level requiring escalation to her superiors. *See* Hr'g Tr. at 9715:5-18, 9791:17-24. However, her testimony is rebutted by the many reports of pressure on employees to meet unreasonable sales goals from throughout the country. Further, as NBE Crosthwaite testified: "if you were having hot spots in L.A. and Orange Country, New Jersey, and Arizona, more than likely you're going to have problems elsewhere." *Id*. at 2332:3-11 (Crosthwaite).

Based on the foregoing, the Comptroller finds that Anderson had knowledge that sales goals in the Community Bank were unreasonable and were incentivizing employees to commit SPM and rejects her exceptions relating to this finding.

c. Anderson failed to credibly challenge the incentive compensation program to Bank executives

For the reasons explained below, the Comptroller finds that Anderson failed to credibly challenge the Bank's incentive compensation program.

As established above, Anderson was aware that employees were committing SPM due to sales pressure, and she acknowledged her responsibility to credibly challenge Bank executives on the incentive compensation program. Despite Anderson's knowledge of SPM caused by the unreasonable sales goals, there is scant evidence in the record that she raised the issue with her superiors. She justifies her failure by claiming that other Bank executives already knew about the SPM issue and by offering some bare assertions that she orally challenged sales goals. *See, e.g.*, CRA Exceptions at 104; CRA Br. at 503-05; Hr'g Tr. at 9715:12-18 (Anderson); *see also infra* Part VI.B.4. Even if her superiors knew about the unreasonable sales goals and SPM, that knowledge would not have relieved her of her responsibility to credibly challenge the unreasonable sales goals. As GRO, Anderson should have been the first person to advocate for changes to sales goals during 2013-2016. Hr'g Tr. at 1138:6-9 (Candy). She should have challenged the Community Bank's business model, advocated for a formal policy that employees could not be fired for failing to meet sales goals, sought to withhold incentive compensation credit for accounts of dubious origins, and advocated for tighter controls on new accounts. *Id*. 1068:1-1069:15 (Candy).

Specifically, Anderson should have raised the alarm to Chief Risk Officer Michael Loughlin[31] and Community Bank head Carrie Tolstedt.[32] Anderson asserts that she attended many meetings with Loughlin and Tolstedt, inviting the inference that she credibly challenged the incentive compensation program merely because she regularly met with them. *See, e.g.*, CRA Exceptions at 93-94, 118. Her testimony that she orally challenged sales goals is unsupported by

[31] Anderson had a "dotted-line" reporting to Chief Risk Officer Michael Loughlin, beginning some time before 2016. SD Order SOMF 20; MSD-290A at 26:18-27:10.
[32] Anderson reported directly to Community Bank head Carrie Tolstedt from 2006 through 2016. SD Order SOMF 19.

any identified record evidence. *See, e.g.*, Hr'g Tr. at 9278:23-9279:19. As established in the SD Order, Anderson failed to provide Loughlin with independent assessments of the incentive compensation program, including whether it appropriately balanced risk and reward, as required under Bank policy. SD Order SOMF 95. Loughlin further testified that he believed Anderson should have done more to invite inspection of the SPM problem, escalated to him in a more aggressive way, and credibly challenged the Community Bank's business model more strongly. Hr'g Tr. at 2958:9-14. Having reviewed the relevant portions of the record, the Comptroller declines to give any weight to Anderson's bare assertions of credible challenge.

Anderson argues in her exceptions that the Comptroller should find that she did exercise credible challenge and therefore discharged her obligation. *See, e.g.*, CRA Exceptions at 118; CRA Br. at 501-505. None of these arguments are availing.

First, Anderson asserts that she never told Loughlin or Tolstedt that sales goals needed to be modified because she did not believe they were causing employees to commit SPM or that the incentive compensation program failed to appropriately balance risk and reward. Hr'g Tr. at 9628:7-9629:7 (Anderson). However, the Comptroller has already found that Anderson knew that sales goals were unreasonable and incentivized employees to commit SPM. Since Anderson was aware of that substantial risk, she was obligated to credibly challenge.

Second, Anderson asserts that she did not have unilateral authority to lower or eliminate sales goals, and that even Tolstedt would have been ignored or replaced if she proposed to eliminate sales goals. *See, e.g.*, CRA Exceptions at 104, 460. Even accepting these assertions as true, a gap remains between what Anderson did and what she was obligated to do. The fact that Tolstedt, Loughlin, and other Bank executives may have known about the SPM problem did not

absolve Anderson from her obligation to credibly challenge them to change the incentive compensation program. *See also infra* Part VI.B.4.

Last, Anderson asserts that she discharged her duties by taking various actions, such as site visits to Wells Fargo facilities across the country, updating new training material for employees on risk and ethics, consulting banks in the United Kingdom on sales goals, participating in a pilot initiative on eliminating sales goals, and adjusting existing sales goals. *See, e.g.*, CRA Exceptions at 93-95, 120-21; CRA Br. at 503-04. However, these actions do not address her failure to credibly challenge the incentive compensation program up her chain to Tolstedt and Loughlin. Moreover, while Anderson took some actions to lower the sales goals during the 2012-2013 period, she admitted that she did not advocate for lowering sales goals from 2013 to 2016. *See* CRA Post-Hearing Reply Br. at 5; Hr'g Tr. at 9405:25-9406:4, 9629:3-7 (Anderson).

The Comptroller finds that the record evidence establishes that Anderson was obligated to credibly challenge the incentive compensation program, that the incentive compensation program imposed unreasonable sales goals that failed to balance risk and reward and incentivized employees to commit SPM, and that Anderson failed to credibly challenge the incentive compensation program. Given Anderson's knowledge that unreasonable sales goals posed substantial risks to the Bank, Anderson's failure to provide such credible challenge constituted unsafe or unsound banking practices.

3. Anderson's failure to institute effective controls to manage the risk of SPM was an unsafe or unsound practice

The Comptroller finds that the record evidence and hearing testimony supports the ALJ's findings that Anderson engaged in unsafe or unsound practices by failing to institute effective controls to prevent and detect SPM from 2013 until October 1, 2016, when the Bank eliminated

sales goals. *See generally* RD at 93-105, 112-17, 121-25, 145-47, 150-60; 197-201, 231-32, 370-87, 424. Specifically, the record shows that the controls that existed were ineffective because (1) the significant amount of SPM that existed demonstrates that the controls failed to prevent SPM; and (2) the controls detected only a small proportion of SPM that existed in the Bank. 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 157, 161-64, 168, 170-71, 174-93, 195-96, 199-200, 202-07, 209, and 211-13.

a. Overview of SSCOT and SPM Controls

Anderson managed SSCOT, which was responsible for reviewing allegations of SPM as well as conducting proactive monitoring to detect SPM in the Bank. OCC Exh. 1771 at *3; SD Order SOMF 181. SSCOT received allegations of SPM from a variety of sources, including the Bank's EthicsLine (a 24-hour hotline and website), customer complaints, human resources, management, Corporate Investigations, and proactive monitoring tools. R. Exh. 1778 at 20.

Upon receipt of an SPM allegation, SSCOT processed the allegation on one of two tracks. *See* R. Exh. 9704. The most serious allegations were referred directly to Corporate Investigations.[33] *See id.* at 8. Allegations not sent directly to Corporate Investigations were reviewed by SSCOT, which applied certain criteria to determine whether the allegation should be dismissed, whether the employee involved should be referred for additional training, or whether "polling" should be conducted.[34] *Id.* at 1-7; *see also* R. Exh. 1778 at 20. When conducting

[33] Corporate Investigations was a department within the Bank responsible for investigating employee misconduct. *See* Hr'g Tr. at 5961:4-11 (Julian).

[34] For example, an allegation that an employee opened an unauthorized checking or savings account had the following investigation and resolution criteria:

- If the accused employee had less than 15% of new accounts missing signatures
- and no customer complaints, the allegation was closed as a non-issue;

polling, SSCOT contacted a randomly selected list of the employee's customers who had opened the same type of banking product involved in the allegation. Hr'g Tr. at 5795:24-5796:11 (Rawson). SSCOT talked to a maximum of five customers during polling. OCC Exh. 302 at *3. SSCOT generally required three substantiations from polling before referring the allegation to Corporate Investigations. *See* R. Exh. 9704 at 9.[35]

The record shows that only a small percentage of SPM allegations that SSCOT received were referred to Corporate Investigations. *See, e.g.*, Hr'g Tr. at 10065:9-17 (Anderson); R. Exh. 10730 at 6; OCC Exh. 1865 at *1-2. For example, in 2014, SSCOT received 10,964 allegations of SPM that did not require direct referral to Corporate Investigations. OCC Exh. 1865 at *1. Of those, SSCOT substantiated and referred to Corporate Investigations for further review only 693 allegations. *See id.*; OCC Exh. 1998U at *88-89.[36] Similarly, in 2013, only 641 allegations of SPM out of 10,316 were substantiated and referred to Corporate Investigations for further review. *See* OCC Exh. 1998U at *88-89.

- If the accused employee had between 15% and 40% of new accounts missing signatures, SSCOT would close the allegation and send an e-mail to the employee's managers recommending training; or
- If the accused employee had over 40% of new accounts missing signatures or over 100 accounts missing signatures, SSCOT would then move the allegation to polling.

R. Exh. 9704 at 2, 11. This exhibit also shows the criteria that were applicable to teller referrals, *id*. at 3, debit card consent, *id*. at 4, account opening procedures, *id*. at 5, possible falsifications, *id*. at 6, and low volume sales, *id*. at 7.

[35] There were a few circumstances where SSCOT would refer cases directly to Corporate Investigations. For example, if polling revealed one substantiated instance of record falsification, then the allegation would be referred directly to Corporate Investigations. *See* R. Exh. 9704 at 9.

[36] These numbers come from examiner notes from a June 4, 2015, meeting with Bank personnel. *See* OCC Exh. 1865. Bank documents potentially show the number of SSCOT allegations processed to be slightly lower—showing 7,962 "inquires" in 2014. OCC Exh. 1998U at *88. However, the 2014 resolution data on the following page totals to 10,964. *See id.* at *89. The exact number of allegations sent to SSCOT is not material because the evidence is clear that only a small percentage of allegations were substantiated as SPM by SSCOT.

As of May 2015, approximately 80% of the allegations SSCOT received came from the EthicsLine. OCC Exh. 1771 at *3. Bank employees used the EthicsLine to report violations of the Bank's code of ethics, violations of law, and suspicious conduct involving other employees. R. Exh. 1373 at 44. The most commonly reported allegations to the EthicsLine were sales integrity violations, which includes types of SPM and comprised approximately half of all EthicsLine complaints. *See, e.g.*, R. Exh. 7214 at 5-6 (showing more than half of EthicsLine cases were for sales integrity violations); OCC Exh. 1265 (showing between 40% and 47% of EthicsLine cases were for sales incentive program violations). The EthicsLine sent 4,261 and 3,809 SPM allegations to SSCOT in 2013 and 2014, respectively. OCC Exh. 174 at *7.

Another control SSCOT used to detect SPM was proactive monitoring for simulated funding. Employees identified through proactive monitoring would then go through the SSCOT review process detailed above. *See* R. Exh. 1778 at 20. Proactive monitoring began in 2013 but was paused in December 2013. OCC Exhs. 280, 100; *see also* SD Order SOMFs 184-91. For this initial proactive monitoring period, SSCOT's protocols called for a review of sales activity involving phone number changes and signs of simulated funding.[37] OCC Exh. 280 at *2-3. As an example of the number of employees this initial proactive monitoring detected, in November 2013, proactive monitoring identified 77 employees who engaged in phone number changes and 38 employees who engaged in potential simulated funding. OCC Exh. 1365 at *1-2.

[37] Proactive monitoring initially included a review of customer phone number changes and a check for simulated funding. For phone number changes, employees were identified if, from May 2013 to July 2013, they changed more than 50 phone numbers by 1-3 digits. OCC Exh. 280 at *2. For simulated funding, employees were identified if, from March 2013 to July 2013, they: (1) opened 50 more accounts that showed potential simulated funding, or (2) in four of those five months, they had 10 or more accounts with potential simulated funding and 10% or more of checking and savings sales involved potential simulated funding. *Id.*

Proactive monitoring resumed in July 2014. From July 2014 to March 2015, SSCOT's proactive monitoring protocols used a new 99.99% threshold for potential simulated funding. OCC Exh. 196 at *3; *see also* SD Order SOMFs 203-04. This threshold identified employees in the top 99.99% for potential simulated funding activity and placed those employees in SSCOT's review process. OCC Exh. 196 at *1. Until October 2014, the monitoring looked at the previous 30 days' activity, but starting October 2014, the monitoring expanded and looked at the previous 90 days. *Id.* at *3. These thresholds identified approximately 4 employees per month while they were used. *Id.*

Starting in April 2015, SSCOT again changed the thresholds for proactive monitoring to a 99.95% threshold for potential simulated funding. *Id.*; *see also* SD Order SOMFs 204-07. This threshold identified employees in the top 99.95% for potential simulated funding activity and placed those employees in SSCOT's review process. OCC Exh. 196 at *3. The Bank used this threshold for proactive monitoring until the Bank eliminated sales goals on October 1, 2016. Hr'g Tr. at 1079: 8-13 (Candy). This threshold identified approximately 18 employees per month. OCC Exh. 602 at *3. These last two phases of proactive monitoring identified *only* approximately 354 employees for SSCOT review from July 2014 to September 2016. *See* OCC Exhs. 196, 602.[38]

[38] The parties extensively argued in post-hearing briefing about whether proactive monitoring was effective. *See, e.g.*, EC Post-Hearing Br. at 14-22; EC Post-Hearing Reply Br. at 9-14; CRA Post-Hearing Reply Br. at 48-52. The RD has extensive discussions on these points. *See, e.g.*, RD at 91-92; 100-17; 145-47; 152-60; 197-201. It also has extensive findings on these points. *See id.* at 370-83. Anderson's exceptions brief, however, appears to abandon the argument that proactive monitoring was effective. *See* CRA Br. at 505-14. The Comptroller has reviewed the record evidence and finds that none of the controls, including proactive monitoring, were effective. The Comptroller need not decide the other arguments related to proactive monitoring as they do not alter this conclusion.

b. The amount of SPM demonstrates the controls were ineffective

Based on a review of the record, the Comptroller finds that SSCOT's controls were ineffective in detecting or preventing SPM. A comparison of the overall amount of potential SPM to the amount of SPM that the controls actually detected and referred for investigation demonstrates that the controls were ineffective in detecting SPM. Additionally, the substantial amount of SPM and SPM allegations that persisted even with the controls in place demonstrates that the controls were ineffective in preventing SPM.

A series of reports produced by PwC attempted to quantify the amount of SPM at the Bank. *See* OCC Exhs. 1811RU, 1812RU, 1813RU, 1636R.[39] Combining the numbers from the PwC reports, PwC identified approximately *1.9 million* unauthorized accounts that Bank employees opened from 2013 to 2016. *Id.*; *See also* Hr'g Tr. at 1197:1-4 (Candy) (stating that PwC identified approximately 1.8 million unauthorized accounts).[40] Anderson argues that PwC's analyses overstate the amount of SPM because they likely include false positives. *See, e.g.*, CRA Proposed Findings of Fact and Conclusions of Law ¶¶ 276-78. However, the PwC report makes clear that the numbers of unauthorized accounts it identifies is only an estimate, and the report includes a caveat that the accounts it identifies are those that PwC "could not otherwise exclude from being potentially unauthorized." *E.g.*, OCC Exh. 1813RU at *2.

Upon reviewing the evidence, the Comptroller finds that PwC's numbers likely undercount the amount of SPM. PwC only included accounts showing potential simulated funding, potentially unauthorized online bill pay, potentially unauthorized credit cards, and potentially unauthorized lines of credit. *See* Hr'g Tr. at 1197:5-14 (Candy). NBE Candy testified

[39] These reports are discussed in more detail in Part VI.A.1.a above.
[40] The difference between NBE Candy's testimony and the PwC numbers is immaterial to the conclusion that the amount of SPM demonstrates the controls were not effective.

that the PwC methodology resulted in underestimates of those four types of SPM. *See* Hr'g Tr. at 1200:4-24. This figure does not include other types of SPM, such as bundling, pinning, and sandbagging. *See* Hr'g Tr. at 1199:1-19 (Candy). It also does not include all the types of accounts that could have been used to engage in SPM. *See* Hr'g Tr. at 1199:16-19 (Candy), 10298:21-10300:7 (Abshier).

Although the weight of the evidence supports a finding that the 1.9 million number is likely an undercount of SPM, the Comptroller need not decide whether this specific number is correct. No matter the exact number, the record demonstrates that SSCOT's controls only detected a small sliver of SPM. *See* OCC Exhs. 1998U, 1865 at *1-2. Another example is simulated funding, which was one type of SPM that PwC reviewed. The amount of simulated funding detected with SSCOT's controls was only a small percentage of simulated funding. While PwC found approximately 1 million unauthorized accounts with potential simulated funding, *see* OCC Exh. 1636R, SSCOT's proactive monitoring only detected approximately 700 employees in total responsible for the opening of approximately 24,500 unauthorized accounts with potential simulated funding.[41] This is well below the number of accounts opened with

[41] Because the Comptroller has not located record evidence totaling all of the employees identified for potential simulated funding by the various thresholds, this total is conservative and likely overstates the number of employees identified through proactive monitoring. Proactive monitoring for simulated funding identified 48 employees from July 2014 through April 2015. *See* OCC Exh. 196 at *3. Extrapolating from OCC Exhibit 1365, the Bank identified 342 employees through the initial thresholds from March to December 2013. *See* OCC Exh. 1365. The 99.95% threshold identified approximately 18 employees per month, meaning the Bank identified 306 employees for potential simulated funding from May 2015 to September 2016. *See* OCC Exh. 603. Adding this up, SSCOT's proactive monitoring identified roughly 342 employees from March 2013 to December 2013, 48 employees from July 2015 through April 2015, and then 306 employees from May 2015 to September 2016, for a total of 696 employees.

Similarly, there is no record evidence totaling the number of unauthorized accounts these employees opened. OCC Exhibit 602, however, shows the number of average monthly

potential simulated funding, even if the PwC total is overinclusive. Whatever the exact number of SPM was, it dwarfs the amount of SPM SSCOT detected or substantiated, showing that the controls were ineffective in detecting SPM. Likewise, the total amount of SPM that likely occurred makes plain that the controls were ineffective in preventing SPM.

Therefore, the Comptroller finds that SSCOT's controls were ineffective in both preventing and detecting SPM. Anderson's responsibility as GRO was to institute effective controls to manage risks. Failing to effectively manage known risks as GRO is contrary to the accepted standards of a risk officer. Additionally, failing to manage the risk of SPM through effective controls resulted in abnormal risk to the Bank. Accordingly, given Anderson's knowledge that SPM was widespread and posed a risk to the Bank, her failure to institute effective controls constituted an unsafe or unsound practice.

c. The record does not show that SPM decreased from 2013 to 2016

Anderson argues in her exceptions that SPM decreased from 2013 to 2016 because she strengthened the controls. *See* CRA Br. at 505-11; *see also, e.g.*, CRA Exceptions at 45-49. She points to various documents showing a decrease in simulated funding from 2013 to 2016, *see* CRA Br. at 505-08; *see also, e.g.*, CRA Exceptions at 129-31, as well as documents showing decreases in EthicsLine and SSCOT cases. *See* CRA Br. at 508-09; *see also, e.g.*, CRA Exceptions at 129-31. She also points to testimony from Bank employees who stated that the Community Bank was making progress on reducing SPM during that time period. *See* CRA Br. at 509; *see also, e.g.*, CRA Exceptions at 129-31.

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occurrences of simulated funding for various percentiles in September 2015. The highest monthly occurrences of simulated funding with the percentiles was 35. *See* OCC Exh. 602 at *3. Thus, if proactive monitoring identified 700 employees for simulated funding, and these employees averaged 35 instances of simulated funding, that means these employees opened 24,500 unauthorized accounts with simulated funding. The Comptroller recognizes that there are limitations with this number but believes it to be a conservative estimate.

The Comptroller rejects these exceptions and finds that Anderson's arguments fail for two reasons. First, even if SPM had decreased (which is not clearly established by the documentary evidence), the amount of SPM that still existed shows that the controls were ineffective. Second, even if SPM had decreased, Anderson has not established that her controls were the reason for any decrease. The Comptroller addresses each conclusion in turn.

As an initial matter, the Comptroller notes that the documentary evidence Anderson relies on to show that SPM decreased is incomplete because she does not include any evidence after October 2015. *See* CRA Br. at 508. Additionally, the record contains evidence indicating that SPM was trending upwards during the first nine months of 2015, which undercuts Anderson's assertion that SPM decreased in 2015. *See* OCC Exhs. 1896 at 20 (showing customer complaints of SPM increasing from 2014 through the third quarter of 2015), 213 (showing EthicsLine tracking upwards in 2015). Additionally, evidence from 2016 indicates that SPM was continuing to trend upward in 2016. *See* OCC Exh. 899 at 2 (a July 13, 2016, presentation stating that SSCOT cases were up 39% compared to the year-to-date in 2015); R. Exh. 14173 at 8 and 17 (a July 26, 2016, presentation noting the Bank had terminated more employees for SPM in 2016 than 2015 and that SSCOT cases originating from proactive monitoring increased 121% year over year).

There is also record evidence that supports the conclusion that these reports are *undercounting* the amount of SPM. *See* OCC Exh. 1312 at 39 (discussing that employees were not consistently logging customer complaints). Specifically, the October 2015 Accenture Report states: "[n]egative sales practices may be underrepresented or unidentified due to customer complaints in stores not being logged, escalated, and monitored." *Id.* This report further notes

that employees were not consistently reporting ethics issues to the EthicsLine. *Id.* at 41.[42] While these cases are not all confirmed instances of SPM, the record evidence demonstrates that the EthicsLine allegations also underrepresented the amount of SPM. The Comptroller finds that at best the evidence shows that only certain types of SPM decreased in that timeframe, but the preponderance of the evidence does not show that SPM decreased overall from 2013 to 2016.

Even if Anderson were correct that SPM decreased from 2013 to 2016, the amount of SPM that still existed demonstrates that the controls were ineffective. Putting together the PwC analyses for simulated funding, online bill pay, credit cards, and lines of credit, there were 330,659 instances of potential SPM in 2015 and 170,969 potential instances of SPM in 2016 (through September 30). *See* OCC Exhs. 1811RU, 1812RU, 1813RU, 1636R. Over 6% of the lines of credit in the Community Bank were potentially unauthorized. OCC Exh. 1813RU at *2-3. Approximately 4% of the credit cards in the Community Bank were potentially unauthorized. *See* OCC Exh. 1812RU at *2-3. Even without including the full universe of SPM, these numbers are significant. This level of SPM was not acceptable and not consistent with safe and sound banking practices.

Finally, Anderson's assertion that SSCOT's controls *caused* a decrease in SPM is unsupported. Anderson's exceptions brief does not support any such causation. Instead, the brief offers nothing more than a rhetorical question: "Upon establishing that significant improvements were realized, the question then becomes what caused those improvements?" CRA Br. at 506,

[42] Anderson cites to the executive summary of this report, arguing that it shows she was taking effective steps to address SPM. *See* CRA Br. at 509 (quoting OCC Exh. 1311 at *4). Anderson coincidentally ignores the statement: "[a]lthough there are multiple programs in flight to strengthen controls within the 1LOD, the 1LOD does not have a uniform way of evidencing sufficient control over sales practices issues." OCC Exh. 1311 at *42.

505-11. As detailed above, the record does not support that significant improvements in SPM were realized as the result of SSCOT's controls.

In short, Anderson as GRO had a responsibility to address the risks from SPM and to institute effective controls. The data demonstrates that she failed..

d. Anderson's additional controls were also ineffective

In her exceptions, Anderson points to seven additional controls that she argues worked to decrease SPM: (1) training, (2) customer complaint system improvements, (3) increased staffing, (4) elimination of the Jump into January program, (5) signature capture, (6) the quality of sales report card ("QSRC"), and (7) lowering sales goals.[43] *See* CRA Br. at 509-11; *see also*, *e.g.*, CRA Exceptions at 45-49.

The Comptroller has reviewed the RD, hearing testimony, and the record evidence. Based on this review, the Comptroller finds that these additional controls were not effective at preventing or detecting SPM. As detailed above, the sheer amount of SPM alone demonstrates that no control, or combination of controls, was effective in managing or even materially improving SPM. For some of the controls—training, customer complaint system improvements, increased staffing, the elimination of Jump into January, and signature capture—there is no evidence in the record that shows they were effective or had any effect on the level of SPM at all. For one control—the QSRC—the evidence shows that it had other purposes and was not even

[43] The RD does not address training or the elimination of the Jump into January program. The RD touches on the rest of Anderson's posited controls, although some in more depth than others. For example, the RD discusses signature capture in detail, but does not specifically address whether it was an effective control. *See* RD at 150-58. Additionally, the RD states that sales goals were lowered but finds that SPM continued to be significant despite this. *See id.* at 11, 255. The RD states that the Bank's customer complaints system did not consistently capture complaints from customers affected by SPM. *See id.* at 371-73. The RD does, however, discuss the QSRC in some detail.

used as a control for SPM. For the final control—lowering sales goals—the evidence does not support that Anderson was responsible for this.

i. Training

Anderson argues that she improved training and that had lowered SPM. *See* CRA Br. at 510. The record is weak on this point. The evidence does support that Anderson implemented training that was, in part, designed to address SPM. *See* OCC Exh. 1030; R. Exh. 6884 at 9. Nonetheless, the Bank continued to have a significant amount of SPM, which demonstrates that the training was not an effective control to manage the risk of SPM.

ii. Customer complaint system improvements

Anderson also argues that she improved the Bank's customer complaint system and did so to such an extent that in 2015 it was an effective control for SPM. *See* CRA Br. at 511. The record evidence, however, demonstrates that the customer complaint system was inadequate through 2016. From 2015 to 2017, the OCC issued multiple supervisory letters concluding that the Bank's customer complaint system was inadequate. *See* OCC Exhs. 1239 at 4, 805 at 3, 1689R at 12. Bank employee testimony, *e.g.*, Hr'g Tr. at 5705:14-5706:5 (MacDuff), Bank documents, *e.g.*, OCC Exh. 1878 at 10, and third-party reports, *e.g.*, OCC Exh. 1312 at 10, further support this conclusion. For example, the Accenture Report states that the Bank did not have a process or model to ensure all customer complaints were captured, monitored, addressed, and reported across all branches. *See* OCC Exh. 1312 at 10. If anything, the evidence shows that the Bank was only incrementally improving the system through 2016. *See, e.g.*, R. Exh. 18970 at 4; Hr'g Tr. at 9657:9-9658:5 (Anderson). Even taking these improvements into consideration, this does not alter the conclusion that the Bank's customer complaint system remained

inadequate.[44] Therefore, the Comptroller finds that the Bank's customer complaint system was not an effective control.

iii. Increased staffing

Anderson also argues that the Bank invested millions of dollars in risk resources, such as increased staffing, and that such investments served to improve SPM. *See* Anderson's Exceptions Brief at 510. The record evidence shows that the headcount in Anderson's department increased from 261 to 480 in 2015, *see* OCC Exh. 2376 at *17, and this headcount consisted of risk professionals. Hr'g Tr. at 5586:5-5588:1 (MacDuff). The record evidence, however, does not link this increased staffing to an improvement in SPM. As the Comptroller detailed above, SPM continued, despite the increased staffing. The Comptroller finds that increased staffing was not an effective control.

iv. Elimination of Jump into January

Anderson further argues that she eliminated the Jump into January program to reduce SPM risk. *See* CRA Br. at 511. The Jump into January program was a program adopted to incentivize Bank employees to exceed January sales goals each year, but the program increased SPM in January as a result. *See, e.g.*, R. Exh. 18970; Hr'g Tr. at 9657:9-9658:5 (Anderson). The record evidence here supports Anderson's contention that she raised concerns about the program to Tolstedt, which resulted in the Bank changing and then eliminating the program. R. Exh. 278 at 132:22-134:13 (Anderson Dep.). Despite this, the Bank continued to have a significant amount of SPM. Therefore, while Anderson did contribute to the elimination of the Jump into January program, the Comptroller finds that this was not a sufficiently effective control to meet Anderson's obligations as GRO.

[44] A review of the record demonstrates that the Bank's customer complaint system was inadequate before 2015 as well. *See* SD Order SOMFs 174-76.

v. Signature capture

Anderson argues that in 2014 she began to implement controls to capture signatures or other evidence of consent that the customer wanted to open an account through various projects, such as Contact Clarity and Evolving Model. *See* CRA Br. at 509-11. Based on a review of the evidence presented at summary disposition, as discussed above, the Comptroller finds it undisputed that the Bank did not actually require signatures or other evidence of consent on all its products until 2016. *See* SD Order SOMF 157. While the record does show that signature capture improved because of Anderson's projects, *see* R. Exh. 1536 at 4, the record does not show that signature capture effectively prevented SPM. As noted above, SPM remained systemic and widespread despite improved signature capture. Even Anderson's own expert opined that signature capture would not and did not prevent SPM. *See* Hr'g Tr. at 10366:17-10367:14 (Farrell) ("The team member [when opening an account] is free to forge a signature or enter data that's fake into the system. And there's nothing that will prevent that."). Based on this evidence, the Comptroller finds that signature capture was not an effective control to manage the risk of SPM.

vi. QSRC

Anderson argues that the QSRC was an effective control for detecting and assessing the risk from SPM. *See* CRA Br. at 510; *see also* CRA Post-Hearing Br. at 53-55. The QSRC was a tool launched in April 2012 that measured key qualities of sale metrics from branches up to regional parts of the Community Bank. *See* R. Exh. 879 at 8. It was made up of four different components—signatures, activations, procedures, and fundings. Hr'g Tr. at 9137:15-24 (Bernardo). Bankers were graded on the four components separately, which would then be combined to make up a summary score. *Id.* The data was provided quarterly to the regional bank

risk council and gave insight into metrics such as customer signatures on accounts, debit card activation rates, and account funding. *See, e.g.*, R. Exh. 11879 at 33-34.

The RD discusses the QSRC in some depth. *See* RD at 121-25. The RD does not opine on whether the QSRC was an effective control, although the discussion implies that it was not in practice used as a control for SPM. *See id.* Specifically, the RD notes that Anderson admitted that the QSRC was not a control that prevented employees from engaging in SPM. *Id.* at 123. It also notes that the QSRC *could* have been, but was not, used as a control to detect SPM, as a poor QSRC would not result in an employee's termination. *Id.*

The Comptroller, upon review of the record evidence, agrees with the RD's discussion on this point. The evidence is strong that the QSRC was not actually used as a control for SPM. Bank employees, including SSCOT employees, testified that it was not a control to prevent or detect SPM. *See, e.g.*, Hr'g Tr. at 5851:9-18 (Rawson),9129:17-25 (Bernardo), 5690:10-18 (MacDuff). Additionally, even if the QRSC was meant to be used as a control, the QSRC metrics were not robust enough to be useful in that sense, as an employee with 25% of newly open unfunded accounts could still have an acceptable QSRC score. OCC Exh. 135. The only testimony that supports Anderson's argument that the QRSC was an effective control for detecting SPM and assessing the risk from SPM is from her own expert, *see* Hr'g Tr. at 10391:1-10392:14 (Farrell), whose testimony alone does not outweigh the other evidence on this point. Therefore, the Comptroller finds that the QSRC was not a control for SPM.

vii. Lowering sales goals

Anderson finally argues that lowering sales goals and implementing changes to incentive compensation helped to reduce SPM. *See* CRA Br. at 510. While the record evidence is clear that the Bank did lower sales goals from 2012 onward, *see, e.g.*, R. Exh. 16147 at 44-45, the record evidence is also clear that even the lowered sales goals remained unachievable. *See, e.g., id.* at

44. Importantly, while it is true the sales goals were lowered, Anderson presents no evidence that the lowered goals were the result of her efforts. At most, she testified only that she challenged the sales goals in certain discrete settings. *See* Hr'g Tr. at 9406:19-9408:20 (Anderson).[45] While Anderson argues that she implemented lower sales goals as a control for SPM, she has provided no evidence to support her argument. Accordingly, the Comptroller rejects the argument that lowering sales goals was something *Anderson herself* did to manage the risk of SPM.

Accordingly, the Comptroller finds that Anderson failed to institute effective controls to manage SPM risks and that this failure constituted an unsafe or unsound practice.

4. Anderson's failure to escalate known or obvious risks related to SPM was an unsafe or unsound practice

The Comptroller finds that the record evidence supports the ALJ's finding that Anderson failed to escalate risk issues related to SPM. *See generally* RD at 423-26. Specifically, the record reflects that Anderson repeatedly failed to escalate known or obvious SPM risks to the individuals in her escalation path and that she continually downplayed the extent of SPM in the Community Bank. This misconduct constituted an 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 320-22, 327, 332, 343, 351-56.

a. Anderson was required to escalate known or obvious risks related to SPM to Loughlin and Tolstedt

It is undisputed that Anderson had an obligation to escalate SPM risks to Loughlin (and, by extension, Loughlin's Corporate Risk group) and Tolstedt. In her exceptions, Anderson describes that her "escalation path was to Ms. Tolstedt and Mr. Loughlin." CRA Br. at 447.

[45] In contrast, Kenneth Zimmerman, who managed the Bank's deposit products group, testified that he advocated for lower goals than were set in 2013 through 2015. *See* Hr'g Tr. at 4559:8-17.

Anderson also admitted this in her hearing testimony, noting that she believed it was important for her to "timely inform Mr. Loughlin of existing problems in the Community Bank with respect to sales practices misconduct" and that it was important for her to provide Loughlin and the ERMC with "timely and accurate information . . . about whether sales practices risk was adequately managed." Hr'g Tr. at 9526:11-9528:19. She also recognized that "failure to timely disclose existing deficiencies in risk management in the Community Bank with respect to sales practices misconduct could cause substantial harm to the [B]ank." *Id.* at 9527:15-18.

Anderson's responsibility to escalate risk issues is bolstered by internal Bank documents and OCC guidance. The Bank's Risk Management Framework explicitly states that the first line of defense is "responsible for identifying, measuring, assessing, controlling, mitigating, monitoring, and reporting current and emerging risk exposures . . . [as well as] escalating breaches to the appropriate level of the company." OCC Exh. 102 at 32. This accords with the escalation responsibility set forth in the 2012 Product and Service Risk Management Policy, which provides that the Group Risk Officer "[s]erv[es] as a coordination point across all risk management disciplines, escalating matters requiring attention to" the group's own management team (Tolstedt), Corporate Risk (Loughlin), the Law Department, and Wells Fargo Audit Services. OCC Exh. 1733 at 5. The requirement to escalate is also set forth in the Comptroller's Handbook on Corporate and Risk Governance, which explains that management should "recognize[], escalate[], and address[]" material risks and risk-taking activities exceeding the risk appetite in a timely manner. R. Exh. 18439 at 44, *rescinded* and *reimplemented* at OCC Exh. 1908U at 40.

Anderson argues in her exceptions that she did not need to escalate beyond Loughlin and Tolstedt. CRA Br. at 444, 447. But whether she should have escalated to others is immaterial.

The record evidence supports a finding that she was required to escalate risk issues to Loughlin and Corporate Risk, and—as demonstrated below—she failed to do so.

b. Anderson failed to escalate to Loughlin and Corporate Risk

Loughlin and Anderson had frequent interactions throughout the relevant period, including monthly one-on-one meetings about "risk issues," Hr'g Tr. at 9478:7-9 (Anderson), as well as quarterly meetings with both Loughlin and Tolstedt "to try to help them reduce sales pressure at the bank," *id.* at 3237:4-14 (Loughlin). *See also* CRA Br. at 445-46. A primary reason for these frequent meetings was Loughlin's reliance on Anderson, as the GRO, to "manage the risk properly in the businesses," since his own role in Corporate Risk was more of an "oversight function." Hr'g Tr. at 2958:21-25 (Loughlin).

Despite these frequent meetings, Loughlin was dissatisfied with Anderson's "level of transparency." *Id.* at 2959:14-17. He testified that there were "activities inside the Community Bank that I would have liked to have known more about," including SSCOT's proactive monitoring, but Anderson did not tell him about those *Id*. at 2959:19-2960:9.

More broadly, Loughlin testified that he believed that Anderson's conduct deviated from that expected of a group risk officer in two keys way. First, he found that her response to problems stemming from SPM was "generally slow." *Id.* at 2956:2-5. He urged her to move quickly to address SPM, but he "felt that some of her actions delayed an effective response to the problem." *Id*. at 2956:14-19, 2957:22-23; *see also id.* at 2956:8-13 (explaining the consequence of the delays). In particular, he said that the Community Bank was too slow to "size" the problem (*i.e.*, quantify the scope and impact on customers), in part because Anderson did not invite inspection. *Id*. at 2957:25-2958:10. In addition to her delays in addressing the problems, he testified that he "would have hoped that she escalated problems to me in a more aggressive way[.]" *Id.* at 2958:10-12. He also testified that the "other group risk officers escalated issues to

me on a more timely basis," demonstrating that this problem was unique to Anderson. *Id.* at 2961:10-12. He also testified that his "direct reports felt that . . . Claudia could be slow in producing the information they requested." *Id.* at 2960:16-18.

Loughlin's experience with Anderson is corroborated by two other members of the Corporate Risk team, Keb Byers and Yvette Hollingsworth. Byers testified in his sworn statement that Anderson's group "wasn't as transparent as they could have been" and that Anderson frequently attempted to control communication with regulators, even where that hindered efforts to "escalate more quickly." *See* OCC Exh. 2736 at 51:1-3, 110:8-112:7. Hollingsworth's testimony—in which she explained that Anderson made it *more* difficult for her team to address SPM risks—is discussed further in Part VI.B.4.c below.

Anderson argues in her exceptions that Loughlin was already aware of SPM issues, so she had no obligation to escalate anything further to him. *See* CRA Br. at 445; CRA Exceptions at 302. Before discussing how the record evidence contradicts this argument, it is worth noting that this argument fails on its own terms. Just because the target of escalation has some awareness of a problem does not mean that further escalation and ongoing communication about that risk is not required, and the failure to do so could result in a slower response to the problem. *See* Hr'g Tr. at 2956:2-2958:13 (Loughlin).

More importantly, the record reflects that Loughlin was *not* aware of many of the risks related to SPM as well as the controls to manage those risks, including proactive monitoring (and the pause on proactive monitoring) and thresholds. Loughlin testified that he first learned of the "threshold" concept at the April 2015 Risk Committee meeting, and he found the concept "troubling." *Id.* at 4858:19-4859:16. He further testified that, at the time of the hearing, he had "no recollection of proactive monitoring or what it is." *Id.* at 3281:19-20 (Loughlin). Because he

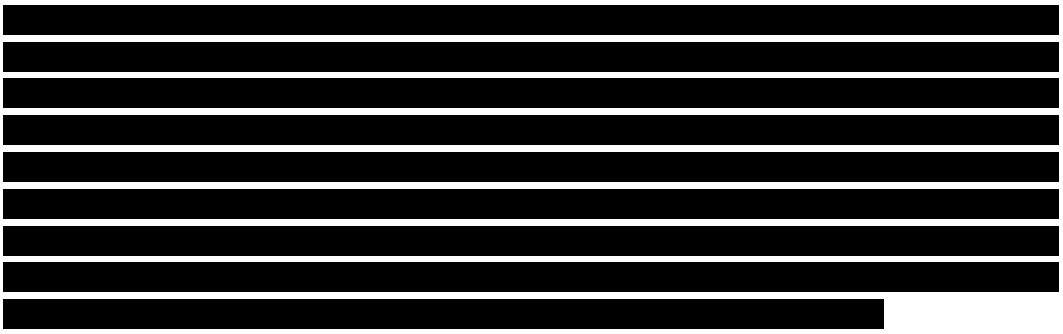
did not "recall what proactive monitoring is," he also did not recall any conversations about the pause on proactive monitoring. *Id*. at 2967:24-2968:23.

Anderson makes much of the fact that she and Loughlin "communicated regularly," including a "monthly risk letter, monthly one-on-one meetings, monthly group risk officer meetings, emails and other one-on-one conversations multiple times per week." CRA Br. at 445-46 (citing Hr'g Tr. at 9478:1-17 (Anderson)); CRA Exceptions Br. at 302. But if anything, this weakens her claim that she escalated to Loughlin. Given the frequency of her communication with Loughlin, the fact that he had not even heard of proactive monitoring only demonstrates how little relevant information she escalated to him throughout the relevant period.

Anderson dedicates most of the escalation section in her exceptions briefing to the argument that she did, in fact, escalate properly. However, while Anderson dedicates roughly 50 pages of briefing to this argument, she points to virtually no affirmative evidence that she "escalated properly through her established escalation path." CRA Br. at 455-501. Most of her arguments involve rebutting arguments that are irrelevant to the finding that she failed to escalate properly to Loughlin and Corporate Risk. *See, e.g.*, CRA Br. at 455 (Anderson's arguments concerning the April 2012 Ethics Committee Meeting), 456 (EthicsLine complaints), 467 (March 4, 2014, TMMEC Presentation). In addition, she points to a few controls she instituted or supported to address the problem, such as "Project Clarity" and "Contact Clarity." *See* CRA Br. at 459-60. But these controls are not escalation, so they are irrelevant. *See generally supra* Part VI.B.3.

Most of the remaining evidence of "escalation" that Anderson puts forth is escalation that was done by *others at the Bank*. *See generally* CRA Br. at 448-50 (using passive voice to argue that "there was escalation" and that "changes were made"); CRA Exceptions Br. at 305 (same).

One of the only affirmative pieces of evidence Anderson puts forth to suggest that she escalated issues related to SPM is an email she sent to David Otsuka in Legal on May 3, 2016. OCC Exh. 251 at 1; *see also* CRA Br. at 462-63. She wrote:



First, because this email is addressed to Mr. Otsuka in Legal, it is irrelevant to whether she failed to escalate to Loughlin and Tolstedt, which she already admitted was her established escalation path. Moreover, one email in 2016 is insufficient to prove that she properly escalated SPM issues. The ALJ found—and the Comptroller agrees—that Anderson failed to escalate risk issues from 2013 to 2016; a sole email in 2016 to someone admittedly is outside her escalation path (and in which she appears to deflect the blame onto those "high[er] . . . in the food chain") proves nothing and is certainly not enough to compensate for years of downplaying and failing to escalate SPM risks.

The rest of Anderson's exceptions regarding escalation are either irrelevant or unavailing.[46] CRA Br. at 449. Underneath her arguments is Anderson's lack of recognition that SPM was a serious problem for the Bank. Anderson testified that she believed that SPM was not a "significant problem" for the Bank from 2013 to 2016. Hr'g Tr. at 9527:5-13 (Anderson). This simple admission all but proves the claim: because she did not believe that SPM was a

[46] *See, e.g.*, Anderson's argument that she was not "an Executive Officer empowered to modify sales goals"—if anything, this proves that escalation to more senior officials who *did* have that power was her best tool to address the problem. CRA Br. at 449.

significant problem for the Bank, she failed to escalate that fact to Loughlin and Corporate Risk. And because she still, six years later, refused to acknowledge that SPM posed a significant problem for the Bank, it is difficult to accept that she sufficiently escalated the risks related to that problem when it was at its zenith.

It is important to put the evidence regarding Anderson's lack of escalation in the larger context of the evidence regarding how she reacted to SPM risks more broadly. As the next section demonstrates, the evidence shows that Anderson repeatedly downplayed risks related to SPM and actively hindered attempts to address those risks.

c. Anderson continually downplayed the severity of SPM

Despite her responsibility to escalate known or obvious risks regarding SPM to her superiors, the record reflects that Anderson took the opposite approach. More than half a dozen witnesses within the Bank testified about Anderson's tendency to downplay the severity of SPM and hinder efforts to escalate and address the issues posed by SPM.

Mary Mack, Tolstedt's successor as head of the Community Bank, testified that "the sales practices issues were described to me fairly consistently by Claudia and my predecessor and others as being . . . fairly limited in scope, limited to a small portion of the employees and something that the tweaks could address." Hr'g Tr. at 4589:14-19. Mack also testified that Anderson generally did not sufficiently address SPM issues. *See id.* at 4587:20-24 ("She had been a part of a series of steps that didn't appear to be solving the problem, didn't appear to be working, and I needed to bring in somebody who could help me build out a rigorous control framework.").

Anderson's tendency to downplay the scope and severity of SPM rather than provide accurate information about SPM risks to her colleagues and superiors is well-documented. For example, the Bank's Chief Compliance Officer, Yvette Hollingsworth, expressed frustrations

with getting accurate information about SPM risks from Anderson. *See generally id*. at 2898:8-2905:15 (Hollingsworth); OCC Exh. 2173 at 1. She explained that "oftentimes information I did request *perhaps I wouldn't receive it because Claudia didn't permission it*." Hr'g Tr. at 2898:25-2899:2 (emphasis added).

Byers expressed a similar general sentiment in his sworn statement. As discussed above, he testified that the Community Bank group was "not as transparent" as it could have been, and he described how Anderson frequently attempted to control communication with regulators, even where that hindered efforts to "escalate more quickly." *See* OCC Exh. 2736 at 111:25, 114:2. James Richards, the Bank's former Head of Financial Crimes Risk Management, corroborated this view. He testified in his sworn statement that Anderson was "extremely irritated and disappointed in me, both professional and personally," after he reported to the Board's Audit & Examination Committee that the Community Bank terminated 14 team members per business day. *See* SD Order SOMF 343 (citing MSD-297 at 44:5-46:22). He said that Anderson expressed to him that she was disappointed that he shared that statistic and that the statistic "lacked context." *Id.*

Michael Bacon also testified about Anderson's tendency to minimize or downplay risks. Throughout his "continuous, ongoing conversations" with Anderson, he described that "she'd follow the Carrie Tolstedt approach of trying to minimize it" and that "she certainly leaned towards downplaying it." MSD-295 at 39:17-18, 41:17-23. The former Chief Compliance Officer of the Community Bank Division, Jay Christoff, submitted a declaration that adds to this narrative of Anderson downplaying, minimizing, and seeking to put herself and her group in the best possible light. He stated that he observed Anderson "edit[ing] the Community Bank's responses to questions posed by the OCC, with an eye towards putting the Bank in the best

possible light." OCC Exh. 2369 at 4. He also stated that he suggested that Anderson implement a "branch review or mystery shopping program," but that she pushed back on his suggestion, stating, "no one goes into the branches, not even Audit." *Id.* at 3. Loughlin also testified that Anderson did not want to implement a mystery shopping program, Hr'g Tr. at 2953:9-11, and he wrote in an email that although he had proposed a mystery shopping program that would target the Bank's branches "[a] number of times . . . I have never received much support." OCC Exh. 35.[47]

Loughlin's testimony also supports the broader idea that Anderson tended to downplay SPM. As noted above, Loughlin and Anderson communicated frequently between 2013 and 2016, including through monthly one-on-one meetings where "[she] would talk to him about risk issues." Hr'g Tr. at 9478:8-9 (Anderson); *see also* CRA Br. at 445-46. In addition, after the publication of the *L.A. Times* articles, Loughlin had quarterly meetings with Anderson and Tolstedt "to try to help them reduce sales pressure at the bank." Hr'g Tr. at 3237:4-14 (Loughlin). Despite these frequent interactions and communications—many of which were ostensibly about reducing risk issues related to SPM—Loughlin testified that "most of my interaction with Ms. Russ Anderson was Ms. Russ Anderson defending the Community Bank and its business model." *Id*. at 2955:15-17. He noted that Anderson "was protective of the Community Bank's business model" and that he "would have hoped that she had invited more

[47] Anderson claimed in her testimony that she was "very excited" about a mystery shopping program. Hr'g Tr. at 9370:1-4 (Anderson). And when asked whether it was "the OCC's recommendation to implement the mystery shopping program, not yours," she responded, "That's not true." *Id.* at 10105:10-11 (Anderson). But no other evidence suggests that she had any role in implementing the mystery shopping program. To the contrary, the multiple witnesses and contemporaneous evidence discussed above suggest that she actively *hindered* efforts to implement the program.

inspection [and] escalated problems to me in a more aggressive way[.]" *Id.* at 2955:8-10, 2958:9-11.

In addition to the Bank witnesses, multiple OCC witnesses have testified about Anderson's tendency to downplay known or obvious risks. NBE Moses, who met with Anderson in November 2015 along with several other examiners, testified that, at that meeting, Anderson was "trying to deflect. . . from the issue of sales pressure and high goals and trying to blame it [on] an employee misperception issue." Hr'g Tr. at 1000:5-8. NBE Hudson, who was present for both the February 2015 OCC exam and May 2015 OCC exam, testified that Anderson's conduct "did not change" even by the May 2015 exam. *Id*. at 739:3. "She continued to downplay and minimize. She continued to say that there was no sales pressure, that everyone is happy, you know." *Id.* at 739:3-6. She testified that this was part of her overall assessment that Anderson "was downplaying … our concerns. She was minimizing the pressure on employees. She minimized the amount of terminations." *Id.* at 729:12-15.

In addition to all this testimonial evidence, there are documents that show Anderson's attempts to downplay SPM issues in real time. The most significant of these is an email exchange with two of her team members in advance of an April 9, 2014, ERMC meeting. The email chain involved suggested additions to the slide deck that Anderson and MacDuff were to present at the meeting. OCC Exh. 60. Specifically, Anderson was told that Keb Byers "is looking [for] what doesn't work well today in our existing sales practices" because the deck was too "heavy" on plans for the future and needed more information about the current state of the problem. *Id*; *see also* SD Order SOMF 332. Anderson then responded, "I am worried about putting something like that into a deck. *I'd rather we did that verbally because this deck is subject to the regulators review*." OCC Exh. 60 at 1 (emphasis added). Accordingly, the

presentation itself downplayed the risks posed by SPM, but Anderson didn't follow through with presenting the risks verbally—effectively concealing the entire issue. Rather, Anderson told the ERMC "that the controls were adequate." Hr'g Tr. at 9713:12-15 (Anderson). And she failed to tell the ERMC about "unattainable sales goals" or "pressure placed on employees to meet sales goals." *Id.* at 9713:16-9714:21. And she likewise failed to tell the committee about the pause in proactive monitoring, the fact that she was allegedly "uncomfortable" with the pause, or the fact that the pause "hindered SSCOT's ability to detect additional sales practice misconduct." *Id.* at 9687:15-9689:13. More broadly, she admitted that she "did not tell the [ERMC] what did not work well with existing sales practices like [she] was directed to do." *Id.* at 9714:12-17*; see also id*. at 5423:14-5424:24 (Hardison), 10594:2-7 (Farrell).

At the hearing, Anderson testified about this email exchange and presentation and tried to justify why she didn't want to put this information in the deck. But her testimony is not convincing, and her answers appear evasive. *See* Hr'g Tr. at 9707:2-24 (Anderson). Anderson further testified that her real concern was that "we had a very short period of time to put that information and turn this deck around," and that the presentation would "not be vetted well" and that "*sometime down the road, it would have a blowback at me*." *Id.* at 9708:2-13 (emphasis added). This answer encapsulates how her priorities were misaligned with her GRO responsibilities. Instead of fully informing the ERMC about the scope of the problem and what hadn't worked so far, her primary concern was with the personal consequences she might face if others found out about the extent of the problem. As NBE Candy explained in her testimony, "For a group risk officer to not want to put material information into a deck because it's subject to regulator review is completely inappropriate . . . the information that goes to the committee needs to be sufficient, accurate, complete, and transparent." *Id.* at 1153:18-23.

Anderson had a similar exchange a year later. MacDuff asked Anderson her thoughts on a memo they were working on to be sent to the Risk Committee, and Anderson replied, "I would not add anything more than what we have in the document. We're still forming and storming and since this document will also go to the OCC I would prefer we keep it to a minimum." OCC Exh. 952 at 2; SD Order SOMF 353. Yet again, the evidence shows Anderson deliberately minimizing issues, rather than providing complete and transparent information to her colleagues and the OCC.

One final example should suffice. Anderson made edits to a risk memo from Audit to Rebecca Rawson, and the edits evidence attempts by her to downplay risks associated with SPM. *See* SD Order SOMF 198; RD at 393. She deleted the existing text under the "root cause" section and repeatedly changed "repeat sales offenders" to the softer "second time training notifications." OCC Exh. 1030 at 1, 3, 5. This demonstrates, again, that Anderson's instinct was to make her own group look better, even in internal documents where another line of defense—internal audit—was trying to work through the same issues related to SPM. *See* Hr'g Tr. at 2360:19-2362:20 (Crosthwaite).[48]

Putting this all together, the picture that emerges of Anderson is remarkably consistent. And it is not a picture of an executive faithfully executing her duties to the Bank. Indeed, instead

[48] Anderson excepts to this finding in the Recommended Decision, but her only exception is an argument that the ALJ found this fact at Summary Disposition against Julian and McLinko, and *not* against Anderson, so she had no notice that the fact would be used against her and no opportunity to rebut it. CRA Exceptions at 253-54. While it is true that the ALJ found these facts against Julian and McLinko, he also found them against Anderson. *Compare* SD Order SOMF 441 (Julian and McLinko) *with* SD Order SOMF 198 (Anderson). Moreover, the exhibit he relied on in finding against Anderson on that issue—MSD-198—is essentially the same as two hearing exhibits combined—OCC Exhs. 1029 and 1030—so all of this information was in the record already, giving Anderson ample opportunity to respond.

of escalating obvious risks related to SPM, Anderson did the exact opposite: she actively hindered the flow of information that would have allowed herself, her colleagues, and the OCC to address those risks and minimize the damage to the Bank and its depositors. Given the obvious risks posed by widespread SPM at the Bank, *see supra* Part VI.A, Anderson's repeated failure to escalate and her continual downplaying of SPM risks constituted an unsafe or unsound practice.

5. Anderson's failure to provide information or provision of false, incomplete, and/or misleading information during the 2015 examinations violated 18 U.S.C. §§ 1517 and 1001(a)

The Comptroller finds that the record evidence supports the ALJ's findings that Anderson violated federal laws by failing to provide or providing false, incomplete, and/or misleading information during the 2015 examinations. *See generally* Executive Summary at 39-40, 56, 58-61.

Title 18 U.S.C. § 1517 makes it unlawful to "corruptly obstruct[] or attempt[] to obstruct any examination of a financial institution by an agency of the United States with jurisdiction to conduct an examination of such financial institution." The term "corruptly" in § 1517 means that "the conduct must be engaged in voluntarily and intentionally, and with the bad purpose of accomplishing . . . an unlawful end or result," such as "obstructing [a] bank investigation." *United States v. Church*, 11 F. App'x 264, 268 (4th Cir. 2001) (quoting H.R. REP. NO. 681(I), 101st Cong., 2d Sess., 174 n. 5, *reprinted in* 1990 U.S.C.C.A.N. 6472, 6580). "The substance of the [IAP's] obstruction need not be material to the bank investigation." *Id.* at 267. Lying to bank examiners, falsifying bank documents, and withholding bank records sought in an examination "falls squarely within the common-sense meaning of section 1517." *Id.* at 268.

Knowingly and willfully making a false statement to the Government as well as falsifying, concealing, or covering up, including by use of half-truths when a person has a duty to

speak the truth, also violates 18 U.S.C. § 1001(a). *See generally United States v. Matthews*, 48 F. App'x 168, 172 (6th Cir. 2002); *see also United States v. Wintermute*, 443 F.3d 993, 1000 (8th Cir. 2006) (affirming a conviction under § 1001 based on false statements made to the OCC); *United States v. Moore*, 446 F.3d 671, 677, 680 (7th Cir. 2006) (explaining that "half-truths" may constitute false statements when they render other disclosures inaccurate). For purposes of § 1001(a), any assertion that is false "under any reasonable interpretation" is a false statement. *United States v. Adler*, 623 F.2d 1287, 1289 (8th Cir. 1980); *see also United States v. Stoddard*, 150 F.3d 1140, 1144–45 (9th Cir. 1998) (holding that an ambiguous statement was "false" under § 1001 because "[a] jury could rationally infer that [the defendant's] statement was at best a half-truth.").

As detailed above, the Comptroller has already found that that Anderson failed to provide or provided false, incomplete and/or misleading information to the OCC during the 2015 examinations (1) by falsely stating that no one loses their job because sales goals are not met; (2) by making false statements regarding her knowledge of sales pressure; (3) by failing to provide accurate information about the volume of terminations relating to SPM; and (4) by failing to disclose the thresholds used in proactive monitoring. The Comptroller finds that this same misconduct also violated both 18 U.S.C. §§ 1517 and 1001(a), because it involved intentional and knowing obstruction of a bank examination and willful and knowing omissions and false statements to OCC officials. *See supra* Part VI.B.1.[49]

[49] Anderson's exceptions do not directly challenge these findings as violations of law; rather, she merely refers back to her arguments challenging the underlying misconduct findings, which the Comptroller has already rejected. *See* CRA Exceptions at 748-751, 753, 779-80, 782-85, 787; *see also supra* Part VI.B.

C. Effect

The *effect* element of a prohibition order under 12 U.S.C. § 1818(e) can be satisfied by showing that one of the following three events occurred "by reason of" Anderson's misconduct:

1. The Bank suffered or will probably suffer financial loss or other damage;
2. The interests of the bank's depositors have been or could be prejudiced; or
3. Respondent received financial gain or other benefit.

In the RD, the ALJ found that all three prongs of the effect element were satisfied. *See* RD at 415-16. For the foregoing reasons, the Comptroller finds that the record evidence supports the ALJ's findings that Anderson's misconduct satisfied the bank-loss prong (prong 1) and depositor-prejudice prong (prong 2) of the effect element. The Comptroller finds that the record evidence does not support the ALJ's findings that Anderson's misconduct satisfied the third prong, but since the effect element was still met under both the first and second prongs, this does not change Anderson's ultimate liability under § 1818(e).

The parties disagree over the causation standard required by the phrase "by reason of" in this statutory provision. Anderson argues that the effect element requires a showing of both proximate cause and but-for cause.[50] CRA Br. at 591-92. Enforcement Counsel argues that "there is no proximate cause requirement" for either provision. EC Post-Hearing Br. at 65. The phrase is not defined in the statute, and there is a circuit split concerning whether proximate cause is the proper standard for the effect element of § 1818(e) or whether some other standard—such as a *reasonably foreseeable* test—is appropriate. *See, e.g., Calcutt v. FDIC*, 37 F.4th 293, 329-30 (6th Cir. 2022) (holding that § 1818(e) requires proximate cause); *Landry v. FDIC*, 204 F.3d 1125, 1139 (D.C. Cir. 2000) (not specifying a standard); *De la Fuente v. FDIC*, 332 F.3d at 1223 (risk

[50] None of Anderson's cited authorities support the idea that but-for causation *and* proximate causation are required. Since proximate cause is the stricter standard, the Comptroller uses that standard (without deciding whether it is mandated by § 1818(e)) for his analysis.

of loss to the Bank must be "reasonably foreseeable"). *See also FDIC v. Bierman*, 2 F.3d 1424, 1434 (7th Cir. 1993) (adopting proximate cause in a pre-Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA") FDIC enforcement action). However, the Comptroller does not need to determine whether proximate cause is required under § 1818(e) because, as the following analysis shows, the record supports a finding that Anderson's misconduct satisfied the effect element under the heightened proximate-cause standard.

1. The Bank suffered financial loss or other damage

The Comptroller finds that the record supports the ALJ's finding that Anderson's misconduct satisfied the "financial loss or other damage" prong of 12 U.S.C. § 1818(e)'s effect element. 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 448, 449, 454, 458, 466-68, 472-76, 479-80, 488.

The SD Order SOMFs demonstrate that the Bank paid the following fines, penalties, fees, and related expenses as a result of its SPM problem:

- The OCC, the Consumer Financial Protection Board ("CFPB"), and the Los Angeles City Attorney issued a total of $185 million in fines and penalties against the Bank related to sales practices misconduct. CRA Am. Ans. ¶ 132; Julian Am. Ans. ¶ 132; MSD-343; MSD-344.

- The Bank was fined $65 million by the Office of the Attorney General of the State of New York in connection with its sales practices. MSD-670; MSD-673; MSD-678.

- The Bank was fined $575 million by all 50 state Attorneys General and the District of Columbia in connection with its sales practices and related matters. MSD-671; MSD-672.

- The Bank was fined $3 billion by the U.S. Department of Justice and U.S. Securities and Exchange Commission in connection with its sales practices. MSD-1 at 1-4; MSD-674.

- The Board of Governors of the Federal Reserve imposed an "asset cap" limiting the Bank's ability to increase in asset size, and this asset cap had a significant financial impact on the Bank. MSD-267 (NBE Smith Expert Report) ¶ 148(e); MSD-669 at 1

(noting the Bank "has missed out on roughly $4 billion in profits – and counting – since the cap was imposed").

- The Bank paid a $142 million class-action settlement in *Jabbari v. Wells Fargo & Co*, No. 15-cv-02159-VC, which the Bank admitted in a press release was a "significant step forward in making things right for our customers and further restoring trust with all of Wells Fargo's stakeholders . . . [and] supports our efforts to help customers impacted by improper retail sales practices[.]" MSD-665; MSD-666; *see also* Julian Am. Ans. ¶ 173.

In short, the Bank suffered a loss of more than $3 billion because of SPM. The crucial question that remains, for the purposes of liability under § 1818(e), is to what extent Anderson is responsible for a portion of those losses. In answer, the Comptroller finds that a preponderance of the evidence supports the ALJ's finding that Anderson's misconduct caused financial loss to the Bank—even under the proximate-cause standard advocated for by Anderson.[51]

To satisfy the effect prong of § 1818(e), Anderson's misconduct need not have caused—as Anderson appears to suggest in her exceptions—"the entirety" of the losses identified by Enforcement Counsel. *See* CRA Br. at 539. Enforcement Counsel merely has to demonstrate that some portion of the losses can be attributable to Anderson's misconduct, even though Enforcement Counsel need not identify "the exact amount of harm."[52] *Pharaon*, 135 F.3d at 157. Indeed, Congress amended § 1818 with the explicit goal of making it easier for the federal banking agencies to pursue enforcement actions, "without having to quantify losses to the institution or the degree of prejudice to depositors." *Proffitt v. FDIC*, 200 F.3d 855, 864 (D.C.

[51] The Comptroller agrees with Enforcement Counsel that the RD did not fully address the causation standard. *See* EC Exceptions Br. at 46-50. The Comptroller upholds these exceptions to the extent detailed in this section.

[52] Anderson also takes issue with the fact that some of the settlement agreements "expressly concern conduct that predates the relevant period." CRA Br. at 542. But because Enforcement Counsel need only demonstrate that a portion of the losses can be attributable to Anderson's misconduct, it is irrelevant whether some of those losses can be attributable to events that occurred outside the relevant period, so long as some event(s) occurred within the relevant time period.

Cir. 2000) (discussing H.R. Rep. No. 101–54, at 392, *reprinted in* 1989 U.S.C.C.A.N. 188). These changes were intended to "expand, enhance, and clarify the enforcement powers" of the banking regulators. *Id.*

Likewise, Anderson need not be solely responsible for the losses. Anderson attempts to shift blame onto others at the Bank for failing to address the risks posed by SPM. *See, e.g.*, CRA Br. at 444-447. But doing so does not absolve her of her own liability under § 1818(e). It does not matter if others at the Bank also committed actionable misconduct; nor does it matter if others at the Bank were "more guilty" than Anderson. *Landry*, 204 F.3d at 1139; Restatement (Second) of Torts § 439, cmt. b (Am. L. Inst. 1965) ("If the harm is brought about by the substantially simultaneous and active operation of the effects of . . . the actor's negligent conduct and [the] [wrongful] act of a third person . . . the conduct of each is a cause of the harm, and both . . . are liable."). All that matters is whether Anderson's misconduct was a "substantial factor" in producing the loss and that the loss was "reasonably foreseeable." *Bierman*, 2 F.3d at 1434 (applying a proximate-cause standard).

The weight of the evidence supports the conclusion that Anderson's misconduct caused the bank to suffer financial loss or other damage. As Group Risk Officer, Anderson was responsible for ensuring that risks were managed and escalated appropriately. *See* Hr'g Tr. at 282:15-22 (Coleman). And her failure to manage the risks posed by SPM—including her failure to credibly challenge the Bank's business model, institute proper controls, and escalate SPM risks—delayed an effective response to the problem and resulted in a greater loss to the Bank than if she had properly managed and escalated the risks in the first place. *See* Hr'g Tr. at 2957:16-2958:25 (Loughlin), 1238:11-1239:14 (Candy), 4064:15-4065:24 (Smith). It was

certainly reasonably foreseeable that Anderson's misconduct, which exacerbated the SPM problem and delayed an effective response, would lead to greater losses for the Bank.

Anderson argues that she cannot be held liable for Bank losses stemming from SPM because the Board was already aware of SPM in February 2014 but did not eliminate sales goals until September 2016. CRA Br. at 538. Even if this is true, it does not follow that additional escalation—let alone instituting the proper controls—would have been ineffectual. Indeed, the evidence discussed above suggests that the Bank would have been able to resolve SPM issues more quickly if Anderson had fulfilled her duties and identified and escalated sales issues on a timely basis. *See supra* Part VI.B.4. It does not matter that the Board already may have been aware of the problem; the Board's awareness does not absolve Anderson of her own responsibilities to address the problem, nor does such awareness mean that her failure to execute her responsibilities did not make the problem far worse than it otherwise would have been. *See* Hr'g Tr. at 4066:8-24 (Smith) ("It doesn't matter if other people also failed. It doesn't make their failures less severe or less impactful.").

Anderson also argues that losses to Wells Fargo & Company ("WFC"), the Bank's holding company, do not qualify as losses to Wells Fargo Bank, N.A. CRA Br. at 543-44. This argument is moot, because most—if not all—of the above-mentioned penalties were paid by the Bank itself, rather than the holding company. The only settlements arguably paid for by the holding company were the New York Attorney General settlement and the settlement with 50 State Attorneys General. *Id.* at 543. And the latter settlement involved the holding company "*acting for* Wells Fargo Bank, N.A. and their current and former parents." MSD-671 at 1 (emphasis added). There is no reason to think that Congress intended for IAPs to escape liability simply because the Bank's holding company—rather than the Bank itself—is the entity writing

the check. But again, more than $3 billion of loss was clearly incurred by the Bank itself, even without the two state settlements.

Enforcement Counsel also argued that reputational damage, the Bank's decline in market capitalization, legal and consulting fees, and the Federal Reserve Board's "asset cap" satisfy the bank-loss prong. EC Post-Hearing Br. at 65; OCC Exh. 2338 (Report of NBE Smith) ¶148. Anderson has raised exceptions to each of those arguments. *See* CRA Br. at 546-47 (reputational damage), 549-50 (market cap), 544, 547 (legal and consulting fees), 550-52 (asset cap). Because the evidence supports a finding that the fines and penalties are more than sufficient to satisfy the "financial loss or other damage" prong of the "effect" element of § 1818(e), the Comptroller declines to decide whether those additional losses also satisfy the element, and Anderson's exceptions regarding those losses are therefore moot.

2. The interests of the Bank's depositors were prejudiced

The Comptroller finds that the record supports the ALJ's finding that Anderson's misconduct satisfied the second prong of 12 U.S.C. § 1818(e)'s effect element—that the "interests of the [bank's] depositors have been or could be prejudiced." 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 412, 447, 449, 462-65, 488.

First, it is worth addressing Anderson's argument that Enforcement Counsel is required to prove that Anderson caused "actual past harm" to the Bank because they are bound to the specific language they used in the Notice of Charges. *See* CRA Br. at 526-27, 594.[53] The Notice

[53] Anderson primarily levies this exception in relation to the first prong—financial loss or other damage—but because there is abundant evidence that Anderson's misconduct did cause actual loss (rather than just "likely" loss), the exception is moot with respect to that prong.

alleged that Anderson's misconduct "prejudiced the interests of depositors." Notice at 60. But it did not allege that her misconduct "could" prejudice the interests of depositors, which is also sufficient to satisfy the "effect" element under the statute. *Id.* According to Anderson, Enforcement is bound by this assertion and cannot now claim that the effect element is satisfied by potential prejudice to depositors—it must rely on *actual* prejudice.

This argument is unavailing for several reasons. First, Enforcement Counsel's failure to specifically allege potential prejudice had no effect on their burden of proof, as it is a lesser-included offense. *See, e.g.*, *United States v. Walkingeagle*, 974 F.2d 551, 554 (4th Cir. 1992). An assertion that Anderson's misconduct prejudiced the Bank's depositors *necessarily includes* the lesser assertion that her misconduct *could potentially* prejudice depositors. Proving the former necessarily proves the latter; no additional notice is required.[54] Moreover, Respondent cites only general legal authorities that support the principle that parties can be bound by factual allegations in pleadings, but none of their authorities supports the notion that Enforcement Counsel must specifically elucidate every lesser-included offense where they have already expressly provided notice of their claims with the same statutory elements.[55] Last, and most important, the record

[54] Indeed, all the APA requires is that a party "understood the issue" and "was afforded full opportunity" to be heard. *Golden Grain Macaroni Co. v. FTC*, 472 F.2d 882, 885 (9th Cir. 1972). Anderson's own prehearing filings indicate that she acknowledged that she would have to contest future losses at the hearing. *See* CRA Statement of Disputed Issues to be Resolved at the Hearing ¶ 54, June 25, 2021.

[55] Anderson cites one case—*Proffitt*—for the specific proposition that Enforcement cannot hold an IAP liable for "potential future harm" where "the 'notice [of charges] focused solely on [Respondent]'s prior conduct' causing actual past harm." CRA Br. at 527 (alterations in original). *Proffitt* provides no support for that assertion. The relevant discussion in *Proffitt* concerned whether a prohibition order constituted a "penalty" for statute-of-limitation purposes; the discussion of the lack of forward-looking assertions in the Notice of Charges concerned Proffitt's ongoing fitness to serve, which might have provided support for the prohibition order being less of a backwards-looking penalty. *Proffitt*, 200 F.3d at 862. There is no discussion of "potential future harm," let alone anything resembling a holding or even dicta that could justify Anderson's reliance on such case law.

reflects that Anderson's misconduct *did* prejudice depositors' interests, rendering this particular exception moot.

There is no substantive factual dispute that SPM caused significant harm to customers, including unwarranted account fees, credit score impacts, and misuse of customers' personal information. *See generally* MSD-543; MSD-663; SD Order SOMF 464; OCC Exh. 2175 at 31 (proffered). The Bank has repeatedly admitted that SPM harmed customers and eroded their trust in the Bank. *See* MSD-1 at 31 ¶ 32; MSD-664; MSD-677; Julian Am. Ans. ¶ 178; McLinko Am. Ans. ¶ 178. Anderson herself admitted that one of the responsibilities of her job involved "ensur[ing] security of all customer information." Hr'g Tr. at 9529:16-21. She further admitted that several of the practices associated with SPM—including changing customer contact information—constituted "misuse of customer information" and "compromised the security of customer information." *Id.* at 9529:22-9530:19. She also admitted in her deposition that SPM can erode customer trust. OCC Exh. 2509A at 179:10-14.

For the same reasons the Comptroller finds that a portion of the Bank's losses can be attributed to Anderson's misconduct, the Comptroller finds that some of SPM's harms to customers occurred by reason of Anderson's misconduct. *See supra* Part VI.C.1 (applying proximate-cause analysis to the first prong). Anderson's misconduct, individually and in the aggregate, exacerbated the risks posed by SPM and delayed an effective response to the problem, and this misconduct could have and did prejudice the interests of the Bank's depositors. *See* Hr'g Tr. at 2956:24-2957:1 (Loughlin) ("[T]he longer it took to get our hands around the problem, the more . . . customers were potentially being harmed."). NBE Smith's testimony provided a useful summary of the scope of the harm to customers and the extent to which SPM eroded trust in the Bank: "This was one of the worst events in banking. It created a level of mistrust around Wells

Fargo that is hard to match. I can't think of another instance in a consumer bank that has created this level of distrust within a bank." Hr'g Tr. at 4019:19-23. Or perhaps it is best to hear the perspective of a customer, in her own words: "[I]t is truly scary that an employee of a financial institution can manipulate my information and assert himself [*sic*] into my personal and financial life." MSD-110; *see also* SD Order SOMF 312.

In addition to the compounding effect that Anderson's failures as GRO played in exacerbating the harms posed by SPM (including her failure to escalate, failure to credibly challenge, and failure to institute proper controls), her provision of false and/or misleading information to the OCC caused a unique harm that has been recognized in other enforcement cases brought by the federal banking regulators. As noted in *Cousin*, an IAP's attempts to "disrupt a lawful government inquiry" can prejudice depositors' interests by eroding trust in their Bank's ability to communicate with its regulator to address relevant risks. The Office of Thrift Supervision explained:

> Effective communication is seriously jeopardized by the efforts of an association's chief executive officer to obstruct a lawful government inquiry. In this case, the evidence is compelling that Respondent intended to do exactly that. In the Acting Director's judgment, Respondent's interference with a lawful IRS investigation could destroy whatever confidence depositors might have that Respondent would communicate with regulators with the requisite candor. Their deposits would be subject to a substantially greater risk than at an institution where the management cooperated with government oversight.

In re Cousin, No. AP 94-98, 1994 WL 621240, at *16 (OTS Oct. 11, 1994). Here, Anderson's obstruction of the OCC exam by failing to provide or providing false, incomplete and/or misleading information is even more of a threat to depositors' interests than the obstruction in *Cousin* because it involved a lack of candor to the specific regulator whose mission it is to ensure the safety and soundness of the institution and the banking system as a whole. In her exceptions, Anderson argues that depositor prejudice requires "evidence of an actual threat to a bank's

ability to safeguard the depositors' funds." CRA Br. at 594. But the case law does not support the overly narrow interpretation of 12 U.S.C. § 1818(e)(1)(b)(ii) that she advances. Cases such as *Cousin* reveal that there are alternative means to satisfy this prong, including potential prejudice (rather than actual prejudice) as well as a loss of trust by depositors in the institution itself. Because Anderson's misconduct harmed customers and could have eroded their trust in the Bank, this prong of the effect element is satisfied.

3. The financial gain or other benefit prong was not met

The Comptroller finds that Enforcement Counsel did not meet its burden to prove that Anderson also satisfied the *financial gain or other benefit* prong of the effect element. Enforcement Counsel levied two distinct arguments relating to this prong: (1) the Community Bank's unsafe or unsound business model was financially profitable, thereby increasing Anderson's compensation, which was tied to the Bank's profits; and (2) Anderson's misconduct "allowed her to keep her job," which qualifies as an "other benefit" under this prong. EC Post-Hearing Br. at 69-71. As to the first argument, Enforcement Counsel did not adduce sufficient evidence to prove that the illegal or unsafe or unsound aspects of the Bank's business model—rather than the Bank's so-called *cross-sell* model generally—generated additional profits for the Bank. *See id.*; CRA MSD Opp. at 123-24. In addition, this argument contradicts Enforcement Counsel's argument that Anderson's misconduct caused a loss to the Bank in the form of share price underperformance. *Compare* EC Post-Hearing Br. at 70 (the business model was "financially profitable for the Bank" and Anderson benefitted from more-valuable "stock awards") *with* EC MSD Br. at 154-55 (arguing that the Bank's "reduced shareholder return" and "negatively impacted" share price provides evidence for the bank-loss prong). And while the ALJ accepted Enforcement Counsel's argument, he did so in part by relying on an expert report that was not admitted into evidence at the hearing from a witness who did not testify at the

hearing. *See* RD at 311-12. Simply put, the record does not contain sufficient evidence to support the argument that Anderson's misconduct resulted in financial gain due to the increased value of her compensation.

Enforcement Counsel's second argument fares no better. They provide no evidence that it was Anderson's *misconduct* that allowed her to keep her job. If anything, the record evidence suggests the opposite. Anderson was ultimately fired for cause in February 2017. OCC Exh. 2126; Hr'g Tr. at 10136:9-11, 10139:11-10140:8 (Anderson). It seems highly unlikely that Anderson would have lost her job *earlier* had she refrained from committing any misconduct in the first place. *See In re Akahoshi*, No. AA-EC-2018-20, Order Modifying Sections A2, B2, and B3 of This ALJ's October 16, 2020 Order, 2021 WL 7906090 (Mar. 1, 2021) (Order) ("[I]f Respondent would have remained employed at the Bank simply by *not engaging in the alleged misconduct to begin with*, then it cannot be said that the alleged misconduct resulted in her continuing to receive salary and bonuses.") (emphasis in original). The Comptroller therefore rejects the ALJ's finding that Anderson's misconduct satisfied the financial gain or other benefit prong of 12 U.S.C. § 1818(e)'s effect element.

D. Culpability

The culpability element may be satisfied where the alleged misconduct either "involves personal dishonesty," 12 U.S.C. § 1818(e)(1)(C)(i), or "demonstrates willful or continuing disregard by [an IAP] for the safety or soundness of such insured depository institution . . . ." § 1818(e)(1)(C)(ii). The RD found that both prongs of the culpability element were met. *See* RD at 414-16. The Comptroller finds that the record evidence supports both findings.

Both prongs of the culpability element require some showing of *scienter*. *See Kim*, 40 F.3d at 1054-55 (collecting cases). *Personal dishonesty* "may include: a disposition to lie, cheat, or defraud; untrustworthiness; lack of integrity; misrepresentation of facts and deliberate

deception by pretense and stealth; or want of fairness and straightforwardness." *Van Dyke v. Bd. of Governors*, 876 F.2d 1377, 1379 (8th Cir. 1989) (internal citations omitted); *see also Michael v. FDIC*, 687 F.3d 337, 351 (7th Cir. 2012). *Willful disregard* and *continuing disregard* present distinct bases for a finding of scienter. *Brickner v. FDIC*, 747 F.2d 1198, 1202 (8th Cir. 1984). Willful disregard is shown by "deliberate conduct which exposed the bank to abnormal risk of loss or harm contrary to prudent banking practices," while continuing disregard requires conduct "over a period of time with heedless indifference to the prospective consequences." *Dodge v. Comptroller of the Currency*, 744 F.3d 148, 160 (D.C. Cir. 2014) (quoting *Grubb v. FDIC*, 34 F.3d 956, 961–62 (10th Cir. 1994)) (citations and internal quotation marks omitted).

1. Anderson demonstrated *personal dishonesty*

The record evidence clearly establishes that Anderson demonstrated personal dishonesty. *See generally supra* Part VI.B. The personal dishonesty element "is satisfied when a person disguises wrongdoing from the institution's board and regulators or fails to disclose material information." *Dodge*, 744 F.3d at 160 (internal citations omitted). There is ample evidence to show that Anderson failed to provide information or provided false, incomplete, and/or misleading information to the OCC during the 2015 examinations. *See supra* Part VI.B.1. Specifically, the evidence demonstrates that, during the 2015 OCC examinations, Anderson: (1) did not provide accurate information about the volume of terminations relating to SPM, *id*. at VI.B.1.a; (2) made false statements regarding her knowledge of sales pressure, *id*. at VI.B.1.b; (3) falsely stated that no one loses their job because sales goals are not met, *id.* at VI.B.1.c; and (4) failed to disclose the thresholds used in proactive monitoring, *id*. at VI.B.1.d.

Anderson understood that if she did not provide appropriate information to the OCC, that it "would obviously hinder them." Hr'g Tr. at 9777:16-9778:13. Despite this understanding, the record evidence establishes that she failed to provide information or provided false, incomplete,

and/or misleading information, evidencing personal dishonesty in her communications with the OCC.

2. Anderson exhibited *willful disregard*

Willful disregard exists when an IAP "deliberately and consciously tak[es] part in an action that evidences utter lack of attention to an institution's safety and soundness" or demonstrates "a willingness to turn a blind eye to [the institution's] interests in the face of known risks." *Cavallari* 57 F.3d at 145. Here, the record evidence shows that Anderson deliberately exposed the Bank to abnormal risks and turned a blind eye to the risks of SPM: (1) by failing to credibly challenge the incentive compensation program, *see supra* Part VI.B.2; (2) by failing to institute effective controls to counter SPM, *id*. at VI.B.3; and (3) by failing to escalate concerns about SPM, *id*. at VI.B.4. Anderson admitted at the hearing that she knew that employees engaging in SPM posed operational, compliance, regulatory, and reputational risks to the bank. Hr'g Tr. at 9520:5-9522:1. Given the known or obvious risks posed by SPM, Anderson's misconduct evidenced willful disregard to the Bank's safety and soundness.

3. Anderson exhibited *continuing disregard*

Continuing disregard is conduct that has been "voluntarily engaged in over a period of time with heedless indifference to the prospective consequences." *See Grubb*, 34 F.3d at 962. It is a mental state "akin to recklessness." *See Kim*, 40 F.3d at 1054; *Brickner* 747 F.2d at 1203 n.6. "Recklessness is established by acts committed 'in disregard of [] and evidencing conscious indifference to a known or obvious risk of a substantial harm.'" *See Douglas v. Conover*, FDIC-13-214e, 2016 WL 10822038, at *27 (Dec. 14, 2016) (quoting *Cavallari*, 57 F.3d at 142). It may also be demonstrated through "voluntary and repeated inattention to" unsafe or unsound practices, or the "knowledge of and failure to correct clearly imprudent and abnormal practices that have been ongoing." *See In the Matter of Swanson*, No. AP 95-19, 1995 WL 329616, at *5

(OTS Apr. 4, 1995). Disregard is continuing where there is repetition of the misconduct, *see id.*, "over a period of time," *see Grubb*, 34 F.3d at 962.

The same record evidence identified above also supports a finding that Anderson exhibited continuing disregard for the safety and soundness of the Bank. The evidence shows that between at least January 2013 and August 2016, when she left the Bank, Anderson knew or should have known that SPM was widespread and systemic and, further, recognized or should have recognized that SPM created operational, compliance, regulatory and reputational risks to the Bank. *See supra* Part VI.A. Yet during that time period, she consistently failed to take appropriate steps to prevent or detect SPM through better controls, by failing to ensure the incentive compensation plans program adequately balance risk and reward, and by failing to escalate the issues up the chain so actions could be taken to reduce SPM. *See supra* Part VI.B.2-4. These actions demonstrated continuing disregard for the serious risks posed by SPM.

VII. COMPTROLLER'S FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING THE CIVIL MONEY PENALTY

A. Misconduct

The *misconduct* element of a second-tier CMP may be satisfied by any violation of law, breach of fiduciary duty, or the "reckless" engagement in an unsafe or unsound practice. *See* 12 U.S.C. § 1818(i)(2)(B)(i).

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*, 57 F.3d at 142. "[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,* 2017 WL 4510840, at *14. If Respondent was aware of a risk of substantial harm but did not act to appropriately address or mitigate that risk, that conduct is reckless. *Id.* Here, the record has established that Anderson knew or should have known that

SPM was widespread and systemic at the Bank throughout the relevant period and that SPM posed significant risks to the Bank. *See supra* Part VI.A. Therefore, misconduct that evidenced a conscious indifference to the significant risks posed by SPM was reckless.

For the reasons set forth below, the Comptroller hereby finds that the unsafe or unsound practices detailed in Part VI.B above were reckless for the purposes of § 1818(i)(2)(B)(i)(II). Each of these unsafe or unsound practices, in addition to the violations of law detailed in Part VI.B.5, is sufficient to satisfy the misconduct element of § 1818(i).

1. Anderson *recklessly* failed to provide or provided false, incomplete and/or misleading information to the OCC during the 2015 OCC examinations

The Comptroller has found that Anderson's failure to provide information and/or providing false, incomplete, and/or misleading information to the OCC during the 2015 OCC examinations constituted an unsafe or unsound practice. *See supra* Part VI.B.1. The record evidence also supports a finding that this unsafe or unsound practice was reckless, meeting the standard for misconduct for a second-tier CMP under § 1818(i)(2)(B).

The relationship between a bank and its prudential regulator depends upon cooperation by bank personnel; the OCC cannot achieve its mandate of ensuring a safe and sound banking system if bank personnel do not furnish complete and accurate information. *See In re Bankers Tr.*, 61 F.3d 465, 471 (6th Cir. 1995) ("The success of [bank] supervision . . . depends vitally upon the quality of communication between the regulated banking firm and the bank regulatory agency."); *see also* OCC PPM 5310-10, "Examiner Guidance for Securing Access to Bank Books and Records" (January 7, 2000). Anderson's testimony demonstrates that she understood that she was required to be transparent and honest with the OCC, Hr'g Tr. at 9773:23-9774:9, and that her failure to do so could result in increased reputational, compliance, and operational risk, *id*. at 10030:10-10031:8. By failing to provide information and/or providing false,

incomplete, and/or misleading information to the OCC, Anderson compromised the OCC's ability to fully identify and address the risks posed by SPM, and she did so in conscious disregard of the obvious risks of substantial harm to the Bank. *See In the Matter of Blanton*, 2017 WL 4510840, at *13.

2. Anderson *recklessly* failed to credibly challenge the incentive compensation program

The Comptroller has found that Anderson's failure to credibly challenge the Bank's incentive compensation program, which included unreasonable sales goals and which raised substantial risks of SPM by applying pressure to employees, was an unsafe or unsound practice. *See supra* Part VI.B.2. The record evidence also supports a finding that this unsafe or unsound practice was reckless, meeting the standard of misconduct for a second-tier CMP under 12 U.S.C. § 1818(i)(2)(B).

Based on the record evidence, the Comptroller finds that Anderson had actual knowledge of a risk of substantial harm: the risk of SPM caused by pressure on employees to meet unreasonable sales goals. Anderson acquired a wealth of knowledge about the extent of SPM and the fact that managers and employees were complaining about sales goals and sales pressure. Hr'g Tr. at 1156:10-20 (Candy); *see supra* Part VI.A-B. She also participated in numerous email chains detailing instances of employees committing SPM to meet sales goals, demonstrating that she read and considered those details. *See supra* Part VI.B.2. Despite this knowledge, she failed to credibly challenge the incentive compensation program to her superiors Michael Loughlin and Carrie Tolstedt.

Given the amount of information Anderson possessed, the Comptroller finds that Anderson acted recklessly by disregarding a known and obvious risk and by failing to credibly challenge the incentive compensation program.[56]

3. Anderson *recklessly* failed to institute effective controls to manage the risk of SPM

The Comptroller has found that Anderson's failure to institute effective controls to manage the SPM risk constituted an unsafe or unsound practice. *See supra* Part VI.B.3. The record evidence also supports the finding that this unsafe or unsound practice was reckless, meeting the standard for misconduct for a second-tier CMP under 12 U.S.C. § 1818(i)(2)(B).

Specifically, the record demonstrates that Anderson disregarded a risk of substantial harm by relying on controls that both the OCC and Accenture warned Anderson were ineffective. *See* OCC Exhs. 195 at 3-5 (showing Anderson read both reports documenting that the controls in place were ineffective), 1239 at 6 (OCC's June 2015 supervisory letter), 1312 at 4, 6, 42 (Accenture's October 2015 report); Hr'g Tr. at 10028:20-22 (Anderson). Additionally, Bank employees warned Anderson that SSCOT's proactive monitoring was ineffective. *See, e.g.*, OCC Exh. 280 at *1 (e-mail from Bank employee stating that 50 phone numbers are "a lot"); Hr'g Tr. at 9964:19-22 (Anderson) (testimony that the head of the Bank's risk committee criticized the concept of thresholds). Anderson dismissed this criticism. *See, e.g.*, Hr'g Tr. at 9964:23-9965 (testifying that the risk committee "didn't understand the concept" of thresholds). In relying on ineffective controls despite knowledge of their nature, Anderson disregarded the substantial risk of harm from the ineffective controls.

[56] The Comptroller also finds that Anderson had constructive knowledge of an obvious risk of substantial harm, as she was informed through various channels of many instances of employees committing misconduct in order to meet unreasonable sales goals. *See supra* Part VI.B.2.

Even if Anderson were to assert that, despite this evidence, she didn't know about the risks, the Comptroller finds that she should have known. Given the warnings she received, any lack of knowledge of the risks of substantial harm on her part would have to mean that Anderson was consciously indifferent to such risk. *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 substantial harm.") (internal quotation marks omitted).

4. Anderson *recklessly* failed to escalate known or obvious risks related to SPM

The Comptroller already has found that Anderson's repeated downplaying of the risks posed by SPM and her lack of escalation constituted an unsafe or unsound practice. *See supra* Part VI.B.4. The record also supports the finding that this unsafe or unsound practice was reckless, meeting the standard for misconduct for a second-tier CMP under 12 U.S.C. § 1818(i)(2)(B).

As demonstrated above, more than half a dozen witnesses within the Bank testified to Anderson's tendency to downplay the risks posed by SPM. Instead of faithfully discharging her duties as GRO, she actively hindered the flow of information within the Bank that would have allowed herself, her colleagues, and the OCC to address the risks posed by SPM and minimize the harm to the Bank's customers. Given that Anderson knew or should have known that SPM was widespread and systemic at the Bank throughout the relevant period and that SPM posed significant risks to the Bank, her repeated downplaying of those risks and her failure to escalate was done in conscious disregard of a "known or obvious risk of substantial harm." *Cavallari*, 57 F.3d at 142. The Comptroller finds that this unsafe or unsound practice was reckless under § 1818(i)(2)(B).

5. Anderson committed violations of law

The Comptroller previously found that that Anderson failed to provide information or provided false, incomplete, and/or misleading information to the OCC during the 2015 examinations (1) by falsely stating that no one loses their job because sales goals are not met; (2) by making false statements regarding her knowledge of sales pressure; (3) by not providing accurate information about the volume of terminations relating to SPM; and (4) by failing to disclose the thresholds used in proactive monitoring, and these actions violated both 18 U.S.C. §§ 1517 and 1001(a).[57] *See supra* Part VI.B.5. These violations are sufficient to meet the misconduct prong of § 1818(i)(2)(B). *See id.*

B. Effect

The *effect* element of a second-tier CMP under 12 U.S.C. § 1818(i)(2)(B) can be satisfied by showing that Respondent's 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 RD, the ALJ found that all three prongs of the effect element were satisfied. *See* RD at 427-28. For the following reasons, the Comptroller finds that the record evidence supports the ALJ's findings that Anderson's misconduct satisfied two prongs of the effect element of § 1818(i)(2)(B):a pattern of misconduct (prong 1); and bank-loss (prong 2). As to the last prong (prong 3, pecuniary gain), the Comptroller finds that Enforcement Counsel did not meet its burden of proof and overrules the ALJ's finding as to that prong.

[57] The Comptroller partially upholds, to the extent detailed in this paragraph, Enforcement Counsel's exception that although the Executive Summary makes a finding, the RD did not explicitly find Anderson violated these laws. *See* EC Exceptions Br. at 58-67. The Comptroller rejects the remainder of Enforcement Counsel's exceptions related to violations of law. *See id.* at 67-71.

1. Anderson's misconduct constituted a pattern of misconduct

Under the Federal Deposit Insurance Act ("FDI Act"), 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). Repeated instances of statutory misconduct can constitute a pattern and, so too, repeated attempts to conceal such misconduct. *See Rapp v. OTS*, 52 F.3d 1510, 1518 (10th Cir. 1995). 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; *see also In the Matter of Blanton*, 2017 WL 4510840, at *10.

The record evidence establishes that Anderson's misconduct constituted a pattern of misconduct for the purposes of § 1818(i)(2)(B). As discussed in Part VI.B.1, Anderson repeatedly made false, incomplete and/or misleading statements to the OCC. As discussed in Part VI.B.2, Anderson repeatedly failed to credibly challenge the Bank's incentive compensation program. As discussed in Part VI.B.3, Anderson repeatedly failed to institute the proper controls to manage the risks posed by SPM. And, as discussed in Part VI.B.4, Anderson repeatedly downplayed the severity of the risks posed by SPM and repeatedly failed to escalate SPM risks. Each of these repeated instances of misconduct constituted a pattern under the statute.

In her exceptions, Anderson argues that a pattern "must be based on repetitive, affirmative misconduct rather than an overall failure to act." CRA Br. at 532. But the case law does not support this reading of the statute. Anderson reframes the misconduct at issue in *In the Matter of Blanton* as "disregarding warnings from OCC and bank officers," but *In the Matter of Blanton* is a perfect illustration of why repeated failures or omissions can constitute a pattern of misconduct under the FDI Act. In *In the Matter of Blanton*, the OCC found that the Respondent

engaged in a pattern of misconduct by allowing one customer to repeatedly overdraft his account, despite repeated warnings from the OCC about the risks this posed to the Bank. *In the Matter of Blanton*, 2017 WL 4510840, at *8. Blanton's misconduct was more of a failure to act than an affirmative action—the respondent could have instituted the proper controls to prevent the overdrafts, but he did not, and this repeated failure to prevent the overdrafts constituted a pattern of actionable misconduct. *Id.* The misconduct in this case involves a similar pattern: at all times throughout the relevant period, Anderson was aware of SPM and could have instituted proper controls, credibly challenged the Bank's incentive compensation model, and escalated SPM risks. But she repeatedly failed to do so, which allowed SPM to proliferate, and this repeated failure constituted a pattern of misconduct.

More broadly, if a failure or omission can constitute actionable misconduct under the statute, it follows that *repeated* failures or omissions can constitute a pattern of misconduct. In any case, even assuming Anderson's interpretation is correct, two of the types of misconduct that Anderson committed—repeatedly making false, incomplete, and/or misleading statements to the OCC and repeatedly downplaying the severity of SPM—involved affirmative misconduct that constituted a pattern.

Anderson's exceptions propose additional requirements for "pattern of misconduct" that are not grounded in statutory language or case law. *See* CRA Br. at 533-35. She argues that instances of misconduct must by "tied together by a common illicit purpose," *id.* at 533, but this has never been a requirement for misconduct to form a pattern under § 1818(i)(2)(B). Anderson also argues that the term *pattern* in the FDI Act should be given the precise legal meaning the Supreme Court ascribed to the term *pattern* in the RICO Act of 1970, which she claims involves "identical language" to the FDI Act. *Id.* at 531, 533-34. In RICO, the relevant language is,

"pattern of racketeering activity." 18 U.S.C. § 1961(5). It is a stretch to call this "identical language" to § 1818's "pattern of misconduct" and an even bigger stretch to claim that the Supreme Court's interpretation of that language in RICO is binding here. The Comptroller rejects both of these arguments.

Finally, Anderson argues that a continuing violation cannot form a pattern of misconduct. CRA Br. at 529. This exception is irrelevant, as the Comptroller has not applied the continuing violations doctrine in this case. *See infra* Part IX.A.

2. The Bank suffered more than a minimal loss

The parties have largely combined their arguments for the bank-loss prongs of the effect element of both 12 U.S.C. §§ 1818(e) and 1818(i)(2)(B). *See* EC Post-Hearing Br. at 65 (combining the two bank-loss prongs); CRA Br. at 591-93 (arguing that Anderson did not meet the § 1818(e) bank-loss prong by incorporating her arguments with respect to the § 1818(i) bank-loss prong). Accordingly, the Comptroller incorporates his findings from Part VI. In Part VI.C.1, the Comptroller discussed his findings that Anderson's misconduct caused financial loss to the Bank for the purposes of the effect element of § 1818(e). Her misconduct delayed an effective response to the SPM problem and resulted in a greater loss to the Bank than if she had executed her responsibilities as GRO. *See id.* For the reasons articulated in Part VI.C.1, the Comptroller finds that the "more than a minimal loss" prong of § 1818(i)(2)(B)(ii) is also satisfied.

Anderson argues, again, that but-for and proximate cause is required under this Section. CRA Br. at 538. Because the Comptroller has already determined that Anderson's misconduct caused financial loss to the Bank under a heightened causation standard, *see supra* Part VI.C.1, the Comptroller hereby incorporates those findings, which renders this exception moot. Even under the higher causation standard advocated for by Anderson, her misconduct caused

"financial loss" to the Bank pursuant to § 1818(e)(1)(B)(i), which also entails "more than minimal loss" for the purposes of § 1818(i)(2)(B)(ii).

3. The pecuniary gain or other benefit prong was not met

For the same reasons articulated in Part VI.C.3, the Comptroller finds that Enforcement Counsel did not meet its burden of proof to demonstrate that Anderson satisfied the "pecuniary gain or other benefit" prong of the "effect" element of § 1818(i)(2)(B). The Comptroller therefore accepts the ALJ's recommendation that the first two prongs of § 1818(i)'s effect element are satisfied but rejects his recommendation regarding the third prong.

C. Appropriateness of CMP Amount

1. The CMP increase was warranted

Anderson's next challenge is to the CMP increase. *See* CRA Exceptions at 285-86; CRA Br. at 559-66. The Notice originally sought a $5 million CMP from Anderson; in its summary disposition motion, however, Enforcement Counsel requested a $10 million CMP against Anderson. *Compare* Notice at 2 *with* EC MSD Br. at 199. Anderson argues that the increase in the CMP was "legally improper and factually unfounded." *See* CRA Br. at 560. For the reasons explained below, the Comptroller rejects this exception.

Title 12 U.S.C. § 1818(i)(2)(F) gives the OCC the authority to "compromise, modify, or remit" a CMP after a notice of charges is filed. The Tenth Circuit interpreted this provision to allow federal banking agencies to increase *or* decrease a penalty. *See Long v. Bd. of Governors of the Fed. Rsrv. Sys.*, 117 F.3d 1145, 1157-58 (10th Cir. 1997). To read "modify" as only meaning "lessen"—as Anderson does—would render the surrounding terms "compromise" and "remit" redundant. *See id.* at 1157 (noting that "a statute must be construed in such a manner that every word has some operative effect.").

In addition to the sound legal basis for increasing the penalty, the Comptroller also has sound factual basis for adopting the higher penalty. As the Tenth Circuit acknowledged in *Long*, there will often be situations where the factual basis for a given penalty will change—and support a higher penalty—after the notice of charges is filed. *Id.* at 1158. In this case, Enforcement Counsel adduced new evidence that justified the increase. In particular, new evidence reflected that the Bank opened over 18.2 million deposit and checking accounts that never had any customer-initiated transactions. *See* EC MSD Br. at 200; MSD-231 ¶ 17. Moreover, new evidence further revealed how Anderson misled the OCC and obstructed OCC exams. *See infra* Part VI.B.1. Given the substantial record evidence demonstrating the extent of Anderson's misconduct and the effect her misconduct had on the Bank's depositors, the Comptroller is justified in adopting the higher CMP amount.

Anderson also argues that Enforcement Counsel and the ALJ impermissibly increased the CMP "to punish [her] for asserting her right to a hearing," in violation of her due process rights. CRA Br. at 585. However, Enforcement Counsel clearly pointed to factual reasons for the increased penalty. *See* EC MSD Br. at 200. In any case, as Enforcement Counsel correctly note in their exceptions, what matters is the Comptroller's rationale for the increased CMP. EC Exceptions Br. at 40. The Comptroller's Final Decision is based on his review of the entire record in this proceeding, and it this review of the evidence in the record that supports the imposition of a $10 million CMP.

2. <u>The statutory factors support a $10 million CMP</u>

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). The Comptroller finds

that the balance of the four statutory factors does not weigh in favor of mitigation. Although Anderson does not have a history of previous violations, the gravity of the violations was severe,[58] she did not demonstrate sufficient good faith,[59] she has not demonstrated that she does not have the necessary financial resources to pay the $10 million CMP, and no such other matters as justice may require apply in this instance.

Anderson argues in her exceptions that she does not have the necessary financial resources to pay the CMP amount. CRA Exceptions at 358-361; CRA Br. at 570-72. Anderson declined to provide a notarized financial statement in this proceeding, Hr'g. Tr. at 9500:6-9501:11 (Anderson), but only submitted a self-compiled statement without notarization or supporting documentation estimating her net worth at $6.8 million. R. Exh. 20974. Enforcement Counsel produced evidence to support, and Anderson does not dispute, that she received annual pre-tax compensation between $500,000 and $1.37 million every year between 2004 and 2016, indicating a very high income for an extended period of time. OCC Exh. 2055. The OCC need not affirmatively prove Anderson's financial condition before imposing a CMP. *Stanley v. Bd. of Governors of Fed. Rsrv. Sys.*, 940 F.2d 267, 274 (7th Cir. 1991).

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 amount $10 million.

3. The thirteen interagency factors further support a $10 million CMP

In addition to the statutory factors which the Agency is required to consider in assessing a CMP, Anderson also excepts to the analysis of the thirteen interagency factors that can guide the

[58] *See, e.g., supra* Part VI.B.4 (finding that Anderson failed to escalate substantial risks relating to SPM).
[59] *See, e.g., supra* Part VI.B.1 (finding that Anderson made false statements to OCC examiners).

Agency in assessing CMPs.[60] CRA Br. at 575-84; *see also* 63 Fed. Reg. 30227 (June 3, 1998) (stating that this "policy provides general guidance"); OCC PPM 5000-7 (explaining that CMP matrices are only guidance). The Comptroller finds that the ALJ reviewed and considered the interagency factors based on the evidence established during the hearing in recommending a CMP. RD at 420-22. Anderson's assertion that the ALJ's analysis should be rejected because he failed to specifically cite evidence supporting his conclusions is erroneous. There is no error simply because the ALJ summarized his prior findings in his review of the thirteen interagency factors. The RD had previously set forth numerous specific findings and citations to the evidence, and there was no requirement for the ALJ to repeat the process again.

4. Anderson's remaining CMP exceptions are rejected

Anderson asserts that the CMP amount exceeds the maximum statutory limit. CRA Br. at 566-67. This is unavailing. For misconduct in the period ending November 1, 2015, the daily maximum CMP was set at $37,500 for each day the misconduct continued. 12 U.S.C. § 1818(i)(2)(B); 28 U.S.C § 2461 note; 73 Fed. Reg. 66493-94, 66496 (Nov. 10, 2008). From November 2, 2015, onward, the daily maximum was set at $61,238. 89 Fed. Reg. 872-74 (January 8, 2024). As established above, multiple instances of misconduct continued from 2013 to 2016. Even one instance of misconduct persisting from January 1, 2013, through August 1,

[60] Anderson asserts she was prejudiced because the ALJ precluded her from reviewing the CMP matrices Enforcement Counsel had prepared prior to issuing the Notice of Charges. CRA Br. at 576; *see also id*. at 271-76. This exception is rejected. First, the excluded matrices pertain to another Respondent, not Anderson. *See* Hr'g Tr. at 2073:16-2074:12, 2078:7-2079:14 (Candy). Second, the ALJ properly sustained an evidentiary objection because the attorney did not lay the proper foundation. *See id*. at 2076:10-2077:9. Most importantly, because the matrices are only guidance, and were not directly considered by the ALJ in his RD, any error is harmless.

2016, would produce a maximum CMP amount of over $55 million,[61] an order of magnitude higher than the actual CMP amount of $10 million. The exception is rejected.

VIII. ANDERSON'S STRUCTURAL EXCEPTIONS

In addition to the exceptions related to the ALJ's factual findings discussed above, Anderson also makes numerous exceptions related to the structure and nature of the proceedings, up to and including the RD. The Comptroller discusses these exceptions in the remaining Parts of the Final Decision.

A. This Proceeding Does Not Violate Article III or the Seventh Amendment

Anderson asserts that the enforcement proceeding violated Article III of the U.S. Constitution and deprived her of her Seventh Amendment right to a jury trial. CRA Br. at 26-45. For the reasons explained below, the Comptroller rejects these exceptions.

Congress may validly assign adjudications outside of Article III in cases that implicate *public rights*. *Jarkesy,* 144 S. Ct. at 2132. In contrast, if a case involves *private rights*—that is, if the case "is made of 'the stuff of the traditional actions at common law tried by the courts at Westminster in 1789'"—adjudication by an Article III court is mandatory. *Id.* Because this case involves public rights, Anderson's Article III challenge fails. And so, too, does her Seventh Amendment challenge: public rights cases may be validly assigned to an agency for adjudication "without a jury, consistent with the Seventh Amendment." *Id.* at 2131.

Enforcement actions brought by the OCC under the federal banking statutes are quintessentially public rights actions. Unlike some agencies whose enforcement powers extend to "private individuals interacting in a pre-existing market," *id.* at 2136, the OCC's enforcement

[61] The 1,034 days between January 1, 2013, and November 1, 2015, at a daily maximum of $37,500 produce a penalty of $38,775,000. The 273 days between November 2, 2015, and August 1, 2016, at a daily maximum of $61,238 produce a penalty of $16,717,974.

authority extends only to national banks, federal savings associations, federal branches of foreign banks, and certain IAPs affiliated with those institutions, *see* 12 U.S.C. § 1813(q). National banks did not exist at common law; they are "are instrumentalities of the Federal government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States." *Davis v. Elmira Sav. Bank*, 161 U.S. 275, 283 (1896). The OCC's adjudications pursuant to § 1818 vindicate the public's right to a safe and sound banking system. Moreover, courts have long understood that enforcement actions brought by the federal banking regulators pursuant to § 1818 implicate public rights. *See, e.g.*, *Cavallari*, 57 F.3d at 145 (explaining that the charges brought by the OCC "pursuant to its regulatory authority . . . clearly implicate public rights."); *Simpson v. OTS*, 29 F.3d 1418, 1423-24 (9th Cir. 1994) (holding the Seventh Amendment inapplicable to an Office of Thrift Supervision proceeding under § 1818 because it implicates public rights); *Akin v. OTS*, 950 F.2d 1180, 1186 (5th Cir. 1992) (same).

Because this action implicates public rights, Anderson's arguments regarding Article III and the Seventh Amendment are unavailing.

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

Anderson asserts that ALJ McNeil was improperly appointed and that he enjoyed dual for-cause removal protection in violation of Article II of the U.S. Constitution. *See* CRA Exceptions at 629; CRA Br. at 48-56. For reasons explained below, the Comptroller rejects both of these exceptions.

First, following the Supreme Court's decision in *Lucia v. S.E.C.*, 585 U.S. 237 (2018), on November 15, 2018, then-Secretary of the Treasury Steven T. Mnuchin—the relevant head of department for Article II appointment purposes—issued an order appointing Christopher B.

McNeil as an ALJ. EC Exhibits in Opposition to Respondents' Motion for Summary Disposition Regarding Appointments, Removal, Article III, etc. ("EC Exhibits"), Exh. 2 at *6; *see also* 5 U.S.C. §§ 556-57, 3105 (statutory authority for appointing ALJs); 5 C.F.R. § 930.204 (regulations on appointing ALJs); 12 U.S.C. § 1 (establishing the OCC as a bureau within the Treasury Department). This 2018 Order cured any potential constitutional defect of ALJ McNeil's appointment well before the Notice of Charges was issued on January 23, 2020.[62] The Comptroller thus rejects this exception.

Second, Anderson's assertion that ALJ McNeil enjoyed unconstitutional dual for-cause removal protection is also unavailing. By statute, ALJs can only be removed by an agency for "good cause established and determined" by the Merit Systems Protection Board ("MSPB"). 5 U.S.C. § 7521(a). In turn, members of the MSPB may only be removed by the President for "inefficiency, neglect of duty, or malfeasance in office." 5 U.S.C. § 1202(d). But there is no constitutional bar to this dual layer of for-cause removal protection.

In *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, the Supreme Court ruled that two layers of for-cause removal protection for inferior officers violated Article II of the U.S. Constitution, but only where inferior officers perform *executive* functions, such as enforcement or policymaking. 561 U.S. 477, 483-85 (2010)(explaining the executive functions of the Public Company Accounting Oversight Board ("PCAOB")). Indeed, the Court explicitly distinguished ALJs from members of the PCAOB because ALJs do not perform executive functions, writing: "our holding also does not address that subset of independent agency

[62] Anderson's claim that this order was a mere ratification of a previously invalid appointment that did not cure the defect is belied by the express language of the order: Secretary Mnuchin's order certified that ". . . I today approve their appointment as my own action under the Constitution."

employees who serve as administrative law judges" because ". . . unlike members of the [PCAOB], many administrative law judges of course perform adjudicative rather than enforcement or policymaking functions or possess purely recommendary powers." *Id*. at 507 n.10 (cleaned up).

ALJ McNeil performed solely adjudicative rather than enforcement or policymaking functions. *See* 12 C.F.R. § 19.5 (laying out the powers of an ALJ). He also possessed purely recommendatory powers, because the Comptroller—who is removable at-will by the President, 12 U.S.C. § 2—has the sole authority to rule on dispositive motions, *see* 12 C.F.R. § 19.5(b)(7), issue the final decision of the agency, *see* 12 C.F.R. § 19.40(c), and may, "at any time during the pendency of a proceeding, perform . . . any act which could be done or ordered by the administrative law judge," 12 C.F.R. § 19.4. In issuing a final decision, the Comptroller may review the record *de novo* and make his own findings of fact and conclusions of law. *In the Matter of O'Connell*, No. OCC AA-EC-92-21, 1993 WL 13967907, at *1 (OCC June 4, 1993).

Because ALJ McNeil performed solely adjudicative functions and possessed purely recommendatory powers, he did not enjoy unconstitutional dual for-cause removal protection. Anderson has also not demonstrated any "compensable harm" flowing from these alleged constitutional defects. *Collins v. Yellen*, 594 U.S. 220, 259 (2021). Thus, the Comptroller rejects this exception.

2. Deputy Comptroller for Large Bank Supervision Gregory Coleman, who signed the Notice of Charges, was properly appointed

Anderson asserts that the Notice is invalid because it was signed by Deputy Comptroller for Large Bank Supervision Gregory Coleman, who was purportedly not validly appointed. *See* CRA Exceptions at 629-30; CRA Br. at 56-59. For the reasons explained below, the Comptroller rejects this exception.

Specifically, Anderson alleges that Coleman's appointment to that position violated 12 U.S.C. § 4, which provides that the "Secretary of the Treasury shall appoint no more than four Deputy Comptrollers of the Currency." She posits that since there were more than four OCC employees holding a title that included "Deputy Comptroller" at the time of the Notice, Coleman's appointment violated § 4.

However, Coleman was not appointed under § 4 as a "Deputy Comptroller of the Currency." Instead, he was appointed as "Deputy Comptroller for Large Bank Supervision" under the authority of 12 U.S.C. § 482, which provides that "the Comptroller of the Currency shall… appoint and direct, all employees of the Office of the Comptroller of the Currency." *Compare* EC Exhibits, Exh. 6 at *39 (showing Coleman was appointed as "Deputy Comptroller for Large Bank Supervision" under § 482) *with* Exh. 5 at *31, *33 (showing others appointed as "Deputy Comptrollers of the Currency" by the Secretary of the Treasury under § 4).

Whereas "Deputy Comptroller of the Currency" is a position established and limited in number by statute in § 4, "Deputy Comptroller for Large Bank Supervision" is the title of a separate position appointed by the Comptroller under his general employment authority found in § 482. Because Coleman's appointment to his position was proper, the Comptroller validly delegated authority to Coleman to sign the Notice of Charges under 12 U.S.C. § 4a, which provides that the Comptroller "may delegate to any duly authorized employee, representative, or agent any power vested in the office by law." *See* Respondents' Exhibits to Statement of Undisputed Facts in Support of Respondents' Appointments MSD, Exh. 7 at *35-41 (delegating authority to Coleman). The Comptroller therefore rejects this exception.

C. The OCC's Funding Structure is Constitutionally Sound

Anderson asserts that the funding structure of the OCC violates the Appropriations Clause of the U.S. Constitution. CRA Br. at 59-61. For the reasons explained below, the Comptroller rejects this exception.

The OCC is statutorily funded by assessments on its own regulated entities, up to an amount determined by the Comptroller to be appropriate for the Agency's operation. 12 U.S.C. § 16. As a threshold matter, the Comptroller notes that it is unclear whether the Appropriations Clause even applies to the OCC's funding structure. The clause provides that "no money can be paid out of the Treasury unless it has been appropriated by an act of Congress." *CFPB v. Cmty. Fin. Servs. Ass'n of Am.*, 601 U.S. 416, 425 (2024) (quoting *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321 (1937)). Specifically, "[t]he Appropriations Clause applies to money 'drawn from the Treasury.'" *Id*. The OCC's funding neither originates from, nor flows to, the Treasury. Indeed, Congress specifically provided that the OCC's funds "shall not be construed to be Government funds or appropriated monies." 12 U.S.C. § 16. Anderson offers no justification for why the Appropriations Clause should be interpreted so broadly as to encompass the OCC's fee-assessment funding regime.

Even assuming the Appropriations Clause applies to the OCC, the Agency's standing appropriation—set forth in 12 U.S.C. § 16—is more than sufficient to satisfy the clause's requirements. The Supreme Court recently rejected a similar challenge to the CFPB's funding structure. *See CFPB. v. Cmty. Fin. Servs. Ass'n of Am.*, 601 U.S. 416 (2024). The Court wrote that "the Appropriations Clause requires [no] more than a law that authorizes the disbursement of specified funds for identified purposes." *Id*. at 438. The law in § 16 provides exactly such authorization of specified funds for identified purposes. As such, the Comptroller rejects this exception.

D. The Administrative Proceeding Afforded Anderson All Her Due Process Rights

Anderson argues that her due process rights under the Fifth Amendment were violated by the structure of the administrative proceeding because the OCC "serves as witness, investigator, prosecutor, and judge." CRA Br. at 47, 61. For the reasons explained below, the Comptroller rejects this exception.

There is no dispute that a CMP and prohibition order implicate Anderson's property and liberty interests, respectively, affording her the protection of due process under the Fifth Amendment. *See FDIC v. Mallen*, 486 U.S. 230, 240 (1988); *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 572 (1972). However, Anderson's due process rights were not infringed by the administrative proceeding. The Supreme Court has held that vesting the aforementioned separate functions in a single agency does not violate due process. *Withrow v. Larkin*, 421 U.S. 35, 55-58 (1975). The OCC's Uniform Rules provide for a strict separation of adjudicative and prosecutorial functions. *See* 12 C.F.R. § 19.9(e). Anderson does not argue—and there is nothing in the record to suggest—that the OCC did not adhere to this strict separation of functions in prosecuting this case.[63] The Comptroller therefore rejects this exception.

IX. EXCEPTIONS REGARDING PREHEARING ERRORS

A. The Statute of Limitations Does Not Bar Any Claims Against Anderson

Both Anderson and Enforcement Counsel filed exceptions related to the statute of limitations. For the reasons detailed below, the Comptroller rejects Anderson's exceptions and partially rejects and partially accepts Enforcement Counsel's exceptions.

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[63] Anderson argues that "[d]ue process is especially violated where, as here, [Enforcement Counsel] chose to prove its case almost entirely based on witnesses who are conflicted." CRA Br. at 62. But her cited authority does not support this claim. Because Enforcement Counsel's witnesses were not acting as "decisional employees," their role in the prosecution of the case raises no specter of a due-process violation. *See Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 878-79 (2009).

Anderson asserted the statute of limitations as an affirmative defense in her answer. *See* Ans. at 18; Am. Ans. at 24. All Respondents filed a joint motion for summary disposition based on the statute of limitations. *See* Respondents' Joint Motion for Summary Disposition on the Basis of their Statute of Limitations Defenses, May 12, 2020. On June 24, 2020, ALJ McNeil issued an order denying this motion. *See* Order Regarding Respondents' Initial Joint Motions for Summary Disposition, June 24, 2020.

In the RD, the ALJ found that the five-year statute of limitations in 28 U.S.C. § 2462 applies to the CMP and prohibition charges filed against Anderson. *See* RD at 428-30. The ALJ found that the effect of Anderson's misconduct occurred within the statute of limitations period and that the charges were timely brought. *See id.* The ALJ further found that the continuing violations doctrine applied. *See id.* The ALJ, however, found that claims against Anderson based on violations of federal law prior to January 23, 2015, did not constitute continuing violations and were therefore time-barred. *See id.* at 430. Despite this, the ALJ held that the claims against Anderson based on conduct after January 23, 2015, were sufficient to support a prohibition and the $10 million CMP. *See id.*

Both Anderson and Enforcement Counsel filed exceptions to the ALJ's statute of limitations analysis. Anderson argues that the ALJ incorrectly applied the statute of limitations, finding liability based on conduct prior to the statute of limitations. *See* CRA Br. at 62-67; CRA Exceptions at 628. She argues that the RD correctly stated that claims against her for conduct prior to January 23, 2015, were timed-barred, yet it imposed liability for that conduct. *See* CRA Br. at 62-67. Therefore, she argues that the case should either be dismissed entirely or narrowed to conduct that occurred after January 23, 2015, and remanded to the ALJ to determine the correct amount of the CMP based solely on that conduct. *See id.* at 67.

Enforcement Counsel argues that the ALJ misstated the law for when prohibition and CMP claims accrue under the statute of limitations. *See* EC Exceptions Br. at 77-79. Enforcement Counsel also argues that the ALJ misapplied the continuing violations doctrine. *See id.* at 73-77.

Both parties and the Comptroller agree that CMP and prohibition claims are subject to the generally applicable statute of limitations in 28 U.S.C. § 2462 which states:

> Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

Accordingly, the Comptroller analyzes when the claims against Anderson first accrued. If the claim accrued more than five years prior to the case commencing, the statute bars the claim. Because the Notice was filed on January 23, 2020, the five-year date for purposes of 28 U.S.C. § 2462 is January 23, 2015, and claims that first accrued prior to January 23, 2015, are barred.

Both parties recognize, and the Comptroller agrees, that the D.C. Circuit case *Proffitt v. FDIC*, 200 F.3d 855 (D.C. Cir. 2000), applies to this action. *Proffitt* explains that a prohibition claim under 12 U.S.C. § 1818 accrues when the "factual and legal prerequisites for filing suit are in place." *Id.* at 862 (internal quotation omitted). In *Proffitt*, the court stated that all three elements of a prohibition claim—misconduct, effect, and culpability—must be present for a prohibition claim to accrue within the meaning of 28 U.S.C. § 2462. *Id.* at 862-63. The court explained, "Because misconduct and effect are separate [elements], the underlying conduct may not always immediately effect a [12 U.S.C. § 1818(e)] violation and thus the accrual of the claim. The same misconduct can produce different effects at different times, resulting in separate [12 U.S.C. § 1818(e)] claims and separate accruals." *Id.* at 863. The *Proffitt* court held that

regardless of when the first effect occurred, the statute of limitations period can be triggered separately under the alternative effects language in 12 U.S.C. § 1818(e)(1)(B). *Id.* at 862-83. Thus, the first occurrence of one element of a prohibition action does not necessarily start the statute of limitations. This is true even if all three elements are satisfied—the first occurrence of a different effect (or misconduct or culpability) under 12 U.S.C. § 1818(e) means a new prohibition claim has accrued. *See id.* at 864 (holding that, even though the conduct at issue in *Proffitt* occurred prior to the five-year statute of limitations *and* satisfied the effect element prior to the five-year statute of limitations, a different effect occurring within the five-year statute of limitations made the action timely).

The D.C. Circuit later applied *Proffitt*'s reasoning to CMP actions under 12 U.S.C. § 1818(i) in *Blanton v. OCC*, 909 F.3d 1162 (D.C. Cir. 2018). In *Blanton*, the OCC sought a second-tier CMP, which has two elements: misconduct and effect. The *Blanton* court held that a CMP claim accrues each time there is misconduct that also has an effect. *Id.* at 1171. Each instance of misconduct triggers a new claim if it also meets the effect element. *See id.* (citing *Proffitt*, 200 F.3d at 863-64).

Accordingly, the Comptroller finds that the ALJ erred in his discussion of the statute of limitations. Considering only dates, the ALJ found that claims based on Anderson's misconduct that occurred prior to January 23, 2015, were time-barred, but the claims based on Anderson's misconduct that occurred after January 23, 2015, were timely. *See* RD at 429-30. The ALJ's sole focus on the timing of Anderson's misconduct is misplaced because misconduct is only one element of a second-tier CMP or prohibition claim. Instead, if *any* occurrence of *any* element *first* occurred on or after January 23, 2015, the claims against Anderson are timely under 28 U.S.C. § 2462.

Applying this legal standard to the facts of this case, the Comptroller finds that the statute of limitations does not bar any claims against Anderson. 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, CFPB, and the Office of the Los Angeles City Attorney. This loss satisfies the "effect" element of a CMP, as it was the first time Anderson's misconduct "cause[d] more than a minimal loss" to the Bank. 12 U.S.C. § 1818(i)(2)(B)(ii)(II).[64] This loss also satisfies the "effect" element of a prohibition because it was the first time the Bank "suffered . . . financial loss," 12 U.S.C. § 1818(e)(1)(B)(i).[65] Following the reasoning in *Proffitt*, the first occurrence of loss in 2016 means the entire action against Anderson is timely, as it occurred after January 23, 2015.

Additionally, the Comptroller notes that Anderson committed misconduct numerous times within the five-year statute of limitations period. As detailed in Parts VI and VII, Anderson violated federal law and recklessly engaged in unsafe or unsound practices after January 23, 2015. Anderson cannot evade liability because her misconduct continued for more than five years. *See In the Matter of Blanton*, 2017 WL 4510840, at *16. In fact, the record shows that Anderson's misconduct in providing false, incomplete, and/or misleading information to the OCC occurred *entirely* within the five-year statute of limitations period. *See supra* Part VI.B.1.

[64] For a detailed discussion of the effect element, *see supra* Parts VI.C and VII.B.
[65] Anderson argues that reputational damage that occurred after the publication of the Los Angeles Times articles in 2013 satisfies this element. *See* CRA Br. at 65. However, Enforcement Counsel did not allege that these articles caused reputational damage, nor did they allege that reputational damage occurred in 2013. *See, e.g.*, Notice ¶¶ 174-77 (alleging various forms of reputational damage that all occurred after September 2016); MSD-658 (Pocock Expert Report) ¶ 14 ("[T]he sales practice misconduct scandal caused severe reputational and financial damage to WFC and the Bank following the September 8, 2016 announcement[.]").

That misconduct provides an independent basis for the prohibition and CMP action. Under 28 U.S.C. § 2462, that misconduct falls within the statute of limitations.

Finally, the Comptroller overrules Enforcement Counsel's exceptions to the RD's analysis of continuing violations. The Comptroller need not determine whether the continuing violations doctrine applies, because the entire action is timely pursuant to 28 U.S.C. § 2462. Therefore, the Comptroller does not adopt or rely on the ALJ's continuing violation analysis, and Enforcement Counsel's exceptions to this analysis are moot.

B. Partial Summary Disposition Was Proper

Anderson's exceptions advance both legal and factual arguments about the summary disposition process. *See* CRA Exceptions at 13-20; CRA Br. at 95-123. Anderson's legal arguments are: (1) the Administrative Procedure Act ("APA") does not allow for summary disposition; and (2) the ALJ did not adhere to the requirements of 12 C.F.R. Part 19 by issuing partial summary disposition for some of Enforcement Counsel's material facts.[66] *See id.* Beyond those purely legal arguments, she also advances factual arguments that the ALJ erred in finding partial summary disposition in favor of Enforcement Counsel. *See id.* Anderson urges the Comptroller to dismiss the entire case based on these alleged errors. *See generally id.*

For the reasons explained below, the Comptroller rejects both of Anderson's legal arguments as meritless. To address Anderson's factual arguments, the Comptroller reviewed the summary disposition record, including Enforcement Counsel's SOMFs and the evidence cited therein, as well as Anderson's responses to the SOMFs and any evidence cited therein. Based on

[66] Anderson also complains that the ALJ relied on OCC decisions not available to her. *See* CRA Br. at 119-21. Anderson points to one case cited by Enforcement Counsel that she claims the OCC did not publish. This decision, however, is available on Westlaw. *See In the Matter of Texas National Bank*, Nos. OCC-AA-EC-92-88, OCC-AA-EC-92-90, OCC-AA-EC-92-92, 1994 WL 17121289 (OCC Sept. 28, 1994). In any case, the Comptroller does not rely on unpublished precedent in this Final Decision. This exception is therefore rejected.

this review, the Comptroller finds that the ALJ erred in finding that some of Enforcement Counsel's material facts were undisputed. However, these errors do not require dismissal of the case or remand because, as detailed in Parts VI and VII, there is still sufficient evidence in the record to support both the prohibition and the CMP against Anderson.

1. Summary disposition is allowed in OCC administrative actions

Anderson's first legal argument is that the text of the APA does not allow for summary disposition. *See* CRA Exceptions at 13; CRA Br. at 101-05. Anderson points to the text of 5 U.S.C. § 556(d), arguing that she has a statutory right to present oral and documentary evidence, submit rebuttal evidence, and to conduct cross-examination at an on-the-record hearing. *See id.* Beyond this statutory argument, Anderson cites to an academic article that argues administrative summary judgment in SEC cases is unlawful under the APA. *See generally id.*

This argument is incorrect. Section 916 of FIRREA expressly allows for summary disposition for OCC administrative hearings under 12 U.S.C. § 1818. *See* FIRREA, Pub. L. No. 101-73, § 916, 103 Stat. 183, 486-87 (1989). Section 916 states:

> Before the close of the 24–month period beginning on the date of the enactment of this Act, the appropriate Federal banking agencies (as defined in section 3(q) of the Federal Deposit Insurance Act)[67] and the National Credit Union Administration Board shall jointly—
>
> > (1) establish their own pool of administrative law judges, and
> >
> > (2) develop a set of uniform rules and procedures for administrative hearings, *including provisions for summary judgment rulings where there are no disputes as to material facts of the case*.

Id. (emphasis and footnote added). This provision of FIRREA, enacted after the APA, expressly allows for summary disposition. Anderson does not address this in her exceptions. *See* CRA

[67] 12 U.S.C. § 1813(q)(1) (defining appropriate Federal banking agency to include the OCC).

Exceptions at 13; CRA Br. at 101-05. The Comptroller rejects this exception, as Congress expressly authorized summary disposition in OCC administrative action.[68]

2. 12 C.F.R. Part 19 allows for partial summary disposition

Anderson's second legal argument is that the ALJ improperly entered partial summary disposition under 12 C.F.R. Part 19. *See* CRA Exceptions at 13; CRA Br. at 105-06, 108-10. She argues that the ALJ did not have the power to enter partial summary disposition *sua sponte* or without prior notice to the nonmovant. *See* CRA Br. at 105-06. She also argues that the ALJ can only resolve "claims" in summary disposition, which she argues are causes of action. *See id.* at 108-10. She argues the ALJ erred by resolving material facts instead of causes of action. *See id.*

The Comptroller rejects these arguments. The text of 12 C.F.R. §§ 19.29 and 19.30 allow the ALJ to grant partial summary disposition and resolve factual claims. Twelve C.F.R. § 19.29(b)(1) allows a party to move "for summary disposition in its favor of all or any part of the proceeding." Twelve C.F.R. § 19.30 states:

> If the administrative law judge determines that a party is entitled to summary disposition as to certain claims only, he or she shall defer submitting a recommended decision as to those claims. A hearing on the remaining issues must be ordered. Those claims for which the administrative law judge has determined that summary disposition is warranted will be addressed in the recommended decision filed at the conclusion of the hearing.

[68] Anderson's argument fails for other reasons as well. She argues that she was entitled to an oral hearing under the APA, but she did receive a hearing—a 38-day oral hearing where she was able to present oral and documentary evidence, submit rebuttal evidence, and conduct cross-examination. Moreover, case law fails to support her assertion that the APA's text does not allow for summary disposition. *See, e.g.*, *Crestview Parke Care Center v. Thompson*, 373 F.3d 743, 750 (6th Cir. 2004) ("[I]t would seem strange if disputes could not be decided without an oral hearing when there are no genuine issues of material fact."). Even the academic article that Anderson relies upon cites only to cases that have *upheld* the use of summary disposition in SEC administrative actions. *See* Alexander I. Platt, *Is Administrative Summary Judgment Unlawful?*, 44 HARV. J.L. & PUB. POL'Y 239, 292-96 (2021).

Reading these together, the Comptroller finds that the ALJ can enter partial summary disposition when a party moves for either partial or total summary disposition. *See also* 56 Fed. Reg. 27790, 27795 (June 17, 1991) ("If only a portion of the proceeding warrants summary disposition, the administrative law judge will accordingly limit the issues for hearing to the remaining claims[.]"). This accords with the intent of Part 19 to encourage judicial economy and limit the hearing to the genuine controversies.[69]

Similarly, the text of 12 C.F.R. § 19.30 allows the ALJ to resolve material facts. As a definitional matter, the word "claim" in § 19.30 is best interpreted as a factual claim—or, as Enforcement Counsel styled it, a material fact. Black's Law Dictionary's first definition for claim is: "1. A statement that something yet to be proved is true <claims of torture>." *Claim*, BLACK'S LAW DICTIONARY (11th ed. 2019). The preamble also uses the words "claim" and "issue" interchangeably, indicating that the word "claim" in 12 C.F.R. § 19.30 does not mean entire causes of action. *See* 56 Fed. Reg. 27790, 27795 (June 17, 1991). It is in the interest of judicial economy to limit hearings to factual claims where there is a genuine dispute. Furthermore, OFIA ALJs routinely issue partial summary disposition orders in response to motions for total summary disposition[70] and routinely issue partial summary disposition orders

[69] Anderson faults the ALJ for not giving notice that he was considering partial summary disposition. *See* CRA Br. at 105-06. While the Comptroller does not believe this was an error, any error was harmless. Anderson submitted extensive briefing and exhibits and responded to each of Enforcement Counsel's SOMF.

[70] *See, e.g.*, *In the Matter of Joseph Jiampietro*, Nos. 16-012-E-I, 16-012-CMP-I, 2021 WL 7906101 (FRB, Dec. 7, 2021) (ALJ granting partial summary disposition in response to a motion for total summary disposition); *In the Matter of Frank E. Smith*, No. 18-036-E-I, 2021 WL 7906091 (FRB, Mar. 24, 2021) (noting that the ALJ granted partial summary disposition in response to a motion for total summary disposition).

that resolve factual claims rather than entire causes of action.[71] The Comptroller sees no reason within the text of Part 19 to upend this practice.

3. The Comptroller's *de novo* review has cured any remaining errors related to summary disposition

Anderson advances a variety of factual arguments about summary disposition. She argues that the ALJ did not test the sufficiency or admissibility of the evidence Enforcement Counsel presented. *See* CRA Br. at 112-16. She also argues that the ALJ did not view evidence in the light most favorable to her as the non-moving party. *See id.* at 110-12. She further argues that the ALJ entered findings despite obvious disputes. *See id.* at 116-18; *see also* CRA Exceptions at 19.[72]

To address these arguments and cure any deficiencies, the Comptroller conducted a *de novo* factual review of the SD Order's factual findings, Enforcement Counsel's SOMFs, and the evidence cited by all parties. Where this Final Decision relies on a finding or SOMF from the SD Order, the Comptroller's review has determined that the finding or SOMF is properly supported by the evidence adduced at the summary disposition stage. 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 a prohibition order and a CMP against Anderson.[73]

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[71] *See, e.g., Jiampietro*, 2021 WL 7906101 (Order for partial summary disposition); *In the Matter of Bank of Louisiana*, Nos. FDIC 12-489b, FDIC 12-479k, 2016 WL 10879437 (FDIC, May 17, 2016) (Recommended Decision).

[72] Anderson also objects to the first 139 pages of the SD Order, which she argues were procedurally and substantively flawed. *See* CRA Br. at 121-23; CRA Exceptions at 18-19. The Comptroller did not consider these introductory pages in this decision. As explained throughout this decision, the Comptroller considered and reviewed the rest of the SD Order and the RD.

[73] Enforcement Counsel argued in its exceptions that testimony and evidence presented at the hearing further supported the ALJ's summary disposition findings. *See* EC Exceptions Br. at 99-102. This argument has some merit, and the Comptroller agrees with it to the extent detailed in Parts VI and VII.

C. The ALJ Properly Rejected Anderson's Affirmative Defense of Estoppel

Anderson's exceptions assert that the ALJ erred by striking her affirmative defense of estoppel in two respects: (1) by finding that the defense was insufficiently pled and (2) by rejecting the defense on the merits. *See* CRA Br. at 602-06; CRA Exceptions at 634. For the reasons detailed below, the Comptroller finds that the ALJ properly rejected this affirmative defense.

Government estoppel is applied "only in the narrowest of circumstances," *Linkous v. United States*, 142 F.3d 271, 277 (5th Cir. 1998), and requires the party asserting the claim to bear a "heavy burden." *Morgan v. Comm'r*, 345 F.3d 563, 566 (8th Cir. 2003). In addition to proving the traditional estoppel elements, the party must show that the government engaged in affirmative misconduct. *Id*. This misconduct cannot rest on an omission, a failure to discharge an obligation, or an "erroneous representation." *Rider v. U.S. Postal Serv*., 862 F.2d 239, 241 (9th Cir. 1988); *see also Mich. Exp., Inc., v. United States*, 374 F.3d 424, 427 (6th Cir. 2004). Instead, the alleged misconduct must involve the government "intentionally or recklessly" misleading the claimant, *Mich. Exp., Inc.*, 374 F.3d at 427, through "an affirmative misrepresentation" or "concealment of a material fact," *Watkins v. U.S. Army*, 875 F.2d 699, 707 (9th Cir. 1989).

Here, Anderson's assertion that her estoppel defense was properly pled can be easily rejected as her pleadings plainly did not assert any affirmative misconduct by the OCC. *See* Am. Ans. at 24. ("Because OCC knew about the issues raised in the Notice of Charges and *took no action* for many years, its claims are barred by the doctrines [of] estoppel and waiver") (emphasis added).[74]

[74] Anderson also incorporated the other two Respondents' affirmative defenses by reference. Those answers likewise fail to properly plead that the OCC engaged in affirmative misconduct. *See e.g*, McLinko Ans., Sixth Affirmative Defense (alleging the OCC "failed to exercise its

Moreover, Anderson fails to demonstrate how the record supports active concealment or affirmative misconduct by the OCC. Anderson claims that "the ALJ refused to recognize that the OCC's contemporaneous positive feedback to [her], and its subsequent attempt to find Ms. Russ Anderson liable for that same conduct, amounted to affirmative misconduct." CRA Br. at 603. This theory cannot square with the limited application of government estoppel. Courts only recognize government estoppel in cases where "the government's wrongful act will cause a serious injustice, and the public's interest will not suffer undue damage by imposition of the liability." *Morgan v. Heckler*, 779 F.2d 544, 545 (9th Cir. 1985); *Morgan v. Comm'r*, 345 F.3d at 566-67 (holding that "negligence and possible bad faith" in an IRS officer's representations about tax liability were "insufficient grounds for estoppel"). Here, neither of these conditions is met. *See generally supra* Part VI.

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

Anderson asserts that the ALJ's Order restricting her (and the other Respondents') communications with former Respondent Carrie Tolstedt while Tolstedt's parallel criminal case was pending was unconstitutional because it interfered with Anderson's ability to prepare a defense.[75] *See* CRA Br. at 67-75. For the reasons explained below, the Comptroller rejects this exception.

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regulatory authority"). "[A] failure to discharge an affirmative obligation, [] never amounts to affirmative misconduct." *Matamoros v. Grams*, 706 F.3d 783, 794 (7th Cir. 2013); *see also Lanvin v. Marsh*, 644 F.2d 1378, 1382-84. (9th Cir. 1981) (an alleged failure to inform or discharge an obligation does not establish the affirmative misconduct necessary to support a government estoppel claim).

[75] At the request of the Attorney General, Enforcement Counsel moved for a stay of the administrative proceeding against Respondent Tolstedt to limit her ability to utilize civil discovery mechanisms to obtain information and evidence that she would otherwise not be entitled to under the Federal Rules of Criminal Procedure. In granting the stay, the ALJ clearly highlighted this fact as the basis for imposing discovery controls on Respondent Tolstedt. The

In determining the validity of such restrictions, courts balance the justification for the restrictions against any harms they may impose. *See e.g.*, *Kines v. Butterworth*, 669 F.2d 6, 10 (1st Cir. 1981) (finding no violation from restricting access to witness because there was no "specific prejudice resulting from the non-access"); *United States v. Gonzalez*, No. 17-CR-709 (WFK), 2018 WL 2186406, at *3 (E.D.N.Y. May 11, 2018) (finding no error in imposing restriction because "the defendant never identified any evidence or offered any argument to establish how the restriction actually prevented him from preparing for his trial"). Here, there was a compelling reason for the restriction—the parallel Department of Justice criminal proceedings—and the record shows that Anderson was not prejudiced by the restriction.

Anderson fails to point to any specific information that Tolstedt might have provided her that was unavailable from other sources prior to the issuance of the Stay Order. The OCC produced more than 90 sworn statement transcripts and approximately 1.6 million other documents requested by the Respondents prior to the Stay Order. *See* Opposition to the Request for Clarification of the Order Regarding Enforcement Counsel's Motion to Stay the OCC's Enforcement Action Against Respondent Carrie Tolstedt at 15, Oct. 5, 2020. Moreover, Anderson had over seven months to engage in conversations with Tolstedt prior to issuance of the Stay Order, and she clearly *did* engage in those conversations, as evidenced by their joint filings. *Id.* In addition, the record shows that it is highly unlikely that Tolstedt would have offered Anderson much help in defending the charges given her stipulation that she would invoke her Fifth Amendment privilege against self-incrimination if called to testify. Clarification

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restriction on communication was entered as part of this stay order. *See* Order Regarding EC's Motion to Stay the OCC's Enforcement Action Against Respondent Carrie Tolstedt, Sept. 9, 2020 ("Stay Order"); *see also* Order Regarding Respondents' Request for Clarification of the Order Regarding Enforcement Counsel's Motion to Stay the OCC's Enforcement Action Against Respondent Carrie Tolstedt, Oct. 6, 2020 ("Clarification Order").

Order at 5. These facts undermine Anderson's claim that denial of communications with Tolstedt interfered with her ability to prepare a defense.

E. The ALJ's Discovery Orders Restricting Certain Testimony and Documents Pertaining to NBEs Were Not Arbitrary and Capricious

In her exceptions, Anderson claims that the ALJ arbitrarily blocked certain discovery to shield the OCC by (1) quashing subpoenas to certain NBEs, (2) not requiring the disclosure of exculpatory materials, and (3) blocking discovery of OCC personnel information. CRA Br. at 76-91. The Comptroller has considered these exceptions and rejects them.

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 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.

As to quashing the subpoenas of several NBEs, *see* CRA Br. at 76-80, the Comptroller reviewed the relevant motions and responses and finds that the ALJ fully considered and appropriately rejected respondent's legal and factual arguments in quashing the subpoenas. *See* Order Regarding EC's Motions to Quash Hearing Subpoenas Directed to Certain OCC Personnel and Strike Them from Respondents' Witness Lists and for Order to Show Cause, Aug. 18, 2021.[76]

[76] The ALJ provided multiple grounds for quashing the subpoenas, including but not limited to the fact that these witnesses were among 79 total witnesses listed in her prehearing papers who would testify to the same or similar facts, and because her witness list ignored the ALJs specific instructions to take into account the findings previously made in his SD Order in identifying witnesses and their relevant testimony. Moreover, the ALJ specifically considered and found that Anderson had failed to establish a factual predicate for her claim that these witnesses were relevant to the issue of bias and credibility.

In addition, Anderson's assertion that the ALJ erred in striking discovery requests, including requests for "exculpatory information under *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny" can be summarily disposed of because neither the APA nor the Uniform Rules extends the *Brady* standard to OCC administrative hearings.[77] *See* CRA Br. at 83-87.

Moreover, Anderson's assertion that the ALJ wrongly blocked discovery requests seeking the personnel records of the NBEs who supervised the bank also lacks merit. *See id*. at 87-91. The Comptroller has previously recognized that public policy considerations weigh against disclosure of bank examiner personnel files and that personnel files are not needed to establish or impeach witness credibility. *In the Matter of Texas National Bank*, Nos. OCC-AA-EC-88, 89, OCC-AA-EC-90, 91, OCC-AA-EC-92, 93, 1993 WL 13967919 at *3-4 (OCC Feb. 26, 1993). In this case, the ALJ properly evaluated the relevant factors supporting his finding that Respondents failed to advance a sufficient basis to justify inquiries into the personnel files of the NBEs. *See* Order Regarding Enforcement Counsel's Motion for Protective Order Regarding Sensitive OCC Personnel Information, Nov. 2, 2020.[78]

In addition, the Comptroller rejects Anderson's assertion that the ALJ's order striking pre-2010 discovery was in error, *see* CRA Br. at 80-83, finding the ALJ appropriately balanced the proportionality and the relevance and scope of documents the parties had agreed were discoverable. *See* Order Regarding EC's Motions to Limit and Strike Portions of the First Requests for Production of Documents by Respondents Anderson and Strother, Mar. 20, 2020.

[77] *Brady* requires the prosecution in a criminal case to turn over all evidence to the defense that might exonerate the defendant. *See United States v. Brady*, 373 U.S. 83 (1963). Although some administrative agencies have adopted rules requiring disclosure of *Brady* material, as Anderson recognizes, the OCC has not, and the cited Executive Order does not require it to do so.

[78] Anderson also alleges that the ALJ similarly erred in disallowing evidence concerning examiner competence, credibility, and bias during the hearing. CRA Br. at 91-92. The proffered testimony generally relates to when the examiners knew certain information and what they did with such information, based on the theory that the examiners had motives to blame Respondents for what they had failed to figure out. For the reasons stated above, this proffered testimony is not relevant or material to Anderson's alleged misconduct.

F. Anderson Was Not Prejudiced by the ALJ's Prehearing Rulings

In her exceptions, Anderson alleges that she was "burdened" by several prehearing rulings that she claims had no basis in the Uniform Rules. CRA Br. at 92-95. The Comptroller has considered these exceptions and rejects them for the reasons set forth below.

As noted above, *see supra* Part IV, the ALJ has broad powers to consider and rule upon all prehearing motions, and those rulings should only be overturned where they amount to "an abuse of discretion" or constitutes "manifest unfairness." *Brooks*, 1993 WL 13966512, at *14. The limits the ALJ set relating to depositions, the sufficiency of Anderson's prehearing statements, and the timing to file motions regarding her affirmative defenses all clearly fall within these broad powers and were not an abuse of discretion. Anderson's briefing cites no case law that suggests otherwise. Moreover, despite her claims she was prejudiced by these various rulings, Anderson fails to point to any particularized harms resulting from the rulings.

In addition, Anderson claims that the ALJ's denial of her motion to extend the deadline to file a supplemental expert report was arbitrary and capricious. CRA Br. at 124-29. After review of the relevant motions and orders, the Comptroller rejects this exception. The denial did not occur in a vacuum. Only months before, in September 2020, the ALJ had previously denied cross-motions by both parties seeking extensions of time. *See* Order Regarding EC's Motion Requesting Extension of the Current Schedule and Respondents Russ Anderson's et al. Cross-Motion for Adjustment of Interim Deadlines, at 5-6, Sept. 17, 2020. Moreover, Anderson's exceptions focus on the technological issues she faced in collecting the data in a timely manner but fails to explain why she waited months after discovery began before requesting the data. Therefore, the denial of the requested deadline extension was not an abuse of discretion.

X. EXCEPTIONS REGARDING HEARING ERRORS

A. The ALJ Did Not Infringe on Anderson's Due Process Rights in Conducting the Hearing

Anderson asserts that the ALJ infringed on her due process rights during the hearing in four ways: (1) making new findings of fact in his "opening statement" prior to the presentation of evidence; (2) denying her the right to counsel by prohibiting her from consulting with her attorney during breaks and recesses from her testimony; (3) setting the order of and timing for her presentation of witnesses; and (4) requiring her to conduct direct examination of witnesses before Enforcement Counsel rested its case. *See* CRA Br. at 129-38. The Comptroller rejects each of these exceptions for the reasons explained below.

First, the hearing was conducted pursuant to the Uniform Rules, 12 C.F.R. Part 19, and Anderson has not pointed to anything in those rules that prohibit an ALJ from introducing himself and providing some background of the case, including a summary of what previously occurred in the case prior to the presentation of the evidence. *See e.g.*, Hr'g Tr. at 6:8-11:5, 44:6-62:6. Moreover, Respondents specifically asked the ALJ if his opening statements constituted additional findings, and the ALJ rejected that characterization, stating, "No additional findings. It was just an opening statement." *Id*. at 63:21-22. Most importantly, even if the ALJ had made additional findings, Anderson was still provided a meaningful opportunity to be heard at the hearing as well as the opportunity to challenge the findings and to have them reviewed by the Comptroller. Thus, the "opening statement" did not violate Anderson's due process rights.

Second, Anderson was not denied her right to counsel. The administrative right to counsel under due process "is not synonymous with, and certainly not greater than the Sixth Amendment right to counsel." *See In reUlrich*, No. AA-EC-00-40, 2003 WL 21307609 (OCC Jan. 31, 2003) (Recommended Decision). Even under the Sixth Amendment, Anderson would

only have a right to consult with counsel *before* she began to testify. *Perry v. Leeke*, 488 U.S. 272, 281-83 (1989).[79] She does not have an absolute right to consult with her attorney during breaks and recesses from her testimony in this administrative hearing. *See In re Ulrich*, No. AA-EC-00-40, 2003 WL 22379189, at *10 (OCC Oct. 15, 2003) (Final Decision) (finding that while the APA allows parties to be "accompanied, represented, and advised by counsel," it does not state or suggest that parties are entitled to discuss their ongoing testimony with counsel while on breaks at an administrative hearing). In addition, the ALJ correctly found that Anderson's counsel failed to timely object to this restriction by waiting until more than three months after the restriction was first imposed, *see* Hr'g Tr. at 13:16-14:8, 310:22-311:14, and because the restriction had already been followed by the other Respondents' counsel and Enforcement Counsel, *see id.* at 9187:16-9189:16 (raising objection for first time), 9192:19-9193:6 (Enforcement Counsel noting restriction previously abided by others).

The last two exceptions—setting the order and timing of witnesses and requiring Anderson to conduct direct examination of witnesses before the government rested its case—are squarely addressed by the OCC's Uniform Rules. The rules state that hearings must be conducted to provide a "fair and expeditious presentation" of the issues. 12 C.F.R. § 19.35(a)(1). To accomplish this, the rules provide ALJs with "all powers necessary" to fairly and impartially conduct proceedings and to avoid unnecessary delay. *Id.* § 19.5(a). The rules also provide ALJs with the general power "[t]o regulate the course of the hearing and the conduct of the parties and their counsel," *id*. § 19.5(b)(5), and the rules explicitly contemplate ALJs changing the order of presentation, *see id* § 19.35(a)(2). The ALJ's actions here were reasonable and did not change

[79] The protections provided by the Sixth Amendment do not apply to administrative hearings, because such protections "are explicitly confined to 'criminal prosecutions.'" *Austin v. United States*, 509 U.S. 603, 608 (1993); *see also United States v. Ward*, 448 U.S. 242, 248 (1980).

Anderson's burden of proof or prevent her from meaningfully responding to the government's case. *See e.g.*, Hr'g Tr. at 60:11-20.

The fundamental requisite of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. The administrative hearing provided Anderson such an opportunity.

B. Anderson's Exceptions Regarding Evidence

Anderson posits numerous evidentiary errors in her exceptions. *See* CRA Br. at 144-284. The Comptroller has considered each of these 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. As discussed above, ALJs have significant discretion to determine the scope of the proceedings. *See* 12 C.F.R. § 19.5. This broad discretion also extends to evidentiary rulings. The Uniform Rules provide that evidence that would be admissible under the Federal Rules of Evidence ("FRE") is admissible in adjudicatory proceedings, *id.* § 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).

Many of the alleged evidentiary errors were previously raised in an omnibus motion *in limine* and were rejected by the ALJ. *See* Respondents' Omnibus Motion in Limine, Sept. 3, 2021; Order Nunc Pro Tunc Regarding the Parties' Motions Seeking Orders in Limine, Oct. 1, 2021; Order Regarding the Parties' Motions Seeking Orders in Limine, Sept. 9, 2021. In that Omnibus Motion, Anderson (along with the other Respondents) moved to exclude much of the evidence on the grounds that the evidence would be inadmissible under the FRE. However, evidence that is inadmissible under the FRE is admissible in an administrative proceeding as

long as it is relevant, material, reliable and not unduly repetitive. *See* 12 C.F.R § 19.36(a)(3). Given the ALJ's substantial discretion to rule on evidentiary matters under the Uniform Rules, the Comptroller finds that the ALJ's rulings that the evidence was admissible under the Uniform Rules were not an abuse of discretion.

In her exceptions briefing, Anderson once again incorrectly relies on the FRE to support her assertions that the ALJ erred in admitting evidence. For example, Anderson objects to the admissibility of certain evidence on hearsay grounds, including expert reports, board reports, investigative documents, and newspaper articles. *See e,g,* CRA Br. at 201-06, 217-28, 230-45. However, even Anderson recognizes that hearsay evidence is admissible if it is relevant, material, reliable, and not unduly repetitive. *See id*. at 138 (citing 12 C.F.R. § 19.36). The Comptroller rejects Anderson's evidentiary exceptions to the extent she bases her arguments on the FRE. Similarly, Anderson generally asserts that some pieces of evidence and related testimony were wrongly admitted because they were unreliable, such as reports of supervisory activity, EthicsLine reports, and settlement documents. S*ee, e,g, id*. at 245-46, 252-67. To the extent the Comptroller has relied on such 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. Therefore, Anderson's exceptions on these grounds are hereby rejected.

Anderson's exceptions also challenge the admissibility of evidence and testimony relating to communications with Tolstedt, *see id.* at 155-59, the OCC's supervision and knowledge of SPM, *id*. at 159-64, and the characterization of Anderson's testimony regarding terminations, *id.* at 248-52. The Comptroller discusses and rejects these arguments in other sections of this decision. *See supra* Part IX.B.C-F; *infra* Part XI.

The Comptroller likewise rejects Anderson's exception that the ALJ erred by admitting evidence from outside of the 2013 to 2016 time period—which the ALJ had stated was the "relevant" time period—because doing so violated her rights under the APA and the Due Process Clause. *See generally* CRA Br. at 144-55. The Comptroller finds that Anderson was on notice that evidence outside of this time period was not excluded from being presented during the hearing. *See e,g,* Hr'g Tr. at 35:8-36:5 (ALJ agreeing that the time period from 2010 to October 3, 2013 was "still in play" and he was not "going to rule [it] out"); Order Regarding the Parties' Motions Seeking Orders in Limine at 32, Sept. 9, 2021. Although the ALJ limited the focus of Anderson's misconduct to the period of 2013 to 2016, this did not operate to exclude evidence that pertained to or discussed events outside of this time period. *See id.* Accordingly, the Comptroller finds that the ALJ did not abuse his discretion by allowing such evidence and letting the parties present arguments about the extent to which that evidence demonstrated or failed to demonstrate that Anderson committed misconduct within the relevant time period.

Anderson also asserts that the ALJ erred by limiting her right to cross-examination. *See* CRA Br. at 173-76. In an administrative enforcement hearing, there is no absolute right to conduct cross-examination. *Cellular Mobile Sys. of Pa., Inc. v. FCC*, 782 F.2d 182, 198 (D.C. Cir. 1985) ("Cross-examination is therefore not an automatic right conferred by the APA; instead, its necessity must be established under specific circumstances by the party seeking it."); 12 C.F.R. § 19.35(a) (party only entitled "to conduct such cross examination as may be required for full disclosure of the facts."). Moreover, setting limits on cross-examination is clearly within the ALJ's broad discretion. *See* 12 C.F.R. § 19.5. As part of the *de novo* review prior to issuing this final decision, the Comptroller has reviewed and considered Anderson's proffers relating to

excluded testimony. *See, e.g.*, CRA Br. at 175-76; *see also infra* Part XI.E.[80] While, in some cases, the Comptroller may not have made the same initial determinations as the ALJ, the Comptroller finds that the ALJ's limits on cross-examination were not an abuse of discretion and did not constitute manifest unfairness.

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 Exceptions Br. at 104-33. Enforcement Counsel argues that the ALJ should have allowed the testimony of Michael Bacon and that the ALJ should not have excluded certain pre-2013 evidence. *See id.*[81] The Comptroller has reviewed these exceptions and, for the reasons set forth below, rejects them. 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.

First, the ALJ reasonably found that Michael Bacon's testimony was only marginally relevant. The ALJ found Bacon's testimony to be unreliable and repetitive. *See* Hr'g Tr. at 7723:15-7724:6. Nothing in Enforcement Counsel's proffer at hearing, *see id.* at 7714:20-7718:23, or in Enforcement Counsel's briefing shows that this determination was an abuse of discretion or constituted manifest unfairness.

[80] Many of the instances of alleged error are harmless because the Comptroller does not rely on the offending testimony or evidence in this final decision. *See, e.g.*, Anderson's exceptions concerning R. Exh. 17863 and OCC Exh. 1370, which she claims were admitted outside the scope of Anderson's cross examination. CRA Br. at 174. The Comptroller does not use or rely on those exhibits in this decision.

[81] Enforcement Counsel argues that it was significantly prejudiced by the ALJ excluding pre-2013 evidence. *See* EC Exceptions Br. at 115-18. Given that the ALJ recommended a prohibition order and the $10 million CMP sought by Enforcement, this argument is without merit, and the Comptroller rejects it.

Similarly, the Comptroller declines to admit the additional pre-2013 evidence Enforcement Counsel offers at this stage of the proceeding. Any error here is harmless, given the Comptroller's ultimate decision. The ALJ's reasoning for excluding some evidence predating 2013 was that the *Los Angeles Times* articles published in 2013 established the point at which Anderson had uncontroverted knowledge of SPM. *See* Order Regarding the Parties' Motions Seeking Orders in Limine at 31-32, Sept. 9, 2021. The Comptroller understands that this evidence might buttress Enforcement Counsel's case against Anderson; as discussed above, however, the admitted evidence already supports the case.[82] Enforcement Counsel argued, for example, that this decision allowed Anderson to advance misleading arguments that she lacked knowledge of the widespread nature of SPM at the Bank. *See* EC Exceptions Br. at 116. As explained in Part VI.A, however, the admitted evidence shows that she knew or should have known that SPM was widespread and systemic. Even if the ALJ erred by generally excluding pre-2013 evidence, this error did not prejudice Enforcement Counsel. The Comptroller rejects this exception accordingly.

D. The ALJ Was Not Required to Recuse Himself

Anderson's 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* CRA Br. at 290. The Comptroller rejects these exceptions for the reasons detailed below.

[82] The Comptroller notes that the ALJ did not *categorically* exclude all pre-2013 evidence, as he stated such evidence could be admitted with a "particular showing of materiality." Order Regarding the Parties' Motions Seeking Orders in Limine at 32, Sept. 9, 2021. He also stated at the hearing that he would not rule out evidence between 2010 and 2013 but generally did not think it relevant. Hr'g Tr. at 36:2-5. The ALJ did admit evidence pre-dating 2013 using this standard. *See, e.g.*, OCC Exhs. 34, 38.

First, to prevail on a claim of disqualification based on prejudgment, Anderson must prove that the ALJ had "demonstrably made up [his] mind about important and specific factual questions and [was] impervious to contrary evidence," and that the ALJ had a "closed mind on the merits of the case." *Power v. FLRA*, 146 F.3d 995, 1001-02 (D.C. Cir. 1998); *see Liteky v. United States*, 510 U.S. 540, 541 (1991). "[O]pinions formed by the [ALJ] on the basis of facts introduced or events occurring in the course of the current proceedings, or prior proceedings, do not constitute a basis for a bias . . . unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." *Liteky*, 510 U.S. at 541. Similarly, statements made by an ALJ at the beginning of a hearing noting that he is "ready to rule" on a violation are insufficient to show prejudgment. *See Throckmorton v. Nat'l Transp. Safety Bd.*, 963 F.2d 441, 445 (D.C. Cir. 1992).

Anderson claims that the ALJ had prejudged the case because he made factual and quasi-legal findings before the hearing began. *See* CRA Br. at 288-93. This claim is not supported by the record. By the time the hearing began in September 2021, the ALJ had already entered substantial findings into the record throughout the summary disposition proceedings, and it was not error to refer to those findings in later parts of the proceedings. Moreover, Anderson points to the ALJ's "opening statement" at the hearing as evidence of prejudgment. CRA Br. at 292. But his opening remarks at the hearing do not show that the ALJ had demonstrably made up his mind about important and specific factual questions, that he was impervious to contrary evidence, or that he had a closed mind about the merits of the case. *Power*, 146 F.3d at 1001-02. On the contrary, the ALJ stated:

> Enforcement Counsel must provide a preponderance of substantial evidence to establish each of the remaining material facts supporting the charges that have not yet been determined through summary disposition. . . . Each party has the right to

> present its case or defenses by oral and documentary evidence and to conduct such cross-examination that may be required for full disclosure of the facts.

Hr'g Tr. at 60:14-24. Because the ALJ's opinions were formed based on facts and events that had already occurred in the proceedings, and because the ALJ had an open mind about the merits of the case, the Comptroller finds that there is no basis for disqualification of the ALJ based on prejudgment.

Second, 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). Anderson asserts that the ALJ engaged in improper *ex parte* communications with Enforcement Counsel,[83] which reflected an appearance of partiality and provided grounds for disqualification. CRA Br. at 294-98. Specifically, Anderson points to an occasion in which the ALJ met with attorneys from Enforcement Counsel, one of whom was in charge of COVID protocols for the OCC, in his office following a tour of the hearing site with all counsel, as well as 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. CRA Br. at 294-96. 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 administrative or logistical in nature. As

[83] 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 administrative law judge handling that proceeding, the Comptroller, or a decisional employee." 12 C.F.R. § 19.9(a)(1) (emphasis added).

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).

Third, ALJs are presumed to be unbiased, and a bias claim requires a "high burden of persuasion." *Hasie v. OCC*, 633 F.3d 361, 368 (5th Cir. 2011); *see also Schweiker v. McClure*, 456 U.S. 188, 195 (1982); *Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir. 2001); *Partee v. Astrue*, 638 F.3d 860, 865 (8th Cir. 2011) ("There is a 'presumption of honesty and integrity in those serving as adjudicators.'" (quoting *Withrow*, 421 U.S. at 47)). For bias to rise to the level requiring disqualification, it must "stem from an extrajudicial source and result in an opinion on the merits on some other basis than what the judge learned from his participation in the case." *United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966); *Liteky*, 510 U.S. at 555; *see also Jenkins v. Sterlacci*, 849 F.2d 627, 634 (D.C. Cir. 1988).[84] Bias based on an ALJ's factual findings must "point to something outside of the record indicating prejudgment or [demonstrating] that the . . . findings were undermined by his animus toward" the accusing party. *Migliorini v. Director, OWCP*, 898 F.2d 1292, 1294 n.9 (7th Cir.), *cert. denied*, 498 U.S. 958 (1990).

Judicial rulings alone almost never constitute a valid basis for bias because in and of themselves, they cannot possibly show reliance upon an extrajudicial source; only in the rarest of circumstances do they evidence the degree of favoritism or antagonism required when no extrajudicial source is involved. *Grinnell Corp.*, 384 U.S. at 583; *Liteky*, 510 U.S. at 555. Similarly, bias cannot simply be inferred from a pattern of rulings by a judicial officer; it

[84] Anderson argues that the ALJ erred in applying an "actual bias" standard rather than an "appearance of bias" standard. CRA Br. at 285-90. The Comptroller finds that Anderson did not meet the burden of persuasion required to succeed on a bias claim under either standard.

requires evidence that the officer "had it 'in' for the party for reasons unrelated to the officer's view of the law, erroneous as that view might be." *McLaughlin v. Union Oil Co. of Cal.*, 869 F.2d 1039, 1047 (7th Cir. 1989); *see also Jenkins*, 849 F.2d at 634-35. Bias cannot be established merely by questioning the correctness of an ALJ's rulings, as rulings in administrative proceedings are not by themselves sufficient to show bias. *NLRB v. Honaker Mills*, 789 F.2d 262, 266 (4th Cir. 1986); *Orange v. Island Creek Coal Co*., 786 F.2d 724, 728 (6th Cir. 1986).

Similarly, making an error of law does not constitute bias on the part of an ALJ. Even if an ALJ's rulings are erroneous, "a judicial ruling made in the ordinary course is not to be translated into bias by disappointed counsel." *Hedison Mfg. Co. v. NLRB*, 643 F.2d 32, 35 (1st Cir. 1981). Something more than unfavorable or even unsupported findings must be shown to sustain a charge of bias by the body that pronounces judgment in a judicial or quasi-judicial proceeding. *Cont'l Box Co. v. NLRB*, 113 F.2d 93, 95-96 (5th Cir. 1940); *see also NLRB v. Stackpole Carbon Co*., 105 F.2d 167, 177 (3d Cir. 1939) (stating that erroneous conclusions by the NLRB do not establish bias by the NLRB), *cert. denied*, 308 U.S. 605 (1939). Further, "judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge." *Liteky*, 510 U.S. at 555. Lastly, ineffective case management is not grounds for disqualification of an ALJ under the APA. *See* 5 U.S.C. § 554, 556(b).

Anderson argues that the ALJ was biased based on his misapplication of the law and pattern of improper and unfair rulings throughout the proceedings. CRA Br. at 288-89, 298-99, 301. She also argues that the ALJ's comments and conduct, coupled with inconsistent and erroneous rulings, reflect an appearance of bias, regardless of whether actual bias was present, that justified disqualification. *Id.* at 286-90. It must first be noted that, as discussed above, bias

cannot be established merely by questioning the correctness of an ALJ's rulings, as rulings in an administrative proceeding are not by themselves sufficient to show bias and mismanagement. Even a pattern of rulings requires a showing from outside of the record that the ALJ's rulings were undermined by his animus for a party in order to establish bias. Anderson makes no such showing here. Additionally, the 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. Therefore, the Comptroller finds that Anderson fails to meet the high burden of persuasion required to make a showing of actual bias or the appearance of bias.

XI. EXCEPTIONS REGARDING THE RECOMMENDED DECISION

A. The RD Generally Complies with the APA and Any Alleged Deficiencies Are Cured by This Final Decision

Anderson asserts that the RD violates the APA for several reasons. *See generally* CRA Br. at 304-420. For the reasons set forth below, the Comptroller rejects these exceptions.

Anderson asserts that the RD generally fails to explain the ALJ's reasoning. CRA Br. at 329-38. She further asserts that the ALJ mischaracterizes her testimony in inexplicable ways, thus failing to offer a reasoned explanation for the RD's findings. *Id*. at 385-95. More specifically, Anderson asserts that large parts of the ALJ's testimony summary were unclear and provided no purpose, that the RD unjustifiably criticized Anderson for failing to supply contemporaneous documentary evidence during testimony, and that the RD unjustifiably discounted Anderson's testimony due to "leading questioning." *Id*.

Agency decisions under the APA must "include a statement of . . . findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 5 U.S.C. § 557(c)(3)(A). Such administrative decisions must be "based on substantial evidence and reasoned findings." *Balt. & O. R. Co. v. Aberdeen & Rockfish R.*

Co., 393 U.S. 87, 92 (1968). An agency is required to adequately explain its reasoning and fails to do so where it merely "list[s] the facts and state[s] its conclusions, but d[oes] not connect them in any rational way." *Dickson v. Sec'y of Def.*, 68 F.3d 1396, 1407 (D.C. Cir. 1995). Still, even agency decisions of "less than ideal clarity" will be upheld "if the agency's path may reasonably be discerned." *Id*. at 1404 (citations omitted).

The Comptroller recognizes that the RD is not a model of clarity; some of Anderson's arguments concerning the RD's deficiencies are valid. However, the Comptroller, as the ultimate decider of issues of fact and law under the APA, has the power to review the record *de novo* and cure any relevant factual or legal deficiencies in the RD. The Comptroller has done so in this Final Decision.

As explained in detail throughout this decision, the Comptroller's review has found that preponderant evidence supports the findings that Anderson engaged in *misconduct*, that the misconduct had the requisite *effect*, and that she possessed the requisite *culpability* so as to uphold a prohibition order against her. 12 U.S.C. § 1818(e). Further, the Comptroller has determined that preponderant evidence in the record supports the findings that Anderson recklessly engaged in *misconduct*, and that her reckless misconduct had requisite *effect*, so as to uphold a second-tier CMP against her. 12 U.S.C. § 1818(i)(2)(B). In this Final Decision, the Comptroller has cured any relevant factual or legal deficiencies in the RD that would have affected the outcome of the case by not relying on findings in the RD that are unsupported by substantial evidence.

The Comptroller recognizes that the RD fails in places to make clear the ALJ's actual findings and conclusions or the connection between the findings and conclusions. However, the Comptroller does not adopt the RD in its entirety, nor does the Comptroller accept all of the

ALJ's findings without exception. In reaching this Final Decision, the Comptroller has reviewed the entire record, has identified the relevant evidence and law, has relied on the evidence and law in reaching findings of fact and conclusions of law, and has presented a reasoned explanation for the imposition of prohibition and CMP orders. Moreover, any mischaracterization of Anderson's testimony in the RD, if it occurred, is not fatal to the outcome of the case because the Comptroller has reviewed Respondent's testimony in reaching this decision. Further, the Comptroller has not relied upon findings from the RD that are unsupported by the evidence. Although Anderson's arguments concerning the RD's deficiencies have some merit, these deficiencies have been cured on review and do not warrant the relief Respondent requests.

Anderson also asserts that the RD fails to address arguments made in her briefing, CRA Br. at 339-47, and ignores hearing testimony and contradictory evidence, *id*. at 347-60. Agency decisions under the APA must consider all parties' non-frivolous arguments. *See Dickson*, 68 F.3d at 1405; *Frizelle v. Slater*, 111 F.3d 172, 177 (D.C. Cir. 1997). An agency decision cannot "*entirely ignore[]* relevant evidence," *Morall v. DEA*, 412 F.3d 165, 178 (D.C. Cir. 2005) (emphasis in original), nor can it depend "merely on the basis of evidence which in and of itself justified it, without taking into account contradictory evidence." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487-88 (1951) (holding that the "substantiality of evidence must take into account whatever in the record fairly detracts from its weight"). An agency decision also cannot "provide[] virtually no explanation for [its] acceptance of some opinions and [its] rejection of others." *Barren Creek Coal v. Witmer*, 111 F.3d 352, 355 (3d Cir. 1997). Mere conclusory statements that do not provide a reasoned explanation will not suffice. *See Dickson*, 68 F.3d at 1407; *Amerijet Intern., Inc. v. Pistole*, 753 F.3d 1343, 1350 (D.C. Cir. 2014).

While the RD does fail to fully address some arguments Anderson made in her briefing, the Comptroller has identified, considered, and analyzed all such relevant arguments in reaching this Final Decision. The Comptroller also recognizes that the RD fails in places to cite or analyze relevant evidence procured at the hearing, including testimony and exhibits entered into evidence. However, the Comptroller has again identified, considered, and analyzed the relevant evidence in reaching this Final Decision, weighing its importance and ascribing it to the conclusions stated. For example, Anderson asserts that the RD fails to address her arguments challenging the credibility of NBE testimony and the ALJ's appointment under the Appointments Clause of the U.S. Constitution. CRA Br. at 340-41. The Comptroller addresses both of these issues in this Final Decision. *See supra* Parts VIII, X, *infra* Part XI.E. A comparable analysis has been conducted for all relevant factual and legal issues, fully addressing any deficiencies that may exist in the RD.

B. The Executive Summary Is Not Unlawful

Anderson argues that the ALJ's "Executive Summary," which was issued contemporaneously with the RD, is unlawful because neither the APA nor the OCC's Uniform Rules authorize the ALJ to issue an executive summary, CRA Br. at 326, and because the summary contains findings and conclusions not found in the RD, *id.* at 326-27. As explained below, the Comptroller rejects this exception.

Aside from this conclusory assertion and a bare citation to relevant parts of the APA and the OCC's Uniform Rules, Anderson provides no legal support that it is *unlawful* for an ALJ to issue and transmit an executive summary to the Comptroller. The OCC's rules provide only that the transmitted record "must include" the ALJ's recommended decision—not that it *cannot include* a summary. The APA likewise contains no provision barring the transmission of a summary. The Comptroller rejects the unsupported notion that the APA and the Uniform Rules

exert such unnecessary control over the form of the ALJ's transmitted recommendation to the Comptroller. Most importantly, as detailed several times throughout this opinion, it is the Comptroller's final decision—not the ALJ's recommendation—that forms the final agency action in this case. To the extent the ALJ erred in his executive summary by insufficiently explaining or supporting his findings, the Comptroller cures such errors in this decision. *See supra* Part XI.A.

C. The RD's Reliance on Unadmitted or Excluded Evidence Does Not Prejudice Anderson

Anderson asserts that the ALJ erred because he relied on unadmitted or previously excluded evidence in the RD or relied on admitted evidence that should have been excluded. CRA Br. at 360-63. For the reasons set forth below, the Comptroller rejects this exception.

The Comptroller has already addressed Anderson's arguments concerning evidence she believes should have been excluded from evidence in Part X.B. The same reasoning applies to the use of that evidence in the RD. As noted previously, the ALJ has broad discretion under the Uniform Rules to rule on evidentiary matters, and the Comptroller has determined that he did not abuse that discretion. *See supra* Parts IX-X. And to the extent that the ALJ relied on any evidence that should have been excluded in the RD, the Comptroller has not relied on such evidence in the final decision. *See id.*

Anderson's argument regarding reliance on unadmitted or previously excluded evidence is based on a misunderstanding of the OCC's procedures and on a misreading of the ALJ's August 2, 2021 Supplemental Order Regarding Order Determining the Merits of EC's Motions for Summary Disposition ("August 2 Order"). Anderson excepts to dozens of findings in the RD on the basis that the ALJ relied on evidence unadmitted or excluded at hearing. But the vast

majority of those instances involved citations to summary disposition exhibits.[85] As the ALJ explained in his August 2 Order, the documents presented in support of summary disposition are part of the record for the Comptroller on review. August 2 Order at 4. They did not need to be separately admitted at the hearing for them to be part of the record. Because the Comptroller's final decision encompasses a review of all aspects of the proceeding—including summary disposition and exhibits relied on therein—the Comptroller may rely on exhibits and findings from both summary disposition as well as the hearing. *See also supra* Part IX.B. To the extent the RD errs by relying on unadmitted evidence that otherwise should not be part of the record, the Comptroller's decision cures those errors for the reasons explained in Part XI.A.

D. The RD's Reliance on Summary Disposition Findings Does Not Amount to Uncurable Error

In her exceptions, Anderson argues that the ALJ repeatedly committed two errors with respect to summary disposition findings in the RD. CRA Br. at 402-05. First, she argues that the RD relies only on summary disposition evidence in deciding claims that the ALJ previously found disputed at summary disposition. Second, she argues that the ALJ included several summary disposition findings made exclusively against McLinko and Julian that were never alleged against Anderson.

The Comptroller acknowledges that these exceptions have some merit, but they have been cured by the Comptroller's review. The Comptroller reviewed the entire record, including all findings at both the summary disposition stage and in the RD, and this final decision is based

[85] *See, e.g.*, Anderson's exceptions to the RD's Findings of Fact ("FOF") ¶¶ 6, 8, 9, 13, 17, 37, 39-41, 44-47, 52, 61-62, 68-71, 73-74, 78, 83, 86, 88, 91, 93-98, 102-03, 107-12, 116, 121-22, 125-28, 131-39, 142-43, 149, 183, 224, 226, 233, 235-36, 240-41, 246-54, 276-77. CRA Exceptions (throughout).

on those parts of the record that the Comptroller has determined can be properly upheld at each stage of the case. *See supra* Parts IX.B, XI.A.

For example, Anderson identifies SD Order SOMF 314 as an example of a fact that the ALJ found controverted at summary disposition but resolved against Anderson at the hearing without citing to new evidence. CRA Br. at 402 (citing SD Order SOMF 314); RD at 383. The proposed SD finding stated, "Each year, nearly half of all Ethics Line cases related to employee sales integrity violations." SD Order SOMF 314. In the RD, the ALJ found that sales integrity issues comprised "more than half" of EthicsLine cases. RD at 383. While it is true that the ALJ cited only to SD evidence to support this finding in the RD, it is also true that there was sufficient evidence adduced at the hearing to support a finding that roughly half of EthicsLine cases were related to sales integrity. For instance, MSD-135, which shows that 47% of EthicsLine cases in Q1 2016 involved sales incentive program violations, was ultimately admitted at the hearing (in substantially the same form) as OCC Exh. 1265. Moreover, additional hearing exhibits and hearing testimony support the RD's finding. *See, e.g.*, R. Exh. 7214 at *5 (showing that more than half of EthicsLine allegations were related to sales quality); Hr'g Tr. at 2040:12-14 (Candy) ("over half of the [EthicsLine] complaints were with regard to sales practice misconduct in the Community Bank"). Because the evidence adduced at the hearing supports the finding that roughly half of EthicsLine cases were related to sales integrity, the Comptroller has included this finding in his discussion of SPM controls. *See supra* Part VI.B.3.

In addition, characterization of a fact as "disputed" at summary disposition does not preclude the entry of a finding of that fact in the final disposition of the case, even if the evidence at the hearing is substantially the same as—or even identical to—the evidence at summary disposition. The burden of proof in the final disposition of the case is substantially lower than

that at summary disposition, so it certainly follows that some factual findings would meet the former burden but not the latter. *See Adams*, 2014 WL 8735096, at *7 (specifying "preponderance of the evidence" burden for final disposition); 12 C.F.R. § 19.29(a) (specifying "no genuine issue as to any material fact" burden for summary disposition).

The Comptroller's review of the record also cures any alleged defects relating to summary disposition findings alleged against McLinko and Julian, rather than Anderson. Most of these findings concern evidence and testimony relevant to the other two Respondents and are unnecessary to support the penalties against Anderson; the Comptroller has therefore not relied on these findings in his final decision. However, upon review the Comptroller has determined that some of the offending findings *were* found against Anderson, either in the first instance or in substantially identical form, undercutting any argument that Anderson had "neither notice nor an opportunity to be heard" with regard to those findings.[86] CRA Br. at 405.

E. The ALJ's Reliance on NBE Testimony and Expert Reports Did Not Prejudice Anderson

Anderson argues that the RD improperly ignores evidence of NBE knowledge and bias. CRA Br. at 363-68. This section of Anderson's exceptions brief is primarily a reiteration of her exceptions regarding determinations the ALJ made in prehearing rulings and at the hearing concerning evidence and cross-examination related to NBE bias. *See* CRA Br. at 76-91, 159-64; *supra* Parts IX.E, X.A-B. As explained above, the ALJ did not abuse his discretion by limiting Respondents' access to certain impeachment evidence, including personnel files. *See supra* Part IX.E. Moreover, evidence from all three Respondents—including testimonial evidence—

[86] *See, e.g.*, RD at 369, FOF ¶ 87 (found specifically against all three Respondents in SD Order SOMF 122); SD Order SOMF 441 (Julian and McLinko) (found in substantially the same form against Anderson at SD Order SOMF 198 (Anderson)).

regarding NBE knowledge and bias has been preserved in the record as proffers, and the Comptroller has reviewed all of that evidence *de novo*, rendering any errors the ALJ may have made in excluding or ignoring that evidence harmless. *See, e.g.*, R. Exhs. 826 (proffered), 1215 at 2-3 (proffered), 1218 at 1 (proffered), 1220 (proffered), 13741 at 1 (proffered), 15477 (proffered); Hr'g Tr. at 616:20-619:2 (Coleman) (proffered), 2160:4-2161:25 (Candy) (proffered), 2863:17-2865:2 (Crosthwaite) (proffered), 4189:19-4190:1 (Smith) (proffered). This proffered evidence, which shows merely that the OCC and its employees were trying to learn as much as they could in the years following the SPM crisis, is insufficient to support Respondents' claims of a conspiracy among OCC officials and NBEs to "shift blame away from themselves toward Ms. Russ Anderson." CRA Br. at 187.

In her exceptions, Anderson also points out several deficiencies in the NBE expert reports. She argues that the NBE expert reports are unreliable because Enforcement Counsel drafted a substantial portion of them. CRA Br. at 365, 401. She argues that the NBE expert reports offer largely "conclusory" opinions that lack evidence and proper justification. *See, e.g.*, CRA Br. at 368-69, 371. And she argues that these expert reports offer "legal conclusions," which are impermissible from expert witnesses. CRA Br. at 383.

The Comptroller partially accepts these exceptions. Four of the NBE witnesses did, in fact, admit that Enforcement Counsel drafted a substantial portion of their expert reports. *See* MSD-303A at 14:14-21 (Crosthwaite) ("My attorneys drafted my report"); MSD-301A at 26:1-12 (Smith) ("I wrote the first couple pages."); MSD-304A at 16:6-19:1 (Candy) (admitting that Enforcement Counsel wrote the first draft of her report); MSD-646A (Hudson) at 17:20-18:13 (admitting that an Enforcement Counsel attorney wrote the first draft of her report). And it is true that the expert reports largely consist of conclusory statements and conclusions of law. Recognizing that this is an inappropriate practice, the Comptroller nevertheless finds that the

ALJ did not err in admitting the reports, because these factors go to the *weight* that a decisionmaker should give to the expert reports, rather than their admissibility. As a result, the Comptroller gives little weight to the NBE reports and only cites them when they are factual, highly relevant, and material.

F. The Comptroller Does Not Give Any Witnesses Special Deference in this Case

Anderson makes two primary arguments concerning the ALJ's alleged deference to the NBE witnesses. First, she argues that the ALJ improperly deemed NBEs "experts as a matter of law" and accorded them "*Sunshine* deference" pursuant to the Eleventh Circuit case *Sunshine State Bank v. FDIC*, 783 F.2d 1580 (11th Cir. 1986). CRA Br. at 372-73.[87] Anderson further argues that, even assuming the applicability of *Sunshine*, the ALJ should not have deferred to the NBE expert reports because they were "unreliable, irrelevant, and immaterial" and because they are not otherwise covered by *Sunshine*. CRA Br. at 369, 380-85.

As explained above in Parts X.B and XI.E, the ALJ did not abuse his discretion in admitting the expert reports under the OCC's Uniform Rules. However, as explained above, there are deficiencies in the expert reports that affect how much weight they are due, and the Comptroller is attentive to those deficiencies and therefore places little weight on the expert reports. *See supra* Part XI.E. The Comptroller accordingly gives no special deference to the opinions of any witnesses, including the NBE witnesses.

G. The Comptroller Does Not Decide Whether Anderson Breached Her Fiduciary Duty

In her exceptions, Anderson argues that the ALJ applied the wrong body of law in determining whether Anderson breached her fiduciary duties. CRA Br. at 515. She argues that

[87] The parties appear to disagree over whether the RD applied such deference. In their exceptions, Enforcement Counsel argue that the ALJ should have explicitly applied *Sunshine* deference. EC Exceptions Br. at 55.

Delaware state law governs, rather than Federal common law. *Id.* She further argues that the ALJ's findings regarding breach of fiduciary duty are flawed because he did not separate his findings and analysis for breach of fiduciary duty from his findings regarding unsafe or unsound practices. *Id.* at 516-17.

As explained in Parts VI and VII above, the Comptroller has determined that Anderson committed several unsafe or unsound practices and violations of law, each of which supports a prohibition order and second-tier civil money penalty. The Comptroller declines to decide whether Anderson's conduct also resulted in breaches of her fiduciary duties to the Bank, rendering these exceptions moot.

XII. CONCLUSION

For the foregoing reasons, the Comptroller hereby assesses a prohibition order and a $10 million CMP against Anderson.

IT IS SO ORDERED.

Michael J. Hsu

Digitally signed by Michael J. Hsu
Date: 2025.01.14 07:22:32 -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:	)	
	)	
Claudia Russ Anderson	)	
Former Community Bank Group Risk Officer	)	AA-EC-2019-81
	)	
Wells Fargo Bank, N.A.	)	
Sioux Falls, South Dakota	)	

ORDER OF PROHBITION AND
ORDER FOR THE ASSESSMENT OF A CIVIL MONEY PENALTY

WHEREAS, the Office of the Comptroller of the Currency ("OCC") initiated prohibition and civil money penalty proceedings against Claudia Russ Anderson ("Respondent"), former Group Risk Officer of Wells Fargo Bank, N.A. ("Bank"), pursuant to 12 U.S.C. §§ 1818(e) 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 11, 2020, and filed an Amended Answer on August 7, 2020;

WHEREAS, pursuant to 12 U.S.C. §§ 1818(e) 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 prohibition 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 prohibition and civil money penalty actions against Respondent pursuant to 12 U.S.C. § 1818(e) and (i).

ARTICLE II

ORDER OF PROHIBITION

Pursuant to the authority vested in him by the Federal Deposit Insurance Act, as amended, 12 U.S.C. § 1818, the Comptroller hereby orders that:

(1) With respect to the institutions and agencies set forth in paragraph (2) of this Article, Respondent hereby shall not:

(a) participate in any manner in the conduct of their affairs;

(b) solicit, procure, transfer, attempt to transfer, vote, or attempt to vote any proxy, consent, or authorization with respect to any voting rights;

(c) violate any voting agreement previously approved by the "appropriate Federal banking agency," as defined in 12 U.S.C. § 1813(q); or

(d) vote for a director or serve or act as an "institution-affiliated party," as defined in 12 U.S.C. § 1813(u).

(2) The prohibitions in paragraph (1) of this Article apply to the following institutions and agencies:

(a) any insured depository institution, as defined in 12 U.S.C. § 1813(c);

(b) any institution treated as an insured bank under 12 U.S.C. §§ 1818(b)(3), (b)(4), or (b)(5);

(c) any insured credit union under the Federal Credit Union Act;

(d) any institution chartered under the Farm Credit Act of 1971;

(e) any appropriate Federal depository institution regulatory agency; and

(f) the Federal Housing Finance Agency and any Federal Home Loan Bank.

(3) The prohibitions of paragraphs (1) and (2) of this Article shall cease to apply with respect to a particular institution if Respondent obtains the prior written consent of both the OCC and the institution's "appropriate Federal financial institutions regulatory agency," as defined in 12 U.S.C. § 1818(e)(7)(D).

ARTICLE III

ORDER FOR CIVIL MONEY PENALTY

(1) Respondent shall pay a civil money penalty in the amount of ten million dollars ($10,000,000.00), 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-2019-81) 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

Digitally signed by Michael J. Hsu
Date: 2025.01.14 07:23:04 -05'00'

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MICHAEL J. HSU
ACTING COMPTROLLER OF THE CURRENCY