**PUBLIC VERSION**

**UNITED STATES OF AMERICA**
**BOARD OF GOVERNORS OF THE**
**FEDERAL RESERVE SYSTEM**

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| In the Matter of:<br><br>**JOSEPH JIAMPIETRO,**<br><br>A former institution-affiliated party of<br>Goldman, Sachs & Co.,<br>New York, New York<br><br>A Non-Bank Subsidiary of a<br>Registered Bank Holding Company | Docket Nos.:<br>16-012-E-I<br>16-012-CMP-I |

# ORDER REGARDING CROSS MOTIONS FOR SUMMARY DISPOSITION[1]

[1] This order is being issued under temporary seal for the reasons provided in notes 5 and 6 *infra*. Within fourteen days of the date of this order, and as further detailed *infra* at 56, the parties shall jointly notify the undersigned's office whether any portion of the order should remain under seal in furtherance of the public interest. If so, this version of the order will remain sealed and the undersigned will issue a redacted, public version. If not, this order will be deemed unsealed and will be posted in its entirety at https://www.ofia.gov/decisions.html in accordance with normal practice.

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The Board of Governors of the Federal Reserve System ("Board of Governors" or "Board") commenced this action against Respondent Joseph Jiampietro ("Respondent") on August 2, 2016, filing a Notice of Intent to Prohibit and Notice of Assessment ("Notice") that seeks an order of prohibition and the imposition of a second-tier civil money penalty against Respondent pursuant to 12 U.S.C. §§ 1818(e) and 1818(i). The Notice alleges that Respondent, in his capacity as a Managing Director in the Financial Institutions Group of Goldman, Sachs & Co. ("Goldman" or "GS"), engaged in actionable misconduct in connection with his "receipt, use, and dissemination of misappropriated Confidential Supervisory Information ("CSI") of the Board of Governors and other banking regulators." Notice at 1. Following the remand and reassignment of this matter in the wake of the Supreme Court's decision in *Lucia v. SEC*,[2] Enforcement Counsel for the Board of Governors ("Enforcement Counsel") and Respondent (collectively "the Parties") have now filed renewed cross-motions for summary disposition, each contending that there are no material facts in dispute that would preclude a resolution of this matter in their favor as a matter of law.[3]

Specifically, Enforcement Counsel has moved for summary disposition on its claims that Respondent "used and disclosed [CSI] . . . that he received from his investment banking subordinate, former bank examiner Rohit Bansal" in August and September 2014 ("the Relevant

[2] 138 S. Ct. 2044 (2018).

[3] The Parties have previously moved for summary disposition of this action. On June 5, 2017, the administrative law judge ("ALJ") initially assigned to this matter issued an order granting in part Enforcement Counsel's original motion for summary disposition and denying Respondent's original motion for summary disposition in its entirety. *See* June 5, 2017 Order Regarding the Parties' Motions for Summary Disposition, Order Regarding Enforcement Counsel's Motion to Close the Hearing, Order Amending Scheduling Order, and Time-Limited Order Sealing the Summary Disposition Order. After the Parties stipulated to the waiver of any remaining controverted factual issues, this Order formed the basis of the ALJ's Recommended Decision to the Board of Governors. *See* October 17, 2017 Order Vacating Administrative Hearing; November 30, 2017 Recommended Findings of Fact and Conclusions of Law, Analysis, Recommended Decision, and Proposed Orders. On September 11, 2018, the Board ordered that this Recommended Decision be vacated as a result of *Lucia* and the matter remanded to this Tribunal for readjudication. *See* September 11, 2018 Order Reassigning Case to Judge Miserendino and Remanding the Above-Captioned Case for Further Proceedings. Following her assignment to this matter in early 2020, the undersigned construed the Board's Order as likewise vacating the original ALJ's summary disposition order. *See* March 11, 2020 Order Reviewing Prior Administrative Law Judges' Pre-Hearing Actions at 12.

Period").[4] September 30, 2021 Memorandum of Points and Authorities in Support of Enforcement Counsel's Motion for Summary Disposition ("FRB Mot.") at 1; *see id.* at 15-24.[5] Respondent, in turn, contends that Enforcement Counsel has presented no evidence of his wrongdoing and that "the core of the allegations against [him]" have now been proven to be false, thus requiring dismissal of this action at this stage. October 15, 2021 Memorandum of Law in Support of Respondent's Motion for Summary Disposition ("Resp. Mot.") at 2.[6] For the reasons set forth below, the undersigned recommends the partial grant of Enforcement Counsel's motion with respect to certain aspects of the misconduct and effect elements of Sections 1818(e) and 1818(i) and otherwise finds that there remain genuine issues of material fact that preclude summary disposition for either party.

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[4] The Notice also alleges that Respondent "repeatedly obtained, used, and disseminated CSI" from client banks without proper authorization for a period of years beginning in 2012, Notice ¶ 8, and that he affirmatively directed Bansal to illicitly obtain CSI from a former colleague for Respondent's own use, *see id.* ¶¶ 14-16, but neither of these allegations form a basis for actionable misconduct on which the agency expressly seeks summary disposition in its instant motion. Enforcement Counsel represents that it does not seek summary disposition on the allegation that Respondent requested that Bansal obtain CSI because that allegation is based on testimonial evidence that is in dispute. *See* November 5, 2021 Opposition to Respondent's Motion for Summary Disposition ("FRB Opp.") at 2 n.5. Further, while Enforcement Counsel adverts in its motion to instances unrelated to Bansal of Respondent receiving and disseminating CSI, such behavior appears to be offered largely as evidence of Respondent's asserted willful and continuing disregard for Goldman's safety and soundness rather than as standalone misconduct for which the summary entry of a prohibition order and assessment of a civil money penalty is sought or warranted. *See* FRB Mot. at 26-28, 57-58; *see also id.* at 1 (stating that elements for prohibition order and civil money penalty are satisfied with respect to Respondent's Bansal-related misconduct), 33-48 (centering arguments regarding Respondent's misconduct on agency's Bansal-related claims). To the extent that Enforcement Counsel seeks summary disposition in its favor on instances of allegedly improper use and disclosure of CSI by Respondent that is not related to Bansal, the undersigned finds that Enforcement Counsel has not demonstrated that it is entitled to such relief at this time.

[5] Enforcement Counsel's Motion, its Statement of Undisputed Facts in support of that Motion ("FRB SOF"), its Opposition to Respondent's summary disposition motion ("FRB Opp."), and its Response to Respondent's statement of undisputed facts ("FRB Opp. SOF"), as well as certain supporting materials, have all been filed under seal pursuant to Enforcement Counsel's authority under 12 C.F.R. § 263.33(b) and its representation that disclosure of those documents would be contrary to the public interest. *See* September 30, 2021 Notice of Filing Under Seal; November 5, 2021 Notice of Filing Under Seal.

[6] On November 5, 2021, Enforcement Counsel represented that Respondent's submissions in connection with the instant summary disposition briefing—including his Motion, his Statement of Undisputed Facts in support of that Motion ("Resp. SOF"), and his Opposition to Enforcement Counsel's summary disposition motion ("Resp. Opp.")—contain unredacted information the disclosure of which would be contrary to the public interest. *See* November 5, 2021 Joint Submission in Response to Order Regarding Motion for Leave at 1 (stating Enforcement Counsel's position that Respondent's summary disposition filings "include many references, descriptions, and quotations of sealed exhibits that effectively disclose CSI and are therefore contrary to the public interest"). Consequently, Respondent's motion, opposition, and supporting materials are hereby deemed sealed.

## I. Summary Disposition Standard

The Board's Uniform Rules of Practice and Procedure ("Uniform Rules") provide that summary disposition on a given claim is appropriate when the "undisputed pleaded facts" and other evidence properly before this tribunal demonstrates that (1) "[t]here is no genuine issue as to any material fact," and (2) "[t]he moving party is entitled to a decision in its favor as a matter of law."[7] A genuine issue of material fact is one that, if the subject of dispute, "might affect the outcome of the suit under the governing law."[8] The summary disposition standard "is similar to that of the summary judgment standard under Rule 56 of the Federal Rules of Civil Procedure."[9] Thus, when determining the existence of a genuine factual dispute, all evidence must be evaluated "in the light most favorable to the non-moving party."[10] That means that this tribunal must "draw 'all justifiable inferences' in the non-moving party's favor and accept the non-moving party's evidence as true," although "mere allegations or denials" will not suffice.[11]

Any party moving for summary disposition of all or part of the proceeding must submit, along with such motion, "a statement of the material facts as to which the moving party contends there is no genuine issue."[12] A party that opposes summary disposition, moreover, must likewise "file a statement setting forth those material facts as to which he or she contends a genuine dispute exists."[13] In both cases, the enumeration of material facts "must be supported by documentary evidence [in] the form of admissions in pleadings, stipulations, depositions, transcripts, affidavits,

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[7] 12 C.F.R. § 263.29(a).

[8] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

[9] *In the Matter of William R. Blanton*, No. OCC AA-EC-2015-24, 2017 WL 4510840, at *6 (OCC July 10, 2017), *aff'd on other grounds*, *Blanton v. OCC*, 909 F.3d 1162 (D.C. Cir. 2018).

[10] *Scott v. Harris*, 550 U.S. 372, 380 (2007).

[11] *Heffernan v. Azar*, 417 F. Supp. 3d 1, 7 (D.D.C. 2019) (quoting *Anderson*, 477 U.S. at 248, 255).

[12] 12 C.F.R. § 263.29(b)(2).

[13] *Id.*

[or] any other evidentiary materials that the . . . party contends support [its] position."[14] Where, as here, the Parties have filed cross-motions for summary disposition, "the underlying facts and inferences in each party's motion" are to be considered in the light most favorable to the opposing party,[15] and summary disposition will be granted "only if one of the moving parties is entitled to judgment as a matter of law upon material facts that are not genuinely disputed."[16]

Furthermore, "in granting a motion for summary of disposition, a trier of fact is not obliged to credit the non-moving party's factual assertions when they are not supported on the record," and the Tribunal "is not required to move a case past the summary [disposition] stage when inferences drawn from the evidence and upon which the non-moving party relies are implausible."[17] If this Tribunal determines that summary disposition is merited only on certain of a party's claims, it may recommend a grant of partial summary disposition and proceed to a hearing on the remaining disputed material issues.[18]

## II. Background and Summary of Facts

The following is drawn from the Parties' pleadings, their respective statements of material fact, and the exhibits submitted in support thereof.[19] Unless otherwise stated, the facts relayed

[14] *Id.*

[15] *Schaerr v. Dep't of Justice*, 435 F. Supp. 3d 99, 107 (D.D.C. 2020).

[16] *Heffernan*, 417 F. Supp. 3d at 7 (internal quotation marks and citation omitted).

[17] *Blanton*, 2017 WL 4510840, at *6.

[18] *See* 12 C.F.R. § 263.30.

[19] Exhibits submitted by Enforcement Counsel in support of its Motion and in opposition to Respondents' Motion are styled "FRB-MSD" and "FRB-BIO," respectively. With the exception of a two-page declaration from a corporate representative of Goldman, *see* October 7, 2021 Declaration of Eileen M. Fields ("Fields Decl."), Respondent exclusively references exhibits submitted in 2017 during the previous summary disposition briefing, which are here styled "R-MSD." *See* Resp. Mot. at 2 n.1. Enforcement Counsel objects to Respondent's use of the Fields Declaration on the grounds that (1) "the Declaration was submitted after the close of Discovery and is therefore outside the evidentiary record that Respondent may rely on for purposes of summary disposition" and (2) "the declarant does not claim to have any personal knowledge of the events at issue[,] . . . instead stat[ing] that her representations are based upon her 'review of certain documents,' none of which are cited as exhibits." FRB Opp. SOF at 1. While Respondent is entitled to submit affidavits such as this one in connection with his summary disposition motion, *see* 12 C.F.R. § 263.29(b)(2), the undersigned agrees that the Fields Declaration is of limited probative value given its conclusory assertions without citation to the record or any representation of personal knowledge on the part of the declarant, and she will accord it scant evidentiary weight as a result.

below are not materially disputed. Where the Parties appear to be in some genuine factual dispute, both accounts are noted as well as the evidence that each side has marshaled in support. The undersigned will then address where appropriate in this Order the extent to which these disputes implicate facts that are material to the resolution of some aspect of the instant action.

**Restrictions on the Use and Disclosure of CSI**

The Board's regulations during the Relevant Period define CSI as encompassing, *inter alia*, "information consisting of reports of examination, inspection and visitation, confidential operating and condition reports, and any information derived from, related to, or contained in such reports," and "[a]ny documents prepared by, on behalf of, or for the use of the Board, a Federal Reserve Bank, a federal or state financial institutions supervisory agency, or a bank or bank holding company or other supervised financial institution."[20] The Board of Governors and the Federal Reserve Bank of New York ("Reserve Bank") have made it clear that this definition includes internal examiner work papers, "whether or not [those] work papers have been shared with a financial institution," as well as all information regarding a supervised financial institution's supervisory ratings, such as its CAMELS rating[21]—a confidential composite assessment of the "overall condition and performance" of a financial institution using six separate components:

[20] 12 C.F.R. § 261.2(c)(1), *Definitions*, 78 Fed. Reg. 71441 (Nov. 29, 2013) (operative version until July 24, 2020), *available at* govinfo.gov/content/pkg/CFR-2014-title12-vol4/pdf/CFR-2014-title12-vol4-part261.pdf. However, such CSI "does not include documents prepared by a supervised financial institution for its own business purposes and that are in its possession." *Id.* § 261.2(c)(2).

[21] FRB-MSD-112, Federal Reserve Bank of New York Circular No. 11002 ("Circular No. 11002"), *Improper Disclosure of Confidential Supervisory Information by Financial Institutions* (Dec. 5, 1997), available at https://www.newyorkfed.org/banking/circulars/11002.html; *see also* FRB-MSD-100, Board of Governors of the Federal Reserve System, Supervisory Letter 05-4 ("SR 05-4"), *Interagency Advisory on the Confidentiality of the Supervisory Rating and Other Nonpublic Supervisory Information* (Feb. 28, 2005), available at https://www.federalreserve.gov/boarddocs/srletters/2005/SR0504a1.pdf.

**C**apital adequacy, **A**sset quality, **M**anagement administration, **E**arnings, **L**iquidity, and **S**ensitivity to market risk.[22]

It is beyond dispute that information that qualifies as CSI is the property of the supervisory agency in question—here, the Board of Governors—and cannot be used or disclosed without that agency's authorization. Indeed, the Board has promulgated regulations stating this repeatedly in no uncertain terms. As operative at the time, Sections 20 and 21 of the Board's Rules Regarding Availability of Information govern the circumstances under which (1) supervised financial institutions and financial institution supervisory agencies and (2) law enforcement agencies and other nonfinancial institution supervisory agencies, respectively, may use or disclose CSI that has been made available to them by the Board of Governors or the appropriate Federal Reserve Bank.[23] Section 22 of the regulations, entitled "Other disclosure of confidential supervisory information," governs all other circumstances in which CSI may or may not be disclosed, and states broadly (in a concluding subsection denoted "Other disclosure prohibited") that "[a]ll confidential supervisory information made available under this section shall remain the property of the Board. ***Any person in possession of such information shall not use or disclose such information for any purpose***

[22] Federal Reserve Bank of New York Circular No. 10905, *Revision of CAMEL Rating System Effective January 1, 1997* (Jan. 3, 1997), available at https://www.newyorkfed.org/banking/circulars/10905.html. *See also* FRB-MSD-100 (SR 05-4) (stating that "[a]s part of the examination process, the [banking] agencies assign a confidential supervisory rating, called a CAMELS rating, to each depository institution they regulate").

[23] 12 C.F.R. §§ 261.20, 261.21, 78 Fed. Reg. 71441 (Nov. 29, 2013) (operative version until July 24, 2020), *available at* govinfo.gov/content/pkg/CFR-2014-title12-vol4/pdf/CFR-2014-title12-vol4-part261.pdf. For example, Section 20 provides that a supervised financial institution may only share CSI that has been made available to it with its parent holding company, the directors, officers, and employees of the institution and its holding company, and (with certain restrictions) its certified public accountants and external legal counsel. *See id.* § 261.20(b). The institution's certified public accountants and legal counsel, in turn, may only review the CSI on bank premises, may not make or retain copies of the information, and may not disclose the CSI "for any purpose without the prior written approval of the Board's General Counsel except as necessary to provide advice to the supervised financial institution, its parent bank holding company," and their constituent personnel. *Id.*

other than that authorized by the General Counsel of the Board without his or her prior written approval."[24]

The Board and the Reserve Bank have also emphasized the restriction on the unauthorized use or disclosure of CSI in public issuances directed at supervised institutions, and the undersigned credits the opinion of Enforcement Counsel's expert that these issuances help provide individuals and institutions within the banking industry with "ample notice of the restrictions regarding CSI."[25] The Reserve Bank, for instance, issued a circular to all institutions under its supervision warning those institutions that any CSI in their possession "may be used only as the Board of Governors permits" and that unauthorized "[d]isclosure of [CSI] constitutes a violation of the Board of Governors' regulations [that] could lead to formal supervisory action, including the imposition of substantial civil money penalties."[26]

Likewise, in an Interagency Advisory on the Confidentiality of the Supervisory Rating and Other Nonpublic Supervisory Information, the Board and other federal banking agencies reminded supervised institutions of the confidential and nonpublic nature of CAMELS ratings and other examination-related information, noting that "***[a]ny person who discloses or uses nonpublic information*** except as expressly permitted by one of the appropriate federal banking agencies or as provided by the agency's regulations may be subject to [] criminal penalties."[27] There should consequently be no doubt that an individual in possession of a banking agency's internal

[24] *Id.* § 261.22(e) (emphasis added). Respondent argues that this prohibition against unauthorized use or disclosure of CSI applies only to information that has been made available by the supervisory agency through the process outlined earlier in the section, and that individuals who have obtained the agency's CSI in some other fashion—by finding it carelessly left in a Starbucks or on the Metro seat next to them during their morning commute, say—are free to use that information however they please. *See* Resp. Opp. at 49-50. As discussed further *infra* at 27-30, the undersigned disagrees with Respondent's interpretation.

[25] FRB-MSD-19 (Expert Report of Kevin Bertsch) ("Bertsch Report") at 6.

[26] FRB-MSD-119 (Circular No. 11002).

[27] FRB-MSD-100 (SR 05-4) (emphasis added).

supervisory documents or sensitive information regarding an institution's CAMELS rating would be prohibited from using or disclosing that information unless authorized to do so by regulation or by an appropriate representative of the agency itself.

Indeed, Goldman's own internal policies warn employees to "[e]rr on the side of caution" when considering whether to disseminate confidential information, as "[r]egulatory sensitivity to the improper use of material nonpublic information is high, and penalties and reputational damage can be significant."[28] The firm's policies regarding the safeguarding of confidential information, although assertedly inadequate,[29] nevertheless make it clear that the "[m]isuse and misappropriation of confidential information can violate contractual obligations, laws, rules, or regulations in various jurisdictions in which the firm does business and give rise to both civil liabilities and criminal penalties for the firm and for individual employees."[30]

**Respondent's Background and Responsibilities**

Respondent graduated from Columbia Law School in 1992. *See* FRB SOF ¶ 12. After over a decade of experience in financial law, investment banking, and advising financial institutions, Respondent joined the Federal Deposit Insurance Corporation ("FDIC") in 2009 as a senior advisor to the Chairman. *See id.* ¶¶ 12-14. As part of his work resolving failed financial institutions, Respondent was familiar with CAMELS ratings and understood that they "affected an institution's ability to conduct a merger or acquisition." *Id.* ¶ 15. Respondent knew that public disclosure of CAMELS ratings could lead to criminal sanctions, and he was also "aware that the information that he received at the FDIC was confidential and [that] its disclosure could cause harm to the institutions that the FDIC regulated." *Id.* ¶ 16.

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[28] FRB-MSD-75 (April 9, 2013 Policies Regarding the Safeguarding of Confidential Information) at 5 n.9.

[29] *See* Resp. Opp. at 20 (observing that during the Relevant Period, "there was no GS policy on recognizing and handling CSI" as distinct from other categories of confidential information).

[30] FRB-MSD-75 at 2.

In February 2011, Respondent joined Goldman as a Managing Director in the firm's Financial Institutions Group ("FIG"). *See id.* ¶ 17; Answer ¶ 6. While there, Respondent "developed a regulatory practice advising banking organizations on stress testing and other regulatory matters." FRB SOF ¶ 17. In addition, "Respondent was Goldman's lead banker for a number of depository institution and bank holding company clients," and as such "was responsible for maintaining relationships with senior management, identifying merger and acquisition ("M&A") and capital markets opportunities, and staying abreast of the financial condition of the bank, in addition to providing stress testing advisory services." *Id.* ¶ 20.

**Respondent's Prior Use of CSI**

As part of Respondent's regulatory practice at Goldman, he "reviewed and . . . signed client engagement letters acknowledging that Respondent and Goldman were prohibited from receiving CSI from its clients without prior regulatory authorization."[31] *Id.* ¶ 22. Notwithstanding this acknowledgment, Enforcement Counsel has identified numerous instances prior to the Relevant Period in which Respondent received and used CSI from client banks without any indication that the client had received the proper authorization, something that Respondent does not dispute.[32] *See id.* ¶¶ 82-95; *see also* FRB Mot., Appendix. Rather, Respondent contends that he did not know the documents contained unauthorized CSI and that the practice of receiving such information from client banks was widespread and routine within FIG.[33]

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[31] *See* FRB-MSD-4 (May 23, 2012 engagement letter signed by Respondent) (stating that "we are mindful of the prohibition on our receiving from you confidential supervisory information in the absence of regulatory permission for you to share such information with us"). Respondent contends that there is no evidence that he played any part in devising this language, but he does not dispute that he reviewed and signed the letters in question. *See* Resp. Mot. at 4; FRB Opp. SOF at 4.

[32] *See* Answer ¶ 8 (admitting that Respondent "obtained, used, and disseminated within FIG confidential information regarding client banks so that he could properly advise them"); FRB-MSD-1 (Deposition of Joseph Jiampietro) ("Jiampietro Dep.") at 194:4-6 ("I was getting all sorts of information that I now know was CSI."), 219:14-18 (stating that he could not recall any client having received authorization to share its CSI with Goldman).

[33] *See* FRB-MSD-1 (Jiampietro Dep.) at 218:7-9 ("We were never educated within the investment bank as to what confidential supervisory information is."), 219:21 ("I was never trained on CSI."); Answer ¶ 8 (averring that

**Respondent's 2013 Performance Evaluation**

Enforcement Counsel highlights two aspects of Respondent's 2013 annual performance review that it asserts are relevant to the arguments in its instant motion. First, Enforcement Counsel contends without dispute that Respondent was instructed at his review "to focus on more lucrative 'revenue-making opportunities' with his clients, like M&A transactions." FRB SOF ¶ 24 (quoting FRB-MSD-1 (Jiampietro Dep.) at 76:14-77:1). In addition, Enforcement Counsel avers that Respondent's review "cautioned him to take more care in the treatment of confidential information." *Id.* ¶ 25. Specifically, the review stated that Respondent "will come into contact with very sensitive information" due to the nature of his regulatory work, and warned that he "needs to protect the confidential nature of this at all times – ***be careful not to email around regulatory orders or similar feedback***." *Id.* (quoting FRB-MSD-3) (emphasis added).

Respondent also adduces facts suggesting that he was faulted during that year for not always reviewing client materials that he had committed to review. *See* Resp. Opp. at 11-12. One individual providing feedback for Respondent in 2013, for example, stated that "[i]t seems that he rarely looks at deliverables in a timely manner, and that when reviewing with the client, it's also the first time [Respondent] has seen the materials." *Id.* at 12 (quoting FRB-MSD-3).

**Summary of Allegations**

The allegations that are the subject of the instant briefing primarily concern Respondent's handling of materials containing non-public agency CSI that he received from his subordinate Bansal over the course of August and September 2014. For organizational ease, these materials are categorized as follows: (1) documents emailed to Respondent by Bansal and another Goldman

Respondent's "peers within FIG" also received and used CSI from client banks); Resp. Opp. at 4 (contending that "scores of individuals within GS received csi [sic] from clients for the explicit purpose of providing Investment Banking advice"), 13 (table of several dozen "GS employees corresponding about 'unauthorized' csi that was received and/or distributed within GS").

associate on August 18, 2014 and August 19, 2014 in connection with, and in preparation for, client presentations on regulatory issues, *see* FRB SOF ¶¶ 45-62; (2) information regarding a bank's CAMELS rating relayed by email and telephone from Bansal to Respondent on September 23, 2014, *see id.* ¶¶ 63-74; and (3) assorted hard copy documents located in Respondent's office and provided to him by Bansal during Bansal's employment, *see id.* ¶¶ 75-76.

**Bansal's Hiring**

Respondent and Bansal first became acquainted when Bansal applied for a position with Goldman in April 2014. *See id.* ¶ 29; Answer ¶ 12. It is undisputed that the two formed an amicable relationship during the course of the hiring process and communicated frequently, *see* FRB SOF ¶¶ 32-33; Resp. Opp. at 21, with Bansal ultimately thanking Respondent for his "support and guidance" upon receiving an employment offer from Goldman, FRB SOF ¶ 34. Bansal was a former bank examiner for the Reserve Bank,[34] and Respondent believed that he offered valuable regulatory insight and expertise that would assist client banks in their M&A applications. *See* FRB SOF ¶¶ 29-30. During his time at the Reserve Bank, Bansal had served as lead examiner for a bank (termed "Bank A" in the Notice) that was "a key client of Respondent and one he was advising regarding a potential merger." *Id.* ¶ 29. Respondent also was aware that, as lead examiner for Bank A, "Bansal had led a targeted examination of [that bank] regarding enterprise-wide risk management ("ERM") based on a draft policy document within the Federal Reserve System ("ERM Framework")." *Id.* ¶ 31.

[34] The Parties disagree as to whether Bansal resigned from his position at the Reserve Bank or was terminated for poor performance, although there is credible evidence that Bansal had a history of misconduct and dishonesty as an examiner that by all accounts was not known to Respondent or Goldman at the time of his hiring. *See* Resp. Mot. at 8-11; FRB Opp. SOF at 5-6. The undersigned finds that resolution of this question is not material to the disposition of the instant motions.

Bansal began his employment with Goldman on July 21, 2014. *See id.* ¶ 35; Answer ¶ 12. As part of his release from the Reserve Bank, Bansal signed a Post-Employment Restriction Form that prohibited him "from knowingly accepting compensation as an employee, officer, director, or consultant" for Bank A or its holding company for a period of one year, given his past status as Bank A's Senior Supervisory Officer. Resp. Opp. at 22 (quoting R-MSD-12). Respondent represents, and Enforcement Counsel does not dispute, that Goldman's external counsel interpreted this restriction as applying only to direct, client-facing interaction with Bank A, concluding that Respondent "was permitted to work on [Bank A] matters internally."[35] *Id.* at 23 (quoting R-MSD-3).

Upon joining Goldman, Bansal immediately began to work under Respondent in FIG. *See* FRB SOF ¶ 35. Although Respondent disputes that he was Bansal's "formal supervisor," Resp. Mot. at 3, there can be no doubt on the present record that Respondent exercised some manner of day-to-day supervision and managerial oversight over Bansal's work on various projects, *see* FRB Opp. SOF at 1-2. For example, Respondent asked Bansal to join an internal call involving Bank A on Bansal's first day at Goldman, *see* FRB SOF ¶ 40, and Bansal then proceeded to do work for Respondent on Bank A and several other banks, including work that ultimately gave rise to the allegations in the instant action, *see id.* ¶¶ 41-74.

[35] Enforcement Counsel itself represents that Bansal was not placed on client-facing work for Bank A because multiple Bank A executives had negative impressions of Bansal, leading Respondent "to inform them that Goldman was hiring Bansal, but that Bansal would not be on the team covering" Bank A or its holding company. FRB SOF ¶ 39; *see id.* ¶ 38. To the extent that there is any tension between this representation and Respondent's adducement of evidence that Bansal did not work directly with Bank A because he was prohibited by the Reserve Bank from receiving compensation as a consultant for Bank A for one year, the undersigned finds that it is immaterial and need not be resolved at the present stage.

***August 2014 Disclosure of CSI (Client Presentations)***

During Bansal's first month of employment, Respondent and Bansal worked together on a presentation designed to inform various client banks regarding "the key issues that banks need to be aware of as they think about submitting an M&A application." FRB SOF ¶ 45 (quoting FRB-MSD-1 (Jiampietro Dep.) at 183:12-17). One issue to be "covered in the presentation was ERM, which could affect an institution's ability to execute a merger or acquisition." *Id.* ¶ 46. In this context, Respondent testified that he was interested in the Board's internal draft ERM framework that Bansal had used in his targeted review of Bank A, "because there was no rulemaking associated with any kind of policy focused on enterprise-wide risk that [he] was aware of." *Id.* (quoting FRB-MSD-1 (Jiampietro Dep.) at 222:9-12).

On August 18, 2014, in the course of preparing the regulatory presentation for a bank termed "Bank B" in the Notice, Bansal emailed to Respondent several "documents constituting portions of the Board's confidential draft ERM Framework." *Id.* ¶ 48. In the body of the email, Bansal stated the following:

> Below is the ERM request list, work program and assessment framework we used for ERM targets. ***Again this is highly confidential as its not public and has not been issued [as] guidance yet.*** Not sure where it is anymore due to internal politics. ***I worked on this framework and guidance within the context of a system working group with the Fed system.*** We ran several pilots to test it as well.
>
> ***Please don't distribute.***

FRB-MSD-37 at 1 (emphases added). In response, Respondent stated, "I won't. Will review on plane tomorrow to DC." FRB-MSD-38 at 1.

It is undisputed that "[t]he draft ERM Framework sent by Bansal to Respondent on August 18, 2014 contains CSI and consists of confidential documents developed by the Board for the examination of supervised institutions under a pilot program." FRB SOF ¶ 49. While Respondent

contends that "[h]e never even opened the attachments" to this email, Resp. Opp. at 51 n.174, the undersigned finds that there is substantial evidence that Respondent at least read the email itself, given his response to Bansal. The email alone, moreover, gives sufficient indicia that the attached documents were non-public and contained "highly confidential" internal agency information of Bansal's former employer.[36] *See* FRB SOF ¶ 48. Furthermore, Respondent—as a sophisticated and experienced financial professional adept at regulatory banking issues[37]—knew or should have known that neither he nor Bansal was authorized to use or disclose such confidential internal information.[38] Yet Respondent "did not inquire how Bansal [had] obtained the ERM Framework or report Bansal's conduct to supervisors or compliance personnel."[39] *Id.* ¶ 50.

On August 19, 2014, Bansal emailed Respondent another two documents in connection with the Bank B presentation, both of which Enforcement Counsel asserts (and Respondent does not dispute) also contained unauthorized CSI. *See id.* ¶¶ 52, 54; Resp. Opp. at 39-40. Bansal characterized the first document, an internal agency model risk management ("MRM") survey, as something that "all Examiner-in-Charge [sic] of institutions were instructed to complete in the Fall of 2013," stating that it gave "some perspective into what examiners are looking for initially in terms of compliance with" an applicable regulation. FRB SOF ¶ 52 (citing FRB-MSD-41 at 1). In response, Respondent stated three minutes later that the document should be used "as a guide" for

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[36] Bansal's use of the word "Again" in his email also suggests that he had already previously described the highly confidential nature of these documents to Respondent. *See* FRB-MSD-37 at 1.

[37] *See*, *e.g.*, FRB SOF ¶ 19 (describing Respondent's expertise in financial regulatory matters).

[38] If Respondent had opened the attachments at any point, as he claims he did not, he would likely have noticed designations of "Restricted-FR" or "Internal-FR" on each page "reflecting the documents' sensitivity," another clear indication that he had been given internal agency materials that he was not entitled to possess. FRB SOF ¶ 49; *see* FRB-MSD-19 (Bertsch Report) at 8, 10.

[39] Enforcement Counsel also asserts that Pratik Pareek, a different Goldman associate working on the Bank B presentation, emailed a document containing CSI to Respondent on August 18, 2014. *See* FRB SOF ¶ 51. Respondent contends, however, that the document sent by Pareek had been created by Goldman employees and did not contain CSI. *See* Resp. Opp. at 39, 40 n.132. The undersigned finds that there is a genuine factual dispute regarding the provenance of this document that may be addressed by the Parties at the hearing if they deem it material to the disposition of this action at that stage.

the Bank B presentation. *Id.* (quoting FRB-MSD-43 at 1). Respondent maintains that he never opened or read the email or the attachment and that he responded solely on the basis of the email subject header, which was "Fed MRM Fall 2013 Survey." *See* Resp. Opp. at 39. Bansal then emailed Respondent a second internal agency document, this one concerning the results of a stress testing ("DFAST") survey conducted by the Board and the Reserve Bank. *See* FRB SOF ¶ 54. Respondent also contends that he "never responded to [this] email or opened the attachment." Resp. Opp. at 40. As discussed *infra* at 36, and in contrast to the draft ERM framework, the undersigned finds that the question of whether Respondent opened or read the attachments containing the MRM survey or DFAST survey is a genuine issue of disputed fact.

The August 21, 2014 in-person presentation to Bank B ultimately included CSI that had been "copied or paraphrased from" both the draft ERM framework sent to Respondent on August 18, 2014 and the MRM survey sent to Respondent on August 19, 2014.[40] *See* FRB SOF ¶¶ 53, 56. Enforcement Counsel further represents that this same CSI "appeared in at least four other client presentations for which Respondent had oversight," although at least one of those presentations took place prior to the Bank B presentation and thus prior to the disclosure of CSI to Respondent via email that Enforcement Counsel has identified. *Id.* ¶ 58; *see also id.* ¶¶ 59-62; Resp. Opp. at 37-38 (noting that one of the presentations in question occurred on August 12th). In any event, it appears undisputed that Respondent reviewed and approved the draft deck for the presentation to Bank B while it contained CSI that had been sent to him previously, albeit in partially repurposed form. *See* FRB SOF ¶¶ 55-56.

[40] There is no representation that CSI relating to the stress test survey provided to Respondent on August 19, 2014 was included in any client presentation. *See* Resp. Mot. at 26. Respondent also offers evidence that Bansal included CSI from the draft ERM framework in another, previous bank presentation with which Respondent was not directly involved, *see* Resp. Opp. at 28-34, but Respondent has not shown how this fact, even if true, is material to the question of whether Respondent engaged in actionable misconduct with respect to the allegations at issue here.

***September 2014 Disclosure of CSI (CAMELS Rating)***

In the summer of 2014, Respondent was advising Bank A—Bansal's former subject of examination—regarding "potential merger and acquisition activity which, if completed, would have caused the bank to cross the $50 billion asset threshold" and thus be deemed a "systematically important financial institution," a designation with "important regulatory implications." *Id.* ¶ 36. At the time, however, Bank A had a [redacted] score in its CAMELS management rating, something that could complicate its chances at a merger approval. *See id.* ¶ 37. As a result, Respondent and Bank A determined that the bank should wait to seek approval of a potential merger transaction until it "learned its [updated] CAMELS rating at a September 2014 meeting with regulators to discuss the results of its most recent examination." *Id.* Respondent also discussed Bank A's CAMELS rating with Bansal, who predicted that the bank's "only chance" to improve its management rating was to meet with regulators in advance of the September 2014 meeting to "display and discuss all the improvements and corrections they have made during the last examination cycle." *Id.* ¶ 64. Respondent conveyed this advice to Bank A's Chief Financial Officer ("CFO"), who did not take it. *See id.* ¶ 65.

On September 23, 2014, following dinner with some former Reserve Bank colleagues, Bansal emailed Respondent to tell him that he had learned that "the exit meeting is tomorrow and looks like no upgrade to "M" rating. I heard there won't be any split rating."[41] *Id.* ¶ 66; *see* Resp. Opp. at 43-44. Respondent and Bansal then "agreed to speak by cell phone," during which conversation—and according to Respondent's own testimony—Respondent "confirmed . . . with Bansal that, by conveying the "M" rating, Bansal was conveying the management component of [Bank A's] CAMELS rating." FRB SOF ¶ 68 (citing FRB-MSD-1 (Jiampietro Dep.) at 311:10-

[41] Respondent and Bansal had previously discussed the possibility that the examination would result in a split rating, with different regulators giving Bank A different "M" ratings. *See* FRB SOF ¶ 63.

11, 312:5-16). Despite knowing that CAMELS ratings were confidential and should not be disclosed, *see id.* ¶ 16, Respondent testified that he did not know, ask, or care how or from whom Bansal had obtained advance information regarding Bank A's CAMELS rating, *see id.* ¶ 72 (citing FRB-MSD-1 (Jiampietro Dep.) at 314:14-16, 317:19-20, 318:1-2).[42]

Phone records show that Respondent spoke with Bansal from 10:40 to 10:50 pm on the evening of September 23, 2014. *See id.* Within a minute of ending his call with Bansal, Respondent called the CFO of Bank A on his cell phone and spoke for over an hour. *See id.* ¶ 69; *see also* FRB-MSD-36 (phone records showing that Respondent placed a call at 10:50 pm that lasted 61 minutes). Respondent then set up and participated in a telephone call the next day, on September 24, 2014, with, among others, his direct supervisor Scott Romanoff, in which "he shared the confidential CAMELS rating he had obtained from Bansal with others from Goldman and discussed a strategy for his meeting later that day with [Bank A's CEO] to advise [Bank A] concerning the impact of the rating." FRB SOF ¶ 70; *see* Answer ¶ 20.

It is Respondent's contention that his decision to call Bank A's CFO was not prompted by the confidential information relayed by Bansal and that he did not communicate Bank A's upcoming CAMELS rating to the CFO during that call. *See* Resp. Opp. at 53 (arguing that "[Respondent] and the CFO, given the timing, were more likely to be discussing the upcoming exit meeting, which required a lengthy conversation"). Respondent also asserts without evidence that his colleagues at Goldman "all already knew" the information he conveyed on September 24th—that is, that the regulators would not be upgrading Bank A's management rating during the examination exit meeting taking place that day.[43] *Id.* at 54. As discussed further *infra* at 41-42, the

[42] *See also* FRB-MSD-1 (Jiampietro Dep.) at 317:11-13 ("If [Bansal] conveys information to me, I assume it's okay for him to convey that information.").

[43] Specifically, Respondent asserts—again, without any cites to record evidence—that the colleagues to whom Respondent disclosed this CSI "already knew the CAMELS rating and the likelihood of a change from what

undersigned does not find these assertions to be credible or supported by the factual record, even resolving all plausible inferences in Respondent's favor.

***Hard Copy Documents Containing CSI***

On September 26, 2014, Bansal "circulated a highly confidential asset ratio analysis . . . that he had obtained from the Reserve Bank" during an internal conference call, prompting an investigation into Bansal's CSI-related misconduct by Goldman's Legal and Compliance departments. FRB SOF ¶ 75. When interviewed by investigators, Respondent revealed that he was in possession of a number of hard copy documents concerning Bank A that he had received from Bansal. *See id.* These documents, which were located "in a pretty large pile on the right-hand side of [Respondent's] desk," *id.* ¶ 76 (quoting FRB-MSD-1 (Jiampietro Dep.) at 340:4-8), assertedly and undisputedly contained sensitive and non-public CSI of the Board of Governors, "including reports of examination and assessments drafted by regulators, 'first day' letters from regulators, and non-public enforcement actions." FRB Mot. at 54. Indeed, Enforcement Counsel points to Respondent's testimony that if he had looked at the documents, their sensitive nature would have been apparent. *See id*. at 54-55; FRB-MSD-1 (Jiampietro Dep.) at 346:12-13 ("[I]f I had seen this, alarm bells would have gone off in my mind."), 348:3-6 (agreeing that seeing a regulator's report of examination in the documents "would have stood out to [him] as significant"). That being said, there is no allegation that Respondent used or disclosed any CSI that may have been contained in the hard copy documents found on his desk.

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everyone believed to be lawfully obtained sources (the client and the FDIC)," and that the news that the rating would not be changed "was contemporaneously being disclosed to the Bank, who [Respondent] knew intended to update GS on the latest information following their meeting, consistent with GS' obligations to provide advice under the engagement letter." Resp. Opp. at 54 (emphasis omitted). Even taken as true, Respondent's framing of simultaneous disclosures of the newly updated CAMELS rating by Respondent to his colleagues and by the regulators to Bank A underscores that, whatever the terms of Bank A's client engagement letter, there is no apparent dispute that Respondent's colleagues first learned that the bank's CAMELS rating would not be changed, as opposed to merely possessing views on "the likelihood of a change," when Respondent disclosed that information to them.

It is unclear from the present record when or how Bansal provided Respondent with these documents. Respondent contends that Bansal "dropped off hard-copy documents in his office," but that he did not know what they were, and that he never reviewed them. Resp. Opp. at 93; *see also* FRB-MSD-1 (Jiampietro Dep.) at 339:13-18 (testifying "that at one point [Bansal] came into my office and he said, Joe, I have some documents here that you should read when you have some time. I said, Rohit, put them on my desk. I'll look at them when I have a chance. And I never looked at them."). Enforcement Counsel, on the other hand, takes Respondent's assertion "that he never so much as glanced at the documents" at face value for purposes of the instant motion, FRB Mot. at 54, but contends that even in that event, it would be undisputed that Respondent had maintained a "trove of illicit documents" on his desk without bothering to examine them or report them to his superiors, *id.* at 55. As discussed further *infra* in Part IV.A.4, the undersigned finds that the level of Respondent's knowledge of the contents of the hard copy materials on his desk is a material fact that remains in dispute at this stage.

**Aftermath**

On October 3, 2014, following the completion of its investigation, Goldman terminated both Bansal and Respondent. *See* FRB SOF ¶ 77; Answer ¶ 23. The reason given for Respondent's termination was that he "failed to properly escalate that he was in possession of confidential information, to which he should not have had access." R-MSD-11; *see* Resp. Mot. at 13. Enforcement Counsel represents without dispute that Goldman "has spent more than $7 million in legal fees and other costs" to date in connection with "multiple regulatory and law enforcement" investigations arising from the events described in the foregoing pages. FRB SOF ¶ 78.

On October 28, 2015, the New York State Department of Financial Services ("DFS") and Goldman entered into a consent order in which Goldman agreed to pay a $50 million civil money

penalty for, *inter alia*, (1) its failure "to implement and maintain sufficient policies and procedures" regarding possession and use of unauthorized CSI; (2) Bansal's "criminal theft of Department [CSI]"; (3) Respondent's "improper [receipt of] that stolen information"; and (4) the failure of Goldman management generally "to effectively supervise [Bansal] to prevent this theft from occurring." FRB-MSD-69 (DFS Consent Order) at 1-2; *see also* FRB SOF ¶ 79. In addition, the consent order required Goldman to undertake remedial measures and prohibited it "from accepting any new engagements that would require [DFS] to authorize the disclosure of [CSI] to Goldman for a three year period." FRB-MSD-69 (DFS Consent Order) at 12; *see also* FRB SOF ¶ 79. The order expressly stated that this latter restriction was justified "[i]n light of the misconduct by the Associate [Bansal] and the Managing Director [Respondent]." FRB-MSD-69 (DFS Consent Order) at 12.

On November 5, 2015, the Board of Governors prohibited Bansal from further employment in the banking industry. *See* FRB SOF ¶ 81. The Board then commenced the instant action against Respondent on August 2, 2016, seeking a similar order of prohibition against him as well as the assessment of a second-tier civil money penalty of $337,500. *See* Notice ¶¶ 33, 40.

## III. Elements of Sections 1818(e) and 1818(i)

Any evaluation of the Parties' cross-motions for summary disposition must begin with the statutory elements that undergird the Board's claims. The Board brings this action against Respondent as an institution-affiliated party ("IAP") of a supervised financial institution for a prohibition order under 12 U.S.C. § 1818(e) and a second-tier civil money penalty under 12 U.S.C. § 1818(i).[44] *See* Notice ¶¶ 2, 48-50. To merit a prohibition order against an IAP under Section

[44] The previous ALJ in this matter found that Respondent is an IAP as that term is defined in 12 U.S.C. § 1818(u), and the undersigned adopted that conclusion on March 11, 2020. *See* Order Reviewing Prior Administrative Law Judges' Pre-Hearing Actions at 3.

1818(e), an agency must prove the separate elements of misconduct, effect, and culpability. The misconduct element may be satisfied, among other ways, by a showing that the IAP has (1) "directly or indirectly violated any law or regulation [or] any cease-and-desist order which has become final," (2) "engaged or participated in any unsafe or unsound practice in connection with any insured depository institution or business institution," or (3) "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). The effect element may be satisfied, in turn, by showing either that the institution at issue thereby "has suffered or probably will 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." *Id.* § 1818(e)(1)(B). And the culpability element may be satisfied that the alleged violation, practice, or breach either "involves personal dishonesty" by the IAP or "demonstrates willful or continuing disregard by such party for the safety or soundness of such insured depository institution." *Id.* § 1818(e)(1)(C).

The assessment of civil money penalties under Section 1818(i) also contains an "effect" element of a sort, at least with respect to the criteria necessary for the imposition of the second-tier penalty sought by the Board.[45] The statute authorizes different levels of money penalties contingent on an increasingly stringent showing by the agency regarding the nature and consequences of the alleged misconduct. The lowest level, a first-tier penalty, may be assessed solely upon a showing of misconduct: specifically, that an IAP has violated some law, regulation, order, or written condition or agreement with a federal banking agency.[46] For a second-tier penalty

[45] *See* 12 U.S.C. § 1818(i)(2)(B). The assessment of a third-tier civil money penalty similarly requires a showing of "effect," but the Board does not seek such a penalty here, and it is accordingly unnecessary for the undersigned to discuss. *See id.* § 1818(i)(2)(C).

[46] *Id.* § 1818(i)(2)(A).

to be assessed, by contrast, the agency must show not only misconduct,[47] but also some external consequence or characteristic of the misconduct: (1) that it "is part of a pattern of misconduct"; (2) that it "causes or is likely to cause more than a minimal loss to such depository institution"; or (3) that it "results in pecuniary gain or other benefit to such party."[48] As with Section 1818(e), fulfillment of this prong for the assessment of a second-tier money penalty does not require satisfaction of all three conditions; a second-tier penalty may be assessed (assuming misconduct has been shown) if the misconduct is part of a pattern even if it has not caused more than a minimal loss to the institution, and so forth.

Although the misconduct prongs of both Sections 1818(e) and (i) may be satisfied by an IAP's engagement or participation in an "unsafe or unsound practice" related to the depository institution with whom he is affiliated, that phrase is nowhere defined in the Federal Deposit Insurance ("FDI") Act or its subsequent amendments. John Horne, Chairman of the Federal Home Loan Bank Board ("FHLBB") during the passage of the Financial Institutions Supervisory Act of 1966, submitted a memorandum to Congress that described such practices as encompassing "any action, or lack of action, which 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."[49] This so-called Horne Standard has long guided federal banking agencies, including the Board of Governors, in

[47] In addition to the violations described in Section 1818(i)(2)(A), a second-tier showing of misconduct can be made as to a breach of a fiduciary duty or the reckless engagement in unsafe or unsound practices while conducting the institution's affairs, *see id.* § 1818(i)(2)(B)(i), both of which the Notice also alleges against Respondent. *See* Notice ¶¶ 39-40.

[48] 12 U.S.C. § 1818(i)(2)(B)(ii).

[49] *Financial Institutions Supervisory Act of 1966: Hearings on S. 3158 Before the House Comm. on Banking and Currency*, 89th Cong., 2d Sess. 49 (1966) (statement of John H. Horne, Chairman of the FHLBB), 122 Cong. Rec. 26,474 (1966).

bringing and resolving enforcement actions.[50] It has also been recognized as "the authoritative definition of an unsafe or unsound practice" by federal appellate courts.[51] The undersigned accordingly adopts the Horne Standard, both for purposes of the instant motions and going forward in this proceeding, when evaluating allegations of unsafe or unsound practices under the relevant statutes.

Here, with respect to the misconduct element of Section 1818(e) and as applicable for Section 1818(i), the Board alleges in the Notice that Respondent (1) engaged in unsafe or unsound banking practices "by failing to take corrective action when he received unauthorized CSI . . . and instead misappropriating or using it for his own use and benefit," Notice ¶ 26, and "by failing to supervise his subordinate Bansal . . . and to prevent Bansal's use and dissemination of CSI materials and work product taken from his former employer," *id.* ¶ 27; (2) violated 12 C.F.R. § 261.22(e) by "knowingly" using or distributing CSI without authorization, *see id.* ¶¶ 28-30; and (3) breached his fiduciary duties to Goldman "[b]y allowing Bansal to continue to disseminate the CSI materials without taking any corrective measures," *id.* ¶ 31, by "requesting that Bansal obtain, use, and disseminate CSI," *id.* ¶ 32,[52] and by "failing to adequately supervise Bansal or to escalate Bansal's conduct within [Goldman]," *id.* ¶ 32.

Likewise, with respect to culpability, the Board alleges that Respondent acted with actionable personal dishonesty, recklessness, and willful and continuing disregard for the safety and soundness of Goldman. *See id.* ¶ 33, 39. And with respect to the statutory "effect" elements, the Board alleges that Respondent's conduct constituted a pattern of misconduct that "conferred

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[50] *See*, *e.g.*, *In the Matter of Patrick Adams*, No. AA-EC-11-50, 2014 WL 8735096 (Sep. 30, 2014) (OCC final decision) (discussing Horne Standard in detail).

[51] *Gulf Federal Sav. & Loan Ass'n of Jefferson Parish v. FHLBB*, 651 F.2d 259, 264 (5th Cir. 1981); *see also Patrick Adams*, 2014 WL 8735096, at **14-17 (surveying application of Horne Standard by various circuits).

[52] As noted *supra* at 4 n.4, Enforcement Counsel does not seek summary disposition on its allegations that Respondent requested that Bansal obtain and provide CSI from his former employer.

upon him a financial gain or other benefit and caused [Goldman] more than minimal financial loss or other damage."[53] *Id.* ¶ 39.

## IV. Argument and Analysis

Enforcement Counsel contends that the undisputed facts of Respondent's conduct in connection with materials containing non-public CSI that he received from Bansal via email, telephone call, and hard copy over the course of Bansal's brief employment with Goldman entitle the Board to summary disposition on each element of Section 1818(e) and Section 1818(i). *See* FRB Mot. at 33-62. In addition, Enforcement Counsel argues that Respondent's remaining affirmative defenses should all be stricken as a matter of law. *See id.* at 62-67.

For his part, Respondent asserts that he is entitled to summary disposition of all claims against him on the grounds that Enforcement Counsel does not have, and cannot adduce, evidence that he "intentionally directed Bansal to wrongfully obtain csi [sic]," which he contends "forms the foundation of the [Notice]" and "underpins all 1818(e) and (i) elements." Resp. Mot. at 17. Respondent also argues that the Notice should be dismissed because it is based on "false statements that Enforcement Counsel knows or should know to be false." *Id.* at 40.

### *A. The Undisputed Evidence Shows That Respondent Engaged in Actionable Misconduct in August and September 2014*

Enforcement Counsel asserts that Respondent's alleged conduct in August and September 2014 violated 12 CFR § 261.22(e),[54] breached Respondent's fiduciary duties to Goldman, and

[53] The Notice pleads off-handedly in the alternative that Respondent's alleged misconduct also caused or could cause prejudice to depositor interests, *see* Notice ¶ 33, but Enforcement Counsel's instant motion does not pursue this claim and it appears to be boilerplate language in any event, *see id.* at 1 (alleging only Respondent's gain and Goldman's loss as actionable effects), so the undersigned need not treat it here.

[54] Enforcement Counsel also argues in its motion for summary disposition that Respondent's actions were a violation of a separate provision governing the use and disclosure of CSI, namely 12 CFR 261.20(g). *See*, *e.g.*, FRB Mot. at 34. The undersigned agrees with Respondent that Enforcement Counsel did not plead this violation in the Notice and as a result cannot use it as a basis for an order of prohibition or assessment of a civil money penalty. *See* Resp. Opp. at 49; 12 CFR 263.18(b) (stating that the Notice "must set forth . . . [a] statement of the matters of fact or law showing that the Board is entitled to relief"); *see also* Notice ¶¶ 28-30, 40 (pleading only violations of 12 CFR

constituted actionably unsafe or unsound practices. *See* FRB Mot. at 33. As a threshold matter, Respondent challenges the legal applicability of each of these statutory triggers to Enforcement Counsel's factual allegations outright. First, Respondent argues that Section 22(e) does not place restrictions on the unauthorized use or disclosure of CSI that was misappropriated from the agency, and therefore he could not have violated it. *See* Resp. Opp. at 49-51. Second, Respondent contends that he was a mere "employee" of Goldman who did not owe that institution the same level of fiduciary duty as would an officer or director. *See id.* at 54-56. Third, Respondent posits that it is impossible for an IAP to engage in unsafe or unsound practices unless their conduct in fact threatened the institution's financial integrity, which Enforcement Counsel does not allege. *See id.* at 65. For the reasons set forth below, the undersigned rejects these arguments and further finds, based on the present factual record, undisputed evidence that Respondent engaged in misconduct with respect to the email containing the draft ERM framework in August 2014 and the disclosure of the confidential CAMELS rating in September 2014. On the other hand, disputed material facts remain as to Respondent's actions regarding the CSI contained in the other emails at issue in August 2014 and in the hard copy materials left on his desk by Bansal, and summary disposition is precluded on those claims as a result.

1. The Board's Section 22(e) Claim is Cognizable Against Respondent

Respondent argues that the Board's prohibition on the use and disclosure of unauthorized CSI in 12 CFR § 261.22(e) applies only to information that the Board has "made available" to the individual possessing it, and therefore does not apply to the allegations against Respondent here. *See* Resp. Opp. at 49 (asserting that "[S]ection 261.22(e) does not apply, since there is no allegation

261.22(e)). This is true regardless of whether Section 20(g) and Section 22(e) are "interconnected" or "substantially overlapping," as Enforcement Counsel maintains. FRB Opp. at 28 n. 106. Accordingly, the undersigned will not consider any putative violation of Section 20(g) in resolving the instant motions.

in the [Notice] that [Respondent] received the CSI from the Board") (emphasis omitted). Enforcement Counsel counters that such an interpretation "would allow for the free use and disclosure of any CSI, if it was improperly obtained in the first instance." FRB Mot. at 38. The undersigned agrees with Enforcement Counsel.

As previously noted, 12 CFR §§ 261.20 through 261.22 collectively cover circumstances in which Board CSI can be disclosed by and to outside parties. *See supra* at 7-9. Section 20 provides that the Board of Governors or the appropriate Federal Reserve Bank may make CSI available to a supervised financial institution or financial supervisory agency, but that those institutions and agencies may not further disclose the CSI except as specified or with prior written approval.[55] Section 21 says the same regarding the Board's disclosure of CSI to law enforcement agencies and nonfinancial supervisory agencies and the permissible boundaries of use of that CSI by those agencies.[56] And Section 22 addresses all *other* scenarios regarding the potential use or disclosure of Board CSI, providing (1) that the agency may choose to make CSI available upon request to entities not covered in the previous sections, and (2) that any "other disclosure" of Board CSI by any persons possessing such CSI that is not authorized by statute or by prior written approval is prohibited.[57]

Respondent chooses to interpret this latter restriction as encompassing only the use and disclosure of CSI by individuals to whom the Board has made CSI available under that section, but that interpretation of Section 22(e) is neither logically sound nor supported by the regulatory text. A comparison of the parallel provisions in Sections 20(g), 21(g), and 22(e) is illustrative. All three subsections begin the same way, noting that any and all CSI "made available under this

[55] *See* 12 C.F.R. § 261.20, 78 Fed. Reg. 71441 (Nov. 29, 2013) (operative version until July 24, 2020), *available at* govinfo.gov/content/pkg/CFR-2014-title12-vol4/pdf/CFR-2014-title12-vol4-part261.pdf.

[56] *See id.* § 261.21.

[57] *See id.* § 261.22.

section"—to supervised financial institutions, to agencies, and to other persons that have requested and been granted access to CSI through the prescribed process—"shall remain the property of the Board."[58] But the provisions then diverge.

Section 20(g) provides that "[n]o supervised financial institution, financial institution supervisory agency, person, or any other party ***to whom the information is made available***, or any other officer, director, employee, or agent thereof, may disclose such information without the prior written permission of the Board's General Counsel except in [certain] published statistical material."[59] Likewise, Section 21(g) provides that "except as otherwise provided in this regulation, no person, agency, or authority ***to whom the information is made available***, or any officer, director, or employee thereof, may disclose any such information except in [certain] published statistical material."[60] Section 22(e), by contrast, provides: "Any person ***in possession of such information*** shall not use or disclose such information for any purpose other than that authorized by the General Counsel of the Board without his or her prior written approval."[61]

In other words, Sections 20 and 21 expressly limit their restrictions on the use or disclosure of CSI to specific categories of entities "to whom [that] information [has been] made available," while Section 22 encompasses all other persons "in possession of such information" within its ambit, whether or not the information has been obtained through appropriate channels. This is a salient distinction. It is a fundamental principle of statutory and regulatory interpretation that "parallel provisions in the same statute [or regulation] utilizing different words suggest different meanings."[62] Moreover, as Enforcement Counsel observes, it would confound logic for the

[58] *See id.* §§ 261.20(g), 261.22(e); *see also id.* § 261.21(g), which says the same thing using slightly different language.
[59] *Id.* § 261.20(g) (emphasis added).
[60] *Id.* § 261.21(g) (emphasis added).
[61] *Id.* § 261.22(e) (emphasis added).
[62] *Singh v. Attorney General of the United States*, 12 F.4th 262, 273 (3rd Cir. 2021) (citing *Russello v. United States*, 464 U.S. 16, 23 (1983)); *see also*, *e.g.*, *Meritor, Inc. v. EPA*, 966 F.3d 864, 871 (D.C. Cir. 2020) ("Where an agency

Board's regulations to limit the use of CSI by persons to whom the CSI has been legitimately provided while leaving entirely unaddressed and unfettered individuals possessing CSI obtained through illicit means.[63] The undersigned therefore holds that Enforcement Counsel may make out a violation of 12 CFR § 261.22(e) if it can show that Respondent possessed Board CSI and then used or disclosed that CSI without authorization.

This Tribunal also rejects Respondent's blanket contention that only individuals who *knowingly* use or disclose CSI without the agency's authorization can violate 12 CFR § 261.22(e). *See* Resp. Opp. at 50-51. That regulation does not itself include a scienter component, and the undersigned will not impose one here.[64] *See* FRB Opp. at 31-32. Respondent is correct, however, that mere "passive receipt" of CSI does not establish a violation of this provision without additional evidence of subsequent use or disclosure. Resp. Opp. at 50. It may also be true that good faith use of information that, having passed through several pairs of hands, is not fairly recognizable as CSI would not be actionable under the regulation. But if there are some objective indicia that certain information is sensitive, nonpublic, and the property of a supervisory agency—if, for example, it is accompanied by an email stating as much, *see* FRB-MSD-37—then an individual who possesses that information, uses or discloses it, and has reason to be aware of those indicia cannot shield himself from liability by claiming lack of knowledge of the information's protected nature.

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includes particular language in one section of a regulation but omits it in another, courts generally presume that the agency acts intentionally and purposely in the disparate inclusion or exclusion.") (internal quotation marks, citation, and bracketing omitted); *accord Collins v. Yellen*, 141 S. Ct. 1761, 1782 (2021) (applying same principle to statutory interpretation).

[63] *See* FRB Opp. at 30 ("If confidential information made available by the Board continues to be protected, then information *not permitted* to be disclosed cannot reasonably be regarded to have less protection of its confidential nature.") (emphasis in original).

[64] *See* FRB Mot. at 37 ("[W]hile [Respondent's] scienter or mental state may bear on the culpability element of a prohibition order under [12 U.S.C. § 1818(e)], it is not required to find a violation of the Board's regulations.").

2. Respondent Owed Goldman Fiduciary Duties of Loyalty and Care

Respondent argues that, despite his title of Managing Director, he was not a director or officer of Goldman and thus owed only a limited fiduciary duty to that institution that falls short of the more stringent level of duty that he allegedly owed and breached. *See* Resp. Opp. at 54-56 (asserting that "[Respondent's] title 'managing director' is simply one of four titles GS gives to its employees"). This argument is unpersuasive, irrelevant, and contradicts earlier representations that Respondent has made.

To begin with, the undersigned credits Enforcement Counsel's citation to related legal proceedings in which Respondent himself has averred that he was an officer of Goldman. *See* FRB Opp. at 34 (citing exhibits). In the Chancery Court of Delaware, for example, in an effort to recoup attorney's fees incurred in connection with investigations into his alleged misconduct (including the investigation by the Board of Governors out of which the instant proceedings arose), Respondent pleaded in no uncertain terms that "as a Managing Director, [he] was an officer of Goldman Sachs during the relevant period" and thus entitled to advancement and indemnification.[65] This averment was made under penalty of perjury and sworn by Respondent to be "true and correct to the best of his knowledge, information, and belief."[66] Similarly, in defending an action brought by Goldman in the Supreme Court of New York, Respondent unequivocally proclaimed that he "was listed in each of Goldman Sachs' Annual Reports during the years he was employed there as an 'officer and director' of the company," referring to himself

[65] FRB-MSD-113 (Verified Complaint for Advancement and Mandatory Indemnification) ¶ 2; *see also id.* ¶¶ 8-9 (enumerating Respondent's many "officer duties" for Goldman and asserting that "Goldman Sachs held [Respondent] out to its shareholders as an 'Officer and Director'").

[66] *See id.* at 18 (signed verification by Respondent).

repeatedly as a "former officer" of Goldman.[67] In both instances, Respondent was represented by the same counsel who represents him in this proceeding.[68]

This Tribunal will not countenance such naked gamesmanship. Respondent cannot swear to be an officer when it benefits him and a mere employee when he contends that it does not.[69] On these grounds alone, and consistent with Respondent's sworn representation that he "believed he was accepting a position as an officer at Goldman Sachs" upon being offered the position of Managing Director,[70] the undersigned holds that Respondent owed fiduciary duties commensurate and coextensive with those of a director or officer during his time at Goldman.

Moreover, even if Respondent retained his same duties and responsibilities but was solely an employee of Goldman, that would not change this conclusion. While enforcement actions alleging breaches of fiduciary duty are most frequently directed at the directors and officers of a depository institution, the statute itself contains no such limiting language,[71] and the supervisory agencies have drawn things more broadly.[72] In its *Landry* decision, for example, the FDIC Board

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[67] FRB-MSD-114 (Respondent's Memorandum of Law in Support of Motion to Dismiss Pursuant to CPLR 3211(a)(4) and Temporary Anti-Suit Injunction Brought by Order to Show Cause) at 3; *see also id.* at 5 (referring to himself as a "former officer"), 14 (same).

[68] *See* FRB-MSD-113 at 17; FRB-MSD-114 at 1. Under Rule 7 of the Uniform Rules, each filing or submission before this Tribunal requires a signature of counsel constituting a good faith certification that, "to the best of his or her knowledge, information, and belief formed after reasonable inquiry, the filing or submission of record is well-grounded in fact." 12 CFR § 263.7(b)(1); *see also id.* § 263.94 (sanctions warranted for "[k]nowingly or recklessly giving false or misleading information . . . to any tribunal authorized to pass upon matters administered by the Board"). ***Respondent's counsel would do very well not to take this requirement lightly.***

[69] *See* FRB-MSD-114 at 5 (noting that Goldman's bylaws "mandate indemnification and advancement of legal fees to its current and former 'officers'" and asserting that Respondent had sought "indemnification and advancement under rights arising from his status as a 'former officer' [of Goldman]"), 10 (arguing that "[o]fficers and directors who are seeking advancement to defend themselves against accusations need access to fund promptly in order to adequately mount their defense on an ongoing basis").

[70] FRB-MSD-113 ¶ 8.

[71] *See* 12 U.S.C. §§ 1818(e)(1)(A) (applying breach of fiduciary duty provision to "any institution-affiliated party"), 1818(i)(2)(B)(i) (same).

[72] *Cf. Brickner v. FDIC*, 747 F.2d 1198, 1202 (8th Cir. 1984) (noting that because the relevant provisions of the FDI Act do not define fiduciary duty, the enforcement agencies should be accorded "substantial deference" in determining its scope); *see also*, *e.g.*, *In the Matter of Neil M. Bush*, No. AP 91-16, 1991 WL 540753, at *5 (Apr. 18, 1991) (OTS final decision) ("The federal government as regulator and insurer . . . may establish a regulatory and common law of fiduciary duties that does not depend on the location of the institution.").

observed that "[d]irectors, officers, and *institution-affiliated parties* of a bank owe duties of care and loyalty, which require that they exercise a high degree of vigilance and honestly and fairly deal with the bank."[73] The Comptroller of the Currency ("Comptroller") has stated that "bank directors, officers, *and employees*" are bound by fiduciary duties of care and loyalty to their institutions.[74] And the Board of Governors itself, on multiple occasions, has held that a fiduciary duty is "owed by *all bank employees* to place the interests of their institution above their own personal interests."[75] Most recently, the Board held in September 2021 that an IAP owed fiduciary duties to her affiliated institution "[b]y virtue of holding senior operational and managerial positions."[76] This is more than congruent with Respondent's position at Goldman, which in his own words was "a position of trust, authority, and command that is only bestowed upon a select number of individuals in the company."[77] For this independent reason, and in keeping with Board precedent, the undersigned finds that Respondent owed fiduciary duties to Goldman.

Specifically, Respondent owed Goldman a fiduciary duty of care, which at all times required him "to act in good faith and in a manner reasonably believed to be in the [institution's] best interest."[78] In furtherance of this duty, fiduciaries must "act diligently, prudently, honestly, and carefully in carrying out their responsibilities and must ensure their bank's compliance with

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[73] *In the Matter of Michael D. Landry and Alton B. Lewis*, No. 95-65e, 1999 WL 440608, at *15 (May 25, 1999) (FDIC final decision), *aff'd on other grounds sub nom*, *Landry v. FDIC*, 204 F.3d 1125 (D.C. Cir. 2000) (emphasis added) (internal quotation marks omitted).

[74] *In the Matter of Steven J. Ellsworth*, Nos. AA-EC-11-41 & -42, 2016 WL 11597958, at *15 (Mar. 23, 2016) (OCC final decision) (emphasis added).

[75] *In the Matter of Elena Espiritu*, No. AA-EC-98-05, 1998 WL 672688, at *3 (Sep. 8, 1998) (FRB final decision) (emphasis added); *see also*, *e.g.*, *In the Matter of Adam L. Benarroch*, No. 09-52-I-E, 2010 WL 10875986, at *3 (June 1, 2010) (FRB final decision) (holding that "[e]xposing the bank to additional risk and lowering interest rates and fees breaches a bank employee's fiduciary duty"); *In the Matter of Garfield C. Brown, Jr.*, No. AA-EC-03-11, 2003 WL 22814520, at *3 (Nov. 21, 2003) (FRB final decision) (holding that "[i]t is a breach of fiduciary duty . . . for a bank employee to give bank funds to a person the bank employee knows is not entitled to receive such funds[] . . . and to record inaccurate information on bank records," among other misconduct).

[76] *In the Matter of Mai Ly-Vu*, Nos. 19-018-E-I & -B-I, 2021 WL 5037459, at *9 (Sep. 29, 2021) (FRB final decision).

[77] FRB-MSD-113 ¶ 9.

[78] *Ellsworth*, 2016 WL 11597958, at *15.

state and federal banking laws and regulations."[79] Respondent also owed Goldman a fiduciary duty of loyalty, requiring him "to put the interests of the bank before [his] own, and not use their positions at the bank for [his] own personal gain."[80] One aspect of this duty of loyalty is the duty of candor, which in turn requires fiduciaries to "disclose all material information relevant to corporate decisions from which they may derive a personal benefit."[81]

3. Respondent Misstates the Standard for Unsafe or Unsound Practices

Respondent contends that conduct may not be deemed "unsafe or unsound" for purposes of Sections 1818(e) and 1818(i) unless it creates "an abnormal risk of loss or damage that *threaten[s] the financial integrity of the institution*." Resp. Opp. at 65 (emphasis added). This is wrong. The banking agencies have repeatedly and expressly declined to impose a requirement that risky, imprudent conduct must directly affect an institution's financial soundness or stability in order to be considered "unsafe or unsound," adhering instead to the Horne Standard discussed *supra* at 24-25. In its *Smith & Kiolbasa* decision in March 2021, for example, the Board of Governors observed that it "has found [actionably imprudent] practices unsafe or unsound if they could be expected to create a risk of harm or damage to a bank, without necessarily attempting to measure their impact on the bank's overall financial stability."[82] The Board further explained that "[a] construction of 'unsafe or unsound' conduct that focuses on the nature of the act rather than any 'direct effect' of such act on the institution's financial stability is consistent with the structure

[79] *In the Matter of Tonya Williams*, No. 11-553e, 2015 WL 3644010, at *9 (Apr. 21, 2015) (FDIC final decision) (internal quotation marks and citation omitted).

[80] *In the Matter of Frank E. Smith and Mark A. Kiolbasa*, No. 18-036-E-I, 2021 WL 1590337, at *15 (Mar. 24, 2021) (FRB final decision).

[81] *Id.* (internal quotation marks and citation omitted) (also noting that "[o]missions are sufficient to trigger a violation of this duty").

[82] *Id.* at *21; *see also*, *e.g.*, *Patrick Adams*, 2014 WL 8735096, at **3-4 (rejecting an unsafe or unsound practices standard that "requires that a practice produce specific effects that threaten an institution's financial stability"); *In the Matter of Marine Bank & Trust Co.*, No. 10-825b, 2013 WL 2456822, at *4-5 (Mar. 19, 2013) (FDIC final decision) (declining to apply more restrictive standard).

of [S]ection 1818."[83] The undersigned will therefore apply the Horne Standard, unadorned by any further requirement, to the question of whether Respondent's alleged misconduct constituted unsafe or unsound practices within the meaning of the statute.

4. Allegations of Misconduct

Undisputed material facts demonstrate that Respondent breached his fiduciary duties to Goldman and engaged in unsafe or unsound practices in connection with the email containing the draft ERM framework on August 18, 2014 and the unauthorized disclosure of information regarding Bank A's confidential CAMELS rating on September 23 and 24, 2014. Respondent's disclosure of the CAMELS rating to the CFO of Bank A and to other Goldman personnel also constituted a violation of 12 CFR § 261.22(e). With respect to the other allegations of misconduct at issue in the instant motions, the undersigned finds that there remain genuine issues of disputed fact that preclude summary disposition.

*a. August 2014 Disclosure of CSI*

Enforcement Counsel argues that Respondent's actions concerning the CSI contained in emails sent by Bansal on August 18 and August 19, 2014 constitute indisputably actionable misconduct on the present record. *See* FRB Mot. at 34-35 (arguing violation of regulation), 42-43 (breach of duty of care), 45 (breach of duty of candor and loyalty), 47-48 (unsafe or unsound banking practices). The undersigned agrees in part.

***Violation of 12 CFR 261.22(e):*** Disputed questions of material fact exist with respect to Respondent's allegedly unauthorized use or disclosure of CSI in connection with the August 2014 emails. *See supra* at 15-17. As to the "documents constituting portions of the Board's confidential

[83] *Smith and Kiolbasa*, 2021 WL 1590337, at *22; *accord Patrick Adams*, 2014 WL 8735096, at *16 (noting that the standard suggested here by Respondent "conflicts with the fundamental structure of the FDI Act by introducing an effects element, textually reserved as a predicate for more severe remedies, into the definition of an element of misconduct").

draft ERM framework" sent on August 18, the Parties disagree whether Respondent in fact directed Bansal to use that CSI in client presentations (or otherwise authorized its use in the presentation to Bank B or other presentations).[84] *Compare*, *e.g.*, FRB Mot. at 34 *with* Resp. Opp. at 52. As to the internal MRM survey sent to Respondent on August 19, it is undisputed that Respondent told Bansal to use that information "as a guide" for the presentation to Bank B, FRB SOF ¶ 52, but Respondent asserts that he did so solely on the basis of the subject header of that email, which did not indicate the confidential and supervisory nature of the information therein. *See* Resp. Opp. at 39. Given the three-minute interval between Bansal's email and Respondent's reply, and considering Respondent's heretofore undisputed tendency not to review materials provided to him, *see id.* at 11-12, the undersigned finds that it is a genuine issue of material fact whether Respondent read the email or the attachment before suggesting to Bansal that it be incorporated into the client presentation. Finally, regarding the internal DFAST survey Respondent received from Bansal on August 19, the Parties disagree both as to whether Respondent ever opened that attachment and whether this information was ever used in a client presentation or otherwise disclosed by Respondent without authorization. *See* FRB SOF ¶ 54; Resp. Opp. at 40.

***Breach of Fiduciary Duties:*** It is undisputed that, when Bansal provided Respondent with the draft ERM framework on August 18, he relayed that the information contained therein was "highly confidential" and "not public" and had been developed by an internal working group

[84] To the extent that it is undisputed that Respondent reviewed draft presentations containing "CSI that was copied or paraphrased from the ERM Framework and other documents obtained from the Reserve Bank," FRB SOF ¶ 56, Enforcement Counsel has not yet offered some conclusive indication that Respondent understood or should have understood this to be the case. In other words, to make out a violation of 12 CFR § 261.22(e) based on the presence of CSI in client presentations that Respondent himself did not draft, Enforcement Counsel must more clearly connect the dots of Respondent's active involvement in the inclusion of that CSI in the presentation. The mere fact that Bansal repurposed aspects of the draft ERM framework into the presentation will not suffice to prove that Respondent violated 12 CFR § 261.22(e) if Respondent did not direct the inclusion of the CSI and could not have reasonably recognized it as CSI upon review of the repurposed material.

within the Federal Reserve.[85] FRB-MSD-37 at 1 (also stating that the framework "has not been issued [as] guidance yet"). It is likewise undisputed that Respondent read Bansal's email and responded with assurances that he would not distribute the material further. *See* FRB-MSD-38. But despite understanding that his subordinate had access to confidential supervisory information from his prior job and that (per Goldman's policies) "[r]egulatory sensitivity to the improper use of material nonpublic information is high, and penalties and reputational damage can be significant,"[86] Respondent did not ask Bansal where he had obtained these documents or in any way alert others at Goldman to Bansal's activities, thus leaving the firm exposed to significant potential liability.[87] The undersigned finds that Respondent's failure to take corrective action or exhibit any oversight regarding Bansal's transmittal of the draft ERM framework was plainly contrary to Goldman's best interests and constitutes a breach of his fiduciary duty of care.[88] Whether or not Respondent was Bansal's direct supervisor, which Respondent disputes, *see* Resp. Opp. at 57, he unquestionably exercised some measure of managerial authority over Bansal and, more importantly, was in a position to identify, address, and seek to correct—or at least

[85] The undersigned further concurs with Enforcement Counsel's assertion that, in transmitting the draft ERM framework to Respondent, "Bansal was explicit in stating that the CSI had come from the Reserve Bank and that he had used the CSI as an examiner during his employment there." FRB Mot. at 39.

[86] FRB-MSD-75 (April 9, 2013 Policies Regarding the Safeguarding of Confidential Information) at 5 n.9.

[87] *See id.* at 2 (warning that "[m]isuse and misappropriation of confidential information can . . . give rise to both civil liabilities and criminal penalties for the firm and for individual employees"). This lapse is particularly egregious given Respondent's annual performance review for the previous year, which had "cautioned him to take more care in the treatment of confidential information." FRB SOF ¶ 25; *see* FRB-MSD-3.

[88] The undersigned finds, however, that Enforcement Counsel has not yet demonstrated that Respondent breached his fiduciary duties of loyalty and candor with respect to any of the August 2014 emails containing CSI. Enforcement Counsel argues that Respondent's failure to escalate Bansal's misconduct implicated those fiduciary duties because doing so "served Respondent's own interests at the expense of Goldman by delaying the discovery of the misconduct and increasing its ultimate repercussions for the institution." FRB Mot. at 45. This is not persuasive in the absence of a more tangible showing of "conflict[] of interest," "self-dealing," or "personal benefit" gained by Respondent in withholding information regarding Bansal's use of CSI from others at Goldman. *Smith and Kiolbasa*, 2021 WL 1590337, at *15.

acknowledge or inquire about *in some way*—the nature of Bansal's misconduct, thereby mitigating any potential harm to Goldman.[89] Yet he did not do so.

On the other hand, and resolving all plausible inferences in Respondent's favor, it remains in material dispute whether Respondent also breached his fiduciary duty in connection with Bansal's communications about the MRM survey and DFAST survey. Enforcement Counsel contends that the confidential nature of these documents would have been apparent to Respondent, *see* FRB Mot. at 43, while Respondent maintains that he did not open the documents or read the substance of the accompanying emails, *see* Resp. Opp. at 39-40. This is not a question that can be resolved on the present factual record.[90]

***Unsafe or Unsound Practices:*** Similar conclusions follow with respect to the allegations that Respondent engaged in unsafe or unsound banking practices by using CSI from the August 2014 emails in client presentations or by failing to address Bansal's own misuse of such information. *See* FRB Mot. at 47-48. To begin with, the undersigned credits Enforcement Counsel's expert regarding the danger posed to the safety and soundness of financial institutions and to "the supervisory system as a whole" by unauthorized disclosure of CSI.[91] Among other things, "[i]f the confidentiality of bank supervisory information and communications is not rigorously protected, bank boards and management may be reluctant to be candid and forthcoming, potentially undermining examiners' understanding of the safety and soundness of supervised organizations."[92] Furthermore, "[t]he risks of unauthorized disclosure are exacerbated by the

[89] The fiduciary duty of care owed by Respondent, as a self-admitted officer of Goldman, *see supra* at 31-34, included the "proper supervision of subordinates." *In the Matter of Douglas V. Conover*, Nos. 13-214e & -217k, 2016 WL 10822038, at *19 (Dec. 14, 2016) (FDIC final decision) (internal quotation marks and citation omitted).

[90] The undersigned disagrees with Enforcement Counsel that failing to read an email sent by a subordinate in the course of business or to open the attendant attachments would necessarily constitute a *per se* breach of a supervisor's fiduciary duties. *See* FRB Mot. at 43 n.222.

[91] FRB-MSD-19 (Bertsch Report) at 6.

[92] *Id.* at 5-6.

potential for members of the public to misinterpret [confidential supervisory] material and draw incorrect conclusions about the implications of supervisory findings for the prospects of a financial institution"—particularly where, as here, the CSI in question consists of internal conclusions and analytical frameworks of a supervisory agency that have not been finalized and are not intended for consumption and use by either the public or the supervised institutions themselves.[93]

To recall, unsafe or unsound banking practices are those that are "contrary to generally accepted standards of prudent operation, the possible consequence of which, if continued, would be abnormal loss or risk or damage to the institution, its shareholders, or the insurance fund."[94] The D.C. Circuit has held that "[a] banking practice is unsafe or unsound if it poses a reasonably foreseeable undue risk" of some kind.[95] According to the Board of Governors, moreover, "[f]iduciary duties define standards of prudent operation[,] and thus an act in violation of such duties is by its nature imprudent and unsafe."[96]

Here, the imprudence of Respondent's actions, or lack thereof, following his receipt of what Bansal represented—and what Respondent indisputably understood or should have understood—to be sensitive, non-public agency documents in the form of the draft ERM framework is actionably unsafe or unsound for the same reasons that it constitutes a breach of his fiduciary duty of care. A prudent course of action, upon being provided documents that Bansal had "worked on . . . within the context of a system working group with the Fed system,"[97] and which

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[93] *Id.* at 5.

[94] *Smith and Kiolbasa*, 2021 WL 1590337, at *24 (emphasis omitted).

[95] *Blanton v. OCC*, 909 F.3d 1162, 1172 (D.C. Cir. 2018) (internal quotation marks and citation omitted).

[96] *Smith and Kiolbasa*, 2021 WL 1590337, at *24; *cf. In the Matter of Donald V. Watkins, Sr.*, Nos. 17-0154e & 17-0155k, 2019 WL 6700075, at *7 (Oct. 15, 2019) (FDIC final decision) (observing that "[t]he standard of conduct for determining whether someone has breached their fiduciary duty is the level of care that ordinary prudent and diligent [persons] would exercise under similar circumstances").

[97] FRB-MSD-37 at 1.

Bansal stated were "highly confidential" and had not yet been issued as guidance,[98] would have been to alert Goldman's Legal and Compliance Departments that Bansal was disseminating internal agency materials from his former employer without apparent authorization, as Respondent's supervisor Romanoff did following the September 26, 2014 conference call in which Bansal circulated a similarly confidential agency document.[99] At the very least, a prudent person whose job demanded that he be attuned to heightened "[r]egulatory sensitivity to the improper use of material nonpublic information" would have inquired as to the provenance of the confidential documents that Bansal was sharing.[100] But, despite his extensive experience with regulatory banking materials as a sophisticated financial professional, including time as a senior advisor at a federal banking agency, Respondent did neither.[101] *See* FRB SOF ¶¶ 13-14, 19, 50.

The undersigned also finds that Respondent's conduct was unsafe or unsound to the extent that it foreseeably increased the Bank's potential legal or regulatory exposure. It is undisputed that the Board of Governors and the Reserve Bank made it clear to supervised financial institutions, including Goldman, that unauthorized use or disclosure of CSI "could lead to formal supervisory

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[98] *Id.*

[99] *See* FRB SOF ¶ 75; *see also* Resp. Opp. at 45 ("Romanoff opened the attachment and he realized that that bank was not a client of GS and questioned where Bansal obtained this document. . . . Bansal responded that 'it was a company-specific information from the time he was at the Board of Governors.'").

[100] FRB-MSD-75 (April 9, 2013 Policies Regarding the Safeguarding of Confidential Information) at 5 n.9; *see also* FRB-MSD-3 (2013 performance review) at 11 (stating that, due to the nature of his position, Respondent "will come into contact with very sensitive information [and] needs to protect the confidential nature of this at all times").

[101] To the extent that Respondent suggests that he was acting prudently by Goldman's standards at the time regarding the use and dissemination of CSI and thus cannot be considered to have engaged in unsafe or unsound practices, *see* Resp. Opp. at 63-65*,* this argument falls short. First, as Enforcement Counsel notes, "the test is not whether Respondent's conduct was contrary to Goldman's generally accepted standards, but rather whether it was contrary to generally accepted standards *of prudent operation*." FRB Opp. at 38 (emphasis in original). Second, and regardless, Respondent has made no showing that it was "generally accepted" for similarly situated individuals at Goldman or elsewhere to take no remedial or oversight action upon receiving copies of sensitive internal agency files from subordinates. To the contrary, the fact that Romanoff alerted Goldman's Legal and Compliance teams to Bansal's CSI-related misconduct after the September 26, 2014 conference call suggests that Respondent's earlier inaction when forwarded the draft ERM framework was not acceptable even in a context where, as Respondent would have it, "many [Goldman] employees were insufficiently familiar with the full scope of the legal protections applicable to [CSI]." Resp. Opp. at 65 (internal quotation marks omitted).

action, including the imposition of substantial civil money penalties" as well as "criminal penalties."[102] Goldman's own policies likewise warned that "[m]isuse and misappropriation of confidential information can violate contractual obligations, laws, rules, or regulations in various jurisdictions in which the firm does business and give rise to both civil liabilities and criminal penalties for the firm and for individual employees."[103] Yet when presented with evidence of a subordinate circulating "highly confidential" and non-public agency documents like the draft ERM framework, actions which foreseeably could and did expose Goldman to significant risk of liability, the best that can be said is that Respondent turned a blind eye.[104] This is not indicative of safe or sound banking practices.[105]

*b. September 2014 Disclosure of CSI*

As detailed in Part II *supra*, it is undisputed that (1) Bansal conveyed to Respondent, by email and in a phone call on September 23, 2014, sensitive information regarding the prospect of a change in the CAMELS rating of Bank A in advance of that bank's exit meeting with regulators the following day; (2) Respondent did not ask Bansal how he had obtained advance information about Bank A's CAMELS rating; (3) after ending his call with Bansal, Respondent immediately

[102] *See supra* at 9-10 (quoting FRB-MSD-100 (SR 05-04) and FRB-MSD-119 (Circular No. 11002).

[103] FRB-MSD-75 at 2.

[104] Respondent argues that his failure to exercise any oversight regarding the unauthorized CSI he received from Bansal on August 18 and 19, 2014 was because he "was out of the office traveling on other business" at the time and was "unfocused on emails from a junior associate." Resp. Opp. at 64. Even if true, this does not excuse Respondent's lack of prudence, given the undisputed material evidence that Respondent read, understood, and responded to Bansal's email attaching the draft ERM framework, in which Bansal expressly communicated that the materials provided were confidential draft agency work product that had not been made public. Likewise, even assuming that Respondent's inaction "was just a blip on his otherwise sterling 20-year career" (*id.*), as Respondent claims, that fact would have no bearing on whether his conduct *in that instance* was actionably unsafe or unsound, although it might be relevant to questions of culpability or the mitigating factors to be considered when assessing a civil money penalty, both of which are issues to be resolved at a later point in the proceeding. *See infra* at 44-45, 49-51.

[105] As with the breach of fiduciary duty discussed *supra*, this conclusion applies only to the August 18, 2014 email containing the draft ERM framework. Disputed questions of material fact exist that preclude a determination of whether Respondent's conduct with respect to Bansal's disclosure of the MRM survey and the DFAST survey was unsafe or unsound.

telephoned the CFO of Bank A and spoke for an hour, until almost midnight; and (4) Respondent then disclosed Bansal's information—namely, that the Management component of Bank A's CAMELS rating would not be changed—to others at Goldman on September 24, 2014, before those individuals could have learned that information from Bank A itself.[106] *See supra* at 18-20. It is further undisputed that CAMELS ratings are intrinsically CSI and property of the federal banking agencies, that Respondent was aware of the extremely sensitive nature of CAMELS ratings by virtue of his work at the FDIC, and that Respondent did not have the authorization of the Board of Governors to disclose the confidential information that he possessed regarding the lack of change in Bank A's CAMELS rating to anyone, including clients and colleagues.

The undersigned finds that these facts establish a violation of 12 CFR § 261.22(e). First, it is simply not credible that Respondent withheld the information regarding Bank A's CAMELS rating that he had just learned from Bansal while speaking to Bank A's CFO for over an hour that night, in a call made seconds later. In evaluating motions for summary disposition, the undersigned is not obliged to credit facially implausible representations that are unsupported by logic or by record evidence, and she will not do so here.[107] Second, and irrespective, Respondent admits to disclosing that same information to his colleagues the next day, despite having reason to believe that it was confidential, nonpublic, and should not be shared.[108] The regulation in question does not have an exception for co-workers. Respondent was in possession of CSI, he disclosed that CSI, and he did not have authorization to do so. The elements of Section 261.22(e) are thus met.

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[106] The undersigned concludes that it is immaterial to the disposition of the present motions whether Bank A could legitimately have disclosed the information in question to Respondent and his colleagues following the exit meeting, under the terms of its client engagement letter with Goldman and the relevant regulations. *See* Resp. Opp. at 54 (asserting that "the news was contemporaneously being disclosed to the Bank, who [Respondent] knew intended to update GS on the latest information following their meeting") (emphasis omitted).

[107] *See Blanton*, 2017 WL 4510840, at *6.

[108] *See* FRB SOF ¶ 70; Answer ¶ 20.

Likewise, and for similar reasons, the undersigned concludes that Respondent's conduct in connection with the information he received from Bansal on September 23, 2014 constitutes a breach of his fiduciary duty of care and unsafe or unsound banking practices. Bansal communicated to Respondent information that was unambiguously sensitive, nonpublic property of the Board of Governors. Rather than inquire where Bansal had obtained this information or take any steps to escalate or correct Bansal's apparent misconduct, Respondent promptly telephoned the CFO of the bank that was the subject of the confidential information and later relayed the same information to multiple other people within Goldman. In doing so, Respondent exposed Goldman to reasonably foreseeable undue risk and failed to "act diligently, prudently, honestly, and carefully in carrying out [his] responsibilities."[109] This is independently sufficient to satisfy the misconduct prongs of Sections 1818(e) and 1818(i).

*c. Hard Copy Documents Containing CSI*

By contrast, the undersigned concludes that Enforcement Counsel has not yet demonstrated misconduct with respect to the hard copy documents containing CSI that were discovered in Respondent's office during the investigation into Bansal's misuse of sensitive information from his previous employer. *See supra* at 20-21. Disputed questions of material fact exist as to whether Respondent had any knowledge of the confidential, nonpublic nature of these documents, let alone whether he used or disclosed them within the meaning of 12 CFR § 261.22(e). While the materials unquestionably constituted CSI that (by Respondent's own admission) would and should have been apparent at a glance, *see* FRB Mot. at 54-55, all that can be stated on the present record is that they were provided to Respondent by Bansal and, as of late September 2014, occupied "a pretty large pile" on one side of Respondent's desk.[110] The undersigned declines to find that mere

[109] *Williams*, 2015 WL 3644010, at *9 (internal quotation marks and citation omitted).
[110] FRB-MSD-1 (Jiampietro Dep.) at 340:4-5.

possession of these documents, standing alone, constitutes a breach of Respondent's fiduciary duty or conduct "contrary to generally accepted standards of prudent operation," and anything more remains the subject of genuine factual dispute at this stage.[111]

*d. Other Allegations Against Respondent*

Respondent asserts that he is entitled to summary disposition in his favor on the allegations set forth in the Notice that Respondent directed Bansal to obtain documents containing CSI from his previous employer, arguing that these allegations are based on unsubstantiated or incorrect factual assertions and rely heavily on testimony by Bansal that is "demonstrably false." Resp. Mot. at 5; *see generally id.* In response, Enforcement Counsel argues that the balance of the misconduct alleged in the Notice is not dependent on Respondent having solicited CSI from Bansal, and contends that Bansal's testimony is both credible and supported by the record in any event. *See* FRB Opp. at 13-27. The undersigned finds that Respondent's averment that he "never instructed or requested Bansal to obtain [CSI]," Resp. Mot. at 7, is a matter more appropriately treated at the hearing through evaluation of witness testimony and a fully developed evidentiary record, should Enforcement Counsel pursue those allegations against Respondent in that forum. Accordingly, Respondent's motion for summary disposition of this issue is denied.

***B. Disputed Questions of Fact Exist with Respect to Respondent's Culpability***

Enforcement Counsel argues that, through his misconduct, Respondent has demonstrably acted with both personal dishonesty and a willful or continuing disregard for the safety and soundness of Goldman in a manner that fulfills the "culpability" element of a Section 1818(e) enforcement action. *See* FRB Mot. at 52-58. Requiring as it does some proof of scienter, or state

[111] Specifically, the undersigned rejects Enforcement Counsel's contention that failure to review these documents and ascertain the nature of their contents would itself be an independent basis for a finding of misconduct, *see* FRB Mot. at 55, absent some further indication that Respondent knew or should have known that they were likely to contain unauthorized agency CSI.

of mind, it is typically appropriate to resolve questions of culpability at the hearing stage rather than on summary disposition.[112] The undersigned finds that any evaluation of culpability on the present record would require the sort of "credibility determinations, weighing [of] evidence, and drawing inferences from facts" that this Tribunal is precluded from undertaking except in its capacity as factfinder.[113] With respect to a showing of personal dishonesty, Enforcement Counsel has not yet shown that the misconduct by Respondent that has thus far been established was reflective of "a disposition to lie, cheat, or defraud; untrustworthiness; lack of integrity; misrepresentation of facts and deliberate deception by pretense or stealth; or want of fairness and straightforwardness," rather than poor judgment or negligence.[114] Similarly, willful disregard for the safety and soundness of an institution requires a finding of deliberate and conscious misconduct, which cannot yet be made.[115] And continuing disregard "requires conduct over a period of time with heedless indifference to the prospective consequences,"[116] which describes neither of the instances of misconduct—Respondent's reaction to the draft ERM framework and his improper disclosure of Bank A's CAMELS rating—that have been proven at this point. The Parties' motions for summary disposition on issues of culpability are therefore denied.

### ***C. Respondent's Misconduct Caused Loss to the Institution***

The effect elements of 12 U.S.C. §§ 1818(e) and 1818(i) may be satisfied with a showing that the financial institution suffered "financial loss or other damage" as a result of an IAP's

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[112] *See*, *e.g.*, *Miller v. FDIC*, 906 F.2d 972, 974 (4th Cir. 1990) (noting "the general rule that summary judgment is seldom appropriate in cases wherein particular states of mind are decisive elements of a claim or defense"); *Gomez v. Trustees of Harvard Univ.*, 677 F. Supp. 23, 24 (D.D.C. 1988) (noting that "intent and state of mind [are] areas that are particularly ill-suited for summary disposition"); *see also* FRB Mot. at 52 (acknowledging that "scienter is ordinarily left for the factfinder").

[113] *Blanton*, 2017 WL 4510840, at *6.

[114] *Williams*, 2015 WL 3644010, at *10 (internal quotation marks and citation omitted).

[115] *See Dodge v. OCC*, 744 F.3d 148, 160 (D.C. Cir. 2014).

[116] *Id.* (internal quotation marks and citation omitted).

misconduct and that the misconduct caused "more than a minimal loss" to the institution, respectively.[117] The undersigned agrees with Enforcement Counsel that the $50 million penalty and restrictions on new engagements incurred by Goldman as part of its 2015 settlement with DFS arose, at least in part, from Respondent's misconduct, constituting actionable loss—and thus a triggering "effect"—under those statutes.[118] *See* FRB Mot. at 48-50.

The terms of the consent order to which Goldman stipulated in October 2015 make it clear that the investigation that led to this settlement was partially predicated on the same misconduct by Respondent that is the subject of this action.[119] There can be no dispute that Respondent is the "Managing Director" referred to in this document, who is charged with improperly receiving and disclosing CSI and with failing to effectively supervise an Associate engaged in the same.[120] Indeed, the consent order specifically identifies Bansal's sharing of the draft ERM framework and Bank A's CAMELS rating with Respondent as examples of misconduct for which Goldman was being penalized.[121] It is also indisputable that, under this settlement, Goldman paid a civil money penalty of $50 million and agreed to "not accept any new engagements that would require [DFS] to authorize the disclosure of [CSI] to Goldman" for a three-year period, a restriction that was

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[117] 12 U.S.C. §§ 1818(e)(1)(B), 1818(i)(2)(B)(ii).

[118] Enforcement Counsel also argues that the effect element is satisfied because Respondent received a financial gain or other actual benefit from his misconduct—namely, that his use and disclosure of CSI "allowed him to bolster [his] reputation by giving him unique insight into the regulatory process," and otherwise gave him means to advance his career prospects. FRB Mot. at 51; *see id.* at 50-52. Because the undersigned concludes here that Enforcement Counsel has demonstrated the requisite effect of Respondent's misconduct in connection with Goldman's $50 million penalty payment to DFS, it is unnecessary at this juncture (and unsuited for disposition without further development of the factual record) to resolve the somewhat amorphous question of whether Respondent also derived "actual benefit" from the misconduct at issue. *Id.* at 50. The undersigned also declines to resolve at this time whether the averred $7 million in legal fees and other costs expended by Goldman in responding to regulatory and law enforcement investigations related to Respondent's misconduct would independently constitute loss or damage for the purposes of Sections 1818(e) and 1818(i). *See id.* at 49-50; FRB SOF ¶ 78; Resp. Opp. at 68 (offering authority that "[t]he incurring of legal fees is a normal and presumptively proper cost of doing business for a bank" and that a prohibition action "should not be instituted solely on the strength of legal fee payments") (internal quotation marks and citation omitted).

[119] *See* FRB-MSD-69 (DFS Consent Order) at 1-2.

[120] *Id.*

[121] *See id.* ¶¶ 18, 21.

specifically attributable to "the misconduct by the Associate [Bansal] and the Managing Director [Respondent]."[122] These facts, by themselves, are enough to satisfy the effect elements of 12 U.S.C. §§ 1818(e) and 1818(i).

Respondent disagrees. He argues that "the decision of a company that he has no [present] relationship with to enter into a settlement agreement, without [Respondent] having a chance to be heard or defend himself" during that process, cannot constitute "loss" for the purpose of the instant enforcement action. Resp. Opp. at 69. He also contends that any loss suffered as a result of the settlement was not caused by him, because the misconduct described in the consent order "was premised on a finding that the institution failed to implement proper policies and procedures to protect CSI" and thus stemmed from "a systemic problem in which multiple Goldman Sachs employees improperly received CSI and otherwise failed to escalate, not just [Respondent]." *Id.*

Respondent's arguments are unpersuasive. To begin with, the undersigned concludes here, as she has previously in another agency's enforcement proceedings,[123] that payments made by a financial institution in furtherance of a settlement or plea agreement may be used as evidence of bank loss to fulfill the effect elements of Section 1818, if the enforcement agency can show that the settlement occurred "by reason of" a respondent's actionable misconduct.[124] The same can be said for a substantive restriction on an institution's ability to accept new engagements for a certain period, which may reasonably be considered "other damage" to the institution within the meaning of the statute, assuming some showing that the restriction had a negative effect on the institution's

[122] *Id.* at 12; *see also id.* at 11 (civil money penalty).

[123] *See* Order Regarding the Parties' Cross-Motions for Summary Disposition, *In the Matter of Laura Akahoshi*, OCC No. AA-EC-2018-20 (Aug. 5, 2021) at 57, *available at* ofia.gov/decisions/2021-08-05-occ-aa-ec-2018-20.pdf.

[124] *See In the Matter of Christopher Ashton*, No. 16-015-E-I, 2017 WL 2334473, at *5 (May 17, 2017) (FRB final decision) (on default, effect element satisfied when bank paid "$2.4 billion in criminal and civil fines in connection with the [alleged] conduct"); *In the Matter of Towe*, Nos. AA-EC- 93-42 & -43, 1997 WL 689309, at *3 (Oct. 1, 1997) (FRB final decision) ($20,000 settlement payment to Internal Revenue Service constituted loss to bank).

business. Of course, evidence of causation is not evidence of liability for the underlying violations of law, and Enforcement Counsel must demonstrate separately that Respondent committed misconduct—that is, that he violated 12 CFR § 261.22(e), breached his fiduciary duties to Goldman, or engaged in unsafe or unsound practices—without adverting to the merits of any allegations or admissions made by Goldman in the consent order, which it has so far done with respect to the draft ERM framework and the disclosure of the confidential CAMELS rating.

Moreover, it should be without question that Respondent can "cause" the Bank to incur loss through the entry of a consent order even if Respondent was not a party to that prosecution and his conduct not adjudicated to rise to the level of the particular legal violations being asserted here. To hold otherwise would effectively immunize IAPs from any liability for unsafe or unsound practices, breaches of fiduciary duty, or violations or law that exposed their institutions to significant legal or regulatory risk unless the IAP's institution chose to take its chances by contesting an enforcement action or prosecution until a final judgment is assessed against it (and perhaps not even then, under Respondent's logic). A bank's decision to plead guilty to a prosecution for some certain loss now rather than risking a much greater loss and more severe consequences later should not absolve from liability the individual on whose conduct such claims are based. No such restriction is apparent from the text of Section 1818, and the undersigned will not impose one. An IAP who transfers $100,000 of an institution's money into his personal account has caused loss to the bank; an IAP whose conduct is the impetus for a $500,000 penalty paid by the institution following the settlement of an enforcement action should be no less liable, if that conduct is actionable under Section 1818.

Nor does it present an insuperable barrier to eventual proof of causation that the consent order also resolved Goldman's exposure related to broader systemic issues within the firm, or that

Respondent's misconduct arose in the context of a system with inadequate policies and procedures for the safeguarding of confidential information. As the FDIC Board of Directors has held, a respondent in an enforcement action under Sections 1818(e) and 1818(i) "cannot escape liability simply because others have contributed to the bank's loss as well."[125] Similarly, interpreting a related statutory provision in *In the Matter of Grant Thornton LLP*, the Comptroller concluded that an independent auditor had caused actionable loss to a bank through its issuance of an unqualified audit opinion, even though it was the bank's actions in response to the opinion that arguably were more directly responsible for any loss suffered.[126] Likewise here, it is immaterial that other misconduct related to the treatment of CSI by Goldman personnel may have played a part in DFS's prosecution and Goldman's eventual settlement, as long as some of the loss as a result of that settlement is fairly attributable to Respondent as well. It is.

### ***D. The Appropriateness of a Civil Money Penalty Should Be Determined at a Later Stage***

The Board of Governors seeks to assess a civil money penalty against Respondent in the amount of $337,500. *See* FRB Mot. at 60. For such a penalty to be appropriate, the agency must find that the statutory elements of 12 U.S.C. § 1818(i) have been met, *see* Part III *supra*, and must further consider certain potentially mitigating factors that are enumerated in the statute.[127] Enforcement Counsel argues that the undisputed material facts establish the basis for a second-tier civil money penalty, *see* FRB Mot. at 58-61, and offers a brief analysis of the statutory mitigating

[125] *In the Matter of Michael R. Sapp*, Nos. 13-477(e) & 13-477(k), 2019 WL 5823871, at *15 (Sep. 17, 2019) (FDIC final decision); *see also Landry*, 204 F.3d at 1139 (IAP responsible for misconduct causing loss even if "others may have been more guilty"); *In the Matter of Jeffrey Adams*, No. 93-91(e), 1997 WL 805273, at *5 (Nov. 12, 1997) (FDIC final decision) (noting that "multiple factors, and individuals, may contribute to a bank's losses" without absolving respondent of liability).

[126] *In the Matter of Grant Thornton LLP*, Nos. AA-EC-04-02 & -03, 2006 WL 5432171, at *25 (Dec. 29, 2006) (OCC final decision) (noting that under the auditor's theory of causation, "conduct of independent contractors could never be the cause of a loss or other adverse effect for purposes of [the applicable statute], because it would always be the financial institution's acts or omissions that led to the loss to, or adverse effect on, the bank").

[127] *See* 12 U.S.C. § 1818(i)(2)(G).

factors in support of its requested penalty amount, *see id.* at 61-62. The undersigned agrees that the elements of a second-tier civil money penalty have been met but finds that any showing regarding the appropriateness of the amount in light of the mitigating factors should be made by both parties at a later stage in this matter.

1. Section 1818(i)'s Misconduct Element

As with a prohibition order under Section 1818(e), both first-tier and second-tier civil money penalties under Section 1818(i) require proof of some form of actionable misconduct, including the violation of "any law or regulation" or a breach of fiduciary duty.[128] Here, the misconduct element has so far been satisfied in these respects as to Respondent's actions in connection with his receipt of the draft ERM framework on August 18, 2014 and the confidential CAMELS rating on September 23, 2014, as discussed in Part IV.A.4.[129]

2. Section 1818(i)'s Effect Element

Enforcement Counsel argues that Respondent's misconduct has caused "more than a minimal loss to Goldman" and is "part of a pattern of misconduct," either one of which, if true, would be sufficient to satisfy the remaining statutory prong for the assessment of a second-tier civil money penalty.[130] FRB Mot. at 60. Because the undisputed material facts demonstrate that Respondent caused Goldman loss for the reasons stated in Part IV.C *supra*, it is unnecessary to

[128] *Id.* § 1818(i)(2)(B)(i).

[129] Enforcement Counsel argues that a second-tier penalty is appropriate for the additionally actionable reason that Respondent has recklessly engaged in unsafe or unsound conduct in conducting Goldman's affairs. *See* FRB Mot. at 59-60. Conduct is "reckless" for the purposes of this statute if "it is done in disregard of, and evidencing conscious indifference to, a known or obvious risk of a substantial harm." *Blanton*, 2017 WL 4510840, at *13 (internal quotation marks and citation omitted). Given that the undersigned has already concluded that the misconduct element of Section 1818(i) have been satisfied, the undersigned finds that it is not necessary to decide on the present record whether the harm "knowingly or obviously" risked by Respondent's misconduct is similarly and sufficiently substantial to constitute reckless engagement in unsafe or unsound practices.

[130] 12 U.S.C. § 1818(i)(2)(B)(ii).

determine at this time whether Respondent's misconduct in August and September 2014 was "part of a pattern of misconduct" within the meaning of the statute.[131]

3. Statutory Mitigating Factors

Before assessing a civil money penalty, the agency is bound to consider the appropriateness of the amount being assessed in light of four mitigating factors: (1) "the size of financial resources and good faith of the insured depository institution or other person charged"; (2) "the gravity of the violation"; (3) "the history of previous violations"; and (4) "such other matters as justice may require."[132] Enforcement Counsel now seeks to justify the $337,500 civil money penalty it seeks in this matter by adverting to these factors. *See id.* at 61-62. The undersigned finds that consideration of any mitigating factors is premature at this stage, not least because the precise contours of Respondent's violations are still at issue and because Respondent should be afforded an opportunity to be heard regarding his good faith, financial resources, and "such other matters as justice may require."

### ***E. Respondent's Argument for Dismissal of the Pleadings Must Fail***

Irrespective of the substance of the underlying charges, Respondent contends that the Notice should be dismissed in its entirety because it is "underpinned by false statements that Enforcement Counsel knows or should know to be false." Resp. Mot. at 40. Specifically, Respondent argues that Enforcement Counsel lacks a good faith basis for the allegations in the

[131] Enforcement Counsel adverts in its Motion to "the repeated nature of the conduct over a two-year period." FRB Mot. at 60. As stated *supra* at 3-4, however, the operative period of Respondent's misconduct for purposes of Enforcement Counsel's summary disposition motion appears to be limited to the several months of Bansal's employment with Goldman. *See* FRB Mot. at 1 ("The evidence establishes that [Respondent] used and disclosed [CSI] of the Board . . . and other regulators that he received from his investment banking subordinate, Rohit Bansal."), 35 (discussing Bansal's provision of materials to Respondent during August and September 2014 and stating that Respondent "was repeatedly presented with a stream of documents containing CSI during the relevant period"). Enforcement Counsel may seek to establish that Respondent committed misconduct alleged in the Notice and unrelated to Bansal at the appropriate later stage if it wishes to do so.

[132] 12 U.S.C. § 1818(i)(2)(G).

Notice because Bansal's testimony, upon which those allegations ostensibly rely, are false and misleading. *See generally id.* at 40-44. Respondent further contends that, in using Bansal's testimony, Enforcement Counsel has exhibited "obvious bad faith" and "knowing or conscious disregard of the truth." *Id.* at 44.

Respondent's argument is defective in at least two ways. First, the allegations in the Notice are predicated on more than Bansal's testimony—indeed, this Tribunal has concluded that undisputed material facts exist that establish misconduct by Respondent, and the actionable effects thereof, relying only on record evidence without any weight given to Bansal's own assertions whatsoever. Enforcement Counsel's motion for summary disposition does not cite to any of Bansal's testimony and the undersigned does not credit it in any way for the present purposes. The August 18, 2014 email attaching the draft ERM framework speaks for itself, as do Respondent's admissions regarding Bank A's confidential CAMELS ratings information. These alone establish misconduct. Second, the question of Bansal's credibility and truthfulness in the face of Respondent's competing narrative is, at base, one for the finder of fact to consider. Bansal says one thing. Respondent claims another. This is quintessentially a matter for hearing, should Enforcement Counsel opt to offer Bansal as a witness at that point. Until then, Respondent's counsel of record is advised to be circumspect when accusing other attorneys of bad faith conduct, given Respondent's own conveniently changing representations regarding his status as a director or officer of Goldman as it suits his legal interests. *See* Part IV.A.2 *supra*.

### ***F. The Instant Motions Should Not Be a Vehicle for Striking Respondent's Affirmative Defenses***

In addition to seeking summary disposition of certain of its claims against Respondent, Enforcement Counsel argues that Respondent's first, third, fourth, fifth, and sixth affirmative

defenses are meritless and should be the subject of summary disposition as well.[133] *See* FRB Mot. at 62-67. The Uniform Rules of the Board of Governors contain no specific provision regarding the mechanics of this Tribunal's consideration of such a request,[134] and the undersigned finds that it is not appropriate here absent some showing of prejudice that Enforcement Counsel has not made.[135] Motions to strike affirmative defenses "are a drastic remedy that courts disfavor" even when brought prior to discovery in an effort to streamline proceedings.[136] Where, as here, discovery has closed and the factual record is largely established beyond what testimony will be offered at the hearing,[137] parties should be especially mindful whether such a motion is truly necessary to the efficient disposition of these proceedings before seeking such relief.

In this instance, Enforcement Counsel argues that Respondent's first, third, and fourth affirmative defenses fail because they are not proper affirmative defenses but merely contend "that Enforcement Counsel cannot state a claim for relief or satisfy the elements thereof, particularly with respect to scienter." *Id.* at 63. It is generally unnecessary for Enforcement Counsel to move to strike any defenses that a respondent terms as an affirmative defense but that actually function as a denial of factual allegations or a negation of the agency's *prima facie* case—that is, defenses that the respondent is unquestionably permitted to assert but do not *per se* constitute "affirmative" defenses that must be pleaded in an answer.[138]

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[133] Respondent's second affirmative defense was stricken by the previous ALJ in this matter on November 23, 2016, a determination that was upheld by the undersigned upon review of that order. *See* March 11, 2020 Order Reviewing Prior Administrative Law Judges' Pre-Hearing Actions at 3.

[134] *See* 12 CFR § 263.29.

[135] *See*, *e.g.*, 5C Wright & Miller, *Federal Practice and Procedure* § 1381 (absent a showing of prejudice, motions to strike affirmative defenses often not granted "even when technically appropriate and well-founded").

[136] *Moore v. United States*, 318 F. Supp. 3d 188, 190 (D.D.C. 2018); *see also*, *e.g.*, *Newborn Bros. Co. v. Albion Engineering Co.*, 299 F.R.D. 90, 99 (D.N.J. 2014) (before granting motion to strike, requiring showing that the existence of an affirmative defense "will substantially complicate the discovery proceedings and the issues at trial" or is otherwise demonstrably prejudicial to the moving party) (internal quotation marks and citation omitted).

[137] *See* July 7, 2021 Order Adding Additional Dates to Procedural Schedule (close of discovery on July 14, 2021).

[138] *See*, *e.g.*, *United States v. Williams*, 836 F.3d 1, 13 (D.C. Cir. 2016) (defense that defendant did not possess requisite mental state to commit homicide was not a "legally recognized justification[] or excuse" but rather "[a]n argument

Enforcement Counsel also contends that Respondent's fifth affirmative defense, based on the doctrine of selective enforcement, is legally and factually deficient. *See id.* at 63-65. In making this defense, Respondent asserts that the agency is barred from bringing the instant enforcement action because "numerous other individuals and entities . . . received, discussed, used, and disseminated" CSI but "no other individual or entity has been charged by the Board of Governors based on identical conduct." Answer at 7. Enforcement Counsel articulates the legal standard necessary to make out a selective enforcement claim of this type and asserts that Respondent has not met the "heavy burden" necessary to support it. FRB Mot. at 65. The undersigned agrees that Respondent has not satisfied the criteria for a selective enforcement affirmative defense at this point, but concludes that he may attempt to do so at the hearing. Such criteria, however, include evidence both "that he was treated differently from others similarly situated" and that this "differential treatment was ***based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person***."[139] It will not be sufficient for Respondent simply to show that he was prosecuted while others who assertedly engaged in similar behavior were not, and Respondent should consider carefully before expending resources in pursuit of this claim.

Finally, Enforcement Counsel argues that "Respondent has failed to meet the factual and legal elements necessary to sustain" his sixth affirmative defense, FRB Mot. at 67, which asserts that the agency is estopped from bringing claims against him "by virtue of its unclean hands, gross

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that a required element of a crime is missing"); *United States v. Sandoval-Gonzalez*, 642 F.3d 717, 723 (9th Cir. 2011) ("Classic affirmative defenses are those . . . that do not negat[e] any of the elements of the crime but instead go to show some manner of justification or excuse which is a bar to the imposition of . . . liability."); *Elliott & Frantz, Inc. v. Ingersoll-Rand Co.*, 457 F.3d 312, 320-21 (3d Cir. 2006) (failure to plead defense challenging *prima facie* element of cause of action did not result in waiver).

[139] *Gentile v. Nulty*, 769 F. Supp. 2d 573, 578 (S.D.N.Y. 2011) (emphasis added) (internal quotation marks and citation omitted).

negligence, and supervisory failures," Answer at 8. The undersigned agrees. Affirmative defenses such as the unclean hands defense "may not be invoked against a government agency which is attempting to enforce a congressional mandate in the public interest," as the Board of Governors assuredly is doing here.[140] Courts have been clear that banking agency enforcement actions "clearly implicate public rights."[141] As a result, and in the interests of judicial efficiency, Respondent is precluded from offering evidence in support of his sixth affirmative defense at the upcoming hearing.[142]

## V. Conclusion

The undersigned hereby recommends the partial entry of summary disposition in favor of Enforcement Counsel in the manner and to the extent detailed above. Specifically, based on the undisputed material facts of the case, the undersigned finds that:

(1) Respondent breached his fiduciary duty of care and engaged in unsafe or unsound banking practices in connection with his receipt of the draft ERM framework on August 18, 2014;

(2) Respondent violated 12 C.F.R. § 261.22(e), breached his fiduciary duty of care, and engaged in unsafe and unsound banking practices in connection with his receipt of confidential CAMELS ratings information on September 23, 2014 and his disclosure of the same;

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[140] *SEC v. Gulf & Western Ind., Inc.*, 502 F. Supp. 343, 348 (D.D.C. 1980); *accord United States v. DynCorp Int'l LLC*, 282 F. Supp. 3d 51, 58 (D.D.C. 2017) (holding that defendant "cannot sustain an affirmative defense asserting [that] the government engaged in inequitable conduct"); *United States v. Philip Morris*, 300 F. Supp. 2d 61, 75 (D.D.C. 2004) ("Where . . . the Government acts in the public interest[,] the unclean hands doctrine is unavailable as a matter of law.").

[141] *Cavallari v. OCC*, 57 F.3d 137, 145 (2d Cir. 1995); *see also Simpson v. OTS*, 29 F.3d 1418, 1423 (9th Cir. 1994) (stating that "[b]y instituting the cease-and-desist proceedings, the [Office of Thrift Supervision] served a public purpose of the sort Congress envisioned in providing for administrative adjudication").

[142] The undersigned notes that Respondent's opposition to Enforcement Counsel's motion does not address Enforcement Counsel's arguments regarding the sufficiency of this or any other affirmative defense.

(3) Respondent's misconduct caused loss or other damage to Goldman in connection with the October 2015 consent order between Goldman and DFS.

In addition to the facts identified in this Order as being the subject of material dispute, the undersigned also concludes that resolution of the following material issues is either not possible or not necessary at this time as the facts are presently developed: (a) whether the other allegations against Respondent constitute actionable misconduct; (b) whether Respondent acted with personal dishonesty or willful or continuing disregard for the safety and soundness of Goldman; (c) whether Respondent received a financial gain or other actual benefit as a result of his misconduct; (d) whether Respondent recklessly engaged in unsafe or unsound practices for purposes of 12 U.S.C. § 1818(i)(2)(b)(i)(II); (e) whether Respondent's misconduct constitutes a pattern of misconduct; and (f) the appropriateness of the amount of the civil money penalty sought by the Board of Governors.

The Parties will have 14 days from the issuance of this Order to determine what, if anything, should be redacted before it is released publicly.[143] The Parties should meet and confer on this issue and make a joint submission by December 21, 2021 to ofia@fdic.gov. (The Parties are reminded that OFIA proceedings are presumptively public and that redactions to the public version of this Order should be made only if disclosure of that information would be contrary to the public interest.)[144] In the interim, the Order will remain under temporary seal.

The Parties' submission should also include the filing of a joint status report reflecting the Parties' deliberations on the expected length of the upcoming hearing and whether that has

[143] In future submissions, the Parties are directed to clearly and specifically identify what information contained within documents that are being submitted under seal would necessitate redaction if referenced in this Tribunal's orders, including by putting such information in [red text and bracketed] or [highlighting such text and bracketed] when cited by the Parties in their briefs. This will allow the undersigned to issue a public order, to the extent practicable.

[144] *See* 12 C.F.R. § 263.33(b).

changed in light of the conclusions of this Order.[145] Finally, the Parties should propose multiple suitable dates for a telephonic status conference in January 2022 at which these and any other appropriate issues may be addressed.

**SO ORDERED.**

December 7, 2021

Jennifer Whang
Administrative Law Judge
Office of Financial Institution Adjudication

[145] The hearing is currently scheduled to take place from March 21, 2022 through April 1, 2022, in the Southern District of New York or such other location as the parties agree to. The parties also should come to an agreement regarding a prospective alternate location for the hearing (such as at a Board field office, or in another judicial district) if courtroom facilities cannot be secured in the Southern District in the first instance, and should consider the prospect of a virtual hearing in the event that COVID restrictions tighten again in the coming months.